

DECISION NO. 2008-FOR-006(a)

In the matter of an appeal under section 82 of the *Forest and Range Practices Act*, S.B.C. 2002, c. 69.

BETWEEN:	Ainsworth Lumber Co. Ltd.	APPELLANT
AND:	Government of British Columbia	RESPONDENT
BEFORE:	A Panel of the Forest Appeals Commission Margaret Eriksson, Panel Chair	
DATE:	Conducted by way of written submissions concluding on October 15, 2009	
APPEARING:	For the Appellant: Mark S. Oulton, Counsel For the Respondent: A.K. Fraser, Counsel Darcie Suntjens, Counsel	

APPEAL

[1] This is an appeal by Ainsworth Lumber Co. Ltd. ("Ainsworth") against a July 7, 2008 Contravention Determination and Notice of Penalty issued by Charles van Hemmen, District Manager, pursuant to section 71(2) of the *Forest and Range Practices Act*. The District Manager found that Ainsworth had contravened section 105.1 of the *Forest Act* when it made its August 23, 2005 appraisal data submission for Cutting Permit 205 ("CP 205"). Section 105.1 of the *Forest Act* states:

105.1 A holder of an agreement under this *Act* who

(a) is required under this Act, or

(b) obliged under the agreement

to submit information to the government for use in determining, redetermining or varying a stumpage rate, or for any other purpose under this Act, must ensure that the information is accurate. [Emphasis added]

[2] The District Manager concluded that Ainsworth did not submit accurate information in connection with the detailed engineering cost estimates ("ECEs") for road construction that formed part of its August 23, 2005 appraisal data submissions for CP 205. He levied a penalty of \$1,500 for the contravention.

[3] The Forest Appeals Commission has the authority to hear this appeal under Part 6, Division 4 of the *Forest and Range Practices Act*. Section 84(1) of that Act sets out the Commission's powers on an appeal. It states:

84(1) On an appeal

...

the commission may

(c) consider the findings of the person who made the determination or decision, and

(d) either

(i) confirm, vary or rescind the determination or decision, or

(ii) with or without directions, refer the matter back to the person who made the determination, for reconsideration.

[4] Ainsworth maintains that its August 23, 2005 ECEs were accurate when they were submitted. It asks the Commission to rescind the Determination and set aside the \$1,500 penalty.

[5] This appeal was conducted by way of written submissions and affidavit evidence.

BACKGROUND

[6] CP 205, issued under Forest Licence A18700, grants Ainsworth harvesting rights within the Cascades Forest District in the Southern Interior Forest Region, Ministry of Forests and Range (the "Ministry").

[7] On December 16, 2004, Ainsworth provided its initial appraisal data submission for CP 205 to the Ministry through the ECommerce Appraisal System ("ECAS"). This submission is referred to in this Decision as the "original appraisal data submission". Detailed ECEs for road construction were provided as part of the original appraisal data submission for CP 205. The ECEs for road construction in Ainsworth's original submission totaled \$811,015. They included cost estimates for building three new roads identified as 205.110, 205.223 and 205.342, as well as cost estimates for reconstructing or upgrading existing roads known as Lac La Mare ("LLM") Mainline, LLM Spurs #1-8, Woodlot Mainline and Woodlot Spurs 1-2. In addition, the ECEs included estimates to install permanent steel and a railcar bridge. For the purpose of this appeal, only the estimates relating to constructing the new road 205.110 ("Road 205.110"), and reconstructing portions of the LLM Mainline and LLM Spurs are at issue.

[8] Ainsworth retained Forsite Consultants Ltd. ("Forsite") to provide it with forest management services for Forest Licence A18700. Forsite's services relating to CP 205 included:

(i) providing terrain stability analysis required as part of the road design and layout work;

- (ii) preparing appraisal data submissions, including the ECEs that formed part of the appraisal data submissions; and
- (iii) providing, in part, the foundation for Ainsworth's road permit application for Road Permit R06128 – Amendment 116, that was submitted on November 3, 2004, and which included both upgrades to the LLM Mainline and LLM Spurs, and new roads to be constructed, including Road 205.110.

[9] On or about May 30, 2005, construction began on Road 205.110.

[10] On June 22 and 23, 2005, two employees of the Ministry's Southern Interior Region Engineering Office, Pat McAfee and Ernie Carson, conducted a field inspection of the completed and the planned roadwork on CP 205. They did a "drive by inspection" of new construction on Road 205.110, and a detailed review of the upgraded sections of

- (i) LLM Mainline Section 2 (station 0+000 to 0+129),
- (ii) LLM Spur 1 – Section 4 (station 0+000 to 0+116) and Section 5 (station 0+000 to 0+278), and
- (iii) LLM Spur 2 - Section 6 (station 0+000 to 0+115), Section 7 (station 0+000 to 0+220), Section 8 (station 0+000 to 0+308) and Section 9 (station 0+000 to 0+461).

[11] Mr. McAfee took photographs of these portions of the upgrade to the LLM Mainline and Spurs and made notes of his inspection.

[12] On July 5, 2005, Mr. McAfee sent an email to Ainsworth's Woodlands Manager, Rick Takagi. With respect to the upgrades, Mr. McAfee states:

[I]t is apparent that the scope of the works undertaken to date do not reflect the road design or the engineered costs indicated in [the] CP 205 appraisal submission. In almost all of the upgrade sections where a geometric design has been completed the actual works, which are generally adequate, do not involve the scope of works required by the design or included in the submitted cost estimates. We also note that the drainage systems of the reactivated roads have not been upgraded to current standards.

[13] Regarding the preliminary review of Road 205.110, Mr. McAfee states:

While I appreciate that the road is still under construction, it appears as though some of the works carried out to June 22 may not be in accordance with the design or the submitted engineering costs.

[14] Mr. McAfee asked Ainsworth to resubmit appropriate engineered costs for CP 205 and recommended that a qualified professional inspect the works completed to date to ensure that the terrain stability assessment recommendations were being implemented.

[15] Under the terms of its forest management services agreement with Forsite, Ainsworth was precluded from hiring anyone but Forsite to review the construction work and provide revised ECEs. After Ainsworth received Mr. McAfee's request, Forsite was unavailable to perform this work for several months due to other commitments. As a result, Ainsworth responded to the request.

[16] On August 23, 2005, Ainsworth resubmitted its original appraisal data submission to the Ministry, with the ECEs unchanged. Ainsworth included the following notation on the submission:

Please note that CP 205 is being resubmitted, with no changes to the appraisal data. The MoF [the Ministry] comments received through ECAS and also through e-mail were discussed with ... [Forsite] and they have elected to revisit the road construction activities in the field rather than resubmitting the requested information. Where necessary, the licensee will alter road construction activities (current and past) to ensure consistency with the appropriate plans and prescriptions. Therefore, the attached appraisal information remains the same as the original ECAS submission.

[17] This August 23, 2005 submission is referred to in this Decision as the "second appraisal data submission" or the "second submission", and is the one alleged by the Ministry to be "inaccurate".

[18] On August 31, 2005, harvesting commenced on CP 205. On September 12, 2005, hauling began from CP 205.

[19] On November 3, 2005, Forsite conducted its field review of the road construction work on CP 205 in response to the Ministry's July 5th email to Ainsworth. It assessed whether the planned road construction adhered to the terrain stability assessment recommendations and geometric road designs. Forsite concluded that, for the most part, road construction conformed to the intent of the terrain stability assessment recommendations, the risk assessment summary, a description of the as-built condition of the road and any further recommendations for road construction and deactivation.

[20] According to Forsite, the primary difference between the prescribed design and the constructed roads was that less end haul was needed than was anticipated. In some locations, sliver fills were used instead of end haul. In addition, some prescribed cross drain culverts were absent. However, these variations were necessary because of two conditions encountered during construction that were not considered in the original design. These variations were described by Forsite as follows:

1. More rock was encountered in the cut slope than anticipated and some of this rock is standing up near vertical in some locations; this resulted in less waste volume being excavated for prism construction.
2. The soils in the steep gradient road sections tend to be granular and rocky and therefore well drained. This reduces the potential for failure of the sliver fills or underlying ground.

[21] Finally, Forsite concluded that all of the prescribed $\frac{3}{4}$ to full bench cut road sections were built to prescription. However, in many areas the benching was more conservative than prescribed. Overall, Forsite was of the view that sliver fills, rather than end haul, did not increase the risk of landslide because of the two conditions noted above.

[22] On April 11, 2006, Ainsworth met with Ministry representatives to discuss the ECEs and how a stumpage rate could be determined for CP 205.

[23] On April 12, 2006, the Ministry returned the second appraisal data submission to Ainsworth so that Ainsworth could revise the ECEs to reflect the costs agreed to at the April 11, 2006 meeting, and resubmit its appraisal.

[24] On May 15, 2006, Ainsworth submitted a revised appraisal data submission, including revised ECEs totaling \$613,480, based on the actual construction work completed on CP 205. This is referred to in this Decision as the "final appraisal data submission."

[25] On May 30, 2006, the Ministry issued Stumpage Advisory and Adjustment Notices establishing stumpage rates for timber harvested from CP 205 that were, in part, based on Ainsworth's revised ECEs.

[26] Later, on or about December 7, 2007, the Ministry advised Ainsworth that it believed Ainsworth had contravened section 105.1 of the *Forest Act*. The District Manager provided Ainsworth with an opportunity to be heard.

[27] On July 8, 2008, the District Manager issued the Determination now under appeal. He found that Ainsworth's second appraisal data submission contravened section 105.1 of the *Forest Act*, as it was not accurate at the time it was submitted. The District Manager states:

- ... Ainsworth indicated they further expected additional 'give and take' and negotiation was permissible between themselves and the ministry on the [appraisal data] submissions which could result, in Ainsworth's opinion, [in] further changes to the appraisal allowances submission prior to acceptance by the ministry and the setting of the stumpage rate. On that basis, Ainsworth on the second submission –August 23, 2005, resubmitted the identical original submission.
- On the matter of accurate information, the Canadian Oxford Dictionary defines accurate as "1. *careful, precise, lacking errors*". Section 105.1 sets out that Ainsworth must ensure the information is accurate upon time of submission. This precludes, in my opinion, significant 'give and take' post-submission that would carry the appraisal cost estimates outside the reasonable bounds of 'accurate'. Again, there must be accuracy at the time of submission.
- The notion of accuracy is applicable to the second submission submitted, August 23, 2005. The second submission consisted of a new submission but of the original appraisal costing. At that time, however, ministry staff had concluded and communicated to Ainsworth that based on the works completed to date and a field evaluation of future planned works, the ECE could not be justified for its significant endhaul costing which was not carried out and for uncompleted outsloping and ditching. These and other anomalies amounted to a reduction in the ECE of almost \$200,000 or close to a 24 percent reduction of the original estimate. The new ECE value of \$613,480 is further corroborated by the fact that the final full ECAS submission reflected this value. This information and ministry opinion was known to Ainsworth. Ainsworth however chose to resubmit through ECAS with no changes to the original \$811,014 appraisal.

- I find this difference in costing, known to Ainsworth but not addressed by them in the second submission to be well beyond a reasonable interpretation of accurate under section 105.1.

[Italics in original]

[28] The District Manager also found that the facts did not support any of the statutory defences of due diligence, mistake of fact or officially induced error, although he also acknowledged that Ainsworth had not raised any of these defences. The District Manager imposed a \$1,500 penalty.

[29] On July 28, 2008, Ainsworth appealed the Determination to the Commission. Ainsworth advances two arguments in support of its appeal.

[30] First, Ainsworth maintains it did not contravene section 105.1 of the *Forest Act*. It asserts the data contained in the second appraisal data submission was "accurate" within the meaning of section 105.1 of the *Forest Act*, when that section is interpreted in its proper legislative and policy context. It submits that, at the time Ainsworth filed this submission, the submission reflected the estimated costs that Ainsworth expected to incur to construct the roads within CP 205. Ainsworth points out that, at that time, the roads were still under construction so the actual site conditions and costs were yet to be determined.

[31] In the alternative, Ainsworth states that, even if the data in the second appraisal data submission was inaccurate and a contravention of section 105.1 occurred, no penalty should be imposed.

[32] The Respondent maintains that the District Manager properly found that Ainsworth's second appraisal data submission contained inaccurate information, that the penalty is appropriate, and that the appeal should be dismissed.

ISSUES

[33] There are two main issues to be decided in this appeal:

1. Has Ainsworth contravened section 105.1 of the *Forest Act*?
2. If so, should the \$1,500 penalty be upheld?

RELEVANT LEGISLATION AND POLICIES

[34] The key section of the *Forest Act* at issue in this Decision, section 105.1, is repeated for convenience as follows:

105.1 A holder of an agreement under this *Act* who

(a) is required under this Act, or

(b) obliged under the agreement

to submit information to the government for use in determining, redetermining or varying a stumpage rate, or for any other purpose under this Act, must ensure that the information is accurate.

[35] Section 105.1 is found within Part 7 of the *Forest Act*, which is primarily directed at the determination and collection of stumpage. It is for the purpose of “determining, re-determining or varying a stumpage rate” that section 105.1 requires the licensee to provide accurate information.

[36] Stumpage is determined under section 105(1) of the *Forest Act* using the policies and procedures issued by the Minister under the authority of subsection (c), which states:

105 (1) Subject to the regulations made under subsection (6) and orders under subsection (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

...

(c) in accordance with the policies and procedures approved by the minister. [Emphasis added]

[37] For the Cascades Forest District, such policies and procedures are found in the November 1, 2004 Interior Appraisal Manual (“IAM”) as amended to December 15, 2004. The IAM requires a licensee to provide certain information calculated or stipulated in the various tabular and other estimation tools set out in the IAM.

[38] Various sections of the IAM are relevant, including provisions pertaining to the appraisal procedure and requests for information in section 2.2 and section 4.3.3, and related provisions dealing with estimating detailed engineering costs.

[39] The relevant parts of section 2.2 include:

1. An appraisal is a process used to determine a stumpage rate for a cutting authority area using the *Interior Appraisal Manual* in effect on the effective date of the cutting authority.

2. A licensee ... shall submit an interior appraisal data submission and map ... to the district manager when the licensee ... makes application for a cutting authority.

3. The licensee ... shall submit to the district manager any other information required by the district manager or their designate for the purposes of the appraisal.

...

5. The district manager or their designate may review the licensee ... submission and will notify the licensee ..., in writing, of any omissions, errors or provisions of the *Interior Appraisal Manual* that, in the opinion of the district manager or their designate, the signing professional forester may not have considered. The licensees ... will consider the district manager’s or their designate’s notification and **may** revise the submission. [Emphasis added]

...

7. The person who determines the stumpage rate may review the licensee ... submission and information supplied by the district manager or their designate, and will notify the licensee ..., in writing, of any omissions, errors or

provisions of the *Interior Appraisal Manual* that, in the opinion of the person who determines the stumpage rate, the signing professional forester may not have considered. The licensee ... will consider the notification and **may** revise the submission. [Emphasis added]

8. The person who determines the stumpage rate shall consider, when determining the stumpage rate:

- a. the information provided by the licensee ... and the district manager or their designate, and
- b. any information available to the person who determines the stumpage rate that is relevant to the appraisal.

[40] Section 4.3.3 of the IAM has a number of paragraphs relating to the calculation of ECEs.

4.3.3 Detailed Engineering Cost Estimates

Where the tabular cost estimating procedures of this manual cannot be used due to their physical limitations, the cost of a project shall be estimated by preparing a detailed engineering cost estimate. The regional manager may approve standardized procedures to generate cost estimates for use in projects as listed below.

...

For appraisal purposes, the estimated development project costs are made on the basis of the site-specific data including the definitions found in section 4.3.2.2 for common subgrade construction variables, the culvert costs included in Table 4-4, and the equipment and labour rates specified in Appendix I. Due consideration is given to arm's length competitive bids for any specific project. The appraisal estimate is not constrained in any way by a licensee's actual costs.

...

Where road sections estimated as a detailed engineered cost estimate are contiguous with tabular cost estimates, costs for mobilization and demobilization will only be allowed for special equipment not required for the construction of the tabular roads. ...

[41] Paragraph 4.3.3.1 of the IAM also refers to detailed engineering costs:

4.3.3.1 Trending of Detailed Engineering Costs

All detailed engineering costs must be adjusted to match the cost base of the manual in effect at the time of the appraisal or reappraisal (refer to Table 4-5). This includes development costs in apportionment agreements, ministry approved competitive bid tenders, and ECEs prepared using Appendix I.

[42] Section 4.3.3 requires that these estimates be based on both certain site-specific data applied to the definitions and allowances made for tabular roads.

AFFIDAVIT EVIDENCE

[43] Ainsworth provided an affidavit sworn on October 22, 2009 by its Woodlands Manager, Rick Takagi, a Registered Professional Forester.

[44] The Respondent's evidence was provided in affidavits sworn by the following individuals:

(1) Pat McAfee, then District Engineering Officer in the Cascades Forest District. Mr. McAfee was one of two Ministry employees whose June 22-23, 2005 field inspection led to the request that Ainsworth re-file the ECE component of its appraisal data submission. His affidavit was sworn on October 5, 2009.

(2) Tracy Hendry, then Timber Pricing Coordinator for the Southern Interior Forest Region, had the authority to determine the stumpage rates for cutting authorities within the Cascades Forest District. Her affidavit was sworn on October 1, 2009.

[45] As the Respondent's evidence provides the background to the findings of contravention, the Panel will first review its affidavits.

Affidavit of Pat McAfee

[46] Mr. McAfee's affidavit focuses on his June 22 and 23, 2005 detailed field review of reconstruction activity on certain sections of the LLM Mainline and LLM Spurs, and the differences between the estimates contained in the ECEs for these upgrades and what Ministry employees thought would have been more reasonable cost estimates for these road sections.

[47] Mr. McAfee deposed that, for the sections of the LLM upgrades that he reviewed, the ECEs attributable to the upgrades were "much higher than works that would reasonably be done given the site conditions." Mr. McAfee's affidavit has numerous pictures with typed captions of various LLM sections where Mr. McAfee notes a number of discrepancies between what had been estimated in the ECEs dealing with the LLM upgrades, compared to the construction work observed during his detailed field inspection.

[48] Mr. McAfee's affidavit has only one paragraph on Road 205.110. He states as follows:

We did a drive by inspection of the new construction on Road 205.110. It was my opinion, and still is, that the engineered cost estimates for the new construction on Road 205.110 that claimed for almost 25,000 cubic metres of end haul, which I did not believe would be hauled out [sic]. My opinion is based on my observations at the site on June 22nd and over 30 years of road engineering experience.

[49] Unlike the LLM upgrades, Mr. McAfee's affidavit has no pictures or analysis of construction activities on Road 205.110. Also, the concerns expressed in his October 5, 2009 affidavit about Road 205.110 were not expressed in his July 5, 2005 email to Ainsworth.

Affidavit of Tracy Hendry

[50] Ms. Hendry's affidavit discusses her duties when she was Timber Pricing Coordinator for the Southern Interior Forest Region, authorized to process appraisals and determine the stumpage rates for cutting authorities in the Cascades Forest District, including Ainsworth's CP 205.

[51] Ms. Hendry became involved with the appraisal of CP 205 on September 23, 2005. On that day, Ray Neighbor (a Ministry employee now deceased who had reviewed Ainsworth's appraisal information at the District level) called her to advise that he was about to send her some appraisal data through ECAS. The data contained a million dollar ECE, but the District felt that 40% of the costs were not claimable. Mr. Neighbor told Ms. Hendry that Pat McAfee and Ernie Carson "knew of the issues".

[52] On September 26, 2005, two weeks after Ainsworth began hauling timber from CP 205, Mr. Neighbor emailed Ainsworth's second submission to the Regional Office "with issue".

[53] Ms. Hendry states that the Ministry prefers to have stumpage rates in place before, or close to, the date timber starts being hauled from a cutblock so that the Ministry can simultaneously receive revenue as timber is being hauled. Having accurate data ensures that an accurate stumpage rate can be set so there is not a "temporary decrease in the Crown's stumpage revenue", and other licensees are also not temporarily disadvantaged. She states that consistency in determining stumpage rates is also important: no matter who has the right to harvest a particular cutting authority, the stumpage rate should be the same.

[54] According to Ms. Hendry, although Ainsworth began to haul timber from CP 205 around September 12, 2005, the stumpage rate for CP 205 was not set until May 30, 2006, over eight months later. It was set after a meeting with Ainsworth on April 11, 2006, at which the parties agreed to a course of action whereby an accurate stumpage rate could be set for CP 205. On April 12, 2006, Ms. Hendry returned Ainsworth's second submission to Ainsworth so that it could make the agreed upon revisions.

[55] The Ministry received Ainsworth's revision of its ECEs, its final appraisal data submission, on May 15, 2006. On May 30, 2006, Ms. Hendry issued a Stumpage Advisory Notice setting a stumpage rate.

[56] Ms. Hendry attributes the delay in setting a stumpage rate for CP 205 to the Ministry's concerns about Ainsworth's ECEs. Ms. Hendry's opinion is that, if Ainsworth had submitted "better costing information" in August of 2005 when it made its second submission, a stumpage rate could have been determined before, or shortly after, the hauling of timber from CP 205 began.

[57] In her affidavit, Ms. Hendry compares the cost estimates for new roads 205.223, 205.342 and 205.110 in Ainsworth's second submission, with the revised amounts claimed in Ainsworth's final appraisal data submission (which was based on data available in April 2006). The differences in cubic metres of material transported were 81,107 cubic metres compared to 16,660 cubic metres, and the cost of such transport was \$126,332 compared to \$23,037.

[58] She also gives detailed comparisons of Ainsworth's second appraisal data submission (which is the same as its original submission) and the final appraisal

data submission with respect to the upgrades for various sections of the LLM Mainline and LLM Spurs:

Upgrade Section	Original & Second Submission	Final Submission
LLM Mainline Section 2, Station 0+000 to 0+129 (total costs)	\$7,183.00	\$5,117.00
LLM Spur 1 Section 3, Station 0+000 to 0+208 (excavating other materials)	\$6,471.00	\$ 1,472.00
(material transportation)	\$5,226.00	
LLM Spur 1 Section 4, Station 0+000 to 0+116 (rock drilling and blasting)	\$3,019.00	
(material transportation)	\$1,537.00	
(other construction activities)	\$7,050.00	\$1,273.00
LLM Spur 1 Section 5, Station 0+000 to 0+278 (rock drilling and blasting)	\$ 3,251.00	
(material transportation)	\$ 4,366.00	
(other construction activities)	\$13,859.00	\$2,703.00
LLM Spur 2 Section 6, Station 0+000 to 0+155 (total cost)	\$5,632.00	\$1,130.00
LLM Spur 2 Section 7, Station 0+000 to 0+220 (material transportation)	\$ 5,255.00	
(other construction activities)	\$12,518.00	\$2,731.00
LLM Spur 2 Section 8, Station 0+000 to 0+308 (material transportation)	\$ 663.00	
LLM Spur 2 Section 9, Station 0+000 to 0+461 (material transportation)	\$5,124.00	

Affidavit of Rick Takagi

[59] Mr. Takagi first clears up a misunderstanding on the part of Mr. McAfee about the role of Ainsworth's consultant Forsite.

[60] Roder Runner Excavating Ltd., not Forsite, was Ainsworth's contractor for roads and upgrades on CP 205. Forsite was retained to provide the following forest management services for Forest Licence A18700:

- (i) terrain stability analysis required for road design and layout work, which provided the foundation for Ainsworth's road permit application for CP 205;
- (ii) the appraisal data submissions, including the ECEs, for CP 205; and
- (iii) site inspection of roadwork completed on CP 205 and preparation of a report in response to Mr. McAfee's July 5, 2005 email.

[61] Forsite prepared the ECEs that were submitted as part of Ainsworth's original appraisal data submission for CP 205. Before Ainsworth could resubmit ECEs for CP 205, it needed Forsite to review the construction work that had been completed and provide revised estimates of the relevant ECEs. Under the terms of Ainsworth's agreement with Forsite, Ainsworth was precluded from hiring another consultant to perform this work. Forsite was unable to perform site inspections between July 5 and November 3, 2005 due to other commitments.

[62] Mr. Takagi takes issue with the Ministry's detailed focus on the LLM upgrade areas, rather than the history and overall ECEs submitted by Ainsworth. Ainsworth's original and second appraisal data submissions contained ECEs of \$811,015. Following Forsite's inspection of completed construction activities, Ainsworth's final appraisal data submission reduced the ECEs to \$613,480. Mr. Takagi notes that the majority of development expenses in each of these submissions related to new construction activities on Road 205.110, rather than the LLM upgrades. [Exhibit "D" to Mr. Takagi's affidavit contains a chart showing the magnitude of cost differences between ECEs for various sections of the upgrade and the new roads: LLM upgrades (\$113,293) compared to Road 205.110 (\$502,494)].

[63] In August 2005 when Ainsworth made its second appraisal data submission, the new construction on Road 205.110 was largely incomplete, and continued into 2006. He notes that construction of this road was still ongoing at the time Ainsworth made its final appraisal data submission.

DISCUSSION AND ANALYSIS

1. Has Ainsworth contravened section 105.1 of the *Forest Act*?

The Appellant's submissions

[64] Ainsworth maintains it did not contravene section 105.1 of the *Forest Act*. Ainsworth agrees that, as the holder of Forest Licence A18700, it is "holder of an agreement" under the *Forest Act* and is, therefore, obliged to submit accurate information to the Government for use in determining the stumpage rate for CP 205. However, despite the Respondent's claims, Ainsworth submits that the second appraisal data submission *was* accurate when it was submitted because it reflected

the estimated costs that Ainsworth expected to incur to construct the roads within CP 205. At that time, the roads were still under construction, so actual site conditions and costs were yet to be determined.

[65] To fully understand Ainsworth's argument, one must understand the stumpage appraisal system generally and the role of cost estimates as set out in the IAM.

[66] Ainsworth notes that the version of the IAM in place during the times at issue in this appeal was based on the comparative value pricing system. This system was described in *Canadian Forest Products Ltd. v. British Columbia*, 2009 BCSC 1040 at para. 13-15:

The appraisal procedure set out in the Manual requires a licensee to submit an "appraisal data submission" to the district manager when it applies for a cutting permit providing information relevant to its estimated operating costs under the permit, such as the number and length of logging roads the licensee expects will have to be built to harvest the timber in the cutting permit area. The Ministry considers this information in arriving at the (notional average) operating costs estimates it uses to calculate the stumpage rate for the cutting permit area.

In simple terms, stumpage rates are calculated under the Manual ... based on the difference between the estimated selling price of the timber in the cutting permit area, and the estimated operating costs to harvest the timber. As a matter of principle, it is generally (with a few exceptions) the estimated operating costs of a "notional average operator" that are used in the calculation, not the costs actually incurred by the licensee.

As part of its data submission, a licensee is required to submit its estimated development costs. These costs generally fall into two categories: (1) new construction; and (2) reconstruction and replacement. For each category, the licensee calculates and submits costs estimates for the development work [Ainsworth's emphasis]

[67] Ainsworth submits that stumpage determinations are, essentially, a forward-looking exercise where cost estimates are provided before all of the development and harvesting costs have been incurred. Stumpage rates are determined on the basis of those estimates. Because of when in the process they are submitted, Ainsworth submits that cost estimates are intended to approximate the operating costs of a "notional average operator" based on what the licensee expects will be required to harvest timber, rather than the *actual costs* incurred by the particular licensee. To hold otherwise would require the stumpage rate to be determined after all of the development and harvesting costs have been incurred, rather than at the outset of the process.

[68] Ainsworth submits that, determining stumpage based on the estimated costs of the "notional average operator", allows the Ministry to set stumpage rates before harvesting commences, so the timber can be invoiced as it is harvested and scaled rather than waiting until all costs for the cutting authority have been incurred, submitted and approved.

[69] Under this type of system, the “accuracy” of the information submitted for the purposes of section 105.1 must be determined at the time the information is submitted. “Accuracy” must also recognize the vagaries inherent in basing stumpage on the estimated costs of a “notional average operator”. Since the term “accurate” is not defined in the *Forest Act* or its regulations, nor has it been judicially considered in a case of any precedential value, Ainsworth states that it is appropriate to look at the context and to interpret the word in reference to its context. In this regard, Ainsworth relies on the modern approach to statutory interpretation as set out by E. A. Driedger in his text, *Construction of Statutes* (2nd ed. 1983) at page 87:

Today there is only one principle or approach [to statutory interpretation], namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament.

[70] This approach has been adopted by the Supreme Court of Canada on various occasions (see for example, *Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21 and *Montreal (City) v. 2952-1366 Quebec Inc.*, [2005] 3 S.C.R. 62 at para. 9).

[71] Ainsworth also cites section 8 of the *Interpretation Act*, R.S.B.C. 1996, c. 238, which states:

Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

[72] Ainsworth agrees with the District Manager that the ordinary grammatical meaning of the word “accurate” is defined by the Canadian Oxford Dictionary (1998) as follows:

1. Careful, precise; lacking errors.
2. Conforming exactly with the truth or with a given standard.

[73] Ainsworth also agrees with the District Manager that section 105.1 requires that the information submitted “to the government for use in determining, re-determining or varying a stumpage rate” must be accurate at the time of submission. This is consistent with section 7 of the *Interpretation Act*, which provides that an enactment that is expressed in the present tense applies to circumstances as they arise.

[74] Ainsworth submits, however, that the District Manager erred by failing to consider whether or not the ECEs in the second appraisal data submission were accurate *at the time they were submitted*. Instead, Ainsworth submits that the District Manager’s reasons clearly demonstrate that, when deciding whether the August 2005 submission was inaccurate, he relied heavily on the changes made in the May 2006 revised ECEs, which were based upon information that came to light after much of the construction had been completed. This construction had not been completed at the time of the second submission.

[75] Ainsworth argues that, if compliance with section 105.1 is to be assessed “at the time of submission,” then subsequent changes to the ECEs, and subsequent information that comes to light, cannot be proper considerations.

[76] Ainsworth also argues that the District Manager misstates the facts. At the time of the second appraisal data submission, Ministry staff had done a detailed inspection of the first three LLM upgrade sections, but merely a quick “drive by” review of the early stages of construction on Road 205.110. At this time, road construction on CP 205 had just begun three weeks earlier and was incomplete. Neither Mr. McAfee’s July 5, 2005 email, nor Mr. Neighbor’s ECAS notification, specifically raised the issues of end haul, out sloping or ditching. Rather, after observing the early stage of road construction on CP 205, Ministry staff merely advised Ainsworth that it was concerned that the “scope of works undertaken to date do not reflect road design or the engineering costs indicated” in the original appraisal data submission.

[77] Given that construction was at such an early stage, Ainsworth says that it was reasonable to resubmit the original ECEs on August 23, 2005, with a qualification that it would be revising past and future construction activities in the field to take all necessary steps to ensure that they were consistent with road design and other requirements. This allowed construction activities to be altered to address specific site conditions as they were encountered. Such alterations ultimately resulted in the revised ECEs contained in the final appraisal data submission, which were compiled when Forsite and Ainsworth had a greater amount of information on the actual site conditions and construction costs. Ainsworth submits that, the fact that the revised ECEs were provided, does not render the second appraisal data submission inaccurate. At the time of the second appraisal data submission, Ainsworth still had limited information because construction was still at an early stage, was ongoing, and might be altered.

[78] In addition, Ainsworth argues that the burden for demonstrating non-compliance must be relatively high. A licensee must know that it can submit its cost estimates based on the reasonable advice received from professionals and consultants, without facing the threat of regulatory action under section 105.1 in the event that such estimates are subsequently varied to reflect specific site conditions discovered after the original appraisal data submissions have been submitted. The estimates cannot always, and do not always, reflect the actual site conditions since such conditions are often latent and cannot be determined until construction is underway or is completed. This reality does not render an appraisal data submission inaccurate within the meaning of section 105.1. If it did, licensees would be held to an unrealistic and unduly burdensome standard.

Summary

[79] In summary, Ainsworth asserts that, when interpreted in its proper legislative and policy context, the data contained in the second appraisal data submission was “accurate” within the meaning of section 105.1. At the time the second appraisal data submission was made, the ECEs reflected the “estimated” costs that Ainsworth expected to incur to construct Road 205.110 and perform the other upgrading activity in CP 205, using the tables contained in the IAM. The original appraisal data submission and the second appraisal data submission reflected Ainsworth’s estimates of the estimated costs that the notional average operator would incur if constructing roads for CP 205.

[80] The greatest monetary difference between the second and final ECEs was in relation to the new road construction. However, Ainsworth submits that it was only after construction was completed and the actual site conditions were known that the ECEs could be amended as they were, in fact, amended after negotiations with the Ministry. This does not make the estimates that were the basis of the second appraisal data submission inaccurate at the time they were submitted. Therefore, Ainsworth maintains that it did not contravene section 105.1.

The Respondent's submissions

[81] The Respondent observes that there is a notion of flexibility that underlies much of Ainsworth's argument. However, the Respondent submits that a plain reading of section 105.1 does not suggest that the Legislature intended section 105.1 to include a concept of flexibility or "give and take" in the appraisal data submission process. Further, the Respondent states that Ainsworth's arguments regarding the "notional average operator" and "results-based" legislation are not applicable to ECEs provided under the *Forest Act*.

[82] Section 105.1 of the *Forest Act* states that a licensee that is "required under this Act" to submit information to the Government "for use in determining, redetermining or varying a stumpage rate" must "ensure that the information is accurate."

[83] The Respondent notes that section 105 of the *Forest Act* states that stumpage is to be determined "in accordance with policies and procedures approved for the region by the Minister." The Minister's policies and procedures are set out in the IAM and it is the IAM that describes the information required by the Government for use in determining a stumpage rate. Thus, it is this information that must be "accurate".

[84] The Respondent submits that, although Ainsworth relies on the IAM and the "notional average operator" to interpret "accurate", as the IAM is a policy approved by the Minister, it is subordinate legislation and should not be used to interpret the meaning of the word "accurate" in section 105.1 of the *Forest Act*. The Respondent submits that the term "accurate" in this section should be interpreted in accordance with its ordinary definition which is "careful, precise, lacking errors", "conforming exactly with the truth or with a given standard" or "able to give an accurate result". The Respondent states that the ECEs in Ainsworth's second appraisal data submission do not meet any of these definitions.

[85] The Respondent also submits that section 105.1 is a strict liability contravention, in that there is no requirement for the Ministry to prove that Ainsworth either intended to deceive, or even knew that the information submitted in the second appraisal data submission was inaccurate. In this case, however, the Respondent submits that Ainsworth had the means to know that much of its second appraisal data submission was inaccurate: much of the construction work on the upgrades was complete, and work on new Road 205.110 had already been started at the time of Mr. McAfee's field review on June 22-23, 2005.

[86] When considering what information must be accurate, the Respondent states that it is not the total amount of \$811,015, contained in Ainsworth's second

appraisal data submission, that is required to be accurate (although the Ministry believes the total amount was too high.) Rather, it is the underlying information regarding cost estimates for each construction activity, for each section of road, that must be accurate. The Respondent submits that it is this information that was not accurate at the time of the second appraisal data submission.

[87] The Respondent submits that Ainsworth was obliged to revise the ECEs for the upgrades, as well as any other work completed, or even uncompleted, since the original appraisal data submission. This would have ensured that its second appraisal data submission was "accurate".

[88] Although Ainsworth submits that cost estimates are intended to approximate the operating costs of a "notional average operator" based on what the licensee expects will be required to harvest timber, the Respondent asserts that this is not correct. Rather, the ECEs are site specific cost estimates for the cutting authority being appraised. The Respondent submits that the *Canadian Forest Products Ltd. v. British Columbia* case relied upon by Ainsworth is not applicable to the present appeal. That case dealt with section 4.3.2 of the IAM, involving formulas used to calculate tabular roads. In contrast, the present case deals with ECEs prepared under section 4.3.3 of the IAM, using estimated hours of equipment time multiplied by IAM Appendix I machine rates (\$/hour), plus material costs.

[89] Accordingly, the Respondent submits that ECEs are tied to a licensee's actual costs on the site, rather than those of a "notional average operator." If the work has not started at the time of the appraisal, the Respondent submits that ECEs would be based upon reasonable estimates of equipment and labour hours. However, if work has started before the appraisal, then the information in the ECEs should be based upon the circumstances known to date.

[90] The Respondent notes Ainsworth's statement that estimates cannot, and do not, always reflect the actual site conditions that are encountered; such conditions are often latent and cannot be determined until construction is underway. In this case, the Respondent points out that, prior to the second appraisal data submission, construction on Road 205.110 had begun and most of the LLM upgrades were completed. As a result, cost estimates could have been updated to reflect the new information as construction was underway.

[91] The Respondent points out that Ainsworth did not even investigate the request for better information in the ECEs until Forsite's November 2005 report - more than two months after its second appraisal data submission. In addition, Forsite's report focused on terrain stability assessment and the difference between the constructed roads and the prescribed design. It does not directly address any of the costing information for the ECEs.

[92] The Respondent submits that section 105.1 of the *Forest Act* places a duty on the licensee to take positive steps to ensure the accuracy of the information. As such, Ainsworth's employees should have done a site inspection to verify the accuracy of the costing estimates, or asked its contractor, Forsite, to prepare updated cost estimates based upon work done prior to making the second appraisal data submission.

[93] The Respondent notes that Ainsworth provides no explanation for why it was unable to provide updated cost information for the LLM Mainline and Spur upgrades when it made its second appraisal data submission.

[94] Although the Respondent appears to agree with Ainsworth that evidence of a later appraisal submission containing a revised estimate cannot, alone, be used as proof of a section 105.1 contravention, it submits that the later submission can be used to corroborate a finding that an earlier submission was not accurate. This is what the District Manager did in his Determination.

[95] On the facts of this case, the Respondent notes that, by August 23, 2005, Ainsworth had completed at least some of the road construction activity on CP 205: it had completed work on the upgrades to various sections of LLM Mainline and the LLM Spurs as discussed in Mr. McAfee's affidavit. Therefore, the Respondent submits that Ainsworth should have been able to revise its ECEs in August 2005 to reflect what was known at that time. That work, and what was known about the LLM upgrades are important, and should not be diminished by Ainsworth's emphasis on new road construction.

[96] If Ainsworth had revised the ECEs to reflect what was known at the time the second appraisal data submission was made - rather than simply resubmit the original estimates - the Ministry could have set a stumpage rate sooner, and received revenue when harvesting occurred. Instead, because Ministry employees believed that Ainsworth's ECEs overstated road construction costs, the Ministry delayed setting a stumpage rate until it finally reached an agreement with Ainsworth, and received Ainsworth's final appraisal data submission in May of 2006.

[97] The Respondent maintains that the ECEs were not accurate when Ainsworth sent them in unchanged in August 2005 and, therefore, it contravened section 105.1 of the *Forest Act*.

[98] Finally, the Respondent notes Ainsworth's assertion that a licensee should be able to submit cost estimates based on reasonable advice from professionals and consultants without facing threat of regulatory action under section 105.1. The Respondent refers to a December 2001 "Notice to Profession", issued by the Association of BC Forest Professionals, that requires Registered Forest Professionals to ensure that appraisal data submissions reflect current plans and the most appropriate data, estimates and assumptions available at the time. The Respondent submits that, if a licensee submits inaccurate cost estimates based on such reasonable advice, it has nevertheless contravened the statutory provision. Reliance on reasonable advice may, however, be evidence of due diligence. However, in this case, Ainsworth's second appraisal data submission was not based on any new advice from Forsite.

The Panel's Findings

[99] As noted above at paragraphs 69 and 70 of this Decision, the Supreme Court of Canada has repeatedly affirmed the modern approach to statutory interpretation:

Today there is only one principle or approach [to statutory interpretation], namely, the words of an Act are to be read in their entire context and in their

grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament.

[100] Thus, in determining the meaning of “accurate” in section 105.1 of the *Forest Act*, the Panel takes into account its grammatical and ordinary meaning, the overall scheme and object of applicable legislation, and legislative intent.

[101] In terms of the grammatical and ordinary meaning, the Panel accepts that the Canadian Oxford Dictionary (1998) definition of “accurate” reflects the ordinary grammatical meaning. It is: “careful, precise; lacking errors” and “conforming exactly with the truth or with a given standard”. This ordinary meaning must be considered within the context of the legislative scheme.

Legislative Scheme

[102] In addition to section 105.1 itself, the legislative scheme that forms the context in which a licensee submits information for the purpose of determining a stumpage rate includes section 105(1) of the *Forest Act*. Section 105(1)(c) provides that rates of stumpage must be determined, redetermined and varied “in accordance with the policies and procedures approved by the minister.”

[103] The applicable policies and procedures approved by the Minister are contained in the November 1, 2004 IAM (as amended to December 15, 2004).

[104] The IAM itself is very detailed, stipulating what information a licensee must submit to the Government when it makes application for a cutting authority (i.e., several months before work on a cut block begins), and the appraisal process that the Ministry delegates follow when determining, redetermining or varying stumpage rates.

[105] Due to the language of section 105(1) of the *Forest Act*, the IAM is, therefore, an essential part of the legislative context that the Panel must take into account when interpreting what constitutes accurate information for the purpose of section 105.1 of the *Forest Act*.

[106] When reviewing provisions of the IAM to determine what information must be included in an appraisal data submission, it is clear that a licensee must include information about its future development and operating costs as calculated through various tabular, or other estimation tools, set out in the IAM. Many of these estimates are constrained by values determined by a survey of the costs of a “nominal average operator” for an extensive range of the variables: see *Canadian Forest Products Ltd. v. British Columbia*, 2009 BCSC 1040, para. 13-15.

[107] While certain site specific data is input into the formulas when a licensee’s appraisal data submission includes ECEs, it is apparent that the detailed engineering costs are estimates constrained mainly by formulas set out in the IAM (see section 4.3.3, which refers to section 4.3.2.2, and other tables). The detailed engineering costs are often intertwined with the formulas for calculating tabular road costs. Because this data input takes place months before the work on a cutblock begins, they are not reflective of the licensee’s actual engineering and construction costs. This is acknowledged in the last sentence of the third paragraph of section 4.3.3 on estimated development costs:

The appraisal estimate is not constrained in any way by a licensee's actual costs.

[108] In summary, the IAM requires a licensee to provide cost estimates as a forward-looking exercise using the estimation tools and parameters set out in the IAM, and those estimates reflect those of the notional average operator. Consequently, the phrase from the Canadian Oxford Dictionary (1998) definition of "accurate" that most appropriately fits the context of this case is "conforming ... with a given standard".

[109] The IAM contains provisions where additional information may be requested from a licensee during the appraisal process. In addition to its appraisal data submission, section 2.2(3) requires a licensee to "submit to the district manager any other information required by the district manager or their designate for the purposes of the appraisal" [Emphasis added]. Section 2.2(5) establishes a process where, after the district manager reviews an appraisal data submission, the licensee will be notified of any omissions, errors or IAM provisions that, in the opinion of the district manager or their designate, may not have been considered by the licensee's professional forester, and the licensee may revise its appraisal data submission.

Application to the facts

[110] Although not raised by the parties, the Panel assumes that Mr. McAfee was qualified as a "designate" of the district manager for the purposes of requesting from Ainsworth "any other information" (per section 2.2(3) of the IAM), or notifying Ainsworth of potential omissions or errors in its appraisal data submission and requesting Ainsworth to revise its submission (per section 2.2(5) of the IAM).

[111] The affidavit evidence establishes that staff at the District level, after reviewing Ainsworth's original appraisal data submission, had concerns about the magnitude of the estimates involved in the detailed engineering cost component of Ainsworth's appraisal data submission. As a result, Mr. McAfee and another employee conducted the June 22- 23, 2005 site inspection of road construction work that was in progress on CP 205, including a "drive by" of construction work on new Road 205.110 that had begun only three-weeks earlier. Mr. McAfee emailed Ainsworth, noting certain discrepancies between the actual work completed to date and the road design and engineering costs submitted by Ainsworth the previous December.

[112] Mr. McAfee's request for additional information is as follows:

Please resubmit appropriate engineering costs for CP 205. In addition, I recommend that Ainsworth have a qualified professional inspect the works completed to date to ensure that the recommendations of the Terrain Stability Assessment are being implemented. [Emphasis added]

[113] The parties' submissions did not include any discussion of whether Mr. McAfee's request to "resubmit appropriate engineering costs for CP 205" was a mandatory request for additional information under section 2.2(3), or fell under section 2.2(5): a notification of "any omissions, errors or IAM provisions not considered" in its appraisal data submission. Ainsworth, in choosing to resubmit its original appraisal data submission unchanged, obviously interpreted this request as

the latter where it may, but was not required to, revise its appraisal data submission.

[114] The Respondent's argument that the ECEs in Ainsworth's August 23, 2005 appraisal data submission were inaccurate is based on its contention that, because certain road construction and engineering work had been completed, Ainsworth's second appraisal data submission should have been updated to include its actual construction and engineering costs.

[115] The Panel notes that, in his July 5, 2005 email, Mr. McAfee does not specifically request Ainsworth to submit actual construction and engineering costs incurred to date.

[116] Nor did the Respondent refer to any section of the IAM which requires a licensee to update its detailed ECEs based on actual costs incurred at the date of an information request.

[117] Rather than point to an applicable section of the IAM requiring Ainsworth to revise its ECEs for work completed or partially completed, the Respondent asks the Panel to take a restrictive view of what constitutes accurate information in section 105.1 of the *Forest Act*, to ignore the IAM provisions because they are subordinate legislation, and to ignore the fact that Mr. McAfee's request for information did not specifically ask for Ainsworth's actual road engineering and construction costs that had been incurred in the summer of 2005.

[118] Due to the language of section 105(1) of the *Forest Act*, the IAM forms part of the legislative scheme that the Panel must take into account in determining whether Ainsworth contravened section 105.1. The IAM specifies the information that is required to be submitted for the ECEs component of a licensee's appraisal data submission, and how such estimates are arrived at. This is the standard that Ainsworth was required to meet when it provided information to the Ministry on August 23, 2005.

[119] In considering this issue, the Panel finds that subsequent information provided by Ainsworth in May 2006 is not appropriate to take into account in determining whether Ainsworth violated section 105.1 of the *Forest Act*.

[120] In the absence of a specific reference to which part of the formulas for estimating ECEs in the IAM that Ainsworth failed to meet, or a specific request for actual detailed engineering costs incurred to date, the Panel is unable to conclude that, at the time Ainsworth made its second appraisal data submission, the information submitted was inaccurate. The original appraisal data submission and the second appraisal data submission reflected Ainsworth's estimates of the engineering costs that the notional average operator would incur if constructing roads for CP 205. Only after construction was complete, and actual site conditions were known, were alterations made to its road design. It was only when these changes were made that the construction and actual site costs were known, and Ainsworth's ECEs could be amended (as they were in fact amended after negotiations with the Ministry). This does not make the estimates that were the basis of the second appraisal data submission inaccurate at the time they were submitted.

[121] Accordingly, the Panel finds that Ainsworth did not contravene section 105.1 of the *Forest Act* when this provision is interpreted in its proper legislative and policy context.

[122] As a result of this finding, the penalty is hereby rescinded and the second issue need not be addressed.

DECISION

[123] In making this decision, the Panel of the Forest Appeals Commission has carefully considered all of the material before it, whether or not specifically reiterated here.

[124] For the reasons above, the Panel finds that Ainsworth did not contravene section 105.1 of the *Forest Act*.

[125] The appeal is allowed. The Determination and penalty are rescinded.

“Margaret Eriksson”

Margaret Eriksson
Forest Appeals Commission

October 29, 2010