Forest Appeals Commission

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APPEAL NOS. 2008-WFA-001(a) and 2008-WFA-002(a)

In the matter of an appeal under the *Wildfire Act*, S.B.C. 2004, c. 34.

BETWEEN:	Canadian National Railway	**APPELLANT**
AND:	Government of British Columbia	**RESPONDENT**
BEFORE:	A Panel of the Forest Appeals Commission Alan Andison, Chair James Hackett, Member Les Gyug, Member	
DATE:	March 23, 2009	
PLACE:	Kamloops, BC	
APPEARING:	For the Appellant:	Ross Switzer, Counsel Maryam Sherkat, Counsel
	For the Respondent:	A.K. Fraser, Counsel Darcie Suntjens, Counsel

APPEALS

[1] These appeals are brought by Canadian National Railway ("CNR") against two determinations, dated June 2 and June 19, 2008 regarding two forest fires. The determinations were made by Denis G. Gaudry, Fire Centre Manager (the "Manager"), Kamloops Fire Centre, Ministry of Forests and Range (now the Ministry of Forests, Lands and Natural Resource Operations) (the "Ministry").

[2] In his June 2, 2008 determination, the Manager found that CNR contravened sections 3(1) of the *Wildfire Act* (the "*Act*") and sections 9(a), (b) and (c) of the *Wildfire Regulation* (the "*Regulation*") with respect to Fire K7-0135 ("Fire 135"). Section 3(1) of the *Act* states:

> **3**(1) Except for the purpose of starting a fire in accordance with this Act or another enactment, a person must not start or risk starting an open fire in forest land or grass land, or within 1 km of forest land or grass land, by dropping, releasing or mishandling
>
> (a) a burning substance, or
>
> (b) any other thing that the person reasonably ought to know is likely to cause a fire.

[3] Section 9(a) to (c) of the *Regulation* states:

9 A person carrying out a railway operation, on or within 300 m of forest land or grass land, must

(a) maintain locomotives and engines, equipment and rolling stock in a manner that does not produce an ignition source capable of starting a fire on or adjacent to the railway operation,

(b) maintain the railway right of way so that it is substantially free from dead or dry grass, weeds and other combustible materials,

(c) having regard to the Fire Danger Class, ensure that there are sufficient patrols of the railway right of way to provide for early and effective detection and suppression of fires on and adjacent to the right of way, and

...

[4] The Manager levied a $1,000 administrative penalty for the contravention of section 3(1) of the *Act*, and a $10,000 penalty for the contravention of sections 9(a) to (c) of the *Regulation*. Pursuant to section 27(1)(c) of the *Act*, the Manager further ordered CNR to pay $254,680.38 in damages for Crown timber burned in the fire, which was 75% of the total stumpage value of the timber, at $339,573.85.

[5] The second determination, dated June 19, 2008, dealt with Fire K7-0136 ("Fire 136"). The Manager found that CNR contravened section 9(a) of the *Regulation* by failing to maintain locomotives, engines and rolling stock, and he levied an administrative penalty of $1,000.

[6] Before these appeals were heard, the parties settled a number of matters that were under appeal. The parties agreed that there were no contraventions for Fire 136. The parties also agreed that CNR did not contravene sections 9(b) and (c) of the *Regulation* regarding Fire 135. Further, CNR agreed to accept the Manager's finding that it had contravened section 9(a) of the *Regulation* with respect to Fire 135, and to pay the administrative penalty of $10,000.

[7] The narrow grounds of appeal that remain pertain to the calculation of the value of the timber that was destroyed or damaged by Fire 135.

[8] This appeal is heard pursuant to section 39(1) of the *Act*. The powers of the Commission on an appeal are set out in section 41 of the *Act*, which states:

41 (1) On an appeal under section 39 by a person or under section 40 by the board, the commission may

(a) consider the findings of the decision maker who made the order, and

(b) either

(i) confirm, vary or rescind the order, or

(ii) with or without directions, refer the matter back to the decision maker who made the order, for reconsideration.

[9] CNR requests that the Commission vary the Manager's June 2, 2008, determination by reducing or eliminating the amount levied for the Crown timber that was damaged or destroyed in Fire 135.

BACKGROUND

[10] Fire 135 was reported at 6:58 pm on July 29, 2005. It occurred near Ashcroft, BC, approximately 585 feet south of the Mile 84 marker on CNR's rail line. The fire was caused by hot metal fragments separating from the dragging brake of a westbound CNR train car and falling onto the adjacent right-of-way. Shortly after the fire was reported, the Ministry responded with an initial attack crew, helicopters and air tankers. CNR train crews, once aware of the fire, stopped their operations and isolated the suspected cars in order to contain the problem.

[11] The following day, the fire escaped from the right-of-way and covered approximately 40 square kilometers. The fire damaged or destroyed 25,010.8 cubic meters of mature timber.

[12] Approximately one year following the fire, Ainsworth Lumber Company Ltd. ("Ainsworth") salvaged 19,809.79 cubic meters of timber (including waste billings) from the area of the fire under cutting permit 255 of Forest Licence A18700, issued by the Ministry. The stumpage paid on the salvaged timber amounted to $4,874.80.

[13] On June 2, 2008, the Manager issued his determination that CNR had contravened section 3(1) of the *Act* and sections 9(a) to (c) of the *Regulation* in relation to Fire 135. He levied deterrent penalties of $1,000 for violating section 3(1) of the *Act* and $10,000 for violating sections 9(a) to (c) of the *Regulation*. The Manager also assessed an amount under section 27(1)(c) of the *Act* for the Crown timber that was damaged or destroyed by the fire. In that regard, he concluded that the Ministry contributed to the lost value of the timber because the "on site" Ministry supervisor did not exercise his full authority and stop passing trains in order to provide firefighting crews and equipment with access to the fire two hours earlier on July 30. For this reason, the Manager assessed the timber value at 75% of his estimate of $339,573.85 for the timber's total value (excluding reforestation); i.e., $254,680.38.

[14] Although the Ministry incurred costs of $5,691,466.04 in fighting Fire 135, the Manager did not assess fire control costs against CNR under section 27(1)(b) of the *Act*. An agreement in principle regarding a fire control cost sharing agreement had been negotiated between CNR and the Province at the time of the fire, and the Manager decided that the intent of the agreement in principle was broad enough to cover the fire control costs for Fire 135.

[15] On July 23, 2008, CNR filed appeals against both the June 2, 2008 determination regarding Fire 135 and the June 19, 2008 determination regarding Fire 136.

[16] As stated above, the parties settled a number of issues before the appeals were heard. Specifically, the parties agreed that Fires 135 and 136 were both caused by a single act, and the appeal of the June 19, 2008 determination regarding Fire 136 should be allowed. The parties also agreed that CNR did not

violate sections 9(b) and (c) of the *Regulation* regarding Fire 135. Further, CNR agreed to accept the Manager's finding that it had contravened section 9(a) of the *Regulation* with respect to Fire 135, and to pay the administrative penalty of $10,000.

[17] Consequently, the only remaining appeal is against the June 2, 2008 determination regarding Fire 135 (Appeal No. 2008-WFA-001), and the remaining issues pertain to the value of the Crown timber damaged or destroyed as a result of CNR's contravention of section 9(a) of the *Regulation*. In that regard, CNR argues that the stumpage value of the Crown timber that was damaged or destroyed should be determined based on the stumpage rate that applied to timber on the date that the salvaged timber was scaled. CNR also argues that the Manager had jurisdiction to reduce the timber value to 75% of the timber's stumpage value. Further, CNR submits that the Government's claim to the stumpage value of the timber amounts to double recovery, because stumpage was paid on the timber when it was harvested by Ainsworth.

[18] The Government submits that the stumpage value of the timber should be determined based on the stumpage rate that would have applied to the timber on the date that the fire occurred. In addition, the Government argues that the Manager had no jurisdiction to reduce the timber value to 75% of the timber's stumpage value. Additionally, the Government submits that its claim for the stumpage value of the timber under section 27 of the *Act* is unrelated to the stumpage revenue that was collected from Ainsworth for the salvaged timber.

[19] The parties agree on the volume of timber that was damaged or destroyed: 25,010.8 cubic metres. If the applicable stumpage rate is that which was in effect at the time of scaling, the rate is $0.25 per cubic metre and the stumpage value would be $6,252.20, before taking into account any of the reductions that CNR asserts apply. Alternatively, if the applicable stumpage rate is that which was in effect at the time of the fire, the stumpage value would be $311,280.39, before taking into account any reductions.

ISSUES

1. Whether the effective date for appraising the damaged and destroyed timber should be the date of Fire 135 (i.e., July 29, 2005) or the date when the timber was scaled (i.e., July 1, 2006) in accordance with section 103(1)(c)(i) of the *Forest Act*.
2. Whether the Manager had the jurisdiction to reduce the timber value assessed under section 27(1)(c) of the *Act* to 75% of the stumpage value of the damaged and destroyed timber.
3. Whether stumpage revenue obtained from the salvaged timber should be applied as a credit to CNR's account.

RELEVANT LEGISLATION

[20] Relevant sections of the *Act,* the *Regulation* and the *Forest Act* are set out below.

Wildfire Act

Administrative penalties and cost recovery

27 (1) If the minister determines by order under section 26 that the person has contravened a provision, the minister by order

(a) may levy an administrative penalty against the person in an amount that does not exceed a prescribed amount,

(b) may determine the amount of the government's costs of fire control under section 9 for a fire that resulted, directly or indirectly, from the contravention, calculated in the prescribed manner,

(c) may determine the amount that is equal to the dollar value of any

(i) Crown timber,

(ii) other forest land resources,

(iii) grass land resources, and

(iv) other property

of the government damaged or destroyed as a result, directly or indirectly, of the contravention, calculated in the prescribed manner,

(c.1) may determine the costs

(i) that have been or will be incurred by the government in re-establishing a free growing stand as a direct or indirect result of the contravention, and

(ii) that have been incurred by the government for silviculture treatments that were rendered ineffective as a direct or indirect result of the contravention, and

(d) except in prescribed circumstances, may require the person to pay the amounts determined under paragraphs (b) and (c) and the costs determined under paragraph (c.1), subject to the prescribed limits, if any.

Wildfire Regulation

Determination of damages

30 For the purposes of section 25(1)(b) and 27(1)(c) of the Act, the manner in which the dollar value of

(a) Crown timber, if it is mature timber, is to be calculated is by ascertaining the amount of stumpage applicable to that timber under the Forest Act and assigning that amount as the dollar value for that timber,

...

Forest Act

Amount of stumpage

103 (1) Subject to sections 107, 108 and 142.7, if stumpage under section 104 or under an agreement entered into under this Act is payable to the government in respect of Crown timber, the amount payable must be calculated by multiplying the volume or quantity of the timber

(a) reported in a scale made under Part 6, or

(b) calculated under section 106 using information provided by a cruise of the timber

by the sum of

(c) the rate of stumpage applicable to the timber under section 105 when

(i) the timber is scaled, or

(ii) the volume or quantity is calculated under section 106, and

(d) if applicable, the bonus bid offered in respect of the timber.

(2) If a bonus offer is made in respect of Crown timber referred to subsection (1), the bonus offer must be paid to the government in addition to the stumpage calculated in accordance with that subsection.

(3) Despite sections 107 and 108, a person who cuts, damages, destroys or removes Crown timber without authorization must pay, in addition to all other amounts payable under this Act or another enactment, stumpage calculated by multiplying the volume or quantity of the timber that was cut, damaged, destroyed or removed without authorization, as determined by an official designated by the minister, by the sum of

(a) the rate of stumpage that an employee of the ministry referred to in section 105 (1) determines would likely have applied to the timber under that section if rights to the timber had been granted under an agreement entered into under this Act

[Emphasis added]

Stumpage rate determined

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

(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.

DISCUSSION AND ANALYSIS

1. Whether the effective date for appraising the damaged and destroyed timber should be the date of Fire 135 (i.e., July 29, 2005) or the date when the timber was scaled (i.e., July 1, 2006) in accordance with section 103(1)(c)(i) of the *Forest Act*.

[21] CNR submits that the Manager incorrectly chose the date of Fire 135 to assess the applicable stumpage rate, and cites certain legislation to support that argument. First, section 30 of the *Regulation* stipulates that the dollar value of Crown timber is to be calculated using section 103(3) of the *Forest Act*. Section 103(3)(a) of the *Forest Act* stipulates that a person who cuts, damages, destroys or removes Crown timber without authorization must pay stumpage calculated by multiplying the volume of timber, as determined by an official designated by the minister, by the sum of the rate of stumpage that an employee of the Ministry determines would likely have applied to that timber under that section if rights to the timber had been granted under an agreement entered into under the *Act*.

[22] CNR further submits that using the date of the fire is inconsistent with the language in section 103(3)(a) of the *Forest Act*, "would likely have applied", which denotes some discretion on the part of the Ministry in calculating the appraisal value of the damaged timber. In this case, the date on which the Crown timber was "cut, damaged, destroyed, or removed", as referred to in section 103(3)(a), is a known date. If the legislative intent was to use the date of loss as the applicable date for determining the value of the timber, explicit language would have been employed and this was not done. In support of this point, CNR cites *Sullivan and Dreidger on the Construction of Statutes*[1] which states that it is "… presumed that in so far as possible legislatures will adopt a simple, straightforward and concise way of expressing themselves".

[23] CNR submits that if stumpage is payable under section 103(3)(a) of the *Forest Act*, then the method for determining the stumpage rate is found in section 105 of the *Forest Act*. That section states that stumpage rates must be determined, re-determined, and varied by an employee of the ministry, at the times specified by the minister, in accordance with the policies and procedures approved for the forest region by the minister.

[24] CNR submits that neither of these sections makes any reference to the date which must be used to determine the applicable stumpage rate. Rather, section 105(1) states that this determination is left to an "employee of the ministry".

[25] CNR submits that no prescribed date for determining applicable stumpage is stipulated under section 103(3) of the *Forest Act*. However, CNR argues that section 103(1)(a) provides that the date specified for determining stumpage rates includes the date that the timber is scaled.

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[1] Ruth Sullivan, *Sullivan and Dreidger on the Construction of Statutes*, 4th ed. (Ontario, Canada: Butterworths, 2002).

[26] CNR submits that the Ministry applied the correct stumpage rate from Table 6-1 of the Interior Appraisal Manual (the "IAM"), Amendment No. 12, in effect on April 1, 2006. The reason for applying this rate is that there was no infrastructure in place to log the burnt timber from Fire 135. By this CNR means there was no approved cutting permit and completed timber appraisal at the time of the fire. CNR submits that the logging for this timber started in the Fall of 2006 after Ainsworth received a cutting permit, and it continued through the Summer of 2007, therefore, it was reasonable to use the April 1, 2006, stumpage rate.

[27] The Government provided three arguments on this issue. First, it submits that, based on section 30 of the *Regulation*, the correct approach for determining the amount of stumpage applicable to the timber damaged by Fire 135 is to multiply the volume of timber damaged or destroyed by the stumpage rate applicable on the date of damage or destruction, which is July 30, 2005. It submits that CNR's approach to quantifying loss is not normally accepted, even at common law. When a person damages or destroys property, he or she is not normally entitled to the benefit of any loss in value between the date of destruction and the likely date on which the property might have been sold. In this regard, the Government cites: *Waddams, the Law of Damages* (Toronto, Canada Law Book), November 2008, paras 1.660 and 1.1000; *Scobie v. King*, [1992] 2 WWR 514, [1992] BCJ No 35 (BCCA); and *RF Fry & Associates (Pacific) v. Reimer*, [1993] 8 WWR 663, 83 BCLR 2d 199 (BCCA).

[28] Second, the Government submits that there is no basis for incorporating the provisions of section 103(1)(c)(i) of the *Forest Act* into the calculation of the applicable stumpage value for the damaged or destroyed timber in accordance with section 30(a) of the *Regulation*, because the plain meaning of this section is that the stumpage rate applicable immediately before the timber was damaged shall be multiplied by the volume of timber to arrive at the total stumpage value lost due to the fire. According to the Government, there is no basis for calculating the stumpage payable based on the date that the timber was scaled.

[29] Third, the Government argues that, if section 103 of the *Forest Act* is relevant to the stumpage calculation, then subsection 103(3) is the more applicable sub-section since it directs an employee of the Ministry, using section 105(1), to determine a stumpage rate that would likely have applied to the timber had cutting rights been in place. However, the Government notes that section 103(3) does not specify that the scaling date is the applicable date since it addresses the method of valuing Crown timber without any agreement in place with the Crown. This section is also silent on whether a Ministry official should determine the stumpage payable on the assumption that the timber was harvested under an agreement. This section provides that the official shall determine the stumpage rate that would likely have been applied had there been an agreement in place.

The Panel's Findings

[30] It has been established that Fire 135 started on July 29, 2005, and the fire damaged or destroyed Crown timber as a result of the contravention. CNR concedes that it caused the fire, and consequently, contravened a provision of the *Regulation*. The volume of timber that was damaged or destroyed is not in dispute between the parties.

[31] In their submissions, the parties refer to both the relevant legislation and common law authorities. In this case, the Commission must consider the language in the relevant legislation before turning to the common law. *Sullivan and Driedger on the Construction of Statutes* states at page 340:

> It follows from the principle of legislative sovereignty that validly enacted legislation is paramount over the common law. Acting within its constitutionally defined jurisdiction, the legislature can change, add to or displace the common law as it thinks appropriate and the courts must give effect to that intention regardless of any reservations it may have concerning its wisdom….

[32] *Sullivan and Driedger* further state at pages 341-342 that legislation is presumed to respect common law principles, but that presumption may be rebutted by a clear legislative intention to the contrary. Legislatures may deliberately modify the common law by changing it, adding to it or abrogating it. Courts will readily concede the primacy of legislation in areas traditionally outside of the common law, such as where the legislature has created a public regulatory regime.

[33] Turning to the relevant legislation, section 27(1)(c) of the *Act* provides that "if the minister determines … that a person has contravened a provision, the minister by order … may determine the amount that is equal to the dollar value of any (i) Crown timber … of the government that is damaged or destroyed as a result, directly or indirectly, of the contravention, calculated in the prescribed manner". The language of this legislation provides discretion to the minister, through the use of the word "may" in relation to the word "determine" and not to the word "calculate". In other words, the Minister (or his delegate), upon arriving at an administrative penalty for a contravention, has been granted discretionary powers to determine the amount of the penalty but not the way it is calculated. The dollar value of the timber must be arrived at in the "prescribed manner", which is set out in section 30 of the *Regulation*.

[34] Section 30(a) of the *Regulation* directs the Ministry to ascertain the amount of stumpage applicable and assign that amount as the dollar value for the timber. This section states:

Determination of damages

30 For the purposes of section 25(1)(b) and 27(1)(c) of the Act, the manner in which the dollar value of

(a) Crown timber, if it is mature timber, is to be calculated is by ascertaining the amount of stumpage applicable to that timber under the Forest Act and assigning that amount as the dollar value for that timber,

[35] Section 30(a) clearly states that, for the purposes of section 27(1)(c) of the *Act*, the dollar value of mature Crown timber damaged or destroyed in a fire is to be calculated by ascertaining the amount of stumpage applicable under the *Forest Act,* and assigning that amount as the timber's dollar value.

[36] The relevant sections of the *Forest Act* for determining stumpage are sections 103 to 109. Section 103(1) describes in general terms the procedure for determining the amount of stumpage payable to the Crown if an "agreement" has been entered into under the *Forest Act*.

[37] Section 103(3) further provides that:

> … a person who cuts, damages, destroys or removes Crown timber without authorization must pay, in addition to all other amounts payable under this Act… stumpage calculated by multiplying the volume or quantity of timber that was … damaged [or] destroyed…, by the sum of… the rate of stumpage that an employee of the Ministry referred to in section 105(1) determines would likely have applied to the timber under the section if rights to the timber had been granted under an agreement entered into under this Act, and… if applicable the bonus bid…
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> [underlining added]

[38] This language indicates that section 103(3) was intended to apply in situations where Crown timber has been damaged or destroyed without authorization, and the rights to harvest the timber have not been granted under a cutting authority.

[39] Both sections 103(1) and 103(3) of the *Forest Act* refer to section 105 to determine the applicable stumpage rate.

[40] The key point here is that the *Forest Act* contemplates a stumpage determination under section 103(3) as if an agreement had been in place, followed by a stumpage calculation determined under section 105.

[41] As noted above, both sections 103(1) and 103(3) of the *Forest Act* reference section 105(1) for the determination of stumpage rates. Section 105(1) states:

Stumpage rate determined

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

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

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

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

[42] Section 103(1) specifies that, when an agreement is in place, stumpage is payable to the Crown when a volume is determined either by scale or timber cruise multiplied by the stumpage rate determined under section 105. Based on sections 103(1) and 105(1) of the *Forest Act* the Panel finds that, if an agreement had been in place, the timber that was damaged or destroyed would have been valued based on the stumpage rate that applied when the timber was scaled or cruised, and therefore, the applicable stumpage rate would have been $0.25 per cubic metre.

[43] However, here section 103(3) should be applied, and the Panel finds that the applicable stumpage rate is still not the rate that applied when the fire occurred. Applying section 103(3), the Panel finds that the stumpage rate that an employee of the Ministry determines "would likely have applied to the timber" is a rate that would have applied when the timber might have been harvested.

[44] There is no dispute that when the fire occurred, there was no cutting permit in place. If the fire had not occurred, the licensee may have applied for a cutting authority to harvest the timber sometime in the future. If so, an employee of the Ministry would have determined a stumpage rate based on the provisions of the IAM that applied at the time when the licensee applied for a cutting authority. There is no evidence as to when the licensee may have applied for a cutting authority, but it is certain that there was no cutting authority in place (nor is there evidence that the licensee had applied for one) when the fire occurred. Consequently, the Panel finds that the stumpage rate that would likely have applied is not the rate that applied at the time of the fire; rather, it is a rate that would likely have applied sometime in the future. In this case, the most likely possible future rate that the parties have presented to the Panel is the rate that applied when the timber was scaled or cruised; namely, $0.25 per cubic metre.

[45] Accordingly, the Panel finds that the legislation is clear in its intent and takes precedent over the common law principles regarding the timing of valuation, and the effective date for appraising this damaged timber is July 1, 2006, the date of scale or cruise, and not July 29, 2005, the date of Fire 135.

[46] As a final comment, the Panel notes that CNR argued that the Manager should have used the version of the IAM that was in effect as of April 1, 2006 in calculating the value of the timber. The Government argued that the Manager should have used the version that was in effect on the date of the fire (i.e., April 1, 2005). The Panel finds that the IAM that was in effect on April 1, 2006 was the correct version for determining the stumpage rate applicable to the timber. However, based on the language in section 105(1) of the *Forest Act* and the relevant section of the IAM, it appears that the Manager was not authorized to determine the stumpage rate. The Panel has already found that both sections 103(1) and 103(3) point to section 105(1) regarding the determination of the stumpage rate. Section 105(1) expressly states that "rates of stumpage must be determined … by an employee of the ministry, identified in the policies and procedures referred to in paragraph (c)" [underlining added]. In this case, paragraph (c) directs us to the applicable version of the IAM. Section 1.4 of the IAM effective April 1, 2006[2], specifies which employees of the Ministry are authorized to determine stumpage rates:

> **1.4 Responsibility for Stumpage**
>
> For the purposes of section 105 of the *Forest Act*, the following employees of the ministry are authorized to determine, redetermine and vary stumpage rates.

[2] Alternatively, if the Commission is wrong and the IAM effective April 1, 2005 applies, section 1.4 of the IAM effective April 1, 2005 contains identical language.

- regional manager, regional timber pricing co-ordinator, an employee of the regional revenue section designated by the regional manager, and
- director, Revenue Branch, Ministry of Forests and an employee of Revenue Branch.

[47] Section 105 of the *Forest Act* uses the word "must" in relation to which employees are authorized to determine stumpage rates under the IAM, and the IAM does not list a Fire Centre Manager as one of those employees. It is widely accepted that the IAM is a form of subordinate legislation and has the force of law. Consequently, it appears that the Manager should have referred the question of the applicable stumpage rate to an employee who is authorized to determine stumpage rates. The Manager could have applied the rate determined by that employee in calculating the value of the timber in accordance with the *Act* and the *Regulation.* However, given that the parties did not directly address this point, the Panel offers these observations only as commentary for the Ministry's consideration in future cases.

2. Whether the Manager had the jurisdiction to decrease the damage claim to 75% of the stumpage value of the damaged and destroyed timber.

[48] CNR argues that there is both a legal and a factual basis for finding that a 25% reduction in assessed stumpage applied to the assessment of damages and that finding ought to stand. Specifically, CNR submits that the Manager had a legal duty under the *Act* to determine what loss was caused by CNR as a result of the contravention, and he found that 75% of the loss caused by the fire was attributable to or caused by CNR. CNR submits that the Manager's jurisdiction to make that determination does not depend on the *Negligence Act*; rather, it stems from section 27(1)(c) of the *Wildfire Act*.

[49] Alternatively, CNR submits that the Manager's reduction of the damages to 75% properly reflects the Ministry's failure to mitigate the loss.

[50] The Government submits that there is no basis for the Manager's 25% reduction of the value of the timber.

[51] The Government submits that the Manager had no authority to reduce the damage claim based on his conclusion that the Ministry failed to stop passing trains during the time that firefighting crews were fighting the fire. The Government asserts that mitigation is a common law principle that is found in the law of negligence. It submits that the common law principle of mitigation cannot be imported into the statutory scheme. According to the Government, the statute is a complete scheme that produces a stumpage rate followed by multiplication to the relevant volume of timber to produce a final dollar figure. There is no authority in the statute to reduce that result.

The Panel's Findings

[52] The Panel accepts the Government's submission that the Manager did not have the statutory authority to reduce the amount of stumpage by 25%. In his decision, the Manager notes that he has the authority under section 27(1)(c) of the Act to determine an amount that is equal to the dollar value of any Crown timber

damaged or destroyed directly or indirectly as a result of the contravention. He then uses this authority to reduce the recoverable amount to 75%. His exact finding is as follows:

> The Ministry of Forests and Range indicate 25,010.8m^3 of mature timber valued at $339,573.85 were destroyed as a result of this fire. It is my decision to seek recovery of 75% of these funds. There is sufficient question in my mind that the "on site" Ministry supervisor did not exercise his full authority and stop the train, whereby he could have accessed the fire on July 30th, some two hours earlier. For this reason I have adjusted the recoverable amount to 75%.

[53] The Panel notes that section 27(1)(c) of the *Act* goes on to state that the Minister or his delegate may determine the amount "… calculated in the prescribed manner." There is no prescribed manner under the *Regulation* or the *Forest Act* to reduce the amount for the reasons described by the Manager. Rather the prescribed manner is set out in section 30 of the *Regulation*, the *Forest Act* and the IAM and is a simple mathematical exercise. For these reasons the Panel finds that the Manager did not have the jurisdiction to reduce the damage claim to 75% of the value of the damaged or destroyed timber.

3. Whether stumpage revenue obtained from the salvaged timber should be applied as a credit to CNR's account.

[54] CNR submits that, since the stumpage appraisal for Ainsworth's cutting permit 255 for the damaged or destroyed timber is included in the BC Interior Market Pricing System and the timber was appraised at $4,874.80, this is the full value of the timber. The Crown has been paid for the stumpage value of the timber, and any further collection of stumpage amounts to double recovery for the same timber lost, which the Government should not be able to do. CNR submits that if there is double recovery that the $4,874.80 should be deducted from any amount that is assessed against CNR.

[55] The Government submits that the statutory scheme under the legislation does not provide authority to give credit for salvage. The ability to mitigate for the value of salvaged timber is only available under the common law. However, according to the Government, the common law does not apply in these circumstances.

The Panel's Findings

[56] The Panel agrees with the Government respecting the question of double recovery and giving credit for subsequently salvaged timber. As noted above, section 27(1)(c) of the *Act* provides that the amount assessed for damaged or destroyed Crown timber shall be "calculated in the prescribed manner." In this case, there is nothing in the *Act*, the *Regulation*, the *Forest Act* or the IAM that allows the Government to give credit for subsequently salvaged timber. The Panel also finds that the common law is of no assistance to CNR in this case as the statute has created a complete scheme for valuing lost timber. As was noted by *Sullivan and Dreidger*, "… validly enacted legislation is paramount over the common law." For these reasons, the Panel finds that the stumpage revenue obtained from the salvaged timber should not be credited to CNR when assessing damages for damaged or destroyed timber.

DECISION

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

[58] For the reasons provided above, the Panel orders as follows:

- by consent of the parties, the June 19, 2008 determination regarding Fire 136 is rescinded;
- by consent of the parties, the finding that CNR contravened section 3(1) of the *Act* and the levying of the $1,000 penalty regarding Fire 135 is rescinded;
- by consent of the parties, the finding that CNR contravened sections 9(b) and (c) of the *Regulation* regarding Fire 135 is rescinded;
- by consent of the parties, the finding that CNR contravened section 9(a) of the *Regulation* and the levying of the $10,000 penalty regarding Fire 135 is confirmed;
- the requirement that CNR pay the government for damaged or destroyed Crown timber is varied and the Manager is directed to re-assess these damages based on the stumpage rate that applied on April 1, 2006. The damages shall be for 100% of the damaged or destroyed timber and there shall be no credit for subsequently salvaged timber. Finally, with the consent of the parties a silviculture cost estimate (if applicable) should be applied to the stumpage rate.

[59] Accordingly:

Appeal No. 2008-WFA-001 (re: Fire 135) is allowed, in part; and

Appeal No. 2008-WFA-002 (re: Fire 136) is allowed, by consent.

"Alan Andison"

Alan Andison, Chair

"Les Gyug"

Les Gyug, Member

"James Hackett"

James Hackett, Member

Forest Appeals Commission
June 27, 2011