Forest Appeals Commission

Fourth Floor 747 Fort Street
Victoria British Columbia
Telephone: (250) 387-3464
Facsimile: (250) 356-9923

Mailing Address:
PO Box 9425 Stn Prov Govt
Victoria BC V8W 9V1

DECISION NO. 2007-FA-023(a)

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

BETWEEN:	Canadian Forest Products Ltd.	**APPELLANT**
AND:	Government of British Columbia	**RESPONDENT**
BEFORE:	A Panel of the Forest Appeals Commission Alan Andison, Chair	
DATE:	Conducted by way of written submissions concluding on October 5, 2007	
APPEARING:	For the Appellant: Peter G. Voith, Counsel; Mark S. Oulton, Counsel For the Respondent: Bruce Filan, Counsel	

APPEAL

This appeal is brought by Canadian Forest Products Ltd. ("Canfor") against a stumpage redetermination set out in a Stumpage Advisory Notice ("SAN") issued on March 19, 2007 by the Timber Pricing Officer, Northern Interior Forest Region, Ministry of Forests and Range (the "Ministry").

The SAN set out a reappraised stumpage rate for cutting permit R78 ("CP R78"), effective January 16 to March 31, 2005. The reappraisal was triggered when the Ministry determined that there had been a "changed circumstance" as defined in the Interior Appraisal Manual ("IAM"). The Ministry set the January 16, 2005 "effective date" of the reappraised stumpage rate in accordance with the IAM as amended on April 1, 2006. The stumpage rate that resulted from the reappraisal was higher than the rate set in the original SAN for CP R78.

This appeal is heard pursuant to Division 2 of the *Forest Act* (the "*Act*"). The powers of the Commission on an appeal are set out in section 149 of the *Act*, which states:

149 (1) On an appeal, whether or not the person who conducted the review confirmed, varied or rescinded the determination, order or decision being appealed, the commission may consider the findings of

(a) the person who made the initial determination, order or decision, and

(b) the person who conducted the review.

(2) On an appeal, the commission may

(a) confirm, vary or rescind the determination, order or decision, or

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

For the purposes of this appeal, Canfor concedes that a "changed circumstance" reappraisal was triggered for CP R78. However, Canfor appeals on the grounds that the "effective date" for the reappraisal is wrong and that, based on section 103 of the *Act*, the redetermined stumpage rate cannot apply to timber that has already been scaled.

Canfor asks the Commission to rescind the reappraisal SAN and to direct the Timber Pricing Officer to adjust the reappraisal SAN to reflect the reappraisal date submitted by Canfor.

BACKGROUND

Canfor holds forest licence A18165, which grants Canfor harvesting rights within the Prince George Forest District. CP R78 was issued on January 19, 2005, and authorized Canfor to cut and remove timber from the cutting authority area (i.e., the area covered by CP R78) commencing on January 15, 2005.

According to section 105(1)(c) of the *Act*, stumpage rates "must be determined, redetermined and varied … in accordance with the policies and procedures approved for the forest region by the minister." In this appeal, those policies and procedures are found in the IAM. Chapter 2 of the IAM sets out a process for determining stumpage rates for a cutting authority area. Chapter 2 requires licensees to submit an appraisal data submission ("ADS") to the relevant District Manager within the Ministry when applying for a cutting permit. The ADS is then reviewed by District staff before forwarding the ADS to the relevant regional office of the Ministry. A regional employee of the Ministry, in this case the Timber Pricing Officer, then considers the ADS in determining the stumpage rate for the cutting permit. Chapter 2 of the IAM also sets out a process for determining stumpage rates when reappraisals are required.

The original stumpage rate for CP R78 was determined in February 2005. Specifically, on February 17, 2005, a SAN was issued setting the stumpage rate at $37.72 per cubic metre for timber scaled between January 15, 2005 and March 31, 2005 under CP R78. That stumpage rate was based, in part, on total estimated development costs of $197,050.58 claimed by Canfor in the ADS it submitted with its application for CP R78. Those total estimated development costs consisted of tabulated road costs and engineered development costs, with the former being based on Canfor's estimate of gravelling work and other road construction required for two cutblocks.

Before Canfor began harvesting under CP R78, it realized that some of the road sections that were planned were unnecessary if the roads were reconfigured. As a result, three road sections that were included in the original ADS were not built, but an additional road that was not part of the original ADS was built. In addition, gravelling of the roads in one cutblock was not completed because harvesting was

completed before spring thaw occurred. Although this gravelling had also been included in the ADS, it turned out to be unnecessary.

In 2005 and early 2006, Canfor harvested approximately 70,000 cubic metres of timber from CP R78. It completed its harvesting activities in January 2006. Some of the harvested timber was scaled during May, June and July of 2005, and the remainder was scaled in January and February of 2006. Canfor was invoiced and paid the stumpage owing on that timber in accordance with the original SAN.

In the fall of 2006, Ministry staff inspected the road construction and upgrade work that had been performed for CP R78, and determined that some of the work included in the ADS had not been performed.

In a letter dated September 20, 2006, the District Manager notified Canfor that he believed a changed circumstance had occurred, and he requested that Canfor submit a reappraisal data sheet ("RDS") for CP R78 deleting the cost allowances for the work that had not been performed.

Paragraph 2.3.2.1(1)(b) of the IAM states that a "changed circumstance" is a circumstance where "there will be at least a fifteen percent change in the total development cost estimate from the total development cost estimate used in the most recent appraisal or reappraisal due to site conditions upon reappraisal." Canfor disputes that the change in the total development cost estimate for CP R78 was "due to changed site conditions", but for the purposes of this appeal, it is prepared to concede that paragraph 2.3.2.1(1)(b) was triggered for CP R78.

In January 2007, Canfor submitted a RDS to the District office. The RDS was based on the lower total development costs that Canfor had incurred for the actual work it had carried out, and it specified an effective date of October 1, 2006 for the reappraisal. This effective date was based on the wording of section 2.4.1 of the IAM in effect when the original SAN was issued in 2005.

On March 19, 2007, the Timber Pricing Officer issued a reappraisal SAN for CP R78. That SAN is the subject of this appeal. It set a stumpage rate of $36.41 per cubic metre for sawlogs from CP R78[1], and was based on total estimated development costs of $144,684.98. In particular, the tabulated road costs allowed in the reappraisal were $60,814.60, versus $113,180.20 in the original appraisal. Of concern to Canfor, this rate was made effective January 16, 2005 to March 31, 2005, based on section 2.4.1 of the IAM as amended on April 1, 2006, and applied to timber that had long since been scaled and the stumpage paid.

On April 11, 2007, Canfor filed a Notice of Appeal with the Commission, challenging the reappraisal. Canfor takes issue with the effective date of the reappraisal, as determined by the Ministry. It argues that the *Act* precludes stumpage rates from being retroactively changed for timber that has already been scaled, invoiced and paid. Canfor also rejects the Ministry's interpretation and application of the provisions of the IAM, and suggests that the Ministry's interpretation of the Coast

---

[1] This stumpage rate of $36.41 was incorrect, as there should have been an increase in the stumpage rate. The parties have agreed that this rate will be corrected, should that become necessary based on the Commission's decision.

Appraisal Manual (the "CAM") should be applied in accordance with the "presumption of consistent expression."

The Government requests that the stumpage determination in the reappraisal SAN be confirmed.

It should be noted that, since CP R78 was issued, two other SANs have been issued to Canfor which raise similar issues. Canfor has sought an extension of time to file appeals of these SANs, and has asked that, if the extensions are granted, those appeals be held in abeyance pending the outcome of this appeal.

ISSUES

The issues raised in this appeal are as follows:

1. Whether section 103 of the *Act* precludes the Ministry from redetermining the stumpage rate for timber that has already been scaled.
2. Whether section 2.4.1 of the IAM, as amended on April 1, 2006, applies to this changed circumstance reappraisal when the original appraisal occurred prior to April 1, 2006, under a previous version of the IAM.
3. Whether the changed circumstance reappraisal provisions of the IAM need to be applied in a manner that is consistent with the interpretation adopted by the Coast Forest Region for the equivalent provisions in the CAM.

RELEVANT LEGISLATION

The Act

The sections of the Act that are relevant to the issues on appeal are sections 103 and 105.

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

...

by the sum of

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

(i) the timber is scaled, or...

[emphasis added]

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.

The IAM

The Ministry reappraised CP R78 in accordance with the amendments to the IAM which took effect on April 1, 2006. The Ministry applied the following sections when reappraising CP R78:

2.3.2 Reappraisals

1. A reappraisal is a process used to redetermine a stumpage rate for a cutting authority area using the *Interior Appraisal Manual* in effect on the effective date of the reappraisal.
2. Except as provided in sections 2.3.2.1(1)(d), 2.3.2.2, 2.3.2.3, 2.3.2.5 and Appendix VI, a reappraisal is based on a complete reassessment of the cutting authority area at the time of the reappraisal, as if the area has been returned to the condition it was in prior to development or harvesting.

...

2.3.2.1 Changed Circumstances

1. In this section a changed circumstance means a circumstance where:

   ...

   b. there will be at least a fifteen percent change in the total appraised development cost estimate from the total development cost estimate used in the most recent appraisal or reappraisal due to changed site conditions upon reappraisal, ...

   ...

2. The licensee must notify the district manager immediately when a changed circumstance has occurred.
3. Where the district manager believes that a changed circumstance has occurred, the district manager will notify the licensee of that belief.
4. A cutting authority area other than a cutting authority area that is the subject of a road permit or a cutting authority area with a non-adjusting stumpage rate, must be reappraised when a changed circumstance has occurred.

...

2.4.1 Effective Date of a Changed Circumstance Reappraisal

1. Except as provided in subsections (2) and (3) of this section, a reappraisal because of a changed circumstance is <u>effective on the day</u>

> after the effective date of the most recent appraisal or reappraisal of the cutting authority area prior to the changed circumstance reappraisal.
>
> [emphasis added]

When the original SAN was issued in 2005, an earlier version of the November 1, 2004 IAM was in effect. Canfor argues that the 2004 version of the IAM should apply, particularly as it relates to the "effective date" for the changed circumstance reappraisal as defined in section 2.4.1. This section differs significantly from the version applied by the Ministry. The 2004 version states as follows:

2.4.1 Effective Date of Changed Circumstance Reappraisal

> 1. The effective date of the reappraisal under section 2.3.2 is the first day of the month following the date of the licensee's written request to the district manager or the district manager's notification to the licensee that a changed circumstance has occurred unless the reappraisal is because of:
>   a. amendments to the cutting authority exhibit A area ... or
>   b. sudden and severe damage to the appraised timber ....
>
>   [emphasis added]

Neither exceptions in (a) or (b) apply in this case.

DISCUSSION AND ANALYSIS

1. Whether section 103 of the *Act* precludes the Ministry from redetermining the stumpage rate for timber that has already been scaled.

Canfor submits that section 103 of the *Act* sets out a mandatory formula for calculating stumpage and, in the present case, it requires that stumpage must be calculated by multiplying the volume of timber as reported in a scale by the rate of stumpage applicable under section 105 of the *Act* "when the timber is scaled."

Based on section 103, Canfor argues that the changed circumstance reappraisal provisions of the IAM must be applied in a prospective manner. Canfor maintains that a stumpage rate that is determined by way of a changed circumstance reappraisal can only apply to timber that has not yet been scaled. It submits that subordinate legislation such as the IAM cannot override or conflict with its enabling statute, and as such, the IAM cannot change the requirement under section 103 that stumpage be determined based on the rate applicable when the timber in question is scaled.

As a result, Canfor submits that the revised SAN, which purports to change the stumpage rate applicable to timber that has already been scaled, invoiced and paid for, cannot stand. It submits that the Commission must refuse to apply the changed circumstances provisions of the IAM because they are contrary to section 103 of the *Act* and are therefore *ultra vires*.

The Government submits that this is not an appeal of a calculation of the amount of stumpage payable under section 103, but of a stumpage rate determination under

section 105 of the *Act*. Therefore, the question over which the Commission has jurisdiction in this appeal is whether the stumpage rate was correctly redetermined in accordance with the provisions of the IAM.

The jurisdiction of the Commission is set out in section 146 of the *Act*, which provides as follows:

> **146** (2) An appeal may be made to the Forest Appeals Commission from
>
> ...
>
> (b) a determination of an employee of the ministry under section 105 (1), and...
>
> (6) For the purpose of subsection (2), a redetermination or variation of stumpage rates under section 105 (1) is considered to be a determination.
>
> [emphasis added]

The Government submits that the calculation of stumpage payable under section 103 is not a decision that is appealable under section 146. The Government asserts that, since section 103 does not prescribe how a stumpage rate must be determined or the temporal applicability of a determined stumpage rate, it cannot be used to modify or read down the policies and procedures set out in the IAM.

The Government further argues that, even if section 103 was found to be pertinent to this appeal, a plain reading of the words "applicable to the timber under section 105 when the timber is scaled" in subsection 103(1)(c) does not support Canfor's assertion that the amount of stumpage payable is to be calculated on the basis of the stumpage rate applicable to the timber on the date that it is scaled. The Government submits that section 103(1)(c) simply provides that when timber is scaled, it is subject to the payment of stumpage at the rate that has been determined in accordance with the Minister's policies and procedures that apply to that timber. The Government argues that, if the Legislature had intended section 103 to mean that the amount of stumpage payable is to be calculated on the basis of the stumpage rate applicable to the timber on the date that it is scaled, or at the time that it is scaled, then it could have said so.

In sum, the Government argues that there is nothing in section 103, section 105, or the balance of the *Act* that provides that a rate that has been determined for timber that has been scaled may not be redetermined. The Government maintains that section 103 is irrelevant to this appeal and that, even if it is relevant, it does not limit the Minister's jurisdiction to approve policies and procedures that prescribe the determination, redetermination or variance of a stumpage rate that applies to timber after that timber has been scaled. In particular, the Government submits that the rate that applies to scaled timber may be redetermined before or after the timber has been scaled.

As a practical matter, the Government submits that it is not uncommon for a stumpage rate to be determined after the relevant cutting permit has been issued, such that timber from the cutting permit area may have been cut and scaled by the licensee before the stumpage rate for that timber has been determined. Similarly, the Government submits that, when the IAM requires that a stumpage rate be redetermined, it is not uncommon for a licensee to continue cutting and scaling

timber under the authority of the cutting permit before the rate has been redetermined. The Government argues that, if Canfor's argument succeeds, then the manner in which the forest industry in British Columbia conducts its affairs would have to be changed so that: (1) no timber may be scaled by a licensee until after the stumpage rate for the timber has been determined; and (2) if a licensee has commenced harvesting and a new stumpage rate must be redetermined, harvesting operations would have to stop and no further timber could be scaled until after the new rate was redetermined. The Government submits that such changes would adversely impact the manner in which the Government utilizes forest resources and would impair the present flexible and efficient manner in which the industry now carries out operations.

Panel's findings

Before addressing the issue of whether section 103 of the *Act* precludes the Ministry from redetermining the stumpage rate for timber that has already been scaled, the Panel will address the extent of its jurisdiction in deciding this issue.

Sections 148(4)(d) and 150(1) of the *Act*, respectively, provide that the Panel has the authority to hear submissions from the parties "as to facts, law and jurisdiction", and that a decision of the Commission may be appealed to the B.C. Supreme Court "on a question of law or jurisdiction." The Panel finds that those sections are authority for the proposition that the Commission has the jurisdiction to decide questions of law in deciding appeals under the *Act* (*Paul v. British Columbia (Forest Appeals Commission)*, 2003 S.C.C. 55). The power to decide questions of law includes the power to decide questions involving the statutory interpretation of the Commission's enabling legislation, in this case the *Act*, and whether subordinate legislation that is purported to have been created pursuant to the *Act* conflicts with the *Act*.

The Panel finds that the requirement in section 149(3) of the *Act* that the Commission "apply" the policies and procedures set out in the IAM in deciding appeals of stumpage determinations must be considered in the context of the Commission's jurisdiction to consider questions of law in deciding such appeals. The requirement in section 149(3) must also be considered in light of statements by the courts that the policies and procedures approved by the Minister under section 105(1) of the *Act* are akin to subordinate legislation and have the force of law (see for example, *MacMillan Bloedel Ltd. v. British Columbia (Ministry of Forests)*, 2000 B.C.C.A. 351, at paragraph 6). In addition, as noted by Canfor, subordinate legislation cannot conflict with its parent legislation, and an Act will prevail over inconsistent or conflicting subordinate legislation (*Friends of Oldman River Society v. Canada (Minister of Transport),* [1992] 1. S.C.R. 3 (hereinafter *Oldman River*), at paragraph 42).

Based on the foregoing, the Panel finds that sections 148(4)(d) and 150(1) of the *Act*, together with section 149(3), provide that the Commission is required, in deciding appeals of stumpage determinations, to apply the policies and procedures that have been approved under section 105, to the extent that those policies and procedures are consistent with, and do not conflict with, the *Act*. If a provision of those policies and procedures is invalid or inoperable due to a conflict or inconsistency with the *Act*, then the Commission will decline to apply the invalid or

inoperable provision. If the Panel finds that certain provisions of the IAM conflict with the *Act*, then the Panel is not bound to apply those provisions (*Bell Canada v. Canadian Telephone Employees Assn.,* 2003 S.C.C. 36).

However, the Panel notes that interpretations of the *Act* and the IAM that avoid conflicts are to be preferred. In statutory interpretation, there is a presumption that subordinate legislation is intended to be consistent with its enabling legislation: *Oldman River*.

Turning to the relevance of section 103 to this appeal, there is no dispute that this is an appeal of a stumpage <u>rate</u> redetermination made under section 105(1) of the *Act*, over which the Commission has jurisdiction. Also, it is clear that a calculation of the <u>amount</u> of stumpage payable on a given amount of timber, pursuant to section 103 of the *Act*, is not a decision that is appealable to the Commission under section 146 of the *Act*. However, the Panel finds that section 103 may, in some cases, be relevant in deciding appeals of stumpage determinations, because calculating the amount of stumpage owing pursuant to section 103(1)(c) of the *Act* uses, as one of its inputs, "the rate of stumpage applicable to the timber under section 105." Thus, while stumpage rates are <u>determined</u> under section 105 of the *Act*, those rates are <u>applied</u> pursuant to section 103(1) of the *Act*. Consequently, section 103(1) may provide contextual assistance when interpreting section 105 of the *Act*, as well as the policies and procedures that are approved pursuant to section 105.

The next question is whether section 103 of the *Act* precludes the Ministry from redetermining the stumpage rate for timber that has already been scaled.

The Panel finds that section 103(1)(c) does not preclude the redetermination of stumpage rates for timber that has already been scaled. The focus of section 103(1) is on the calculation of the amount of stumpage owing (rate x volume or quality scaled = stumpage payable), it does not in any way limit or restrict the timing of the determination or redetermination of stumpage rates. In fact, section 103(1) does not even refer to stumpage rate determinations or redeterminations; rather, it only refers to the stumpage rate applicable under section 105.

In contrast, section 105(1), which is focused on stumpage rates, expressly says that "rates of stumpage must be determined, redetermined and varied …." The Panel finds that section 103(1)(c) does not "freeze" the stumpage rate at the rate that applied on the date on which the amount of stumpage owing was scaled. Rather, section 103(1)(c) relates back to section 103(1)(a), in that it ties a stumpage rate to a volume of timber that was reported in a scale. Consequently, if a stumpage rate is redetermined after a given volume of timber is scaled, then the redetermined rate attaches to the original volume and scale information for that timber on the date that it was scaled. Based on the Panel's interpretation of the legislation, there is no conflict between section 103 of the *Act* and the IAM.

2. Whether section 2.4.1 of the IAM, as amended on April 1, 2006, applies to this changed circumstance reappraisal when the original appraisal occurred prior to April 1, 2006, under a previous version of the IAM.

When the Ministry issued the reappraised stumpage rate, it determined the effective date of the reappraisal on the basis of section 2.4.1 of the IAM which came into effect on April 1, 2006. Under this version of the IAM, section 2.4.1 stated that a changed circumstance reappraisal "is effective on the day after the effective date of the most recent appraisal or reappraisal prior to the changed circumstance reappraisal." Based on this wording, the Ministry concluded that the effective date of the reappraisal was January 16, 2005, being the first day after the effective date of the original appraisal for that cutting permit [January 15, 2005].

Canfor argues that the Ministry erred when it applied this version of section 2.4.1. It submits that the Ministry should have applied the version of this section that was in effect at the time of the *original* appraisal of CP R78 - January of 2005. At that time, section 2.4.1 stated that the effective date of a changed circumstance reappraisal "is the first day of the month following the date of … the district manager's notification to the licensee that a changed circumstance has occurred." Since the District Manager's letter to Canfor regarding the changed circumstance was dated September 20, 2006, Canfor submits that the effective date of the reappraisal should have been the first day of the following month, October 1, 2006. This is a almost 21 months later than the January 16, 2005 effective date applied by the Ministry.

Canfor argues that if one accepts the Ministry's position that the April 1, 2006 version of section 2.4.1 applies in this case, one enters into "a circular exercise in which the two versions of the Manual perpetually compete with one another" and this could not have been the Minister's intent. The circularity arises as follows.

First, Canfor notes that section 2.3.2(1) of the IAM states that reappraisals must be conducted using the version of the IAM "in effect on the effective date of the reappraisal." The language in section 2.3.2(1) is the same in both versions of the IAM that are relevant to this appeal.

It then notes that, if January 16, 2005 is accepted as the "effective date" for the reappraisal, then, pursuant to section 2.3.2, the previous 2004 version of the IAM must be used to determine stumpage rate for the reappraisal. This version of the IAM also contains the former 2004 version of section 2.4.1 setting the "effective date as "the first day of the month following the date of … the district manager's notification to the licensee that a changed circumstance has occurred." Since the District Manager's letter was dated September 20, 2006, applying this 2004 version of section 2.4.1 would cast the effective date of the reappraisal forward to October 1, 2006. Canfor argues that, if October 1, 2006 is accepted as the effective date for the reappraisal, then the April 1, 2006 version of the IAM would be triggered, casting the effective date for the reappraisal back to January 16, 2005. And around it goes.

To prevent this circularity, Canfor suggests that the IAM be applied in a prospective manner, so that the April 1, 2006 version of the IAM only applies to a changed circumstance reappraisal, if the "most recent appraisal or re-appraisal prior to the changed circumstance reappraisal" has an effective date <u>after</u> March 31, 2006.

Since the original appraisal for CP R78 has an effective date of January 15, 2005, Canfor submits that the April 1, 2006 version of the IAM, in force at the time of the reappraisal, is inapplicable, the reappraisal SAN should be set aside and the

effective date of the reappraisal should be October 1, 2006, as mandated by the previous version of section 2.4.1. As a result, the stumpage rate for the timber that has already been scaled would be unchanged.

Finally, Canfor argues that this interpretation would also prevent the IAM from being applied retroactively to change stumpage. It submits that the language of section 2.4.1, as amended, is not clear enough to overcome the presumption against the retroactive or retrospective application of statutes. Canfor argues that section 2.4.1 must be applied prospectively, in accordance with section 2.3.2 of the IAM and section 103 of the *Act*, to ensure that the redetermined stumpage rate does not apply to timber that was scaled before the reappraisal.

The Government submits that, under the IAM, the determination of the effective date of a redetermined stumpage rate is separate from the redetermination of the stumpage rate itself. The Government maintains that section 2.3.2 of the IAM prescribes how to redetermine stumpage rates in a reappraisal, but it does not specifically deal with the "effective date" of the reappraisal. The "effective date" of the reappraisal is addressed in section 2.4.1 and therefore, there is no competition between the two versions of the IAM regarding the determination of the effective date of a changed circumstance reappraisal.

The Government further submits that the provisions of the IAM under consideration are not retroactive, as they do not purport to change the law in effect prior to the amendment of section 2.4.1. It also denies that the presumption against retrospectivity is applicable in the circumstances.

Both parties provided legal argument on these principles and their relevance to the provisions at issue in this case.

Finally, the Government argues that Canfor's interpretation would lead to unreasonable and absurd results. Specifically, the timber that was harvested under CP R78 would be subject to a stumpage rate that would be lower than it should be in light of the amount of development that was required. The Government submits that its own interpretation of the IAM leads to a fair redetermination of a stumpage rate in accordance with the development that was actually undertaken by the licensee, and it corrects an earlier stumpage rate determination that was based on the licensee's overestimation of the development work it would undertake. However, it also points out that, in another situation, it could equally work to the advantage of a licensee by producing lower stumpage rates in some circumstances.

Panel's findings

Section 105(1) of the *Act* provides the Minister with a wide discretion to specify at what <u>times</u> stumpage rates must be redetermined, and to specify the policies and procedures for redetermining stumpage rates. Specifically, sections 105(1)(b) and (c) of the *Act* state that stumpage "must be determined, <u>redetermined</u> and varied… <u>at the times specified by the minister</u>, and … in accordance with the policies and procedures approved for the forest region by the minister" [emphasis added].

The Panel has reviewed the relevant sections of the IAM. In both versions of the IAM, section 2.3.2(1) provides that a reappraisal "is a <u>process used to redetermine a stumpage rate</u> for a cutting authority area <u>using the *Interior Appraisal Manual* in effect on the effective date of the reappraisal</u>" [emphasis added]. Based on the

plain meaning of the language in section 2.3.2(1), the "effective date" of the reappraisal determines which version of the IAM dictates the "process used to redetermine a stumpage rate" for the cutting authority. Section 2.3.2 neither defines nor specifies how to ascertain the "effective date" of the redetermined rate. Rather, section 2.4.1 of both versions of the IAM addresses how to ascertain the effective date of changed circumstance reappraisals.

Based on the language used in sections 2.3.2(1) and 2.4.1 of the IAM, the Panel agrees with the Government that section 2.3.2(1) clearly specifies how the redetermined rate for a reappraisal shall be redetermined, whereas section 2.4.1 clearly specifies when the redetermined rate shall become effective. The Panel is of the view that this separation was intentional, possibly to avoid the circularity to which Canfor referred in its submissions.

In the Panel's view, the wording of section 2.3.2(1) requires two steps to be undertaken in order to determine which IAM applies to the reappraisal process: first, one must determine the effective date. To do so, the Panel finds that the version of the IAM in effect at the time that the changed circumstance is brought to the attention of the Ministry by the licensee, or visa versa, will determine the "effective date". Once the effective date is determined, the next step is to look at the IAM in effect at the time of the effective date to determine the *process* to be used to "redetermine the stumpage rate for a cutting authority." The Panel finds that, in this way, the sections work together in a logical and coherent fashion.

In this case, the changed circumstance was not identified by Canfor, and was not discovered by the Ministry until some time after the scaling of the timber was done. The Ministry notified Canfor of the possible changed circumstance in September of 2006, after the April 1, 2006 amendment had come into force. Thus, the April 1, 2006 version of section 2.4.1 of the IAM applies to determine the "effective date" of the reappraisal.

Under this legislative structure, new stumpage rates may apply to timber that has already been harvested, scaled and the stumpage paid in accordance with a stumpage rate determined under a previous version of the IAM. Depending on the effective date of the most recent appraisal or reappraisal of the cutting authority area prior to the changed circumstance reappraisal, the effective date of the reappraisal may dictate that the reappraisal rate applies to timber that was harvested before April 1, 2006, timber that was in the process of being harvested on April 1, 2006, and/or timber that is harvested after April 1, 2006.

Although there is a presumption against the retrospective application of statutes, that presumption is rebutted by express words or necessary implication. The Panel agrees with the Government that the words in section 2.4.1, as amended, indicate that section 2.4.1 is intended to operate to change the past. Unlike the 2004 version which makes the effective date of a reappraisal the month following the licensee's request or the Ministry's notification of the changed circumstance, the 2006 version goes back in time. It ties the effective date to a time before the changed circumstance; specifically, to the previous appraisal or reappraisal of the cutting authority area "prior to the changed circumstance reappraisal".

In addition, the Panel accepts the Government's submission that this operation of the section does not violate the relevant presumption against retrospectivity as it

may operate to produce a higher redetermined stumpage rate for a licensee in one case, but it can also result in lower redetermined rates for the same licensee in another case.

For all of these reasons, the Panel finds that section 2.4.1 of the IAM, as amended, applies to this changed circumstance reappraisal even though the original appraisal occurred prior to April 1, 2006, under a previous version of the IAM. Specifically, section 2.4.1 of the amended IAM can be applied to cutting authorities where the effective date of the most recent appraisal or reappraisal prior to the changed circumstance reappraisal is earlier than April 1, 2006.

3. Whether the changed circumstance reappraisal provisions of the IAM need to be applied in a manner that is consistent with the interpretation adopted by the Coast Forest Region for the equivalent provisions in the CAM.

Canfor submits that the presumption of consistent expression mandates that the changed circumstances reappraisal provisions of the IAM must be applied in a manner that is consistent with the interpretation adopted by the Coast Forest Region for the equivalent provisions of the CAM. Specifically, Canfor argues that the provisions of the IAM should be construed consistently with section 3.3 of the CAM, as amended on June 1, 2006. Section 3.3.1.2(1) of the CAM, as amended, similarly provides that the effective date of a changed circumstance reappraisal is "the day after the effective date of the most recent appraisal or reappraisal of the cutting authority area prior to the changed circumstance reappraisal." Canfor notes that, prior to the June 1, 2006 amendment, that section of the CAM was identical to section 2.4.1 of the IAM.

Canfor further submits that section 2.4.1 of the IAM, as amended, should be interpreted in accordance with a memo issued on February 12, 2007, by Bill Howard, Director of the Ministry's Revenue Branch, to Jim Gowriluk, Regional Manager of the Coast Forest Region, which clarifies that the June 1, 2006 amendment to the changed circumstance reappraisal provisions of the CAM only applies to cutting authorities where the effective date of the most recent appraisal or reappraisal was June 1, 2006 or later. The relevant portion of that memo states as follows:

> ... those cutting authorities with an appraisal or reappraisal effective date prior to June 1, 2006, would have an effective date for the reappraisal resulting from a changed circumstance of the first day of the month following the date of the licensee's notification to the district manager, or the district manager's notification of the licensee, that a changed circumstance had occurred.

Canfor submits that the presumption of consistent expression applies not only within statutes but across statutes, especially where the legislative instrument deals with the same or similar subject matter.

Canfor further submits that the failure to apply the IAM in a manner that is consistent with the CAM is contrary to the obligation set out in section 4 of the *Ministry of Forests Act*, as follows:

> **4** The purposes and functions of the ministry are, under the direction of the minister, to do the following:
>
> ...
>
> (e) assert the financial interest of the government in its forest and range resources in a systematic and equitable manner.

In support of those submissions, Canfor refers to a number of judicial decisions.

The Government submits that Mr. Howard's February 12, 2007 memo provides no support for Canfor's argument, because that memo is inconsistent with the Government's interpretation of the CAM, as amended on June 1, 2006, and section 2.4.1 of the IAM, as amended on April 1, 2006. The Government notes that Mr. Howard's February 12, 2007 memo was rescinded in a second memo dated July 13, 2007.

The Panel finds that Mr. Howard's February 12, 2007 memo is not helpful in interpreting the IAM. That memo was rescinded and is, therefore, no longer a valid expression of Mr. Howard's interpretation. Also, despite the presumption of consistent expression, the Panel is reluctant to imply meaning to a provision of the IAM based on a memo regarding a provision of the CAM, without further information regarding the intention behind Mr. Howard's memo and the reasons for the amendments to the IAM and the CAM. The policies and procedures set out in the CAM and the IAM may have some similarities, but they also have differences. The IAM and the CAM are, in many ways, specific to the distinct harvesting conditions in the Interior and Coast Regions, respectively. For example, it is common knowledge that the predominant tree species are quite different between the two Regions. The fact that there are differences between those Regions is precisely why section 105 of the *Act* contemplates that the Minister may approve different policies and procedures for different regions of the Province.

For these reasons, the Panel rejects this ground for appeal.

DECISION

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

For the reasons provided above, the Commission confirms the March 19, 2007 stumpage determination issued by the Timber Pricing Officer.

The appeal is dismissed.

"Alan Andison"

Alan Andison, Chair
Forest Appeals Commission

November 13, 2007