

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Canadian Forest Products Ltd.
v. British Columbia,***
2009 BCSC 1040

Date: 20090730
Docket: S078139
Registry: Vancouver

Between:

Canadian Forest Products Ltd.

Appellant

And:

**Her Majesty the Queen in Right of
the Province of British Columbia
and Forest Appeals Commission**

Respondents

Before: The Honourable Mr. Justice Groves

On Appeal from: A decision of the Forest Appeals
Commission dated November 13, 2007 (*Canadian
Forest Products Ltd. v. Government of British Columbia,*
Decision No. 2007-FA-023(a))

Reasons for Judgment In Chambers

Counsel for the Appellant:

Counsel for the Respondent Her Majesty the Queen in Right of the
Province of British Columbia:

Counsel for the Respondent Forest Appeals Commission:

Place and Date of Hearing:

Place and Date of Judgment:

Introduction

[1] This matter is a statutory appeal from a decision of the Forest Appeals Commission (the “Commission”). The decision under appeal affirmed a reappraisal of the stumpage rate for a cutting permit issued to Canadian Forest Products Ltd. (“Canfor”) on January 15, 2005 under a forest license which granted Canfor certain harvesting rights in the Prince George Forest District in British Columbia. The appellant submits that the Commission erred in the interpretation of certain provisions of the *Forest Act*, R.S.B.C. 1996, c. 157, relating to the assessment of stumpage rates.

[2] Stumpage is a harvesting fee that a licensee must pay the Crown for the timber it harvests under the permit, according to a mandatory formula set out at s. 103(1) of the *Forest Act*. The formula, as applicable in the present circumstances, is: (a) the volume of the timber harvested by the licensee as reported in a scale under Part 6 of the *Forest Act*; multiplied by (b) “the rate of stumpage applicable to the timber under section 105 when the timber is scaled”.

[3] Pursuant to s. 105(1)(c) of the *Act*, the Ministry of Forests and Range (the “Ministry”) formulates “policies and procedures” relating to the determination, redetermination and variation of stumpage rates, which are set out in the Interior Appraisal Manual (the “Manual”).

[4] Sections 2.3.2 and 2.3.2.1 of the Manual permit a reappraisal to redetermine a stumpage rate if there is a “changed circumstance”. Section 2.4.1 of the Manual specifies that the effective date of a changed circumstance reappraisal is “...the day after the effective date of the most recent appraisal...prior to the changed circumstance reappraisal”.

[5] Thus, says the appellant, s. 2.4.1 permits retroactive application of a redetermined stumpage rate, even to timber that has already been harvested, scaled and paid for. This is the situation in the present case, where Canfor, having paid its full stumpage fees for timber harvested in 2005 and early 2006, has been ordered by the Ministry, over a year later in March 2007, to pay a redetermined (and increased) stumpage rate backdated to the day following the issue of the cutting permit, that is, January 16, 2005.

[6] However, as s. 103(1)(c) specifies that the amount payable is “...the rate of stumpage applicable to the timber under section 105 when (i) the timber is scaled”, Canfor argues that this is prospective language that precludes the retroactive redetermination of stumpage rates to timber already harvested and scaled.

Consequently, submits Canfor in its principal argument on appeal, as subordinate legislation (here the Manual) cannot conflict with the terms of its parent statute, the *Forest Act*, s. 2.4.1 of the Manual must be found to be *ultra vires* the Minister.

[7] On the other hand, the respondent emphasizes that under the *Forest Act* and the Manual, when the stumpage rate is originally determined the rate is expressed as being subject to

redetermination or variation in accordance with policies and procedures in force at the time pursuant to s. 105. Thus, says the respondent, if the policies and procedures require a change in the rate after the original determination, in light of new evidence, the new rate is the rate to be applied to the timber scaled on a particular date. This, in the respondent's view, is simply what the redetermination of a stumpage rate due to changed circumstances involves – the working out, in accordance with policies and procedures in force at the time of original determination, of a correct price for timber in light of new evidence.

The Legislation Governing Stumpage Rates

[8] Subsection 103(1) of the *Forest Act* provides:

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

[9] Section 105, in turn, addresses determination of the stumpage rate used to calculate the amount of stumpage payable, providing in relevant part:

Stumpage rate determined

- 105 (1) ...if stumpage is payable to the government under an agreement entered into under this Act..., 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

[10] The “policies and procedures” referenced in s. 105(1)(c) are set out in the Interior Appraisal Manual. The following provisions of the Manual are relevant to this proceeding:

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. A reappraisal is based on a complete reassessment of the cutting authority area at the time of 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 ...

...

4. A cutting authority area other than a cutting authority 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.

[11] The following section of the Manual, the provision at issue in this proceeding, was brought into force with amendments to the Manual effective August 1, 2005. It specifies the effective date of a changed circumstance reappraisal as follows:

2.4.1 Effective Date of Changed Circumstance Reappraisal

1. Except as provided in subsections (2) and (3) of this section, a reappraisal because of a changed circumstance is effective on the day after the effective date of the most recent appraisal or reappraisal of the cutting authority area prior to the changed circumstance reappraisal.

This version of s. 2.4.1 represented a significant change in the re-

appraisal regime set up under the Manual. Prior to August 1, 2005, the changed circumstance reappraisal provisions provided that a reappraisal would be effective on the first day of the month after receiving notice of a changed circumstance from the Ministry. As such, reappraised stumpage rates would not be applied retroactively. Following the amendments, the Manual permits the Minister to retroactively change stumpage rates where there has been a changed circumstance. As noted below, this is not the case for other reappraisals under the Manual.

The Facts

[12] Canfor is the holder of forest licence A18165. The licence grants Canfor certain rights to harvest Crown timber in the Prince George Timber Supply Area. Harvesting began in January 2005, after the Ministry issued cutting permit R78 to Canfor under the forest licence, authorizing it to cut and remove timber from two cutblocks in the Pelican operating area of the forest licence, PEL222 and PEL223.

[13] 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 cost estimates it uses to calculate the stumpage rate for the cutting permit area.

[14] In simple terms, stumpage rates are calculated under the

Manual per “cutting authority [*i.e.* cutting permit] area”, 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.

[15] 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 cost estimates for the development work. In its original appraisal data submission, Canfor estimated that three new roads would have to be constructed on PEL223, and that roads it built on PEL222 would have to be graveled.

[16] On February 17, 2005, the Ministry issued a stumpage advisory notice setting the stumpage rate at \$37.72 per cubic metre for timber scaled between January 15, 2005 and March 31, 2005. The stumpage rate in this original appraisal was based on Canfor’s estimated total development costs of \$197,050.58, comprised of tabulated road costs of \$113,180.20 and engineered development costs of \$83,870.38.

[17] In 2005 and early 2006, Canfor harvested approximately 70,000 cubic metres of timber under the cutting permit. The timber was scaled, and the Ministry issued invoices to Canfor for the amount of stumpage payable for the timber, based on the stumpage rate in the original appraisal. Canfor paid the total amount owed.

Canfor's harvesting operations concluded in January 2006.

[18] On August 31, 2006 the Ministry inspected PEL222 and PEL223, and determined that Canfor had not in fact built the three road sections on PEL223 or graveled the roads on PEL222 as had been estimated in Canfor's original appraisal data submission.

[19] According to Canfor, construction of the three new roads turned out to be unnecessary, as it was discovered prior to harvesting that a different, more efficient configuration of roads on PEL223 could be used. With regard to PEL222, it proved unnecessary to undertake any graveling, as Canfor was able to complete its hauling in the winter through adjustments in scheduling.

[20] On September 20, 2006, the Ministry wrote to Canfor, requesting that it submit a revised appraisal data submission for the cutting permit, deleting the cost allowances it had included previously for the proposed three road sections on PEL223 and the gravelling on PEL222. The basis for the request was the Ministry's view that a "changed circumstance...due to changed site conditions", triggering a reappraisal, had occurred within the meaning of s. 2.3.2.1(1)(b) of the Manual.

[21] Canfor disputed that a "changed circumstance" within the meaning of the Manual had occurred. However, in accordance with the Ministry's request, Canfor filed a reappraisal data submission for the cutting permit on January 26, 2007, omitting the cost allowances it had previously included for the three road sections on PEL223 and the gravelling on PEL222.

[22] On March 19, 2007, the Ministry issued the stumpage advisory notice at issue in this proceeding, which reduced the allowance for development costs (for the road construction and graveling), thereby increasing the stumpage rate for the wood already cut and scaled. Pursuant to s. 2.4.1(1) of the Manual, this notice made the new rate effective retroactive to January 16, 2005, the day after the cutting permit was issued to Canfor.

The Decision of the Forest Appeals Commission

[23] On April 11, 2007, Canfor appealed the Minister's reappraisal to the Commission, under s. 146(2) of the *Forest Act*:

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)

...

146 (6) For the purpose of subsection (2), a redetermination or variation of stumpage rates under section 105(1) is considered to be a determination.

Before the Commission, Canfor argued the reappraisal was invalid insofar as it provided for the redetermined stumpage rate to take effect retroactively, on January 16, 2005. Although Canfor advanced two arguments before the Commission, the only basis advanced in these proceedings is that the language of s. 103 of the *Forest Act* precludes the retroactive application of stumpage rates redetermined under s. 105, to timber that has already been scaled.

To the extent that s. 2.4.1(1) of the Manual provides otherwise, it is inoperative, says the appellant, on the principle that subordinate legislation cannot conflict with its enabling statute.

[24] In its decision of November 13, 2007, the Commission rejected this argument and affirmed the reappraisal, reasoning as follows:

[S]ection 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 [Manual].

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[25] On December 2, 2007, Canfor filed a notice of appeal to this Court from the decision of the Commission, under s. 150(1) of the *Forest Act*, which provides that “the appellant..., within 3 weeks after being served with the decision of the commission, may appeal the decision of the commission to the Supreme Court on a question of law or jurisdiction”. Canfor submits that the Commission erred in its interpretation of ss. 103 and 105.

Issues

1. What is the appropriate standard of review in this proceeding?
2. Is section 2.4.1(1) of the Manual *ultra vires* the Minister because it conflicts with ss. 103 and 105 of the *Forest Act* by permitting the

retroactive application of redetermined
stumpage rates?

Discussion

Issue 1: What is the appropriate standard of review?

[26] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 45, the Supreme Court of Canada held that there are two possible standards of review in a judicial review proceeding: either reasonableness or correctness. The court explained the process of determining the standard of review as follows:

62 In summary, the process of judicial review involves two steps. First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.

...

64 The analysis must be contextual. As mentioned above, it is dependent on the application of a number of relevant factors, including: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal. In many cases, it will not be necessary to consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case.

[27] Both Canfor and the Province agree that the appropriate standard of review in this proceeding is correctness. Several factors support this conclusion: s. 150(1) of the *Forest Act* expressly provides a statutory right of appeal from a decision of the

Commission on a question of law; there is no privative clause protecting the Commission from judicial review; and the particular question of law on which Canfor appeals is one of pure statutory interpretation – a question of law, and not fact. As noted in *Dunsmuir*, legal issues generally attract a standard of correctness, as compared to questions of fact or mixed fact and law, which generally attract a reasonableness standard (para. 51).

[28] As Canfor submits, in a case with very similar circumstances, *MacMillan Bloedel Ltd. v. British Columbia (Ministry of Forests)*, 2000 BCCA 351, 76 B.C.L.R. (3d) 71, the Court of Appeal held that the appropriate standard of review to be applied to a decision of the Forest Appeal Board (a predecessor to the Commission) was correctness.

[29] However, the respondent the Forest Appeals Commission also appeared in this proceeding to argue that the appropriate standard is reasonableness. The Commission argues that because the question at issue involves the interpretation of the *Forest Act*, a statute closely connected to the Commission's function and specialized expertise, the Commission is entitled to the deference accorded under the reasonableness standard.

[30] The Commission relies primarily on *Dunsmuir*, referring specifically to the following quote, at para. 54: “[d]eference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity...”.

[31] Indeed, the Commission is a specialized tribunal set up as an alternative to the courts to hear appeals under various provisions of

the forest legislative and regulatory scheme in British Columbia, and consequently it has specialized expertise in the matters coming before it: see *International Forest Products Ltd. v. B.C. (Forest Appeals Commission)*, [1998] B.C.J. No. 1314 (S.C.). In that case, Bauman J. (as he then was) held that reasonableness was the appropriate standard to apply in an appeal of a decision of the Commission, as it is a “specialized tribunal” entitled to deference on matters “going to the core of its mandate and expertise” (para. 41).

[32] However, as Canfor argues, while it is recognized that questions of law may attract a reasonableness standard in cases where the nature of the question is such as to engage the core expertise of the tribunal, here the proper interpretation of ss. 103 and 105 of the *Forest Act* turns more on the steps to be followed in the process of statutory interpretation itself – of particular importance, the textual analysis component – than on technical or policy issues arising in connection with the context informing that process. As the Court of Appeal observed in *McMillan Bloedel Ltd.*, “[t]he Forest Appeal Board has no special knowledge or expertise in the field of statutory interpretation” (para. 78).

[33] I agree with Canfor’s submission that the Commission’s brief reasons addressing the interpretation of ss. 103 and 105 do not reveal that the Commission drew on any special understanding it has in the area of stumpage and forestry issues in determining that s. 103(1)(c) simply relates back to s. 103(1)(a). The central issue in this appeal involves pure statutory interpretation, a question of law that does not directly engage the specialized expertise of the Commission.

[34] Having regard to the above factors, and particularly the presence of an express statutory right of appeal on a question of law, I am satisfied that the appropriate standard in this case is one of correctness.

Issue 2: Statutory Interpretation – ss. 103 and 105 of the *Forest Act*

[35] It is the interpretation of the relevant provisions of the *Forest Act*, and particularly the effect of s. 105, where the parties diverge. According to the respondent Province, the Commission's interpretation is correct in finding that s. 105 provides authority for the approval of new policies and procedures with retroactive effect. In the respondent's view, the provision permits stumpage rates to be redetermined and varied, which necessarily involves reopening rates which have already been established in accordance with approved policies and procedures, as set out in the Manual. The respondent submits that this interpretation reflects commercial reality, and serves what it characterizes as the statutory objective of commercial practicality.

[36] Canfor's principal argument is that while s. 105 of the *Forest Act* provides for the redetermination of stumpage rates, it does not expressly or by necessary implication authorize the retroactive application of those rates. According to Canfor's interpretation, the language of s. 103, in particular the use of the present tense, and the broader scheme of the *Forest Act*, indicate that the legislature intended strictly prospective application of a redetermined rate – in accordance with a policy of finality and certainty in stumpage assessment, an important rationale underlying the *Forest Act*. Thus, in Canfor's submission, it follows that s. 2.4.1, insofar as it permits retroactive application of redetermined stumpage rates, is

ultra vires the Minister's power under s. 105(1)(c).

General Principles of Statutory Interpretation

[37] The Supreme Court of Canada has repeatedly affirmed the correct general approach to statutory interpretation as follows, as expressed in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, 154 D.L.R. (4th) 193 at para. 21, citing *Driedger on the Construction of Statutes* (2nd ed., 1983) at 87:

Today there is only one principle or approach, 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.

In addition, there is a principle of general application that subordinate legislation cannot conflict with its enabling legislation.

This is based on the presumption that the legislature did not intend to make or empower the making of contradictory enactments:

Friends of the Oldman River Society v. Canada (Minister of Transport), [1992] 1 S.C.R. 3, 88 D.L.R. (4th) 1 at para. 42.

[38] There are two other presumptions regarding statutory interpretation that have been raised by the respondent Province's submissions. First, "it is presumed that the legislature does not intend to confer a power on subordinate authorities to make regulations or orders that are retroactive": *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Ottawa: LexisNexis, 2002) at 546. Secondly, it is presumed that the legislature will not interfere with vested rights: *Dikranian v. Quebec (Attorney General)*, 2005 SCC 73, [2005] 3 S.C.R. 530 at para. 32.

[39] I agree with the appellant that these presumptions are not directly engaged in the statutory interpretation analysis that the appellant's case relies on, and need not be considered in the subsequent analysis. As framed by Canfor, the question is not the temporal application of ss. 103 and 105 themselves, which is not in dispute, but rather the temporal application the Minister is authorized to give redetermined stumpage rates under s. 105. I agree that Canfor, in describing the redetermined stumpage rate as "retroactive" in its effect, uses the word as it is understood in the general, everyday sense, and does not intend to invoke these legal presumptions. The stumpage rate itself is not legislation, but simply a value determined administratively pursuant to subordinate legislation (the Manual). Simply, the central issue is whether s. 2.4.1(1), by virtue of the fact that it permits the retroactive redetermination of stumpage rates, conflicts with ss. 103 and 105.

Analysis

(i) Grammatical and Ordinary Meaning

[40] With regard to s. 105(1), plain reading of the provision leaves no doubt that the Ministry has the authority to redetermine and vary stumpage rates.

[41] With reference to s. 103(1)(c)(i), the starting point is to determine what the grammatical and ordinary meaning of the conjunction "when" is in the context of the section: "the rate of stumpage applicable to the timber under section 105 when the timber is scaled".

[42] Canfor refers to the following passage from *Pharmascience Inc. v. Binet*, 2006 SCC 48, [2006] 2 S.C.R. 513 at para. 30,

explaining “ordinary meaning”:

[m]ost often, ‘ordinary meaning’ refers to ‘the reader’s first impression meaning, the understanding that spontaneously emerges when words are read in their immediate context’... the ‘natural meaning which appears when the provision is simply read through’.

In Canfor’s submission, when s. 103(1)(c)(i) is read through in its immediate context, the meaning of the word “when” that necessarily emerges is the primary dictionary definition: “at the time that”: *Concise Oxford English Dictionary*, 11th ed. (Oxford: Oxford University Press, 2004). Thus the provision contains a mandatory requirement that the amount of stumpage payable must be calculated by multiplying the volume of the timber reported in a scale made under Part 6, by “the rate of stumpage applicable to the timber under section 105 [at the time that] the timber is scaled”.

[43] This interpretation is further supported by s. 7(2) of the *Interpretation Act*, R.S.B.C. 1996, c. 238, which provides:

7(2) If a provision in an enactment is expressed in the present tense, the provision applies to the circumstances as they arise.

[emphasis added].

I agree with Canfor that the grammatical and ordinary meaning of “when” is “at the time that”, and that s. 103(1)(c)(i) was obviously intended to be read as applying to circumstances “as they arise”.

(ii) *Relationship between ss. 103 and 105*

[44] In Canfor’s submission, the effect of s. 103(1)(c) is to create a “temporal constraint” regarding how stumpage rates are

redetermined and varied under s. 105, such that a redetermined or varied rate may apply, to calculate stumpage payable, only prospectively to timber scaled on or after the redetermination or variation date.

[45] Canfor argues that to interpret the interaction between the statutes in any other manner would be contrary to the language of the provisions. Retroactive application of a stumpage rate cannot be reconciled with the use of the present tense in s. 103(1)(c).

Simply put, a subsequently redetermined stumpage rate does not qualify as a stumpage rate “applicable at the time timber is scaled”.

[46] Thus, reading ss. 103 and 105 as a coherent scheme, the fact that s. 105(1) allows for stumpage rates to be redetermined and varied cannot carry with it the implication that the Minister also has power to decide the temporal applicability of redetermined and varied rates. Temporal applicability is a separate question – to which s. 103(1)(c) provides the answer, insofar as it contemplates application of stumpage rates only on a going forward, prospective basis, to timber that has not yet been scaled.

[47] To interpret the words in s. 103(1)(c)(i) “[at the time that] the timber is scaled” and s. 103(1)(c)(ii) “[at the time that] the volume or quantity is calculated under section 106” as simply relating back to s. 103(1)(a) and s. 103(1)(b) and indicating that stumpage is due to the government on a “pay-as-you-cut” basis – would make the subsections redundant. It is already inherent in the s. 103(1) formula that stumpage becomes payable to the government only when the timber in question has been harvested and its volume

determined. This follows from the fact that the volume of the timber determined by scale is one of the variables in calculating the amount of stumpage. For the words in s. 103(1)(c)(i) to have meaning in the section, they must be interpreted as specifying something substantive: that only the rate applicable at the time that the timber is scaled – not rates applicable before or after – be used in calculating the amount of stumpage payable.

[48] The powers s. 105(1) confers on the Minister are limited to specifying the times at which stumpage rates are to be redetermined or varied (s. 105(1)(b)), and the policies and procedures to be used in calculating the rates (s. 105(1)(c)). For the section to encompass power over the temporal applicability of the rates, in light of s. 103(1)(c)(i), express language overcoming the effect of the words “[at the time that] the timber is scaled” would be required – and no such language appears in s. 105(1).

(iii) Broader Scheme & Context of the Act

[49] Canfor submits that a consideration of other provisions of the *Forest Act*, with regard to retroactive application of stumpage rate reassessments, illustrates that were s. 103 to apply in this way, it would be expressly stated. For example, s. 105(1) can be contrasted with s. 105.2(2)(a), which expressly provides for retroactive application of a stumpage rate redetermined in circumstances where the original rate was in error because it was determined, redetermined or varied under s. 105(1) based on inaccurate information. If the power to apply a redetermined stumpage rate retroactively were already implicit in s. 105(1), the special provisions of s. 105.2 would be unnecessary.

[50] The significance of s. 105.2, in other words, is that, insofar as it provides expressly for the retroactive application of a stumpage rate redetermined in the particular circumstances addressed in that section, it suggests that the power to apply stumpage rates retroactively is not otherwise available to the Minister under s. 105(1).

[51] Next, Canfor submits that consideration must be given to ss. 108 and 142.51 of the *Forest Act*, which provide for the amount of stumpage payable under s. 103(1) to be reassessed based on estimates of the volume of timber harvested and the applicable stumpage rate, in circumstances where the volume of timber used in the original calculation was not determined correctly or at all.

[52] Significantly, s. 103(1) is expressly made subject to ss. 108 and 142.7 – but not to s. 105:

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...”

The overall scheme suggested by these sections indicate that, if there are to be reassessments of the amount of stumpage payable under s. 103(1) after the timber in question has been scaled and the licensee invoiced, this must be provided for outside s. 105(1), in a manner that expressly overcomes the prospective orientation of the language in s. 103(1). Read together, ss. 103, 105, 105.2, 108 and 142.51-142.7 support the view that the bare power to redetermine and vary stumpage rates under s. 105(1) does not allow for the reopening of completed stumpage assessments under s. 103(1).

(iv) Object of the Act

[53] Canfor submits that there is a sensible policy rationale for requiring that stumpage rates redetermined and varied under s. 105(1) be applied only prospectively, to timber that has not yet been scaled. This rationale is the licensees' – and equally, the Crown's – interest in certainty and finality regarding the amount of stumpage payable for Crown timber.

[54] From the licensee perspective, submits Canfor, the importance of certainty can be found in the role that stumpage plays in operational planning. For example, Canfor organizes its operations based, at least in part, on its estimated log costs. These are influenced to a large extent (30 – 40%) by the stumpage rates paid for each cut block. Many critical business decisions are made based on Canfor's knowledge of the stumpage rate or the expected rate at the time of harvest. I agree that to retroactively change stumpage payable on the timber after it has been harvested, scaled, invoiced and paid can seriously compromise a licensee's ability to plan its operations.

[55] The language of the previous version of s. 2.4.1(1), from the version of the Manual effective November 1, 2004, supports this interpretation. Previously, s. 2.4.1(1) read: “[t]he effective date of the reappraisal under section 2.3.2 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”. Thus, the effective date of the reappraisal did not permit backdating, but applied only following notification by the Ministry of a changed circumstance, serving the purpose of ensuring finality.

[56] It has long been recognized in relation to stumpage appraisal that certainty is an operative principle in the determination of stumpage, e.g. certainty underlies the use of notional rather than actual operating costs in stumpage determinations. For example, in the Second Report of the Task Force on Crown Timber Disposal, *Timber Appraisal: Policies and Procedures for Evaluating Crown Timber in British Columbia* (July 1974) at 12, it was stated that “the [stumpage appraisal] system should minimize uncertainty on the part of the industry”. This interpretation is also supported by the following passage from the Court of Appeal in *British Columbia (Minister of Forests) v. Whonnock Industries Ltd.* (1983), 49 B.C.L.R. 1 at 5-6, 146 D.L.R. (3d) 357 (C.A.):

[I]t must be noticed that what the [forest] officer is doing [in determining stumpage rates] is estimating... [H]e is not reviewing costs actually incurred by the harvester... [T]hat is because both the Crown and the harvester wish to know with some degree of certainty what revenue, so far as the Crown is concerned, will accrue and what costs, so far as the harvester is concerned, will be incurred.

Moving forward from appraisal of the stumpage rate to assessment of the amount of stumpage payable, it is reasonable to assume the legislature would have intended to provide some measure of finality to the calculation under s. 103(1).

[57] If s. 105(1) of the *Forest Act* empowered the Minister to apply redetermined stumpage rates retroactively, as the Province contends, the extraordinary result would be a power of indefinite duration to reopen stumpage assessments under s. 103(1), in whatever circumstances the Minister might prescribe under s. 105(1)(c). Having paid the amount of stumpage owing for a

given volume of Crown timber in accordance with s. 103(1), a licensee could never thereafter consider itself safe from reassessment.

[58] In Canfor's submission, this result precisely demonstrates the policy behind the language of s. 103(1)(c)(i): "the amount [of stumpage payable] must be calculated [using] the rate of stumpage applicable to the timber under section 105 [at the time that] the timber is scaled". This temporal constraint on the applicability of stumpage rates is the means by which stumpage assessments under s. 103(1) are given finality.

[59] On the other hand, the respondent Province submits that a central objective of the legislation is to sell timber in a commercially practical way, to benefit both taxpayers and those who wish to purchase the province's timber. To this end, says the respondent Province, it is logical, and commercially realistic that the Manual provides for reappraisal regarding timber already scaled.

[60] Secondly, says the respondent Province, the appellant's interpretation is administratively inconvenient as it prevents the determination of different stumpage rates for different time periods. In their view, this interpretation is "narrow and overly literal", and inconsistent with the objectives of the legislation (to sell timber in a "commercially practical" way) and commercial reality.

[61] The respondent Province draws an analogy between private sector contracts and the arrangement between the Ministry and forestry companies under ss. 103 and 105. The gist of this point is that because private contracting parties may agree to adjust ongoing payments through the term of a contract to take into

account changing circumstances and permit variations, it must also be within the Minister's authority under s. 105 to "reopen" rates that have already been established in accordance with approved policies and procedures.

[62] In response, Canfor argues that this analogy overlooks that: legislative intent and the scope of private parties' freedom to contract are entirely disparate concepts; insofar as s. 105 provides for the prospective redetermination of stumpage rates through the term of a cutting permit, this is analogous to what occurs under "private sector" contracts of the type described by the Province; and, recognizing the "commercial reality" asserted by the province, the legislature has separately provided for the retroactive correction of stumpage rates determined on the basis of inaccurate information under s. 105.2 of the *Forest Act*.

[63] I agree with Canfor's submission that the Province's analogy erroneously assumes that whatever commercially reasonable arrangement private parties might have agreed to, the legislature necessarily intended to authorize under a particular provision (s. 105) taken in isolation. With respect, the respondent Province's analogy fails to consider the other relevant provisions of the *Forest Act*, the role of s. 105 within that scheme, and the importance of finality with regard to stumpage rates under the *Forestry Act*.

[64] In fact, in Canfor's view, conceiving of stumpage as simply a price paid under a contract (which it is essentially, though with statutory overlay) further illustrates the rationale for closing stumpage assessments under s. 103(1) once the timber in question has been scaled. Just as a vendor of goods cannot retroactively

change the purchase price for the goods after they have been purchased, so too, it makes sense, in principle, that the legislature would not have intended to permit the Ministry to retroactively redetermine the stumpage rate, and therefore the amount of stumpage payable, for timber a licensee has already harvested, scaled, and paid for. As the Court of Appeal observed in *MacMillan Bloedel Limited* at 111:

The stumpage payable in respect of the timber cut is a purchase price, not a tax. When a T.F.L. holder obtains a cutting permit, he contracts to pay stumpage at the rate specified in the permit. The rate is determined in the manner prescribed by statute.

[65] There are certain provisions of the *Forest Act* that do provide for the reopening of stumpage assessments, as exceptions to s. 103(1), but these apply in limited and specific circumstances, and are consistent with this understanding of stumpage as a purchase price. For example, the power to retroactively redetermine a stumpage rate under s. 105.2(2)(a) (where the original determination was based on “inaccurate information... that was submitted by or on behalf of the [licensee]”) is analogous to damages for misrepresentation. The position of the Province in this case, by contrast, is simply that of a vendor of goods who has decided in hindsight, in light of events subsequent to a sale, that it would have charged a different price for the goods – and on that basis seeks to exact additional payment from the purchaser. As a matter of contract law, such a demand would be without basis.

(v) *Interaction of ss. 103 and 105 with the Manual*

[66] The Manual is subordinate legislation, setting out the law of

stumpage in the province, as enabled under the *Forest Act* (see *McMillan Bloedel* at para. 68). As a form of subordinate legislation, it is presumed that the Manual is inoperative to the extent it conflicts with its enabling statute, the *Forest Act: Oldman River Society*.

[67] As noted in *Smith v. Chamberlain* (1993), 81 B.C.L.R. (2d) 391 at para. 24 (S.C.), “the jurisprudence dealing with subordinate legislation clearly establishes that regulations made pursuant to, but in conflict with, an enabling statute are *ultra vires*...”

[68] Here, direct conflict is apparent between the amended version of s. 2.4.1(1) of the Manual and ss. 103 and 105 of the *Forest Act*. The constraint under the *Forest Act* that redetermined stumpage rates apply only prospectively, to timber that is scaled on or after the date of the redetermination, is not observed if “a reappraisal because of a changed circumstance [under s. 2.3.2.1(1)(a) or (b)] is effective on the day after the effective date of the most recent appraisal or reappraisal of the cutting authority prior to the changed circumstance reappraisal”.

[69] On the particular facts of this case, the conflict materialized decisively. By March 19, 2007, when the Ministry issued the reappraisal, the last of the timber in question had been scaled and invoiced to Canfor a year earlier. For the Ministry to apply the reappraisal retroactively, by providing that the redetermined stumpage rate was effective for timber scaled after January 16, 2005, was beyond its powers under ss. 103 and 105(1) of the *Forest Act*. Thus, s. 2.4.1(1) of the Manual, as amended, although made pursuant to s. 105, is in conflict with it and is therefore *ultra vires* the *Forest Act*.

[70] The difficulty with the amended version of s. 2.4.1(1) of the Manual is further highlighted by reference to the fact that the provision is anomalous even within the broader reappraisal scheme set out in the Manual. As Canfor points out, in each of the other circumstances where the Manual authorizes a reappraisal, the effective date for the redetermined stumpage rate is specified to be in the future, relative to the triggering event:

Basis for reappraisal

“land containing merchantable has been either added to or deleted from the cutting authority area” (s. 2.3.2.1(1)(c))

“at least fifteen percent of the volume of the appraised timber in a cutting authority area has been suddenly and severely damaged” (s. 2.3.2.1(1)(d))

“The Minister of Forests may direct that a reappraisal be made at any time...” (s. 2.3.2.3(1))

mathematical error (s. 2.3.2.4)

mountain pine beetle damage (s. 2.3.2.5)

Effective date of reappraisal

“the first day of the month following the date that the district manager approves the amendment” (s. 2.4.1(2))

“the first day of the month following the date when the event that caused the sudden and severe damage stopped on the cutting authority area” (s. 2.4.1(3))

“...and [the Minister may direct] that the redetermined stumpage rate be effective on any future date” (s. 2.3.2.3(1))

“the first day of the month following the date on which the Notice [of the error] was received by the regional manager or the director of Revenue Branch” (s. 2.3.2.4(e)(i))

“the redetermined rate does not apply to timber scaled before the first of the month following the date upon which the Notice was given. No remedy will be available with respect to timber scaled before the first of the month” (s. 2.3.2.4(h))

“the first day of the month following the month in which the District Manager receives the revised appraisal data submission”

(s. 2.3.2.5.2(1))

It is only with respect to changed circumstance reappraisals under s. 2.3.2.1(1)(a) and (b) that the effective date goes back in time – to “the day after the effective date of the most recent appraisal or reappraisal of the cutting authority area prior to the changed circumstance reappraisal”, as provided in the amended version of s. 2.4.1(1).

[71] I agree with Canfor’s submission that this scheme is misconceived on both levels, being contrary to (i) s. 103 of the *Forest Act*, as explained above, and (ii) the existing language of s. 2.3.2.1(1)(a) and (b) of the Manual. If it becomes apparent that a stumpage rate in effect during a period of time in the past was in error, because the original cost estimates used in calculating the rate were inaccurate, the remedy is to be found in s. 105.2(2)(a) of the *Forest Act*, not the reappraisal provisions of the Manual.

Conclusion

[72] For the reasons given above, the appeal of the Commission’s decision affirming the reappraisal of the stumpage rate is allowed. I agree with the appellant that the Commission erred in its interpretation of ss. 103 and 105 of the *Forest Act*, and specifically in its finding that there is no conflict between s. 103 of the *Act* and s. 2.4.1 of the Manual. I find that s. 2.4.1 of the Manual is *ultra vires* the Minister’s authority under the *Forest Act* to the extent that it purports to retroactively redetermine the stumpage payable on timber that has already been scaled.

[73] Canfor seeks the following order under s. 150(2) of the

Forest Act:

- (a) staying the decision of the Commission;
- (b) rescinding the Stumpage Advisory Notice dated March 19, 2007 for Cutting Permit R78 under Forest Licence A18165; and
- (c) declaring that section 2.4.1 of the Manual is *ultra vires* the *Forest Act* to the extent that it purports to vary the stumpage payable on timber that has already been scaled.

[74] For the reasons given, the order should be granted on the above terms.

“The Honourable Mr. Justice Groves”