



DECISION NO. 2004-FA-003(c)

In the matter of the *Forest Act*, R.S.B.C. 1996, c. 157.

BETWEEN: Western Forest Products Limited **APPELLANT**

AND: Government of British Columbia **RESPONDENT**

BEFORE: A Panel of the Forest Appeals Commission
Margaret Eriksson, Panel Chair
R.A. Gorley, Member
Robert Wickett, Member

DATE: May 24 and 25, 2005 concluded by way of
written submissions on July 11, 2005

PLACE: Victoria, BC

APPEARING: For the Appellant: Peter G. Voith, Counsel
For the Respondent: Alan V.W. Hincks, Counsel

APPEAL

This is an appeal by Western Forest Products Limited ("Western") of 15 Stumpage Advisory Notices ("SANs") issued between November 9, 2001 and January 28, 2003, by Stephen J. Edwards, a Regional Appraisal Coordinator with the Ministry of Forests (the "Ministry")¹ for various cutting permits (the "CPs"), namely CPs 106, 113 – 119, 122 – 127, issued for Western's Tree Farm Licence 25 ("TFL 25"). Mr. Edwards calculated Western's truck haul and towing or barging allowance on the basis of Jordan River as the appraisal log dump.

The appeal was filed pursuant to section 146(2)(c) of the *Forest Act*, R.S.B.C. 1996, c. 157 ("*Act*"). Under section 149(2) of the *Act*, 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.

Western seeks an order rescinding the SANs and directing the Regional Appraisal Coordinator to reappraise the stumpage rates for the CPs associated with TFL 25 using the same appraisal log dump utilized by TimberWest Forest Products Limited

¹ Effective June 11, 2005, the Ministry of Forests became the Ministry of Forest and Range.

("TimberWest") for its cutting permits in the same area: namely; the Sooke basin log dump.

BACKGROUND

This appeal is the latest in a continuing dispute between the Ministry and various licensees regarding whether Jordan River is an "unsuitable" appraisal log dump for the purposes of assessing stumpage.

Stumpage is the sum of money licensees must pay the Crown for the right to harvest Crown timber. A stumpage assessment is the process by which the Regional Appraisal Coordinator determines the stumpage payable by a licensee to harvest Crown timber pursuant to a cutting permit issued by the Ministry.

Under section 105(1) of the *Act*, stumpage rates are determined in accordance with the policies and procedures approved for the forest region by the Minister of Forests. The applicable policies and procedures are found in the Coast Appraisal Manual ("CAM") that was in effect when each of the SANs was issued by the Regional Appraisal Coordinator.

When the subject SANs were issued, stumpage rates were determined by applying a comparative value-pricing ("CVP") model. CVP was subsequently replaced by a new method of assessing stumpage based upon a market pricing system ("MPS").

The issue in these appeals is whether or not Jordan River is unsuitable as an appraisal log dump for the purposes of assessing stumpage on the facts of this case. Determining whether Jordan River is "suitable" or "unsuitable" as an appraisal log dump will have a substantial impact on the amount of stumpage Western pays for its CPs. To understand why this is so, it is helpful to explain how stumpage is assessed.

In essence, the Ministry collects data on, and determines the average price for, the various species of timber. From that average price the Ministry allows licensees to deduct average, notional costs associated with harvesting and transporting the timber to market. The difference between the average selling price and average cost allowed the licensee, determines the stumpage the licensee pays for the particular cutting permit.

Stumpage is not based upon the actual selling price received for the timber, nor is it based on the actual costs incurred in harvesting and transporting the timber to market. Stumpage is based on a pre-determined average selling price and pre-determined average harvesting costs. The actual price and costs are completely irrelevant. As will be later seen, if a well-managed or efficient licensee is able to "beat the average" on either price or cost, that licensee will benefit with higher profit.

One of the most important factors in determining the proper cost allowance for the stumpage assessment is the appropriate method of transporting timber from cut block to market. The CAM requires the Regional Appraisal Coordinator to assess stumpage based on the principle of "least appraisal cost assessment." This means that the licensee will be permitted a truck haul allowance from the cut block to the nearest suitable appraisal log dump, and thereafter, a towing or barging allowance from the appraisal log dump to one of four points of appraisal within the province

as detailed in the CAM. As truck hauling is substantially more costly than barging or towing, it will always be in the licensee's pecuniary interest to obtain a truck haul allowance to an appraisal log dump located as far from the cut block as possible. Conversely, it is in the Ministry's pecuniary interest to assess stumpage based upon a truck haul allowance to an appraisal log dump as close to the cut block as possible.

Jordan River is substantially closer to Western's cut block than the alternate appraisal log dump proposed by Western, located at either the Sooke basin or Otter Point. These two alternate log dumps are discussed below.

The process to determine stumpage for a cutting permit is initiated when the licensee submits an appraisal data sheet to the Ministry. Within that appraisal data sheet, the licensee calculates the truck haul and towing or barging distances to and from a selected appraisal log dump.

In the appraisal data sheets submitted in support of the subject SANs, Western proposed the Sooke location as the suitable appraisal log dump and calculated truck haul and towing or barging allowances using the Sooke location as the appraisal log dump. In issuing the SANs, the Regional Appraisal Coordinator disregarded the Sooke location and, instead, determined the appropriate truck haul and towing or barging allowances using Jordan River as the suitable appraisal log dump. Consequently, the stumpage that Western must pay is substantially greater than if the stumpage had been calculated as proposed by Western in its appraisal data sheets.

After the SANs were issued, Western sought a determination from the District Manager that Jordan River was unsuitable as the appraisal log dump and point of origin. On June 17, 2003, the District Manager determined that Jordan River was a suitable appraisal log dump for calculation of the stumpage payable by Western for the cutting authority area. In a companion determination issued on May 30, 2003, the District Manager determined that Jordan River was not a suitable appraisal log dump for TimberWest, a competitor of Western, operating in a cutting authority area adjacent to TFL 25.

In a preliminary decision issued July 22, 2004, the Commission found that the District Manager's determination did not fetter the Regional Appraisal Coordinator's discretion to select the proper appraisal log dump for the cutting authority. Rather, the District Manager's determination is part of the information that informs the Regional Appraisal Coordinator, who determines applicable stumpage rates. These appeals, therefore, are of the SANs themselves and not of the District Manager's determination.

It is helpful to clarify the meaning of various phrases used in the CAM, but not defined in the versions of the CAM that apply to this appeal. A "point of origin" is typically a place with a functioning or historical log dump on the coast. There is a list in Table 4-7 of points of origin in the CAM, but the list is incomplete and is not kept up to date. The CAM does not require the appraiser to use the points of origin listed in the CAM as appraisal log dumps. Accordingly, although a particular point of origin is listed, and is close to the location where the timber is harvested, that point of origin is not necessarily the appraisal log dump. Under the CVP system, an "appraisal log dump" is the closest theoretical place where the logs can be put in

the ocean for the purpose of stumpage appraisals. It may, therefore, be a decommissioned site no longer in use. Appraisal log dumps are not listed in the CAM. However, an appraisal log dump can also be a point of origin. A "point of appraisal" is the point where the logs get to the market (in other words, the location of a mill), which is an entirely different location than the appraisal log dump. "Point of appraisal" is not relevant to this appeal.

EVIDENCE

Western called three witnesses at the hearing of this appeal. The Ministry called no evidence.

The witnesses who testified were:

1. Terry Anderson, stumpage appraisal supervisor employed by Western;
2. Larry Henkelman, manager of timber appraisal for Western; and
3. Stephen Potter, an expert, qualified to give opinion evidence with respect to timber appraisal policy.

The evidence relevant to determination of these appeals is uncontradicted and is summarized below.

The Jordan River Facility

The Jordan River facility is a dry land sort and log dump owned and operated by Western, which annually receives and disperses approximately 166,000 cubic metres of timber from TFL 25, as well approximately 20,000 to 30,000 cubic metres from Western's private lands. It is able to handle approximately 200,000 cubic metres of timber each year and Western is using it to its full capacity. The facility is located near the mouth of the Jordan River, where Jordan River enters the Pacific Ocean on Vancouver Island's west coast. It is bordered on the northeast by private property, on the north by BC Hydro lands, on the south by Jordan River and on the west by the Pacific Ocean and the town of Jordan River.

The facility is located approximately 6 kilometres south of TFL 25 and approximately 60 kilometres west of Victoria. The appraisal log dump suggested by Western, located in the Sooke inner basin, is approximately 30-37 kilometres further from TFL 25 than Jordan River.

Both Western and TimberWest have harvesting operations in the same area of Vancouver Island south of Port Renew. TimberWest stores and booms its timber at its Shoal Island facility on Vancouver Island's east coast. The Shoal Island facility has five times the capacity of the Jordan River facility.

Western's timber is delivered to the Jordan River facility by truck. Thereafter, the timber is unloaded and sorted at the dry land sort facility. After sorting and scaling, the timber is dumped into Jordan River and assembled into sections. From there the timber is towed approximately 35 km to Western's facility at Becher Bay. Western stores the timber at Becher Bay until it has assembled 64 sections, which is minimum volume required before Western can economically take the timber from Becher Bay to market.

Jordan River has the capacity to store 12 sections of timber in the water during the winter and 16 sections of timber in the water during the summer when timber can be stored further toward the mouth of the River. During the winter, timber must be stored further up Jordan River as the typical winter storms experienced on Vancouver Island's west coast make the river's mouth unsafe for storing timber.

Once 12 or 16 sections of timber (depending on the season) are assembled, Western tows those sections to its Becher Bay facility. Towing from Jordan River is risky. As there is no safe shelter between Jordan River and Becher Bay, towing only occurs when weather permits and there is unlikely to be a storm or high winds. During storms or high winds, Western is unable to tow from Jordan River, and the facility remains dormant. The tides at the mouth of Jordan River can be extreme. Dumping and booming of timber can, therefore, only occur during high tide. Consequently, booming and towing can be conducted, on average, for only four hours within a 24-hour period.

Because of weather and capacity constraints, the dry land sort operations at the facility occur only 10.5 months of the year. The dump and book operations shut down at the beginning of December until sometime in March. Accordingly, Western can only dump, book and tow timber using Jordan River for a maximum of nine months each year.

Further, there is a sedimentation problem at the mouth of the Jordan River, which requires Western to continually apply to the Department of Fisheries and Oceans for approvals to dredge the River so its channel is deep enough to get tug boats through. Jordan River area is environmentally sensitive due to its high fisheries value. For these reasons, dredging approvals are limited, and Western's potential ability to expand the facility is unlikely.

Due to the winter weather, extreme tides, lack of safe storage and its limited size, the Jordan River facility can only accommodate approximately 200,000 cubic metres of timber per year. As the facility is limited in this way, Western uses (and has done so for many years) the facility to its full capacity. It is unavailable to any other licensee who may wish to contract with Western to use the facility.

As a consequence of these many constraints, the witnesses testified that Jordan River is a unique facility, which can be used only by Western.

RELEVANT LEGISLATION AND POLICIES

Stumpage is determined pursuant to section 105 of the *Act*:

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, predetermined 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.

On appeal, section 149(3) of the *Act* requires as follows:

149 (3) If the commission decides an appeal of a determination made under section 105, the commission must, in deciding the appeal, apply the policies and procedures approved by the minister under section 105 that were in effect at the time of the initial determination.

As previously noted, it is common ground that the policies and procedures approved by the Minister for the coast region are found in the CAM. The courts have held that the CAM is akin to subordinate legislation: *MacMillan Bloedel Ltd. v. British Columbia (Ministry of Forests)* (2000), 76 B.C.L.R. (3d) 71 (B.C.C.A.).

The CAM relevant to this appeal, is the one effective April 1, 2002. Although there were a number of amendments to the CAM during the period of time within which the SANs were issued, the key wording remained unchanged.

The provisions of the CAM that are relevant to the issues in these appeals are as follows:

2.2 Appraisal Procedure

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

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

4.1 Cost Estimates

6. The person who determines the stumpage rate must estimate total operating costs for a cutting authority area in a manner that will produce the appraisal least total operating cost estimate for the cutting authority area.
7. The appraisal estimate of harvesting and transportation costs must be determined by using the criteria for determining the harvesting and transportation costs as set out in this manual.
8. The estimate for harvesting costs must be determined for the method of harvesting referred to in this manual, other than a method that the district manager states is unsuitable for the cutting authority area, that will produce the appraisal least total operating cost estimate.
9. *The estimate of transportation costs must be determined for the method of transportation referred to in this manual, other than a method that the district manager states is unsuitable for the cutting*

authority area, that will produce the appraisal least operating cost estimate.

[emphasis added]

4.5.2.3 Towing or Barging

The following tables list the towing and barging cost estimates from specific points of origin. For unlisted points of origin, the costs estimates of two adjacent points of origin may be averaged.

Table 4-7: Towing Cost Estimates lists Jordan River as a point of origin.

ISSUE

Is Jordan River “unsuitable” as the appraisal log dump for the purpose of assessing stumpage for the cutting authority areas?

SUBMISSIONS OF WESTERN

Western maintains that the essential issue is whether, under the policies underlying the CVP system in the CAM, a site that has been consistently characterized as “unsuitable” as an appraisal log dump for every other licensee harvesting timber in the same area as Western, can be, nevertheless, considered as a “suitable” appraisal log dump for Western. It asks: if Western sold its cut blocks to other licensees, would they be assessed based on Jordan River as the appraisal log dump?

Western argues that the Commission must apply and interpret the core principles in the CAM which implement the CVP system, including the principle of the “average, notional, efficient operator” or “licensee neutrality.” Costs are to be assessed based on the activities of an average, notional, efficient licensee operating in the cutting permit area. Actual operating conditions are relevant only if they can be attributed to an average, notional licensee. Unique operating efficiencies or inefficiencies experienced by a particular licensee are to be disregarded. The licensee neutrality principle thus ensures that licensees are treated equally in the payment of stumpage. The Ministry cannot favor one licensee over another by altering stumpage based upon actual operating efficiencies or inefficiencies that are unique to a particular licensee. Licensee neutrality thus rewards initiative and efficiency and does not subsidize inefficiency. In other words, under the CVP system implemented by the CAM, timber is appraised without paying attention to who is doing the work. Two adjacent blocks of timber harvested by different licensees should be assessed the same, regardless of how each licensee actually conducts its operations.

In demonstrating that “licensee neutrality” and “average efficient operator” are at the heart of the CVP system implemented by the CAM, Western referred to numerous tribunal and court decisions that have consistently recognized “licensee neutrality” and the notion of the “average operator”: *Western Forest Products Ltd. v. Province of British Columbia (Ministry of Forests)*, Forest Appeals Commission, 99-FAB-03, May 19, 2000, at page 9 (unreported); *Pacific Forest Products Limited v. Government of British Columbia (Ministry of Forests)* Forest Appeal Board, February 12, 1996, paragraphs 9, 41 (unreported); *MacMillan Bloedel Ltd. v. British*

Columbia (Ministry of Forests) (2000), 189 D.L.R. (4th) 281 (B.C.C.A.) paragraphs 12-13; *Canadian Forest Products v. Government of British Columbia (Ministry of Forests)* (1997), 36 B.C.L.R. (3d) 1 (S.C.) at paragraphs 20-21. This last case was appealed to the B.C. Court of Appeal and that Court stated as follows, in *Canadian Forest Products v. Government of British Columbia (Ministry of Forests)* (1998), 55 B.C.L.R. (3d) 221 (hereinafter *Canfor*), at paragraph 6:

Cost estimates are to be reflective of costs to the "average operator" and are thus neutral to operators across a general area. More efficient operators benefit and less efficient operators suffer. The system is designed to reflect average costs and cost estimates are arrived at as a result of continuing consultation between Ministry of Forests personnel and industry personnel.

Western also refers to numerous Ministry policy statements and government consultant reports to show that the concepts of "licensee neutrality" and the "average efficient operator" are fundamental to the stumpage appraisal system embodied in the CAM, although the phrase "licensee neutrality" is not expressly referred to in the CAM. Western points to places in CAM that expressly refer to the notion of average operations, including "average cutting authority area" (section 1.6), an "average operator" (section 5.2), and "average operating practices" (section 4.1(4)). Western submits that those sections clearly show that the CAM's entire stumpage assessment system implements the concepts of licensee neutrality and the notional efficient operator, and ignores the actual operations of an actual licensee.

Given that the CAM is akin to subordinate legislation, as a matter of statutory interpretation, Western urges the Commission not focus unduly on whether the phrase "licensee neutrality" is expressly used. Rather, the Commission should interpret the relevant provisions of the CAM in a way that will give effect to the policies and objectives for which it was enacted.

Western says that the Ministry's use of Jordan River as an appraisal log dump for Western, but not for other licensees, offends appraisal policy. Two licensees, Western and TimberWest, are harvesting timber in the same area. Yet the District Manager determined on May 30, 2003, that Jordan River was unsuitable as an appraisal log dump for TimberWest, but on June 17, 2003, determined it to be suitable for Western. Thus the SANs under appeal ignore the licensee neutrality principle and improperly strip Western of its unique operating efficiencies. Western argues that the SANs under appeal are flawed in that they are based on Western's "actual" operating activities, rather than on the activities of an average, notional, efficient operator.

Western points out that Jordan River has a history of being found unsuitable as an appraisal log dump for TimberWest, Weyerhaeuser Company Limited, Canadian Forest Products Ltd. or any other licensee.

In 1998, in *TimberWest Forest Limited v. Province of British Columbia (Ministry of Forests)* (97-FAB-07) (hereinafter *Jordan River No. 1*), the Forest Appeal Board (predecessor to the Forest Appeals Commission) determined that Jordan River was "not possible" as an appraisal log dump for TimberWest's Port Renfrew area cutting authorities under section 4.1 of the CAM in effect at that time. (The words "not

possible" have been replaced by the word "unsuitable" in more recent versions of the CAM.) The Jordan River facility was recognized to be limited by size, capacity, tide and weather conditions, which limited its use to 9 or 10 months of the year and 4 hours a day. In addition, the site was recognized to be an environmentally sensitive area with high fisheries values. Finally, the Board noted that "the use of Jordan River as a point of origin for stumpage appraisals, in the circumstances would capture one licensee's unique efficiencies, contrary to MOF's stumpage pricing principles." The Board therefore concluded that it was not a possible point of origin/appraisal log dump.

Western notes that the District Manager's May 30, 2003 determination regarding TimberWest, which concluded that Jordan River was an unsuitable appraisal log dump for the same physical, environmental, capacity and access limitations as found in *Jordan River, No. 1*, the earlier TimberWest Forest Appeal Board decision.

More recently, in *Teal Jones Forest Ltd. and Teal Cedar Products Ltd. v. Government of British Columbia* (Appeal Nos. 2004-FA-072(a) to 074 (a), 080(a) to 083 (a), 089(a), 2005-FA-031(a) and 046(a), May 20, 2005) (unreported) (hereinafter *Teal Jones*), the Forest Appeals Commission again concluded that Jordan River was not suitable as an appraisal log dump. The Commission found that Shoal Island should be used as the appraisal log dump for the 10 SANs at issue. (Western points out that *Teal Jones* was decided under the MPS, rather than the CVP mandated by the CAM in effect when the SANs at issue in the present appeal were issued. However, the facts relating to Jordan River's limitations are relevant in Western's submission.) In that case, the same physical, environmental and ownership constraints were found to make it unsuitable.

Regarding the physical and capacity restraints discussed above, Western argues that the Commission should find Jordan River to be unsuitable as an appraisal log dump for the purpose of assessing stumpage for the cutting authority area at issue.

In its reply, Western says that the doctrines of collateral attack and issue estoppel prevent the Ministry from challenging the correctness of the District Manager's May 30, 2003 TimberWest determination. The rule against collateral attack bars litigants from contesting the validity of prior orders in other proceeding not expressly provided by law for that purpose: *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460 (hereinafter *Danyluk*) paragraphs 18, 20. The rule ensures that an administrative decision's correctness is addressed at the time in accordance with the scheme and process intended by the legislature: *International Forest Products Ltd. v. British Columbia* (2004), 28 B.C.L.R. (4th) 170 (S.C.) (hereinafter *Interfor*) paragraphs 36-45, 55-56. If the Ministry disagrees with the District Manager's conclusion that Jordan River was unsuitable for TimberWest, it should have sought judicial review. Alternatively, it should have altered the appraisal log dump used for subsequent stumpage determinations. Western submits that the Ministry's position on TimberWest produces inconsistent results, confusion and unfairness.

Western also maintains that the Commission cannot consider "suitability" without looking at site specific factors. No panel has rejected capacity or ownership as relevant factors. Those factors are similar to fisheries and other environmental factors. They are all relevant site-specific factors, which are part of the information considered when determining whether a log dump is suitable for a notional,

average, licensee. Licensee neutrality works harmoniously with the consideration of site specific factors in determining suitability. If a notional average licensee cannot use a facility because of fisheries or environmental constraints, or because the facility's owner would deny the notional licensee access, no licensee in the cutting authority area should be appraised to that site.

Finally, Western maintains that its Jordan River site is unique. Other facilities don't have similar physical constraints.

SUBMISSIONS OF THE GOVERNMENT

The Government submits that the Regional Appraisal Coordinator properly used Jordan River as the appraisal log dump when he determined Western's stumpage rates. Section 4.1(9) of the CAM requires that transportation costs be determined for the method of transportation referred to in the CAM "that will produce the appraisal least total operating cost estimate." The CAM is binding as a form of subordinate legislation. There is no discretion involved in determining an appraisal log dump. The Regional Appraisal Coordinator must choose the log dump that is closest to the cutting authority area because it produces the lowest estimate of transportation costs.

The Government submits that there is a functioning log dump at Jordan River. It is the closest log dump to the cutting authority area. Using it for appraisal purposes leads to the lowest estimate of a licensee's trucking costs. Western can and did take advantage of the Jordan River log dump. In contrast, the Sooke log dump is approximately 26 kilometres further from TFL 25 than the Jordan River facility and the Sooke log dump was not used for logs in this case.

In addition, the Government notes that since 1967, Jordan River has been listed in the various manuals as a point of origin for towing cost estimates. It has been listed in the CAM as a point of origin since the CVP system began in October 1987. Although the listed points of origin are not the same as appraisal log dumps, there are no physical or legal impediments to using Jordan River as an appraisal log dump today.

Furthermore, the Government argues that while the CAM expressly requires the Regional Appraisal Coordinator to choose the closest log dump to the tract of timber, the principle of licensee neutrality is not expressly provided for in the CAM. The Regional Appraisal Coordinator would be wrong to apply the licensee neutrality principle when it means ignoring a specific requirement of the CAM.

The Government asserts that consideration of site-specific factors – which Western says make the Jordan River facility unsuitable – offends the licensee neutral principle. When a log dump's suitability is determined using site-specific factors, such as its capacity or ownership, the conclusion is never neutral. Rather, it will always be slanted by which licensee's case is considered first. If the District Manager had first considered whether Jordan River was suitable in relation to Western's situation, she would have reviewed the physical situation and concluded that it was suitable: Western has access to the site and the capacity is sufficient. Then, if she had applied the licensee neutrality principle and considered TimberWest's situation second, she would have likewise concluded that Jordan River was suitable for TimberWest.

The Government maintains that although Western claims Jordan River is unsuitable due to capacity and environmental limitations, Western's real argument turns on how other licensees have been treated. Nothing in the CAM requires suitability to be determined by how other licensees have been treated.

Furthermore, the Government argues that the District Manager erred when, on May 30, 2003, she determined that Jordan River was unsuitable for TimberWest. Her finding was based on site-specific factors, focusing on TimberWest's inability to use the facility because Western owned and used it to full capacity.

The Government asserts that a particular log dump's capacity is an improper consideration under the CAM, when implementing a CVP system. There will always be a problem when logs are notionally appraised to some other dump site. All dump sites have a maximum actual and theoretical capacity. It would be virtually impossible to develop a ledger system to account for volumes actually moved or theoretically assigned to log dumps and then to change the appraisal log dumps for subsequent appraisals once a particular facility's capacity was used up. There is no practical way to track the capacity of the actual logs that go to each dump site on the coast, plus the theoretical logs that are notionally appraised to each site, and then appraise or reappraise accordingly. Moreover, such an exercise is not contemplated by the CAM.

The Government submits that ownership is likewise an improper consideration, as it is really a subset of capacity. Who can use and how much can they use a site is really a business problem for each particular licensee. Consideration of capacity and ownership violates the principle of licensee neutrality.

Accordingly, the Government asserts that suitability of a log dump for appraisal purposes should be based solely on which log dump is closest to the cutting authority area, because that site produces the lowest estimate of an operator's transportation costs. In the cutting authority area at issue, the closest log dump is Jordan River.

The Government distinguishes *Jordan River No. 1* on the basis that the applicable version of the CAM required the appraiser to determine the least total operating costs "possible under the cutting authority." The word "possible" permitted the appraiser to consider site-specific factors.

Similarly, in *Canfor*, which dealt with rail costs, the Court of Appeal found that the phrase "possible under the cutting authority" must be construed "to take account of the real conditions under which the licensee or licensees operate." The Court recognized the dangers inherent in applying a site-specific test, but noted that it was dealing with an "unusual if not unique situation."

While *Jordan River No. 1* was decided before *Canfor*, it applied a similar site-specific analysis in determining whether it was possible to use Jordan River as a point of origin.

The Government also argues that the wording of the CAM has changed since those decisions from not "possible under the cutting authority" to "unsuitable for the cutting authority area." "Suitable" means that which is fitted for or appropriate to a purpose. The change from "not possible" to "unsuitable" requires the appraiser to determine the theoretical least transportation cost method from the cutting

authority area, rather than considering the “real conditions” associated with a particular cutting authority applying the “possibility” criterion.

The Government maintains that the District Manager’s May 2003 suitability determination regarding TimberWest was flawed in that she followed *Jordan River No. 1* without taking this change of wording into account. Instead, under the CAM at issue when she made her determination regarding TimberWest and in the present appeal, she should have found Jordan River to be a suitable appraisal log dump for TimberWest.

Finally, the Government made the following arguments in response to Western’s assertion that the Government is estopped from disagreeing with the District’s Manager’s suitability May 30, 2003 statement. As the Commission concluded on pages 15 and 16 of its May 11, 2004 decision on whether it had jurisdiction to consider Western’s appeal (see appeal No. 2004-FA-003(a)), the District Manager’s function regarding suitability is not that of decision-maker, but as an intermediary providing information to the person who exercises discretion to estimate transportation costs within defined parameters. It is not a determination that can be reviewed under the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241.

Nor, in the Government’s submission, are the three preconditions outlined in *Danyluk* for issue estoppel met. First, the question is not the same. The May 30, 2003 TimberWest determination looked at whether Jordan River was suitable for TimberWest. In contrast, the present appeal considers whether Jordan River is suitable for Western. Second, the District Manager’s decision is not a “judicial decision.” Third, the parties are not the same. This appeal involves Western. The other involved TimberWest. Therefore, *Danyluk* is distinguishable.

The Government also asserts that the doctrine of collateral attack cannot apply. This appeal involves the question of whether Jordan River is suitable for Western. It would not have any effect on TimberWest’s stumpage determinations.

In conclusion, whether the Commission considers or ignores site-specific factors, the Government asserts that Jordan River is a suitable appraisal log dump for Western.

PANEL FINDINGS

The CAM requires the person who determines the stumpage rate to estimate total operating costs for a cutting authority in a manner that will produce the appraisal least total operating cost estimate for the cutting authority area. The CAM specifically states:

- 4.1(8) The appraisal estimate of harvesting and transportation costs must be determined by using the criteria for determining the harvesting and transportation costs as set out in this manual.
- 4.1(9) The estimate of transportation costs must be determined for the method of transportation referred to in this manual, other than a method that the district manager states is unsuitable for the cutting authority area, that will produce the appraisal least total operating cost estimate.

For the purpose of estimating costs, "method of transportation" includes the transportation system and all its primary components or steps.

In the present case, logs are loaded on a truck at the logging site and transported along a road to a log dump. At the log dump they are unloaded, bundled, put into the water and towed to their destination.

The cost per cubic metre to haul by truck is generally higher than the cost for towing over the same distance. Therefore, the relative distribution of truck hauling and towing in the method of transportation is significant in determining the overall operating cost, and thus the stumpage rate(s).

The truck-hauling phase cost estimate is for movement of logs from the roadside or landing in the woods to the off-loading destination selected for the cutting authority. This is referred to as the "appraisal log dump."

For water transportation, the appraisal log dump selected for cost estimating purposes becomes the "point of origin" for towing purposes. Table 4-7 of towing cost estimates, matches known (i.e. well established) points of origin to the least-cost point of appraisal, and provides a per cubic metre towing cost estimate. Where the appraisal log dump is not at one of the points of origin listed in the Table, the towing cost is prorated based on the distance between the selected point of origin and points listed in the Table. The fact that Jordan River has historically been listed as a point of origin in Table 4-7, does not necessary make it the appraisal log dump in the present case.

The discretion to select the "appraisal log dump" for a particular cutting authority must be exercised in a reasonable manner, and in a manner that is consistent with the objectives and intent of the CAM. Although not expressly stated in the CAM, there is an underlying principle that cost estimates are independent of the circumstances of any particular licensee, and are to be based upon what would be done by an average efficient operator. As noted by Western, licensee neutrality has been recognized in many judicial and tribunal decisions as a fundamental principle to be applied in the stumpage appraisals including appraisals under the CVP system.

In this case, the Ministry determined the stumpage rate(s) using Jordan River as the appraisal log dump and point of origin. Jordan River is the closest log dump to the cutting authority area. There is a functioning log dump at Jordan River and it produces the lowest estimate of transportation costs. The Government also makes a reasonable argument that capacity should not be determinative in judging whether a particular facility is a suitable log dump for either a specific or notional average operator. There is no practical way to track the availability of capacity at all the log dumps on the coast and appraise or reappraise accordingly. Furthermore, tracking capacity is not what was contemplated by the CAM.

In a purely hypothetical world, where site-specific or temporal circumstances are ignored, the Ministry is right and all licensees should be appraised to Jordan River. Questions of suitability, however, cannot be determined without consideration of site-specific factors. In order to exercise discretion in a reasonable manner, the appraiser always needs to give reasonable consideration to actual circumstances when estimating appraisal costs. For example, when determining a haul distance, the Ministry does not assume a straight line from A to B; instead it accepts the

actual road distance. Similarly stumpage appraisers do not assume that a log dump will be located at the nearest water location to the cutting authority; they use an existing dump or a previous dump location (not even necessarily the closest possible site at which a dump could be developed). These are site-specific considerations. Under a CVP system, however, those site-specific factors are to be viewed in the context of a notional, average operator, rather than in the context of a particular licensee.

It is useful to review the history of the dispute over whether Jordan River is an unsuitable appraisal log dump and point of origin.

Jordan River No. 1

The history discussed in *Jordan River No. 1* shows that timber harvested in the Port Renfrew area by TimberWest had been appraised to Shoal Island since 1983. In 1987, the Ministry attempted to appraise the timber to Jordan River. This decision was reversed after discussions that included, among other factors, that dump and log handling facilities were inadequate. Timber continued to be appraised to Shoal Island until the CAM became effective in 1997. In June 1997, the Ministry reappraised TimberWest's cutting permits, using Jordan River as the appraisal log dump.

TimberWest appealed to the Forest Appeal Board. It argued that the facility at Jordan River had capacity constraints. In addition, its owner would not allow others to use the facility. Therefore, access to and transportation from the Jordan River facility was not possible. TimberWest also argued that capacity constraints were a proper consideration for appeal, and cited the Supreme Court of British Columbia's decision in *Canfor*, where capacity constraints were considered.

As in the present appeal, the Government argued that there were no physical or legal impediments to using Jordan River as the point of origin. Similarly, the Government asserted that the log dump's actual capacity was not a proper consideration under the CAM, and that it would be virtually impossible to develop a ledger system to account for volumes moved across dumps and then to change points of origin on subsequent appraisals once the volume appraised to the facility had reached capacity.

However, the Forest Appeal Board stated at page 10:

In this instance, Western, not TimberWest, has unique access to the Jordan River facility. The fictional average operation cited by the Respondent would do the same as TimberWest is doing and deliver the logs to Shoal Island, because the average operation would also lack access to the Jordan River log dump. This is not a case of appraising the actual operations of a specific operator.

It found that a point of origin must have a functioning, accessible facility to transfer logs from trucks to booms and it must yield the least total cost. Although Jordan River produced the lowest total cost of the two facilities, no other operator had access to the facility. The Board therefore concluded that Jordan River could not be used as a point of origin because "it would capture one licensee's unique efficiencies" contrary to the Ministry's stumpage pricing principles.

Teal Jones

The issue before the Forest Appeals Commission in its May 20, 2005 decision in *Teal Jones* decision, again, was whether the Regional Appraisal Coordinator erred in using Jordan River as the appraisal log dump to determine stumpage rates for several of *Teal Jones's* cutting permits. *Teal Jones* asked the Commission to rescind the SANs and direct the Regional Appraisal Coordinator to reappraise the stumpage rates using Shoal Island.

The parties made similar arguments to those in the present appeal, and those discussed in *Jordan River No. 1*. *Teal Jones* argued that although the Jordan River log dump is closer to their cutting permits, no operator other than Western had access to the facility. It asserted that the discretion to select an appraisal log dump must be exercised reasonably, and that person determining the stumpage rate may choose a log dump that is not necessarily the closest to the cutting authority. The Government, on the other hand, took the position that there is no discretion involved in determining an appraisal log dump. The Regional Appraisal Coordinator simply chooses the log dump that is closest to the cutting authority.

The Commission found that selecting an appraisal log dump involves a process of considering various alternative sites. The CAM provided no guidance on the characteristics of an "appraisal log dump." In addition, there was no evidence of clear or cogent criteria that are used by Ministry staff to determine what types of sites are considered valid choices as "appraisal log dumps." The discretion to select the "appraisal log dump" for a particular cutting authority must be exercised in a reasonable manner, and must be consistent with the objectives and intent of the CAM. The Commission concluded that Shoal Island, rather than Jordan River should have been selected as the appraisal log dump.

Although the physical circumstances considered in *Teal Jones* are similar to those in the present appeal, the Commission's decision in *Teal Jones* is distinguishable. In *Teal Jones*, the SANs were all issued after the provincial government introduced the new MPS for determining stumpage rates in the Coast Region. MPS is based on a different premise than CVP. Under CVP, the Ministry must choose the method of transportation based on a notional "average efficient operator," whereas under MPS, the consideration is based on what an "average notional bidder" would reasonably do and offer to pay, having considered all of the circumstances. The Commission, in *Teal Jones*, concluded that a notional average bidder acting objectively and rationally would not pay a stumpage rate that reflects hauling logs to a log dump that is decommissioned or is available to only one licensee, even if that log dump is the closest by road. Rather, notional average bidders would pay a price that was based on a hauling cost that reflects hauling to the closest log dump that was actually usable or functional as a log dump at the time of bidding (or, for licensees at the time of appraisal) and was generally available for use by that licensee or bidder. To find otherwise would be inconsistent with the MPS. For these reasons, the *Teal Jones* decision cannot be assumed to apply to the applicable CAM implementing CVP for the present appeal.

Conclusion

In the present appeal, the Jordan River log dump is not suitable for use by a notional average operator because it has several physical and environmental

constraints that prevent a notional, average operator from having access to it. The tides, weather and its limited size, allow it to be operated for only 9 or 10 months a year and, because of the tide and channel depth, for only 4 hours each day. The facility cannot be expanded due to various physical and environmental factors. Western consistently uses the facility to full capacity, and it is therefore not a matter of Western being unwilling to negotiate access.

Since an appraisal is based on estimated costs of a notional average operator, if Jordan River is unsuitable as an appraisal log dump for the notional average licensee, it must be unsuitable for all. It is unfair to appraise all other licensees in the cutting authority area to another log dump but appraise Western to Jordan River. To do otherwise would penalize Western for its unique operating efficiencies.

DECISION

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

For the reasons set out above, this Panel rescinds the SANs under appeal and directs the Regional Appraisal Coordinator to reappraise the stumpage rates for the CPs associated with TLF 25 using the same appraisal log dump utilized by TimberWest for its cutting permits in the same area.

“Margaret Eriksson”

Margaret Eriksson, Panel Chair
Forest Appeals Commission

September 21, 2005