



Forest Appeals Commission

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APPEAL NO. 1997-FAB-07

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

BETWEEN:	TimberWest Forest Limited	APPELLANT
AND:	The Province of British Columbia (Ministry of Forests)	RESPONDENT
BEFORE:	A Panel of the Appeal Board Toby Vigod Panel Chair Patricia Marchak Member Howard Saunders Member	

DATE OF HEARING: February 9, 1998

PLACE OF HEARING: Victoria, B.C.

APPEARING: For the Appellant: Peter Voith, Counsel
For the Respondent: Karen Tannas, Counsel
Dawn House, Counsel

APPEAL

This is an appeal by TimberWest Forest Limited ("TimberWest") from an October 15, 1997 administrative review confirming a June 12, 1997 stumpage appraisal for Cutting Permit ("CP") 13C of Tree Farm Licence ("TFL") 46. TimberWest appeals the decision to substitute Jordan River in place of Cowichan Bay/Chemainus as the point of origin in a reappraisal of the stumpage rates for CP 13C.

Subsequent to this appeal, TimberWest filed requests for review with respect to stumpage advisory notices associated with three additional cutting permits within TFL 46, Port Renfrew Operations. The parties have agreed that the resolution of this appeal will govern the resolution of the additional requests for review of TFL 46, CP 4B-Timbermark 46/4B; CP 6B-Timbermark 46/6B; and CP 25B-Timbermarks 46/25B and T00/63B.

The appeal was brought before the Forest Appeal Board (the "Board") pursuant to section 146(1)(a) of the *Forest Act*. The Board was appointed by Order-in-Council No. 1290, approved on November 27, 1997.

Toward the end of the hearing, the Board asked for and received written submissions from the parties regarding the inclusion of user fees for “dump, sort and boom” in the industry cost surveys that form the basis for the cost estimate. The hearing remained open until February 17, 1998, when the final submissions were received.

BACKGROUND

TimberWest is the holder of TFL 46, and has timber harvesting operations under TFL 46 in the Port Renfrew area. TFL 46 requires TimberWest to supply logs from TFL 46 to sustain operations at its sawmill in Youbou on Lake Cowichan. Generally, TimberWest transports timber harvested from the vicinity of Port Renfrew to its sorting facilities on Shoal Island in the Cowichan Bay/Chemainus area (“Shoal Island”), or to Honeymoon Bay on Lake Cowichan.

Since 1983, the Ministry of Forests (“MOF”) had calculated TimberWest’s stumpage fees based on transportation costs to a point of origin at Cowichan Bay/Chemainus, for subsequent barge or tow to market. In 1987, MOF 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 from TFL 46 continued to be appraised through Shoal Island until 1996.

In 1996, the MOF again contemplated changing the point of origin from Shoal Island to Jordan River, but by mutual agreement with TimberWest deferred its decision until the 1997 Coast Appraisal Manual (“CAM”) became effective. There is no dispute that the “Coast Appraisal Manual Effective from April 1, 1997” did not change the “least cost” or the designation of points of origin sections of the CAM. Nevertheless, the MOF determined that a Jordan River point of origin yielded a lower total delivered cost than did Shoal Island. According to the CAM, the MOF is to appraise stumpage using the compatible operating phases that produce the “least total operating cost estimate”. Such phases are required to be “possible” under the cutting authority.

On June 12, 1997, TFL 46, CP 13C was re-appraised and a stumpage rate of \$30.74/m³ was issued with an effective date of May 1, 1997. TimberWest requested an administrative review, and a decision was issued on October 15, 1997 upholding the Appraisal Coordinator’s stumpage determination.

The log dump at Jordan River is owned by Western Forest Products (“Western”) and is located on its freehold property along the Jordan River. The evidence in this appeal established that the facility is operating at its physical capacity and is in an environmentally sensitive area with high fisheries values.

ISSUES

1. Whether the Appraisal Coordinator erred in designating Jordan River as the point of origin when TimberWest is required to deliver much of the volume from TFL 46 to Lake Cowichan, under the terms of its TFL licence?
2. Should the Appraisal Coordinator have included a land use charge estimate for the use of the Jordan River facility?

3. Whether the Appraisal Coordinator erred in designating Jordan River as the point of origin, notwithstanding the capacity constraints at the only facility at that location?

RELEVANT LEGISLATION AND POLICIES

Stumpage Appraisal

Section 105 of the *Forest Act* provides for stumpage rates to be determined:

105 (1) Subject to the regulations made under subsections (6) and (7), if stumpage is payable to the government under an agreement entered into under this Act, the rate of stumpage must be determined, redetermined and varied by a regional manager or forest officer authorized by the regional manager,

(a) ...

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

The stumpage appraisal being appealed was conducted using the "Coast Appraisal Manual effective from April 1, 1997", a policy approved by the Minister. The CAM instructs the forest officer, in estimating operating costs, as follows:

4.1 Cost Estimates

The forest officer must estimate operating costs for a *cutting authority* in a manner which will produce the *least total operating cost estimate for the cutting authority area*. To do this, the forest officer must base estimates of harvesting and transportation costs on the operating cost estimates set out in this manual for the method, which will produce the least cost estimate to the point of appraisal, *unless that particular method of harvesting or transportation is not possible under the cutting authority*. *An appraisal assumes compatible operating phases*. [emphasis added]

Cutting authority is defined as follows:

1.3 Cutting Authority

The term "cutting authority" means one of the following:

1. A cutting permit issued under:
 - a) ...,
 - b) ...,
 - c) A tree farm licence (a tree farm licence cutting authority may include more than one cutting authority area),
 - d) ...,
 - e)

The CAM refers to the selection of points of origin in section 4.5.2.2

4.5.2.2 Towing or Barging

The following tables list the towing or barging cost estimates from specific points of origin. For unlisted points of origin the cost estimates from two adjacent points of origin may be averaged. Where the listed point of origin is not a functional log dump it should only be used to pro-rate a cost estimate for an unlisted point.

Table 4-6: Towing Cost Estimates

Code	Point of Origin	P/A	\$/m ³
...	...	...	
CHEM	CHEMAINUS	C	0.00
COBY	COWICHAN BAY	C	0.84
JORV	JORDAN RIVER	C	1.48
LADY	LADYSMITH	C	0.74
NANA	NANAIMO	C	0.86
PTRE	PORT RENFREW	C	1.72
SOOK	SOOKE	C	1.39
VICT	VICTORIA	C	1.18
...	...	...	

[This abstract from Table 4-6 includes only those points of appraisal (P/A) designated as Chemainus (C)]

The CAM also provides for user fee estimates in certain instances

4.5.4 Road and Land Use Charges

Where applicable in the following options and prior to a stumpage appraisal cost estimate being used in any appraisal, the licensee must:

1. submit a "Request for Approval of a Road Use Charge" form with the Appraisal Data Sheet.
2. receive written approval of the road or land use charge from the Regional Manager.
 - a. (deals with roads)
 - b. (deals with roads)
 - c. Other Land Use Charges

Only non-governmental land use charges will be considered in appraisals.

The principles of the stumpage pricing system are stated in a document entitled "MINISTRY OF FORESTS TIMBER PRICING PRINCIPLES". Relevant principles to this appeal include the following:

Licensee Neutrality

In the absence of explicit government direction to the contrary, the determination of a given stumpage rate should be the same, regardless of who a potential buyer of the timber might be. Stumpage appraisal estimates should not be different for different applicants.

Contract Requirements and Limitations

To the extent authorized by approved policies, each stumpage appraisal should take into account the requirements and limitations imposed by the relevant cutting authority documents.

Use of Stand Appraisal Estimates

The Application of appraisal tables and formulae should not be tied to a given licensee's past or prospective practices. Rather, it should be based upon the typical method of operating in the situation at hand, in concurrence with the approved logging plan, and with approved appraisal policies. A stumpage appraisal should not deviate from standard policy so as to "capture" a given licensee's unique efficiency in harvesting or processing.

DISCUSSION AND ANALYSIS

ISSUE 1: Whether the Appraisal Coordinator erred in designating Jordan River as the point of origin when TimberWest is required to deliver much of the volume from TFL 46 to Lake Cowichan, under the terms of its TFL licence?

TFL 46 requires TimberWest to supply logs from TFL 46 to sustain operations at its sawmill in Youbou on Lake Cowichan. This is commonly referred to as an appurtenancy clause. The least cost method of doing so for TimberWest is via the dryland sort at Honeymoon Bay on Lake Cowichan. The remainder of the logs beyond those required to sustain the Youbou mill, or grades of logs not suited to the mill, are transported from Honeymoon Bay to points of origin on the east side of Vancouver Island.

Section 84 of the *Forest Act* provides that all timber harvested in the province must be stamped with a timber mark to ensure that logs can be traced to their origin. Once marked, the timber must be sent to a designated location for scaling. The Ministry of Forests requires a "Timber Mark/Scale Site Designation" for each timber mark specifying the point of scale for each timber mark, to ensure that logs in transit are on a route consistent with the designated scaling site. The designated scale sites for the logs from CP 13C are Honeymoon Bay, Shoal Island, Ladysmith and Beaver Lake.

The Appellant argues that since TimberWest must transport its logs to these points, the timber should be appraised to Shoal Island as the point of origin. The Appellant did not adduce any evidence of other situations where appraisals were modified to reflect appurtenancy clauses that directed points of delivery or uses different from those assumed in appraisals.

The Respondent argues that the appurtenancy clause in the licence should not affect the point of origin in this appraisal since that is a requirement of the licence, not of the cutting authority. The Timber Mark/Scale Site Designation would not permit the logs to be transported to Jordan River, but it is the licence and not the cutting authority that caused TimberWest to designate Honeymoon Bay, Shoal Island, et al, as the scale sites. The Respondent argues that modifying the appraisal to correspond to TimberWest's practices would violate the general appraisal principles outlined in the Ministry of Forests Timber Pricing Principles, above. The MOF therefore has used the point of origin that yields the least total cost, and not the practices actually followed by TimberWest.

The Board finds that the obligation imposed on TimberWest by the TFL, to supply logs to the Youbou mill, is not part of the cutting authority, i.e., the cutting permit. Therefore, according to the CAM, it is not an appropriate consideration for determining the point of origin in the stumpage appraisal.

ISSUE 2: Should the Appraisal Coordinator have included a land use charge estimate for the use of the Jordan River facility?

The Appellant's witness Mr. Thomas Charles, Manager Timber Valuation for TimberWest, testified that if TimberWest had been able to access Western's Jordan River facility, it would have expected to pay a user fee in addition to the cost of operating the facility. He cited the example of an unused MacMillan Bloedel log dump and sort facility in the Queen Charlotte Islands to which TimberWest obtained access. TimberWest operated the facility, paying all costs plus a user fee to MacMillan Bloedel of \$2.00 per m³ of logs processed through the facility. He further testified that TimberWest would charge users at its Shoal Island facility the full cost of dumping and booming plus a user fee of about \$2.00 per m³. Mr. Charles also testified that if TimberWest did not have excess capacity at Shoal Island, then other potential users would be turned away.

Mr. Douglas Copp, Manager of Western's Jordan River Division, testified that the Jordan River facility is operating at capacity and Western does not allow others to use it. If there was excess capacity, Western would charge a user fee of about \$2.00 per m³ in addition to its costs of operating the facility.

The Appellant argued that such a fee should have been included in the appraisal cost estimates as permitted under section 4.5.4(c) of the CAM. Had a user fee estimate of \$2.00 per m³ been included, the total cost of logs if processed through Jordan River would have been higher than if processed through Shoal Bay, and the latter would have been the appropriate point of origin for the appraisal.

The Appellant referred to the decision of an Appeal Board panel in *Northwood Pulp and Timber Limited Appeal of the Decision of the Chief Forester to an Appeal Board Regarding Stumpage Determination* (unreported, September 10, 1993). The issue in *Northwood* was whether MOF could use a private road that the owner did not make available to other licencees in its determination of a least cost haul route. All else equal, the private road would produce the least cost haul route. While *Northwood* had argued that the private road was not available to all licencees and therefore not "possible" for stumpage appraisal purposes, the Appeal Board rejected that argument and concluded that:

...we are of the view that the mere fact that a particular private road owner is not prepared to negotiate a right of way with some licencees at the present time does not prevent the Ministry from finding that transportation over that road is "possible" within the meaning of section 4.1 of the Manual. (p.10)

However, the Appeal Board did find that the appraisal should have included a reasonable road use charge in the calculation of the least cost method of transportation. The Appeal Board indicated that MOF had erred in its stumpage appraisal determination because it "implies that the average licencee ought to be able to negotiate a right of way over *Northwood's* road for free" (p.10). The Appeal Board went on to state that "... we do not think the Manual should be interpreted to rely on uncompensated use of private property unless this is set out in very clear language" (p.12).

The Appellant argues that, in this case, the Appraisal Coordinator should not have assumed uncompensated use of Western's Jordan River facility and that if the land use fee was included, Jordan River would not have been the least cost log transportation alternative.

The Respondent's witness, Mr. Stephen Edwards, Regional Appraisal Officer for the Vancouver Forest Region, testified that a user fee was not appropriate as the CAM only provides for user fees in the case of roads and bridges, not for log dumps. He stated that all costs for dump, sort, boom and scale were rolled into the cost estimate. On cross-examination, he stated that the CAM also allowed for non-governmental land use fees.

In response to a request from the Board, both parties attempted to determine if user fees for dump, sort and boom were included in the cost averages used for the cost estimates. Those submissions were received by February 17, 1998.

The Appellant contacted Price Waterhouse, which is primarily responsible for the MOF's cost survey. Price Waterhouse advised that there is no specific category in the survey for such land use charges, and the survey instructions do not explicitly define this type of cost into any category in the survey. Representatives of licencees who respond to the survey form stated that they do not include such charges in their reported costs.

The Respondent stated that the survey forms are designed to capture all logging costs that are incorporated into a company's financial statements. There are a number of places on the survey form in which a company could include such fees. One is the "other" subcategory under "Dump, sort, boom and rehaul". The Respondent contends that the survey should capture any such user fees within the averages used for the cost estimates. A separate land use fee appraisal estimate therefore is not appropriate for the CP 13C appraisal.

The evidence provided is incongruous. Licencees report that they do not include user fees in the cost surveys, although there does not appear to be any instruction not to include them and the Respondent claims the forms are designed to capture all costs. No explanation was provided as to why the licencees universally did not report such user fees if the forms are intended to capture all costs.

The CAM clearly permits appraisers to estimate land use charge where appropriate. The Respondent gave no explanation why a log sort and dump user fee should not be considered a land use charge.

Given that the statements made in the correspondence were not subject to cross-examination and are not conclusive, the Board is not in a position to make a finding as to whether the user fee has been taken into account in the surveys or whether it should be considered a separate land use charge under section 4.5.4 (2)(c) of the CAM.

Although the Board cannot make a determinative finding on this point, it is not necessary to do so given the Board's findings on the issue below.

ISSUE 3: Whether the Appraisal Coordinator erred in designating Jordan River as the point of origin, notwithstanding the capacity constraints at the only facility at that location?

Testimony

The Appellant's witnesses Mr. Douglas Copp, Manager of Western's Jordan River Division; and Ms. Cindy Harlow, Habitat Technologist with the federal Department of Fisheries and Oceans (DFO) for the area, testified as to the capacity limits on the Jordan River dump/sort facility.

Mr. Copp testified that this facility is comprised of an office, shop, and sort and boom facility. Logs are delivered to the site, sorted, put in the Jordan River and pushed to the other side where they are put into eight-section booms for tow to market. Western handles approximately 140,000 to 150,000 m³ per year of logs from its TFL and 30,000 to 40,000 m³ from its private lands. In 1997, Western processed 200,000 m³ of its logs through the facility. This represents its maximum capacity. The facility currently operates 10.5 months annually. It is closed for the balance of the time due to winter snow and summer heat. Western plans to process 180,000 m³ of logs through the facility for the next few years and will not allow others to use it. Mr. Copp testified the facility could not handle TimberWest's volumes.

Mr. Copp testified that the capacity of the facility is limited by the size of the site, weather conditions, water levels in the river, and the need to dredge the river mouth periodically to provide sufficient depth for tug boats. Dredging is accomplished by the use of tracked earthmoving equipment placed into the river at low tide, at times when river levels are low. Western's wood waste permit for the site, which limits it to 7,500 m³ of waste that is disposed of in a landfill site across the river from the log yard, imposes a further capacity constraint. Waste is generated proportional to the volume of logs processed, and waste levels are currently at the maximum.

Ms. Harlow testified that DFO object to the method of dredging due to fisheries values at the river mouth. Other options have been considered, but there has been no resolution. DFO is concerned about more logs being processed at the facility, which would necessitate more dredging and oceanward expansion. She testified that dredging was not DFO's sole concern, but that issue was within her area of responsibility. DFO hopes for a solution over time, perhaps trucking Western's logs elsewhere for dump, sort and boom.

Ms. Harlow testified that DFO would not approve this site if it were a new proposal being presented. In response to a question from the Board, she stated that any new proposals must undergo a full environmental assessment. If they involved filling-in of the foreshore to provide access to deeper water, then mitigation would be required to offset the loss. She considered that the costs of mitigation were such that proposals involving infill of the foreshore were not economically feasible. She stated there were no proposals for new log dump facilities of which she was aware.

The Respondent's witness, Mr. Edwards, testified as to how appraisals were conducted. He stated that the least total cost to market for the logs from CP 13C was through Jordan River as the point of origin. He did not know why other CPs previously had been appraised to Shoal Island, but thought they might have been closer to Shoal Island than CP 13C is.

Argument

The Appellant argues that the use of Jordan River as a point of origin for its stumpage appraisal is "not possible" under subsection 4.1 of the CAM which provides for developing "...the least total cost estimate to the point of appraisal, unless that particular method of harvesting or transportation *is not possible* under the cutting authority."

The Appellant cited the decision of the Forest Appeal Board in *In the Matter of the Appeal by Takla Track and Timber Ltd. From a Decision of the Chief Forester Dated July 9, 1991* (unreported, September 30, 1991) to support its argument that the transportation must be physically possible, not simply theoretically possible. In *Takla*, there was an eight kilometre gap in the road system that was to facilitate the least cost truck haul. However, an "approved road corridor" existed and, if constructed, would unify the road system. MOF's position was that the existence of the approved road corridor eliminated the geographic condition that would otherwise dictate the use of a special transportation system (that is, rail). The Board found that:

“... if the Appraisal officer must consider log transportation by truck, then the appraisal must contain means of physically accomplishing the truck haul.”

The Appellant argues that because of the capacity constraint and Western’s clear statement that they do not allow others to use it, “transportation is not possible” using the Jordan River facility. The Appellant further argues that capacity constraints are a proper consideration for appeal. The authority cited for this is the Supreme Court of British Columbia’s decision in *Canadian Forest Products Ltd. v. The Ministry of Forests and an Appeal Board* (May 2, 1997) Vancouver Registry No. A970371. In upholding the Appeal Board decision, Madam Justice Kirkpatrick indicated that:

... Canfor was unable to establish that the particular method of transportation in this instance was not possible or feasible under the cutting authority as provided in s.4.1 of the Coast Appraisal Manual. Canfor already hauls a small but significant portion of logs by road and there exists, by virtue of the Island Highway, a road which is available for truck haul. There can be little question that the actual implementation by Canfor of a continuous road haul system in the Englewood Division would cause serious disruption to that area. (p. 11-12)

The Appellant argues that the Court in this instance was prepared to assess whether the continuous road-haul could accommodate all blocks in Canfor’s operations, not just a single block, but that Canfor had failed to tender sufficient evidence to support this claim.

The Respondent notes that the Court in *Canfor* found that the Appeal Board had:

... obviously considered whether there were physical or legal impediments, and concluded that there were none.

The Respondent argues that Timber West has not shown any physical or legal impediments to using Jordan River as the point of origin. There is road access that TimberWest could use and therefore no physical impediment. The Respondent acknowledges environmental concerns, but contends that the use of the log dump is theoretically possible and is not legally prohibited. The Respondent also argues that the CAM requires the use of Jordan River as the point of origin.

The Respondents witness, Mr. Edwards, stated that the actual capacity of the log dump was not a proper consideration under the CAM. It would be a virtual impossibility to develop a ledger system to account for volumes moved across log dumps and then to change points of origin on subsequent appraisals once the volume appraised to the facility had reached its capacity. He stated there were no physical impediments to TimberWest using the Jordan River facility, and no additional costs that were not covered by CAM cost estimates.

The two key factors in this particular issue are physical access, and implementation of the CAM.

Physical Access

As noted above, in *Northwood*, the Appeal Board rejected Northwood's argument that as its private road was not made available to other licencees, its use was not "possible" for stumpage appraisal purposes. However, capacity of the road was not cited as a limitation to other potential users.

The Court in *Canfor* considered capacity in determining if a road haul was possible, and concluded that it would be difficult, but not impossible. The Appeal Board in that instance had also considered whether there were any physical impediments to a road haul. Canfor failed in its challenge as it had been unable to establish that the particular method of transportation in that instance was not possible.

In *Canfor*, the Court referred to the Appeal Board's decision that found that:

...it is sufficient that ... a facility exists that *can be accessed and utilized* by the haul method used. The configuration of the facility and the mechanism by which it operates is not an allowable consideration to the appraiser. [emphasis added]

Canfor had argued that its off-highway trucks could not use the Island Highway, and the sort yard was not configured to accept trucks. However, there was nothing in the cutting authority that prohibited Canfor from modifying its equipment to utilize a highway haul. That is, it was notionally within its power to use a highway haul and access the unloading facility. Canfor desired that the appraisal match its unique circumstances by using hauling cost estimates for its private logging railroad, but that is contrary to appraisal policies.

Compelling evidence by both Western and DFO indicates that the Jordan River dump is operating at capacity and that neither TimberWest nor any operator other than Western has physical access to the facility. As a private dump on private land, Western is not forced to provide access to others. Since DFO will not permit expansion of the site, Western could provide access for others only if it displaced or reduced volumes of its own logs. This is not a case of Western being "not prepared to negotiate" as was the case in *Northwood*, but a real capacity constraint imposed by physical factors and the DFO. It is not notionally within TimberWest's power to access the Jordan River facility. Neither is it likely that Western will relinquish its use of the site to another licencee for a nominal user fee.

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 points of origin in the same general area as Shoal Island, because that 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.

CAM Requirements

The CAM lists Jordan River as one of several possible points of origin for which towing costs are estimated. That list also includes towing rates from Port Renfrew, where there is a log dump that is not functional. Section 4.5.2.2 is clear that unlisted points of origin are permitted and towing costs for such points estimated from the average of two adjacent points. The CAM does not restrict the appraiser to points of origin in Table 4-6 of the CAM. Selection of point of origin for the appraisal therefore is governed by the basic appraisal policies. First, a point of origin must have a functioning, accessible facility to transfer logs from trucks to booms (see section 4.5.2.2 of the CAM and *Canfor*); and second, the appropriate point of origin is the one that both meets this criterion and yields the least total cost.

Of the two points of origin for which documentation was provided, Jordan River produced the lowest total cost (in the absence of an estimate for a user fee). However, no operator other than Western has access to this facility. The Board notes 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. In the Board's opinion, Jordan River therefore cannot be used as the point of origin. Based on the documentation provided, the appropriate point of origin under the CAM is Shoal Island as it has the next lowest cost but accessible facilities.

DECISION

The Board has found that Jordan River can not be used as the point of origin. Therefore, pursuant to section 149(1) of the *Forest Act*, the Board rescinds the administrative review decision and remits the matter back to the Appraisal Coordinator to set the appropriate stumpage rates based on the point of origin with the next lowest cost, which would appear to be Cowichan Bay/Chemainus.

The appeal is allowed.

COMMENT

In relation to the outstanding issue of whether user fees for log dumps are included in the average cost estimates or are separate items as are specific road use fees, the Board recommends that the MOF and licensee representatives seek clarification of this issue.

Howard Saunders, Member
Appeal Board

March 4, 1998