



Province of
British Columbia

Forest Appeals Commission

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

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

APPEAL NO. 2004-FA-078(a)

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

BETWEEN:	Weldwood of Canada Limited (now 100 Mile Lumber, a Division of West Fraser Mills Ltd.)	APPELLANT
AND:	Government of British Columbia	RESPONDENT
BEFORE:	A Panel of the Forest Appeals Commission David Ormerod, Panel Chair	
DATE:	Conducted by way of written submissions concluding on March 10, 2005	
APPEARING:	For the Appellant: John Kalmokoff For the Respondent: Jonathan Penner, Counsel	

APPEAL

This is an appeal brought by Weldwood of Canada Limited ("Weldwood"), against the November 8, 2004, Stumpage Advisory Notice and Stumpage Adjustment Notice (the "SANs") issued for Cutting Permit 509 ("CP 509") of Forest Licence A20001, which is located in the 100 Mile House Forest District (the "District"), Southern Interior Forest Region ("SIFR"). Ken Chantler, Timber Pricing Coordinator in the SIFR office, issued the SANs.

This appeal is heard pursuant to section 148 of the *Forest Act*. The powers of the Commission on an appeal are set out in section 149(2) of the *Forest Act*:

149 (2) On an appeal, the commission may

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

Weldwood appeals the SANs on the grounds that the Ministry of Forests' ("MOF") staff in the SIFR incorrectly reduced the on-block road length for CP 509 by 400 meters, contrary to the Interior Appraisal Data Sheets ("IADS") submitted by Weldwood, and failed to contact the submitting registered professional forester ("RPF") prior to such adjustment. Weldwood asks the Commission to direct the Timber Pricing Co-ordinator of the SIFR to include the 400 metres previously removed, and to re-determine the stumpage rates accordingly. The appeal was conducted by way of written submissions concluding March 10, 2005.

The SANs at issue in this appeal were issued to Weldwood and the appeal was filed by Weldwood, which held FL A200001. Weldwood was recently purchased by West Fraser Mills Ltd., and the licence was effectively transferred to 100 Mile Lumber, a Division of West Fraser. For the purposes of this appeal, the Panel will continue to refer to the Appellant as Weldwood, or as the Appellant.

BACKGROUND

On July 27, 2004, Weldwood submitted an IADS electronically, and provided a letter to the MOF applying for CP 509 to be made up of four blocks. The IADS included a map showing the location of the blocks, and the on-block roads required. The IADS indicated that 2.0 kilometres of dry on-block road was planned for harvesting. These roads were shown on the appraisal map. Of the total 2.0 kilometres, block 1 required 400 metres of on-block road: a 200-metre section northwest of the riparian leave strip, and a 200-metre section southeast of the strip.

CP 509 was issued on September 14, 2004. On September 17, 2004, Rob McAinsh, the major tenures technician in the District, emailed John Kalmokoff, RPF with Weldwood, and stated, amongst other things, that a field inspection of block 1 showed that no on-block roads had been built. Mr. Kalmokoff responded on September 21, and also submitted a revised appraisal map, showing that the 200 metre northwest section of road on block 1 would not be required, bringing the total on-block road down to 1.8 kilometres.

On September 22, 2004, Cal Wilson, RPF, the major tenures officer for the District, emailed Mr. Kalmokoff advising that the comments on the appraisal details were being forwarded to the SIFR valuation office. On November 5, 2004, an automated email was sent to Mr. Kalmokoff from the MOF ECommerce Appraisal System advising that the total length of on-block roads in CP 509 had been reduced to 1.4 kilometres based on the District staff's field visit.

On November 8, 2004, Mr. Chantler, the Timber Pricing Coordinator in the SIFR, issued the SANs to Weldwood. The SANs were based on the length of dry on-block road in CP 509 of 1.4 kilometres.

On November 9, 2004, Mr. Kalmokoff called Mr. Chantler. Mr. Kalmokoff also sent a facsimile and email confirming that the total amount of on-block road for CP 509 was 1.8 kilometres.

On November 26, 2004, Mr. Kalmokoff sent a letter to Mr. Chantler and to Jim Shafthuizen, the forest revenue manager for the SIFR. This letter makes reference to a November 18, 2004 letter from Mr. Kalmokoff, which objected to the November 8, 2004, SANs and to Mr. Chantler's reply that since "... a stumpage advisory notice has been issued with an effective date of September 1, 2004, he [Mr. Chantler] cannot re-open the appraisal."

The November 26, 2004 letter sets out Weldwood's argument for a re-determination pursuant to section 2.3.1 of the Interior Appraisal Manual ("IAM"), and advises that a Notice of Appeal would be filed with the Commission if the matter could not be resolved prior to December 1, 2004, being the last day of the 21 days allowed for appeal pursuant to section 147 of the *Forest Act*. Mr. Shafthuizen, in his November 26, 2005 email reply to this letter, states, "... as the effective date of this cutting authority was September 1, 2004, we must use the

Interior Appraisal Manual in effect on this date. Unfortunately the manual in effect did not include the ability to redetermine the stumpage rate by agreement that is now available in the new November 1, 2004 IAM." As a result, Weldwood filed its appeal on November 29, 2004.

On January 24, 2005, Mr. Chantler emailed Mr. Kalmokoff with an offer to increase the dry on-block road length used in the appraisal from 1.4 kilometres to 1.6 kilometres, as he had been advised that section 2.3.1 of the November 1, 2004, IAM could be used to make a redetermination. He states:

... we can proceed with the "informal" redetermination, ...

We have review [sic] the Appraisal and I would agree to change the dry block road from 1.4 km to 1.6 km

On January 25, 2005, Mr. Kalmokoff advised Mr. Chantler that this was not acceptable and the appeal would proceed.

Weldwood raises two main grounds of appeal:

- that the removal of 400 metres of on-block road from the IADS was an error, and
- that it was improper to make this adjustment without contacting the submitting RPF for Weldwood.

The Government maintains that no error was made in removing 400 metres of on-block road from the IADS, and that the appraisal determination must "... produce the least total development, harvesting and transportation estimate", and that the removal was not made arbitrarily, but because District staff had determined that the road length submitted was "excessive." Further, the Government says that Weldwood had already been advised of this opinion by District staff, and that it did not err by not further contacting the submitting RPF (Mr. Kalmokoff). Although the Government submits that no error was made, it asks the Commission to vary the SANs to reflect 1.6 kilometres of dry on-block road for CP 509, as was set out in Mr. Chandler's January 24, 2005 redetermination.

ISSUES

The Commission has framed the issues to be decided as follows:

1. Whether the length of on-block road in CP 509 should be 1.8 kilometres.
2. Whether the MOF was obligated to discuss the road length reduction with Weldwood's RPF prior to determining the stumpage rates as set out in the SANs.

RELEVANT LEGISLATION

Stumpage rates are determined under authority of section 105 of the *Forest Act*.

Stumpage rate determined

105 (1) Subject to the regulations made under subsections (6) and (7), if stumpage is payable to the government under an agreement entered into under this

Act or under section 103 (3), the rates of stumpage must be determined, redetermined and varied

- (a) by an employee of the ministry, identified in the policies and procedures referred to in paragraph (c),
- (b) at the times specified by the minister, and
- (c) in accordance with the policies and procedures approved for the forest region by the minister.

Powers of commission

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.

The policies and procedures relevant to this appeal are contained in the IAM in effect prior to November 1, 2004.

1.4 Responsibility for Stumpage

For the purposes of section 105 of the Forest Act, the following employees of the ministry are authorized to determine, redetermine and vary stumpage rates.

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

2.2 Appraisal Procedure

1. An appraisal is a process used to determine a stumpage rate for a cutting authority area using the Interior Appraisal Manual in effect on the effective date of the cutting authority.
2. A licensee or BC Timber Sales (BCTS) shall submit an interior appraisal data submission and map (Appendix IV) to the district manager when the licensee or BCTS makes an application for a cutting authority.
3. The licensee or BCTS shall submit to the district manager any other information required by the district manager or their designate for the purposes of the appraisal.
4. The submissions under subsections (2) and (3) of this section must be signed and sealed by a professional forester registered in the Province of British Columbia.
5. The district manager or their designate may review the licensee or BCTS submission and will notify the licensee or BCTS, in writing, of any omissions, errors or provisions of the Interior Appraisal Manual that, in the opinion of the district manager or their designate, the signing professional forester may not have considered. The licensees or BCTS signing professional forester will consider the district manager's or their designate's notification and may revise the submission.

6. The district manager or their designate shall give any information supplied by the licensee or BCTS under this section to the person who determines the stumpage rate together with any other information that the district manager or their designate considers relevant to the appraisal.
7. The person who determines the stumpage rate may review the licensee or BCTS submission and information supplied by the district manager or their designate, and will notify the licensee or BCTS, in writing, of any omissions, errors or provisions of the Interior Appraisal Manual that, in the opinion of the person who determines the stumpage rate, the signing professional forester may not have considered. The licensee or BCTS signing professional forester will consider the notification and may revise the submission.
8. The person who determines the stumpage rate shall consider, when determining the stumpage rate:
 - a. the information provided by the licensee or BCTS 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.
9. Regional staff will notify the licensee of the total stumpage rate by way of a stumpage advisory notice. Regional staff will advise BCTS of the upset stumpage rate. Once the timber sale has been auctioned regional staff will notify the successful bidder of the total stumpage rate by way of a stumpage advisory notice. Regional staff will also provide the licensee or BCTS with a summary of the information used to determine the stumpage rate or upset stumpage rate.
10. Within three (3) weeks of the date of the stumpage advisory notice, the licensee may notify regional revenue staff, in writing, of any objection to the information contained in the stumpage advisory notice that could be resolved without a review or appeal. The written objection must state the grounds for objection as well as a statement describing the relief requested. At this point, the objection is not considered a request for appeal under the *Forest Act* (section 143 to 150).
11. Regional revenue staff will notify the licensee, in writing, if the objection referred to in subsection (10) cannot be resolved. In this notification, the regional revenue staff will indicate that the three (3) week time requirement for notice for review specified in section 144 (3) of the *Forest Act*, will commence upon receipt of that notification.

DISCUSSION AND ANALYSIS

1. Whether the length of on-block road in CP 509 should be 1.8 kilometres.

The Government submits that the District staff clearly communicated to the Appellant that the Appellant's estimate of on-block road length submitted in the IADS was excessive. The District's communication consists of the following:

- A field inspection carried out by Rob McAinsh, as reported in his email of September 17, 2004, showed that block 1 had no roads built, and he was concerned that "The amount of on block road ..." in the IADS "... appears excessive".
- The September 22, 2004 email from Cal Wilson to the Appellant includes the statement: "The comments regarding excessive roads on logging blocks will be forwarded to the region along with your comments."
- The January 24, 2005 email from Ken Chantler to the Appellant, says that the "rational[e]" for not allowing some of the on-block road was rejection of the Appellant's position on safety and a wildlife 'known resource feature' (i.e., a hawk's nest).

No other evidence has been submitted to the Commission to substantiate how the on-block road length estimate in the IADS was "excessive." No errors in the measurement of the length of planned roads on the appraisal map have been shown, no aerial or other photographs were submitted showing that what was built differed from the plans, no alternate road layouts have been suggested, and no criteria have been given on which to judge whether an estimate of on-block road length was excessive.

The premise that the appraisal estimate of on-block road length was excessive appears to be based primarily on the comments of Mr. McAinsh following his September 17, 2004 field inspection of block 1, in which he observed that no roads had been built on the block, when the original appraisal map showed that 400 metres of road were to be built. Mr. Kalmokoff has explained, in his replies to Mr. McAinsh and Mr. Chantler, that both the road length planned for block 1 and the planned roads in the other blocks were built. Consequently, the estimate of 1.8 kilometers was correct. Mr. Kalmokoff's explanations consist of the following:

- On September 22, in reply to Mr. McAinsh, he states "I have spoken to the Weldwood Logging Supervisor in charge of logging this permit and he has indicated that all roads, except for the one I have dropped from the appraisal [the 200 metre northwest section of road on block 1] will be built."
- On November 9, in an email to Mr. Chantler, the Timber Pricing Coordinator in the SIFR office, he says "Ken, I have faxed you a close up of block 1 ... block 1 north, totally logged, 200 meters of road was dropped in this area, bringing the amount of dry onblock from 2.0 to 1.8 km. ... block 1 south, all felled, road roughed in as shown on map, most of the wood decked to the roughed in road. ... We plan to use all of the other onblock roads shown."

In the January 24, 2005 email of redetermination, Mr. Chantler asserts that part of the reasoning for reducing the appraised on-block road length to 1.4 kilometres was MOF's rejection of Weldwood's position on safety and the wildlife "known resource feature". However, neither Mr. Chantler nor Mr. McAinsh have explained how the rejection of the Appellant's position on safety and the known resource feature resulted in a 400-metre reduction in the length of on-block road.

Mr. Kalmokoff, in his January 25, 2005 reply to Mr. Chantler's redetermination, asserts that the MOF has not provided a rationale for removal of 400 metres of road.

The Commission finds that the MOF still has not provided any rational basis for its conclusion that 1.8 kilometres of on-block road is excessive.

The Government submits that an appraisal determination must be done "in a manner that will produce the least total development, harvesting and transportation estimate," pursuant to section 4.1 of the IAM. Further, the Government asserts that the Appellant appears to take the position that the Timber Pricing Coordinator is not permitted to make a determination that differs from the submitted appraisal. In rebuttal, the Appellant agrees that the MOF can make a determination that differs from the submitted appraisal (the IADS), and that the discretion of a statutory decision maker is not fettered with respect to such appraisal. However, it states, "... at the time of the determination the Timber Pricing Coordinator ... did not demonstrate a clear understanding of which roads he dropped, let alone a rationale as to why they were considered excessive."

The Appellant, in replying to the Government's position that the Timber Pricing Coordinator must make a determination based on section 4.1 of the IAM's "least cost" requirement, submits the following:

... least cost allowances are the result of an extended survey [of Interior logging operations] which produces least cost values for each recognized phase and component of a logging operation.

However, the IAM's 'least cost' requirement does not direct operators on issues such as where to place roads, or on how much road to construct. ...

... the appellant is not obliged to compromise safety or logging truck cycle times on this or any other development simply because a Timber Pricing Coordinator feels it will produce a cheaper appraisal.

...

... The appellant reserves the right to determine what constitutes a safe logging operation, in accordance with WCB [Workers Compensation Board] regulations and company safety policies.

...

In the professional opinion of the prescribing forester [understood to be Mr. Kalmokoff] the prescribed road network balanced the issues on the block, one of which was risk of damage to the nest site [the known resource feature].

...

... to date neither the Timber Pricing Coordinator, nor the district staff member he relied on for information, have indicated why the road submitted is considered excessive.

...

Therefore, in the opinion of the appellant, the changes are arbitrary.

...

... neither the district staff member nor the Timber Pricing Coordinator have provided a rationale for the arbitrary removal of the road [length amount]. The District staff member simply says 'the amount of on block road appears excessive'. This is not a rationale. ...

Section 4.1 of the IAM requires the Timber Pricing Coordinator to use the information available "... in a manner that will produce the least total development, harvesting and transportation cost estimate. However, it is apparent that the only information Mr. Chantler could have relied on is Mr. McAinsh's September 17, 2004 observation that no roads were seen on block 1, when 400 metres had been planned (later reduced by the Appellant to 200 metres), as well as disagreement between the Appellant and Mr. McAinsh on safety and dealing with a wildlife "known resource feature".

Of further note, the basis for Mr. Chantler's January 24, 2005 redetermination, agreeing to increase the on-block road length to 1.6 kilometres, is unclear. District staff did not provide any concrete evidence or rationale prior to that time, which would justify a reassessment of the on-block road length, and the Appellant had not provided any further information to the MOF. Consequently, there was no additional information available to the Timber Pricing Coordinator, which he could objectively use to substantiate a further reassessment to 1.6 kilometres. As *any* reduction from 1.8 kilometres has not been explained, the Commission cannot find any rational basis for the change.

In *Canadian Forest Products Ltd. v. Government of British Columbia* (Appeal 2000-FA-004, July 28, 2000) (unreported), the Commission found that changes to appraisal data information made by regional staff must be based on "... such things as errors in the data sheets, or engineered cost estimates that do not conform with the IAM." In the present case, the Government asserts that the Timber Pricing Coordinator made the reduction because the Appellant's submission "did not conform with the IAM," but the Government has not shown how the submission did not conform.

The Commission agrees with the Appellant that the reduction made by the Timber Pricing Coordinator was arbitrary and unsubstantiated, and finds that the 1.8 kilometres of on-block road submitted with the final IADS from the Appellant should be applied. The Appellant submitted precise maps with the IADS and the Commission is satisfied that these maps support the on-block road lengths in the IADS, both before and after the amendment that reduced the length estimate from 2.0 kilometres to 1.8 kilometres.

2. Whether the MOF was obligated to discuss the road length reduction with Weldwood's RPF prior to determining the stumpage rates as set out in the SANs.

Section 2.2 of the IAM sets out the overall appraisal procedure that is to be followed. Subsection 4 requires that the appraisal data submission, the IADS, made by a licensee must be signed and sealed by a RPF. In the present case, Mr. Kalmokoff is a RPF. Subsection 5 requires the designated district staff to review this data, and provide written comments to the licensee on any aspect of the IADS they may find wanting. Subsection 6 requires that the IADS, together with the

district's concerns, be forwarded to the person who determines the stumpage rate. In this case, that person is Mr. Chantler, the SIFR's Timber Pricing Coordinator.

Section 2.2(7) requires this person (Mr. Chantler) to notify the licensee, in writing, of "any omissions, errors or provisions of the IAM that ... the signing professional forester may not have considered." Subsection 8 requires that the Timber Pricing Coordinator use the information that has been provided, and any other information that might be relevant. Subsections 9, 10 and 11 require that a SAN be issued by the Timber Pricing Coordinator after considering any objections made by the licensee.

The Appellant alleges that Mr. Chantler made the arbitrary change in on-block road length without consultation, and that such consultation is required by the IAM. The Government submits that Mr. McAinsh emailed Mr. Kalmokoff about his concerns with the on-block road length for block 1, and that the responses to those concerns were forwarded to Mr. Chantler by Mr. Wilson. Therefore, it could not be said that there was information available to Mr. Chantler that Mr. Kalmokoff "may not have considered."

The Commission finds that there is no basis for the change in road length made by Mr. Chantler. Consequently, the Commission finds that whatever justification Mr. Chantler had in mind when making the change should have been treated as information that Mr. Kalmokoff may not have considered. This justification should have been communicated to the licensee in accordance with section 2.2(7) of the IAM, prior to the stumpage determination being made and the SANs being issued.

Accordingly, the Commission finds that the MOF was obligated to discuss the road length reduction with Weldwood's RPF prior to determining the stumpage rates as set out in the SANs.

DECISION

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

For the reasons provided above, the Commission refers the matter back to the Timber Pricing Coordinator of the SIFR with directions to appraise CP 509 using the on-block road length of 1.8 kilometres as provided in the IADS.

The appeal is allowed.

"David Ormerod"

David Ormerod, Panel Chair
Forest Appeals Commission

April 14, 2005