



Province of
British Columbia

Forest Appeals Commission

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DECISION NOS. 2005-FOR-003(a) and 2005-FOR-012(a)

In the matter of two appeals under section 82 of the *Forest and Range Practices Act*, S.B.C. 2002, c. 69 and section 131 of the *Forest Practices Code of British Columbia Act*, R.S.B.C., 1996, c. 159.

BETWEEN: Tolko Industries Ltd.

APPELLANT

AND: Government of British Columbia

RESPONDENT

BEFORE: A Panel of the Forest Appeals Commission
Alan Andison, Chair
Cindy Derkaz, Member
Katherine Lewis, Member

DATE: January 31 and February 1, 2006

PLACE: Kamloops, BC

APPEARING: For the Appellant: Daniel Bennett, Counsel
For the Respondent: Bruce Filan, Counsel

APPEALS

Tolko Industries Ltd. ("Tolko") appealed two determinations made by Shane Berg, District Manager, Kamloops Forest District (the "District Manager"), Ministry of Forests (now the Ministry of Forests and Range) (the "Ministry") denying Tolko's request for funding in respect to a high incidence of seedling mortality attributed to drought conditions in the summer of 2003. Specifically, Tolko appealed the January 21, 2005 determination (reviewed and confirmed by the District Manager on February 28, 2005) refusing funding pursuant to section 108(2) of the *Forest and Range Practices Act* (the "*Act*"), and the March 21, 2005 determination refusing funding pursuant to section 162.2(2) of the *Forest Practices Code of British Columbia Act* (the "*Code*").

At the hearing, Tolko elected to proceed only with its appeal of the District Manager's January 21, 2005 determination (as confirmed February 28, 2005) under section 108(2) of the *Act* (Appeal No. 2005-FOR-012). Thus, the appeal of the *Code* determination (2005-FOR-003) has not been pursued.

Under section 84(1)(d) of the *Act*, the Commission may confirm, vary or rescind the determination, or refer the matter back to the person who made the determination, with or without directions.

Tolko seeks an order from the Commission varying the District Manager's January 21, 2005 determination by finding that, for the cut blocks at issue in this appeal, the 2003 drought was "an event causing damage" for which Tolko is entitled to funding pursuant to section 108(2) of the *Act*.

BACKGROUND

Tolko holds Forest Licence A18686 in the Kamloops Forest District. A forest licence allows the licensee to harvest timber over a portion of a timber supply area. Tolko's operating area, under Forest Licence A18686, stretches from south of the City of Kamloops to north of the settlement of Little Fort, on both sides of the South and North Thompson Rivers.

Since 1987, licensees have had a legal obligation to reforest areas of Crown land that they have harvested. Reforestation obligations commence at the time of harvest of a cut block and end when the reforested cut block is declared by the Ministry to be "free growing". Several requirements must be met before a reforested cut block is declared to be free growing but, in summary, there must be a minimum number (but below a maximum number) of well-spaced, healthy trees of a commercially valuable species, the growth of which is not impeded by competition from other vegetation. This minimum number of free growing trees per hectare (referred to in the forest industry as "stems per hectare") must be achieved, on average, over the reforested cut block.

The Ministry may levy penalties against a licensee who fails to achieve free growing status within the prescribed time period. Once a reforested cut block is declared to be free growing, the licensee is relieved from any further responsibility to the Crown in respect to that cut block.

J. Brent Olsen, RPF, Silviculture/Stewardship Officer, Kamloops Forest District, testified for the Government as an expert witness in silviculture. Mr. Olsen stated that free growing status is typically achieved between 7 and 20 years after the start of harvesting, with the average being between 10 to 12 years. Dennis Farquharson, RPF, Silviculture Forester, employed by Tolko, testified that the maximum time to achieve free growing status for most of Tolko's cut blocks is 15 years.

In the spring of 2003, Tolko planted seedlings on approximately 170 previously harvested cut blocks. Mr. Farquharson outlined the steps Tolko took in respect to its 2003 spring planting program, starting with sowing requests issued to various nurseries in the fall of 2001, through to planting the seedlings in late April to early June of 2003.

Mr. Farquharson testified that the 2003 spring planting season was normal. He stated that there were "some wet spells and rains" with higher than average precipitation during April, May and June. However the weather throughout July, August and the first half of September was very hot and dry, with no precipitation.

According to information posted on the Ministry's website, the summer of 2003 was the driest summer on record in 105 years, and was the fifth year of drought in a 10 year cycle. Wildfires destroyed vast areas of forested lands in the Kamloops Forest District during the summer, including a large portion of Tolko's operating area that was burned by the McLure fire.

In the fall of 2003, Mr. Farquharson conducted "spot checks" of some recently planted cut blocks. He found "significant mortality" of seedlings planted in the spring of 2003 and retained a contractor to survey some of the replanted cut blocks in late October and early November. The survey confirmed Mr. Farquharson's observations of significant seedling mortality.

During the summer of 2004, Tolko conducted a survey of all the cut blocks planted in 2003 and some of those planted in 2002. The survey found that there was significant seedling mortality for the entire 2003 planting program: in some cut blocks, up to 50% of the seedlings were dead. However, cut blocks planted in 2002 did not exhibit significant mortality.

Mr. Farquharson testified that some seedling mortality is expected and replanting seedlings is "part of the business", usually ranging between 2% and 5% of Tolko's annual planting program. Mr. Olsen stated that the 1st year survival rate for seedlings is generally expected to be over 90%.

Both Mr. Farquharson and Mr. Olsen testified that seedling mortality can be caused by a number of factors including deer browse, voles, cattle, competing vegetation, cold or wet conditions, shallow soil over rock, snow press, problems with nursery stock and drought. Mr. Olsen explained that during a drought, seedlings are unable to take up the moisture through their root systems required for metabolism and growth. Consequently, the seedlings desiccate and die.

Mr. Farquharson explained that in anticipation of some seedling mortality, Tolko plants more seedlings than the maximum stocking standard prescribed for a cut block. He stated that if a cut block is planted at a density of 1400 stems per hectare, Tolko expects a survival rate of between 1150 and 1250 stems per hectare after the first year.

The cut blocks at issue in this appeal were all planted at a density of 1400 stems per hectare. The minimum stocking standard for the cut blocks to be declared free growing is either 500 or 700 stems per hectare, depending on the cut block. The 2004 survey found the number of stems per hectare on the relevant cut blocks ranged from 500 to 800, one year after planting. Mr. Farquharson stated that over the next approximately 10 years before the cut blocks can be declared free growing, there will probably be further mortality. In order to ensure that Tolko will

meet its obligation to the Crown, the cut blocks were replanted in the spring of 2005.

On December 17, 2004, Tolko wrote to the District Manager requesting funding or relief from obligation under section 108(2) of the *Act* for 26 cut blocks that had suffered drought-related mortality. The District Manager's determination declining the request is set out in his letter to Tolko dated January 21, 2005, as follows:

Section 108 of the *Forest and Range Practices Act* states that "*the minister must grant relief to a person who has an obligation under the Act to establish a free growing stand if, because of an event causing damage, the obligation on the area cannot be met without significant extra expense than would have been the case if the damage had not occurred*". Section 96(1.1) of the Forest Planning and Practices Regulation states: "*for the purpose of Section 108 of the Act, **an event causing damage**, in relation to an area in which a person has an obligation to establish a free growing stand, means (a) an occurrence of wildfire, (b) an outbreak of Dothistroma, or (c) another event that renders the area ill-suited for the establishment of a free growing stand*". Category (c) is reserved for events such as slides or floods that change an area too [sic] non-productive or bordering on non-productive.

According to the Forest Planning and Practices Regulation drought is not considered to be "*an event causing damage*", therefore, I will not be able to grant any funding or relief of obligation for your 26 blocks that incurred high mortality from drought conditions.

[italics and bold in original]

On February 15, 2005, Tolko requested the District Manager to "re-evaluate" his determination of Tolko's request for funding or relief from obligation under section 108(2) of the *Act*. The District Manager replied on February 28, 2005, stating in part:

The decision on whether or not drought would be considered "*an event causing damage*" under Section 108 of FRPA [the *Forest and Range Practices Act*] has been made. The District Manager was presented with briefing notes from both the Ministry of Forests and Industry prior to making the final decision. This decision precludes drought from the definition of "*an event causing damage*" for the purpose of Section 108 of FRPA. Therefore, I will not be able to grant any funding or relief of obligation for your 26 blocks that incurred high mortality from drought conditions.

[italics in original]

On March 9, 2005, Tolko wrote to the District Manager stating that upon further review of the transitional rules in the *Act*, it would appear that section 162.2(2) of the *Code* applies to its application for funding in respect to its obligation to establish free growing stands on cut blocks harvested prior to January 31, 2004.¹ The District Manager responded on March 21, 2005 as follows:

This is further to your letter of March 9, 2005, in which you requested funding, as per Section 162.2 of the *Forest Practices Code Act (FPC)*, for 26 blocks that incurred high mortality from drought conditions.

You had asked that because the FPC did not restrict the definition of "*an event causing damage*", that your application for funding should be allowed. Although the FPC does not define "*an event causing damage*", governments [sic] original intent was not to include drought within this definition. Therefore, I will not be able to grant any funding or relief of obligation for your 26 blocks that incurred high mortality from drought conditions.

[italics in original]

Although the District Manager's March 21, 2005 determination states that it is in respect to 26 cut blocks, Tolko submitted application forms for 43 cut blocks under cover of its letter of March 9, 2005.

Tolko received the District Manager's March 21, 2005 determination on April 15, 2005 and filed a Notice of Appeal with the Commission on May 5, 2005.

On November 17, 2005, following consideration of submissions from both parties, the Commission found that the District Manager had made two separate determinations in respect to Tolko's request for funding or relief from obligation for the high mortality of seedlings attributed to the 2003 drought: the January 21, 2005 determination (confirmed on review on February 28, 2005) under section 108(2) of the *Act*; and the March 21, 2005 determination under section 162.2(2) of the *Code*. The Commission exercised its authority under section 131(4) of the *Code* to extend the time for filing of the appeal of the January 21, 2005 determination (confirmed February 28, 2005) and accepted Tolko's Notice of Appeal of May 5, 2005 as an appeal of that determination in addition to an appeal of the March 21, 2005 determination.

As part of its submission to the Commission, prior to commencement of the hearing, the Government conceded that no event, including a drought, has been specifically precluded by section 96(1.1)(c) of the *Forest Planning and Practices Regulation* from being an event causing damage within the meaning of that paragraph.

¹ On January 31, 2004 the *Act* came into force and much of the *Code* was repealed.

At the hearing, Tolko chose to limit its appeal to the District Manager's January 21, 2005 determination, as confirmed on February 28, 2005, in respect to Tolko's application for funding pursuant to section 108(2) of the *Act* (hereinafter the "Determination"). Tolko further limited its appeal by reducing the number of cut blocks at issue from 26 cut blocks to 8 cut blocks, identified by number as follows: 639-5, 639-8, 642-1, 642-2, 642-3, 642-6, 999-412, and 999-605 (the "Affected Blocks").

Tolko requests the Commission to find that the 2003 drought was "an event causing damage" pursuant to section 108(2) of the *Act* and to vary the Determination by finding that Tolko is entitled to the funding described in section 108(4) of the *Act* in respect to the Affected Blocks.

The Government requests that the Commission refer the Appellant's application under section 108 of the *Act* back to the District Manager for reconsideration with the direction that he determine:

- (a) whether or not the appellant has met all of the requirements of section 96(2) of the *Forest Planning and Practices Regulation* with respect to each of the cutblocks for which funding or relief has been requested, and,
- (b) whether the dry weather in the summer and fall of 2003 rendered each area, on which the obligation to establish a free growing stand had to be fulfilled, ill-suited for the establishment of a free growing stand.

In the alternative, the Government requests that the Commission rescind the District Manager's Determination.

ISSUE

Whether the 2003 drought was "an event causing damage" to the Affected Blocks within the meaning of section 108(2) of the *Act*.

RELEVANT LEGISLATION

The following provisions of the *Act* are relevant to this appeal:

Definitions

(1) (1) In this Act:

...

"free growing stand" means a stand of healthy trees of a commercially valuable species, the growth of which is not impeded by competition from plants, shrubs or other trees;

...

Government may fund extra expense or waive obligation

108 (2) The minister must grant

(a) the relief described in subsection (3), or

(b) the funding described in subsection (4)

to a person having an obligation to establish a free growing stand if the person satisfies the minister that

(c) because of an event causing damage, the obligation to establish the free growing stand cannot be met without significant extra expense than would have been the case if the damage had not occurred, and

(d) the person

(i) did not cause or contribute to the cause of the damage,

(ii) exercised due diligence in relation to the cause of the damage, or

(iii) contributed to the cause of the damage but only as a result of an officially induced error.

(3) The relief, that must be granted under subsection (1) or that may be granted under subsection (2) (a), from an obligation by the minister to a person is relief from

(a) the person's obligation to the extent only that the obligation cannot be met without significant extra expense related to the damage referred to in subsection (1) or (2), or

(b) the person's obligation in full if the minister considers that the remaining obligation, after taking paragraph (a) of this subsection into account, is inconsequential.

(4) The funding for an obligation, that may be granted under subsection (2) (b) by the minister to a person, is funding to the extent only that is required for the purpose of restoring the stand of trees on the area affected by the event referred to in subsection (2)

(a) to the stage the stand had reached at the time of the damage caused by the event, or

(b) to the stage that is consistent with an agreement between the person and the minister.

...

- (7) The Lieutenant Governor in Council may make regulations for the purposes of this section resolving any doubt as to what constitutes an event or as to when an event occurred.

Section 96 of the *Forest Planning and Practices Regulation*, B.C. Reg. 14/2004 (the "*Regulation*") provides:

Relief or funding

96 (1.1) For the purpose of section 108 of the Act, "an event causing damage", in relation to an area in which a person has an obligation to establish a free growing stand, means

- (a) an occurrence of wildfire,
 - (b) an outbreak of *Dothistroma*, or
 - (c) another event that renders the area ill-suited for the establishment of a free growing stand.
- (2) A person claiming, under section 108 of the Act, relief from, or funding for, the obligation to establish a free growing stand, must provide to the minister the following information:
- (a) the nature of the relief sought and why the person is entitled to it;
 - (b) if the relief sought is funding under section 108 (4) of the Act, a proposal for returning the stand to the condition referred to in that subsection;
 - (c) an estimate of the extra expense involved in carrying out the course of action, as described in section 108 (3) of the Act.
- (3) If the minister is satisfied that relief or funding is required, the minister must, within one year of receiving the information referred to in subsection (2),
- (a) grant the relief,
 - (b) determine whether or not to provide the funds necessary for the proposal under subsection (2) (b), or
 - (c) provide and fund an alternate course of action to that proposed under subsection (2) (b), if the minister determines that
 - (i) the obligation to establish a free growing stand should continue, and

(ii) either

(A) the person has not provided a proposed course of action under subsection (2) (b), or

(B) the proposed course of action under subsection (2) (b) is unacceptable.

DISCUSSION AND ANALYSIS

Whether the 2003 drought was “an event causing damage” to the Affected Blocks within the meaning of section 108(2) of the *Act*.

This appeal turns on the statutory interpretation of the phrase “an event causing damage” in section 108(2) of the *Act*. The phrase is defined in section 96(1.1) of the *Regulation* as follows:

(1.1) For the purpose of section 108 of the Act, “**an event causing damage**”, in relation to an area in which a person has an obligation to establish a free growing stand, means

(a) an occurrence of wildfire,

(b) an outbreak of *Dothistroma*, or

(c) another event that renders the area ill-suited for the establishment of a free growing stand.

[bold and italics in the original]

The question before the Commission is whether the 2003 drought was “an event causing damage” as defined by section 96(1.1)(c) of the *Regulation*. In other words, was the 2003 drought an event that rendered “the area ill-suited for the establishment of a free growing stand”?

Tolko submits that the 2003 drought was “an event causing damage” within the ordinary meaning of the words in section 96(1.1)(c) of the *Regulation*. It notes the following definitions:

“event” means “something that happens or is thought of as happening; an occurrence, an incident”; (*The New Shorter Oxford English Dictionary on Historical Principles* (Oxford: Clarendon Press, 1993) (“*Shorter Oxford*”) at p. 865)

“render” means to “cause to be or become; make of a certain nature, quality, condition etc.”; (*Shorter Oxford, supra* at p. 2544)

"area" means "a particular extent of ground or of another surface", "a particular tract of earth's ... surface; a region; a neighbourhood, a vicinity"; (*Shorter Oxford, supra* at p. 110)

"ill-suited" means "not suited to doing something; unsuitable, inappropriate"; (*Canadian Oxford Dictionary*, 2d ed.(Oxford University Press) at p. 757)

"establish" means "set up on a permanent or secure basis; bring into being", "make stable or firm; strengthen"; (*Shorter Oxford, supra* at p. 852)

"free growing stand" means a stand of healthy trees of a commercially valuable species, the growth of which is not impeded by competition from plants, shrubs or other trees. (*The Act*, section 1(1))

Tolko submits that the 2003 drought was "an occurrence" that caused particular "regions" (or "areas of ground") to be "unsuitable" for "bringing into being" or "setting up on a permanent basis" stands of healthy trees of a commercially valuable species. Tolko argues that the significant mortality of seedlings in the Affected Blocks in 2003 is proof that the Affected Blocks were ill-suited for the establishment of free growing stands.

In making the Determination, the District Manager took the position that drought is precluded from the definition of "an event causing damage" under section 96(1.1)(c) of the *Regulation*.

On appeal, the Government takes a different position. It says that no event, including drought, is precluded from the definition of "an event causing damage" under section 96(1.1)(c) of the *Regulation*.

The Government submits that for an event to fall within the meaning of section 96(1.1)(c), it must affect the area in which the free growing stand must be established to the extent that the area is rendered ill-suited for meeting that obligation. It is not sufficient for the event to have only had the described effect on the trees in the area.

The Government argues that the word "area" is significant in the interpretation of section 96(1.1)(c) of the *Regulation* and should be given its ordinary meaning as follows:

area: "a level piece of ground", "the surface included within a set of lines", "a particular extent of space or surface or one serving a special function". (*Webster's New Collegiate Dictionary*)

The Government submits that the use of the word “area” in section 96(1.1)(c) of the *Regulation* and in section 108(4) of the *Act* is consistent with the ordinary meaning of “area” being “an area of land”.

It is the Government’s position that for an event to fall within the meaning of section 96(1.1)(c) of the *Regulation*, the event must change the area of land in which the licensee has the obligation to establish a free growing stand, such that it is no longer feasible to establish a free growing stand in that area.

The Government submits that in the present appeal, Tolko would only be entitled to funding, under section 108(2) of the *Act*, if the 2003 drought changed the areas in which Tolko has the obligation to establish free growing stands (the Affected Blocks) such that they have been rendered ill-suited for the establishment of free growing stands.

The Government submits that the 2003 drought did not render the Affected Blocks ill-suited for the establishment of free growing stands. It argues that the Affected Blocks are apparently capable of producing free growing stands because Tolko has replanted them. It also notes that Tolko considers the seedlings that survived the 2003 drought to be capable of contributing to the establishment of free growing stands in the Affected Blocks.

Tolko called Steven Charles Grossnickle, PhD in physiological forest ecology, as an expert witness in seedling establishment on reforestation sites. Dr. Grossnickle testified that drought is a “plantation phenomenon” that can affect plantations in the first 2 or 3 years after replanting. The prolonged lack of moisture during a drought, usually of 2 to 3 months duration, causes stress to the seedlings. Dr. Grossnickle stated that some seedlings in a plantation might survive a drought while others will succumb. However, larger trees, with deeper root systems, are not very susceptible to drought.

Dr. Grossnickle testified that drought never permanently damages an area, nor does it damage the nutrients in the soil. The ecosystem is “very certain to recover” – almost “instantaneously” – as soon as it rains.

Tolko submits that the Government’s position is inconsistent and unsustainable. If, as the Government conceded, drought is not precluded as “an event causing damage” under section 96(1.1)(c) of the *Regulation*, and drought does not permanently change or damage an area, then section 96(1.1)(c) cannot be interpreted as restricted to events that have the effect of changing the area for a long period of time such that a free-growing crop cannot be established.

Tolko submits that under section 96(1.1)(c) an event qualifies as an “event causing damage” if it renders an area “ill-suited” for any period of time. The Government’s interpretation would require the Commission to read the word “permanently” or “for a long period of time” into the section when, Tolko submits, it is not required by the ordinary meaning of the words in the section.

Tolko further supports its argument by reference to the word “another” which is used to introduce section 96(1.1)(c). It submits that the word “another” refers to the events previously described in subsections (a) and (b) of section 96(1.1), namely: (a) an occurrence of wildfire; and (b) an outbreak of *Dothistroma*². Tolko argues that the Government’s interpretation of section 96(1.1)(c) of the *Regulation* ignores the word “another” at the beginning of subsection (c).

Tolko submits that an occurrence of drought is as much “an event causing damage” to a plantation as an occurrence of wildfire or an outbreak of *Dothistroma*: drought is “another event that renders the area ill-suited for the establishment of a free growing stand”. An area is ill-suited to the establishment of free growing stands if it lacks moisture due to drought.

Dr. Grossnickle testified about the effect of wildfire and *Dothistroma* on plantations. He stated that wildfire and *Dothistroma* are similar to drought in that they rarely affect all the trees within a plantation. Some trees will survive while others will die, creating a mosaic (or “patchy”) effect. Dr. Grossnickle stated that neither wildfire nor *Dothistroma* render an area permanently unsuitable for the re-establishment of a plantation. A high intensity wildfire has the most potential to negatively affect the soil layer, but eventually the forest will regenerate. He noted that even areas affected by the eruption of Mt. St. Helens in Washington State are beginning to recover.

Dr. Grossnickle stated that very few events would render an area permanently ill-suited to the establishment of a free growing stand. He gave the examples of mines and roads, being man made alterations of the landscape, that permanently render an area ill-suited because the entire top soil layer has been peeled away. In his closing argument, counsel for the Government suggested other examples of events that would change an area such that a stand cannot achieve free-growing status, including: landslides, flooding due to beaver dams, changes in watercourses, global warming, drought for a very long duration, acid rain, and industrial activity.

The Commission notes that it is common ground that words contained in an enactment are to be given their ordinary meaning and the principles of statutory interpretation are only applied when the words to be interpreted are ambiguous (See: *MacMillan Bloedel Ltd. v. British Columbia (Ministry of Forests)*, 2000 BCCA 351 at paras 50,51, 54 and 55).

The Commission finds, based on the ordinary meaning of the words in section 96(1.1) of the *Regulation*, that drought is not precluded from the definition of “an event causing damage.” The Commission finds that the District Manager erred at law when he determined on January 21, 2005, and confirmed on February 28,

² *Dothistroma* is generic (genus) name of a fungus that attacks the needles of lodgepole pine, causing reduction in photosynthetic capacity, and if repeated for several years, eventual mortality.

2005, that drought is precluded from the definition of “an event causing damage” under section 96(1.1)(c).

The Commission finds that while section 96(1.1)(c) of the *Regulation* provides the definition of “an event causing damage”, it is section 108(2) of the *Act* that creates the minister’s obligation, as follows:

108 (2) The minister must grant

...

(b) the funding described in subsection (4)

to a person having an obligation to establish a free growing stand if the person satisfies the minister that

(c) because of an event causing damage, the obligation to establish the free growing stand cannot be met without significant extra expense than would have been the case if the damage had not occurred, ...

The Commission finds that there is nothing in the wording of section 108(2) of the *Act* that would limit the minister’s obligation to grant funding to only those events that change an area of land such that it is no longer feasible to establish a free growing stand (with the exception of two very specific transient events, being: occurrences of wildfire and outbreaks of *Dothistroma*). On the contrary, section 108(2)(c) contemplates that a licensee will be able to establish a free growing stand after an event causing damage – however, it will take “significant extra expense than would have been the case if the damage had not occurred.”

Section 108(2) of the *Act* operates to shift the risk for reforested plantations from a licensee to the Government where a licensee has carried out its silviculture obligations with due diligence and, as a result of an event beyond its control, it cannot establish a free growing stand without significant extra expense. In that case the government is prepared to assume the risk and either relieve the licensee from some, or all, of its obligation to establish a free growing stand, or provide the licensee with funding to restore the affected stand of trees.

The definition of “an event causing damage” in section 96(1.1) of the *Regulation* was enacted pursuant to section 108(7) of the *Act* “for the purpose of resolving any doubt as to what constitutes an event or as to when an event occurred.” The Commission finds that the definition in section 96(1.1) of the *Regulation* must be considered in the context of section 108(2) of the *Act*. The definition was enacted to provide certainty in the application of section 108, not to restrict the rights created by that section.

The Government’s interpretation of section 96(1.1) of the *Regulation* draws a distinction between two events that affect the trees in an area (i.e. occurrences of wildfire and outbreaks of *Dothistroma*) and events that affect the area of ground in

which a licensee has an obligation to establish a free growing stand. Applying the Government's interpretation of section 96(1.1)(c) of the *Regulation*, a licensee would not be entitled to relief or funding under section 108(2) of the *Act*, unless the event causing damage changed the area for a long period of time whereby it becomes, ill-suited for the licensee to meet its obligation to establish a free growing stand.

The Commission finds that the interpretation proposed by the Government is too restrictive and is not supported on a plain reading of section 96(1.1) of the *Regulation*.

In particular, the Commission finds that applying the Government's interpretation of "an event causing damage" could lead to illogical and potentially inequitable results. It would restrict a licensee's right to relief or funding to two of the many events that can affect trees in a plantation without changing the area to the extent that it is ill-suited for the establishment of a free growing stand. A licensee would be eligible for relief or funding if its plantation is affected by an outbreak of *Dothistroma*, but would not be eligible if its plantation is affected by the outbreak of another pathogen, a new invasive plant species, an insect infestation, a flash flood or another temporary event that causes damage that cannot be remedied without significant extra expense. This appears to be inconsistent with the section 96 (1.1) which states "(b) an outbreak of *Dothistroma*, or (c) **"another** event ..." [emphasis added].

The Commission also finds that the use of the word "another" in section 96(1.1)(c) of the *Regulation* supports a finding that section 96(1.1)(c) contemplates events that, like occurrences of wildfire and outbreaks of *Dothistroma*, affect trees in a stand without changing the area for a long period of time.

The Commission does not find anything in the wording of section 96(1.1)(c) that supports the conclusion that "an event causing damage" must permanently or otherwise significantly change the area of ground on which the licensee has an obligation to establish a free growing stand. The phrase "renders an area ill-suited" does not have to mean changing the area such that a free-growing stand can never be established. The Commission finds that an event that renders an area temporarily ill-suited to the establishment of a free growing stand would fall within the definition of "an event causing damage" under section 96(1.1)(c) of the *Regulation*. The Commission finds that drought can, for its duration, render an area ill-suited for the establishment of a free growing stand.

Tolko requests that the Commission vary the Determination by finding that, for the Affected Blocks, the 2003 drought was "an event causing damage" for which Tolko is entitled to funding pursuant to section 108(2) of the *Act*.

The Government submits that the Commission does not have the jurisdiction in this appeal to decide the merits of Tolko's application. The Government concedes that the District Manager erroneously determined, as a matter of law, that drought was precluded as "an event causing damage" under section 96(1.1)(c) of the

Regulation. The District Manager did not consider, as a matter of fact, whether the 2003 drought was an event causing damage for which Tolko would be entitled to funding under section 108(2) of the *Act*. The Government submits that the Commission's jurisdiction to vary a determination under section 84(1)(d) of the *Act* does not extend to making a decision on the merits of a case where there has been no determination by the District Manager.

Given its position that no event, including drought, is precluded as "an event causing damage" under section 96(1.1) of the *Regulation*, the Government requests that the Commission refer the matter back to the District Manager with the direction that drought is not precluded from the definition. In the alternative, it requests that the Commission rescind the Determination.

On this point, Tolko submits that the Commission can deal with underlying factual issues, and that the powers of the Commission enable it to vary the original order substantially if the factual issues are directly related to the original determination. Tolko is not seeking an order that funding be given, but a determination that the 2003 drought (specifically) qualifies as an "event causing damage" under section 96(1.1) of the *Regulation*.

The Commission has considered the parties' submissions on this point. The Commission notes that it has a wide ambit of appellate authority, including *de novo* powers. The Commission heard insufficient evidence to decide whether the drought that occurred in 2003 was "an event causing damage" under section 96(1.1) of the *Regulation*. Therefore, the Commission is not prepared to make a finding that Tolko is entitled to relief under section 108(2) of the *Act*. Further, the Commission is not referring the matter back to the District Manager for reconsideration, as such an exercise would be limited to the eight cutblocks that are the subject of this appeal.

Accordingly, in the present case the Commission has decided to rescind the Determination. Should Tolko wish to pursue its remedy under section 108(2) of the *Act*, it should make a fresh application to the District Manager listing each of the blocks that it wants the District Manager to consider. It is open to Tolko to pursue its application(s) for funding for the 2003 drought based on the Commission's interpretation of the relevant legislation contained in this decision.

DECISION

In making this decision, the Commission has considered all of the evidence and submissions before it, whether or not specifically reiterated in this decision.

The Commission finds that the District Manager erred at law when he determined on January 21, 2005, and confirmed on February 28, 2005, that drought was precluded from the definition of an event causing damage under section 96(1.1)(c) of the *Regulation* and denied Tolko's application for funding under section 108(2) of the *Act*.

Further, the Commission finds that drought can be "an event causing damage" within the meaning of section 108(2) of the *Act*. The Commission further finds that on a plain reading of section 96(1.1)(c) of the *Regulation*, "an event causing damage" does not need to change an area (the substrate or environment) for a long period of time such that it renders it "ill-suited for the establishment of a free growing stand."

For the reasons provided above, the Commission rescinds the Determination.

Accordingly, the appeal is allowed.

"Alan Andison"

Alan Andison, Chair
Forest Appeals Commission

"Cindy Derkaz"

Cindy Derkaz, Member
Forest Appeals Commission

"Katherine Lewis"

Katherine Lewis, Member
Forest Appeals Commission

March 28, 2006