

DECISION NO. 2011-FA-001(a)

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

BETWEEN:	Lowell A. Johnson Consultants Ltd.	APPELLANT
AND:	Government of British Columbia	RESPONDENT
BEFORE:	A Panel of the Forest Appeals Commission James Hackett, Panel Chair	
DATE:	October 4, 2011	
PLACE:	Prince George, BC	
APPEARING:	For the Appellant: Alistair Schroff For the Respondent: Sarah Bevan, Counsel	

APPEAL

[1] This appeal is brought by Lowell A. Johnson Consultants Ltd. against a December 8, 2010 Stumpage Advisory Notice for cutting permit 014 ("CP 014"). This Notice contained a stumpage rate redetermination made pursuant to the "changed circumstance reappraisal" provisions of the Interior Appraisal Manual (the "IAM"). Section 2.2.1(1)(b) of the IAM defines a 15% or greater change in the "total appraised development cost estimate" relative to the original appraised cost estimate, as a "changed circumstance" requiring reappraisal of the cutting authority.

[2] The Appellant appeals this rate redetermination, stating that it was a mistake, and asks that the original appraisal be re-instated. In particular, the Appellant takes issue with the removal of a cost estimate allowance for "additional stabilizing material" on all of the road sections in CP 014, and maintains that the tabular roads should have been reclassified as "Short Term" rather than "Temporary". The Appellant also asks that it be awarded the costs that it incurred preparing for the appeal and attending the hearing, plus any interest incurred for stumpage improperly withheld by the Government.

[3] This appeal was heard by way of an oral hearing, pursuant to section 146, Part 12, Division 2 of the *Forest Act*. The powers of the Forest Appeals Commission on an appeal are set out in section 149(2) of the *Forest Act*:

Powers of Commission

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.

BACKGROUND

[4] Non-replaceable Forest Licence A58943 ("FL A58943") was originally awarded to Pleasant Valley Remanufacturing Ltd. for a 10-year term starting on February 17, 2000 and expiring on February 16, 2010.

[5] Sometime in 2006, Pleasant Valley Remanufacturing Ltd. transferred FL A58943 to the Appellant, Lowell A. Johnson Consultants Ltd. In a letter dated August 25, 2009, addressed to the Timber Sales Manager in Burns Lake, the Appellant authorized Tahtsa Timber Ltd. to act as its agent regarding all matters related to the harvesting of timber from FL A58943.

[6] FL A58943 is located within the Lakes Timber Supply Area in north central BC. It is administered by the Nadina Forest District, which lies within the Northern Interior Forest Region of what was then known as the BC Ministry of Forests and Range (now the Ministry of Forests, Lands and Natural Resource Operations) ("the Ministry").

[7] On September 4, 2009, the Nadina District Manager issued CP 014 to the Appellant for a relatively short term, from September 4, 2009 to February 16, 2010. The expiry of the cutting permit coincided with the expiry of FL A58943.

[8] The process for determining the stumpage rate for CP 014 is called a stumpage appraisal. An appraisal is a necessary part of the process of issuing a cutting permit. The policies and procedures for completing an appraisal are approved by the Minister under section 105(1)(c) of the *Forest Act*. They are found, for the purposes relevant to this appeal, in the IAM.

[9] The version of the IAM in effect on September 4, 2009, the effective date of CP 014, is the July 1, 2008 version, as amended up to and including Amendment No. 8, effective July 1, 2009.

[10] The timber pricing system employed by the Ministry at the time of the appraisal of CP 014 was known as the Market Pricing System-B ("MPS-B"). The objective of MPS-B was to charge stumpage rates for timber priced under this system according to the relative value of each cutting permit, such that the average stumpage charged was equal to the Average Market Price ("AMP") for all timber within the system appraised in any given business quarter.

[11] A stumpage rate for a cutting permit under MPS-B was calculated according to the following formula:

$$IR = BR + (VI - MVI)$$

Where:

IR = indicated stumpage rate for the cutting permit

BR = base rate

VI = value index for the cutting permit and

MVI = the mean value index

[12] The base rate is a variable derived through an iterative process that ensures that average stumpage, including timber charged at the statutory minimum rate of \$0.25 per cubic meter, is equal to the AMP.

[13] The MVI (mean value index) is the average of all of the value indices in the stumpage appraisal system in a given business quarter.

[14] Of particular relevance to this appeal is the calculation of the operating cost component of the VI (value index), the cutting permit VI for CP 014. The VI is equal to:

SP-OC

Where:

SP = the selling price for the lumber equivalent volume of merchantable timber and

OC = the operating cost estimate for harvesting and milling the timber within the cutting permit.

[15] More specifically, the operating cost estimates at issue in this appeal are development costs – those pertaining to the construction and maintenance of roads required to access and transport the timber. The procedures for estimating these costs are found in Chapter 4 of the IAM.

[16] Section 4.3(3) of the IAM provides for the estimation of development costs in one of two ways, either as tabular cost estimates or detailed engineering cost estimates. Tabular cost estimates were used in this appraisal. The specific tabular cost estimates at issue are the “subgrade construction” and “additional stabilizing material” costs.

[17] Subgrade construction is defined in section 4.3.2.1 of the IAM to include a number of activities involved in road construction, including clearing, stump removal, ditch construction, stripping and the installation of culverts. Sections 4.3.2.2 and 4.3.2.3 provide for a subgrade cost estimate to be calculated for “the total length of road that the submitting forest professional certifies is required to remove the timber from the cutting authority area.”

[18] The exact procedure involves the calculation of a dollar per kilometre cost estimate by applying a regression equation for the relevant road group, which is Road Group 3 for roads in the Nadina Forest District.

[19] The dollar per kilometre estimate is then multiplied by the length of the section of road that it applies to, and the cost estimates for the various sections of road are then summed to a total road cost estimate.

[20] An important consideration in the road cost estimate calculation is the type of road being built. There are four road types recognized in the IAM, including Snow and Ice, Long Term, Short Term, and Temporary roads. In the stumpage determination for CP 014, the roads were classified as "Temporary", which is defined in the IAM as a road planned to be used for harvesting and/or hauling timber for less than one year.

[21] A road classified as "Temporary" means that subgrade cost estimates are decreased compared to a road classified as "Short Term" or "Long Term". Put another way, decreasing the subgrade cost estimate increases the stumpage rate, all other calculations in the appraisal being equal.

[22] Section 4.3.2.5 of the IAM provides procedures for estimating costs for "additional stabilizing material". Stabilizing material consists of gravel or broken rock that creates a road surface useable for logging equipment. It is "additional" because it must be sourced some distance away from a particular road section: there is not enough material close by to complete the job.

[23] A dollar per kilometre cost estimate for additional stabilizing material is calculated using the appropriate equation from Road Group 3, applicable to Nadina Forest District appraisals.

[24] As part of its application for CP 014, the Appellant submitted an appraisal data submission ("ADS") that included 10 cutblocks for harvesting - blocks 1, 3, 4, 5, 6, 8, 11, 15, 16 and 18.

[25] In the tabular roads section of the ADS, the Appellant specified that:

- a. 23 sections of "T – Temporary" road, of total length 20 km, would be required to remove timber from the 10 cutblocks earmarked as the cutting authority area; and
- b. "additional stabilizing material" would be required on the full length of each of the 23 road sections comprising the 20 km.

[26] A stumpage advisory notice for CP 014 was issued on November 5, 2009, providing a sawlog stumpage rate of \$7.54 per cubic meter for sawlogs scaled between September 4, 2009 and September 30, 2009. Included in this stumpage rate calculation was the provision for 20 kms of "Temporary" tabular roads and "additional stabilizing material" for the same 20 kms.

[27] A field inspection of CP 014 was conducted by District Compliance and Enforcement staff on June 9-11, 2010. They inspected the road system on the cutting permit and discovered that stabilizing material had not been placed on the road sections as originally outlined in the appraisal. They documented this information in a General Inspection Report dated June 11, 2010.

[28] This report was sent to the Appellant on the same day, June 11, 2010. On September 21, 2010, the Timber Pricing Coordinator for the Ministry notified the Appellant, via its representative Mr. Broadworth, by email, that the IAM required a reappraisal of CP 014 on account of the "changed circumstance"; specifically, no "additional stabilizing material" had been applied to any of the 20 kms of road within the cutting permit as originally envisioned.

[29] Sections 2.2.1(1)(b) of the IAM require a changed circumstance reappraisal of a cutting permit where:

- b. There will be a difference of at least fifteen percent between the total appraised development cost estimate in the changed circumstance reappraisal and the total appraised development cost estimate that was used in the most recent appraisal or reappraisal where the change is caused by circumstances other than a change in the manual or a change as a result of a stumpage adjustment.

[30] On October 8, 2010, the Appellant's representative, Mr. Sean Broadworth, submitted a changed circumstance reappraisal ADS. He stated that stabilizing material was still required on 11 of the 23 tabular road sections (those roads associated with cutblocks 1, 4, and 15). He also changed the road type for each road section from "Temporary" to "Short Term". Mr. Broadworth added a comment to the October 8, 2010 ADS as follows:

This is a changed circumstance reappraisal submitted at the request of my client. He requested me to remove gravel from Blocks 3, 5, 8, 11, and 18, and keep gravel on blocks 1, 4, 15, and 16. He also asked me to change all spurs to short term as there [sic – they] will be used for more than one season to pick-up biomass fibre. He also changed the cycle time to reflect the reality of the haul flow along the Tamen.

Please contact me if you have any questions.

[31] The District Tenures Officer for the Nadina Forest District responded with the following comment on November 5, 2010:

Hi Sean. I have looked at this re-appraisal submission.

I note that the appraisal length for road section 4-01 is 1.4 km. The road as built was measured at 0.7 km. Please provide supporting information for the road length in your submission.

The cutting authority was issued on September 4, 2009 and hauling for the cutting authority was completed on March 9, 2010. This timeframe is less than one year. Some road sections have a road type of Short Term. Please provide supporting information if the Short Term roads were used for more than a year to remove timber from this cutting authority.

Stabilizing was included on some tabular roads, yet none of the roads appeared to be stabilized. Please provide supporting information if these roads were stabilized to remove timber from this cutting authority.

[32] The Appellant's representative responded on November 15, 2010:

Hi Ken.

I changed spur 4-01 to 0.7 km and changed 11-05 to 1.0 km. My client informed me he build [sic] spur 5 to connect to spur 2 in block 11 increasing the length of the spur to 1.0 km.

My client called the spurs short term because wood was left on the roads for biomass to be hauled out sometime in the future beyond the temporary road definition.

Surfacing was left on some of the spurs because they were harvested and hauled during a time that surfacing may have been required ie prior to freeze up. My client believes this does not change the appraisal estimate because surfacing may still have been required at the time harvesting and hauling was occurring.

Please call if you have any questions.

[33] The Timber Pricing Officer who redetermined the stumpage rate rejected the Appellant's position that the tabular roads should be reclassified as "Short Term" rather than "Temporary" roads. He also deleted the estimates for "additional stabilizing material" for all of the tabular roads within the appraisal. These actions were confirmed in a note within the Electronic Commerce Appraisal System on December 3, 2010:

As per IAM, road type is Temporary, and stabilizing material has been found not to be applied and is deleted.

[34] The Stumpage Advisory Notice at issue in this appeal was then issued on December 8, 2010, reflecting these changes to the appraisal of CP 014. The resulting stumpage rate increased to \$9.42 per cubic metre from \$7.54 per cubic meter (the initial rate) for sawlogs scaled between September 5, 2009 and September 30, 2009.

[35] By removing the cost estimate for "additional stabilizing material" on all of the road sections, the total tabulated development cost estimate was reduced by \$272,959.40, from \$343,249.40 in the original appraisal, to \$70,290 in the reappraisal, which is greater than the 15% threshold in section 2.2.1(1)(b) of the IAM.

[36] Some additional changes were also made in the reappraisal to reflect actual conditions on the cutting permit, but they were relatively minor and are not at issue in the appeal.

[37] The Appellant agrees that no "additional stabilizing material" was applied to surface the roads within CP 014. It was not required since the entire timber volume was transported over these roads in winter conditions when the roads were frozen and strong enough to support the equipment involved in the timber harvesting operation. However, the Appellant objects to the reappraisal decision of the Respondent on three main grounds:

- a) The Appellant was not required to submit a reappraisal since there was no "changed circumstance" as defined in the IAM;
- b) The stabilization estimate was improperly removed for all road sections in the reappraisal; and
- c) The road type should be changed from "Temporary" to "Short Term".

ISSUES

[38] This appeal raises the following issues:

1. Did a changed circumstance occur requiring the reappraisal of CP 014 and the deletion of tabular cost estimates for "additional stabilizing material"?
2. Whether the roads within CP 014 should be classified as "Temporary" or "Short Term" for purposes of the subgrade cost estimate.
3. Whether the Appellant should be granted an order of costs to compensate for its appeal preparation and attendance at the hearing.

RELEVANT LEGISLATION

[39] The determination of stumpage rates is addressed in section 105(1) of the *Forest Act*:

- 105** (1) Subject to the regulations made under subsections (6) and (7), if stumpage is payable to the government under an agreement entered into under this Act or under section 103 (3), the rates of stumpage must be determined, 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. [Emphasis added]

[40] As stated earlier, the relevant policies and procedures approved for the region are contained in the July 1, 2008 (as amended to July 1, 2009) version of the IAM. Changed circumstances reappraisals are governed by sections 2.2.1(a) and (b) of the IAM, which state:

2.2.1 Changed Circumstances

1. In this section a changed circumstance means a circumstance where:
 - a. (i) The licensee has used or will use a harvest method to harvest at least fifteen percent of the volume of timber in the cutting authority area that is different from the method used in the most recent appraisal or reappraisal of the cutting authority area, and
 - (ii) the different harvest method that has been used or will be used when used in the changed circumstance reappraisal will produce the least cost total harvesting, development, and transportation cost estimate, or
- b. There will be a difference of at least fifteen percent between the total appraised development cost estimate in the changed circumstance reappraisal and the total appraised development cost estimate that was used in the most recent appraisal or reappraisal where the change

is caused by circumstances other than a change in the manual or a change as a result of a stumpage adjustment.

...

2. Where a changed circumstance has occurred with respect to a cutting authority area, other than a cutting authority area that is subject of a road permit or a cutting authority area with a non-adjusting stumpage rate, the cutting authority area must be reappraised in accordance with section 2.2.1.1.

[41] Section 4.3.2.2(2) of the IAM defines road types as follows:

2. Road Types:

...

- Long Term (LT) - A long term road is a road that will be used for more than two years for harvesting or hauling and has a ditch line and raised subgrade. A road within a cutblock is not considered long term unless the road will be extended beyond the cutblock to provide to additional tributary cutblocks within the cutting authority area.
- Short Term (S) - A short term road is a road that is neither temporary or long term.
- Temporary (T) - A temporary road is a road that is planned to be used for harvesting and/or hauling for less than one year.

ANALYSIS AND DISCUSSION

1. **Did a changed circumstance occur requiring the reappraisal of CP 014 and the deletion of tabular cost estimates for “additional stabilizing material”?**

The Appellant's Position

[42] The Appellant argues that the allowance for additional stabilizing material should not have been deleted. It argues that even though it did not place additional stabilizing material on the road sections, this is irrelevant to the changed circumstance test. Therefore, it should not have been required to submit a reappraisal for CP 014 since there was no “changed circumstance”.

[43] The Appellant argues that the Respondent's interpretation of section 2.2.1.1(b) of the IAM is incorrect and that this is supported by a recent decision of the Forest Appeals Commission in *International Forest Products Limited v. Government of British Columbia* (Decision No. 2009-FA-007, June 16, 2011) [Interfor]. The Appellant maintains that, in *Interfor*, as in the present case, the Respondent asserted that the *actual* logging activities and outcomes following an appraisal are sufficient evidence to justify a changed circumstance reappraisal, and that the reappraisal must be based on the *actual* activities and outcomes that occurred during the logging operation. The Appellant submits that the proper

interpretation is to view the reappraisal with the same perspective as the forest professional completing it:

That is to say the comparison is not between estimates/plans to actual, but rather estimates/plans to estimates/plans.

[44] The Appellant submits that this is what the Commission found in the *Interfor* case.

[45] The Appellant also cited an online Merriam Webster definition for “estimate” as it pertains to the phrase “appraised development cost estimate” in the IAM. The Appellant submits that “estimate” in the context of the IAM means a “rough or approximate calculation”. The Appellant states:

The rough, approximate calculation of the “appraised development cost” uses prescribed values which relate to professional judgement of a variety of factors. For CP 014 there would be no change in the estimate by the appraising forest professional given that the reappraisal (effective September 5th, 2009) would consider site and operating conditions that are no different than the appraisal (effective September 4th, 2009) and would yield the same professional judgement of these factors and therefore the same calculation using the prescribed values. Therefore there should not have been a reappraisal based on the actual road construction – the 15% threshold could not be met.

[46] In other words, the *estimates* used on September 5th, 2009 (the effective date of the reappraisal) will be no different than the *estimates* applied on September 4th, 2009 (the effective date of the original appraisal); therefore, the stumpage calculations would not change. The plans or estimates included in the original appraisal remain unchanged, regardless of the events that occurred when CP 014 was logged.

[47] The Appellant relies on paragraphs 115 to 117 of *Interfor* as the correct view of a reappraisal generally. It argues that section 3.3.2 of the Coast Appraisal Manual (“CAM”), which was at issue in *Interfor*, is mirrored in section 2.2.2 of the IAM. At paragraphs 115 to 117 of *Interfor*, the Commission found as follows:

[115] Section 3.3(2) [of the CAM] states that a reappraisal is based on a “complete reassessment of the cutting authority area on the effective date of the reappraisal, as if the area has been returned to the condition as it was prior to development or harvest.” (underlining added). *Interfor* submits that, in this case, that means it had to look at the cutting authority area as if all the trees were still standing. The Panel agrees.

[116] *Interfor*’s witnesses, Mr. Gullickson and Mr. Modesto, are both forest professionals with considerable experience in stumpage and appraisal data submissions. They testified that, in their professional opinions, there were no changes in the terrain conditions, the anticipated weather conditions, or any of the other appraisal estimate considerations between April 30, 2007 and May 1, 2007 for the area

covered by CP 136. They also said that they used their professional judgement in preparing and submitting the appraisal and reappraisal data submissions according to the requirements in the CAM. They assessed the conditions for the cutting authority area as of May 1, 2007, and determined that the same conditions existed as those that were considered in Interfor's appraisal data submission that was accepted for the appraisal effective April 30, 2007. They did not factor actual harvest volumes by harvest methods into Interfor's reappraisal submittal. They estimated the same volumes for harvest by cable yarding and by ground-based systems for May 1, 2007 as for April 30, 2007, because all appraisal conditions were the same.

[117] The Panel accepts this testimony as that of forest professionals who used their professional judgement and experience to determine what the cutting authority area conditions would be on April 30, 2007 and on May 1, 2007 for their appraisal and reappraisal data submissions. The Panel has found that the requirements in section 3.3.1(1)(a) were not met in this case, and the Panel further finds that, based on the opinions of Interfor's forest professionals, there would have been no changes in the appraisal conditions for the cutting area authority between April 30, 2007 and May 1, 2007. Interfor correctly used the same appraisal data with the same CAM methodology in April 2007 as on May 1, 2007. The April 2007 appraisal data submission was accepted by the Ministry based on the requirements in the CAM, and the Ministry determined a stumpage rate of \$17.59. The reappraisal effective on May 1, 2007 should be no different from the appraisal effective on April 30, 2007, and therefore, neither should the stumpage rate be any different.

[48] The Appellant states that it submitted a changed circumstance reappraisal ADS to the Ministry because it felt compelled to do so. This was before the *Interfor* decision was released. It included "actual experience" such as changes to cycle times, the removal of stabilization estimates from several sections of road and road type classifications that were changed from "Temporary" to "Short Term". Only the changes to cycle times were accepted by the Ministry. The other changes submitted by the Appellant were rejected.

[49] In the alternative, the Appellant argues that even if a changed circumstance had occurred, the road stabilization allowance should not have been removed from the appraisal. In its written submissions, the Appellant notes that stabilizing material was expected to be required for use on the roads within CP 014, based on the sound judgement of a forest professional: it is not appropriate for the Ministry's Timber Pricing Coordinator to remove these estimates.

The Respondent's Position

[50] The Respondent argues that the Commission should interpret section 2.2.1(1)(b) of the IAM in its ordinary and grammatical sense and, within a broader context of the IAM itself. In its ordinary and grammatical sense, a "changed circumstance" in section 2.2.1(1)(b) includes a discrepancy between the licensee's

actual development activities, and those in which a forest professional *estimated* at the time of the initial appraisal.

[51] Reading section 2.2.1(1)(b) together with section 2.2.1(1)(a) of the IAM, the Respondent argues that their intent is to use the licensee's actual activities within the cutting permit as a benchmark with which to compare estimates established in the original appraisal.¹ If the new development cost estimates meet or exceed the threshold of a 15% difference in estimated cost, and they are consistent with the "least cost" principle in timber appraisals, then a changed circumstance has occurred and this comparison is proof of the change.

[52] In response to the Appellant's reliance on *Interfor*, the Respondent states that the wording used in the changed circumstance reappraisal section of the IAM is significantly different than the wording used in the changed circumstance reappraisal section of the CAM at issue in *Interfor*. It submits that the two cases are distinguishable because the language used in the two Manuals is so different.

[53] In *Interfor*, the Commission considered section 3.3.1(1)(a) of the CAM. That section defines a "changed circumstance" using language that solely refers to "plans" and changes to "planned" harvesting methods. Specifically, it uses the phrases such as "plans to use a harvesting method", "is different from the method that was planned to be used" and "the different harvesting method that is planned to be used."

[54] In all three phrases, the emphasis is on changes to *plans* rather than changes to *actual* harvesting methods or changes between planned harvesting methods and actual harvesting methods.

[55] Although section 2.2.1(1)(a) of the IAM is not directly applicable to this appeal, the Respondent argues that subsection 2.2.1(1)(a) must be read in the context of subsection 2.2.1(1)(b). Subsection 2.2.1(1)(a) refers to the "harvest method" a licensee "has used or will use" that "is different from the method used in the most recent appraisal or reappraisal".

[56] The focus is on the difference between harvest methods used, or that will be used, relative to the harvest method applied in the appraisal or reappraisal. It is not between differences in harvesting "plans" or "planned" harvesting methods. The Respondent notes that this was a deliberate change made to the 2008 version of the IAM. Previously, subsection (a) included the words "plans to use". These words were removed in the 2008 version of the IAM and were replaced with "has used or will use".

[57] The Respondent argues that subsection 2.2.1(1)(a) of the IAM, now refers "explicitly and unequivocally" to actual harvest method as the basis for the changed circumstance reappraisal: the harvest method that the licensee "has used or will

¹ Although the Respondent used the broader term "cutting authority" throughout its submissions, the Panel has used the more specific term "cutting permit", since this appeal only relates to one cutting permit.

use” on the cutblock areas within the cutting permit, compared to the methods used in the most recent appraisal or reappraisal.

[58] With regard to subsection 2.2.1(1)(b), which is the applicable subsection to this appeal, read in the context of subsection 2.2.1(1)(a), the Respondent argues that the language of this subsection focusses on the 15% or greater difference between:

- a. A *revised* total “appraised development cost estimate” *taking into account the licensee’s actual development activities (insofar as they come within the “least cost” imperative of Chapter 4), and*
- b. the “total appraised development cost estimate” used in the prior appraisal. [Emphasis in original]

[59] The Respondent elaborated on this argument by distinguishing between the unit appraisal cost estimates included in the IAM as average costs, and the actual activity (in this case, length of road) that the unit costs are applied to. It argued that a licensee’s actual activities must be considered under section 2.2.1(1)(a) and (b) of the IAM.

[60] The argument is summarized at paragraphs 78 and 79 of the Respondent’s Statement of Points as follows:

78. The final numbers used in the changed circumstance reappraisal remain, however, “estimates” in the sense that they are calculated from the average unit costs specified in Chapter 4 of the IAM. They are revised estimates, based upon the best information available, reflecting an assumption as to what the licensee’s pre-harvesting estimates ought reasonably to have been. The requisite 15% threshold of change ensures the assumption is not made lightly.
79. When ss. 2.2.1(1)(a) and (b) are understood in this light, no inconsistency arises between them and the broader scheme of the IAM to use “cost estimates” rather than actual costs. A “total appraised development cost estimate” used in a changed circumstance reappraisal under s. 2.2.1(1)(b) remains fundamentally an “estimate”, even if based upon consideration of actual activities.

[61] At the hearing, the Respondent called Diana Spelay as its first witness. Ms. Spelay is the Acting Timber Pricing Coordinator for the Northern Interior Forest Region of the Ministry, based in Prince George, BC. She has been in this position for five months. Previously, she spent eleven and a half years as a Timber Pricing Officer, and 18 years in total working for the Ministry.

[62] Ms. Spelay testified that the development costs in CP 014 remained estimates, but the appraisal was opened (i.e., reappraised) to provide better estimates of the road costs required to harvest the timber under this cutting permit. It is a process of refining estimates but it does not include substitution of actual for appraised costs.

[63] The Respondent called Mr. Wesley Bender as its second witness. Mr. Bender is a Compliance and Enforcement Officer with the Ministry. He has held this position within the Nadina Forest District for six years and has worked for the Ministry for a total of twenty-one years.

[64] Mr. Bender was one of the Compliance and Enforcement Officers who inspected CP 014 following the timber harvesting operation, and he completed the General Inspection Report for this cutting permit.

[65] Mr. Bender testified that "additional stabilizing material" was not added to the roads in question within CP 014, nor did he think it was necessary since harvesting was completed during winter months when these roads were frozen and strong enough to support logging machinery. Mr. Bender also provided photographs of CP 014 roads confirming that no additional stabilizing material had been added.

The Panel's Findings

[66] The Panel agrees with the Respondent on this issue.

[67] Section 2.2.1(1)(b) of the IAM uses language that focuses on the difference between the "total appraised development cost estimate" in the changed circumstance reappraisal and the "total appraised development cost estimate" of the most recent appraisal or reappraisal.

[68] Based on the language in section 2.2.1(1)(b), read together with section 2.2.1(1)(a), this is the difference in cost between the estimate submitted in the ADS for the most recent appraisal or reappraisal, and the cost estimate that corresponds to the actual activities undertaken within the cutting permit.

[69] In the Panel's view, accepting the Appellant's argument means that a changed circumstance would never arise since new plans would always be replacing old ones, which is not the intent of this section of the IAM. Section 2.2.1(1)(b) provides the opportunity, within the life of an appraisal, to reconcile actual activities with those submitted by a qualified forest professional operating in good faith and submitting, what was at the time of the original appraisal or reappraisal, his or her best estimates of harvesting costs.

[70] If a 15% difference in estimated development cost occurs, a changed circumstance reappraisal is triggered. The Panel finds that such a circumstance arose with CP 014. The Ministry was correct to initiate a changed circumstance reappraisal given that no additional stabilizing material was used, and based on the language of section 2.2.1(1)(b) of the IAM.

[71] The Panel notes that the unit cost estimates are sourced differently. The unit road costs are derived from average cost data and, in this instance, formulated into an equation for average road costs in Road Group 3, used specifically in the Nadina Forest District. The forest professional that completes the appraisal or reappraisal estimates the road lengths to which these costs will be applied. Regardless, both are still estimates (i.e., cost - \$/km and road length - km), which, when multiplied together, provide the dollar estimate of road cost for appraisal purposes.

[72] The Appellant relied on *Interfor* to support its argument that a changed circumstance did not arise in this instance. More specifically, the Appellant quoted paragraphs 115 to 117 of *Interfor* to support its case.

[73] However, the Commission's findings in *Interfor* were made in relation to specific sections of the CAM, and the issue in that case hinged on the words "plans" and "planned" and were based on the role of forest professionals preparing appraisal data submissions in that context. As such, those findings do not apply to an appeal involving different wording found in a different Manual – the IAM. The Panel agrees with the Respondent that the Commission's interpretation of the CAM's changed circumstances provision in *Interfor* is distinguishable from, and cannot be applied to, the changed circumstance wording found in the IAM at issue in this appeal.

[74] The Appellant also argued that the Ministry and the Commission should show deference to the opinions of the forest professional preparing the appraisal or reappraisal, including the ADS documents they submit.

[75] The Panel disagrees. The forest professional's opinion, included in his or her appraisal submission, is just that, an opinion. It is the wording of the legislation and the Manual that must guide the ultimate result. The Panel finds that the Appellant's interpretation of the IAM, based largely on *Interfor*, is not supported by the language of the IAM. For this reason, the Panel also rejects the Appellant's alternative argument outlined in its submissions above.

[76] Based on all of the evidence and argument provided on this issue, the Panel finds that a changed circumstance did occur requiring the reappraisal of CP 014, and that the Government correctly deleted the tabular cost estimates for "additional stabilizing material".

2. Whether the roads within CP 014 should be classified as "Temporary" or "Short Term" for purposes of the subgrade cost estimate?

The Appellant's Position

[77] The Appellant argued that the roads within CP 014 should have been reclassified as "Short Term" instead of "Temporary" roads since the time frame from which the roads were needed had lengthened beyond the timeframe defined for "Temporary" roads in the initial appraisal. There was now a need to recover fibre for bioenergy or pellett production and, given the sound rationale of a competent forest professional, the Timber Pricing Coordinator should not have reclassified these roads.

[78] At the hearing, the Appellant made a brief presentation emphasizing the same arguments made in his pre-hearing submissions, especially the importance of *Interfor* as a precedent in this appeal.

[79] The Appellant also argued that, since the CP 014 appraisal or reappraisal was completed under the MPS-B system, the Government would receive its stumpage revenue regardless of the outcome of the CP 014 appraisal. The Appellant submits that the system employs a waterbed mechanism. By this the Appellant means that,

if there was a shortfall in stumpage from CP 014 (or any other cutting permit for that matter) as a consequence of the appraised development costs, it would be "made up" from stumpage received from other cutting permits in the system, since, overall, the Government has to extract a target stumpage rate from the industry as a whole.

The Respondent's Position

[80] The Respondent argues that the Appellant's intention to use the roads within CP 014 to haul biomass is a new plan, for some time in the future, and is beyond the one-year anniversary of the cutting permit.

[81] On the basis of this new plan, one that, according to the Respondent, has not been acted upon some 17 months following the expiry of CP 014, the Respondent submits that the tabular road sections should not be reclassified from "Temporary" to "Short Term" within the changed circumstance reappraisal.

[82] The Respondent points out that, according to section 4.3.2.2(2) of the IAM, "a Temporary road is a road that is planned to be used for harvesting and/or hauling for less than one year." In other words, the Respondent states that the use must be "planned" and executed within the terms of the cutting permit and its appraisal, and not something that is part of a notional intention at some vague point in the future. The Respondent submits that the Appellant's plan to haul "biomass" from the cutting permit area some time in the future is not "a plan" under the definition of a "Temporary" road in section 4.3.2.2(2) of the IAM.

[83] The Respondent further maintains that the "Temporary" road classification used in the initial appraisal reflected the fact that the term of CP 014 was for only five and one half months, which is clearly less than a year.

[84] Regarding the Appellant's reliance on *Interfor*, the Respondent points out that the *Interfor* decision does not involve interpreting the meanings of "Temporary" and "Short Term" roads in section 4.3.2.2(2) of the IAM. Nor did it involve interpreting those words in the context of the CAM. Rather, the section at issue in *Interfor* in the CAM focused on the meaning of the words "plan" and "planned" in a prospective sense, determining a licensee's intent to harvest timber with one particular method over another.

The Panel's Findings

[85] The Panel finds for the Respondent on this issue as well. It is a fundamental tenet of timber appraisals that the timber under appraisal must be included within the cutting permit being appraised.

[86] The Panel received no evidence from the Appellant demonstrating that biomass fiber from CP 014 had been harvested and removed from the cutting permit area before CP 014 expired.

[87] Since the term of CP 014 was for less than one year, the Panel finds that it was appropriate to classify these roads as "Temporary", as defined in section 4.3.2.2(2) of the IAM. Moreover, CP 014 expired at the same time as FL A58943, so no further cutting permits were going to be issued under that licence.

[88] The Panel also finds that *Interfor* does not assist the Appellant in its argument. The *Interfor* decision did not involve interpreting the meanings of "Temporary" and "Short Term" roads in either the CAM (at issue in that case), or section 4.3.2.2.(2) of the IAM. Rather, the *Interfor* decision focused on the meaning of the words "plan" and "planned" in a prospective sense in order to determine the licensee's intent to harvest timber using one method over another.

[89] Accordingly, in answer to the second issue, the Panel finds that the Ministry properly classified the tabular road sections as "Temporary" rather than "Short Term" for purposes of the subgrade cost estimate.

[90] Finally, the Panel notes that the Respondent went to great lengths to develop its arguments with regard to the proper interpretation of section 2.2.1(1)(b) and section 4.3.2.2(2) of the IAM. This included a detailed history and purpose of these sections within a broader context of the IAM, along with a review of the applicable principles of statutory interpretation.

[91] The Respondent also included other evidence as well, such as documentation on the hauling extension granted the licence holder of CP0 014, and hauling, scaling, and invoicing information regarding this cutting permit. The Respondent also submitted an affidavit from Brian Cornelis, Scaling and Billing Manager for the Ministry.

[92] However since the Panel has found that there was a changed circumstance in this appeal, the Panel has focused its findings primarily on the statutory interpretation of section 2.2.1(1)(b) and 4.3.2.2(2) of the IAM, and need not make any findings on those other sections.

3. Whether the Appellant should be granted an order of costs to compensate for its appeal preparation and attendance at the hearing.

[93] The Appellant asked the Panel to order that certain of its costs be covered in relation to the appeal.

[94] The Commission's policy is to order costs only in special circumstances. Its policy outlines the types of special circumstances that may warrant an order for costs. They include:

- (a) where, having regard to all of the circumstances, an appeal is brought for improper reasons or is frivolous or vexatious in nature;
- (b) where the action of a participant or the failure of a participant to act in a timely manner resulted in prejudice to any of the other participants;
- (c) where a participant, without prior notice to the Commission, fails to attend a hearing or to send a representative to a hearing when properly served with a Notice of Hearing;
- (d) where a party unreasonably delays the proceeding;
- (e) when a party's failure to comply with an order or direction of the Commission has resulted in prejudice to another party; and

(f) where a party has continued to deal with issues which the Commission has found to be irrelevant.

[95] The Panel finds that there are no such circumstances in this case.

DECISION

[96] 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.

[97] For the reasons provided above, the Commission confirms the December 8, 2010 Stumpage Advisory Notice and stumpage rate redetermination.

[98] The appeal is dismissed.

[99] The application for costs is denied.

"James Hackett"

James Hackett, Panel Chair
Forest Appeals Commission

November 15, 2011