Province of British Columbia

Forest Appeals Commission

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APPEAL NO. 2004-FA-042(a)

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

BETWEEN:	Tahtsa Timber Ltd.	**APPELLANT**
AND:	Government of British Columbia	**RESPONDENT**
BEFORE:	A Panel of the Forest Appeals Commission Gary Robinson, Panel Chair	
DATE:	Conducted by way of written submissions concluding on November 29, 2004	
APPEARING:	For the Appellant: Mary DeLury For the Respondent: Richard Butler, Counsel	

APPEAL

This is an appeal brought by Tahtsa Timber Ltd. ("Tahtsa"), which is located in Burns Lake, B.C., against a stumpage rate determination in a June 10, 2004 Stumpage Advisory Notice ("SAN") for road permit R13752, as confirmed in a letter dated July 28, 2004.

The SAN was issued by Sharon Robinson, Revenue Officer Supervisor, Northern Interior Forest Region, Ministry of Forests (the "Ministry"). The July 28, 2004 letter was issued by Jim Snetsinger, Regional Executive Director, Northern Interior Forest Region. In that letter, the Regional Executive Director confirmed that the rate contained in the SAN was correct.

The appeal is brought before the Commission pursuant to section 146 of the *Forest Act*. The powers of the Commission 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.

Tahtsa asks that the rate be rescinded and that an earlier rate, quoted to it by the District Engineering Officer, be imposed.

BACKGROUND

Tahtsa was awarded Forest Licence A68213 on July 1, 2002. This is Tahtsa's first forest licence.

The Nadina Forest District (the "District") approved Tahtsa's forest development plan on May 13, 2003. In or around this time, the District was making funding arrangements for completion of the Square Lake Connector Road with certain licensees. The District proposed that licensees build segments of the road on behalf of the District. Licensees would recover their respective road building costs as an engineered cost in future appraisals connected to their respective forest tenures. This arrangement was set out in a letter dated July 4, 2003 to Tahtsa from R. A. Murray, District Manager. Tahtsa agreed to construct Section 1 (the "Road") under road permit R13752. The Road was outside of Tahtsa's designated operating area.

Tahtsa did not perform any of the preliminary design work for the Road. It states that it agreed to construct the Road based on "information provided to us and our good relations with this District".

The disposition of wood harvested from the Road's right-of-way was at the District's discretion. As an alternative to the cost-recovery scheme originally offered by the District (apply the costs as engineered costs in future appraisals), the District asked Tahtsa if it wished to take the wood and sell it to a mill of its choice. If so, Tahtsa would pay stumpage on the wood taken.

In order to decide which option to take, Tahtsa requested from the District the stumpage rate for R13752. On July 3, 2003, Dan Rensby, District Engineering Officer in the District, sent a facsimile to Tahtsa asking the company to sign and return a "Road Permit Rate Request Form". He also wrote "Confirmed $18.95 is a fixed Rate."

Based on this information and other considerations, Tahtsa chose to take the wood and expected to pay stumpage at a rate of $18.95 per cubic metre.

Road Permit R13752 was issued on July 7, 2003. Tahtsa sold the wood to Houston Forest Products ("Houston"), based upon this "confirmed stumpage rate." The wood was hauled and scaled at Houston in November 2003.

Tahtsa says that it did not hear anything further about the stumpage rate until mid June of 2004 when it received the SAN. The June 10, 2004 SAN was issued by Ms. Robinson, Revenue Officer Supervisor, setting the stumpage rate at $21.54 per cubic metre for species and products scaled between July 07, 2003 and May 31, 2004. Houston received the SAN at about the same time and, noting the discrepancy, expressed its concern that Tahtsa had been dishonest with it.

Based on the SAN rate and the scaled volume, on June 22, 2004, the Ministry of Provincial Revenue issued a bill to Tahtsa for $92,929.86.

On July 13, 2004, Tahtsa wrote to Mr. Snetsinger, the Regional Executive Director, requesting a meeting and a reevaluation of the stumpage rate for R13752. The letter restated the background to Tahtsa's arrangement with the District, and advised that an integral part of the arrangement was the "confirmed stumpage rate" provided to it by the District Engineering Officer. Tahtsa says that the Northern Interior Forest Region "choose to override this agreement" and, in doing so, the Ministry not only retroactively changed a "confirmed stumpage rate" but it also affected Tahtsa's good relations with Houston.

The Regional Executive Director replied by letter dated July 28, 2004. He states that it was unfortunate that Tahtsa was quoted an incorrect stumpage rate of $18.95 per cubic metre by District office staff. The rate quoted corresponded to the District Value Indexes for the third quarter of 2003. The Regional Executive Director quoted section 1.4 of the Interior Appraisal Manual (the "IAM"), which identifies the Ministry employees authorized to determine, redetermine and vary stumpage rates. The letter states that the SAN of June 10, 2004 is the correct stumpage rate as it was determined according to the policies and procedures in the IAM.

Tahtsa filed a Notice of Appeal with the Commission on August 18, 2004. In its Notice of Appeal, Tahtsa states that it is appealing the Regional Executive Director's decision not to apply the stumpage rate quoted by the District Engineering Officer. Tahtsa's main concerns and submissions on the stumpage rate determination are as follows:

1. The Ministry erred by changing a "confirmed stumpage rate".

2. The Ministry took an unreasonable amount of time (over one year) to issue the SAN. If Tahtsa had received the rate shown in the SAN within the 10 days that the Regional Executive Director says it normally takes to issue a SAN, Tahtsa would not have taken the wood. It would have bunched and skidded the wood thereby increasing its cost estimate for the road.

3. The Ministry has a responsibility to act in a reasonable and responsible manner, and failed to do so in this case.

Tahtsa asks the Commission to refer the SAN back to the Revenue Officer Supervisor and direct that the rate be re-determined to reflect the "original agreement" of $18.95 per cubic metre, and for this rate to be retroactive to July 4, 2003. Specifically, Tahtsa seeks relief of $8,487.62, based on the volume harvested and the differential in the two rates.

The Government argues that the Commission lacks jurisdiction over this appeal because Tahtsa is attempting to appeal the decision of the Regional Executive

Director, rather than the SAN itself. Further, or in the alternative, the Government submits that there is no basis to vary the stumpage rate contained in the June 10, 2004 SAN. Accordingly, the rate should be confirmed.

ISSUES

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

1. Whether the Commission has jurisdiction over the appeal.

2. If so, whether there is a proper basis to vary the rate referred to in the SAN dated June 10, 2004.

3. Whether there is any other basis on which the Commission may remedy Tahtsa for its alleged losses.

RELEVANT LEGISLATION

Forest Act

Form of agreements

12 (1) A district manager, a regional manager or the minister may enter on behalf of the government into an agreement granting rights to harvest Crown timber in the form of a

…

(k) road permit

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.

The powers and procedures for administrative reviews and appeals are found in sections 143 to 150 of the *Forest Act*. The following sections are relevant to this appeal:

Determinations that may be appealed

146 (2) An appeal may be made to the Forest Appeals Commission from a determination, order or decision of

...

(c) a determination of an employee of the ministry, under section 105 (1), and

...

Notice of appeal

147 (1) If a determination, order or decision referred to in section 146 (1) or (2) is made, the person

(a) in respect of whom it is made, or

(b) in respect of whose agreement it is made

may appeal the determination, order or decision by

(c) serving a notice of appeal on the commission

(i) in the case of a determination, order or decision that has been reviewed, not later than 3 weeks after the date the written decision is served on the person under section 145 (3), and

(ii) in the case of a determination, order or decision that has not been reviewed, not later than 3 weeks after that date the determination, order or decision is served on the person under the provisions referred to in section 146 (2), and

...

(4) Before or after the time limit in subsection (1) expires, the chair or a member of the commission may extend it.

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.

(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 approved … by the minister" for the Interior Region are found in the IAM. The following sections of the IAM (November 2002 with amendments to June 2004) are relevant to this appeal:

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.

- regional managers, regional appraisal coordinators and employees of the regional revenue section, and

- director, Revenue Branch, Ministry of Forests and the employees of Revenue Branch

2.3.2 Annual Reappraisal for Road Permits and Blanket Salvage Cutting Permits

1. A road permit must be appraised or reappraised effective June 1 of each year. The stumpage rate determined at the appraisal or reappraisal is fixed for one year.

6.3 Right-of-way Cutting Authorities

1. The stumpage rate for a road permit will be determined using Ministry of Forests stumpage billing records.

2. The stumpage rate for a road permit is the weighted average sawlog stumpage rate for:

a. cutting authorities, other than a road permit, that are located in the same forest district as the area to which the road permit applies, and that are

issued under the licence that entitles the licensee to apply for the road permit,

b. a licence to cut or a timber sale licence under which cutting permits have not or will not be issued, that entitles the licensee to apply for the road permit,

c. if there are no records from which the stumpage rate may be determined under (a) or (b),

i. `all the cutting authorities, other than road permits, that are for areas located in the same forest district as the area to which the road permit applies, or

...

DISCUSSION AND ANALYSIS

1. Whether the Commission has jurisdiction over the appeal.

There is no dispute that the June 10, 2004 SAN, issued by the Revenue Officer Supervisor, is an appealable decision under the *Forest Act*. The jurisdictional issue arises because, in its Notice of Appeal, Tahtsa referenced the Regional Executive Director's letter confirming the stumpage rate contained in the June 10, 2004 SAN.

The Government argues that the Regional Executive Director did not have the authority at the time of the correspondence to review determinations with respect to rates of stumpage. The Government cites section 143 of the *Forest Act*, as it applies from November 3, 2003, which states:

Determinations that may be reviewed

143 (1) A review may be required under this Division of

(a) a determination, order or decision of a district manager under section 75.1 (1) (d), 76 (1), (2) or (6), 77 (1) (d) or (e), 78.1 or 112 (2) or (3),

(b) a determination, order or decision of a timber sales manager under section 78, and

(c) a determination, order or decision of a regional manager under section 59, 59.1 (9) or (10), 70 (4), 75, 75.1 (1) (d), 76 (1), (2) or (6), 77 (1) (c) or (e) or 112 (2) or (3).

It submits that this section no longer gives the Regional Executive Director (formerly the Regional Manager) the power to "review" determinations made by an

employee under section 105(1) of the *Forest Act*. The Government argues that the letter from the Regional Executive Director to Tahtsa, dated July 28, 2004, was simply an informal attempt by the Ministry to respond to the concerns raised by Tahtsa; not a review and re-determination of the June 10, 2004 SAN, as was the previous process authorized under the *Forest Act*. Consequently, there is no review or re-determination that is appealable in this case.

The Commission agrees that amendments to the *Forest Act* removed the jurisdiction of the Regional Executive Director (previously the Regional Manager) to review stumpage determinations. It therefore follows that the Regional Executive Director's reply to Tahtsa was not a re-determination authorized under the *Forest Act*, and, accordingly, not an appealable decision.

Nevertheless, it is apparent from Tahtsa's Notice of Appeal, and all subsequent submissions, that its sole concern is the stumpage rate contained in the SAN of June 10, 2004, and that the remedy it seeks is the rescission of that rate. Furthermore, the Commission notes that Tahtsa was not represented by legal counsel in this matter.

This jurisdictional issue was initially addressed by the Chair of the Commission in his August 19, 2004 letters to the parties acknowledging receipt of the Notice of Appeal. In that letter, the Chair accepted the appeal as an appeal against the SAN, and extended the appeal period pursuant to section 147(4) of the *Forest Act*. He states:

> The Commission finds that the July 28, 2004 letter from the Ministry of Forests does not constitute an appealable decision under the *Forest Act*. However, the Commission is accepting your appeal notice, in accordance with Section 147(4) of the *Forest Act*, as an appeal against the Stumpage Advisory Notice dated June 10, 2004.

Consequently, the Commission finds that it has jurisdiction over this appeal which is against the stumpage rate determination contained in the SAN dated June 10, 2004.

2. Whether there is a proper basis to vary the rate referred to in the SAN dated June 10, 2004

Tahtsa argues that certain considerations should have been taken into account in the SAN issued for R13752. While it cites a number of considerations, such as this being Tahtsa's first forest licence, it makes two primary points:

1. The Ministry should be bound by the stumpage rate quoted by a District employee in July 2003 as part of the "deal" Tahtsa had with the District.

2. The Ministry should produce SANs in a timely fashion. Had it done so before Tahtsa had harvested the right-of-way, Tahtsa could have avoided a financial loss, as well as the alleged damage to its business relationship.

Tahtsa cites no statutory provisions or sections of the IAM in support of these assertions.

With respect to its first point, Tahtsa states that it "realizes that according to the [Interior] Appraisal Manual there are only a few select people who have the authority to determine stumpage rates". Consequently, Tahtsa "did not ask Engineering to set a rate but to provide us with the stumpage rate, so that we could go ahead with this project." Tahtsa is of the view that Mr. Rensby, the District Engineering Officer, "would have had to ask someone qualified what the stumpage rate was on this road, we felt (and still feel) confident that Dan had gone through the correct channels to get us this rate."

The Government argues that the Ministry is not bound by the rate of stumpage communicated to Tahtsa by Mr. Rensby. Further, the Government argues that even if Mr. Rensby had obtained the rate from someone authorized to determine rates of stumpage, it is not binding. This is because that rate was not determined in accordance with the IAM. The Government further argues that even if the Commission did find that the communication was binding, it lacks the jurisdiction to give the relief requested. It points out that section 149(3) of the *Forest Act* requires the Commission to "apply the policies and procedures approved by the minister under section 105 that were in effect at the time of the initial determination." The only rate determined in accordance with the IAM was the rate contained in the June 10, 2004 SAN.

The Commission has considered whether the stumpage rate quoted by Mr. Rensby is binding on the Ministry. Section 105 of the *Forest Act* sets out the statutory requirements in relation to the stumpage payable to the Crown under agreements entered into under the *Forest Act*. A road permit is an agreement identified in section 12 (1)(k) of the *Forest Act*. Section 105 defines who must determine (redetermine or vary) rates of stumpage, when, and according to what policies and procedures.

The relevant policies and procedures are contained in the IAM, approved by the Minister. The British Columbia Court of Appeal found in *Re MacMillan Bloedel Ltd. and Appeal Board under the Forest Act et al.* (1984), 8 D.L.R. (4th) 33 that the IAM is a form of subordinate legislation akin to a regulation. In *Green Mountain Ranch Co. Ltd. and Government of British Columbia* (Appeal No. 2004-FA-005(a), May 27, 2004) (unreported) (hereinafter *Green Mountain*) the Commission concluded,

> Therefore, the IAM is legally binding on employees of the MOF [Ministry of Forests] when determining stumpage rates, as a form of subordinate legislation under the *Forest Act*.

The Commission finds that Mr. Rensby's communication does not satisfy the requirements of section 105 of the *Forest Act* and the provisions of the IAM. Specifically, and the parties agree, Mr. Rensby is not identified in the IAM as a person responsible for determining rates of stumpage. Also, it appears that the policies and procedures for determining the stumpage rate for road permits were not followed prior to Mr. Rensby's quote. Since Mr. Rensby's communication does not comply with the *Forest Act* or the IAM, it is not a valid stumpage rate determination. Conversely, there is no dispute that the June 4, 2004 SAN was made in accordance with section 105 of the *Forest Act* and the relevant provisions of the IAM. Hence, it is the official stumpage rate to be paid to the Crown.

Regarding the second point, Tahtsa argues that had the SAN been delivered in a reasonable period of time (i.e., prior to harvesting in November 2003), or had Mr. Rensby quoted the correct stumpage rate, Tahtsa would have negotiated a different arrangement.

In his letter to Tahtsa, the Regional Executive Director refers to "extenuating circumstances last winter" that had caused a delay in processing SANs. However, as Tahtsa correctly notes, its Road Permit Rate Request Form was submitted on July 4, 2003. It points out that it received its SAN for one of its cutting permits (CP 4) within six weeks of initiating the stumpage appraisal process. Furthermore, the stumpage rate determination for that cutting permit required an analysis of appraisal data, which is not the case for R13752. In contrast, the Road Permit Rate Request Form for R13752 was submitted on July 4, 2003, *before* the cutting permit request for CP 4, but the SAN for the road permit was not issued until June 10, 2004. The Ministry took more than 11 months to process the request.

The Commission has reviewed what appears to be the Road Permit Rate Request Form submitted to the District by Tahtsa. The Road Permit Mark number and the effective date for the permit were written in the appropriate spaces, but there are no signatures of approving officials at the district and regional levels, and the space provided for entering the "Rate" is blank. The completed form, with the necessary approval signatures and the declared rate was not entered as evidence. The Statutory Declaration of Ms. Robinson, the Revenue Officer Supervisor who issued the June 10, 2004 SAN, states that the road permit was issued on July 7, 2003. However, the permit itself was not submitted as evidence.

The Government argues that neither the *Forest Act* nor the IAM impose a statutory requirement on the Ministry to deliver a SAN within a specified length of time. The Regional Executive Director stated that "regional staff make every effort to deliver Stumpage Advisory Notices with in a reasonable time period, usually 10 working days from receipt of the correct appraisal data from the district." The Government argues that there may be an onus on the Ministry to be efficient and ensure that SANs are issued in a timely matter, but there is no legal or jurisdictional basis for the Commission to vary rates of stumpage if the Ministry fails to do so.

It is unclear on the evidence why the Ministry required more than 11 months to produce the SAN for R13752. Since the determination did not require an appraisal, the stumpage rate would be determined from information internal to the Ministry. Pursuant to section 6.3 of the IAM, stumpage rates for a road permit are determined using Ministry stumpage billing records. According to Ms. Robinson's Statutory Declaration, the billing records are obtained from the Revenue Branch for the previous fiscal year, in this case April 1, 2002 to March 31, 2003. Ms. Robinson states: "it is the Ministry's normal practice to re-calculate road permit rates on June 1 of each year based on this data." Her declaration also contains 45 pages of harvest data records from which the district average rate of $21.54 was determined. Where the applicant has no harvest history, she states that the rate of stumpage for the road permit is set at the district average rate.

It would appear from the evidence that the normal practice is for Revenue Branch to provide the regions with the harvest billing information soon after March 31. Ms. Robinson's statement indicates that, normally, the determinations would be available for road permits by June 1 of that same year. If this normal practice had occurred, Tahtsa would have had accurate information to make an informed choice. The Ministry's performance in this instance is clearly not timely.

Although the Regional Executive Director refers to extenuating circumstances that winter that resulted in delays to the issuance of SANs, Tahtsa did obtain the SAN for one of its cutting permits (CP 4) approximately six weeks following approval of that cutting permit. This indicates that the process for determining rates of stumpage was being performed efficiently in some cases at the same time that the Road Permit Rate Request Form was before the Ministry. At a minimum, if regional revenue staff generally try to issue SANs within 10 working days from receipt of correct appraisal data from the district, it would be helpful if there was some method of providing notification to licensees when lengthy delays are occurring or expected.

Although the Ministry did not provide the SAN in a timely manner, the Commission notes that receipt of the SAN dated August 21, 2003 for CP 4 should have alerted Tahtsa to the fact that it had not yet received a corresponding letter for R13752. The facsimile communication from Mr. Rensby is not in the form or substance of an official stumpage determination notice. Upon receipt of the rate determination letter for CP 4 in late August 2003, the Commission is of the view that it would have been prudent for Tahtsa to inquire as to the status of its Road Permit Rate Request, to obtain official confirmation of Mr. Rensby's quote.

In *Edward Rierson and Government of British Columbia* (Appeal No. 2002-FA-004, April 24, 2002) (unreported), the government noted that the *Forest Act* is silent on the issue of notification of newly determined stumpage rates. In *Green Mountain*, the company argued that the Ministry's policy regarding timeliness (policy No. 11.2 of the Ministry's Policy Manual) was incorporated by reference into the IAM, and is a policy referenced in section 105 of the *Forest Act*. The appellant, in that appeal, argued that since the Ministry failed to comply with its timeliness obligations, this breach of policy and statute was unfair and was an appealable error of law by the

Ministry that afforded the company a remedy. Tahtsa is advancing a similar argument in the present case.

In *Green Mountain*, the Commission did not accept the company's arguments. The Commission concluded that the Ministry's Policy Manual does not have the force of law. In the present appeal, no statutory provisions or sections of the IAM have been referenced in relation to a timeline for issuing SANs. The Commission has reviewed the legislation and the IAM and cannot find a statutory obligation requiring the Ministry to deliver a SAN by a certain date. Nevertheless, the Commission agrees with the comments of other Commission panels which encourage the Ministry to act in a timely manner in issuing stumpage determinations.

Although the Commission is of the view that Tahtsa may have been misled in this case, the Commission finds that the only valid stumpage rate for R13752 is the rate contained in the June 10, 2004 SAN. Further, the Commission finds that the Ministry's lack of timeliness in producing the SAN did not breach any legal requirement. The Commission finds no basis to rescind the rate of stumpage contained in the June 10, 2004 SAN.

In addition, if the need for variation of the stumpage rate had been established, the Commission is bound by section 149(3) of the *Forest Act* to apply the policies and procedures in place at the time of the original determination. Since the computation producing the June 10, 2004 rate is not in dispute, the Commission would find the equivalent rate applies.

3. Whether there is any other basis on which the Commission may remedy Tahtsa for its alleged losses.

Tahtsa is seeking monetary relief of $8,487.62, based on the differences between the initial stumpage rate quoted, the official rate, and the volume scaled. The Commission will address whether this remedy may be pursued without challenging the SAN.

The Government notes that the facts and arguments on which Tahtsa based its appeal is more in the nature of a claim for damages for negligent misstatement. The Government does not concede there is a sufficient basis to make this claim. However, it submits that the Commission lacks jurisdiction to consider such a claim or to order the Crown to compensate Tahtsa. The Commission agrees.

Thus, even if the evidence was such that the Commission could find that there had been a negligent misstatement or misrepresentation resulting in financial loss to Tahtsa, it has no jurisdiction to order such a remedy.

DECISION

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

The Commission confirms the rate of stumpage of $21.54 per cubic metre for R13752.

The appeal is dismissed.

Gary Robinson, Panel Chair
Forest Appeals Commission

January 6, 2005