Province of British Columbia

Forest Appeals Commission

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DECISION NO. 2006-FA-064(a)

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

BETWEEN:	James Wayne Dyck	**APPELLANT**
AND:	Government of British Columbia	**RESPONDENT**
BEFORE:	A Panel of the Forest Appeals Commission David Ormerod, Panel Chair	
PLACE:	Conducted by way of written submissions concluding on February 28, 2007	
APPEARING:	For the Appellant: Steve Law, RPF For the Respondent: Darcie Suntjens, Counsel	

APPEAL

This appeal is brought by James Wayne Dyck against the August 14, 2006, Stumpage Advisory Notice (the "SAN") issued for Cutting Permit D ("CP D") of Woodlot Licence 549 ("WL549").

The woodlot is located within the Central Cariboo Forest District, Southern Interior Forest Region ("SIFR"), of the Ministry of Forests and Range (the "Ministry").

The SAN for CP D set the stumpage rate for all coniferous sawlogs at $\$22.26/m^3$, for the period February 3, 2006 to March 31, 2006, under a "full appraisal", in accordance with section 4.3 of the Interior Appraisal Manual (the "IAM") in effect for the period.

This appeal is heard pursuant to Part 12, Division 2 of the *Forest Act*. The powers of the Commission on an appeal are set out in section 149(2) of the *Forest Act*:

149 (2) On an appeal, the commission may

(a) confirm, vary or rescind the determination, order or decision, or

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

The Appellant submits that the SIFR improperly disallowed the full extent of road development that the Appellant claimed as a cost for the appraisal of CP D. He asks the Commission to allow the road development cost as claimed.

The Government submits that the IAM was properly applied, and asks the Commission to dismiss the appeal.

BACKGROUND

Harvesting of Crown timber in British Columbia is authorized by cutting permits appurtenant to one of several forms of tenure. WL549 is a replaceable woodlot licence which allows the licensee to harvest timber from, and to manage, specified Crown and private land. WL549 is held by the Appellant, James Wayne Dyck, of 150 Mile House, BC.

A number of cutting permits have been issued for WL549. This is an appeal from a SAN issued for CP D on the grounds that a portion of the Appellant's development costs, 4.2 kilometres of road costs, were improperly disallowed by the SIFR. The SIFR disallowed the costs on the basis that these costs had been applied to a previous cutting permit, CP Y, issued for "blanket" salvage.

CP Y was issued on February 15, 2002, for a 5-year term. CP Y provided for the harvesting of small areas of beetle infested timber throughout the woodlot. It was appraised in 2004, using the "base permit" method. Under this method, cost data, intended to represent the averages for woodlots in the district, were used to appraise CP Y. This appraisal was not appealed, and was effective to July 31, 2005. CP Y was re-appraised effective August 1, 2005, using the new "billed data" system, specified by section 6.3.1 of the IAM. This appraisal was also not appealed.

CP D was issued to the Appellant, effective February 3, 2006. It is the appraisal for this cutting permit that is the subject of this appeal.

The Appellant applied to include 4.4 kilometres of road development costs within the appraisal of CP D. There is no dispute that some of this road was used to transport timber harvested under CP Y prior to July 31, 2005. There is also no dispute that the remaining 200 metres of new road had not been previously used to transport timber harvested under CP Y. When the Appellant applied to have this 4.4 kilometres included within the appraisal of CP D, he was, in essence, asking the SIFR to amortize the 4.4 kilometres against the volume to be removed from CP D. In his view, although part of the road had been used in relation to CP Y, it was not included in the appraisal of CP Y, because CP Y was appraised using the "base permit" method.

CP D was appraised on August 14, 2006, for the period February 3, 2006 to March 31, 2006 and the SAN was issued by Ken Chantler, Timber Pricing Co-ordinator for the SIFR. The Timber Pricing Co-ordinator used section 4.3 of the IAM to determine the road development costs that would be applied to the appraisal of CP D. The relevant portions of section 4.3 are as follows:

> **4.3 Development**
>
> Development costs are estimated for each of two categories:
>
> 1. New construction.
>
> 2. Reconstruction and replacement.
>
> Throughout this section the term "roads" includes roads, drainage and other pertinent structures.
>
> …
>
> **Tributary Volume**
>
> The costs for development works may only be allocated to the first tributary cutting authority, subject to section 4.3.1.1.5. A cutting authority is considered to be tributary:
>
> 1. If timber from the cutting authority is appraised over the development works in question, or
>
> 2. If the development works occur on a main service road. ….
>
> [emphasis added]

Section 1.3 of the IAM, effective February 3, 2006, defined “cutting authority” to include a cutting permit issued under a licence.

The Timber Pricing Co-ordinator reduced the applied for cost of 4.4 kilometers of road on the grounds that 4.2 kilometers had previously been built and used to service CP Y. The Government takes the position that CP Y is properly treated as the “first tributary cutting authority”, and the development costs of the disputed 4.2 kilometers of road were written off under the appraisal of CP Y. The Appellant argues that because CP Y was appraised under the base permit method, it does not account for the costs of these 4.2 kilometers of road. This disagreement is at the heart of this appeal.

The Timber Pricing Co-ordinator based the road development cost for CP D on 200 metres of road (200 m x 5.958 = 1,192.60) in the Logging and Silviculture Cost Estimate, for a total logging cost of $44.88 m^3. The total logging cost of $44.88/$m^3$ was used in the calculation of the Total Stumpage Rate.

In his submissions on this appeal the Appellant states that:

- The “base permit” appraisal of CP Y does not “fully appraise” the permit – it does not directly recognize the roads constructed in the appraisal. Subsequent amendments to the IAM (Amendment No. 13), have clarified the term “fully appraised” to allow roads to be expensed

against fully appraised permits rather than others that are not fully appraised, such as salvage permits.

- The woodlot was developed under a "total chance plan" so that roads constructed could be utilized for future harvesting. As blanket salvage permits were intended only for small volume salvage (500-2,000 m^3), there cannot be any significant cost recovery. For instance, if the blanket salvage permit allowed for \$0.50/m^3 and 500 m^3 was harvested, the licence would recover \$250 towards the cost of road building. A total of \$1,192.60 or \$0.09/m^3 was allowed in the appraisal for CP D.

- The appraisals of both CP Y and CP D are inconsistent and inequitable.

- More recent changes to the IAM confirm the inconsistency and inequity in the IAM as it applies in this appeal.

The Appellant asks the Commission to include the full 4.4 kilometers of road construction costs in the appraisal of CP D, so that an approximate reduction in stumpage of \$1.87/m^3 can be realized.

In response, the Government submits that a proper interpretation of the IAM supports a finding that (a) road development costs should only be deducted from stumpage once and (b) that it should be allocated to the first tributary cutting authority. The Government submits that accepting the Appellant's argument would result in a double deduction of the road development costs; they would have been deducted first as the average forestry costs under the 2004 CP Y, and they would be deducted again under the 2006 CP D.

More specifically, the Government submits that:

- The Appellant's submissions on "fully appraised" permits, "total chance plan", and inconsistent application of appraisal policy are not relevant to the appeal.

- CP Y, as the first tributary cutting authority, is the only permit that the cost of the disputed 4.2 kilometers can be allocated to, and CP D is the first tributary permit for the remaining 200 meters of constructed road.

- The average road development costs applied in the February 2004 "base permit" appraisal of CP Y were proper and adequate consideration of the development costs for the disputed 4.2 kilometers of road. CP Y "was the tributary cutting authority for the disputed 4.2 kilometres of road development works because timber from the cutting authority CP Y was appraised over the 4.2 kilometers of road development works on February 15, 2004".

- Although the Appellant is correct that road construction costs were not explicitly, or "directly recognized" in the base permit appraisal of the salvage permit, the base permit calculation method included average transportation costs, which include road development, from full appraised cutting permits in the forest district. Therefore, the approximate costs for the development of 4.2 kilometres of road were considered in the 2004 reappraisal rates.

The Government requests that the Commission dismiss the appeal.

ISSUES

The main issue in this appeal is whether 4.2 kilometres of road used to transport timber harvested under CP Y can be allocated as a road development cost for CP D. To determine this issue, two sub issues must first be addressed:

1. Whether the IAM, as applied to the appraisal of CP Y and CP D, can fully account for the road development costs over the tributary cutting permits.

2. Whether CP Y is, according to the IAM, "the first tributary cutting authority".

RELEVANT LEGISLATION

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 149(2) 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

...

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

…

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.

DISCUSSION AND ANALYSIS

1. Whether the IAM, as applied to the appraisal of CP Y and CP D, can fully account for the road development costs over the tributary cutting permits

Section 4.3 of the IAM contains provisions for the write-off of road development costs over cutting permits that are tributary to the roads. The intent of section 4.3 is clear to the Commission. The write-off of costs for road development is to be applied incrementally as the cutting permits are granted along the road system being developed. This is done by applying the costs of the first section of road to the first tributary cutting permit, the next section to the next tributary cutting permit (which becomes the first tributary of the newly developed section), and so on. By this means, all of the road development costs are written off against the timber to be harvested by all of the cutting permits that are serviced by the newly constructed roads, and there is no double deduction.

As noted by the Appellant, the "base permit" method of appraisal does not fit perfectly into appraisals covered by section 4.3 (full appraisals). This is because the "base permit" method does not reflect the licensee's full appraisal development costs; rather, it applies district averages to the licensee's appraisal. As such, the terrain and other physical conditions of the forest area from which the base permit is drawn may not be representative of the terrain and physical conditions of the actual area being appraised. Further, with blanket salvage cutting permits, the location of the damaged timber is indeterminate. These permits cover small patches of beetle infested wood throughout the woodlot. Therefore, it is not possible to unequivocally say what part of the blanket salvage harvesting operations is "first tributary" to a particular section of road.

The Commission uses the description "licensee's full appraisal development costs" in the sense of the costs that would be allowed by the IAM if all cutting permits that were tributary to road development were subject to "full appraisal" as it is described in the IAM. In the present appeal, CP D is subject to full appraisal, but CP Y is not, as it is based on "base permit" cost allowances.

For all of these reasons, applying "base permit" data to section 4.3 of the IAM results in a mixture of concepts (a district "average" on the one hand, and the licensee's full appraisal development costs on the other), and does not reflect the intent of section 4.3 which is to incrementally write-off the licensee's appraisal costs for road development along the road system being developed.

The only way that the intent of section 4.3 can be reasonably satisfied when using base permit data is to deem a proportion of the total blanket salvage cutting permit volume as "first tributary" to a particular section of the new road system in such a way that the base permit data contributes to the overall road development costs. Specifically, the per m^3 cost for all cutting permits combined (both non-blanket and blanket) should be reflective of what are reasonable costs, under the IAM, for developing the particular road system that jointly services these cutting permits.

Three versions of the IAM are relevant to this appeal:

- CP Y, the blanket salvage cutting permit, was appraised according to the 2002 IAM Amendment No. 8, effective November 1, 2003, as it set stumpage rates effective April 1, 2004. This appraisal was subsequently extended to July 31, 2005.

- CP Y was re-appraised in 2005, for stumpage rates effective August 1, in accordance with the 2004 IAM Amendment No. 4.

- CP D was appraised effective February 3, 2006, in accordance with the 2004 IAM Amendment No. 10.

For the 2004 appraisal of CP Y, section 2.3.2(2) of the IAM specified that the relevant procedure was that provided by the Director of Revenue Branch. The Commission has not been provided with any applicable directives from the Director. However, there is no dispute that the "base permit" method is the method which should apply to this 2004 appraisal of CP Y. It is only the results of the application of the method that are in dispute, in as much as they affect the appraisal of CP D that is under appeal.

The base permit data was applied to CP Y. This data amortized $1,634.50 for 0.5 kilometers of road over 4,935 m^3; or, $\$0.33/m^3$. In the disputed SAN for CP D, the 200 meters of road cost allowance is $1,192.60, or $\$0.09/m^3$ for the appraised 13,364 m^3.

If the Appellant were to receive consideration for 4.4 kilometers of road under the appraisal for CP D, the amortized allowance for the appraised would be $\$1.96/m^3$.

The total amount of volume available for harvest under CP Y has not been provided to the Commission. Therefore, the overall appraisal cost per m^3 of the 4.4 kilometers of road that jointly service CP Y and CP D cannot be determined.

Consequently, the Commission can make no finding as to whether or not the costs of the 4.4 kilometers of road can be fully accounted for by the stumpage appraisals of CPs Y and D. It is, therefore, not possible to determine whether more than 200 meters of road cost should be allowed in the appraisal of CP D, in order that the costs of the total 4.4 kilometers be fully accounted for by all the timber that will be harvested from CP Y and CP D. However, the SIFR does have the information that is required to make this determination, and they should do so.

Although this finding alone is sufficient to decide this appeal, the Commission has considered the second issue.

2. Whether CP Y is, according to the IAM, "the first tributary cutting authority".

The Appellant submits that the SIFR incorrectly interpreted the IAM in issuing the SAN for CP D. The effective date of appraisal for the SAN under dispute is February 3, 2006; consequently, the 2004 IAM, as amended by Amendment No. 10, was in effect. There is no dispute that this is the version of the IAM that was used in this case.

Under section 4.3 of the IAM, new construction costs are allocated to "the first tributary cutting authority, subject to section 4.3.1.1.5", which provides for a written agreement to distribute costs to two or more tributary authorities. Section 4.3.1.1.5 states as follows:

4.3.1.1.5 Extended Road Amortization

> For new appraisals where the development cost estimate for roads accessing more than one tributary cutting authority exceeds $4.00 per cubic metre, a written agreement may be made between the licensee and the regional manager, which distributes a portion of the development cost estimate to two or more tributary cutting authorities.

There is no evidence that such a written agreement exists in this case. In addition, a written agreement can only be entered into if the road development costs exceed $\$4/m^3$. This condition apparently has not been met in this case.

Accordingly, the Commission finds that the question is whether CP Y is the "first tributary cutting authority" and whether the 4.2 kilometres of new road costs were, as the Government submits, included within the appraisal of CP Y. To allow the same costs to be applied twice would be inconsistent with the "least cost estimate" approach of the IAM, as stated in section 4.1 of the IAM, as well as the mechanism of incremental write-off of road development costs that results from the application of section 4.3.

Section 4.1 of the IAM states in part:

> The timber pricing co-ordinator must estimate development, harvesting and transportation costs for a cutting authority area using the information that the timber pricing co-ordinator has at the time the estimate is made in a manner that will produce the least total development, harvesting and transportation cost estimate.

The Government argues that CP Y is the first tributary cutting authority for the 4.2 kilometers of road cost that the Appellant seeks to apply in the appraisal of CP D. The Appellant does not directly address this argument. The Commission notes that CP Y is for blanket salvage, which by definition allows for the harvesting of damaged timber as it is found to occur within the permit area, and not from pre-planned contiguous regular harvesting blocks. Consequently, there remains some doubt that CP Y can be unequivocally categorized as the "first tributary cutting authority". This difficulty has been discussed under the first question posed in this analysis.

The Government further claims that the "base permit" method of appraising CP Y fairly allocates the costs of the disputed 4.2 kilometers to CP Y. The Appellant objects to this on the grounds that the base permit used for the appraisal of CP Y does not fully "write-off" these costs. He submits that the base permit method is not a "fully appraised" permit. Rather,

> [a] base permit is selected based on the same leading species and depending on the timing and availability of existing permits, there can be limited choices that are deemed representative. This permit is simply borrowed data, which generates a stumpage rate. Any roads built under a salvage permit are not directly recognized in the appraisal. They are built at the licensees cost with no recognition other than the blanket salvage permit may have had some road allowance within it.

Therefore, the Appellant is of the view that the road costs were not actually applied to CP Y, and should be "written off" in the appraisal of CP D. The Government submits that the IAM is not intended to recognize the "actual costs" to the licensee. Instead, it submits that the IAM allows certain costs on a fixed or formulaic basis. The Government submits that "the 'base permit' method was the scheme applied under the IAM on February 15, 2004 to allow certain costs, not the Appellant's actual costs". However, the Commission finds that this line of argument is not supported by the mechanism inherent to section 4.3 of the IAM, and is not persuaded by the Government's position.

The Commission has some concerns with the interpretation of the Government. The Commission acknowledges that, in some instances, the IAM prevents a licensee's full appraisal development costs from being considered in an appraisal. However, in this case, it was not the Appellant's full appraisal development costs that were allocated in the appraisal of CP Y, it was a figure derived from a "base permit" appraisal that the SIFR had deemed representative for application in the

appraisal of blanket salvage cutting permits. If the base permit appraisal of CP Y does not adequately reflect, or take into account, the Appellant's full appraisal road development costs, then the Commission is of the view that it cannot be considered the "first tributary cutting authority" for the purposes of section 4.3, without some further adjustment.

The difficult for the Commission is that it cannot determine the merit of the Appellant's claim because it does not know the combined total volume of timber to be harvested under CP Y and CP D. Consequently, the appraisal of CP D should be returned to the Timber Pricing Co-ordinator so that it can be determined what the overall m^3 allowance of road development costs will be for the total amount of timber to be harvested from CP Y and CP D, in combination.

This raises the question, "does the Timber Pricing Co-ordinator have the discretion to adjust the length of road in determining the development cost allowed in the appraisal, from that which was submitted by the licensee?" In a previous decision of the Commission, *Weyerhaueser vs. the Government of British Columbia* (Decision No. 2005-FA-11(a)/112(a)/113(a), April 11, 2006) (unreported), the Panel found that he does. The Panel states at page 16:

> …timber pricing co-ordinators have discretion under section 4.1 of the IAM to "estimate" development costs, and their discretion is informed by the least cost principle stated at the beginning of section 4.1. The Panel finds that, if the Minister had intended that timber pricing co-ordinators should simply apply the data provided by licensees … co-ordinators would not be directed in section 4.1 to "estimate" development costs ….

In relation to CP D of WL549, the Timber Pricing Co-ordinator determined that 4.2 kilometers of road development cost, out of the total 4.4 kilometers applied for, had already been accounted for in the appraisal of CP Y. The Appellant did not appeal the previous stumpage rate for CP Y and the Commission is aware that it has no jurisdiction over those previous appraisals. However, the difficulty in this case is that the appraisal of the SAN under appeal is based upon the belief that 4.2 kilometres of road development cost was included in that previous appraisal, and that it is the "first tributary cutting authority" even though this earlier appraisal used base permit data, which has not been shown to be directly comparable and applicable to the terrain and other physical conditions under which the roads for CP Y and CP D had to be developed. There is simply no evidence before the Commission which supports the critical assumption that the base permit road development cost data can be applied, without also adjusting the proportion of the road development that is deemed to be first tributary to CP Y.

Accordingly, on the main issue of whether 4.2 kilometres of road used to transport timber harvested under CP Y can be allocated as a road development cost for CP D, the Commission finds that it cannot be allocated to CP D if it has, in fact, already been allocated under CP Y. However, the Commission cannot confirm, on the evidence provided, whether or not this is what has occurred.

As the Timber Pricing Co-ordinator has the discretion to vary from the data submitted by the Appellant, the Commission has decided that the reasonable course of action in this case is to send this matter back to the Timber Pricing Co-ordinator for his review and further consideration of this matter.

DECISION

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

For the reasons provided above, the Commission directs that the Timber Pricing Co-ordinator for the SIFR reconsider the appraisal of CP D. In doing so, he is directed to confirm that the road construction costs to be allocated between CP Y and CP D are equitable and consistent with the intent of section 4.3 of the IAM, so that the incremental allowance of the costs of the road development for CP Y and CP D fully accounts for the overall full appraisal development cost, without double counting.

The appeal is allowed.

"David Ormerod"

David Ormerod, Panel Chair
Forest Appeals Commission

April 11, 2007