Forest Appeals Commission

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DECISION NOS. 2017-FA-001(a), 002(a), 003(a), 004(a), 005(a), 006(a), 007(a) and 008(a) [Group File 2017-FA-G01]

In the matter of eight appeals under section 147 of the *Forest Act*, R.S.B.C. 1996, c. 157

BETWEEN:	Government of British Columbia	**APPLICANT (RESPONDENT)**
AND:	Canadian Forest Products Ltd.	**APPELLANT**
BEFORE:	A Panel of the Forest Appeals Commission: Alan Andison, Panel Chair	
DATE:	Conducted by way of written submissions concluding on May 16, 2017	
APPEARING:	For the Appellant:	Mark S. Oulton, Counsel Trevor J.S. Bant, Counsel
	For the Respondent:	Karen Horsman, Q.C., Counsel Sarah Bevan, Counsel

PRELIMINARY APPLICATIONS

APPLICATIONS

[1] The Government of British Columbia (the "Government") applies for an order summarily dismissing eight appeals filed by Canadian Forest Products Ltd. ("Canfor"). The applications are made pursuant to subsections 31(1)(a), (c), and (g) of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 (the "*ATA*"), which state as follows:

31(1) At any time after an [appeal] is filed, the tribunal may dismiss all or part of it if the tribunal determines that any of the following apply:

(a) the [appeal] is not within the jurisdiction of the tribunal;

…

(c) the [appeal] … gives rise to an abuse of process;

…

(g) the substance of the [appeal] has been appropriately dealt with in another proceeding.

[2] The Government submits that Canfor's appeals ought to be summarily dismissed on the grounds that:

- the appeals are beyond the jurisdiction of the Forest Appeals Commission (the "Commission") because the substance of the appeals was pre-adjudicated by the Minister's delegate in a proceeding under section 105.2 of the *Forest Act*, and the delegate's decision is not appealable to the Commission;
- the substance of the appeals have been "appropriately dealt with" in the proceeding before the Minister's delegate, as well as in a 2014-2015 appeal proceeding before the Commission; and/or
- the present appeals constitute a relitigating of matters that either were, or could have been, adjudicated in the prior proceedings and thus constitute an abuse of process.

[3] The Government's applications to summarily dismiss the appeals have been conducted by way of written submissions.

[4] Canfor argues that the applications ought to be denied, and its appeals allowed to proceed to a hearing on the merits.

BACKGROUND

[5] Canfor's appeals relate to cutting permits C06, C07, C09, C14, C15, D53, D59 and D66, under Canfor's forest licence A15384. These cutting permits are located in the general vicinity of Williston Lake, which is within Supply Block M of the Mackenzie Timber Supply Area, in the Mackenzie Forest District.

[6] The decisions under appeal are eight stumpage rate redeterminations issued by an employee of the Ministry of Forests, Lands and Natural Resource Operations (the "Ministry") on February 8 and 9, 2017 for the above-noted cutting permits.

[7] The original stumpage rate determinations for the cutting permits were issued years earlier, in 2012 and 2013. Each of Canfor's original stumpage determinations were based upon "direct haul" from the cutting authority to the Mackenzie Point of Appraisal, as defined in the Interior Appraisal Manual (the "IAM"). Each of the eight original stumpage rate determinations were subject to a quarterly adjustment. Canfor paid its stumpage based upon the original determined rates.

[8] However, in 2017, Greg Rawling, acting as the Minister's delegate, directed that the original stumpage rates be redetermined. This direction was made pursuant to section 105.2 of the *Forest Act* (the "section 105.2 direction"). The redetermined rates are higher than the original rates; in some cases, more than double. These higher rates are what Canfor has appealed.

[9] To understand why the rates were redetermined, a review of the section 105.2 process is required.

The section 105.2 process before Mr. Rawling

[10] In the fall of 2013, Ministry employees became aware that a number of appraisal data submissions from licensees in the Mackenzie District had included transportation-related variables based on direct haul from cutting authorities to the Mackenzie Point of Appraisal, while omitting consideration of the higher stumpage (i.e., notional lower-cost) transportation route involving water transportation from the Manson log dump on Williston Lake (the "Manson Site") to the Mackenzie Point of Appraisal. This had not been caught by the Ministry during the District-level review of the submitted appraisal data.

[11] Some of the appraisal data submissions in question had already resulted in completed stumpage rate determinations, such as the eight original stumpage rate determinations issued to Canfor.

[12] In a letter dated January 22, 2014, Mr. Rawling advised Canfor that the District Manager had requested a review of appraisal data submissions for the possible omission of water transport routes from the Manson and Nation dump sites on the Williston Lake Reservoir. He advised that the cycle time to the closest water transportation site on the Williston Lake Reservoir would be calculated for all fully appraised harvest authorities issued post July 1, 2010. A projected initial stumpage rate and impact to stumpage would be calculated. He stated that this information would then be used to develop a list of affected cutting authorities where the stumpage rate could be redetermined under section 105.2 of the *Forest Act*. Section 105.2 states as follows:

Redetermination of stumpage rate at direction of minister

105.2(1) In this section, **"policies and procedures"** means the policies and procedures referred to in section 105(1)(c). [The applicable policies and procedures are found in the IAM effective July 1, 2012 and July 1, 2013.]

(2) The minister may direct under this subsection that a stumpage rate be redetermined or varied under section 105(1) if the minister is of the opinion that the stumpage rate was determined, redetermined or varied under that section based on information, submitted by or on behalf of the holder of an agreement, to which one or both of the following apply:

(a) at the time the information was submitted, the information was incomplete or inaccurate;

(b) at the time the information was submitted, the information did not meet the requirements of the policies and procedures.

(3) The minister may direct under this subsection that a stumpage rate be redetermined or varied under section 105(1) if the minister is of the opinion that both of the following apply:

(a) after the stumpage rate was determined, redetermined or varied under section 105(1), the minister became aware of information that

(i) existed but was not taken into account when the stumpage rate was determined, redetermined or varied, or

(ii) did not exist when the stumpage rate was determined, redetermined or varied;

(b) a redetermination or variation that takes into account the information described in paragraph (a) of this subsection is likely to result in a stumpage rate that is different from the earlier determined, redetermined or varied stumpage rate.

(4) A direction of the minister under this section may be made at any time,

(a) whether the earlier determined, redetermined or varied stumpage rate is still in effect or has expired, and

(b) whether before or after stumpage is paid in respect of the timber to which the stumpage rate relates.

(5) If the minister directs under this section that an earlier determined, redetermined or varied stumpage rate be redetermined or varied under section 105(1),

(a) in the case of a direction issued under subsection (2) of this section, the redetermination or variation must take into account the information that is necessary to completely and accurately meet the requirements of the policies and procedures,

(b) in the case of a direction issued under subsection (3) of this section, the redetermination or variation must take into account the information described in paragraph (a) of that subsection, and

(c) the redetermination or variation must be made in accordance with the policies and procedures that were in effect at the time the earlier stumpage rate was determined, redetermined or varied.

(6) A stumpage rate that, at the direction of the minister under this section, is redetermined or varied under section 105(1)

(a) is deemed to have taken effect on the day after the date on which the earlier determined, redetermined or varied stumpage rate took effect, or

(b) takes effect on the day after the intended effective date for the earlier determined, redetermined or varied stumpage rate, if that earlier rate is not in effect when the redetermination or variation is made.

[13] In his January 22, 2014 letter, Mr. Rawling also advised Canfor that, if it is on the list of cutting authorities whose previous rates may be redetermined, it will be notified and given an opportunity to be heard. The information presented at the opportunity to be heard would be considered in any section 105.2 decision on whether to direct a redetermination of the stumpage rate, and for which cutting authorities.

[14] It is unlikely that Mr. Rawling's letter regarding the use of the Manson Site came as a surprise to Canfor. By that time, Canfor had already received, and appealed, stumpage rates for nine different cutting permits under the same forest licence that had been appraised by the Ministry on the basis of water transportation

from the Manson Site. Canfor had appealed those stumpage rates to the Commission on the grounds that the Manson Site was not a "suitable" transportation route. Its appeals were heard in an eight-day oral hearing.

[15] On September 8, 2015, the Commission released its decision in *Canadian Forest Products Ltd. v. Government of British Columbia* (Decision Nos. 2014-FA-001(a) to 009(a)) [*Canfor#1*]. The Commission held that the Manson Site was a suitable transportation route, and dismissed Canfor's appeals.

[16] Canfor then appealed the Commission's decision to the BC Supreme Court. On November 25, 2016, the Court confirmed the Commission's decision and dismissed Canfor's appeal (*Canadian Forest Products Ltd. v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2016 BCSC 2202).

[17] While Canfor's "suitability" appeals regarding the nine cutting permits was in process, no further activity took place in relation to the possibility of a section 105.2 process for the subject cutting permits. However, the possibility of a section 105.2 process became a reality on August 4, 2016, when Mr. Rawling advised Canfor that the timber pricing staff had identified Canfor's original stumpage determinations for the subject cutting permits as having been determined on the basis of appraisal transportation routes that were inconsistent with the highest stumpage principle in section 3.1 of the IAM; specifically, the stumpage rates had been determined on the basis of direct haul but water transportation on Williston Lake from the Manson Site would have produced the highest stumpage rate in each case.[1]

[18] In his August 4th letter, Mr. Rawling explained that, based upon this information, but subject to consideration of Canfor's submissions during an opportunity to be heard, he could direct a redetermination of Canfor's rates under either or both of subsections 105.2(2) and (3) of the *Forest Act*. He states that information regarding the Manson Site and its potential for use as part of a water transportation route in 2012 and 2013 was either missing from Canfor's data submission, or "did not exist". Mr. Rawling then offered Canfor an opportunity to provide written submissions regarding the proposed redeterminations.

[19] Canfor provided detailed arguments against a section 105.2 redetermination of the original stumpage rates, taking issue with the application of the highest stumpage principle to the transportation variable, and with the applicability of section 3.6.1 of the IAM to the facts. [Section 3.6.1 governs water transportation.]

[20] On February 6, 2017, Mr. Rawling issued a six-page decision to Canfor in which he addressed each of Canfor's arguments. Ultimately, he issued the section 105.2 direction that the stumpage rates for each of the eight cutting permits be redetermined. Under the heading "Direction under section 105.2 of the *Forest Act*", Mr. Rawling states:

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[1] At this time, only five of the cutting permits (C06, C07, C09, C14 and C15) were identified for possible redetermination at this time. Mr. Rawlings advised that he was deferring consideration of the other three (D53, D59 and D66) because they were issued on or after July 1, 2013. However, the latter three were added to the section 105.2 process in December, 2016.

> Based on all the information provided to me I have made a decision to direct that the stumpage rates be re-determined for Cutting Permits C06, C07, C09, C14, C15, D53, D59 and D66. The change to the appraisal variables that I have determined is necessary to completely and accurately meet the requirements of the IAM in effect at the relevant time is use of transportation-related variables based on water transportation from the Manson Site, in place of variables based on direct haul. In accordance with section 105.2(6), the re-determined stumpage rates will be effective as of the day after the date when original appraisals took effect.
>
> No appeal or review of this decision is available under the *Forest Act*. However, Canfor has the option to bring an application for judicial review under the *Judicial Review Procedure Act*.

The 2017 redeterminations

[21] On February 8 and 9, 2017, a Ministry employee issued the eight redeterminations under appeal pursuant to his authority under section 105(1) of the *Water Act*, including stumpage rate notices for the annual adjustments made on July 1 each year after the effective date of each cutting permit. Each of the redeterminations, including the quarterly and annual adjustments applicable to each redetermination, appraises Canfor based on water transportation across Williston Lake using the Manson Site as the appraisal place of unloading. No reasons were given by the Ministry employee as to the factors or information that he or she considered when redetermining the rates.

The Appeals

[22] On March 1, 2017, Canfor appealed the eight stumpage rate redeterminations "collectively" with the quarterly and annual adjustments applicable to those redetermined stumpage rates.

[23] The eight cutting authorities subject to the redeterminations, the original and redetermined stumpage rates, and the appeal file numbers given to each appeal, are set out in the following table:

APPEAL NO.	CUTTING PERMIT	ORIGINAL RATE (based on direct haul)	REDETERMINED RATE (based on water transportation)
2017-FA-001	C09	$0.60	$1.38
2017-FA-002	C15	$1.40	$2.00
2017-FA-003	C06	$0.80	$2.46
2017-FA-004	C14	$6.18	$6.59

2017-FA-005	C07	$6.08	$6.68
2017-FA-006	D53	$6.38	$6.84
2017-FA-007	D59	$9.11	$9.40
2017-FA-008	D66	$8.78	$9.09

[24] The Commission joined the appeals for the purposes of a hearing under group file no. 2017-FA-G01**.**

[25] Canfor appealed the redetermined rates on the ground that all of the redeterminations (and quarterly and annual adjustments based on those redeterminations) are in error. In particular, it states that appraising each of the cutting authorities via the Manson Site is inconsistent with the plain language of section 3.6.1 of the IAM, which expressly provides that water transportation only occurs "when logs must be transported by water between the cutting authority and the point of appraisal". Canfor submits that there is no evidentiary basis to support an assertion that timber from any of the cutting authorities **must** be transported by water. Although Canfor did not identify any other specific ground for appeal, it left the door open for other grounds by stating that the redeterminations are in error "for several reasons, including" that it is inconsistent with section 3.6.1 of the IAM.

[26] Canfor asks the Commission to rescind the redeterminations and refer the matters back to the Ministry with directions to restore the original stumpage rates payable for the timber harvested under each of the cutting permits, subject to the applicable quarterly adjustments.

The Application to Dismiss

[27] The Government submits that the present appeals are the "fourth installment" of litigation on this Manson Site transportation issue, which began with the appeals to the Commission in relation to different cutting permits, followed by an appeal of the Commission's decision to the BC Supreme Court, and then a hearing process before Mr. Rawling under section 105.2 of the *Forest Act* on the present cutting permits. The Government applies for an order to summarily dismiss the eight appeals on the following grounds:

a. The Government submits that, while the appeals appear to challenge stumpage rate redeterminations made under section 105(1) of the *Forest Act*, in fact, Canfor's appeals are against the change from direct haul to water transportation, which was required by the section 105.2 direction. Thus, in substance, the appeals challenge the decision-making of the Minister's delegate under section 105.2 of the *Forest Act* and, accordingly, are not within the jurisdiction of the Commission to adjudicate. Rather, the Government submits that a challenge to a section 105.2 direction is properly brought by way of judicial review, not an appeal to the Commission.

b. The substance of the appeals was appropriately dealt with in other proceedings; specifically,

   i. the written hearing process before the Minister's delegate under section 105.2 of the *Forest Act*; and

   ii. the nine previous appeals by Canfor against stumpage rate determinations involving different cutting authorities under the same forest licence, which were dismissed by the Commission in *Canfor#1*, and affirmed by the BC Supreme Court.

c. The appeals amount to an abuse of process, as they are a relitigation of issues that were, or could have been, addressed in the previous proceedings.

[28] Canfor disagrees. It submits that, for the Commission to summarily dismiss its appeals before a hearing on the merits, the Commission must be satisfied that it is "plain and obvious" that the appeals are beyond the Commission's jurisdiction, that they are an abuse of process, or that they have been previously dealt with in another proceeding. Applying this test, Canfor submits that the Commission has jurisdiction over the redetermination under section 146 of the *Forest Act*, that it is not challenging Mr. Rawling's direction, that it is not relitigating the issues, and that the substance of its appeals have not been appropriately dealt with in another proceeding.

[29] Canfor submits that its appeals should proceed to a hearing on the merits.

RELEVANT LEGSIALTION

[30] The redetermined stumpage rates were issued by an employee of the Ministry pursuant to section 105(1) of the *Forest Act*. That section states as follows:

Stumpage rate determined

105(1) Subject to the regulations made under subsection (6) and orders under subsection (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 by the minister.

[31] The decisions that may be appealed to the Commission are set out in section 146 of the *Forest Act* as follows:

Determinations that may be appealed

146(1) Subject to subsection (3), an appeal may be made to the Forest Appeals Commission from a determination, order or decision that was the subject of a review required under Division 1 of this Part.

(2) An appeal may be made to the Forest Appeals Commission from

(a) a determination, order or decision of the chief forester, under section 60.6, 68, 70(2) or 112(1),

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

(c) an order of the minister under section 75.95(2).

…

(6) For the purpose of subsection (2), a redetermination or variation of stumpage rates under section 105(1) is considered to be a determination.

[Emphasis added]

ISSUES

[32] The Panel has framed the issues to be decided as follows:

1. What is the test to be applied to an application for a summary dismissal of all or part of an appeal under section 31 of the *ATA*?
2. Are the appeals within the Commission's jurisdiction?
3. Are Canfor's appeals, in whole or in part, an impermissible relitigation or "serial litigation" of issues previously decided in another proceeding and, if so, does this constitute an abuse of process in the circumstances?

DISCUSSION AND ANALYSIS

1. What is the test to be applied to an application for a summary dismissal of all or part of an appeal under section 31 of the *ATA*?

Canfor's arguments

[33] Canfor submits that the Commission should exercise its power to summarily dismiss an appeal under section 31(1) of the *ATA* "only when it is 'plain and obvious' that the Commission lacks jurisdiction or the appeal is an abuse of process, as the case may be." It submits that the superior courts do not summarily dismiss a proceeding as an abuse of process unless it is "plain and obvious" that the proceeding is abusive, and that the party "bears a heavy onus" because "only egregious conduct by a party will warrant the summary dismissal of any action". Canfor submits that this test ought to be adopted by the Commission.

[34] In support, Canfor notes that another tribunal, the BC Environmental Appeal Board, applied the "plain and obvious" test to section 31(1) of the *ATA* where

summary dismissal was sought on the basis of a lack of jurisdiction (*Cobble Hill Holdings Ltd. v. Director, Environmental Management Act* (2013-EMA-017(a), 019(b), 020(a) and 021(a), February 5, 2014) [Cobble Hill]).

[35] Canfor submits that the Commission should not summarily dismiss its appeals as it is not plain and obvious that the Commission lacks jurisdiction, or the appeals are an abuse of process.

The Government's arguments

[36] The Government made lengthy submissions on this issue, and provided numerous authorities. It discussed the underlying rationale and function of the plain and obvious test in the civil procedure context where it was developed, and urged the Commission to reject its use in the context of these applications.

[37] The Government submits that the "plain and obvious" test was developed by the court primarily in the context of motions to strike pleadings on the basis that they disclose no reasonable claim. It submits that the power of summary dismissal under section 31 of the *ATA* is not analogous to the court's power to strike pleadings, except to the limited extent of the ground specified in subsection 31(1)(f) of the *ATA* (i.e., "there is no reasonable prospect the application will succeed"). In support, the Government refers to decisions of the BC Human Rights Tribunal and the BC Employment Standards Tribunal, which have summary dismissal powers similar to those set out in section 31(1) of the *ATA*. The Government states as follows at paragraph 24 of its reply submissions:

> In the voluminous body of decision-making in which the Human Rights Tribunal and Employment Standards Tribunal have applied these summary dismissal powers, there has been no superimposition of a 'plain and obvious' standard on the grounds specified in the sections.

[38] The Government also refers to the Supreme Court of Canada's decision in *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52 [*Figliola*], in which the Court considered whether the BC Human Rights Tribunal ought to have dismissed a complaint because the substance of that complaint had already been "appropriately dealt with in a proceeding" before the BC Workers' Compensation Board – Review Division. The Government notes that, "at no point did the Court suggest that the application of a 'plain and obvious' threshold was required in the Tribunal's consideration of that ground for summary dismissal."

[39] Regarding abuse of process, the Government submits that Canfor is incorrect in asserting that a court will only dismiss a claim as an abuse of process when it is plain and obvious that the proceeding is abusive. Rather, the Government argues that the question to be answered by the Commission is whether the record is sufficiently clear to determine whether any of the grounds for summary dismissal under section 31 of the *ATA*, including abuse of process, are made out. It relies upon the Alberta Court of Appeal's decision in *Reece v. Edmonton (City)*, 2011 ABCA 238, in which the Court notes that the leading cases on abuse of process made no mention of a plain and obvious test, and that it was "questionable whether an application to strike a pleading because it is an abuse of process" has to meet that test or standard. At paragraph 15, the Court further observes that an

application to strike an action for abuse of process raises a "pure question of law about the legal legitimacy of the pleadings." The Government notes that these findings by the Alberta Court of Appeal were quoted with approval by the BC Court of Appeal in *Tangerine Financial Products Limited Partnership v. Reeves Family Trust*, 2015 BCCA 359 at paragraph 43.

The Panel's findings

[40] Although both an application to summarily dismiss an appeal and an application to strike grounds for appeal may result in decisions with significant impacts, the Panel agrees with the Government that, based upon the case law presented, the courts have not applied the "plain and obvious" test to both types of applications. Rather, when a claim or an appeal is accepted as being within the jurisdiction of the court or tribunal generally, it will only interfere with the litigant's pleadings or grounds for appeal if the high threshold of the plain and obvious test is met. In other words, when the very issue to be decided is whether the initiating proceeding – in this case the appeal - is within jurisdiction, or falls within one of the express grounds for summary dismissal, the question is whether, as a matter of law, the appeal is within jurisdiction or falls within one of the other section 31(1) categories.

[41] Although Canfor submits that the Environmental Appeal Board has applied the plain and obvious test to section 31(1) of the *ATA*, this is not correct. At paragraph 42 of *Cobble Hill*, the Board expressly states that section 31(1) of the *ATA* did not (at that time) apply to the Board. Further, the Board adopted and applied that test to consider whether the grounds for appeal were within the Board's jurisdiction; it was not a threshold jurisdictional issue of whether the decision sought to be appealed was, itself, appealable. In the present case, the Government's jurisdictional argument is that, in substance, Canfor is really trying to appeal the section 1.5.2 direction, not the section 105(1) redetermination.

[42] Regarding the application of the plain and obvious test to the abuse of process and relitigation issues raised by the Government, the Panel agrees with the Government's interpretation of the common law authorities cited. The plain and obvious test does not apply to those issues. They are "question of law about the legal legitimacy" of the appeal.

2. Are the appeals within the Commission's jurisdiction?

The Government's arguments

[43] The Government accepts that, generally speaking, a stumpage redetermination issued by a Ministry employee under section 105(1) of the *Forest Act* is appealable to the Commission under section 146(2)(b) of the *Forest Act*. However, the Government submits that Canfor's eight appeals are not, in substance, an appeal of the Ministry employee's decision. Rather, they are a challenge to the section 105.2 direction by the Minister's delegate. As section 146 of the *Forest Act* does not provide for an appeal from a section 105.2 direction, the Government submits that the Commission does not have jurisdiction to review that decision or direction and the appeals ought to be summarily dismissed. The

Government submits that Canfor's remedy with respect to the section 105.2 direction is by way of judicial review. Its full argument is as follows.

[44] The Government explains that, in the normal course, a Ministry employee exercises his or her section 105(1) authority to decide, in respect of each and every appraisal data point, the information that will be used to determine stumpage in accordance with the governing version of the IAM. However, in this case, the Government submits that the Ministry employee was "implementing" a section 105.2 direction to redetermine the stumpage rates. It submits that section 105.2 enables the Minister (or, in this case, the Minister's delegate) to direct a retrospective redetermination of a stumpage rate to correct inaccurate, incomplete, or non-compliant information used in the original appraisal. The Government submits that, under section 105.2, it is the Minister or the Minister's delegate who necessarily has the authority to adjudicate issues of interpretation of the IAM to the extent required for the section 105.2 direction. Once that direction is issued, the Government submits that:

> 44. … the Ministry employee, in implementing a s. 105.2 direction, must proceed in accordance with the ministerial delegate's view of how the information underlying the original stumpage determination was incomplete, inaccurate, or non-compliant, or otherwise failed to take into account information relevant to the appraisal, so as to justify the exercise of the s. 105.2 power.
>
> 45. In other words, although it is normally the Ministry employee under s. 105(1) who at first instance interprets the applicable version of the Appraisal Manual [the IAM] to determine the content of appraisal data that will be required to comply with those 'policies and procedures', in the circumstances of a preceding s. 105.2 direction, it is the ministerial delegate under s. 105.2 who necessarily has the authority to adjudicate issues of interpretation to the extent required for the s. 105.2 decision. ….

[45] The Government submits at paragraph 47 that, when interpreted harmoniously, sections 105.2 and 105(1) of the *Forest Act*

> can only mean that the Ministry employee implementing the s. 105.2 direction under s. 105(1) must abide by – not merely consider – any interpretation of the Appraisal Manual [the IAM] that is part and parcel of the Minister's s. 105.2 decision. If it were otherwise, a ministerial decision under s. 105.2 would no longer be a 'direction'; it would be merely a non-binding recommendation to the Ministry employee which the Ministry employee, in the exercise of his or her discretion under s. 105(1), could reverse. [Emphasis added]

[46] The Government notes that Canfor's only identified ground for appeal relates to the interpretation of 3.6.1 of the IAM, and that the Minister's delegate interpreted this provision and rejected each of Canfor's arguments in relation to the provision. The Government argues that Canfor's appeals are simply an attempt to relitigate the delegate's adjudication of this issue, an issue which did not form part of the Ministry employee's decision. On this section 3.6.1 interpretation issue, the

Government submits that the Ministry employee "exercised no discretion and made no decision": the employee simply followed the direction of the Minister's delegate under section 105.2. The Government submits that this lack of discretion when it comes to implementing a section 105.2 direction is intentional. This is apparent from section 105.2(5), which, the Government submits, requires the Ministry employee to "take into account transportation-related variables based on water transportation from the Manson Site, in place of variables based on direct haul."

[47] Consistent with this interpretation, the Government submits that the only changes made by the Ministry employee amount to data entries. Specifically, the Ministry employee changed the following data:

a. the specified operation allowances (inclusion of $\$1.61/m^3$ for dump and boom, $\$1.61/m^3$ for lake tow, and $\$1.42/m^3$ for dewater ad reload); and

b. cycle time (reduction from -7.60 to -3.80).

[48] While the Government acknowledges that there may be other appealable IAM interpretation issues arising out of the Ministry employee's redetermination decision, it states that Canfor has not identified any such issues in its Notice of Appeal. It submits that Canfor only raised issues that it has previously argued to the Minister's delegate in the section 105.2 process.

[49] Given that the basis or essence of the redetermination decision is the section 105.2 direction, and given that there is no right of appeal to the Commission from a decision or direction made under section 105.2, the Government submits that Canfor's appeals are beyond the Commission's jurisdiction.

Canfor's arguments

[50] Canfor notes that section 146(6) of the *Forest Act* states that, for the purposes of an appeal, a redetermination is deemed to be a determination. It submits that there is nothing in section 146 of the *Forest Act*, or the surrounding statutory context, that distinguishes between a section 105.2 redetermination, and the other redeterminations that can be made under the authority of the policies and procedures of the Minister.

[51] Further, Canfor notes that the effect of a redetermination is that it supersedes and renders irrelevant all previous determinations. If the Minister's delegate directs a redetermination because the original determination was based on flawed information, Canfor argues that the Commission should be able to hear an appeal of that entire redetermination, regardless of who sent the matter back for redetermination. Canfor suggests that it would be a bizarre result if the Government is correct and the forum in which a stumpage rate determination is reviewable depends on whether the underlying cutting authority was the subject of a previous rate determination using faulty information. It submits that the second decision should be reviewable by the Commission in precisely the same manner as was the first because it is as though the first decision, in this case the original determination, never occurred.

[52] In the absence of any evidence of a contrary intention in the statute, Canfor argues that the Legislature intended that all stumpage rate determinations,

whether original determinations or redeterminations, are appealable to the Commission, a specialized and expert body created by the Legislature for that very purpose. It argues that there is no implicit exception to section 146(2)(b); the Commission can hear the entire appeal of the redetermination, whether the redetermination was directed by the Minister's delegate, or not. It submits that there is no principled basis to require the provision to be read "in such a convoluted and bifurcated manner."

[53] Canfor submits that all eight of the redeterminations at issue in this case are properly within the Commission's jurisdiction.

The Panel's findings

[54] The parties agree that a stumpage redetermination issued by a Ministry employee under section 105(1) of the *Forest Act* is appealable to the Commission under section 146(2)(b) of the *Forest Act*. They also agree that the stumpage rate redeterminations in this case were carried out by a Ministry employee under section 105(1) of the *Forest Act*. Where the parties differ is in their characterization of that employee's decision-making authority when faced with a section 105.2 direction from the Minister's delegate.

[55] The Government submits that, when the Ministry employee's redetermination is preceded, or is the direct result of, a direction from the Minister under section 105.2, the Ministry employee who implements the direction exercises "no discretion" and makes "no decision", at least not on the interpretation issues which resulted in the direction. The Government submits that this lack of discretion is apparent from section 105.2(5), which requires the Ministry employee to "take into account transportation-related variables based on water transportation from the Manson Site, in place of variables based on direct haul."

[56] The Commission agrees with the Government that section 105.2(5) requires the Ministry employee to "take into account" the information at issue in the section 105.2 proceeding. However, nowhere in section 105.2 is there a requirement for the Ministry employee to "apply" the Minister's opinion or interpretation of the IAM. Nor is there any requirement in section 105.2 for the employee to redetermine the rate "in accordance with" the Minister's opinion. Section 105.2(5) simply requires the Ministry employee to redetermine the rate, and to *take into account* the information which formed the basis for the Minister's direction. Section 105.2(5) states:

> (5) If the minister directs under this section that an earlier determined, redetermined or varied stumpage rate be redetermined or varied under section 105(1),
>
> (a) in the case of a direction issued under subsection (2) of this section, the redetermination or variation must take into account the information that is necessary to completely and accurately meet the requirements of the policies and procedures,

(b) in the case of a direction issued under subsection (3) of this section, the redetermination or variation must take into account the information described in paragraph (a) of that subsection,[2] and

(c) the redetermination or variation must be made in accordance with the policies and procedures that were in effect at the time the earlier stumpage rate was determined, redetermined or varied.

[57] On a careful review of the section, the Panel can find nothing in section 105.2 to indicate that the Ministry employee is bound by the Minister's opinion, such that the employee's discretion under section 105(1) is statutorily fettered by that opinion.

[58] In contrast, there is clear language in sections 105(1)(c) and section 149(3) of the *Forest Act* requiring the Ministry employee, and the Commission on appeal, to apply the policies and procedures approved by the Minister (e.g., the IAM). Section 105(1)(c) states that "the rates of stumpage must be determined, redetermined and varied … (c) in accordance with the policies and procedures approved by the minister", and section 149(3) which states that "the commission must, in deciding the appeal [under section 105], apply the policies and procedures approved by the minister under section 105 that were in effect at the time of the initial determination" [Emphasis added]. Such language is completely absent from section 105.2 of the *Forest Act*.

[59] Although the Government may be correct that Canfor could have sought a judicial review of the section 105.2 direction, this is not determinative of this issue. The Panel finds that, while a Ministry employee is required by section 105.2 to redetermine the stumpage rate, the employee is not required to accept – is not bound by – the delegate's opinion. Rather, if a direction is issued under subsection 105.2(2), the employee is only required to take into account the information that is "necessary to completely and accurately meet the requirements of the policies and procedures". If the direction is issued under subsection 105.2(3), the employee is required to take into account the previously unknown or new information, and redetermine the rate taking into account the policies and procedures in effect at the time of the original determination. In either case, it is for the Ministry employee to determine whether the stumpage rate will, in fact, change from the original determination. Thus, judicially reviewing the "direction" would be premature as it is the redetermination by the Ministry employee that will determine the new rates.

[60] Ultimately, the Panel finds that an appeal of a "directed" redetermination is not an appeal of the direction of the Minister or the Minister's delegate. While that direction is the reason for the redetermination, it is the Ministry employee's discretion under section 105(1) that is at issue. The Panel does not accept that this discretion is eliminated by a direction under section 105.2. Even if the Minister, or the Minister's delegate, has previously interpreted a section of the IAM, and arrived

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[2] "(a) … information that
(i) existed but was not taken into account when the stumpage rate was determined, redetermined or varied, or
(ii) did not exist when the stumpage rate was determined, redetermined or varied;"

at an opinion on its meaning and application to the facts, this does not mean that the Ministry employee does not have discretion to consider that same section and arrive at his or her own conclusion regarding its application to the facts.

[61] The Panel notes that this situation occurs within the Ministry in relation to other stumpage related issues. In *Western Forest Products Limited v. Government of British Columbia*, (Appeal No. 2004-FA-003(a), July 22, 2004) [*Western 2004*], the Government argued that the appellant (Western) was really appealing the determination, or statement, of a district manager regarding suitability under section 4.1(9) of the Coast Appraisal Manual. The Government argued that there is no right of review or appeal from this suitability statement since the District Manager is not an "employee" of the Ministry, but that the suitability statement was subject to judicial review. In that case, the Commission found that a Ministry employee's decision to be bound by the suitability decision or statement of a person not given the discretion to determine stumpage rates under section 105(1) of the *Act*, constitutes an improper fettering of discretion:

> The rule against fettering of discretion requires that the person given the decision-making authority must exercise his or her own discretion in deciding whether, and how, to accept the recommendation of another. It would be an unlawful sub delegation of authority for the Regional Appraisal Coordinator [the Ministry employee under section 105(1)] to agree to act on the recommendations of another who is not charged with the authority to determine stumpage rates: Jones & de Villars *Principles of Administrative Law* (2nd ed.) Carswell 1994 at 172 - 173. Accordingly, the process that was followed in this case, where the Regional Appraisal Coordinator agreed to refer the matter to District Manager and agreed to be bound by the District Manager's decision, constituted an inappropriate fettering of discretion. (page 18)

[62] The Commission further states at page 21 that,

> … in the context of stumpage determinations under section 146(2) of the *Forest Act*, the Commission has jurisdiction to consider the issue of a particular point of origin for assessment of truck hauling and towing costs. The Commission finds that the decisions under appeal in this case, the SANs, were made by an "employee," the Regional Appraisal Coordinator, under section 105(c) of the *Forest Act*. Therefore, the Commission has jurisdiction to hear this appeal.

[63] Although the redeterminations at issue in the present case were the result of a statutorily authorized direction, as stated above, there is no indication that the Ministry employee is bound by the Minister's or the delegate's opinion. The Panel agrees with Canfor that the Ministry employee still has discretion under section 105(1) of the *Forest Act* to exercise his or her discretion to redetermine the stumpage rate in the usual course, albeit after taking into account the information required by section 105.2(5). In the context of a section 105.2 direction, the basis for the ministerial delegate's opinion should be considered only; the only direction is to redetermine, not to implement the findings or opinion. If the Ministry employee in the present case believed that he or she was bound by the Minister's

opinion on the transportation-related variables, then this may also be an issue to be determined in the appeals.

[64] For all of these reasons, the application to summarily dismiss the appeals under section 31(1)(a) of the *ATA* is denied. The appeals, and the "substance of the appeals", are within the Commission's jurisdiction.

3. Are Canfor's new appeals, in whole or in part, an impermissible relitigation or "serial litigation" of issues previously decided in another proceeding and, if so, does this constitute an abuse of process in the circumstances?

The Government's arguments

[65] The Government submits that these appeals by Canfor constitute relitigation or "serial litigation" of the same issues. It submits that the summary dismissal powers in subsections 31(1)(g) of the *ATA* ("appropriately dealt with in another proceeding"), and 31(1)(c) of the ATA ("abuse of process") were enacted to prevent such abuses, and preserve the integrity of the decision-making process. The Government submits that these subsections reflect the principles underlying the common law doctrines of *res judicata* (comprised of both issue estoppel and cause of action estoppel), collateral attack, and abuse of process. Collectively, the Government submits that these doctrines enshrine the principles of finality, the avoidance of multiplicity of proceedings and provide protection for the administrative justice system, under the overarching principle of fairness.

i) "appropriately dealt with in another proceeding"

[66] The Government argues that the issue raised in Canfor's appeals has already been appropriately dealt with in the section 105.2 process. In that process, the Minister's delegate considered whether the opening sentence of section 3.6.1 of the relevant IAMs precluded the use of water transportation for appraisal purposes unless it can be said that such transportation is "necessary to the licensee's operation". It maintains that this same issue is the basis for Canfor's current appeals. The Government argues that relitigation of this issue before the Commission amounts to a collateral attack on the section 105.2 direction.

[67] Further, the Government argues that Canfor's appeals raise an issue that, in substance, has been previously determined by the Commission in *Canfor #1*; i.e., that water transportation via the Manson Site is suitable for appraisal purposes. Although the Government acknowledges that the Commission did not determine the *specific* argument now advanced by Canfor (i.e., that the use of water transportation via the Manson Site for appraisal purposes is inconsistent with the wording of section 3.6.1 of the IAM), it argues that this is not a reason to allow the current appeals to proceed given that Canfor "could have" argued this issue in the previous appeals. On this latter point, the Government submits that the doctrine of *res judicata* (which has similar objectives to this *ATA* subsection) precludes a party from not only relitigating issues *actually* decided in a previous proceeding, but also from raising new issues that *could have been* resolved previously, had they been

advanced. The Government cites that following passage from *Henderson v. Henderson* (1843), 67 E.R. 313, where the Wigram, V.C. states for the Court:

> … where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time. (page 319)
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> [Government's emphasis]

[68] The Government submits that the provision of the IAM that now grounds Canfor's argument against the use of water transportation from the Manson Site (section 3.6.1) is contained in the version of the IAM that was in issue in the *Canfor #*1 appeals. The Government notes that the *Canfor #1* appeals were fully argued before the Commission in an oral hearing that spanned eight days, during which Canfor had the full opportunity to advance any legal and evidentiary argument that it wished to. The Commission's decision to dismiss Canfor's appeals in *Canfor #1* was affirmed on statutory appeal to the BC Supreme Court. The Government submits, "There is no excuse for Canfor's failure to advance this argument previously rather [than] keeping the argument in abeyance, to be advanced in a second round only if the original appeals failed." (para 69)

[69] The Government submits that the integrity of the Commission's decision-making process will be undermined if a party is permitted to seek a different answer to the same question from a different panel of the Commission by advancing reformulated arguments. It submits that, if Canfor is permitted to advance these appeals and the Commission reaches the same conclusion on the suitability of water transportation from the Manson Site for appraisal purposes, then the relitigation will have proved a waste of resources. Conversely, if the appeals proceed and the Commission decides that the use of water transportation is not suitable, then this undermines the credibility of the Commission's process and the aim of adjudicative finality.

[70] In light of the section 105.2 process and the previous appeals to the Commission, the Government argues that it would "seriously undermine the integrity of the decision-making process to allow Canfor a second kick at the proverbial can." The Government submits that the "serial litigation" by Canfor should be discouraged as it offends the principle of finality of litigation. Quoting from *Hughes Land Co. v. Manitoba* (1998), 167 D.L.R. (4th) 652 (Man. C.A.) at paragraph 37, the Government states:

> There is no finality to litigation if the adjudication of disputes is bounded only by the 'never-ending ingenuity of counsel to create new formulations and characterizations'.

[71] The Government also refers to, and relies upon, *Figliola*, *supra*. In that case, the Supreme Court of Canada considered whether the BC Human Rights Tribunal ought to have dismissed a complaint because the substance of that complaint had already been appropriately dealt with in a proceeding before the BC Workers' Compensation Board – Review Division. One of the critical sections considered by the Court was subsection 27(1)(f) of the *Human Rights Code*, which allowed for summary dismissal of a complaint if the "substance of the complaint … has been appropriately dealt with in another proceeding". This language is identical to subsection 31(1)(g) of the *ATA*. Finding that the matter ought to have been dismissed as it had been appropriately dealt with in another proceeding, the majority of the Court in *Figliola* found as follows:

> 47. 'Relitigation in a different forum' is exactly what the complainants in this case were trying to do. Rather than challenging the Review Officer's decision through the available review route of judicial review, they started fresh proceedings before a different tribunal in search of a more favourable result. This strategy represented, as Stromberg-Stein J. noted, a 'collateral appeal' to the Tribunal (para. 52), the very trajectory that s. 27(1)(f) and the common law doctrines were designed to prevent:
>
> > ... this case simply boils down to the complainants wanting to reargue the very same issue that has already been conclusively decided within the same factual and legal matrix. The complainants are attempting to pursue the matter again, within an administrative tribunal setting where there is no appellate authority by one tribunal over the other. [para. 54]

[72] As the only ground for appeal articulated by Canfor in its Notice of Appeal is a duplication of the same argument made to the Minister's delegate (unsuccessfully) in the section 105.2 process, or an issue that could have been made to the Commission in *Canfor #1*, the Government submits that the appeals ought to be summarily dismissed under subsection 31(1)(g) of the *ATA*.

ii) abuse of process

[73] In the alternative, the Government submits that the relitigation amounts to an abuse of process. It submits that, at common law, abuse of process may encompass any matter that renders a proceeding unfair to the point that it is "contrary to the interests of justice". Further, it submits that the focus of the abuse of process doctrine is on the decision-making process itself, and not on the motive or conduct of the parties.

[74] The Government submits that the courts have used the doctrine of abuse of process when the litigation before the court is found to be an attempt to relitigate a claim that has been previously and finally decided. The Government submits that the doctrine of abuse of process has been used to prevent relitigation of a claim where the strict requirements of *res judicata* are not met, but where allowing

litigation to proceed would, "nonetheless violate such principles as judicial economy, consistency, finality and integrity of the administration of justice": *Toronto (City) v. Canadian Union of Public Employees, Local 79*, 2003 SCC 63 [*Toronto v. CUPE*], at paragraph 37. In *Toronto v. CUPE*, the Supreme Court of Canada explained as follows:

> 51. Rather than focus on the motive or status of the parties, the doctrine of abuse of process concentrates on the integrity of the adjudicative process. Three preliminary observations are useful in that respect. First, there can be no assumption that relitigation will yield a more accurate result than the original proceeding. Second, if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality.
>
> 52. In contrast, proper review by way of appeal increases confidence in the ultimate result and affirms both the authority of the process as well as the finality of the result. It is therefore apparent that from the system's point of view, relitigation carries serious detrimental effects and should be avoided unless the circumstances dictate that relitigation is in fact necessary to enhance the credibility and the effectiveness of the adjudicative process as a whole. There may be instances where relitigation will enhance, rather than impeach, the integrity of the judicial system, for example: (1) when the first proceeding is tainted by fraud or dishonesty; (2) when fresh, new evidence, previously unavailable, conclusively impeaches the original results; or (3) when fairness dictates that the original result should not be binding in the new context. This was stated unequivocally by this Court in *Danyluk*, supra, at para. 80.

[75] Given the procedural history in the present case, the Government submits that the appeals ought to be summarily dismissed under subsection 31(1)(c) of the *ATA* as an abuse of process.

Canfor's arguments

[76] Canfor disagrees with the Government that it should have raised the issues in the present appeals during its *Canfor #1* appeal hearing. Canfor submits that the issue of whether the Manson Site was "unsuitable" within the meaning of section 3.1(3) of the IAM is a different issue than whether "logs must be transported by water" as required by section 3.6.1 of the IAMs. Although Canfor accepts that there may be some overlap in the factual context, it submits that the legal issue is different, and the two sets of appeals relate to different cutting authorities. Further, to have raised its present arguments in the context of the "suitability" appeals would have further complicated Canfor's prior appeals, and would have been moot if Canfor had been successful on the suitability argument.

[77] Canfor reiterates that the issue in the *Canfor #1* appeals was whether the Manson log dump was "unsuitable" within the meaning of section 3.1(3) of the relevant IAMs. The Commission found that it was not "unsuitable" and, on appeal, the BC Supreme Court found that this finding was not unreasonable.

[78] Canfor maintains that it is not seeking to "relitigate" anything decided by Mr. Rawling in the section 105.2 direction. It states that the section 105.2 direction does not decide anything about the merits of the eventual redeterminations; rather, the Minister's delegate simply exercised his discretion to order an employee to conduct a section 105(1) redetermination.

The Panel's findings

i) Application to dismiss under subsection 31(1)(g): the substance of the appeal has been appropriately dealt with in another proceeding

[79] The Panel finds that Canfor's appeals should not be summarily dismissed on the basis that the Minister's delegate has appropriately dealt with its issues in the section 105.2 process.

[80] First, all of the appeals heard by the Commission are from a statutory decision-maker. The section 105.2 direction is simply the basis for the redetermination; the redetermination is the appealable decision. The Panel further notes that the fact that the Minister's delegate formed an opinion on the meaning of section 3.6.1 of the IAMs and its application to Canfor's cutting permits does not mean that the substance of the appeal has been "appropriately" dealt with in another proceeding. More importantly, the statutory appeal provision (section 146) contemplates that there will be previous considerations – even decisions – on law, policy, and the facts.

[81] In all appeals heard by the Commission, there is a prior decision-making process. Some of those include a formal opportunity to be heard, while in others it is informal. For instance, under section 146(1) of the *Forest Act*, the appeals are from a decision that has already undergone a full review. In section 105(1) appeals, the licensee has provided appraisal data and will often correspond with the decision-makers on points that are in dispute. The point is, the very fact that the Legislature has provided a statutory appeal from these original decisions or review decisions indicates that those prior proceedings and decisions do not fall within the category of "appropriately dealt with in another proceeding". Moreover, the usual ground for appeal raised by appellants is that the decision below was not appropriately dealt with by the decision-maker. This case is no different.

[82] Second, in Canfor's appeals, the only issue currently identified in Canfor's grounds for appeal is that section 3.6.1 of the IAMs was misinterpreted and applied to its cutting authorities. Even if the Minister's delegate considered this matter in order to arrive at an opinion that the original stumpage determination was missing information, or the information was inaccurate or did not meet the requirements of the policies and procedures, as found in Issue 2 of this decision, there is no indication that the opinion is binding on the Ministry employee when he or she exercises discretion to redetermine the rate under section 105(1) of the *Forest Act*.

Thus, on an appeal of the redetermination, the Commission has jurisdiction to consider the employee's consideration of section 3.6.1, or lack thereof, and arrive at its own conclusion on the interpretation issue.

[83] Although there will undoubtedly be overlap in the evidence and argument that was previously presented to the Minister's delegate, this is not unusual in statutory appeals, and it is not grounds for summary dismissal in this case.

[84] Regarding the Government's argument that the substance of Canfor's new appeals were appropriately dealt with in *Canfor #1*, again, the Panel disagrees. The Panel finds that neither the *Canfor #1* appeal process, nor the Commission's decision, considered or addressed the issue raised in the present appeals.

[85] The Panel further finds that it is unreasonable to expect Canfor to have raised and argued issues regarding the interpretation of section 3.6.1 of the IAMs during its appeals of the "suitability" determination. The Panel finds that the present appeals are "new" appeals regarding different cutting authorities. The issue raised by the new appeals was not argued, considered or addressed in *Canfor #1*, nor does the Panel find that Canfor should have done so in the circumstances.

[86] The Panel finds that the substance of the appeal has not been appropriately dealt with in another proceeding: there is no impermissible relitigation of the issues decided in a previous proceeding.

ii) Application to dismiss under subsection 31(1)(c): the appeal gives rise to an abuse of process

[87] Based upon the Panel's reasons under the preceding issues, the Panel finds that the appeals do not give rise to an abuse of process in the circumstances of this case.

DECISIONS

[88] The Panel has carefully considered all of the submissions of the parties and the documents and evidence before it, whether or not specifically reiterated herein.

[89] For the reasons given above, the Government's applications for summary dismissal are denied.

Alan Andison, Chair
Environmental Appeal Board

June 22, 2017