# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *British Columbia (Minister of Forests, Lands and Natural Resource Operations) v. Canadian Forest Products Ltd.,* 2018 BCSC 771

Date: 20180510
Docket: 176532
Registry: Vancouver

Between:

**Her Majesty the Queen in Right of the Province of British Columbia as represented by the Minister of Forests, Lands and Natural Resource Operations**

Appellant

And

**Canadian Forest Products Ltd. and Forest Appeals Commission**

Respondents

Before: The Honourable Mr. Justice Silverman

On appeal from: Decisions of the Forest Appeals Commission dated June 22, 2017 (Government of British Columbia vs. Canadian Forest Products Ltd. Decision Nos. 2017-FA-001(a)-008(a))

## Reasons for Judgment

| | |
|---|---|
| Counsel for the Appellate: | K. Horsman, Q.C.<br>S. Bevan |
| Counsel for the Respondent, Canadian Forest Products Ltd.: | M. Oulton<br>T. Bant |
| Counsel for the Respondent, Forest Appeals Commission: | M. Underhill |
| Place and Dates of Hearing: | Vancouver, B.C.<br>December 6-8, 2017 |
| Place and Date of Judgment: | Vancouver, B.C.<br>May 10, 2018 |

# Table of Contents

## INTRODUCTION

[1] The appellant, Her Majesty the Queen in right of the Province of British Columbia (the "Province") as represented by the Minister of Forests, Lands and Natural Resource Operations (the "Minister" or "Ministry"), appeals a decision of the Forest Appeals Commission (the "Commission") pursuant to s. 140.7 of the *Forest and Range Practices Act,* S.B.C. 2002, c. 69 ( "*FRPA*"). Section 140.7 provides a right of appeal to this Court from a decision of the Commission, on a question of "law or jurisdiction".

[2] A brief chronology that leads to this Appeal is as follows:

| | |
|---|---|
| February 8-9, 2017 | A Ministry employee redetermines eight stumpage rates |
| March 1, 2017 | Canadian Forest Products Ltd. ("Canfor") commences an appeal of the eight stumpage rates to the Commission |
| April 24 - May 16, 2017 | The Province applies to the Commission for summary dismissal of the stumpage appeals |
| June 22, 2017 | The Commission denies the Province's summary dismissal application |
| | The appeal to this Court is from the Commission's denial of the Province's summary dismissal application |

[3] Canfor appealed eight stumpage rate determinations to the Forest Appeals Commission. At the outset of those proceedings, the Province brought an application seeking to summarily dismiss the stumpage appeals on the alternative grounds that:

1. The substance of the stumpage appeals has been appropriately dealt with in another proceeding (*res judicata*).
2. The Commission lacks jurisdiction over the stumpage appeals;
3. The stumpage appeals are an abuse of process.

[4] The Commission dismissed that application. The Province now appeals to this Court.

[5] If this appeal (from the dismissal of the Province's summary dismissal application) is unsuccessful, this matter will not be over. Rather, the matter will return to the Commission to deal with the merits of Canfor's appeal concerning the stumpage rate. The Commission has agreed to hold the underlying stumpage appeal proceeding in abeyance pending the outcome of the appeal to this Court.

[6] The Province essentially makes the same arguments to this Court that it made before the Commission. It now frames those arguments as errors made by the Commission with respect to each of the following:

1. *Res Judicata* and abuse of process in relation to the stumpage appeals;
2. Interpretation of s. 105.2 of the *Forest Act*, R.S.B.C. 1996, c. 157 [*FA*] and the Commission's jurisdiction under s. 146(2)(b) of the *FA*; and
3. *Res judicata*, abuse of process, and collateral attack in relation to the decision of the Regional Executive Director

[7] Concerning the first argument, and at the risk of over-simplification:

1. The Province argues *res judicata* and abuse of process on the basis that Canfor's latest appeals constitute impermissible relitigation of the same matter adjudicated by the Commission in a previous proceeding.

2. Canfor argues that *res judicata* and abuse of process are not applicable here because the facts, and the legal argument, which formed the basis of the previous proceeding are different than those that are applicable in this matter.

3. Canfor also argues that this issue is not appealable to this Court because of s. 140.7 of the *FA* which restricts appeals to questions of "law or jurisdiction".

[8] Concerning the second argument, and at the risk of over-simplification:

1. The Province argues that the Commission had no jurisdiction to hear the appeals because a redetermination (of the stumpage rate) sought to be appealed by Canfor to the Commission is only appealable when the determination was made pursuant to s. 105(1) of the *FA*. Here, the determination was made pursuant to s. 105.2 of the *FA*, and is therefore not appealable.

2. Canfor argues that the Commission had jurisdiction because it found that s. 146 of the *FA* conferred it with jurisdiction to hear the stumpage appeals. Section 146 is an enabling provision that creates a right of appeal to the Commission from a stumpage rate determination.

[9] Concerning the third argument, and at the risk of over-simplification:

1. The Province argues *res judicata*, collateral attack and abuse of process on this basis. Before the redetermination of the stumpage rate was directed, the Province gave Canfor a full opportunity, which Canfor accepted, to make submissions to the Regional Director about whether a redetermination should be ordered.

2. Canfor argues that *res judicata*, abuse of process, and collateral attack do not arise from an informal submission made prior to the actual determination pursuant to the *FA*, which is the substance of this appeal.

3. Canfor also argues that this issue is not appealable to this Court because of s. 140.7 of the *FA* which restricts appeals to questions of "law or jurisdiction".

[10] The Province argues with respect to all the issues raised that the standard of review in this Court is correctness. It argues that the decision and the issues under appeal are not only incorrect, but also unreasonable.

[11] Canfor argues that the standard of review in this Court is reasonableness and that deference must be granted to the Commission. It argues that the Commission's reasons were not only reasonable, but also correct.

[12] Counsel for the Commission attended and made certain submissions which I heard, subject to my consideration of a subsequent submission from the Province with respect to the extent to which the Commission's submissions should be considered. In that regard, I am satisfied that, in the circumstances of this case, the submissions of the Commission will be considered by me only to the extent that they assist me with respect to the question of the Commission's jurisdiction. As it turns out, the Commission's jurisdiction to hear portions of Canfor's appeal, as well as portions of the Province's preliminary motion, are very much in dispute in the context

of the Commission's jurisdiction. In that regard, the submissions of counsel are helpful.

[13] In the circumstances of this case, I decline to consider the submissions of counsel for the Commission with respect to the characterization of issues as raising either questions of law, questions of fact, or questions of mixed fact and law. I am satisfied that I have sufficient assistance on those topics from the Province and from Canfor. In that regard, the Commission's submissions are repetitive and unnecessary. Similarly with respect to the standard of review which will apply to the various issues argued before me by the Province and Canfor. In the circumstances in this case, those are significantly connected to the issue of whether questions are those of law, fact, or mixed law and fact, and I do not need to hear from counsel for the Commission with respect to those, for the same reasons as previously stated.

## THE LEGISLATIVE CONTEXT

### The Relevant Sections Referred in This Decision

#### *Forestry and Range Practices Act:*

**140.1** (1) The Forest Appeals Commission is continued.

(2) The commission is to hear appeals under

(a) section 82 or 83, or

(b) the Forest Act, the Private Managed Forest Land Act, the Range Act or the Wildfire Act and, in relation to appeals under those Acts, the commission has the powers given to it by those Acts.

...

**140.7** (1) A party to an appeal, or the minister, may appeal the decision of the commission to the Supreme Court on a question of law or jurisdiction.

...

#### *Forest Act*

**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.

...

**105.2** (1) In this section, **"policies and procedures"** means the policies and procedures referred to in section 105 (1) (c).

(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.

**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),

...

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

### *Administrative Tribunals Act*

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

(a) the application is not within the jurisdiction of the tribunal;

(b) the application was not filed within the applicable time limit;

(c) the application is frivolous, vexatious or trivial or gives rise to an abuse of process;

(d) the application was made in bad faith or filed for an improper purpose or motive;

(e) the applicant failed to diligently pursue the application or failed to comply with an order of the tribunal;

(f) there is no reasonable prospect the application will succeed;

(g) the substance of the application has been appropriately dealt with in another proceeding.

**The Interior Appraisal Manual** *(*"IAM*")*

**2.2.2 Minister's Direction**

1. The Minister may at any time direct the determination, redetermination or variance of a stumpage rate and that,

    a. a determined, redetermined or varied stumpage rate be effective on any future date, and that,

    b. the determination, redetermination or variance be made in accordance with any other directions that the Minister may direct.

**3.1 Appraisal Methodology**

...

3. For each part of the cutting authority area, the person who determines the stumpage rate must use the procedures in this manual that must be used for the harvest method that produces the highest stumpage rate other than a method that the district manager states is unsuitable for that part of the cutting authority area.

**3.6.1 Water Transportation**

Water transportation occurs when logs must be transported by water between the cutting authority and the point of appraisal or reload. This includes all costs of dumping, booming, developing and operating dumping and booming grounds, and towing. ...

## Sections From Which Jurisdiction Arises

[14] Section 140.1 of the *FRPA* sets out the Commission's appellate jurisdiction.

[15] Section 146(2)(b) of the *FA* sets out the Commission's appellate jurisdiction in relation to a determination of stumpage rates pursuant to s. 105(1) of the *FA*.

[16] Section 140.7 of the *FRPA* sets out the jurisdiction of this Court to hear an appeal of a decision of the Commission.

## The *Forest Act*

### *General*

[17] The *FA* provides a scheme under which private individuals and corporations may obtain rights to harvest timber from Crown land in British Columbia. The mechanism for the granting of such harvesting rights is an agreement entered into

between the Province and the private party as licensee, under which the licensee obtains, or may apply for, "cutting authority" on defined areas of Crown land.

[18] Canfor holds a specific forest licence in the area of the Province concerned with this appeal. This proceeding and a prior related proceeding pertain to cutting authorities issued to Canfor under that licence.

[19] A fundamental contractual and statutory obligation of *FA* licensees is the payment of stumpage to the Province, the price that the licensee pays for the "purchase" of the publically-owned resource.

[20] The formula governing stumpage calculation is set out in the *FA*. There are a number of variables and means of calculation. Most of those are not necessary to understand for the purposes of this appeal.

[21] What is necessary to understand, generally, is how and why stumpage rates are determined, and how and why they may be redetermined.

***Determination of the Stumpage Rate***

[22] Section 105(1) of the *FA* addresses the issue of the stumpage rate, providing that the rate is to be determined by a Ministry employee "identified in the policies and procedures", at the times specified by the Minister, and "in accordance with the policies and procedures approved by the minister". The process of determining the stumpage rate is known as stumpage appraisal. The policies and procedures approved by the Minister are found in two appraisal manuals. The IAM is the applicable manual in the present matter.

[23] The appraisal manuals are recognized as having the force of subordinate legislation. Courts and tribunals have approached disputes about the meaning of provisions of the manuals as matters of statutory interpretation subject to the usual common law principles.

[24] The concept of "cutting authority" is foundational to stumpage appraisal.

[25] The scheme of the IAM makes the cutting authority the unit of stumpage appraisal. As part of its application for a cutting authority, the licensee must provide an "appraisal data submission" pertaining to the area in question for the purposes of allowing a Province employee to determine a stumpage rate applicable to the timber that the licensee harvests. A Province employee determines a single stumpage rate for each cutting authority that the Ministry issues.

[26] The Province issues a new version of the IAM effective July 1 each year. Periodic amendments may be made. The most recently amended IAM that is in effect on the effective date of the cutting authority governs the determination of the stumpage rate for that cutting authority. In the present case, the relevant Canfor cutting authorities in issue had effective dates the earliest of which was July 9, 2012 and the latest of which was January 16, 2014. Therefore, two versions of the IAM are relevant. Further, for the most part, it is unnecessary to distinguish between the 2012 and 2013 IAMs in these submissions, as the two versions were identical in relevant respects. The only exception is s. 3.1, which was significantly amended July 1, 2013.

[27] Stumpage appraisals have, among others, the following general characteristics:

1. A stumpage rate represents an appraisal of the value of the stand of timber in the cutting authority area.

2. The data that licensees must submit for stumpage appraisal purposes is comprised of information about characteristics of the timber and the area in which it is located, impacting the value of the harvesting rights to timber.

3. To the extent that stumpage rate determinations incorporate data on methods of timber harvesting and transportation, they are based not on actual experienced licensee operations under the cutting authority in question, but rather on the hypothetical, prospectively-imagined operations of a licensee.

4. A system of stumpage appraisal called the Market Pricing System correlates the data about the cutting authority area to an underlying auction data set, by way of a central equation set out in the IAM.

5. The IAM is, for the most part, highly prescriptive and exclusive of discretionary judgment on the part of the Province employee who performs the rate determination. The process for the Ministry employee is one of taking the data submitted by the licensee, conducting checks for any patent inaccuracy or incompleteness against the requirements of the IAM, and cuing a computer system to run the data through the equations.

6. While the IAM does not confer technical staff with a great deal of discretion, it does require them to exercise professional judgment in their interpretation and application of the IAM.

7. In the event choice or discretion arises respecting the data that should be used in a stumpage rate determination, there is an overriding rule that the data that must be used is the data that will produce the highest stumpage rate ("Highest-Stumpage Rule").

8. Where there is a difference of transportation time when comparing the potential of truck haul with water transportation, that difference may have a significant effect on the stumpage rate.

9. The cycle time variable in the estimated winning bid equation is the truck haul time from the centre of the cutting authority area to the nearest Point of Appraisal ("POA") and back. The IAM requires the POA that produces the highest stumpage rate to be used to calculate the cycle time regardless of whether the licensee actually transports timber to that POA, or whether that POA is even operational.

10. The IAM allows for the inclusion of water transportation within the appraisal transportation route from the cutting authority to the POA. Depending on the position of the cutting authority in relation to the POA, the highest-stumpage principle may dictate that water transportation be factored into the appraisal transportation route.

11. Section 3.1(3) of the 2013 IAM is noted as background to the present matter. This provision is exceptional within the scheme of the IAM in introducing limited discretion into the stumpage rate determination.

***Redetermination of the Stumpage Rate***

[28] When directed by the Province to determine or redetermine a stumpage rate, technical staff is required to interpret and apply the IAM while deciding the values for each variable in the estimated winning bid equation.

[29] It is useful to have an understanding of the applicable statutory regime, and in particular the respective roles of the Minister (or his/her delegate), designated Ministry employees, the Commission, and the Court.

[30] Section 105(1) of the *FA* provides for stumpage rates to be "determined, redetermined, or varied" by designated Ministry employees.

[31] With respect to determinations and redeterminations:

1. There are two ways that a redetermination can occur:
    a) Under s. 105.2 of the *FA;* or
    b) Under s. 2.2.2(1) of the IAM.
2. Section 146(6) notes that "... a redetermination or variation of stumpage rates under s. 105(1) is considered to be a determination".
3. Section 2.2.2(1) of the IAM does not impose any preconditions that must be met before the Province may direct a redetermination.
4. An appeal pursuant to s. 146(2)(b) of the *FA* lies to the Commission from a determination under s. 105(1).
5. There is no provision of the *FA* or other statute that expressly provides a right of appeal from a direction (for a redetermination) made by the Province under s. 105.2 of the *FA*.

*Section 105.2*

[32] Section 105(1) of the *FA* states that:

> **105** (1) ...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.

[33] Subsections 105.2(2) and (3) of the *FA* provide that the Minister may direct a redetermination (under s. 105(1)), where the original determination was made on the basis of incomplete or inaccurate information:

> 105.2 (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 [IAM].
>
> (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.

*IAM Section 2.2.2(1)*

[34] The IAM requires a stumpage rate to be redetermined in the following circumstances:

1. When a “changed circumstance” occurs (s. 2.2.1);
2. When directed by the Minister (s. 2.2.2(1));
3. When timber is damaged by insects (typically mountain pine beetle) (s. 2.2.3);
4. When a regional manager or director determines that a determination contains a “correctable error” (s. 2.4); or
5. By mutual agreement (s. 2.5).

[35] Item 2 in the previous paragraph states the following:

> **2.2.2 Minister’s Direction**
>
> 1. The Minister may at any time direct the determination, redetermination or variance of a stumpage rate and that,

a. a determined, redetermined or varied stumpage rate be effective on any future date, and that,

b. the determination, redetermination or variance be made in accordance with any other directions that the Minister may direct.

## BACKGROUND

### General

[36] Issues surrounding the determination of the correct stumpage rate for a group of eight cutting authorities are at the heart of this appeal. The parties have referred to this group of eight as Group B. There is a second group of nine cutting authorities (referred to as Group A) which must be considered in the context of this appeal. Relevant administrative and judicial decisions relating to Group A pre-date the relevant issues concerning Group B. Those decisions also form part of the basis of the Province's argument that the issues at stake on this appeal should be considered as *res judicata*. They are also relevant to the arguments on this appeal concerning jurisdiction and abuse of process.

[37] The stumpage rates for the eight Group B cutting authorities are the subject of the 2017 proceeding before the Commission from which this appeal arises. The stumpage rates for the nine Group A cutting authorities were the subject of a previous proceeding before the Commission that commenced in 2014. The Commission heard and dismissed Canfor's appeals of the Group A stumpage rate determinations in 2015. Further, in 2016, Justice Butler of this Court dismissed an appeal by Canfor from the Commission's 2015 decision: *Canadian Forest Products Ltd. v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2016 BCSC 2202 (the "Butler Decision").

[38] The Group A appeals have been referred to as the "suitability appeals". At stake was whether the transportation route (based on truck haul) was suitable for stumpage determination within the meaning of s. 3.1(3) of the relevant IAMs.

[39] At the risk of over-simplification, the Group A stumpage rates were determined in the following way:

1. A district manager found water transportation "suitable".

2. The Ministry rejected Canfor's direct-haul appraisal data and instead, determined stumpage rates based on water transportation, in accordance with the highest-stumpage rule.

3. Canfor appealed the decision to the Commission.

4. In June 2015, there was a six day hearing before the Commission, with 17 witnesses and thousands of pages of documents entered as evidence.

5. On September 8, 2015, the Commission dismissed Canfor's appeal, finding, again at the risk of over-simplification, that the relevant site met the test of suitability during the relevant time period.

6. Canfor appealed to the Supreme Court of British Columbia resulting in the Butler Decision.

[40] In the Butler Decision, the Court encapsulated the appraisal issue, as it was argued in the Group A suitability appeals. At para. 4, he stated:

> [4] Under the IAM, the "cycle time" is the time it takes for logging trucks to do a return trip to haul timber from the centre of the cutting permit area to the nearest Point of Appraisal ("POA") and back again. Generally, the longer the cycle time, the lower the stumpage rate. The POA for a cutting permit must be selected from a list of locations set out in the IAM. Here, the POA was at Mackenzie, British Columbia, a town situated at the southeast corner of Williston Lake, a large reservoir created in the 1960s when the Bennett Dam was built. The issue in question for these cutting permits is whether the "transportation route to the point of appraisal" used for the stumpage determination is "unsuitable". The cycle time here was based on truck haul to a log dump at Williston Lake and water transportation down the lake to the Mackenzie POA. The alternative transportation route – direct truck haul around the lake to the Mackenzie POA – would result in a longer cycle time and, therefore, a lower stumpage rate.

[41] At the risk of over-simplification, the Group B stumpage rates were determined in the following way:

1. Data concerning water transportation was not provided to the Ministry technical staff. As a result, stumpage rates were determined using direct-haul data, without consideration of water transportation data.

2. The Regional Executive Director (the Minister's authorized delegate), while considering ordering a redetermination of the stumpage rates under s. 105.2(2) of the *FA* (because of the omission of water

transportation data for consideration), provided Canfor with an opportunity to make submissions in that regard.

3. Canfor did make submissions. In so doing, it did not reargue the "suitability" issue. Rather, it advanced a wholly new argument based on an interpretation of s. 3.6.1 of the 2012 and 2013 IAMs. It argues that the IAMs stipulated that water transportation may only be used in a stumpage rate determination if that mode of transportation is, in reality, a matter of operational necessity for the licensee. The first sentence in s. 3.6.1 (and primarily the word "must") is the sentence on which Canfor rested its new formulation of an operational-necessity test:

> 3.6.1 Water Transportation
>
> Water transportation occurs when logs must be transported by water between the cutting authority and the point of appraisal or reload. This includes all costs of dumping, booming, developing and operating dumping and booming grounds, and towing. ...
>
> (my emphasis)

4. On February 6, 2017, the Regional Director directed, pursuant to s. 105.2(2) of the *FA* that, in view of the mistaken omission to examine water transportation data, the stumpage rates for each of the cutting authorities had to be redetermined.

5. That redetermination occurred, the effect of which was to increase the stumpage rates.

6. Canfor appealed the foregoing Group B stumpage rate redeterminations and their subsequent implementation to the Commission.

7. Prior to the merits of Canfor's appeal being heard, the Province applied to the Commission for summary dismissal of the appeals on the basis of jurisdiction, *res judicata*, and abuse of process. The Commission rejected those arguments and declined to summarily dismiss the appeals.

8. The Province now appeals that decision to this Court.

[42] A comparison of Canfor's notices of appeal to the Commission in the two proceedings reveals that the Group A and Group B cutting authorities have common characteristics:

1. Each of the cutting authorities was issued to Canfor under the same forest licence.

2. Each of the cutting authorities is located in the same Forest District, within the same Block of the same Timber Supply Area.

3. Each of the cutting authorities is in the general vicinity of the same large body of water.

4. Each of the cutting authorities was issued to Canfor and had an effective date between July 1, 2012 and June 30, 2014. Therefore, either the 2012 or 2013 IAM was applicable.

[43] In summary, the Province argues that the two proceedings that Canfor has initiated before the Commission in relation to the Group A and Group B cutting authorities:

1. Raise identical factual issues.

2. Are governed by an identical legislative framework (i.e., the 2012 and 2013 IAMs).

3. Have pursued a single uniform remedy: disqualification of water transportation via the relevant site as the appraisal transportation route for cutting authorities located in that area.

[44] Canfor acknowledges that there are factual similarities between Group A and Group B, but notes that at least one significant factual difference remains: Group A and Group B relate to different cutting authorities. Further, the "suitability" issue, which was at the heart of the Group A appeals, is not an argument which Canfor intends to advance before the Commission, if this appeal is permitted to proceed. Rather, the issue to be raised on this appeal was never raised as part of the Group A appeal – that is, the effect of s. 3.6.1 of the IAM.

### The Commission's Decision on the Province's Summary Dismissal Application

[45] On April 24, 2017, the Province applied to the Commission for summary dismissal of Canfor's Group B appeals, under s. 31(1)(a), (c) and (g) of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 [*ATA*].

[46] Although s. 31 uses the term "application" to refer to the proceeding before the tribunal of which the party seeks dismissal, s. 1 of the *ATA* defines "application" as including an "appeal".

[47] The Province's grounds for the application were that:

1. The appeals in substance challenge the decision making of the ministerial delegate under s. 105.2 of the *FA* and as such they are not within the jurisdiction of the Commission to adjudicate;

2. The substance of the appeals was appropriately dealt with in:
   a. the hearing before the ministerial delegate, prior to the decision to direct a redetermination, where Canfor had a full opportunity to make submissions, and did so; and
   b. the previous proceeding relating to the Group A cutting authorities.

3. The appeals amount to an abuse of process as they seek to relitigate issues that were, or could have been, adjudicated in the previous (Group A) proceedings involving the identical subject-matter.

[48] The Commission dismissed the Province's application: *Government of British Columbia v. Canadian Forest Products Ltd.* (June 22, 2017) 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].

[49] It is that decision which is the subject of this appeal.

## ISSUES ON APPEAL

[50] The Province raises three issues on this appeal concerning which they argue that the Commission made the following errors:

1. Its analysis of *res judicata*, abuse of process, and collateral attack principles in relation to its own prior determination of the Group A stumpage appeals.

2. Its interpretation of s. 105.2 of the *FA*, as providing the Minister only a non-binding, recommendatory power, and consequently, its conclusion that s. 146(2)(b) of the *FA* provides appellate jurisdiction over the Group B stumpage appeals.

3. Its analysis of *res judicata*, abuse of process, and collateral attack principles in relation to the prior decision of the Regional Director under s. 105.2 of the *FA*.

## ARGUMENT #1

### *Res Judicata*, Abuse of Process, and Collateral Attack

[51] Before the Commission, the Province argued that Canfor's appeal constituted a relitigating of matters that either were, or could have been, adjudicated in the prior (Group A) proceedings and thus constituted a breach of some or all of the foregoing principles.

[52] The Commission rejected that argument.

[53] The Commission's conclusions, in that regard, were as follows ("Canfor #1" refers to the Group A proceedings):

> [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.
>
> ...
>
> [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.

### *Submission of the Province*

#### *The Commission's Errors*

[54] The Commission made the following errors:

1. In failing to give effect to ss. 31(1)(c) and (g) of the *ATA* which in combination, provide the Commission with comprehensive power to summarily dispose of appeals on the grounds of any of the related common law doctrines of *res judicata*, collateral attack, or abuse of process.

2. In failing to conclude that, because of the Commission's decision in the Group A appeals, one or more of the doctrines of *res judicata*, abuse of process, and collateral attack barred Canfor's appeals of the stumpage rate redeterminations for the Group B cutting authorities.

3. In failing to find that it was "unreasonable to expect" Canfor to have raised the issue relating to s. 3.6.1 of the IAM in the prior (Group A) proceeding.

[55] The appeals of the Group B stumpage rate redeterminations sought the same relief as the Group A appeals (a finding that water transportation via the relevant site should not be used as the appraisal transportation route), on the basis of an identical factual substratum and within an identical legislative context.

[56] Canfor made a strategic choice to reserve the argument based on s. 3.6.1 of the IAM to the Group B proceeding. The established test at common law is that the onus is on the party in Canfor's position to establish a defensible reason why, despite the exercise of reasonable diligence, it could not have raised the issue.

[57] Canfor has had every opportunity to advance its case as to how stumpage should be determined for the identically situated cutting authorities that were in issue in the Group A proceedings, and are in issue in this subsequent proceeding. This included an opportunity to be heard by Province staff in 2013 prior to the confirmation of the original stumpage determinations; an eight-day de novo hearing before the Commission in 2015; an appeal of the Commission's final decision in the first appeal to British Columbia Supreme Court; and a lengthy opportunity to be heard before the Regional Executive Director ("Regional Director") prior to the issuance of the s. 105.2 direction in 2017.

[58] The result in the Group A proceedings (was and is) a final and conclusive judicial decision of the Commission confirming the use of water transportation in the relevant area as the applicable transportation route for appraisal purposes.

[59] The objectives of finality, fairness, and integrity in the decision making process plainly favour the dismissal of Canfor's appeals to the Commission. Canfor's repetitive litigation of what is fundamentally a single point of dispute with the stumpage determinations in issue in both appeals, undermines the objectives that the summary powers of dismissal are intended to address.

[60] It would undermine the integrity of the Commission's process to permit Canfor a new opportunity to argue against the use of water transportation in the appraisal of identically situated cutting authorities. If Canfor were successful in securing a different answer to the same question, this would undermine the credibility of the Commission's decisions, the aim of adjudicative finality, and the statutory imperative for "systematic and equitable" determination of stumpage rates.

*Power of summary dismissal ss. 31(1)(c) and (g) of the ATA*

[61] The Province's application for summary dismissal of Canfor's appeals invoked s. 31(1)(c) and (g) of the *ATA*. Subsection 31(1)(c) empowers the Commission to summarily dismiss an appeal where it "gives rise to an abuse of process". Section 31(1)(g) provides a power of summary dismissal where "the substance" of the appeal "has been appropriately dealt with in another proceeding". These subsections embody related common law doctrines concerned with preserving the integrity of the decision making process.

*Res judicata, abuse of process, and collateral attack of process at common law*

[62] The doctrine of res judicata precludes a party from relitigating issues that were finally decided by a court (or tribunal) of competent jurisdiction in a prior proceeding. There are two types of this form of estoppel. "Cause of action estoppel" precludes a person from bringing an action against another when the same cause of action has been determined in earlier proceedings. "Issue estoppel"

prevents the relitigation of issues finally decided in prior proceedings, even if the cause of action differs.

[63] The policies underlying both forms of res judicata are that there should be an end to litigation, and a party should not be harassed twice by duplicative litigation.

[64] The concept of "cause of action" in this context is to be broadly construed. The estoppel arises if the new cause of action and the prior action are not separate and distinct in their substance.

[65] Issue estoppel, by way of contrast, applies where a party seeks to relitigate a question that was in fact decided in a previous case. The question out of which the estoppel is said to arise must have been "distinctly put in issue and directly determined" in the prior case. Such an issue cannot be relitigated anew, but only challenged through direct rights of review or appeal. In this sense, issue estoppel is closely related to the rule against collateral attack.

[66] The rule against collateral attack prevents a party from using an "institutional detour" to attack the validity of an order by seeking a different result in a different forum, rather than through the designated appeal or judicial review routes. The rule protects the fairness and integrity of the justice system by barring litigants from inappropriately circumventing the established review and appeal structures.

[67] The doctrine of abuse of process also has as its goal the protection of the fairness and integrity of the administration of justice by "preventing needless multiplicity of proceedings".

[68] The doctrine of abuse of process prevents relitigation where the strict preconditions of res judicata are not met, but where allowing litigation to proceed would violate such concepts as finality and integrity of the administration of justice. The doctrine of abuse of process is thus supported by the same policy grounds as the doctrines of res judicata and the rule against collateral attack.

*Standard of review*

[69] The parties agree that the standard of review applicable to the Commission's decision must be determined with reference to the common law rather than s. 59 of the *ATA*.

[70] There are two standards of review to be considered: correctness and reasonableness. On a correctness standard, the reviewing court need not show deference to the tribunal's reasoning process; instead, the court undertakes its own analysis. On review for reasonableness, the court must pay deference to the tribunal's reasoning.

[71] The fact that this proceeding is, procedurally, an appeal rather than a judicial review is irrelevant to the standard of review analysis: *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, at paras. 30-31 and 34. According to the majority in *Edmonton (City),* the presence of a statutory appeal provision such as s. 140.7 of the *FRPA* does not overcome the presumption of deference that applies in relation to a tribunal's interpretation of its home statute.

[72] The Province argues that in the circumstances of this case:

1. The appropriate standard of a review is correctness;
2. In the alternative, reasonableness is the correct standard.

[73] The Province argues that correctness is the appropriate standard for the following reasons:

1. The issues at stake here raise questions of law. The legal issues – the application of common law doctrines of res judicata, collateral attack, and abuse of process – are issues of general law that are reviewable for correctness.
2. Decisions of the Commission are not protected by a privative clause, and there is a statutory right of appeal on questions of law or jurisdiction. While the Commission does perform adjudicative functions within a discrete and specialized regime, these particular issues involve legal questions that are outside the scope of the Commission's expertise.

3. In adjudicating the Province's application under s. 31(1)(c) and (g) of the *ATA*, the Commission was not engaged in an interpretation of any statute closely connected to its function, but rather provisions of the *ATA* that embody fundamental common law principles and have application to a diverse array of provincial tribunals.

4. For these reasons, the Court does not owe deference to the Commission's decision on these issues.

[74] Further, while deciding this issue incorrectly, the Commission, while discussing the "plain and obvious test" correctly characterized (at para. 42) these issues as questions of law:

> [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[s] of law about the legal legitimacy" of the appeal.
>
> (my underlining)

[75] However, if the Court determines that the applicable standard of review is reasonableness, *Dunsmuir v. New Brunswick*, 2008 SCC 9 again provides guidance on how such a review is to be carried out.

[76] This standard concerns not only the outcome of a tribunal's decision, but also the reasoning path adopted by the tribunal in its decision making process. A court cannot properly be said to defer to a tribunal when it ignores the tribunal's reasons and fashions its own rationale for the outcome reached. On judicial review, accordingly, a court must review the reasons as a whole in order to assess whether the manner of arriving at the decision is reasonable.

[77] If reasonableness is the correct standard, the Province argues that the Commission's decision on this issue is unreasonable.

***Submission of Canfor***

*The Commission Did Not Err*

[78] The Group A and Group B issues were not the same. The most that can be said of the overlap between these two proceedings is that the suitability appeals

decided whether water transportation in that area was possible (that is suitable) for appraisal purposes. The issue now, however, is whether water transportation is necessary for these cutting authorities in the sense that the "logs must be transported by water" within the meaning of s. 3.6.1.

[79] The Butler Decision did not, and does not, state that the Group A suitability decision was correct. It merely states that it was a conclusion that was "well within the range of reasonable conclusions". It follows, as a matter of logic, that there are other reasonable conclusions within that range.

[80] The Commission's determination was reasonable in concluding that Canfor was not bound to complicate the suitability appeals with its present arguments about s. 3.6.1 of the IAM and the application of that provision to other cutting authorities.

[81] The fundamental principle underpinning s. 31(1) of the *ATA* is the need for tribunals to protect the integrity and efficiency of their processes. In that context, it was clearly reasonable for the Commission to conclude that the manner in which Canfor proceeded was, in the circumstances, the most efficient overall and the most respectful of the Commission's process. Further, given the singular focus of the suitability appeals on that issue, there is no risk of inconsistent results here.

*Power of Summary Dismissal - Subsections 31(1)(c) and (g) of the ATA*

[82] The Commission came to a reasonable (and correct) interpretation of the substantive legal principles applicable to the exercise of its powers under s. 31(1)(c) and (g) of the *ATA*.

[83] The Commission was not interpreting and applying the common law. It was deciding whether to, in its discretion, summarily dismiss the stumpage appeals on the ground that they are an abuse of process or have in substance been appropriately dealt with in another proceeding within the meaning of s. 31(1)(c) or (g) of the *ATA*.

*Res judicata, collateral attack, and abuse of process at common law*

[84] To the extent the Province attempts to identify a discrete error in the Commission's decision-making, it appears to be that the Commission erred in its interpretation and application of the common law doctrine of *res judicata*, specifically the cause of action estoppel branch of *res judicata*.

[85] These submissions are based on a fundamental flaw as they start from the presumption that the Commission was interpreting and applying the common law and strictly bound by it doctrinal requirements.

[86] The Commission clearly recognizes that cause of action estoppel applies to all issues that were or reasonably ought to have been raised in the prior proceeding. It identifies the correct legal test. It then applies that test to the facts and finds that it was "...unreasonable to expect Canfor to have raised and argued issues..." concerning s. 3.61 during the suitability appeals.

[87] Viewed in this light, the Province's challenge is, ultimately, a challenge to the Commission's application of the correct legal test to the facts. This is a question of mixed fact and law and is not appealable to this Court under s. 140.7 of the *FRPA*. Only a misdirection in applying the law constitutes an appealable legal error.

[88] Alternatively, the Commission might be read as exercising its discretion not to apply *res judicata* even though its requirements are met. The Commission's exercise of discretion in this regard is similarly not appealable as an exercise of fact or mixed fact and law.

*Standard of review*

[89] The parties agree that the standard of review applicable to the Commission's decision must be determined with reference to the common law rather than s. 59 of the *ATA*. They also agree that the fact that this proceeding is, procedurally, an appeal rather than a judicial review is irrelevant to the standard of review analysis: *Edmonton (City)* at paras. 30-31 and 34.

[90] Canfor argues that the standard of review is reasonableness. Deference is owed to the Commission:

1. In deciding this issue, the Commission was not interpreting the common law; rather it was interpreting and applying s. 31(1) of the *ATA*.

2. Those provisions are not intended to codify or "embody" the common law as the Province seems to assert. Section 31, like other parts of the ATA, is intended to confer administrative tribunals with broad and flexible powers to control their own processes with principles and doctrines that the tribunals themselves define.

3. The Commission was deciding whether, in its discretion, summarily dismissing the stumpage appeals was the best manner in which to control its own process and protect the integrity of its decision making. The Commission was guided but not constrained by the common law in this regard. Accordingly, the applicable standard of review is reasonableness and the Commission is entitled to deference (assuming it is appealable at all, having regard to s. 140.7 of the *FRPA*).

***Conclusion***

[91] I am satisfied that, in the circumstances of this case, the issues raised by the Province of *res judicata*, abuse of process, and collateral attack, do not raise questions of law. Rather, they raise questions of mixed fact and law.

[92] The parties argued (and still argue) differing views about a fundamental fact: was the location, and the characteristics of the location, of the cutting authorities in Group A significantly different than those same considerations with respect to the cutting authorities concerning Group B. The Province has argued that they were identical. Canfor has argued that they were not, and has offered a more detailed explanation of that. They also disagreed (and still disagree) about whether the issue of suitability as argued in Group A and the issue of s. 3.61 as is intended to be argued with respect to Group B are the same issues. The Province argues that they are because they both deal with the issue of water transportation. Canfor argues that they are different.

[93] The significant facts, and the different views and related evidence presented by the parties, are set out in detail in the Commission's decision. The Commission's

conclusion in that regard is related briefly in para. 85 of that decision where it states that the "...Panel finds that the present appeals are "new" appeals regarding different cutting authorities." With respect to the legal issues surrounding those facts, the Commission again related the arguments in great detail in its decision and summed it up in para. 85 where it said "the issue raised by the new appeals was not argued, considered or addressed in Canfor #one, nor does the Panel find that Canfor should have done so in the circumstances."

[94] The Commission's decision not to summarily dismiss the stumpage appeals as an abuse of process or on grounds that the issues have in substance been appropriately dealt with in another proceeding involved basic factual determinations that led to the application of a legal test to the facts and, as such, the Province's appeal on these issues involves questions of fact or mixed fact and law.

[95] Two things flow from the foregoing conclusion:

1. This issue is not appealable from the Commission to this Court whose jurisdiction arises from s. 140.7 of the *FRPA* and is restricted to "a question of law or jurisdiction". This conclusion is, by itself, sufficient to dispose of this argument on this appeal.

2. The Tribunal is entitled to deference and a reasonableness standard of review will prevail.

[96] Assuming this Court does have jurisdiction to hear an appeal, the correct standard of review is one of reasonableness:

1. The *ATA* is a "closely related" statute. The Commission's interpretation and application of s. 31 of the *ATA* is subject to the presumption of reasonableness.
2. Section 31 is found in Part 4 – "Practice and Procedure". The Commission has the authority to determine procedural matters and to control its own process.
3. The Commission is expected to apply Part 4 of the *ATA* on a regular basis, and accordingly has particular familiarity with it. These provisions are connected to the tribunal's function.
4. Discretionary and fact-specific decisions by a tribunal aimed at controlling its process are entitled to considerable deference.

[97] I see no obvious error in reasoning in the Commission's decision, and even if deference were not afforded to the Commission, I would consider the decision to be a reasonable one.

[98] The Commission's decision was one within the range of outcomes open to it in the circumstances and, as such, is reasonable and should not be set aside.

[99] I conclude that:

1. This Court does not have jurisdiction to hear the appeal of Argument #1.

2. If there is jurisdiction to hear it, then I conclude that the correct standard is one of reasonableness and the Commission is entitled to deference.

3. Within the range of acceptable and reasonable alternative conclusions, the Commission's decision fits into that category.

4. In all the circumstances, the Commission's reasoning and decision on this issue are reasonable.

[100] It follows that the Province is unsuccessful with respect to this ground of appeal.

## ARGUMENT #2

### Interpretation of s. 105.2 of the *FA* and the Commission's jurisdiction under s. 146(2)(b) of the *FA*.

[101] At the heart of this issue is the nature of the Minister's direction that there be a redetermination of the stumpage rate under s. 105.2; and more generally, in any such case involving s. 105.2, what is the nature of the Minister's direction?:

1. Is it a mere recommendation from the Minister to an employee to reconsider the original determination in light of new information and then form his or her own opinion?; or

2. Is it a direction that the Minister's employee must follow, to the extent that it contains within it the intended result of that direction.

[102] The Province argued before the Commission that it was without jurisdiction to hear Canfor's appeal for the following reasons:

1. The Minister's direction is more than a mere recommendation. It is a direction that the stumpage rate must be changed. Therefore, it is the Minister (or his delegate) who has made the determination. The employee has simply done what employees do – that is, carry out a task on the instructions of his or her superior.

2. The Commission's jurisdiction to hear the appeal can only flow from s. 146(2)(b) of the *FA* which states that a party (such as Canfor) has a right to appeal "... a determination of an employee of the Ministry under section 105 (1)...".

3. The redetermination in this case was made under s. 105.2 of the *FA*, that is, it was really a decision of the Minister (or his delegate), and is therefore not appealable under s. 146(2)(b) (which restricts appeals to "a determination of an employee").

[103] The Commission did not agree with the Province. The Commission's findings in this regard are found at paras. 54 to 64 of its Decision:

> [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 fa) 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.

[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(l)(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(l)(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 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(l)(a) of the ATA is denied. The appeals, and the "substance of the appeals", are within the Commission's jurisdiction.
>
> [my underlining]

***Submission of the Province***

*The Commission's Errors – s. 105.2 of the FA*

[104] The Commission erred in concluding that the Ministerial power to direct a redetermination of stumpage rates pursuant to 105.2 is merely a power to recommend, and not a power to direct the outcome of the redetermination.

[105] The Commission's analysis and interpretation of s. 105.2 of the *FA* appears to have been result-driven, based on the Commission's preference as a matter of policy that it have review jurisdiction over all stumpage appraisal decision making by Ministry officials.

[106] In confirming its jurisdiction under s. 31(1)(a) of the *ATA*, the Commission proceeded on the basis of an interpretation of s. 105.2 of the *FA* as allowing the Minister to make only a non-binding recommendation to the Ministry employee to redetermine the stumpage rate using corrective appraisal data. In the Commission's view the substitution of water transportation variables into the Group B stumpage rates was not the direct result of a direction by the ministerial delegate. Rather, it was a decision of the Ministry employee in the exercise of his or her discretion under s. 105(1) of the *FA*.

[107] The Commission appears to take the view that, if the Legislature had intended a s. 105.2 direction to be binding on the Ministry employee under s. 105(1), the Legislation should expressly state that.

[108] The Commission is wrong in assuming that the Legislature has used the words "must take into account" in the sense of requiring the Ministry employee simply to "notice" or "consider" the corrective information identified by the Minister, but not necessarily to use it in the redetermination.

[109] The Commission erred in not providing an ordinary and grammatical meaning to the word "direct", in not taking appropriate and analytical steps to determine the meaning of "interpret", not providing a proper grammatical meaning to the phrase "must take into account", and in not interpreting words in phrases in the context of the other words and phrases with which they appear and in the entire context of the *FA*, the scheme of the *FA,* and the intention of the legislators.

[110] Is it reasonable that a Ministry employee has overriding discretion to reject the Minister's view that the stumpage rate is erroneous, such that, despite the ministerial direction, no corrective variation will occur? The Commission's interpretation renders meaningless a direction of the Minister, and the s. 105.2 power of the Minister, at the option of a Ministry employee.

[111] The Commission's process of statutory interpretation was unreasonable and outside the range of acceptable, defensible and/or reasonable alternatives. It was also incorrect.

*The Commission's Errors – s. 146(2)(b) of the FA*

[112] Section 146 of the *FA* gives a licensee such as Canfor the right to appeal to the Commission "a determination of an employee of the Ministry under section 105(1)", including a redetermination. However, the redeterminations in issue in the present case are distinct in that they were made to implement a ministerial direction under s. 105.2 of the *FA*. Decisions under s. 105.2 are not appealable to the Commission. As Canfor's appeals go to the substance of the ministerial direction,

the question of the Commission's jurisdiction arises. Only an employee's determination under s. 105.1 can be appealed to the Commission; it has no jurisdiction to hear an appeal from a Minister's (or his delegate's) decision under s. 105.2

[113] The Province does not say that the Regional Director's (the Minister's delegate) decision is beyond review, only that the review must take place in the appropriate forum. The appropriate forum is an application for judicial review where appropriate regard may be accorded to the Regional Director's opinion and his reasons for decision.

*Standard of Review*

[114] The Province argues that the appropriate standard of review on this issue is correctness, but if the appropriate standard is reasonableness, then the Commission's decision was unreasonable.

[115] Correctness is the appropriate standard for the following reasons:

1. The question before the Commission was a question of law involving the issue of determining where jurisdiction lay between two "tribunals".

2. Interpretation of its own statute or statutes closely connected to its function will be subject to review on the deferential standard of reasonableness.

3. However, the presumption of reasonableness is rebutted if the question falls into one of the exceptional categories to which the correctness standard applies (*Dunsmuir*). In this case, the circumstances are captured by one of those categories: Questions regarding the jurisdictional lines between two or more competing specialized tribunals.

4. The Province argues that in this case the competing specialized tribunals are the Minister (under s. 105.2 of the *FA*) and the Commission (under s. 146.2(b)).

5. The specific feature that does take the present case outside the presumption of deference is that, in interpreting s. 105.2 of the *FA*, the Commission was engaged in adjudicating not only a question of jurisdiction, but the line between its jurisdiction under s. 146(2)(b) and that of the Minister under s. 105.2 of the *FA.*

6. Therefore, the presumption of deference is rebutted and correctness is the appropriate standard of review.

7. By determining that the Minister's direction for a redetermination under s. 105.2 was merely a recommendation to his subordinate and not a direction as to the result, the Commission diminished the Minister's jurisdiction and enlarged its own.

[116] Such a decision may be reviewed by judicial review, but not on appeal. Alternatively, whether by judicial review or appeal, the standard is correctness.

[117] In the alternative, if the correct standard of review is reasonableness, it is argued that this decision is unreasonable, in part, because it leads inexorably to the conclusion that the Minister's power to direct that a stumpage rate be redetermined is merely a power to recommend, which may be disregarded, after due consideration, by a technical staff worker in the Ministry.

[118] The Province argues that, on its face, this is simply unreasonable and no degree of deference can make it otherwise.

[119] The case law recognizes that, in certain clear cases, there will not be any range of acceptable outcomes against which to assess the tribunal's interpretation. Rather, unreasonableness in a tribunal's statutory interpretation will be evident simply in the outcome of the analysis as compared to that which the Court determines is the only reasonable interpretation of the section. As explained by Moldaver J., for the majority, in *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67:

> 38 It will not always be the case that a particular provision permits multiple reasonable interpretations. Where the ordinary tools of statutory interpretation lead to a single reasonable interpretation and the administrative decision maker adopts a different interpretation, its interpretation will necessarily be unreasonable — no degree of deference can justify its acceptance; see, e.g., *Dunsmuir*, at para. 75; *Mowat*, at para. 34. In those cases, the "range of reasonable outcomes" (*Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 4) will necessarily be limited to a single reasonable interpretation — and the administrative decision maker must adopt it.

***Submission of Canfor***

[120] The right to appeal a decision of the Commission to this Court is found in s. 140.7 of the *FRPA*. The right to appeal is restricted to a question of law or jurisdiction. While Canfor acknowledges that this (Argument #2) raises a jurisdictional question which is properly before this Court, it disputes that Arguments #1 and #3 are properly before this Court because they both raise only questions of mixed fact and law.

*The Commission Did Not Err – s. 105.2 of the FA*

[121] The stumpage rate determinations at issue in the stumpage appeals are redeterminations:

1. A stumpage rate may be redetermined in several ways. The redeterminations at issue here were directed by the Province, but the Commission correctly found that the reason for which a stumpage rate is redetermined is irrelevant to whether the rate determination is appealable to the Commission.

2. This conclusion flows from ss. 146(6), which expressly provides that "a redetermination or variation of stumpage rates under s. 105(1) is considered to be a determination" for the purpose of the appeal right in s. 146(2).

[122] Section 105.2 confers the Minister with the discretion to direct ("may direct") that a stumpage rate "be redetermined or varied under ss. 105(1)" where the Minister is of the opinion that the original determination was based on information that was incomplete or inaccurate or did not meet the requirements of the applicable stumpage manual.

[123] All the Minister decides under s. 105.2(2) is whether he is of the opinion that the determination was based on information that was incomplete or inaccurate or that did not meet the requirements of the relevant policies and procedures – and, if so, whether he should exercise his discretion to direct an employee to conduct a redetermination.

*The Commission Did Not Err – s. 146(2)(b) of the FA*

[124] The Commission interpreted s. 146 to mean that all stumpage rate determinations, no matter whether they are original determinations or redeterminations, are appealable to the Commission which is the specialized and expert body created by the Legislature for that very purpose. That interpretation is simpler, more logical and more consistent with the plain language of the provision and the surrounding context than the one advanced by the Province.

*Standard of Review*

[125] The Commission's decision that it has jurisdiction over the stumpage appeals under s. 146(2)(b) of the *FA* is reviewable on the reasonableness standard.

[126] The parties agree that the standard of review must be determined with reference to the common law rather than s. 59 of the *ATA* and the standard of review is rebuttably presumed to be reasonableness because the Commission was interpreting a statute closely connected to its function.

[127] In any event, and in the alternative, the Commission's decision that it has jurisdiction over the stumpage appeals under s. 146 of the *FA* was both reasonable and correct.

***Conclusion***

[128] This issue is in the category of a tribunal interpreting its home statute and statutes closely connected to its function. The appropriate standard of review is the deferential standard of reasonableness.

[129] I reject the Province's argument that the circumstances in this case fall within one of the exceptional categories (referred to in *Dunsmuir*) which, if applicable, may rebut the presumption of reasonableness and leave remaining, a standard of correctness.

[130] The third exception referred to in *Dunsmuir*, relied upon by the Province, is "Questions regarding the jurisdictional lines between two or more competing

specialized tribunals". That exception is not applicable in the circumstances of this case:

1. Some of the decisions, in which this exception is discussed, suggest that it is intended to apply only in cases where separate and distinct administrative tribunals, operating in different statutory regimes, have the potential for some overlapping jurisdiction.

2. In those cases, not only would the analysis require consideration of multiple statutory regimes, some of which would be outside the tribunal's expertise, but it would also have the potential to infringe on or undermine the authority of another specialized tribunal.

3. Here, on the other hand, the Commission's analysis in this case did not have the potential to infringe on a decision making authority outside its home statutory regime or to interpret matters outside its expertise. Rather, the questions raised fall squarely and wholly within the Commission's expertise as the courts now define it.

4. In the circumstances that are present here, I do not accept that the Minister, acting pursuant to s. 105.2, can properly be considered a "competing tribunal" within the meaning of this exception.

[131] It follows that the differential standard of reasonableness is not rebutted and remains applicable here.

[132] The Province argues that the Commission's decision is unreasonable because there is a single reasonable interpretation which would have been arrived at if the ordinary rules of statutory interpretation had been implemented. Whatever the literal meaning of the words in s. 105(1) and 105.2, common sense leads to the conclusion that the statute cannot and should not be interpreted in a way which gives an employee the ultimate authority to make a decision different than that of the Minister or his delegate.

[133] Canfor argues that there is no reason to go behind the wording of the statute.

[134] The plain wording of ss. 105(1) and 105.2 is clear:

1. Section 105(1) refers to a typical determination of stumpage rates noting that "...the rates of stumpage must be determined, redetermined and varied (a) by an employee of the ministry...". This is how a

determination usually occurs, without any special direction from the Minister or his or her delegate.

2. Section 105.2(2) states that the "...Minister may direct...that a stumpage rate be redetermined...under s. 105.1 if...[various specified circumstances]...". A plain reading of those two sections together suggests that a redetermination directed under s. 105.2 becomes a redetermination under s. 105(1).

3. Section 146(6) states that "For the purpose of s. (2), a redetermination.of stumpage rates under s. 105(1) is considered to be a determination".

4. Under 146(2), an appeal may be made to...the Commission from "a determination of an employee of the Ministry under s. 105(1)...".

[135] In my view, a plain reading of the two sections together supports the view of the Commission and of Canfor.

[136] The Commission concluded that the Minister's role is to decide whether the necessary preconditions for a redetermination are satisfied and, if so, whether to exercise his or her discretion to direct that the rate be redetermined. If the Minister directs that the rate must be redetermined, the role of technical staff is to carry out the redetermination like any other determination, by interpreting the relevant appraisal manual, and using the same methodology that is used when performing a typical determination under s. 105.1 but including the additional information that the Minister has directed to be considered. The employee has no more and no less discretion in determining the stumpage rate that he or she has under a typical determination under s. 105.1.

[137] While I agree with the Province that the interpretation they advanced is reasonable, I do not agree that it is the only reasonable interpretation. In my view, the view taken by the Commission is an acceptable and reasonable alternative.

[138] In providing these reasons, the Commission was interpreting its own statute. It is entitled to deference in that regard.

[139] It is clear from the foregoing that a redetermination which was ordered by the Minister under s. 105.2 is a determination under s. 105(1) and therefore appealable under s. 146(2).

[140] It follows that the Commission has jurisdiction to hear Canfor's appeal.

[141] It follows that the Province is unsuccessful with respect to this ground of appeal.

## ARGUMENT #3

### *Res judicata*, collateral attack, and abuse of process in relation to the decision of the Regional Executive Director

[142] Under Argument #1 (para. 51 of this decision), the Province raised the issues of *res judicata* and abuse of process arising out of:

1. The prior Group A suitability decision.

2. Canfor's making of a different argument before the Commission in this proceeding which it (Canfor) could have and should have made during the earlier Group A hearing.

[143] Under this heading, Canfor again argues *res judicata*, issue estoppel, abuse of process, and collateral attack, but for a different reason – that the full hearing opportunity offered (and accepted) by the Regional Director to Canfor, with respect to the issue of whether or not a redetermination should be ordered, was a process that gives rise to one or more of the foregoing legal concepts.

[144] The foregoing argument was also made before the Commission, which rejected it.

[145] In that regard, the Commission said this:

> [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.

### *Submission of the Province*

[146] The Province argues that Canfor’s appeal constituted an indirect attack on the decision of the Regional Executive Director under s. 105.2 of the *FA,* which was barred by one or both of the doctrines of issue estoppel and the rule against collateral attack. The full hearing opportunity that the s. 105.2 process accorded Canfor led to a final decision of the Regional Director that is reviewable only by way of judicial review. The matters that Canfor wishes to raise on appeal had been

"appropriately dealt with in another proceeding" within the meaning of s. 31(1)(g) of the *ATA*.

[147] The Province argues that the relevant decision-maker in this case is the Regional Director exercising jurisdiction under s. 105.2 of the *FA*, not an employee directed by the Minister. Ministry staff must redetermine stumpage in accordance with that direction.

[148] Canfor does not argue that there were any procedural deficiencies in the hearing process before the Regional Director. Nor is there any basis for such an argument given the opportunity that Canfor was permitted to actively participate in that process, which it took full advantage of.

[149] Clearly, Canfor understood that the decision making authority rested with the Regional Director. If the Commission is correct, the lengthy process before the Regional Director was meaningless because Ministry staff who carried out the redetermination were free to disregard the Regional Director, as is the Commission on an appeal from the redetermination.

[150] The Province acknowledges that Canfor's participation in that process does not preclude a review of that determination. The decision of the Regional Director to direct a redetermination may be judicially reviewed, but there is no right of appeal to the Commission.

[151] Canfor's indirect challenge to the decision of the Regional Director is barred by the doctrine of issue estoppel and the rule against collateral attack. The Commission's decision to the contrary is premised on an incorrect characterization of the statutory structure, and, alternatively, is unreasonable.

***Submission of Canfor***

[152] Canfor's appeal did not duplicate the process before the Regional Director. Even if the direction of the Regional Direction was binding on Ministry staff, the

Commission is an appellate authority and it is "natural" that the appeal would be preceded by some other decision making.

[153] The Commission was correct in dismissing the Province's argument based on issue estoppel and collateral attack. The Commission's reasons are twofold:

1. In all appeals heard by the Commission there is a prior decision making process in which correspondence may be exchanged with the decision-maker. The existence of a statutory right of appeal evidences a legislative intent that such decisions do not fall within the category of "appropriately dealt with in another proceeding".

2. The opinion of the Regional Director on the correct interpretation of s. 3.6.1 of the IAM is not binding on Ministry staff in carrying out the redetermination.

### *Conclusion*

[154] It is arguable that this argument raises questions of mixed law and fact. If that is the case, then, pursuant to s. 140.7 of the *FRPA*, this Court has no jurisdiction to hear an appeal with respect to anything other than jurisdiction or a question of law. That is sufficient to dispose of this argument.

[155] However, if this argument raises a question of law, then there is jurisdiction for this Court to hear it on appeal. Having said that, I am satisfied that the Commission answered it correctly for the reasons given in paras. 79 to 83 of its Decision.

[156] It follows that the Province is unsuccessful with respect to this ground of appeal.

## **DECISION**

[157] The Province's appeal is dismissed.

[158] Barring some factor that I have not been made aware of, the matter will proceed to hearing before the Commission to be determined on the merits.

[159] If the parties are unable to resolve the issue of costs, they may arrange to bring the matter before me.

"Silverman J."