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Victoria, B.C. V8W 3E7

May 31, 1993

Heather Sadler Jenkins
700-550 Victoria Street
Prince George, British Columbia
V2L 2K1

Attention Mr. Dick Byl

Dear Mr. Byl:

**Re: Appeal by Carrier Lumber Ltd. pursuant to the *Forest Act* Section 154(2)(b) of
a Decision by the Cariboo Regional Manager, dated January 14, 1993
cancelling Forest Licence A20022 under Section 61(1)(b) of the *Forest Act*.**

I have considered the submissions, evidence and argument presented at the hearing held into this matter in Prince George on May 20, 1993. I have obtained independent legal counsel concerning the exercising of discretion by the Regional Manager with respect to the meaning of the word "determination" as it appears in Section 129.3(4) of the *Forest Act*, and I have reached a decision on the appeal.

History of the Licence

On December 31, 1983, the Forest Service issued to the Appellant a licence, self-described as "Forest Licence No. A20022" (the Licence) which conveyed to the Appellant the rights to harvest 5 million cubic metres of timber within the Anahim, Tatla and Chilcotin supply blocks of the Williams Lake Timber Supply Area. It is agreed by both parties that the licence was issued in connection with, and in order to help to control, an outbreak of mountain pine beetle. The Licence was non-replaceable, and was for a 10-year term, to expire in December 1993.

The licence contained the following clause (clause 9.01):

Following the completion of timber harvesting and slash disposal operations under a cutting permit and subject to the management and working plan then in effect, the licensee will establish on the land subject to the cutting permit a crop of commercially-valuable species of timber, in the manner and to the standards determined by a forest officer who is a Registered Professional Forester and approved by the licensor or the District Manager.

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On May 25, 1987, an amendment to the Appellant's Management and Working Plan for the Licence was approved by the Forest Service, making the successful regeneration of all areas logged under authority of the Licence "subject to government funding".

Following a public announcement in mid-September 1987, the British Columbia Legislature, by an amendment to the *Forest Act* which was assented to on December 17, 1987, required the carrying out of basic silviculture by all holders of major licences *at their own cost* for all areas harvested after September 30, 1987.

On July 27, 1990 the Legislature enacted Bill 48, which included Section 129.3(4) of the *Forest Act*:

The district manager or regional manager may, at the times, and in the amounts and in the form determined by the district manager or regional manager, as the case may be, require the holder of a major licence or woodlot licence that is not replaceable to provide security for the performance of the holder's duty to carry out basic silviculture under this Part, and the holder of the licence shall forthwith comply with the requirement.

On July 20, 1992, following a series of discussions and exchanges of correspondence which had begun on May 22, 1991 regarding the application of Section 129.3(4) to the Licence, the Regional Manager of the Cariboo Forest Region issued to the Appellant a letter of suspension indicating failure to comply with Section 129.3(4).

On October 1, 1992, following further correspondence, the Regional Manager cancelled the licence, effective January 15, 1993.

On January 6, 1993 at the Appellant's request a hearing was convened for reconsideration by the Cariboo Forest Regional Manager of the decision to cancel, and in a letter dated January 14, 1993 to the Appellant, the Regional Manager confirmed his decision.

On January 28, 1993, the Appellant appealed the cancellation to the Chief Forester.

Appellant

Initial grounds of appeal:

The initial grounds of appeal set out in the Appellant's January 28, notice of appeal were:

1. The cancellation was contrary to Section 61 of the *Forest Act*;
2. The cancellation was contrary to the provisions of Part 10.1 of the *Forest Act*;
3. The cancellation was illegal, or improper, or in the alternative, placed the Ministry of Forests in the position that it breached its contractual obligations under the Licence;
4. Silviculture levies have been inappropriately assessed against the Licence, and are not due and payable;
5. The Ministry of Forests has failed to take into account the silviculture costs to be borne by the Appellant under the appraisal rules as set out in the *Interior Appraisal Manual*, and, if these calculations were appropriately and legally made, no silviculture would be payable by the Appellant, and the Ministry would have no grounds for suspension or cancellation;
6. The Ministry of Forests, through its ministers, executives, officers, executives, agents or servants has made representations to the Appellant to the effect that silviculture assessments of the magnitude directed against the Appellant would not be made, and, as a result of these representations, the Appellant has formed a reasonable expectation that there would be no silviculture levy assessed against it. The Ministry, in apparently reversing its position, has prejudiced and damaged the interests of the Appellant;
7. The Ministry acted improperly and not in good faith in insisting upon security for the performance of the Appellant's alleged duty to carry out basic silviculture as prescribed by Section 129.3(4) of the *Forest Act*;
8. The cancellation was contrary to Section 4(e) of the *Ministry of Forests Act*;
9. The licence in question is not a forest licence, or in the alternative, is not a major licence, and accordingly, Part 10.1 of the *Forest Act* does not apply;
10. The cancellation was contrary to the law and the evidence.

Restated grounds of appeal:

In its submission to the May 20, 1993 hearing, the Appellant restated its grounds of appeal as follows:

- a) The Regional Manager did not have the jurisdiction to cancel the licence in that Section 129.3(4) of the *Forest Act* does not apply to the licence;
- b) If Section 129.3(4) does apply, the Regional Manager cannot establish that there was a breach of that Section by the Appellant;

- c) If Section 129.3(4) applies, and if there was a breach thereof (which is not admitted but specifically denied) then the Regional Manager did not properly exercise his discretion in requiring appropriate security from the Appellant; and
- d) Even if Section 129.3(4) of the *Act* applies, and a breach can be demonstrated, and it can be demonstrated that the Regional Manager appropriately exercised his discretion, none of which is admitted, then the result obtained thereby is inequitable, and illegal and contrary to Section 4 of the *Ministry of Forests Act*.

The Appellant also provided in its submission a history of the Licence in which it was argued that at the time of issuance of the Licence, 30 to 40 percent of the geographical area in the three western supply blocks of the Williams Lake Timber Supply Area (TSA) were subject to devastation by a mountain pine beetle infestation, and that this fact, together with the characteristically low volume per hectare of the timber, had rendered logging conditions so uneconomic that the Chief Forester had excluded these blocks from determination of the allowable annual cut (AAC) for the TSA.

The Appellant argued that, in a letter dated December 9, 1992 from Ministry of Forests Deputy Minister Philip Halkett to Job Protection Commissioner Doug Kerley, the Ministry had acknowledged the poor state of this timber and the need for salvage as motivating reasons for the issuance of the Licence.

The Appellant held that both the Ministry and the Appellant understood the risks to the Appellant involved in harvesting such low quality timber, and that both parties agreed that, while the 1984 licence required the Appellant to "establish a crop of trees in harvested areas", the the Ministry was to pay for this and there was no mention of looking after the forest until free to grow. The Appellant maintained, and it was subsequently acknowledged by the Ministry, that the silviculture obligation as expressed in clause 9.01 of the Licence (which did not include the free-to-grow provision) had been complied with fully by the Appellant.

The Appellant provided a table comparing the 'stand value index', 'silvicultural cost' and 'indicated stumpage' for cutting permits on two of its Forest licences, including A20022, and stated that the the imposition of the free-to-grow provision reduced the stand value index for CP 38Y on FL A20022 from $-\$6.41/m^3$ to $-\$17.46/m^3$.

The Appellant argued that a licensee transporting 5 million m^3 of logs from CP 38Y to Williams Lake at the $-\$6.41/m^3$ rate would lose more than \$30 million, which represented a risk the Appellant had been prepared to contend with under the original terms of the license, but that the Appellant would not have agreed to the risk associated with the figure of $-\$17.46/m^3$.

The Appellant argued from this that it had used technological innovation to overcome significant economic risk, had mobilized five timber processing facilities, had created between 250 and 300 jobs worth \$15 million annually to the Chilcotin region, and had improved the environment by clearing infested timber, and that "but for the unfortunate actions of the Ministry of Forests, it would have been a successful venture".

In support of its four grounds of appeal, the Appellant argued as follows:

a) The Regional Manager did not have the jurisdiction to cancel the licence in that Section 129.3(4) of the *Forest Act* does not apply to the licence;

This was restated at page 9 of the Appellant's submission to read that the Regional Manager had no jurisdiction to ask the Appellant for security.

The Appellant argued that Section 129.3(4) of the *Forest Act* applies only to "major licences", that Licence A20022 was not a "major Licence", that therefore Section 129.3(4) did not apply and thus there could be no "failure" to post security as alleged by the Regional Manager as the reason for the cancellation.

In support of the contention that Licence A20022 was not a "major Licence", the Appellant contended that of the various forms of licences described under Section 1 of the *Forest Act* as "major licences", the only form of tenure that the Licence could be was a "Forest licence", but that the Licence did not meet the description and definition of a Forest licence as set out in Section 12 of the *Forest Act*.

This was held to be because the Licence was geographically confined through its clauses 1.01 and 4.02 not to a TSA but to specific supply blocks *within* the TSA--a restriction which the Appellant argued exceeded that which could be made under a Forest licence as defined in Section 12(b) or 12(f).

The Appellant also held that the Licence could not be a Forest licence because the requirement under Section 12(g) of the *Forest Act* regarding construction or operation of a timber processing facility differed from that contained in clause 12.01 of the Licence.

The Appellant then argued that because the Licence was not a Forest licence, it was not a major licence, therefore Section 129.3(4) of the *Forest Act* did not apply and the Regional Manager had no statutory authority to insist on security in any form. Thus it was held that the only silvicultural obligation imposed upon the Appellant was that set out in clause 9.01 of the Licence, with which the Appellant claimed--with Forest Service acknowledgement--to have complied.

b) If Section 129.3(4) does apply, the Regional Manager cannot establish that there was a breach of that Section by the Appellant.

The Appellant cited Section 129.3(4) as follows:

The District Manager or Regional Manager may, at the times, in the amounts and in the form determined by the District Manager or Regional Manager, as the case may be, require the holder of a major license that is not replaceable to provide security for the performance of the holder's duty to carry out basic silviculture..."

The Appellant argued that this Section requires the District Manager or Regional Manager to come to a "determination" as to what form and what amount of security is required, and then to require a Licensee to comply with this determination.

The Appellant contended that while there was considerable discussion between the Appellant, the District Manager and the Regional Manager, concerning such matters as an "affirmation", a "formal offer", and "options", yet at no time did either the District Manager or the Regional Manager make a specific demand of the Appellant for a specific security in a specific form.

In support of this contention the Appellant reviewed correspondence and documentation between itself and the Ministry of Forests, beginning with the May 22, 1991 letter from the Chilcotin Forest District Manager to the Appellant, which first brought the matter of security to the Appellant's attention.

Included in the review was a quotation from a letter of January 3, 1992 from the Honourable Dan Miller, Minister of Forests, to the Appellant, which referred to "security in an amount and in a form *to be determined*". The Appellant contended that this was evidence that no determination as to form and amount as required by Section 129.3(4) had been made as of that date.

The Appellant contended that "as of July 20, 1992", when the Regional Manager "purported to suspend" the Licence, "there is no reference anywhere, in any document, letter or minute, as to what the amount and the form of this security was to be". Further, the Appellant contended that as of October 3, 1992, following cancellation of the Licence on October 1, 1992 by the Regional Manager, "(the Regional Manager) still had not made the determination that Section 129.3(4) requires of him".

Other correspondence cited by the Appellant included letters between the Job Protection Commissioner, the Minister of Economic Development, Small Business and Trade, and the Deputy Minister of Forests. In summarizing its review of the material, the Appellant stated at the May 20, 1993 hearing: "To this day (the Appellant) does not know what form and amount of security the Regional or District Manager requires. Thus, a cancellation for an alleged breach of Section 129.3(4) of the *Forest Act* is invalid."

- c) If Section 129.3(4) applies, and if there was a breach thereof (which is not admitted but specifically denied) then the Regional Manager did not properly exercise his discretion in requiring appropriate security from the Appellant;**

The Appellant argued that both the District Manager and the Regional Manager misconstrued the legal requirement of Section 129.3(4) in regarding the provision of security as a mandatory rather than a discretionary stipulation.

The Appellant held that the use of the word "may" instead of "shall" in the first line of Section 129.3(4) affords the discretion to determine whether or not any security is to be required at all, and contended that in insisting upon security, both the Regional Manager and the District Manager "exercised that discretion unreasonably, without considering all the circumstances of the Licence, and in particular, the enormous outlay of capital that Carrier had put out to extract merchantable timber from a resource that, prior to 1984, was simply too uneconomical to log".

The Appellant cited its compliance with the initial conditions of the Licence and with other licences as evidence of a lack of risk to the Crown, and contended that "neither the District Manager nor the Regional Manager considered the devastating consequences of their actions, with not one, but five timber processing facilities being demobilized, and 250 to 300 jobs lost, likely permanently".

- d) Even if Section 129.3(4) of the Act applies, and a breach can be demonstrated, and it can be demonstrated that the Regional Manager appropriately exercised his discretion, none of which is admitted, then the result obtained thereby is inequitable, and illegal and contrary to Section 4 of the *Ministry of Forests Act*.**

The Appellant argued that in demanding security, the District Manager and the Regional Manager did not comply with any of the subsections of Section 4.

Specifically, the Appellant contended that: cancellation of the Licence did not encourage maximum productivity of the province's forest resources, as required by Section 4 (a) since the Appellant's harvesting was improving the health of the Chilcotin forest; that similar arguments applied to subparagraphs (b) and (c); that the cancellation did not encourage a vigorous, efficient and world-competitive industry as required by subparagraph (d); and that the financial interests of the Crown were not asserted in a systematic and equitable manner as required under (e), when licensees operating in positive stumpage areas could "pass silvicultural costs on to the Crown" and "offset this cost against stumpage", while licensees operating in negative stumpage areas must "assume for themselves the silvicultural costs".

With respect to this last point, the Appellant submitted that Chapter 4 of the the Interior Appraisal Manual permits basic silviculture costs to be charged as "operating costs" that are included within the stumpage formula, so that "a licensee operating in a stand of merchantable timber with a reasonably high stand (value) index will be in a position that, in effect, the Crown pays for the silviculture cost by way of an offset against stumpage payable". The Appellant contended that most licensees are being paid by the Crown by an offset to stumpage, while the Appellant has to pay to rehabilitate poor stands, and that this is inequitable.

From this the Appellant concluded that, even if the District Manager or the Regional Manager had the discretion and the jurisdiction to cancel the Licence in the manner in which it was done, the discretion was exercised improperly in that it violates the principles laid down by the Legislature in Section 4 of the *Ministry of Forests Act*.

The Forest Service

The Forest Service submitted its position in detail with respect to the Appellant's initial grounds of appeal. However, for brevity and clarity I will attempt to summarise here the Forest Service's position and arguments only as these were given with respect to the grounds of appeal as restated in four points by the Appellant in its submission to the hearing.

1. The response of the Forest Service to the Appellant's position that the Regional Manager did not have the jurisdiction to cancel the licence, in that Section 129.3(4) of the *Forest Act* does not apply to the licence.

In response to the Appellant's position that Section 129.3(4) does not apply because the Licence is not a major licence since it is not a Forest licence or any other form of major licence, the Forest Service position was that the Licence is indeed both a Forest licence and a major licence, to which Section 129.3(4) does apply.

In support of this position the Forest Service argued that under Section 9 of the *Forest Act* the right to harvest Crown timber can only be granted under one of the forms of agreement provided for under Section 10 of the *Act* and that the Licence either provides tenure under Section 10, or it has been void and invalid from the start.

The Forest Service held that from examining Sections 11, 12, 16 and 17, of the *Act*, the only form of licence other than a forest licence that it was possible for the Licence to be was a timber sale licence, but that the application for a timber sale licence differs from that of a forest licence and, while there was no evidence the Licence was ever advertised or applied for as a timber sale licence, the tenure had been advertised, applied for, evaluated and approved as a forest licence.

The Forest Service submitted that the Licence had been advertised by the Deputy Chief Forester in the fall of 1983 pursuant to Section 11 of the *Forest Act* as a "non-replaceable forest licence with a ten-year term". In response to the advertisement for a forest licence the Appellant submitted an application and a proposal for a forest licence. These were reviewed and approved by the Deputy Chief Forester, and a letter dated December 9, 1983 was sent from the Deputy Chief Forester to the Appellant, accepting the application for a forest licence. The Appellant subsequently prepared and submitted the necessary management and working plan.

The Forest service held that the restriction in the Licence limiting cutting to a part of the TSA was not an uncommon provision, that the Licence was advertised under Section 11 as a forest licence, that the documents were characteristic of a forest licence, and that therefore either the harvesting had proceeded under lawful authority in which case the Licence was a forest licence, or the harvesting had proceeded in trespass since 1983.

The Forest service submitted that because the Licence was a forest licence, it was also a major licence as defined under Section 1 of the *Forest Act*, and Section 129.3(4) therefore applies to the the Licence.

The Forest Service submitted that Section 129.3(4), which came into force on July 27, 1990, empowers the District Manager or Regional Manager to require the holder of a major licence that is not replaceable to provide security for the the performance of the holder's duty to carry out basic silviculture, and imposes a duty on the holder to comply with the requirement to provide security.

The Forest Service submitted further that under Section 59(1)(c) of the *Forest Act* the Regional or District Manager may suspend an agreement where its holder fails to comply with the *Act*, and under 61(1)(b) of the *Act*, where rights are in suspension, a regional manager may cancel a forest licence.

The Forest Service argued that the provisions of the *Forest Act* as legislated under Section 17 of Bill 70, December 17, 1987, and Section 129.1(1) of Part 10.1, requiring holders of major licences to be responsible for the costs of basic silviculture, are worded so as to apply *notwithstanding* previous agreements between the Appellant and the Forest Service.

The Forest service argued therefore that as of October 1987, holders of major licences were required by the *Act* to carry out basic silviculture at their own expense to establish a free growing crop of trees of a commercially valuable species on areas harvested on or after October 1, 1987. Furthermore, when Section 129.3(4) came into force in July 1990, the Regional and District Managers were given the discretionary power to require security to protect the Crown from the risk of assuming silviculture costs associated with non-replaceable licences.

The Forest Service argued from all this that Section 129.3(4) did apply to the Licence, and that Regional Manager had the jurisdiction to cancel the Licence.

- 2. The response of the Forest Service to the Appellant's position that if Section 129.3(4) does apply, the Regional Manager cannot establish that there was a breach of that Section by the Appellant, and**
- 3. to the Appellant's position that if Section 129.3(4) applies, and if there was a breach thereof (which is not admitted but specifically denied) then the Regional Manager did not properly exercise his discretion in requiring appropriate security from the Appellant.**

With respect to the Appellant's position that no breach had occurred because the Forest Service had not made a "determination" regarding the form and amount of security required, the position of the Forest Service was that the Regional Manager and District Manager did make several determinations which were rejected out of hand by the Appellant.

Counsel for the Forest Service contended that if the Forest Service were at fault at all, it was for failing to initiate suspension of the Licence after the first option had been turned down and for allowing a series of determinations in order to avoid the necessity of more drastic action.

In support of its position that determinations had been made, the Forest Service submitted and referred to a chronological documentation of memos, letters and minutes of meetings related to the question of obtaining security.

The Forest Service referred to a May 3, 1991 memo from the Regional Timber Officer to the District Manager, referring to, and discussing options for dealing with, concern by District staff that the Licence would expire in December 1993 with no silviculture deposit to ensure funds were available to cover any basic silviculture obligations that the Appellant might neglect to complete.

The Forest Service referred (Appeal hearing Exhibit 7) to a May 29, 1991 internal Forest District memo indicating two estimates of \$30,369,821 and \$15,687,997 as the cost to reach "free-growing" on areas harvested by the Appellant under the Licence.

The Forest Service documentation showed further that:

- on May 22, 1991 and June 19, 1991 the Forest Service advised the Appellant by letter of the need for security and indicated willingness to consider suggestions or preferences as to how the requirement could be met;
- that the Forest Service met with the Appellant to discuss this;
- that the Appellant apparently indicated it was unwilling to submit a deposit;
- that the Regional Manager proposed an amendment to the Appellant's renewable forest licence in the Prince George TSA to make the Appellant liable under that tenure for its silviculture obligations incurred in respect of the Licence;
- that discussions between the Appellant and the Forest Service indicated that the Appellant felt it had no obligation to carry out the basic silviculture;
- that an exchange of correspondence took place between solicitors for the Appellant and for the Ministry of Forests;
- that the Minister of Forests wrote to the Appellant warning of cancellation and encouraging the Appellant to choose one of the options offered to, it namely:
 - i) that the provision of additional security in an amount to be considered by the Regional Manager after considering suggestions or preferences of the Appellant;
 - ii) an amendment to the Appellant's Prince George licence;
- that the Appellant wrote to the Deputy Minister of Forests stating that the requirement of security imposed a financial responsibility the Appellant was unable to meet;
- that a meeting was held at which the Appellant discussed the need for legislative change and proposed a negotiated termination of the Licence;
- that the Appellant wrote to the District Manager agreeing to surrender the Licence for two separate forest licences that would assume silviculture obligations incurred in respect of the Licence;
- that subsequent correspondence and discussions concerning a proposed joint venture with the Ulkatcho Indian Band were unable to reach an acceptable solution to the silviculture obligation;
- that the Regional Manager gave notice of his intention to suspend the Licence unless an acceptable proposal was received by July 17, 1992;
- that on July 20, 1992, notice of suspension was given;
- that the Appellant subsequently offered to tie the silviculture obligation to its Prince George licence, but with a condition regarding stumpage with which the Forest Service could not agree;
- that the Forest Service sent a cancellation notice to be effective January 15, 1993;
- that the Job Protection Commissioner then became involved;
- that the stumpage appraisal system was explained to the Job Protection Commissioner;
- that following a hearing on January 6, 1993 the cancellation date was extended to March 31, 1993;
- that a subsequent request by the Appellant for extension of the cancellation date was denied.

From all this the Forest Service concluded that several determinations had been made by the Forest Service in the hope that one would be complied with. When it had become clear that the Appellant would not submit a deposit, the Regional Manager had made the formal offer of amending the Prince George Licence. Other options were tried. Counsel for the Forest Service held that each option was a determination, and that the Ministry's fault lay in trying to find one that pleased the Appellant instead of finding one and sticking to it.

The Forest Service argued from this that when the Appellant had indicated, as shown in the District Manager's letter of December 24, 1991 to the Appellant, that the Appellant felt no obligation to carry out the silviculture, the risk to the Crown increased significantly, and, when the deferral of suspension in order to accommodate a further proposal resulted in no form of security being provided, then the power to suspend under Section 59 of the *Forest Act*, and the power to cancel under Section 61 of the *Act*, were applied properly.

From this the Forest Service concluded that Section 129.3(4) of the *Forest Act* does apply, that the Regional Manager can establish a breach of this Section, and that the Regional Manager properly exercised his discretion in suspending and cancelling the Licence.

- 4. The response of the Forest Service to the Appellant's position that even if Section 129.3(4) of the *Act* applies, and a breach can be demonstrated, and it can be demonstrated that the Regional Manager appropriately exercised his discretion, none of which is admitted, then the result obtained thereby is inequitable, and illegal and contrary to Section 4 of the *Ministry of Forests Act*.**

In response to this position of the Appellant, the Forest Service argued that with respect to equitability--as required under Section 4 (e) of the *Ministry of Forests Act*, and in particular as this pertains to the equitable appraisal of stumpage among licensees--the main point turned on the application and interpretation of the Interior Appraisal Manual (the Manual).

The Forest Service contended that even if the Manual were to result in the funding of silviculture obligations for some major licensees in contravention of the requirement of Section 129.3(4), this might invalidate the Manual but it would not invalidate the Appellant's silviculture obligation.

However, the Forest Service contended that in fact there was nothing wrong with the Manual in this respect. The Forest Service argued that however the stand value index is calculated, at the end of the day the Crown will collect overall a predetermined amount of stumpage per cubic metre of timber harvested. Citing page 57 of the Manual, the Forest Service argued that all stumpage is averaged over the total volume harvested, to ensure collection of a mean target rate and that the stand value index is the means of valuing the timber in individual licences (individual cutting authorities) relative to each other in order to rank and position each cutting authority about the mean target rate.

The Forest Service said this provides a "waterbed" effect whereby a change in value index for one stand does not mean a change in overall revenues to the Crown, but rather a change in all the other rates charged, in order that the Crown will collect its target rate.

The Forest Service held that: while operational cost estimates are used to determine stand value indexes, the Ministry does not fund silviculture operations or any other operations through stumpage; that the Manual provides approved policies and procedures for stumpage appraisal and does not relate to silviculture costs; and that the stumpage system is irrelevant to silviculture costs and to the cancellation of the Licence.

In conclusion the Forest Service held that the obligation is on the licensee to provide security by an option approved by the Ministry of Forests to ensure compliance with Section 129.3(4) of the *Forest Act*; that in the course of discussion numerous such options were put forward but that to date no security has been provided and therefore the suspension and cancellation of the Licence were carried out properly.

Reasons for Decision

a) Does Section 129.3(4) of the *Forest Act* apply to the licence and does the Regional Manager have the jurisdiction to cancel the licence?

It is evident that as of December 31, 1983, clause 9.01 of the Licence required the Appellant to carry out basic silviculture on areas harvested under the Licence. It is evident that on May 25, 1987 an amendment to the Appellant's Management and Working Plan for the Licence made this silviculture obligation "subject to government funding".

However, the Forest Service is correct in arguing that pursuant to Section 129.1(1) of the Forest Amendment Act of December 17, 1987, Section 129.3 requiring holders of major licences to carry out basic silviculture as defined in the Act applies *notwithstanding* any previous agreement referred to in Section 10 between the licence holder and the Forest Service.

Being subject to the provisions of Section 129.1(1), the provisions of Section 129.3, including the requirement at Section 129.3(4) to provide security, which came into force on July 27, 1990, therefore also apply to holders of major licences. Therefore, if the Appellant's Licence is a major licence the requirement of Section 129.3(4) applies to the Appellant notwithstanding any previous agreement with the Forest Service.

The Appellant argued that the Licence is not a major licence because the Licence limited the application of the cutting authority to three specified supply blocks within a timber supply area--a "subset of a TSA"--rather than to an area within a complete TSA.

However, Section 12(f) of the *Forest Act* states that a forest licence

shall provide for cutting permits to be issued by the Crown to authorize the allowable annual cut to be harvested, *within the limits provided in the licence*, from specific areas of land in the timber supply area described in the licence. (Emphasis added)

In my view it is consistent with this Section for a forest licence to provide the three western supply blocks as the limits within which specific areas may be harvested, and that this provision therefore does not prevent the Appellant's Licence from being a forest licence.

The Appellant also argues that the Licence does not meet the requirements of Section 12(g) of the *Forest Act* because the Licence did not require the construction or operation of a timber processing facility.

Section 12(g) requires that a forest licence shall

require its holder to continue to operate, construct or expand a timber processing facility in accordance with a proposal made in the application for the licence.

Thus Section 12(g) allows for continuance of operation of an existing facility or for construction of a new one. The Licence itself required all timber harvested under it to be processed through "a timber processing facility or facilities owned or operated by the Licensee...".

It is acknowledged that issuance of the Licence was motivated in good part to harvest low-volume beetle-kill stands. In my view in these circumstances a dispensation from the requirement to construct facilities is reasonable, and should not be seen as a technicality sufficient to negate the entire intrinsic nature of a forest licence which was advertised as such, applied for as such, evaluated as such, approved as such, and issued as such, and into which the Appellant knowingly entered, as evidenced by the documentation submitted.

I therefore find no reasonable grounds to determine that Licence A20022 is a not a forest licence. Since the Licence is forest licence, it is also a major licence. Being a major licence, Section 129.3(4) applies to the Licence. If the Appellant as holder of the Licence does not comply with Section 129.3(4), then the Regional Manager has the jurisdiction under Section 59(1)(c) to suspend the Licence, and, under Section 61(1)(b) to cancel the Licence.

b) If Section 129.3(4) does apply, can the Regional Manager establish that there was a breach of that Section by the Appellant?

Section 129.3(4) of the *Forest Act* states:

The district manager or regional manager may, at the times, and *in the amounts and in the form determined by the district manager or regional manager*, as the case may be, require the holder of a major licence or woodlot licence that is not replaceable to provide security for the performance of the holder's duty to carry out basic silviculture under this Part, and the holder of the licence shall forthwith comply with the requirement. (Emphasis added.)

The Appellant contended that no determination of the form and amount of security required by the Forest Service had ever been made with respect to the Appellant's silvicultural obligation on the Licence, and that therefore the Appellant was not in breach of Section 129.3(4).

In order to clarify what constitutes a determination of security as is required to be made under this section, I have sought independent legal counsel. Legal counsel has provided me with definitions from a number of statutes and legal dictionaries including: *Stroud's Judicial Dictionary*, *Black's Law Dictionary*, *The Encyclopedia of Words and Phrases*, and *Jowitt's Dictionary of English Law*.

I am satisfied that the meaning of the word "security" is not necessarily a narrow one. Rather it is capable of being given a broad meaning which may vary depending on the context in which it is used.

I have concluded that the word security and the determination of amount and form of security, for the purposes of Section 129.3(4) should be given an extended interpretation. In one sense the word security may be understood in a narrow, strictly financial sense, to mean actual underwriting or the posting of a bond of a certain amount by a certain date. It may also be taken in a more general sense, in such a way as to provide the comfort necessary to assure the Regional Manager or District Manager that the silviculture work will be done, and that there will be some recourse to protect the Crown in the event that the Licensee is no longer operating.

I have also had regard to the fact that "security", as it is defined in the the *Interpretation Act*, includes but is not limited to security as defined in the *Securities Act*, and includes but is not limited to financial security.

On the basis of these understandings, I have carefully reviewed the chronology of events, discussions, correspondence, meeting minutes, proposals and options offered and the positions taken, during the interactions between the various parties in their attempts to resolve this issue, and I have come to the following conclusions.

At least two formal offers for solution of the problem were made by the Forest Service which were mutually understood by the Forest Service and the Appellant but which were not complied with by the Appellant.

The Regional Manager's proposal by letter dated October 7, 1991, to

amend your Forest Licence in the Prince George Timber Supply Area to make the company liable under that tenure for performance of silviculture responsibilities on the non-replaceable licence areas

constitutes such an offer and determines a form of security which would be satisfactory to the Forest Service. The letter included a completed Amendment form, ready to sign, with a request to sign all copies, and a ready-made replacement page, for the Prince George Licence A18158. However, the document was not signed.

In my view, the fact that at this point this determination is not forced unilaterally upon the Appellant as the only possible form of security does not detract from its having been made as a determination of the required security.

However, the Appellant's response to the determination, as documented in the letter of the District Manager to the Appellant dated December 24, 1991, was not agreement or compliance, but the communication of the belief that the Appellant "had no obligation to carry out basic silviculture as defined and required in the *Forest Act*".

That the Appellant knew and understood the form of determination being proposed, and that the Appellant also had some idea of the amount, is evidenced in the Appellant's letter of January 8, 1992 to the Deputy Minister of Forests, in response to the Minister's letter to the Appellant of January 3, 1992. When the Minister encourages the Appellant to select one of the "options for complying with the requirement for a silviculture deposit", the Appellant responds to the Deputy Minister that "we cannot financially afford to do what the Ministry want us to commit ourselves to with respect to silviculture".

This indicates that a determination had been made by the Regional Manager with respect to the required security for the silvicultural obligation for the Licence, and that this determination had been proposed to, and understood and rejected by, the Appellant, as such a determination.

Another determination of the form of security required was made in the proposal-- understood and accepted by the Appellant by letter dated January 16, 1992 to the District Manager--to in the Appellant's words "surrender F.L. A20022 and apply for two separate Forest Licences that will assume the silviculture obligations of F.L. A20022". This was not done, and when the proposal evolved into the joint venture with the Ulkatcho Indian Band, which persuaded the Regional Manager to postpone suspension, neither party was prepared to assume responsibility for the silviculture obligation on the Licence, as evidenced in the Appellant's letter of July 8, 1992 to the Regional Manager "...a consensus was reached that the cost of the silvicultural obligations rested with the Ministry of Forests".

In this matter it is my opinion that fundamental to the issue of determination and imposition of a specific amount of security is the acceptance by the appellant of the responsibility to comply with the obligation, which appears missing throughout these events.

For these reasons I find that a determination of the security required for the silviculture obligation for the Licence was made, but that the requirement was not complied with. Thus there was a breach by the Appellant of Section 129.3(4), and I find that the Regional Manager acted properly in suspending and cancelling the Licence.

c) If Section 129.3(4) applies, and if there was a breach thereof, then did the Regional Manager properly exercise his discretion in requiring appropriate security from the Appellant?

The Appellant argued that both the District Manager and the Regional Manager misconstrued the legal requirement of Section 129.3(4) regarding the provision of security as a mandatory rather than a discretionary stipulation.

Section 129.3(4) provides for the District Manager or Regional Manager to require security where the interest of the Crown is at risk. In the present case, the District Manager had information indicating that somewhere between fifteen and thirty million dollars would be needed to complete the silviculture obligation. In situations such as this the primary concern of the Crown is the necessity for basic silviculture obligations to be completed in the form of establishing free growing stands on harvested areas. The Regional Manager therefore exercised his discretion properly in this case in assessing the risk to the Crown and requiring security for the obligation.

- d) Even if Section 129.3(4) of the Act applies, and a breach can be demonstrated, and it can be demonstrated that the Regional Manager appropriately exercised his discretion, is the result obtained thereby inequitable, and illegal and contrary to Section 4 of the *Ministry of Forests Act*?**

The main issue raised here by the Appellant is whether the appraisal of stumpage is equitable--and thus satisfactory to Section 4(e) of the *Ministry of Forests Act*--between licences where an appraisal indicates a positive stumpage rate, and licences where an appraisal indicates a negative stumpage rate, and whether this relates in any way to silviculture obligations.

The Appellant's contention that costs of silviculture operations are offset in stumpage for holders of licences in areas with positive stand indexes, while holders of licences in areas of negative stand indexes must pay for silviculture, has been addressed by, and is best expressed in the words of the Director of Valuation Branch, responding in a letter of November 4, 1992 to the Appellant in connection with the proposal to tie the silviculture obligations of the Licence to the Prince George licence. The Director said:

Each stand of timber ought to be sold in its own individual merits on a site specific basis. If the value of a given stand is so low that the appraisal shows a negative stumpage rate, then the Forest Service will sell that timber at the minimum stumpage rate of \$0.25/m³ as prescribed by law. There is clearly no intention that the timber pricing system ensures an effective write-off or recapture of any of the cost estimates used to determine the upset stumpage rate. In short, stumpage does not pay for silviculture, or road building, or any other of the many costs the forest industry incurs. The appraisal system considers many cost estimates when determining a final stumpage rate, but at the end, if the stand has a negative indicated stumpage rate, the floor level for upset stumpage is \$0.25/m³.

The idea that the Forest Service ought to pay for basic silviculture costs whenever a stand of timber has a negative stumpage rate is not legal.

I find no evidence that the Interior Appraisal Manual provides for offsetting the costs of silviculture operations for some licensees and not for others. Accordingly I find that the stumpage system is fair and equitable, and satisfactory to Section 4(e) of the *Ministry of Forests Act*.

With respect to the Appellant's arguments concerning conflict with the *Ministry of Forests Act* Section 4(a) through (d), the best way to encourage maximum productivity of the resource is to carry out properly all necessary silvicultural obligations. These should be contemplated and planned for before any harvesting takes place. There can be no vigorous, efficient and world-competitive timber processing industry in British Columbia without a vigorous, properly regenerated forest. While a licensee may be harvesting and

rehabilitating good stands, the long-term interest of the forest is that all harvested areas will be regenerated to a free growing state. If a holder of a major license is relieved of this obligation, there is no guarantee the government can provide the funding or do the silviculture, since legislation has imposed this obligation upon holders of major licences.

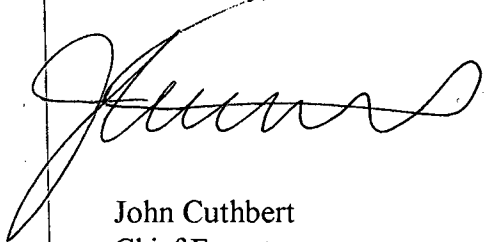
Decision in summary

As of October 1987, holders of major licences who harvested timber were required by the *Act* to carry out basic silviculture at their own expense to establish a free growing crop of trees of a commercially valuable species on areas harvested on or after October 1, 1987. When Section 129.3(4) came into force in July 1990, the Regional and District Managers were given the discretionary power to require security to protect the Crown from the risk of assuming silviculture costs associated with non-replaceable licences.

In the present case, several determinations of suitable means of providing security were made by the Forest Service and were proposed to the Appellant, but were not complied with. The Regional Manager therefore exercised his discretion properly in acting to suspend and cancel the Licence.

I therefore have no alternative but to deny this appeal.

Yours truly,



John Cuthbert
Chief Forester

cc: Mike Carlson, Regional Manager, Cariboo Forest Region
District Manager, Chilcotin Forest District
Jack Biickert, Director, Valuation Branch
Henry Benskin, Director, Silviculture Branch
Bob Harding, Director, Timber Harvesting Branch
Marilyn Seifert, Technical and Administrative Services Branch