

IN THE MATTER OF THE FOREST ACT, R.S.B.C. 1979, C. 140,
AS AMENDED AND IN THE MATTER OF AN APPEAL BY
CARRIER LUMBER LTD. FROM A DECISION OF THE
CHIEF FORESTER TO AN APPEAL BOARD APPOINTED PURSUANT TO
SECTION 156 OF THE FOREST ACT REGARDING A CANCELLATION
DECISION OF THE REGIONAL MANAGER

MEMBERS OF THE APPEAL BOARD:

CARLOS BERNARDINO, ESQ., Chair
JONATHAN PHILLIPS, R.P.F.
VERNON WELLBURN

DATE AND PLACE OF HEARING:

February 9, 1995
Williams Lake, B.C.

1. This Appeal Board was appointed pursuant to Section 156 of the Forest Act, R.S.B.C. 1979, C. 140, as amended, to hear the appeal of Carrier Lumber Ltd. (the "Appellant") from a decision of the Chief Forester confirming the decision of the Regional Manager to cancel Forest Licence Number A20022 which had been issued to Carrier on December 31, 1983 as a 10 year, non-replaceable licence.
2. Central to this appeal is the fact that in 1987 the Legislature enacted the Forest Amendment Act (No. 2) 1987, Chapter 54 (assented to December 17, 1987) which imposed new more onerous silviculture standards on the holders of forest licences and which shifted the funding mechanism for silviculture from the Ministry of Forests to the holders of forest licences.
3. The grounds stated by Mr. M.A. Carlson, R.P.F., Regional Manager, Cariboo Forest Region, for the cancellation of the subject forest licence are stated in his letter to the Appellant of October 1, 1992 to be:

"...you have failed to provide security for the performance of your duty to carry out basic silviculture, as described in Section 129.3(4) of the *Forest Act*. Since you have made no arrangements to fulfil this requirement, you are hereby notified that I have no alternative but to proceed with cancellation of FL A20022, effective at 12:01 a.m. on January 15, 1993."

4. After a number of extensions of the effective date of the cancellation of the subject forest licence and further discussion, the Appellant appealed the cancellation decision to the Chief Forester pursuant to the appeal provisions contained in the *Forest Act*. The appeal was heard by the Chief Forester on January 28, 1993 who upheld the cancellation decision of the Regional Manager.

5. The grounds of appeal placed before the Chief Forester and subsequently before this Appeal Board, are as follows:

- (a) that the Regional Manager did not have jurisdiction to cancel licence A20022 in that Section 129.3(4) of the *Forest Act* does not apply to this licence;
- (b) that the Chief Forester erred in law when he presumed to grant a "dispensation" relieving the Crown from complying with the provisions of Section 12 of the *Forest Act*;
- (c) that the Regional Manager could not establish that there had been a breach of Section 129.3(4) of the *Forest Act*,

even if that Section applies, in that neither the District Manager nor the Regional Manager came to a determination as to the form or amount of the security that they required, pursuant to Section 129.3(4) of the Forest Act;

(d) that even if Section 129.3(4) of the Forest Act applies, and there was a breach thereof, then the Regional Manager did not properly exercise his discretion in requiring appropriate security from the Appellant;

(e) that even if Section 129.3(4) of the Forest Act applies, and a breach thereof can be demonstrated, then the Appellant takes the position that the result obtained thereby is inequitable and illegal and contrary to Section 4 of the Ministry of Forests Act.

HISTORY OF FOREST LICENCE A20022 (THE "FOREST LICENCE")

6. The Appellant is a timber processing company which has for many years held various forest licences and owned and operated timber processing facilities in the Prince George and Williams Lake timber supply areas.

7. In September and October of 1983, the Timber Management

Branch of the Ministry of Forests caused the following notice to be published in the B.C. Gazette and in various newspapers throughout the Province:

"TAKE NOTICE that interested persons are invited to submit applications in a sealed container, to the Chief Forester for Forest Licence(s) A20022, which will authorize the harvesting of 500 000 m³ of beetle infested lodgepole pine timber per year for 10 years from lands within the Anahim, Tatla and Chilcotin supply blocks of the Williams Lake Timber Supply Area (T.S.A.) The Forest Licence(s) will be non-renewable at the expiry of its term and the successful applicant(s) shall not be entitled to replacement privileges under the Forest Act."

8. The background of the above-mentioned publication by the Ministry of Forests is provided by Mr. Carlson, the Regional Manager, in his testimony before the Chief Forester. At page 6 and 7 of the Transcript of the Hearing before the Chief Forester, Mr. Carlson says:

"Well, as the Chief Forester may recall, in the early '80s we had a massive amount of pine beetle attack in the whole west Chilcotin. The sawmilling industry in Williams Lake was totally committed to salvage and control efforts. The west Chilcotin, which is the subject of the licence under appeal here, had traditionally been remote and undeveloped from a forest-harvesting perspective. The mountain pine beetle epidemic was seriously spreading through that area.

We, in the Ministry, tried to initiate salvage and control harvesting licences in the area by short-term; short-term meaning one-year term, non-replaceable timber sales. We were unsuccessful in getting much interest from anyone in harvesting under that type of tenure, so we went to Part 10 of the Forest Act and looked at what forms of tenure were available to us to try to come up

with a tenure option that would, in fact, encourage harvesting in that area.

And the type of tenure that we looked at was a forest licence. The reason we chose a forest licence tenure was the forest licence allowed the Chief Forester to seek proposals, versus a timber sale which traditionally is awarded on a bonus-bid system. A forest licence, we could pick a term of 10 to 12 years, expecting that that would be a sufficient time frame to allow the write-off of any investment that any proposal may need to make.

We chose a non-replaceable tenure because the volume that we were putting up in the interest of beetle control we recognized wasn't a sustainable volume. So in 1983 our recommendations to the Chief Forester were for a 10-year non-replaceable forest licence."

9. The Appellant submitted its application for the forest licence in October of 1983.

10. As required by Section 11(4) of the Forest Act, the Appellant's application for the forest licence was evaluated by the Ministry of Forests on its potential for:

- (a) creating or maintaining employment opportunities and other social benefits in the Province;
- (b) providing for the management and utilization of Crown timber;
- (c) furthering the development objectives of the Crown;
- (d) meeting objectives of the Crown in respect of environmental quality and the management of water, fisheries and wildlife resources; and
- (e) contributing to Crown revenues.

11. In recommending acceptance of the Appellant's proposal for the forest licence, Mr. H.A. Waelti, Director, Valuation Branch, Ministry of Forests, wrote the following in a memorandum dated November 30, 1983 addressed to A.C. MacPherson, Assistant Deputy Minister of Forests:

"Forest Licence A-20022 presents a challenge that has not been met by Cariboo operators in the recent past. Small average tree size, low volume per acre, and isolation have historically made development of these stands a very unattractive proposition at best. The present deterioration of these stands by insect attacks adds to these obstacles the need to ensure timely as well as an adequate level of utilization of the sites. Only the Carrier proposal appears to present a suitable combination of fast performance, size, and degree of innovation and commitment required to surpass (sic) these obstacles."

12. The Appellant's proposal in support of its application for the forest licence was to utilize portable, modular sawmills inclusive of lumber drying and planing facilities to process on site the low value and low quality timber being offered by the Crown. The processing of the timber at the remote locations meant a sizable saving in the transportation costs which would otherwise be incurred in transporting logs to the timber processing facilities in distant Williams Lake. Transporting finished, dimensional lumber was substantially more efficient and economic. Although the concept of portable, modular sawmill technology was apparently not unique in British Columbia, the scale of the Appellant's proposal was unique.

13. Apart from the benefit to the Crown of the Appellant's proposal in the form of the control of the insect infestation, the salvage of insect killed wood and the direct benefit in terms of payment to the Crown in the form of taxes and stumpage, the Carrier proposal also promised the creation of 250 to 300 fulltime jobs in the Chilcotin Region as well as the building of such infrastructure as roads. the Appellant submits that all those benefits did in fact come to fruition. The Ministry of Forests does not contradict that submission.

14. An agreement in the form of Forest Licence A20022 granting the Appellant the rights to harvest Crown timber was executed on behalf of the Crown and of the Appellant as at December 31, 1983.

15. Section 9.01 of the Forest Licence provides as follows:

"Following 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."

16. In October of 1983 pursuant to paragraph 3.01 of the Forest Licence, the Appellant submitted and the Regional Manager

approved, a management and working plan which among other matters contained the Appellant's proposals with respect to the Appellant's obligation under the licence to carry out basic silviculture.

17. The relevant sections of the management and working plan are reproduced below:

"2.24 Silviculture

2.241 Basic The Licensee will ensure the successful regeneration of all areas logged under authority of Forest Licence A20022. The objective is to restock the newly denuded forest sites with desired tree species within an acceptable time frame.

Site Preparation Where required the Licensee will carry out site preparation to facilitate natural or artificial regeneration.

Land rehabilitation will be conducted as directed by the Forest Officer when necessary, and consistent with regional guidelines.

Natural Regeneration Natural regeneration is expected on all the pine sites in this particular locale. The Licensee will implement the appropriate harvesting and site preparation practices to achieve satisfactory levels of restocking with acceptable species within a maximum of seven years.

Artificial Regeneration The hot dry summers experienced in this general area will make successful planting difficult. Fortunately very little planting, if any, is expected to be necessary as natural regeneration is usually successful in pine types such as these. However, should natural regeneration be unsuccessful further site treatment and if necessary planting will be done to put the land back into production.

Sites not expected to regenerate naturally will be site prepared as necessary and seeded or planted within a maximum of three years.

Seed Procurement Ideally a 10 year supply should be on hand at all times.

Carrier Lumber Ltd. will obtain the required quantities of tree seed of the correct provenance for areas planned for logging and planting. Cone collections will be made in accordance with procedures determined by the Regional Manager."

18. It is common ground that prior to the enactment of the Forest Amendment Act (No. 2) 1987, the costs of basic silviculture incurred by the holder of a forest licence were offset as a credit against stumpage payable to the Crown by that licensee.

19. It is also common ground that the timber harvesting areas to which the subject forest licence applied were categorized by the Ministry of Forests as "negative stumpage areas". We understand that term to mean that the valuation procedures and criteria implemented by the Ministry of Forests in arriving at the stumpage rate for a particular cutting area produced a negative number. The result of that negative number is that a licensee's obligation to pay stumpage to the Crown was limited to a legislated "upset price" of 25¢ per cubic metre of wood harvested.

20. The Appellant submits that it was a term of its agreement with the Ministry of Forests that the Appellant's basic silviculture would be funded by the Crown. Neither the agreement by way of a forest licence nor the management and working plans submitted by the Appellant contained any such provision. However,

the Appellant refers to an amendment to the management and working plan precipitated by the following letter from the Appellant to the Ministry of Forests dated May 14, 1987:

"Carrier Lumber Ltd. requests that the Management and Working Plan for Licence A-20022 be amended under Section 2.241 as follows:

BASIC

Carrier Lumber Ltd. will ensure the successful regeneration, subject to government funding, (our emphasis) of all areas logged under authority of Forest Licence A-20022. The objective is to restock the newly denuded forest sites with the desired tree species within an acceptable time frame.

Furthermore, before harvesting commences on any cut block, Carrier Lumber Ltd. will obtain Ministry of Forests and Lands approval for:

1. Pre-harvest Silvicultural Prescriptions.
2. Determine the basic stocking standards for the cut block."

21. Mr. J. Szauer, Regional Director, Forests and Lands, Cariboo Region, replied to the Appellant's request for the amendment to the management and working plan by way of a letter to the Appellant dated May 25, 1987:

"As the amendment you propose gives us the commitment we have been seeking with respect to Pre-Harvest Silviculture Prescriptions and Basic Stocking Standards please be advised that your amendment is hereby approved."

22. The position of the Ministry of Forests is that the only funding available to the Appellant from the Crown to cover the

Appellant's costs of basic silviculture was the credit against stumpage provided by Section 88 of the Forest Act. The Ministry of Forests specifically denies that the Ministry agreed to fund the Appellant's cost of basic silviculture other than through the Section 88 medium. The implication of that position is that if the Appellant's costs of basic silviculture exceeded the stumpage of 25¢ per cubic metre otherwise payable to the Crown by the Appellant, then the Appellant and not the Ministry would be responsible for such excess.

23. The evidence before this Appeal Board is confusing and contradictory as to whether the Crown had in fact agreed to fund the basic silviculture obligations of the Appellant licensee over and above the credit against stumpage provided by Section 88 of the Forest Act. It is not, however, necessary that this Appeal Board make a determination in that regard since such a determination is not required pursuant to any of the grounds of appeal that are before this Appeal Board. The issue is relevant to explain both the actions of the Appellant and of the Ministry of Forests subsequent to the enactment of the Forest Amendment Act (No. 2) 1987.

24. The Appellant commenced its cutting operations pursuant to the forest licence in 1986 but it was not until July of 1987 that the first of its portable, modular sawmill facilities was operating in the Chilcotin and processing timber harvested from the

areas covered by the forest licence. By 1991 the Appellant had all 5 of its planned portable, modular facilities in operation.

THE FOREST AMENDMENT ACT (NO. 2), 1987

25. In 1987 the Legislature enacted the Forest Amendment Act (No. 2), 1987, Chapter 54, (assented to December 17, 1987). This Act amended the Forest Act by, among other matters, redefining basic silviculture as follows:

"basic silviculture" means such harvesting methods and silviculture operations including seed collecting, site preparation, artificial and natural regeneration, brushing, spacing and stand tending and other operations as are prescribed to be required for the purpose of establishing a free growing crop of trees of a commercially valuable species;

"free growing crop" means a crop of healthy trees, the growth of which is not impeded by competition from plants, shrubs or other trees;"

26. It is common ground that the reference to "brushing, spacing and stand tending and other operations as are prescribed to be required for the purpose of establishing a free growing crop" creates a much more onerous standard of basic silviculture than under the previous definition of basic silviculture. Depending on the species of trees involved, the brushing, spacing and stand tending could well mean that the person responsible for the silviculture will have a continuing, labour intensive and therefore

expensive, obligation which could well last for 12 to 15 years.

27. The Forest Amendment Act (No. 2) 1987 further amended the Forest Act by adding thereto the following provisions which are central to the cancellation decision under appeal:

"129.1 (1) The requirements of this Part and of the regulations respecting basic silviculture apply notwithstanding any agreement referred to in section 10, or any cutting permit, whether the agreement or cutting permit was entered into or issued before or after this Part or a provision of it came into force.

129.3 (1) A holder of a major licence who harvests timber under the licence shall, at his own expense and in accordance with

(a) the regulations, and
(b) a pre-harvest silviculture prescription approved under this section, carry out during harvesting, and continue without interruption after harvesting, basic silviculture on the land from which the timber is harvested.

(2) Before harvesting timber under a major licence, the holder of the licence shall prepare and submit to the district manager for approval a pre-harvest silviculture prescription for the land from which timber is to be harvested setting out measures for the carrying out of basic silviculture, and without limiting the generality of this, a pre-harvest silviculture prescription shall include measures required by the regulations.

(3) The district manager shall not approve a pre-harvest silviculture prescription under this section unless

(a) the prescription is signed and sealed by a professional forester,

(b) the prescription complies with the regulations, and

(c) the district manager is satisfied that the measures included in the prescription are adequate to ensure the carrying out of basic silviculture."

28. In 1990 the Legislature further amended the Forest Act by

adding to Section 129.3, the following subsection:

"(4) 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 licence or a 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."

29. The following sections of the Forest Amendment Act (No. 2) 1987 are also relevant:

"17. The amendments to the *Forest Act* made by this Act apply notwithstanding any conflicting or inconsistent provision of any existing licence or agreement issued or made under the *Forest Act* or under the *Ministry of Forests Act* repealed by the *Forest Act*, and where there is any such conflict or inconsistency in any such licence or agreement, the conflicting or inconsistent provision of the licence or agreement has no effect.

18(2) Where the district manager determines that harvesting of timber from an area authorized for harvesting under a major licence was completed after September 30, 1987 but before section 129.3 of the *Forest Act* came into force, the holder of the licence shall, at his own expense and in accordance with the directions of the chief forester, carry out basic silviculture on the land from which the timber was harvested.

19. No compensation or damages are payable by the government and no proceedings shall be commenced or maintained to claim compensation or damages from the government or to obtain a declaration that compensation or damages are payable by the government in respect of any loss caused or resulting, directly or indirectly, by or from the enactment of any provision of this Act."

THE CANCELLATION DECISION OF THE DISTRICT MANAGER

30. On May 22, 1991, Mr. R.J. Reeves, then the District Manager of the Chilcotin Forest Region, wrote the following to the Appellant:

"This is to advise that I am currently evaluating a process to undertake the requirement of Section 129.3(4) of the Forest Act, (Bill. 48 - 1990 Forest Amendment Act (No. 2), 1990) with respect to the above forest licence. This is essentially the requirement for security to guarantee your performance of the silviculture obligations of this non replaceable major licence.

I am willing to consider any suggestions or preferences you may wish to offer with respect to how this legislative requirement may be met. You should note that the costs of basic silviculture for areas harvested since October 1, 1987 and not declared "free growing" as well as those projected silviculture costs for areas planned for harvest for the duration of the licence will be considered in the determination of a process to provide the Crown with the required security for performance."

31. A memorandum dated May 29, 1991 from Mr. Doug Harris, a silviculture official with the Chilcotin Forest District addressed to Mr. Reeves, the District Manager, provides 2 estimates of the cost of basic silviculture to achieve the "free growing" standard introduced in 1987 concerning the areas which were subject to the Appellant's forest licence. One estimate using one set of criteria was for \$30,369,821.00 and the other estimate using a different set of criteria was for \$15,687,997.00.

32. Subsequent to the memorandum dated May 29, 1991 referred to in paragraph 31 above, there was an exchange of correspondence as well as a number of meetings between representatives of the Ministry of Forests and the Appellant. The evidence is that the Appellant refused to admit that the security requirements set out in Section 129.3(4) (reproduced at paragraph 28 above) were applicable to the Appellant's forest licence. The Appellant also refused to admit that the 1987 amendments to the Forest Act requiring basic silviculture to be done at the expense of the holder of the forest licence, applied to the subject forest licence.

33. The Ministry of Forests withheld cutting permits from the Appellant with respect to the subject forest licence. The following letter was sent to the Appellant by R.J. Reeves then the District Manager Chilcotin Forest District on June 19, 1991:

"Thank you for participating in the frank discussions yesterday at our meeting regarding compliance with the 1990 Forest Amendment Act.

As we agreed, I anticipate your suggestions for a methodology to ensure compliance with this legislation. My staff advise that there are a significant number of cutting authorities which are in the final stages of processing at this time and which are urgently required for your operation this Summer.

In view of this fact, I urge you to give immediate attention to this matter. I am reluctant to approve further cutting authority until there is a final resolution of this matter."

34. By October, 1991 the Appellant described its situation to the Ministry of Forests as urgent and the Appellant was well on its way to shutting down its operations in the Chilcotin as a result of the withholding by the Ministry of Forests of cutting permits.

35. On October 7, 1991 Mr. M.A. Carlson, Regional Manager, Cariboo Forest District, sent the following letter to the Appellant:

"Forest License (FL) A20022 is a non-replaceable tenure, and as such falls under the intent of Bill 48 - 1990 Forest Amendment Act. The intent of that amendment, as it pertains to silviculture practices, is clear in that it is designed to assure silviculture is carried out after the expiry of the tenure.

Further to discussions you have had with this Ministry at all levels concerning the requirements of Section 129.3(4) of the Forest Act, I would like to make a formal offer.

You have indicated that you are not prepared to comply by submitting a deposit. I am proposing, therefore, to amend your Forest License in the Prince George Timber Supply Area to make the company liable under that tenure for performance of silviculture responsibilities on the non-replaceable license areas.

For your convenience, I have attached the appropriate amendment. Please sign all copies and return to the Regional Manager, Prince George Forest Region. In the interim, no further cutting authorities will be issued under authority of FL A20022."

36. On December 24, 1991 the District Manger, Chilcotin Forest District, wrote the following letter to the Appellant:

"Enclosed are the cutting authority documents for Cutting Permit Y13 and Y14 of Forest Licence A20022. These permits are issued in accordance with the approved Management and Working Plan and the Development Plan for the Licence.

In recent discussions you have indicated that you feel you have no obligation to carry out basic silviculture as defined and required in the Forest Act. You have also failed to comply with the requirements of Section 129.3 of the Forest Act respecting security for performance of basic silviculture.

I note that the Regional Manager has given you options to satisfy this requirement in his letter of October 7, 1991. Resolution of this matter and affirmation of your basic silviculture obligations is required by January 15, 1992, or I will have no alternative but to recommend to the Regional Manager that we initiate suspension proceedings under Section 59(1)(c) of the Forest Act."

37. Pursuant to the following letter dated July 20, 1992, the Regional Manger for Cariboo Forest Region gave the Appellant notice of the suspension of the forest licence:

"Further to my letter of July 10, 1992 and having received no satisfactory proposal, I have no option but to proceed.

This letter constitutes notice of suspension of Forest License A20022 pursuant to Section 59(1)(c) of the Forest Act. Suspension of Forest License A20022 will take effect at 12:01 a.m. on August 11, 1992.

This suspension has been necessitated by your failure to provide security for the performance of your duty to carry out basic silviculture, as described in Section 129.3(4) of the Forest Act."

38. On October 1, 1992, the Regional Manager gave the Appellant notice of cancellation by way of the following letter:

"This is further to my letter of July 20, 1992 regarding the suspension of rights on Forest License (FL) A20022 on August 11, 1992.

Your outstanding obligation has been discussed with you on numerous occasions and was clearly stated in our suspension letter. As required in my letter of July 20, 1992, you have failed to provide security for the performance of your duty to carry out basic silviculture, as described in Section 129.3(4) of the *Forest Act*. Since you have made no arrangements to fulfil this requirement, you are hereby notified that I have no alternative but to proceed with cancellation of FL A20022, effective at 12:01 a.m. on January 15, 1993.

You may request a hearing with the Regional Manager. A request to be heard must be received by the Regional Manager on or before November 15, 1992.

Notwithstanding cancellation of the Forest License, and in accordance with Section 62 of the *Forest Act*, all your Forest License obligations, as per your FL A20022 document and the *Forest Act*, will remain in effect and you will continue to be held liable for them."

39. The Appellant appealed the cancellation of the forest licence to the Chief Forester pursuant to Section 154(2)(b) of the *Forest Act*. The Chief Forester heard the appeal on May 20, 1993 and rendered his decision on May 31, 1993 denying the appeal. The Chief Forester summarizes his decision as follows:

"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 Manger therefore exercised his discretion properly in acting to suspend and cancel the Licence.

I therefore have no alternative but to deny this appeal."

GROUND OF APPEAL

- A. *That the Regional Manager did not have jurisdiction to cancel licence A20022 in that Section 129.3(4) of the Forest Act does not apply to this licence;*

- B. *That the Chief Forester erred in law when he presumed to grant a "dispensation" relieving the Crown from complying with the provisions of Section 12 of the Forest Act.*

40. Grounds A and B relate to the Appellant's argument that the agreement entered into by the Appellant and the Crown in 1983 did not constitute a forest licence within the meaning of the Forest Act. The importance of that argument is that the silviculture requirements imposed by the Forest Amendment Act (No. 2) 1987 pertained only to holders of major licences or wood lot licences. The Forest Act lists a forest licence as a major licence. Accordingly, if the agreement of 1983 was not a forest licence, then it was not a major licence and therefore not subject to the

basic silviculture provisions introduced in 1987.

41. The issue of whether the agreement of 1983 was a forest licence was taken by the Appellant to the Supreme Court of British Columbia on that narrow point of law and ultimately to the Court of Appeal. The Court of Appeal ruled, in a decision delivered by the Honourable Mr. Justice Lambert, October 12, 1994, that the 1983 agreement was a forest licence. Accordingly, the foregoing grounds of appeal are no longer before this Appeal Board.

42. We note with interest the following comment of the Honourable Mr. Justice Lambert in the Reasons for Judgment of the Court of Appeal:

"We were not asked to consider the fairness of imposing the silviculture provisions on the plaintiff in this case and no issue is before us with respect to the possibility of any remedy or recourse with respect to those provisions. I will say nothing further about them."

43. It is common ground that applying the basic silviculture requirements introduced in 1987 to the Appellant had the effect of imposing on the Appellant onerous prejudicial obligations which were not contemplated by either the Appellant or the Ministry of Forests in 1983 when the Appellant and the Crown entered into the agreement in the form of the forest licence granting the Appellant the right to harvest Crown timber. Based on the Ministry of

Forest's own calculations, the financial burden to the Appellant in applying the 1987 basic silviculture provisions to the Appellant with respect to the subject forest licence is in the neighbourhood of \$15,000,000.00 to \$30,000,000.00. The issue of whether the language of the 1987 and 1990 enactments of the Legislature reproduced above pertaining to basic silviculture must be read to retroactively impose on the Appellant the financial burden of performing basic silviculture and the burden of performing basic silviculture to a standard which the Appellant did not bargain for when it entered into the agreement in the form of the forest licence in 1983, is not one that is before this Appeal Board.

- C. *That the Regional Manager could not establish that there had been a breach of Section 129.3(4) of the Forest Act, even if that Section applies, in that neither the District Manager nor the Regional Manager came to a determination as to the form or amount of the security that they required, pursuant to Section 129.3(4) of the Forest Act;*
- D. *That even if Section 129.3(4) of the Forest Act applies, and there was a breach thereof, then the Regional Manager did not properly exercise his discretion in requiring appropriate security from the Appellant.*

44. The reason stated by the Regional Manager for the

cancellation of the forest licence was the Appellant's failure to provide security pursuant to Section 129.3(4) of the Forest Act which is reproduced at paragraph 28 hereof.

45. The Appellant argues that no determination of the amount and form of the security required pursuant to Section 129.3(4) of the Forest Act had ever been made by the District Manager or the Regional Manager.

46. The following evidence was given by the District Manager, Mr. Carlson, and the Regional Manager, Mr. Reeves, in cross examination at the Hearing of May 20, 1993 before the Chief Forester (pages 70 and 71 of the Transcript):

"MR. BYL: When you issued your first suspension notice, or your suspension notice in mid-1992 sometime, had you come to a determination as to the form and the amount of the security?

MR. CARLSON: No, we had not. That was open for discussion.

MR. BYL: When you issued your cancellation notice later on towards the end of the year in 1992, had you come to a determination as to the form and the amount of the security?

MR. CARLSON: No, we had not.

MR. BYL: Okay. Even as you sit here today before Mr. Cuthbert, have you come to a determination as to the form and the amount of the security?

MR. CARLSON: No, we have not.

MR. BYL: So you at no time, you never came to a

determination as to the form and the amount of the security?

MR. CARLSON: That is correct.

MR. BYL: Mr. Reeves, you were also, to a considerable extent, involved in these discussions. Had you at any point come to such a determination?

MR. REEVES: No, I did not.

MR. BYL: Okay. This particular licence, Mr. Carlson, is restricted on its face to the three western supply blocks of the Williams Lake TSA, correct?

MR. CARLSON: Yes."

47. The District Manager and the Regional Manager subsequently gave evidence before this Appeal Board by way of explanation of their testimony quoted in the foregoing paragraph. The explanation was that the Regional Manager and the District Manager had not made a single determination; that a determination had been made that the Appellant had to provide security and that a determination had been made to offer the Appellant a number of options as to the form of security. The Regional Manager and the District Manager made repeated references to the letter of October 7, 1991 (reproduced at paragraph 35 hereof) as evidence of the determination of the amount and form of security pursuant to Section 129.3(4) of the Forest Act.

48. In considering this issue the Chief Forester writes at page 15 of his decision:

"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 (sic) 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.

49. On the issue of the determination of the amount of the security, the Chief Forester writes at page 17 of his decision:

"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 (sic) us to commit ourselves to with respect to silviculture"."

50. The Chief Forester writes at page 18 of his decision:

"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."

51. In our opinion, the Chief Forester was not entitled to infer a breach by the Appellant of Section 129.3(4) of the Forest Act from the Appellant's adamant refusal to accept responsibility for the onerous basic silviculture obligations which the Ministry of Forests sought to impose on the Appellant as a result of the 1987 amendments to the Forest Act.

52. In our view, the Chief Forester has erred in finding that the District Manager or the Regional Manager had made a determination as to the amount and form of the security required from the Appellant. The reference to "security" contained in Section 129.3(4) of the Forest Act is not some abstract concept to be read in isolation. The reference is to "security for the performance of the holders duty to carry out basic silviculture under this Part." The Appellant had the right to know exactly how much security he was being required to provide and he had a right to know the form of the security that he was required to provide. The various offers and proposals submitted to the Appellant by the District Manager and the Regional Manager were just that, offers and proposals.

53. We find that the District Manager did not properly determine the amount and form of the security required from the Appellant and if such a determination was made, we find that it was

not properly communicated to the Appellant. Consequently, we find that the Appellant did not, contrary to the notice of cancellation issued by the District Manager, fail to provide security as set out in Section 129.3(4) of the Forest Act. We find that the forest licence was improperly cancelled.

E. *That even if Section 129.3(4) of the Forest Act applies, and a breach thereof can be demonstrated, then the Appellant takes the position that the result obtained thereby is inequitable and illegal and contrary to Section 4 of the Ministry of Forests Act.*

54. Section 4 of the Ministry of Forests Act, provides as follows:

"4. The purposes and functions of the ministry are, under the direction of the Minister, to

- (a) encourage maximum productivity of the forest and range resources in the Province;
- (b) manage, protect and conserve the forest and range resources of the Crown, having regard to the immediate and long term economic and social benefits they may confer on the Province;
- (c) plan the use of the forest and range resources of the Crown, so that the production of timber and forage, the harvesting of timber, the grazing of livestock and the realization of fisheries, wildlife, water, outdoor recreation and other natural resource values are coordinated and integrated, in consultation and cooperation with other ministries and agencies of the Crown and with the private sector;

- (d) encourage a vigorous, efficient and world competitive timber processing industry in the Province; and
- (d) assert the financial interest of the Crown in its forest and range resources in a systematic and equitable manner."

55. The Appellant submits that both the District Manager and the Regional Manager in exercising their discretion to demand security from the Appellant did not comply with any of the subsections of Section 4 of the Ministry of Forests Act. It is further submitted that the conduct of the Crown officials was so inequitable and so unfair and had such catastrophic results in the Chilcotin Region and on the Appellant that such conduct was contrary to the provisions of Section 4 of the Ministry of Forests Act and should be overturned for that reason.

56. The evidence submitted by the Appellant under this heading of appeal goes primarily to the issue of whether the Forest Act, its Regulations and the policies of the Ministry of Forests pertaining to the setting of stumpage and pertaining to payment for silviculture are fair and equitable.

57. Assuming, without deciding, that the language of the 1987 and 1990 enactments of the Legislature reproduced above pertaining to basic silviculture, must be read to retroactively impose on the Appellant the financial burden of performing basic silviculture and the burden of performing basic silviculture to a standard which the

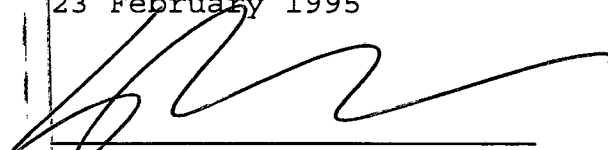
Appellant did not bargain for when it entered into the agreement in the form of the forest licence in 1983, we find that the Appellant has not shown that the District Manger or the Regional Manager have acted inequitably, unfairly or contrary to Section 4 of the Ministry of Forests Act.

58. In our opinion, this Appeal Board does not have the jurisdiction to consider whether the Forest Act, its Regulations and the policies of the Ministry of Forests pertaining to stumpage and to basic silviculture are unfair or discriminatory. However, we are of the opinion that this Appeal Board does have the jurisdiction in the context of reviewing a determination, order or decision of the District Manager or Regional Manager to consider whether that official in making such determination, order or decision acted unfairly or inequitably in applying the Forest Act, its regulations or the policies of the Ministry of Forests. In the matter at hand, we find that there is no evidence that the Regional Manager or the District Manager acted inequitably or unfairly in applying the Forest Act, its regulations and the policies of the Ministry of Forests.

59. Although we have not found the actions of the Regional Manager and of the District Manager to be contrary to Section 4 of the Ministry of Forests Act we are of the view that the result obtained in applying the Forest Amendment Act (No. 2), 1987 to the

Forest Licence to be contrary to subsections (a), (b) and (d) of Section 4 in view of the significant economic and and social benefits lost to the Province in the Chilcotin region when the Appellant was forced to close down its operations. We hold, however, that it is not within the jurisdiction of this Appeal Board to overturn the decision under appeal based on the foregoing result. We would therefore deny this appeal with respect to the grounds set out in paragraph E above.

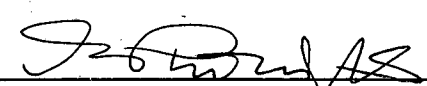
23 February 1995



Carlos Bernardino, Chair



Vernon Wellburn



Jonathan Phillips