

The Honourable Minister of Forests
Ministry of Forests
Parliament Buildings
Victoria, British Columbia

June 24, 1992

Dear Minister:

RE: Your letter dated May 27, 1992, confirming the Appeal Board to hear the appeal of Woodland Lumber Ltd. against a determination of the Chief Forester.

This decision is handed down on the basis of a thorough analysis of evidence that was heard and presented on June 3rd. and June 4th., 1992, in Prince George at an Appeal Board established in pursuant to Section 154 and 156 of the Forest Act, R.S.B.C. 1979, c.140. The Appellant, comprising:- Woodland Lumber Ltd. and Scana Industries Ltd., <1>, according to the Respondent, the Ministry of Forests, has accrued a debt of \$1,965,486.19, <2>. The Appellant is appealing against the stumpage determinations that it alleges have caused this indebtedness, <3>. More specifically, the Appellant states:

" There is a crucial fundamental issue in this appeal, and that issue is how is the Central Interior Appraisal Manual to apply to Section 16.1 licences of the sort held by the Appellants? That is the issue.", <4>.

- <1> Exhibit 2, Tab 18; Transcript, page 4, lines 37 to 40.
- <2> Exhibit 13; Exhibit 14; Transcript, page 143, lines 21 to 38.
- <3> Exhibit 1, Tab 7, page 32; Transcript, page 13, line 45 to page 14, line 25; page 77, line 1 to 7; Exhibit 9, Tab 27, page 2; Exhibit 21-C, page 2.
- <4> Transcript, page 5, lines 19 to 23.

page two

And again:

" and the issue, as I said in my opening, is to what extent and how the Interior Appraisal Manual should be interpreted with respect to a Section 16.1 sale. ", <5>.

The Appellant became the owner of Timber Sale Licence, (hereinafter referred to as "TSL"), A33752 on November 21, 1988, <6>, TSL A27973 on June 5, 1990, <7>, and TSL A36148 on June, 19, 1990, <8>. These TSLs were issued under Section 16.1 of the Forest Act. Section 16.1 became effective on July 11, 1988. Stumpage determinations for all the Appellant's TSLs were based on the procedures stated in the B.C. Forest Service Interior Appraisal Manual, (hereinafter referred to as "IAM"), the pertinent clauses of which became effective on October 1, 1987, <9>.

The Appellant's initial bid proposal for TSL A33752 included a stumpage price of \$6.33 per cubic metre that it was willing and able to pay and that was lower than the Ministry of Forest's stumpage determination at that time, <10>. However, the Respondent, bound by the Forest Act,

- <5> Transcript, page 334, lines 38 to 41.
- <6> Exhibit 2, Tab 16.
- <7> Exhibit 3, Tab 7.
- <8> Exhibit 3, Tab 17.
- <9> Exhibit 2, Tab 2, page 9; Exhibit 1, Tab 10.
- <10> Exhibit 9, Tab 11; Transcript, page 98, lines 5 to 47, page 261, lines 37 to 47.

page three

notified the Appellant that the request for a variance in stumpage should be withdrawn from its bid proposal, <11>. At this juncture, the Appellant had a clear choice of either cancelling its bid proposal or accepting the Respondent's terms.

That the Appellant agreed to accept the TSL at the appraised upset stumpage rates, <12>, higher than the \$6.33 rate, indicated that it was prepared to take a certain financial risk. Furthermore, the Appellant, at the same time, elected the variable stumpage option rather than the fixed rate option, <13>.

The Appellant's bid proposals for TSL A27973 and TSL A36148, 18 months later, again included a proposed stumpage price of \$6.33 per cubic metre. However, the Respondent notified the Appellant that it would not be successful in obtaining the TSLs unless the requests for variances in stumpages were withdrawn. The Appellant was successful in obtaining the TSLs by, once again, withdrawing its requests for stumpage variations, <14>.

<11> Exhibit 9, Tab 8; Exhibit 9, Tab 13.

<12> Exhibit 9, Tab 9.

<13> Transcript, page 262, lines 16 to 28.

<14> Exhibit 9, Tab 19; Transcript, page 250, lines 12 to 19; Transcript, page 251, lines 34 to 44.

page four

From November 21, 1988, to the present, the Appellant has been seeking relief from stumpage payments while the Respondent has been routinely following policies and procedures in the form of the IAM in calculating pertinent stumpage rates. The Appellant has claimed no errors in these calculations, <15>.

Peter Byl, the founder of the Appellant, and his son, John, the General Manager, had many conversations, meetings and access to correspondence with and between various Ministry of Forest's representatives and important political figures in positions of influence that they contend have led to expectations of some form of stumpage relief, <16>. The promises that the Appellant says it relied upon consisted of the following:-

- 1) A conversation that took place between Peter Byl and Julian Juhasz, Director, Timber Harvesting Branch, on November 24, 1988, wherein Mr. Juhasz said that the point of appraisal for stumpage calculation on TSL A33752 would change and stumpage would go down, <17>. Peter Byl says

<15> Exhibit 1, Tab 9, clause 28; Tab 8, clauses 22 to 25; Transcript, page 208, lines 13 to 44.

<16> Exhibit 1, Tab 9, clause 36; Transcript, page 86, lines 4 to 23; Exhibit 9, Tabs 21,35; Exhibits, 21-A,B,C,D; Exhibit 9, Tabs 26,27.

<17> Transcript, page 261, lines 37 to 47; page 262, lines 1 to 29.

page five

that, on the basis of this information from Juhasz, the Appellant withdrew its Section 84 variance application for a lower stumpage rate. The Appeal Board notes that a change in the means of determining the point of appraisal would involve an amendment to the IAM, Section 2.4, by the Minister pursuant to Section 84(1b) of the Forest Act.

- 2) Two meetings that occurred on January 11, and December 11, 1991, <18>. They were attended by Peter and John Byl and numerous government officials from the Ministry of Forests and other Ministries. The relevant Ministers of Forests was present at each meeting. The Appellant says that, as a result of these meetings, it was led to believe that it could expect stumpage relief in the form of a Remission Order reducing the stumpage rate made pursuant to Section 84 (5) of the Forest Act. Both of these orders would have required an Order by the Lieutenant Governor in Council.

<18> Exhibit 9, Tabs 21,22,35; Exhibit 21.

page six

The Respondent conceded that conversations and meetings did take place and there were promises made of a broad nature that the Ministry was looking "for solutions", <19>. However, there was ample correspondence to indicate to the Byls that they should have considered the reasonableness of their expectations more critically, <20>. The two letters in particular from the Minister of Forests to the Appellant, one dated, March 30, 1989, <21>, and the other dated, October 12, 1989, <22>, make it clear that TSLs purchased under Section 16.1 are bound by contract and the Appellant should not expect them to be subject to an arbitrary change in stumpage determinations.

The stumpage determinations, for the Appellant's TSLs have been made by the Respondent within the legal framework provided by the Forest Act. Under Section 16.1 of the Forest Act, it is stated that the owner of a timber sale licence, must pay stumpage described under Part 7 of the Forest Act. No where in Section 16.1 does it state that stumpage determinations should be given special consideration or treatment in TSLs issued under Section 16.1.

- <19> Transcript, page 303, lines 18 to 39.
<20> Exhibit 9, Tabs 13,16,28,34; Exhibit 10, Tab 2.
<21> Exhibit 9, Tab 13.
<22> Exhibit 9, Tab 16.

page seven

In, Bid Proposal Sales : A Report to the Minister of Forests, January 1991, <23>, the Bid Proposal Committee recommended that, "no special consideration be given in the determination of stumpage prices for bid proposal sales".

The intent of Section 16.1 of the Forest Act, as interpreted in Bid Proposal Sales : A Report to the Minister of Forests, <24>, is to encourage the remanufacturing of lumber and the production of specialty products by firms which are in the Small Business Forest Enterprise Program and to provide these firms with a relatively secure source of fibre, the importance of which was established by the Appellant, <25>. The Appellant manufactures value-added wood products such as window frames, tables, book-shelves and miscellaneous furniture components.

Section 84 of the Forest Act authorizes the determination of stumpage rates in accordance with policies and procedures approved for the Forest Region by the

- <23> Exhibit 19, page 11, clause 5.5; Transcript, page 266, line 2 to page 268, line 16.
- <24> Exhibit 19, page 3, clause 4.0.
- <25> Transcript, page 29, lines 15 to 39, page 75, lines 29 to 47, page 76, lines 1 to 46

page eight

Minister. Those procedures are described in the IAM, <26>. The IAM came into effect on October 1, 1987, prior to the formation of the Appellant's first TSL, TSL A33752, on November 21, 1988. The Respondent applied the IAM in its stumpage determination of all the Appellant's TSLs.

Also within Section 84 of the Forest Act, where the Lieutenant Governor in Council considers it to be in the public interest, it may order that stumpage rates for timber in an area, or cut under an agreement, be lower than rates determined under the IAM for timber for a period not exceeding one year.

On January 14, 1991, <27>, January 15, 1991, <28>, and March 12, 1991, <29>, officials of the Ministry of Forests contemplated an Order In Council. A draft Order In Council that would set stumpage rates at \$6.33 per cubic metre, exclusive of levies, payable on timber harvested under the Appellant's TSLs, was prepared for April 1, 1991, enactment. The reason why this Order In Council was not enacted is unknown, but, in no way, should it be construed as a broken promise.

- <26> Exhibit 1, Tab 10.
- <27> Exhibit 21-A.
- <28> Exhibit 21-B.
- <29> Exhibit 21-C.

page nine

As to whether the Respondent has erred in applying the IAM to the Appellant's TSLs, consideration must be given to the British Columbia Forest Service Comparative Value Timber Pricing paper, dated, September 15, 1987, <30>. This paper was an introduction to a new stumpage system. It makes it clear that most timber in the Province should be sold at comparative value prices but makes two provisions, namely:-

- 1) A number of miscellaneous forest products will not be appraised, but instead, continue to be sold at rates set out in schedules incorporated in appraisal manuals, <31>. Miscellaneous forest products are listed in Section 6.6 of the IAM, <32>. Common to these products is the fact that they can be collected and roughly manufactured within the bounds of the areas where they are harvested. The sophisticated, manufactured "sticks", referred to by the Appellant, <33>, clearly cannot be included in this category.
- 2) " Upset prices for Small Business Enterprise Program timber sales will be set at or above the Ministry's direct costs of administering such sales. Smaller sales may be sold without

<30> Exhibit 4, Tab 2.
<31> Exhibit 4, Tab 4.
<32> Exhibit 1, Tab 10.
<33> Transcript, page 344, lines 27 to 46.

page ten

appraisal. Sales of more than 10,000 cubic metres will be appraised ", <34>. The TSLs in the Appellant's possession are all greater than 10,000 cubic metres and, therefore, must be appraised according to the procedures in an appraisal manual.

Section 1.5, of the IAM, states that the comparative value pricing system, subject to minimum rate, is the basis for determining stumpage rates with the exceptions noted in Section 6, <35>. Section 6.4 of the IAM, refers to Small Business Enterprise Program timber sales in that, if they are issued under Sections 16 and 16.1 of the Forest Act, they must be appraised. The Appellant's TSLs were issued under Section 16.1 of the Forest Act and were, therefore, appraised.

The Appellant contends that the comparative value pricing system does not take into account either the selling prices, <36>, nor the costs of its value-added products, <37>, and that its business is fundamentally different from the manufacture of dimension lumber in that it produces such items as window frames and furniture components, <38>.

<34> Exhibit 4, Tab 2, page 2.

<35> Exhibit 1, Tab 10.

<36> Transcript, page 11, lines 24 to 26.

<37> Transcript, page 11, lines 7 to 23.

<38> Transcript, page 9, lines 13 to 16; page 67, line 25 to page 68 line 4; Exhibits 5,6,7,8.

page eleven

The comparative value pricing system for the Interior of British Columbia is based on average prices and costs for dimension lumber and chips, <39>. The approval or disapproval of this procedure by Section 16.1 TSL owners is not within the mandate of this Appeal Board. The Respondent maintains that the Appellant's real objection is to the Minister's policies inherent in the procedures, not with the application of those procedures, <40>.

Section 2.1 of the IAM lists four methods by which stumpage rates may be determined, namely:-

- 2.1 a) The full appraisal method, described under Sections 3 and 4 of the IAM, has been applied to the majority of cutting authorities including Section 16.1 TSLs such as those owned by the Appellant.
- 2.1 b) An Order In Council directive, that sets rates under Section 84(5) of the Forest Act; this method has been considered but not concluded for the Appellant's Section 16.1 TSLs, <41>.
- 2.1 c) Pricing under Section 6 of the IAM, is intended for miscellaneous forest products and does not apply to the Appellant's Section 16.1 TSLs, <42>.

<39> Transcript, page 275, lines 2 to 13; Exhibit 1, Tab 10; Exhibit 4, Tab 4, page 3.

<40> Exhibit 1, Tab 8, Clause 26.

<41> Exhibit 20

<42> Exhibit 4, Tab 4, page 1.

page twelve

2.1 d) The use of rates developed by Regional Valuation Staff and the Regional Manager, is intended for minor or emergency situations, such as where fire has damaged a stand of timber, <43>, and does not apply to the Appellant's Section 16.1 TSLs.

The Appeal Board was impressed by the Appellant's initiative and effort in developing a large secondary wood products manufacturing business in Prince George over the last 25 years, <44>.

The Appeal Board recognizes the Appellant's adverse financial position that has resulted from the decision to acquire TSLs in 1988 and 1990 under Section 16.1 of the Forest Act on which stumpage determinations increased under the variable rate option, <45>. We further recognize that the Appellant acquired these TSLs for the purpose of operating its own sawmill and expanding its remanufacturing business, <46>.

<43> Transcript, page 332, lines 4 to 47, page 333, lines 1 to 13.

<44> Transcript, pages 53 to 71, all lines, page 8, lines 28 to 47, page 9, lines 1 to 10, Exhibits, 5,6,7,8.

<45> Exhibit 9, Tab 19.

<46> Transcript, page 252, lines 11 to 18.

page thirteen

Evidence was presented by the Appellant, and not refuted by the Respondent, that in a number of conversations and meetings with senior Forest Service administrators, MLAs and Cabinet Ministers, an indication was given that, in spite of formal advice to the contrary, <47>, it would be provided with some form of relief or other assistance, <48>. The Appellant maintains that, for this reason, normal harvesting and manufacturing operations were continued, <49>.

Section 154(3) of the Forest Act makes it clear that the Appeal Board must apply those policies and procedures approved by the Minister of Forests under Section 84 that were in effect at the time of the initial determination being appealed. Therefore, we are bound to apply the policies and procedures set forth in the IAM and we have concluded that the Respondent correctly followed those policies and procedures in determining the stumpage that is the subject of this appeal.

Yet, the Appellant asks us to enforce its "expectation" of stumpage relief in the forms of:-

- <47> Exhibit 9, Tab 13, Tab 16; Transcript, page 159, lines 17 to 21.
- <48> Exhibit 1, Tab 9, clause 36; Exhibit 9, Tab 21; Exhibits 21-A,B,C,D; Transcript, page 86, lines 4 to 23, page 180, lines 41 to 47, page 184, lines 15 to 47, page 185, lines 1 to 8, page 203, lines 25 to 30.
- <49> Transcript, page 170, 16 to 32, page 234, lines 1 to 13.

page fourteen

- 1) An amendment by the Minister to the IAM policies and procedures for determining the point of appraisal.
- 2) A reduction or remission of stumpage by Orders in Council made pursuant to Section 84(5) of the Forest Act or to Section 16 of the Financial Administration Act.

The Appeal Board's mandate on this appeal is limited. We cannot ignore policy that has been validly established by the Minister. Nor are we persuaded that either an estoppel lies, or that the doctrine of legitimate expectations operates, against the Respondent in respect of the powers that the Appellant argues it expected were going to be exercised in its favour. This is because the powers in question are legislative in nature and as such create substantive as opposed to procedural rights: MacMillan Bloedel Limited v. Min. of Forests, (1984) 51 B.C.L.R. 105 (B.C.C.A.) at 133-144 and Reference re Canada Assistance Plan, (1991) 83 D.L.R. (4th) 297 (S.C.C.) at 319-321. There is no evidence that Mr. Juhasz had any authority to speak for the Minister regarding future amendments to the policies and procedures prescribed pursuant to Section 84(1) of the Forest Act. Nor is it for the Appeal Board to enforce promises of legislative change made by elected officials. We must decline the Appellant's invitation to do just that.

page fifteen

However, the Appeal Board suggests that the manner by which the Appellant was led to expect some form of stumpage relief created a moral obligation on behalf of the government of British Columbia to assist the Appellant to overcome its current financial crisis. This could involve some form of voluntary adjustment to the stumpage debt as part of a comprehensive plan.

Future stumpage determinations of the Appellant's Section 16.1 TSLs must continue to be in accordance with the IAM though subject to changes that the Ministry of Forests might make, at a later date, such as point of appraisal or the recognition of special features common to secondary wood products manufacturing.

The Appeal Board was informed that the Job Protection Commission is working on a second economic plan to make the Appellant's business viable, <50>. This plan involves the cooperation of several financial institutions, several government ministries and the Appellant. We welcome this government initiative but realize that, for it to be successful, all parties will have to make some difficult decisions. Through this means, we hope that the Appellant will have the opportunity to develop and implement a sound business plan for the future.

<50> Exhibit 11; Transcript, page 147, line 16 to page 149, line 31.

page sixteen

Furthermore, the Appellant indicated that the question of stumpage relief pursuant to Section 84(5) of the Forest Act and Section 16 of the Financial Administration Act was being considered by Cabinet concurrently with the hearing of this appeal, <51>.

Subsequent to the hearing, but before making a decision on this appeal, the Appeal Board inquired of Ministry of Forest's personnel as to what had become of this matter and we were informed that nothing was before Cabinet. As a result of a concern that we had made this enquiry without consulting legal counsel for either the Appellant or Respondent, our legal counsel apprised the other counsels of what had transpired by letter attached as an Appendix to this decision. Our decision has not in any way turned on or been influenced by the inquiry described above.

<51> Transcript, page 143, line 33 to page 144, line 4.

page seventeen

It is the decision of this Appeal Board that the Respondent has followed policies and procedures as prescribed by the Minister of Forests in the determination of stumpages on the Appellant's Timber Sale Licences and that the determination of the Chief Forester should be upheld.

Therefore, the Appeal Board dismisses this Appeal.

SIGNED BY MEMBERS OF THE APPEAL BOARD:

	<u>Date</u>
Mr. Jonathan G. Phillips, Chair,	<i>J.G. Phillips</i> 92.06.24
Mr. Larry Hope, Member,	<i>L. Hope</i> June 24/92
Mr. James F. McWilliams, Member,	<i>J.F. McWilliams</i> June 24/92

CC: Woodland Lumber Ltd. and Scana Industries Ltd.
C/O Heather, Sadler, Jenkins
Barristers and Solicitors
700 - 550 Victoria Street
Prince George, B.C.
V2L 2K1
Attention: D. Byl, Esq.

June 1992

APPENDIX

Reply to: Susan E. Ross
Our File: 326

June 18, 1992

Via Fax 563-8939

Heather, Sadler, Jenkins
Barristers and Solicitors
700 - 550 Victoria Street
Prince George, B.C.
V2L 2K1

Attention: Dick Byl

Dear Sirs

Re: Woodland Lumber Ltd. and Scana Industries Ltd.
Stumpage Appeal

The purpose of this letter is to apprise you that, having been informed by you at the hearing that the Cabinet was considering the issue of relief for the Appellants on stumpage rates at that very time, the Appeal Board took it upon themselves on Friday June 12, 1992, to initiate a telephone conference call with Hans de Visser and Nick Crisp of the Ministry of Forests. Roberta Reader, as counsel for the Ministry, and myself, as counsel for the Appeal Board, only became aware of the conference call between our clients after the fact.

All three members of the Appeal Board participated in the call. I am informed that their purpose was to learn the outcome of the matter you had told them was before the Cabinet; Messrs. de Visser and Crisp advised them that nothing was before Cabinet and that the CIBC had not acted on June 9, 1992, to appoint a Receiver of the Appellants' business.

The preferable procedure, to be sure, would have been for the Appeal Board to have directed their inquiry in such a manner that all the parties could participate in responding. To that end, I have spoken to Ms. Reader and she has agreed to make Messrs. de Visser and Crisp available to inform you of what transpired in the conference call. The members of the Appeal Board also wish to cooperate fully as necessary to ensure that your clients' rights of participation and fairness in the appeal process are fully met.

Heather, Sadler, Jenkins
Barristers and Solicitors
June 18, 1992
Page 2

They have not yet made any decision and have until Thursday June 25, 1992, to do so.

I ask that you contact me immediately upon receiving this letter so that we may discuss this matter and resolve it to the satisfaction of all parties.

Yours sincerely

ARVAY FINLAY

SUSAN E. ROSS

SER*vlh

cc: Roberta Reader
Ministry of Attorney General, Legal Services Branch

cc: Jonathan Phillips
Chairman, Appeal Board