COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Western Forest Products Limited v. HMTQ,* 2009 BCCA 354

Date: 20090813
Docket: CA035166

Between:

Western Forest Products Limited

Appellant
(Respondent)

And

Her Majesty the Queen in Right of the Province of British Columbia as represented by The Minister of Forests and Range

Respondent
(Appellant)

And

Forest Appeals Commission

Respondent
(Respondent)

Before: The Honourable Madam Justice Newbury
The Honourable Mr. Justice Low
The Honourable Mr. Justice K. Smith

On appeal from the Supreme Court of British Columbia, Victoria Registry, Docket No. 0-4862, *British Columbia (Minister of Forests and Range) v. Forest Appeals Commission*, May 16, 2007, 2007 BCSC 696

Counsel for the Appellant:	J.J.L. Hunter, Q.C. M.S. Oulton
Counsel for the Respondent Province of British Columbia:	J.E. Gouge, Q.C.
Counsel for the Respondent Forest Appeals Commission	M.G. Underhill

Place and Date of Hearing:	Vancouver, British Columbia May 29, 2009
Place and Date of Judgment:	Vancouver, British Columbia August 13, 2009

Written Reasons by:
The Honourable Madam Justice Newbury
Concurred in by:
The Honourable Mr. Justice Low
The Honourable Mr. Justice K. Smith

***Reasons for Judgment of the Honourable Madam Justice Newbury*:**

[1] Western Forest Products Limited ("WFP") appeals a decision of a chambers judge below, allowing an appeal brought by British Columbia against a decision of the Forest Appeals Commission. The Commission's decision was on appeal from a decision of a District Manager, who in turn was reviewing a "determination" of a regional appraisal coordinator. The underlying question for that official was whether in assessing stumpage to be paid by WFP to the Province, it was "unsuitable" for WFP to calculate its expenses on the assumption that it was using a log dump at Sooke, or whether, as the Province contends, a log dump location at Jordan River, the location actually used by WFP, was required to be used. The District Manager determined in June 2003 that Jordan River was suitable; but by a decision dated September 21, 2005, the Commission found that the Jordan River log dump was unsuitable for use by a notional average operator and that if it was unsuitable for such an operator, "it must be unsuitable for all." For reasons

indexed as 2007 BCSC 696, the chambers judge below concluded that the Commission's decision was unreasonable and contrary to the "plain and unambiguous" meaning of s. 4.1 of the Coast Appraisal Manual, about which more will be said below.

[2] WFP appeals on the grounds that the chambers judge applied the wrong standard of review, the correct standard being one of reasonableness; that he erred in ruling that certain expert evidence adduced by WFP before the Commission with respect to the operation of the stumpage appraisal system under the *Forest Act,* R.S.B.C. 1996, c. 157 (the "Act") should have been excluded; and that he erred in his interpretation of the Manual, failing to give effect to the "full context" in which stumpage rates are determined.

[3] For the reasons given below, I am of the view that the chambers judge did err in failing to apply a standard of reasonableness to the Commission's decision, in his treatment of the evidence proffered by WFP at the hearing before the Commission, and in his interpretation of the Manual. In the result, I would allow the appeal and restore the Commission's decision.

Legislative Background

[4] As the chambers judge noted at para. 3 of his reasons, stumpage is determined under the authority of s. 105 of the *Forest Act*. It provides in part:

> (1) Subject to the regulations made under subsections (6) and (7), if stumpage is payable to the government under an agreement entered into under this Act or under section 103(3), the rates of stumpage must be determined, redetermined and varied
>
> (a) by an employee of the ministry, identified in the

policies and procedures referred to in paragraph (c),

(b) at the times specified by the minister, and

(c) in accordance with the policies and procedures approved for the forest region by the minister.

...

(2) Rates, policies and procedures under subsection (1) may be different for different timber, places, transactions or holders of agreements entered into under this Act.

...

(3) Despite subsection (1), but subject to the regulations made under subsection (6) and orders under subsection (7), the holder of a timber licence must pay stumpage to the government at a percentage of the rates determined under subsection (1).

...

(5) Within 30 days after the minister approves the policies and procedures for a forest region, they must be filed with the regional manager for the forest region who must make them available for inspection by any person.

(5.1) The policies and procedures referred to in subsection (1) (c) may require the holder of an agreement to submit information to the government as necessary or desirable for the determination, redetermination or variation of a stumpage rate.

The various levels of appeal available in respect of a determination under s. 105 are dealt with at ss. 146, 148 and 149 of the Act. Under s. 150, the Province has a right of appeal from the Commission to the Supreme Court of British Columbia on a question of law or jurisdiction.

[5] The Coast Appraisal Manual is a statement of current policies and procedures approved by the Minister under s. 105(1)(c)

from time to time. In 1984, in *MacMillan Bloedel Ltd. v. Minister of Forests of British Columbia* (1984) 51 B.C.L.R. 105, Macfarlane J.A. for this court noted that the Minister's power to establish policies and procedures in this manner was analogous to regulation making and "more legislative than it is administrative, particularly having regard to the function of the minister to assert the financial interest of the Crown as the vendor of provincial timber resources. Such a power does not lend itself easily to judicial intervention." (At 113.)

[6] Section 1.6 of the Manual (in force April 1, 2002) sets out the procedure to be followed in determining the stumpage rate for a "cutting authority area" (the area from which timber may be harvested under a cutting authority) in the following terms:

> Comparative value pricing (CVP), subject to a minimum stumpage rate and sections 2.1(3), and 2.1(4) is the basis for determining stumpage rates for all cutting authority areas except those specified under section 1.5.
>
> The stumpage rate for a cutting authority area is more or less than the coast base rate (see section 5.5) depending on whether or not the timber in the cutting authority area is more or less valuable than timber from the average cutting authority area. To make that assessment and hence to determine a stumpage rate, the authorized Ministry of Forests employee (see section 1.4) will typically:
>
> 1. Estimate the Average Selling Price of the logs for the cutting authority area (see chapter 3).
> 2. Estimate the least Operating Cost (see chapter 4) for the cutting authority area.
> 3. Determine the value index (see chapter 5) for the cutting authority area by subtracting the estimated least operating cost from the estimated average selling price.
> 4. Determine the indicated stumpage rate by

comparing the value index for the cutting authority area with the coast mean value index and adding the coast base rate (see chapter 5).

5. Determine the reserve stumpage rate (see chapter 5) by selecting:

   a. the greater of the indicated stumpage rate or the prescribed minimum stumpage rate, or

   b. for an appraised cutting authority area containing timber licence volume, the greater of the adjusted indicated stumpage rate or the prescribed minimum stumpage rate.

6. Determine the upset stumpage rate by adding any development or silviculture levies (see section 6.5) to the reserve stumpage rate,

7. Determine the total stumpage rate by adding any bonus bid to the upset stumpage rate.

One stumpage rate is determined for all appraised timber in each cutting authority area with the exception of miscellaneous stumpage rates under section 6.6. [Emphasis added.]

[7] In accordance with chapter 4 of the Manual, the district manager of the region requires licensees to provide "cost appraisal data submissions" and related information from time to time. This includes the licensee's estimate of costs for logging and "trended basic silviculture". Section 4.1, headed "Cost Estimates", requires licensees and contractors to compile costs, including wage, fuel, supplies, freight, and in the case of contractors, profit and risk margins, overhead, and crew transportation. The Manual continues:

6. The person who determines the stumpage rate must estimate total operating costs for a cutting authority

> area in a manner that will produce the appraisal least total operating cost estimate for the cutting authority area.
>
> 7. The appraisal estimate of harvesting and transportation costs must be determined by using the criteria for determining the harvesting and transportation costs as set out in this manual.
>
> 8. The estimate of harvesting costs must be determined for the method of harvesting referred to in this manual, other than a method that the district manager states is unsuitable for the cutting authority area, that will produce the appraisal least total operating cost estimate.
>
> 9. The estimate of the transportation costs must be determined for the method of transportation referred to in this manual, other than a method that the district manager states is unsuitable for the cutting authority area, that will produce the appraisal least total operating cost estimate. [Emphasis added.]

Counsel were at a loss to explain the meaning of "appraisal least total operating cost estimate" in s. 4.1.6 and s. 4.1.9. It may be that the word "appraisal" was misplaced or should not have appeared in the section at all, or that the phrase is simply an inelegant version of "lowest operating cost estimate".

[8] Other sections of the Manual deal with other variables relevant to the determination of cost estimates. For example, s. 4.5, headed "Log Transportation", states:

> The truck hauling phase cost estimate is for the movement of logs from the roadside or landing in the woods to the appraisal final off-loading destination selected for the cutting authority. This cost estimate includes all rehaul situations except those involving lake transportation. Both on-highway and off-highway hauling are calculated with the same formula and variable [*sic*].

[9] As I understand it, all the variables are fed into the basic formula stated at s. 5.2, headed “Value Index”. This is defined as “the difference between the selling price estimate and the operating cost estimate, both of which are estimates expected of an average operator in that stand.” The value index is equal to the excess of the estimated stand selling price determined in accordance with Chapter 3 of the Manual, over the estimated operating cost applicable to the timber in question, determined in accordance with Chapter 4. Obviously, the lower the cost figure, the higher the value index, and thus stumpage payable, will be.

[10] In addition to the Coast Appraisal Manual, the Minister has also issued a “Ministry Policy Manual” which is available on the Internet. It states in part that stumpage rates do not vary for different applicants (citing ss. 103-5 of the Act), and that:

> The application of appraisal tables and formulas will be based on industry’s typical operating methods, in concurrence with the approved logging plan and approved appraisal policies. A given licensee’s past or prospective practices should not influence appraisals. A stumpage appraisal will not deviate from standard policy in order to capture a licensee’s unique efficiency in harvesting or processing.

[11] As mentioned earlier, one of the issues raised on this appeal related to expert evidence adduced by WFP consisting of a report and testimony from Mr. Stephen Potter. He was tendered as an expert “with respect to stumpage appraisal policies under the Coast Appraisal Manual”. The Province did not object to his being so qualified nor to the admission of his report into evidence. In that report Mr. Potter wrote that:

One of the fundamental principles of the Ministry of Forests' (MOF) stumpage appraisal policy is that no matter who harvests a particular tract of timber the same stumpage rate should be payable. In other words a situation where there are two different stumpage rates for the same tract of timber should **not** occur. This is the concept of licensee neutrality. It is irrelevant how a licensee chooses to harvest a tract of timber, who harvests the timber, what the actual destination of the harvested timber may be or what actual harvesting costs are incurred. The stumpage rate payable is determined using cost estimates and methods that would apply if a hypothetical average efficient operator had harvested that tract of timber using the "least total cost harvesting method". Thus the stumpage rate should not vary based on the identity of the licensee or the actual harvesting methods employed by that licensee. ...

Under Comparative Value Timber [Pricing] the "least total operating cost estimate" must be used in determining the stumpage rate. Thus if there are multiple possible destinations for the timber, known as the point of origin, the destination that results in the least total cost estimate is the destination that applies in the stumpage calculation. Thus the same point of origin for a particular tract of timber is used and the same cost estimates for things like silviculture, trucking, boom dump and scale and towing apply no matter who harvests the timber.

Operating cost estimates in the Coast Appraisal Manual are averages derived from a cost survey of coastal industrial harvesting operations. The derived estimates are broad averages of actual experienced costs. ...

If an operator has a unique operating advantage (disadvantage) it is **not** recognized in the stumpage calculation. For example a licensee may have considerable expertise and experience in helicopter logging. The company may own several helicopters that would be difficult to replace at a reasonable cost and thus through experience and lower depreciation the company has a significant unique operating advantage over other companies. Even though this licensee may have a

> unique advantage the same average helicopter cost estimate ... applies in the calculation of stumpage for the company with this unique advantage as those without. Some other examples of unique operating advantages might be good labour relations, off highway trucking versus highway trucking, new equipment versus old equipment or a good log storage area versus a marginal log storage area." [Emphasis by underlining added.]

According to Mr. Potter's report, the concept of licensee neutrality has been in place since 1987 and has been a guiding principle of timber pricing throughout the province since that time.

[12] In his testimony before the Commission, Mr. Potter was asked how the Ministry typically handles "unique" situations or advantages. He responded that unique situations are not recognized – in his words, "They get rolled up into the averages."

[13] WFP also adduced testimony from Mr. Terry Anderson, its stumpage appraisal supervisor for its Mainland-Island region, and Mr. Larry Henkelman, its manager of timber appraisals and pricing. Both testified as to WFP's operations in the cutting authority which is the subject of this appeal and as the chambers judge noted, in describing the calculation of WFP's stumpage, both referred many times to the concept of "average operator, notionally efficient operator, notionally average, efficient operator, and the like." (Para. 32.) There is no suggestion in the Commission's reasons that their testimony was weakened on cross-examination. The Province did not adduce witnesses of its own.

Factual Background

[14] The cutting authority in question in this case is TFL 25,

located south of Port Renfrew on the west coast of Vancouver Island. Approximately six kilometres south of TFL 25, a dry-land sort and log dump is owned and operated by WFP, bordered on the south by the Jordan River and on the west by the Pacific Ocean. The log dump is able to handle about 200,000 cubic metres of timber annually and is being used to its full capacity by WFP. Timber is delivered to the facility by truck, unloaded and sorted and then dumped into the Jordan River and assembled into sections for towing to WFP's facility at Becher Bay, where it is stored until enough sections have been assembled to make it economical to take the timber to market.

[15] Because of various geographical and geological circumstances, the dump can be used only when tide and weather conditions are favourable. According to the Commission's finding, WFP's potential ability to expand the facility is low. As a result, the Commission found, Jordan River is a "unique facility, which can be used only by Western." This is so even though TimberWest has harvesting operations in the same area south of Port Renfrew. It stores and booms its timber at a facility on Shoal Island, near Sooke on the east coast of Vancouver Island, a facility that has a much greater capacity than the Jordan River facility.

[16] I set out again para. 9 of s. 4.1 of the Manual:

> 9. The estimate of transportation costs must be determined for the method of transportation referred to in this manual, other than a method that the district manager states is unsuitable for the cutting authority area, that will produce the appraisal least total operating cost estimate.

In its "appraisal data sheets" for the applicable period WFP did not

calculate its costs based on using the Jordan River log dump, but used the Sooke location that is used by TimberWest, thus producing a higher amount for costs than WFP's actual costs. The regional appraisal coordinator determined, however, that the appropriate appraisal log dump was at Jordan River, with the result that WFP would have to pay substantially greater stumpage than if the Sooke location were used. WFP then sought a determination of the District Manager, who on June 17, 2003 ruled that Jordan River was a suitable log dump (or more correctly, that it was not unsuitable) for appraisal purposes.

[17] WFP again appealed, this time to the Commission, which entered its decision on September 21, 2005, to the effect that Jordan River was unsuitable for WFP's cutting authority area. In the course of its reasons, the Commission noted that the discretion to select the appraisal log dump for a particular cutting authority must be exercised in a reasonable manner and in a manner consistent with the objectives and intentions of the Manual. The Commission continued:

> Although not expressly stated in the [Manual], there is an underlying principle that costs estimates are independent of the circumstances of any particular licensee, and are to be based upon what would be done by an average efficient operator. As noted by Western, licensee neutrality has been recognized in many judicial and tribunal decisions as a fundamental principle to be applied in the stumpage appraisals including appraisals under the [Comparative Value Pricing] system.
>
> In this case, the Ministry determined the stumpage rate(s) using Jordan River as the appraisal log dump and point of origin. Jordan River is the closest log dump to the cutting authority area. There is a functioning log dump at Jordan River and it produces the lowest estimate of

> transportation costs. The Government also makes a reasonable argument that capacity should not be determinative in judging whether a particular facility is a suitable log dump for either a specific or notional average operator. There is no practical way to track the availability of capacity at all the log dumps on the coast and appraise or reappraise accordingly. Furthermore, tracking capacity is not what was contemplated by the [Manual].
>
> In a purely hypothetical world, where site-specific or temporal circumstances are ignored, the Ministry is right and all licensees should be appraised to Jordan River. Questions of suitability, however, cannot be determined without consideration of site-specific factors. In order to exercise discretion in a reasonable manner, the appraiser always needs to give reasonable consideration to actual circumstances when estimating appraisal costs. For example, when determining a haul distance, the Ministry does not assume a straight line from A to B; instead it accepts the actual road distance. Similarly stumpage appraisers do not assume that a log dump will be located at the nearest water location to the cutting authority; they use an existing dump or a previous dump location .... These are site-specific considerations. Under a CVP system, however, those site-specific factors are to be viewed in the context of a notional, average operator, rather than in the context of a particular licensee. [Emphasis added.]

[18] After reviewing two previous cases dealing with the Jordan River question, the Commission concluded that the Jordan River log dump was not suitable for use by a notional average operator because of its physical and environmental constraints. It stated:

> Since an appraisal is based on estimated costs of a notional average operator, if Jordan River is unsuitable as an appraisal log dump for the notional average licensee, it must be unsuitable for all. It is unfair to appraise all other licensees in the cutting authority area to another log dump

> but appraise Western to Jordan River. To do otherwise would penalize Western for its unique operating efficiencies. [Emphasis added.]

Accordingly, the previous stumpage advisory notices were rescinded and the regional appraisal coordinator was directed to reappraise WFP's stumpage rates associated with TFL 25 using the log sump at Sooke, the same log dump utilized by TimberWest for its cutting permits in the same area.

Reasons of the Court Below

[19] The chambers judge reviewed the factual background at the beginning of his reasons and noted the Province's argument that the Commission had wrongly interpreted the phrase "unsuitable for the cutting authority area", by importing into the Manual language such as "average efficient operator" or "notional average operator", with the result that the phrase effectively read "unsuitable for a notional average operator in the cutting authority area." Further, the Province contended that the Commission had erred when it admitted extrinsic documents into evidence that purported to explain the policies underlying the Manual, as well as opinion evidence of the expert witness and WFP employees interpreting the policy underlying the Manual. In response, WFP argued that "the Commission had the right to resort to context" in applying the modern principle of statutory interpretation formulated by Driedger in *Construction of Statutes*, 2d ed. (Toronto: Butterworths, 1983) and adopted by the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd. (Re)* [1998] 1 S.C.R. 27 at para. 21. WFP contended that the Commission had properly considered publications of the Ministry of Forests, including that taken from the Ministry's own

website. The expert witness and WFP's employees had correctly reflected the Coast Appraisal Manual and its adoption of "licensee neutrality" in the calculation of stumpage. In any event, WFP argued, the Commission possessed expertise that the court did not possess on the interpretation and application of the Manual and should be given "a great deal of deference" and be interfered with only if its use of the notions of licensee neutrality and notional, average operator was unreasonable. (Para. 43.)

[20] This brought the chambers judge to the question of standard of review. At paras. 45-60 he analyzed the factors set out in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)* [1998] 1 S.C.R. 982, including the issue of whether the question decided by the Commission was one of law, fact or mixed law and fact. He found that it was one of law. In his words:

> Mr. Underhill, for the Commission, argues that the suitability of Jordan River as the appraisal log dump in this case is best characterized as a question of mixed law and fact. This appeal is not so much from the selection of Sooke as the appropriate appraisal log dump, in preference to Jordan River, as from the reason the Commission decided Jordan River was unsuitable, and the interpretation of the relevant portion of the Coast Appraisal Manual that led to that result. With respect to the application of the notions of "average efficient operator" and "licensee neutrality" to the Coast Appraisal Manual, I view the question as one of law, rather than of mixed fact and law. There was little if any factual finding that contributed to the interpretation now under review, and the evidence on the point was a combination of opinion or argument from the witnesses, and policy statements from the Ministry of Forests. I conclude that an analysis of this factor would indicate a lower level of deference due the Commission. [At para. 59.]

Weighing all the factors together, the chambers judge then concluded at para. 60 that the applicable standard of review lay between reasonableness *simpliciter* and correctness, and that he would put it "closer to reasonableness *simpliciter*."

[21] Since the chambers judge's reasons were released, the landscape of law in Canada relating to judicial review has been reconsidered by the Supreme Court of Canada in *Dunsmuir v. New Brunswick* 2008 SCC 9, [2008] 1 S.C.R. 190. The Court has now determined that there should be only two standards of review – correctness and reasonableness, and has explained that the reasonableness standard is "concerned mostly with the existence of justification, transparency and intelligibility within the decision making process" as well as with whether the decision falls within a "range of possible, acceptable outcomes which are defensible in respect of the facts and law." (Para. 47.) As for the nature of the issue decided by the administrative body, questions of law (including statutory interpretation) are no longer necessarily to be decided on a correctness standard, and indeed it appears most questions of law are to be judged according to the more deferential standard of reasonableness. In the Court's analysis, where the issue is one of fact, discretion or policy, deference will "usually apply automatically". (Para. 53.) On the other hand, the standard of correctness will be maintained in respect of "jurisdictional and <u>some</u> other questions of law" (my emphasis), including "true questions of jurisdiction or *vires*" or questions of general law "that [are] both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise". (Para. 60.) As has always been the case, the analysis must also be "contextual", depending on "a number of relevant factors,

including: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal." (Para. 64.)

[22] *Dunsmuir* was intended to simplify or obviate the kinds of elaborate analysis carried out previously and I believe it has had that effect in this case. We are not concerned here with a jurisdictional issue or one of general law of central importance to the legal system. Rather the case turns on the exercise of discretion in a technical area by a tribunal with technical expertise and certainly a greater expertise in understanding the workings of the appraisal system than a court has. There is little question, in my view, that the standard of reasonableness should have been applied to the Commission's determination that the Jordan River log dump was "unsuitable for the cutting authority area" within the meaning of para. 9 of s. 4.1 of the Manual.

Admissibility of Evidence

[23] The Province contended below that the Commission had erred in admitting certain Ministry of Forests' documents as aids to the interpretation of the Coast Appraisal Manual. The chambers judge did not agree with this submission, and in my view was correct. He found at para. 74 that it was appropriate the Commission be permitted to consider policy statements and explanatory documents issued by the same ministry that had "authored" the Manual. At a minimum, he said, they were part of the context in which the Manual operates.

[24] The Province also contended that the Commission erred in

admitting the evidence of WFP's expert, Mr. Potter, and of the two WFP employees, Messrs. Henkelman and Anderson.

[25] Having characterized the question before the Commission as one of law – i.e., the interpretation of the phrase "unsuitable for the cutting authority area" in para. 9 of s. 4.1 of the Manual – the chambers judge was critical of Mr. Potter's evidence. At para. 71 he observed:

> To the extent that Mr. Potter's evidence was in the form of opinion, it suffered from a lack of proven facts upon which it was based. His written opinion appears to be almost entirely argument, and his oral evidence combined argument and opinion. It could not have been taken as proof that either or both licensee neutrality or average efficient operator or licensee were principles fundamental to the Coast Appraisal Manual.

With respect to Messrs. Henkelman and Anderson, the chambers judge also characterized their evidence as "more argument and conclusion than statements of observed fact or personal experience". (Para. 73.) Although he did not say so explicitly, I read his reasons as adopting the Province's submission that neither Mr. Potter's written opinion nor his oral evidence should have been admitted and that the evidence of Messrs. Henkelman and Anderson should have been excluded.

[26] It is unclear whether the chambers judge was referred to s. 148.6 of the *Forest Act*, which states that the Commission may admit evidence in an appeal "whether or not given or proven under oath or admissible as evidence in a court" provided it is relevant to the subject matter at hand. This provision is consistent with the principle, affirmed by this court in *Cambie Hotel (Nanaimo) Ltd. v.*

British Columbia (General Manager, Liquor Control and Licensing Branch) 2006 BCCA 119, that an administrative tribunal, as "master of its own procedure" may admit hearsay evidence unless its receipt would amount to a clear denial of natural justice. (At para. 30, quoting from J. Sopinka, S.N. Lederman and A.W. Bryant, *The Law of Evidence in Canada*, 2d ed. (1999) at 308.)

[27] The rules of evidence relating to expert reports and testimony admit of more discretion than the hearsay rule and, I would have thought, should be less susceptible to judicial interference. In any event, I do not read Mr. Potter's report or his testimony as being essentially argument or objectionable "opinion". He provided the Commission with an explanation of the comparative value system, where and when the Manual applies, and generally how stumpage rates are determined and by whom. While in a court of law one might have objected that he was opining on matters of law and thus trespassing into the court's province, the "law" in question here involved the interpretation of a highly technical manual. I do not think it was unreasonable for the Commission to have admitted Mr. Potter's report or his testimony in the circumstances of this case to provide an understanding of how the overall CVP system works and how the Manual's policies are administered. The Commission, and on appeal, the chambers judge, were still required to decide the more specific issue of how s. 4.1 of the Manual applies in this case.

[28] Mr. Anderson's testimony was restricted almost completely to matters of fact, and Mr. Henkelman spoke largely to his experience with the issue of the 'appropriate log dump' in the cutting authority, both with respect to WFP and its competitors. He

had been a member of the Coast Appraisal Advisory Committee and might therefore have been qualified as an expert, and did testify as to discussions which he had had with the Committee concerning WFP's assessment and what had transpired at various meetings and hearings on the issue in the past. He was extensively cross-examined and as I read his evidence, it summarized territory that would otherwise have had to be the subject of voluminous documentation. Again, keeping in mind s. 148.6 of the Act, it was not unreasonable, in my respectful view, for the Commission to have accepted this evidence.

The Chambers Judge's Interpretation of Section 4.1.9 of the Manual

[29] Under the heading "Reasonableness/Correctness of the Commission's Interpretation", the chambers judge turned at para. 75 of his reasons to what he saw as the central question before the Commission – the correct interpretation of the phrase "unsuitable for the cutting authority area". He rejected WFP's argument that having access to the Jordan River log dump was no different than if it had had a fleet of fuel-efficient trucks that could operate more cheaply than trucks of other licensees in the area. The chambers judge saw this as an unwarranted extension of the basis on which costs are ascertained by the regional manager for purposes of stumpage calculations. He continued:

> ... to take that concept and apply it in such a way that Western will pay stumpage as if it were trucking logs from its cutting permit area to Sooke, when in fact it is trucking them the shorter distance to Jordan River, and to do so because other licensees cannot use Jordan River and all must be treated the same is to use the concept to produce an absurd result.
>
> Jordan River only becomes "unsuitable for the

> cutting authority area" if the concepts of licensee neutrality, notional average operator, or average efficient operator are read into the Coast Appraisal Manual in order to defeat what would otherwise be the plain, unambiguous and obvious result of a plain and unambiguous reading of section 4.1 of the Coast Appraisal Manual, which is, the suitable appraisal log dump for Western is the one it is using, has used in the past, and will continue to use, for the cutting authority area in question.
>
> The plain meaning of statutory language, when read in its grammatical context, should govern unless it leads to an absurd result. Here, the reverse would be true if the decision of the Commission were allowed to stand.
>
> I conclude that the decision is unreasonable and, had I found otherwise with regard to the standard of review, would have concluded that the decision is patently unreasonable. [At paras. 78-81.]

In the result, the Court stayed the Commission's decision pursuant to s. 150 of the *Forest Act.*

Analysis on Appeal

[30] In this court, the parties provided us in their factums with extensive legal arguments concerning rules of interpretation as they apply to s. 4.1 of the Manual. Mr. Hunter for WFP submitted that Dreidger's "modern principle" requires a consideration of the entire context of the legislation and not simply the text of the law, citing *Pharmascience Inc. v. Binet* 2006 SCC 48, [2006] 2 S.C.R. 513, at para. 32 and *Montréal (City) v. 2952-1366 Quebec Inc.* 2005 SCC 62, [2005] 3 S.C.R. 141, at para. 10. He argued that having incorrectly ruled out the consideration of the purpose and object of the Manual, the chambers judge interpreted the "plain and

unambiguous" meaning of the words "unsuitable for the cutting authority area" as effectively meaning "unsuitable for the particular licensee to whom the cutting authority was issued". (See para. 79 of the chambers judge's reasons quoted above.) In Mr. Hunter's submission, this ignored the "average operator" premise underlying cost value assessments under the Manual, which seeks only to find average costs and average selling prices rather than actual costs and prices in the case of each operator in the cutting authority. Viewed from this perspective, the result arrived at by the Commission was not, Mr. Hunter says, "absurd", but was consistent with the overall CVP scheme.

[31] The Province responds that the word "unsuitable" does not in ordinary English usage mean "unsuitable for the notional average operator" but must in this instance mean "suitable for the cut blocks which the operator cuts". Further, it contends that s. 4.1 is not ambiguous, and that it would have been unnecessary and improper to construe it with reference to the object and policies of the Manual. Mr. Gouge notes that WFP's approach might be correct if the cost amounts used for stumpage calculations were all based on averages, but that in fact, many such costs are specific to particular operators. In this regard, he referred us to the decision of this court in *Canadian Forest Products Ltd. v. British Columbia (Ministry of Forests)* (1998) 55 B.C.L.R. (3d) 221 (C.A.), an appeal taken by an operator which used a railway to transport logs to an approved facility. This was the only railway operation still in existence in the Coast District and, although the operator had incurred substantial costs in the past to upgrade the railway, it expected that its transport costs would be lower than comparable trucking operations in future. At the time, s. 4.1 of the Manual read as follows:

> The forest officer must estimate operating costs for a cutting authority area in a manner which will produce the least total operating cost estimate for the cutting authority area. To do this, the forest officer must base estimates of harvesting and transportation costs on the operating cost estimates set out in this manual for the method, which will produce the least total cost estimate to the point of appraisal, unless that particular method of harvesting or transportation is not possible under the cutting authority. [Emphasis added]

[32] The Forest Appeal Board affirmed the appraisal officer's determination of stumpage without giving an allowance for railway costs, and the operator appealed unsuccessfully to the Supreme Court of British Columbia (see (1997) 36 B.C.L.R. (3d) 1). On appeal, this court ruled that the Board's decision could not stand. The Court described the assessment calculation under the Manual in general terms as follows:

> Perhaps at the risk of oversimplification; it seems to be the case that under the applicable provision of the CAM, cost estimates are arrived at and imposed upon operators to in effect give them a cost allowance for harvesting and transportation that they will be entitled to claim and set off against the value of timber harvested. To the extent that the assessed cost of operations is greater or lesser, this will impact upon the total stumpage payable. Cost estimates are to be reflective of costs to the "average operator" and are thus neutral to operators across a general area. More efficient operators benefit and less efficient operators suffer. The system is designed to reflect average costs and cost estimates are arrived at as a result of continuing consultation between Ministry of Forests personnel and industry personnel. [At para. 6; emphasis added.]

However, the Court noted that the forest officer, in order to achieve

neutrality amongst licensees and to avoid site-specific appraisals, had failed to give proper regard to the words “possible under the cutting authority” in s. 4.1. Hall J.A. stated:

> Those words must be construed to take account of the real conditions under which the licensee or licensees operate. While a licensee should not be advantaged because it holds multiple permits, neither should it be disadvantaged. If several licensees were to harvest TFL 37 under the same cutting permits granted to the appellant, the same practical constraints would apply today.
>
> As I noted earlier, TFL 37 has long been a railroad operation. That does not necessarily imply that it must remain so for all time but an immediate switch over is a pretty daunting prospect. The evidence discloses that the general road system that exists throughout TFL 37 is adequate for the reload operation presently in effect but that the existing roads are generally not up to long distance hauling standards. At least one of the major access roads referred to by the Ministry's representative as being possible for significant truck hauling is not under the control of the appellant and running rates and conditions would have to be negotiated relative to this road. The impact of a greatly increased number of logging trucks travelling up and down the Island Highway from various access points along TFL 37 to and from Beaver Cove would create some significant issues of interest to the Highways Department and to the public generally. [At paras. 28-9; emphasis added.]

At para. 35, Hall J.A. noted that the Minister had conceded that the operator was effectively precluded from using road haul rather than the railway in its operations in the TFL. In the result, the decision-makers below were found to have erred in assuming that it was “possible” for the operator to haul its logs by road rather than by railway. (The Court did not find it necessary to decide any issue of

standard of review.)

[33] As the Province notes in its factum, the District Manager in the case at bar applied the same principle and methodology to WFP's case. It produces the opposite result for WFP because it can and does use the Jordan River log dump. The Province argued that this is not unfair, since stumpage is "intended to reflect the value of timber (sale price less harvesting and transportation costs)" and WFP's costs are in fact "lower than TimberWest's. It is therefore appropriate that WFP's stumpage rate should be higher."

[34] This submission goes to the heart of the question that was before the Commission – in calculating operating costs for the cutting area in accordance with the Manual, was the District Manager concerned with the determination of averages or with actual amounts? That was not, however, the question before the chambers judge. The question before him was whether the Commission's determination was a reasonable one, bearing in mind that as stated in *Dunsmuir*, reasonableness refers to a range of defensible outcomes and in terms of process, is "concerned mostly with the existence of justification, transparency and intelligibility". (Para. 47.) The word "unsuitable" in the present s. 4.1 means something different than "not possible" in the previous version of s. 4.1. It imports some room for the exercise of discretion in a manner consistent with the objectives of the legislative scheme. The Manual is devoted largely to determining average costs incurred by average operators and uses those terms expressly. There was evidence before the Commission that strongly supported the view that, in Mr. Potter's phrase, the "underpinning" of the Province's stumpage appraisal scheme is the principle of licensee neutrality,

as opposed to site-specific or operator-specific factors.

[35] In all the circumstances, it cannot in my view be said that the Commission's determination was unreasonable. To the contrary, the decision was consistent with the scheme and tenor of the Manual as administered by the Ministry of Forests, as explained in the unchallenged evidence of WFP's witnesses, and lies within the range of acceptable outcomes that were available to the Commission.

[36] With thanks to both counsel for their able arguments, I would allow the appeal and revoke the stay granted by the court below.

"The Honourable Madam Justice Newbury"

I Agree:

"The Honourable Mr. Justice Low"

I Agree:

"The Honourable Mr. Justice K. Smith"