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Inaccurate Estimates in Stumpage Appraisals - ss. 105.1 and 105.2 of the *Forest Act*

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On November 4, 2003, the provisions of Bill 45 (the *Forest (Revitalization) Amendment Act (No. 2)*) that enacted ss. 105.1 and 105.2 of the *Forest Act* were brought into force with little fanfare. Sections 105.1 and 105.2 require licensees to ensure that stumpage appraisal submissions contain “accurate” information, and authorize the government to re-appraise stumpage rates deemed to contain “inaccurate” information. Amidst the attention focussed on the higher profile components of the government’s forestry revitalization program (amendments to Bill 13, tenure take-back, market-based stumpage, and so on), ss. 105.1 and 105.2 were scarcely noticed. Now ss. 105.1 and 105.2 have not only begun to attract attention, but some controversy as well.

Definitional Issues - What is "Accurate" Information Anyway?

The whole concept of “accuracy” in the context of stumpage appraisals in British Columbia is inherently problematic. Under both the Comparative Value Pricing System (“CVP”) and the Market Pricing System (“MPS”), licensees are required to provide estimates for stumpage appraisal purposes. The notion of an “estimate” necessarily implies inaccuracy - if precise, immediately identifiable information existed then stumpage appraisals would have no need for estimates.

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Even uncontroversial data used in a stumpage appraisal are not so easily scrutinized under an accuracy standard

Even seemingly uncontroversial data used in a stumpage appraisal (such as average side slope or stems per hectare) are not so easily scrutinized under an accuracy standard, and are derived through methodologies that will not necessarily produce the same results twice. If a licensee and the Ministry of Forests each follow the same methodology and arrive at different results, is either result inaccurate information?

The notion of accuracy in ss. 105.1 and 105.2 cannot simply relate to whether a licensee submits “correct” data for a stumpage appraisal. Rather, it must relate more to whether the policies and procedures contained in the manuals for arriving at the estimates used in a stumpage appraisal are followed properly. The focus of “accuracy” in ss. 105.1 and 105.2, then, is oriented more towards procedural correctness rather than specific results.

Timing Issues - When Does Information Become "Inaccurate"?

Two sorts of timing issues are raised under ss. 105.1 and 105.2:

- whether “accuracy” is determined immediately upon transmission of the information to the Ministry of Forests; and
- whether accurate information can subsequently become inaccurate.

Instantaneous Non-compliance

Some have suggested that the requirement under s. 105.1 to submit accurate information is triggered as soon as a licensee electronically transmits its appraisal data information to the Ministry of Forests. Under this approach, the licensee is in contravention of s. 105.1 the second it clicks the “send” button if the appraisal data form contains an error.

Both the coastal and interior appraisal manuals provide for two levels of ministerial review of appraisal data submissions - one by the District and one by the Region - and the licensee has the opportunity to revise its data submission at each level based upon comments received from the Ministry of Forests. The procedure in the manuals clearly contemplates that the initial appraisal data submission may contain errors, and provides the licensee with an opportunity to correct those errors before the Ministry conducts a stumpage appraisal.

An interpretation of s. 105.1 of the *Forest Act* that provides for instantaneous non-compliance immediately upon the initial transmission of an appraisal data

An interpretation of s. 105.1 that provides for non-compliance immediately upon the initial transmission of an appraisal data submission does not work harmoniously with the manuals

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submission does not work harmoniously with the manuals, and is otherwise not a particularly sensible approach towards s. 105.1. While the timing of non-compliance under s. 105.1 is, admittedly, somewhat ambiguous, we suggest that an interpretation whereby s. 105.1 was not triggered until the Ministry of Forests has actually undertaken a stumpage appraisal based upon the inaccurate information is a more reasonable (and practical) approach towards s. 105.1.

Subsequent Non-compliance

Another timing issue relates to whether changed circumstances can render previously accurate information inaccurate. For example, a licensee may assume a certain method of harvesting at the time of an appraisal, and that method is used to determine the stumpage rate. By the time harvesting actually commences, however, the licensee may have determined that a different method of harvesting better suits its needs. Some have suggested that, in these circumstances, the Ministry of Forests is entitled to re-appraise the licensee's stumpage rate under s. 105.2 on the basis of inaccurate information.

This approach ignores the principle of licensee neutrality. A stumpage appraisal, whether CVP or MPS, is based upon how the notional, average efficient operator would harvest the cutting permit. A stumpage appraisal does not appraise the licensee; the goal is to provide an objective appraisal of the stand of timber, regardless of the actual activities of the licensee. Accordingly, for appraisal purposes, the specification of a particular harvest method in an appraisal data submission is either accurate or not from the outset. Licensee neutrality does not allow something that was initially accurate to subsequently morph into something that is inaccurate.

Administrative Enforcement of Accuracy

Under the *Forest and Range Practices Act* ("FRPA"), the Ministry of Forests now has the authority to enforce compliance under the *Forest Act* through administrative penalties, just like under FRPA and the *Forest Practices Code of British Columbia Act*. Previously, if the Ministry of Forests wanted to impose a penalty for a contravention of the *Forest Act*, it had to convince the Ministry of Attorney General to prosecute a licensee in court for an offence. Prosecutions are much more difficult given that the defendant licensee would have all the protections that go along with a courtroom prosecution (proof beyond a reasonable doubt, strict rules of evidence, and so on).

The maximum administrative penalty for a contravention of s.105.1 is the highest assessable under the Forest Act

If a licensee submits inaccurate information based upon the advice of an appropriate government official, the Ministry of Forests cannot find that licensee in contravention of s. 105.1 of the Forest Act

Now, upon providing a licensee with an opportunity to be heard, a delegate of the Minister (typically, a District Manager) can simply impose an administrative penalty for a contravention of s. 105.1 of up to \$500,000. This is the highest administrative penalty assessable under the *Forest Act*.

Defences

The *Forest and Range Practices Act* expressly provides three defences to the imposition of administrative penalties under the *Forest Act*:

- officially induced error;
- mistake of fact; and
- “due diligence”.

Officially Induced Error

If a licensee submits inaccurate information based upon the advice of an appropriate government official, the Ministry of Forests cannot find that licensee in contravention of s. 105.1 of the *Forest Act* - the Ministry itself induced the contravention.

We have heard the suggestion that if the Ministry of Forests provides advice in respect of appraisal data submissions before the Ministry performs the stumpage appraisal, it may provide licensees with a defence of “officially induced error” if the data used in the stumpage appraisal still contains inaccuracies. The short answer to this concern is: “so what?” Ultimately, if a stumpage rate is based upon inaccurate information contained in a licensee’s appraisal data submission, the Ministry of Forests can still re-appraise under s. 105.2 of the *Forest Act*.

Whether or not its own advice may prevent the Ministry of Forests from pursuing a contravention of s. 105.1 against the licensee should not concern the Ministry of Forests so long as it is still able to correct the stumpage rate under s. 105.2. Under both the interior and coastal manuals, the Ministry of Forests clearly has a role to play in the review of stumpage appraisal data. The Ministry of Forests should not abdicate that role simply on the grounds that it does not wish to provide licensees with a potential defence to a finding of contravention. The purpose of enforcement is not to rack up a high contravention score. The purpose is to achieve an appropriate stumpage rate.

If the licensee did not intend to submit inaccurate information, and this intention was reasonably held, the licensee is not subject to s. 105.1

Mistake of Fact

Although mistake of fact is, technically, a branch of a due diligence defence, FRPA lists due diligence and mistake of fact as separate defences.

If a licensee submits inaccurate information for purposes of a stumpage appraisal, but that licensee had a reasonably-held honest though mistaken belief in facts that lead to the submission of the inaccurate information, the Ministry of Forests cannot find that licensee in contravention of s. 105.1 of the *Forest Act*. Effectively, this means that the intent of the licensee in submitting inaccurate information is relevant.

If the licensee did not intend to submit inaccurate information, and this intention was reasonably held, the licensee is not subject to s. 105.1.

Reasonable Care "Due Diligence"

Otherwise, a licensee can avoid a finding of contravention under s. 105.1 if it takes reasonable care to ensure that it submits accurate information in its appraisal data submission. Licensees should have a standard operating procedure in place to ensure that their preparation and submission of appraisal data complies with the requirements of the appraisal manuals. They should continually evaluate and improve upon the effectiveness of these standard operating procedures. This is no different than standard operating procedures most licensees implemented to demonstrate due diligence for forest practices.

Conflicting Determinations of Accuracy

The relationship between ss. 105.1 and 105.2 of the *Forest Act* can result in unanticipated difficulties. Specifically, there is no guidance under the *Forest Act* with respect to the implications that different determinations of accuracy under each section have for each other.

In other words, a regional official appointed by the Minister of Forests may conclude under s. 105.2 that a stumpage rate is based upon inaccurate information submitted by a licensee and, therefore, may undertake a re-appraisal of the stumpage rate at issue based upon what the official perceives is the accurate information. Meanwhile, a District Manager in a compliance and enforcement investigation under s. 105.1 with respect to the same stumpage appraisal may subsequently reach a contrary

The Forest Act does not indicate whether a s.105.1 determination trumps a s.105.2 determination, or vice versa

If a licensee discovers that it inadvertently submitted inaccurate information in a stumpage appraisal, that licensee may request that the Ministry of Forests conduct a re-appraisal under s. 105.2

conclusion - that the information originally submitted was accurate. The *Forest Act* does not indicate whether the s. 105.1 determination trumps the s. 105.2 determination, or vice versa, or whether there is any obligation for an official who has conducted a reappraisal under s. 105.2 to conduct another reappraisal to reflect a subsequent, contrary determination under s. 105.1.

Government should amend ss. 105.1 and 105.2 of the *Forest Act* to resolve this ambiguity.

Section 105.2 is a Two-Way Street

While some have suggested that a s. 105.2 remedy is only available to the Ministry of Forests, there is nothing in s. 105.2 to suggest that this is the case. In other words, if a licensee discovers that it inadvertently submitted inaccurate information in a stumpage appraisal, that licensee may request that the Ministry of Forests conduct a re-appraisal under s. 105.2 on account of the inaccurate information, and the Ministry of Forests may have to comply with that request.

There is no principled reason why the Ministry of Forests should only re-appraise “one way” under s. 105.2. Certainly, one of the policy objectives of s. 105.2 was to assist the Ministry of Forests to combat licensee manipulation of appraisal data. Equally, however, another policy objective of s. 105.2 was to account for the fact that the availability of re-appraisals under the manuals are now much more restricted than was previously the case. If there is a mistake in a stumpage appraisal there is now very little opportunity for the Crown or the licensee to do anything about it other than under s. 105.2 of the *Forest Act*.

The purpose of s. 105.2 is to achieve an appropriate stumpage rate; it is not intended to allow the Crown to retain windfalls at the expense of licensees. Of course, a licensee who reports that it included inaccurate information in a stumpage appraisal may risk a compliance and enforcement investigation under s. 105.1 of the *Forest Act*. If the error was based upon a mistake of fact, or the licensee otherwise exercised due diligence then, presumably, the licensee need not worry about compliance and enforcement action under s. 105.1. Nevertheless, if a licensee wishes to seek a remedy under s. 105.2 of the *Forest Act*, that licensee may first wish to consider legal advice.

Conclusion - The Erosion of Neutrality

Potentially, the most important impact of ss. 105.1 and 105.2 is a tendency towards licensee specific stumpage appraisals that may result in a movement away from the principle of licensee neutrality. We have already noted a propensity for Ministry of Forests officials to view variations in a licensee's harvesting activities from those reflected in the licensee's appraisal data submission as evidence of inaccurate appraisal information.

We do not appraise stumpage based upon a specific individual, but objectively from the perspective of the average operator

As discussed above, a licensee's actual activities should have little relevance to the stumpage appraisal system. Neutrality is a fundamental precept of any appraisal theory. We do not appraise value to a specific individual, but appraisal value objectively from the perspective of the average operator. Accordingly, whether or not a licensee harvests timber in a manner contemplated in an appraisal data submission is not relevant to whether that appraisal data submission was, in fact, "accurate" for appraisal purposes in the first instance.

Unfortunately, it is easy to assume that the appraisal should reflect the actual harvesting methodology. However, the job of the Ministry of Forests and the licensee in the stumpage appraisal process is to ensure that the appraisal data submission complies with the Manual. Unless a changed circumstances reappraisal is triggered under the appraisal manuals, a change in a licensee's actual harvesting operations should have no implications for that licensee's stumpage rate. Otherwise, we will appraise licensees rather than timber.

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