

Exercising Discretion in Troubled Times

“The Working Roundtable will determine conditions necessary for the long term success of the forest sector in the context of global paradigm shifts...”

- Working Roundtable on Forestry Terms of Reference

WHILE IDENTIFYING THE CONDITIONS NECESSARY FOR OUR FOREST industry to achieve long-term success in the face of global ‘paradigm shifts’ is surely a laudable goal, my sense is that those whose livelihood depends upon the forest industry would rather talk about practical measures that might make some difference in the short-term. The message I took from the Minister’s speech at the COFI convention in Kelowna last year (sadly, this year’s annual convention has been cancelled) was to “hang in there, commodity prices will rebound eventually.” More importantly, he asked the audience for practical suggestions about how the Ministry of Forests and Range could help out in the meanwhile. Well, here goes.

Somehow, the exercise of legal discretion within the ministry sometimes seems to take no account of the practical realities faced by those who are trying to ‘hang in there.’ All too often, I hear from those who have asked the ministry for a life preserver only to receive an anchor.

The ministry has countless discretionary powers that affect those who operate in the BC forest industry on a daily basis. These discretionary powers provide an opportunity for the ministry to provide some practical assistance to the forest industry. For example, under the Scaling Regulation, a license holder is required to scale timber “as soon as possible” after it is cut. The standard “as soon as possible” is a context-based standard that requires some amount of flexibility. If a license holder does not scale timber “as soon as possible,” then the ministry is entitled to scale the timber by way of estimate. Once the timber is scaled, a stumpage and revenue (S&R) invoice is triggered and will follow promptly.

An unfortunately timed S&R invoice can threaten the viability of an operator (particularly in the case of smaller operators). An operator may not have had the opportunity to transport its timber to market and, therefore, will not have received revenues from the timber. Or the operator may have lost its market and need time to find a new purchaser. Yet, once an S&R is issued, the operator will have an outstanding stumpage bill due and owing, and failure to pay could have numerous adverse consequences, including loss of tenure, deposit and timber.

However, in addition to the flexibility built into the “as soon as possible” standard, the ministry’s authority to subsequently conduct a scale based upon estimates is entirely discretionary. While the ministry *may* order the timber scaled using an estimate, there is nothing that *requires*

it to do so. This provides an opportunity for the ministry to assist a licensee—it could exercise its discretion to enforce this inherently flexible standard in a manner that will help the licensee succeed (rather than in an overly strict manner that may cause additional difficulties).

Another example relates to extensions of timber sale licenses (TSLs) and cutting permits (CPs). The *Forest Act* provides holders of TSLs and CPs with the right to an extension. However, the Act also provides for a potentially substantial “extension fee.” The ministry may waive the fee provided that the reasons for the extension do not relate to the financial circumstances of the license holder and are otherwise beyond the holder’s control. Again, this is a discretion that the ministry could use more flexibly to assist the forest industry. Yet, the ministry will sometimes take a strict view of what is “beyond the holder’s control” and attribute everything to the financial circumstances of the holder.

The foregoing are just two examples of the day-to-day discretionary powers vested in the Ministry of Forests and Range. While the ministry should not exercise its discretion for improper purposes, it should exercise its discretion reasonably. Perhaps what is reasonable when the industry is in historically troubled times is something that has more flexibility than in better times. 🐾

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