

Discipline Case: 2009-09

Subject Member: Registered Professional Forester (name withheld)

Referred to: Complaints Resolution Committee

Date of Decision: August 2010

Allegations

This case resulted from a complaint from ABCFP members about the conduct of another ABCFP member. The complaint alleges that the subject member signed and submitted to the Ministry of Forests and Range (MFR) an appraisal datasheet which contained:

1. Inaccurate estimates of the location and amount of surface gravelling to be done on the permit roads;
2. inaccurate road use charge calculation;
3. inappropriate use of tabular road cost estimates (for new road construction) for a number of existing roads; and
4. supervision costs claimed in the engineered cost estimates for road construction.

The complainants believed that the submission of this inaccurate data has potentially put the subject member's client at financial risk. Consequently, the complainants felt that the subject member engaged in conduct unbecoming a member and may have contravened the following bylaws:

- 11.3.7 To practise only in those fields where training and ability make them professionally competent,
- 11.4.6 To keep informed in their field of practice and of current issues and developments in forestry,
- 11.5.1 To act conscientiously and diligently in providing professional services,
- 12.2.1 To maintain sufficient knowledge in their field of practice,
- 12.2.2 To ensure their work is complete, correct, and clear, and
- 12.5.1 To exercise due diligence by being prudent and doing all work with constant and careful attention.

Decision

Upon reviewing the evidence and the recommendations of the Complaints Resolution Committee (CRC) the registrar declined to issue a citation.

Reasons for Decision

The MFR issued the licence to recover fire damaged timber and licensees were encouraged to harvest fire damaged timber as soon as possible to minimize any loss in timber value. The appraisal datasheets were reviewed and signed by the Forest District

in 2004. The regional appraisal staff checked the data sheets, signed them and set an initial stumpage rate. Subsequently, the Forest District conducted an inspection and noted discrepancies between the appraisal information and field observations. In particular, several instances where the submitted appraisal used tabular road costs (for new roads) on roads that may have been pre-existing. The licensee presented revised appraisal data to MFR staff; however, the revised costs were less than the 15% trigger for a reappraisal and the licensee therefore did not believe a reappraisal was warranted. MFR accepted the revised appraisal and corrected some of the discrepancies. However, the MFR felt there remained instances where tabular road costs were being incorrectly applied to existing roads, supervision costs were inappropriately applied to engineered cost estimates, and gravelling costs were included on roads where no gravelling had occurred. In November 2005, MFR notified the licensee that they were being investigated for the submission of inaccurate appraisal data under section 105.1 of the *Forest Act*. Following an "Opportunity To Be Heard" (OTBH), the District Manager sent a determination letter with his decision that the licensee submitted inaccurate appraisal data in contravention of section 105.1 of the *Forest Act*. While the determination letter referenced evidence presented by MFR staff regarding the incorrect application of gravelling costs in the appraisal, the final determination was silent with respect to this issue.

The district relied on openings in the canopy on photos and roads shown on forest cover maps as evidence of an existing road. We examined copies of the aerial photos used in the MFR presentation during the OTBH. The forest cover maps are generated from aerial photos and long openings such as these are often represented as roads unless specific ground information indicates otherwise. Section 4.3.1 of the Interior Appraisal Manual (IAM), November 2002, defines new road construction as "the following construction phases: subgrade construction, placement of additional stabilizing material and the construction and installation of drainage and other pertinent structures." We conclude that to determine if a right of way clearing on a photo/map represents a road, one would need to see the ground to determine if a road prism already exists. While the existence of the opening on the photo and road on the map is indication that some kind of linear feature existed at one time, we do not find it sufficient evidence to determine that the specific standard of road, trail, or fence line existed at the time of the appraisal.

The field work for the original appraisal was conducted during the winter with two feet of snow already on the ground. Under these conditions it would be difficult to determine whether a trail that shows up on a photo is a skid trail, bladed trail, or existing road with a prism sufficiently stable to use in the transportation of logging trucks. Some of the differences between the appraisal and the as-built roads were the result of changed circumstances. That is, there did not appear to be inaccurate data submitted, rather operational changes were made to improve efficiency.

The subject member made reasonable efforts to estimate road construction requirements at the time the field data was collected. Furthermore, considerable effort was made to work with and accommodate MFR's views on new versus existing roads during the preparation of the initial appraisal. We conclude that there is insufficient evidence to support an allegation that the March 30, 2004 data was inaccurate regarding tabular road costs.

We accepted that circumstances had changed, and the revised appraisal in November should have reflected the as-built conditions and corrected any previous identified errors. We next considered whether the November 22, 2004 reappraisal contained inaccurate data.

In 2003, there was a shift in forest policy to results-based forest practices legislation and to increased professional reliance. Section 105.1 of the *Forest Act*, which requires a licensee to submit accurate data, was part of this new legislation. The appraisal process under legislation and the Interior Appraisal Manual (IAM) moved from one where annual reappraisals could be relied upon to account for changing circumstances on the ground to one where the licensees were required to notify MFR if changed circumstances on the ground would result in a change in the total appraised development costs by 15% or more. A reappraisal would then be required.

MFR requested revised appraisal data from the subject member in October 2004 to account for changed circumstances and to correct any mistakes that may have been made in the original submission. The request was not a formal reappraisal request. The subject member reviewed the appraisal and presented revised appraisal data on November 22, 2004. The revisions made by the subject member did not change the operating costs by more than 15%, therefore it did not trigger a formal reappraisal. However, the MFR disagreed, suggesting that there were still numerous existing roads that were incorrectly being costed using tabular cost estimates.

A voluntary reappraisal was done to provide an "as-built" appraisal to correct some errors. A variety of meetings were held to review and reach agreement on the appraisal, but in the end, the subject member only accepted some of the changes and disagreed on some interpretation of elements of the appraisal.

It is clear that the subject member and MFR differed on what constituted an existing road and the parties reached an impasse in November 2004. The discussion revolved around whether a road prism existed. This discussion was complicated by the fact that circumstances changed, ground information was different once the snow melted and

that the licensee took advantage of drier than average summer conditions to minimize road construction in the open grasslands.

On these open range high elevation sites, it is quite likely that old trails would impact the growing conditions to the point of appearing on aerial photos for many years, and that new roads could be built with minimal effort if the logging were conducted during dry conditions. While it may be possible to determine if a trail was pre-existing, it would be very difficult to determine if a road prism was pre-existing on the constructed roads. We therefore found insufficient evidence to support the allegation that the roads should be considered pre-existing.

The complainant alleges that the subject member submitted an inaccurate appraisal allowance for a road use charge and then never actually hauled any timber over the private road. During development planning, it was estimated that the licensee would haul about 13,000 cubic metres of timber over a private road and agreed with the land owner to use the road in return for the installation of two cattle guards and some fencing, which they estimated would cost about \$6,750. Once the snow melted and more detailed field work completed, it was decided not to use the private road. However, the licensee still did the work for private land owner and incurred the cost. This fact is supported by information from the OTBH. In the March 2004 appraisal submission, the "Request for Approval of Road and Land Use Charge in Appraisals" showed a detailed calculation of the road use charges as 13,000 m³ X \$0.50/m³ for a total cost of \$6,750. The \$0.50/m³ rate was then transferred to the log transportation datasheet. While it does not state this on the worksheet or in the appraisal manual, the number to be entered here should have been the road use charge prorated over the entire cruise volume. The actual road use charges being claimed were clearly indicated in the data sheets submitted. At the time of submission of the data directions provided with respect to the calculations were not clear and a diligent review by appraisal staff failed to find any data entry error. As a result we do not find the subject member guilty of professional misconduct in relation to this information.

The March 2004 appraisal submission included labour and supervision costs as part of the Engineered Cost Estimates. The IAM does not allow the inclusion of labour costs in the detailed engineering cost estimates and states that supervision costs are for "supervision of construction of complex structures by a professional engineer." An external expert provided advice to the subject member with respect to these costs. This expert continues to argue that these were allowable costs. The subject member has agreed with MFR that these were ineligible costs and agreed to correct the appraisal accordingly. We consider that this issue has been resolved.

The complainants allege that the appraisal estimated that gravelling would be needed on 20% of the roads, but little gravelling was done over the life of the permit. The subject member stated that during initial field work it was difficult to estimate gravel needs. The estimate that 20% of the roads would need gravelling was based on historic data from local operators. Hot and dry weather negated the need for gravel on most roads during the summer. However, gravelling was done in mid-October to late-November to facilitate the removal of timber during early December. The harvest billing reports support the contention that harvesting took place during November/December 2004 and diaries submitted as part of the OTBH show numerous entries indicating that gravelling was being done at this time.

The complainant alleges that the subject member did not display the behaviours of a competent forester because he/she was not knowledgeable about the appraisal system. It is alleged that by signing and sealing the appraisal, the subject member was either willfully incorrect or willfully ignorant and therefore did not meet the test of due diligence.

To assist in the administration of the license the subject member hired the expertise needed for the development and appraisals. The subject member also had two professional foresters involved in the operation. Both of these individuals had many years of relevant experience. The work of the hired appraisal experts was directed by another RPF, who has extensive appraisal experience in industry and with the MFR.

When the appraisal was challenged in November 2004, the subject member's appraisal contractor enlisted another experienced RPF, who had undertaken the Forest Development Plan work, and the services of two appraisal experts. These two experts reviewed the appraisal with regards to the contentious areas of the appraisal manual and provided advice to the subject member. There were numerous meetings to try and resolve the appraisal issues and differences between the licensee and the MRF. In the end there was a difference of opinion on some of the roads.

Since the subject member demonstrated that the services of competent professionals were used to cover areas in which the subject member lacked expertise, we found insufficient evidence to support the allegation that the subject member practised in an area outside his/her competency and failed to undertake due diligence in ensuring the accuracy of the appraisal data submitted.

It took about six years for this complainant to be brought forward. The large time lapse made the investigation difficult. While a few issues of witness credibility were found during the investigation, witnesses' inability to recall details of discussions, dates, numbers of meetings held, etc. that happened several years earlier is understandable.

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We suggest that in future it would be beneficial to all parties if complaints could be made as promptly as possible.

It is worth noting that the operations conducted by the subject member and the licensee were found to be quite good from a forest stewardship point of view. The dispute was solely regarding the appraisal process followed and not about the results on the ground.