IN THE MATTER OF THE *COMMERCIAL ARBITRATION ACT*
R.S.B.C. 1996, c.55

AND

IN THE MATTER OF THE *FOREST ACT*
R.S.B.C. 1966, C.175 AS AMENDED

AND

IN THE MATTER OF THE *TIMBER HARVESTING CONTRACT AND SUBCONTRACT REGULATION*
B.C. Reg. 22/96, AS AMENDED

BETWEEN:

INTERNATIONAL FOREST PRODUCTS LIMITED ("Interfor")

AND:

HAYES FOREST SERVICES LIMITED ("Hayes")

ARBITRATOR:
George K. Macintosh, Q.C.

COUNSEL FOR INTERFOR:
Eric J. Harris, Q.C.

COUNSEL FOR HAYES:
D. Geoffrey G. Cowper, Q.C. and
Brook Greenberg

DATE OF HEARING: December 21, 2000

DATE OF THIS AWARD: January 8, 2001

AWARD REGARDING COSTS

Hayes claims legal fees, disbursements and other costs of the arbitration, totalling $256,141.82. In addition, it claims interest totalling $228,952.00 based on the interest rate Hayes was charged in its business, prime plus 4% compounded monthly.

Interfor says that whatever I award in this application, I should refer the matter to a Registrar of the Supreme Court of British Columbia, as I have the power to do under the *Commercial Arbitration Act*, rather than seek to quantify the costs myself. I accept that

submission by Interfor. The relatively brief costs hearing did not include any assessment as to the reasonableness of the particular amounts claimed, and therefore I will not approve particular amounts as part of this Award.

In further response to the position of Hayes, Interfor first submitted that the parties should bear their own costs. In support, an award by arbitratror W.J. Wallace was cited from an arbitration between Pacific Forest Products Limited and Hayes. Costs were addressed by the arbitrator briefly, in a couple of sentences at page 32 of the award, where he said that because of divided success, each party would bear its own costs.

Interfor's alternative position was akin to that adopted by arbitrator Joe Wood in an award involving the two parties before me here and dated July 15, 1999. Arbitrator Wood embraced the principle that costs should follow the event but declined the idea of awarding full compensation to the successful party. He reasoned that full compensation in the arbitration would be like ordering special costs in a trial. In the result, he was reluctant to allow full recovery since special costs in a trial carry with them a concept of punishment for wrongdoing, which was not present before him and which I should emphasize is certainly not present before me, where Interfor conducted its defence with utmost propriety.

If I do not accede to either of Interfor's positions, each party bearing its own costs (Wallace) or an award based on the sort of costs that might be awarded in a trial (Wood), I am referred by Hayes to the decision of arbitrator Taylor in *Lineham Logging Ltd. v. International Forest Products Ltd.* The arbitrator at page 94 of his award granted what he quoted from the applicable legislation to be "actual reasonable legal fees" and "disbursements, including the arbitrator's fees, expert witness fees and the expenses incurred for holding the hearings."

There is no dispute before me as to the applicable legislation.

Section 6 of the Regulation under which this arbitration has proceeded incorporates by reference the provisions of the *Commercial Arbitration Act*. Section 11 of that *Act* reserves the question of costs to the discretion of the arbitrator. Subsection 11(2) authorizes the arbitrator to specify that the costs include actual reasonable legal fees and disbursements. Subsection 11(4) directs the Registrar of the Supreme Court not to assess costs on a reference by the arbitrator as though they were costs in a proceeding in the Supreme Court but to assess them instead in the manner specified by the arbitrator.

My reading of section 11 of the *Commercial Arbitration Act*, and in particular subsection 11(2), leads me to conclude there is something close to a presumption that actual reasonable legal fees will be awarded. It is probably not a presumption as a matter of law. It is instead probably the legislature simply advising arbitrators not to be bound by the regime for costs prevalent in our courts. Nonetheless, the only example of costs the legislature chose to discuss in subsection 11(2) was actual reasonable legal fees.

Arbitrator Taylor in *Lineham* addressed costs with his customary eloquence at pages 92 – 94 of his award. I am in substantial agreement with what he wrote there and believe it has application in this arbitration.

Interfor submitted before me that an arbitrator under the Regulation should look to the practice in labour relations law, where each party normally bears its own cost of proceeding by arbitration. An idea underlying that practice appears to be that the inevitably ongoing relation between a union and management speaks against visiting one side or the other with a significant costs award at the end of each of the disputes which sometimes need to be brought under a collective agreement. Hayes and Interfor must live together for some years to come. I however have not concluded that the ongoing nature of the relationship between Hayes and Interfor speaks in favour of awarding Hayes less money in costs. It may instead be the case that an award of actual reasonable legal costs to the successful party, which Hayes is, would be a good thing for the ongoing relationship. I will not seek to resolve that debate here, nor do I need to.

I award Hayes its actual reasonable legal fees and disbursements, including the arbitrator's fees, expert witness fees and the expenses it incurred for holding the hearings, such costs to be assessed, if necessary, by a Registrar of the Supreme Court, pursuant to subsection 11(3) of the *Commercial Arbitration Act*.

Hayes claims interest at prime plus 4% compounded. Intefor says that Hayes should not receive interest and says in the alternative that Hayes should not receive interest for all of the time until the final Award, since some of the delays were the fault of Hayes. Interfor also says in the alternative that the appropriate rate for an interest award is prime plus 1%.

I am awarding interest to Hayes at prime plus 1%, not compounded. Even if Hayes was responsible for some of the delays in the proceedings, which it probably was, I am not ordering that interest be eliminated for certain portions of time. I am of the view that Interfor has had the use of what turns out to be Hayes' money all the time until payment and that the interest award should reflect that simple fact.

DATED at Vancouver, British Columbia, this 8th day of January, 2001.

George K. Macintosh, Q.C.
Arbitrator

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