**IN THE MATTER OF THE *FOREST ACT*, R.S.B.C. 1996, c. 157, as amended**
**AND IN THE MATTER OF THE *TIMBER HARVESTING CONTRACT* AND *SUB CONTRACT REGULATION*, B.C. REG. 22/96**
**AND IN THE MATTER OF THE *COMMERCIAL ARBITRATION ACT*, S.B.C. 1996, c. 55,**
**AND IN THE MATTER OF A DISPUTE**

BETWEEN

**COCHRANE CONTRACTING LTD.**
**DAKINS' CONTRACTING**
**CARDENA FOREST PRODUCTS LTD.**

CLAIMANTS

AND

**CANADIAN FOREST PRODUCTS LTD.**

RESPONDENT

AND

**I.W.A. CANADA, LOCAL 2171**

INTERVENOR

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## INTERIM AWARD

### Introduction

1. Cochrane Contracting Ltd. ("Cochrane"), Dakins' Contracting ("Dakins") and Cardena Forest Products Ltd. ("Cardena") (hereinafter collectively the "Claimaints") are logging road contractors each of whom had replaceable contracts to provide road construction for the Respondent Canadian Forest Products Ltd. ("Canfor" or the "Company") for a term of three years commencing January 1, 1997 (the "1997 Contracts). Each 1997 Contract specified, in Article 1.3 thereof, the amount of road construction work to which each Claimant was entitled.

2. Pursuant to the mandatory requirements of ss. 13(1) and 48 and Schedule 4 of the Timber Harvesting Contract and Subcontract Regulation, B.C. Reg. 22/96 (the "Regulation" or "Reg. 22/96"), the General Conditions of each contract also provided that if the contractor had satisfactorily performed its obligations under the contract the Company would, at least three months before the expiry of the contract, offer a replacement contract that had substantially the same terms and conditions as the 1997 Contracts.

3. In 1999 Canfor offered each of the Claimants a replacement contract which contained substantially the same terms, including the amount of work allocated to each

contractor, as were contained in the 1997 Contracts (the "2000 Replacement Contracts"). The Claimants refused to accept the 2000 Replacement Contracts on the ground that the 1997 Contracts failed to specify the amount of work to which they were then entitled pursuant to the mandatory requirements of Reg. 22/96, with the result the 2000 Replacement Contracts likewise did not allocate to each of them the amount of work to which by law they were entitled.

4. The dispute between the Claimants and Canfor resulted in a Notice of Dispute and Request for Mediation and Arbitration, filed on behalf of the Claimants jointly on November 9, 2000. I have no evidence before me to indicate whether a mediation was held, but if it was it did not resolve the dispute and on October 12, 2001 I was appointed by all parties to arbitrate the dispute under the dispute resolution provisions of Reg. 22/96.

5. The parties first appeared before me on November 28, 2001 at which time I entertained an application to intervene by Local 2171 of the I.W.A. Canada (the "I.W.A." or the "Union"). This application, which was supported by Canfor, was opposed by the Claimants who argued that my jurisdiction as arbitrator flowed from Part 4 of Reg. 22/96, which made no provision for interventions. On December 4, 2001, I delivered an Interim Award in which I held that the Union was entitled to intervene. In reaching that conclusion I held that the dispute between the Claimants and Canfor was an amount of work dispute and that my jurisdiction was therefore governed by s. 23 of Reg. 22/96, subs. 10(d) of which entitled the Union to receive notice of, and to take part in, the arbitration as an intervenor.

**The Nature of the Dispute**

6. Cardena began building road for Canfor in 1992 and became eligible for a replaceable contract the following year under The Timber Harvesting Contracts and Subcontracts Regulation, B.C. Reg. 258/91, the predecessor to Reg. 22/96 ("Reg. 258/91" or the "1991 Regulation"). Cochrane and Dakins first built road for Canfor in 1994 and 1995 respectively, and in the latter year both also became eligible for replaceable contracts under Reg. 258/91. None of the contracts held by the Claimants prior to January 1, 1997, specified or defined the amount of work to which each was entitled although, consistent with the requirements of Reg.

258/91, they did provide that each must be replaceable upon terms providing for "the same or a greater amount of work".

7. All of the Claimants' contracts under Reg. 258/91 related exclusively to Canfor's timber harvesting operation on a portion of TFL 37, all of FLA 19233 and all of TO 716 (the "Fibre Basket"). Canfor conducts all timber harvesting in the Fibre Basket through its Englewood Division. All road building in the Englewood Division since at least 1992 has been divided among Canfor employees, the Claimants and other non-replaceable contractors. The amount of road constructed by each, measured in metres, together with the percentage of total road construction in the Fibre Basket which such amount represents, for each year from 1992 through 1996 inclusive is shown in the table found at Tab 17 of Exhibit 2:

| | **1992** | **1993** | **1994** | **1995** | **1996** |
|---|---|---|---|---|---|
| Cochrane | 0 | 0 | 1,774 ( 2%) | 4,365 ( 6%) | 7,943 ( 9%) |
| Dakins | 0 | 0 | 0 | 8,830 (12%) | 11,170 (13%) |
| Cardena | 4,654 ( 8%) | 8,919 (18%) | 10,047 (14%) | 11,902 (17%) | 11,385 (13%) |
| Other | 4,846 ( 9%) | 5,981 (12%) | 28,649 (39%) | 1,753 ( 2%) | 1,622 ( 2%) |
| Canfor | 46,900 (83%) | 35,800 (71%) | 33,600 (45%) | 44,600 (62%) | 53,000 (62%) |
| Total | 56,400 | 50,700 | 74,400 | 71,500 | 85,100 |

8. Effective April 1, 1996, the 1991 Regulation was replaced by Reg. 22/96. In addition to identifying three different classes of replaceable contracts, Reg. 22/96 required that all replaceable contracts specify an amount of work to which the replaceable contractor was entitled. In s. 18 it provided the formulae for establishing the entitlement of each classification of replaceable contractor to a particular amount of work.

9. It was the intention of the parties that the 1997 Contracts be "volume independent contracts" as that term is used in Reg. 22/96. In what is but one of a number of problems encountered when trying to give effect to the Regulation, the definition of a volume independent

contract in s. 1(1) applies only to Part 6 of the Regulation, the provisions of which have nothing to do with the problem before me:

> **"volume independent contract"** means, for the purposes of Part 6, a replaceable contract that
>
> (a) pertains to a licence for the coastal area,
>
> (b) is not a dedicated phase contract, and
>
> (c) provides exclusively for work relating to one or more phases, where the amount of work associated with that phase does not depend directly on a volume of timber, and by way of example, may include log hauling, logging road construction, logging access road construction, logging road maintenance and temporary logging road deactivation;

10. Subsections 18(5) and (6) of Reg. 22/96 define the formula for determining the amount of work to be specified in a volume independent contract:

> (5) Except as otherwise provided in this Part, the amount of work specified in a volume independent contract that pertains to a licence for the coastal area must be expressed as an amount equal to the specified percentage of E – F
>
> where
>
> E is the total amount of work of the type provided for in the contract, expressed in units appropriate to that work, that is required by the licence holder in any year for the purposes of all timber harvesting operations carried out under the licence, and
>
> F is the total amount of work of the type provided for in the contract, expressed in the same units that are used to determine the value of E, that is carried out on behalf of the licence holder in the year used to determine the value of E for the purposes of timber harvesting operations under the licence
>
> (a) pursuant to replaceable contracts described in subsection (1),

(b) pursuant to dedicated phase contracts, and

(c) by employees of a licence holder as part of company operations that operate as an integrated unit performing a substantial proportion of a timber harvesting operation but, for greater certainty, not including work that, if performed by a contractor, would be characterized as work performed under a volume independent contract.

(6) Subject to any adjustment provided for in subsection (7), the specified percentage referred to in subsection (5) must be equal to

$$G \div (H-J) \times 100$$

where

G is the total amount of work of the type provided for in the contract, expressed in units appropriate to that type of work, in the later of 1991 and the calendar year that the contractor first became entitled to a replaceable contract,

H is the total amount of work of the type provided for in the contract, expressed in the same units used to determine the value of G, that was required by the licence holder in the year used to determine the value of G for the purposes of all timber harvesting operations carried out under the licence, and

J is the total amount of work of the type provided for in the contract that was carried out on behalf of the licence holder in the year used to determine the value of G for the purposes of timber harvesting operations under the licence

(a) pursuant to replaceable contracts described in subsection (1),

(b) pursuant to dedicated phase contracts, and

(c) by employees of a licence holder as part of company operations that operate as an integrated unit performing a substantial proportion of a timber harvesting operation but, for greater certainty, not including work that, if performed by a

contractor, would be characterized as work performed under a volume independent contract.

11. In accordance with their intention, the parties negotiated and entered into what they believed to be volume independent contracts, dated for reference January 1, 1997, in which the amount of work allocated to each, with the exception of the actual percentage, was described in precisely the same terms:

> 1.3. Amount of Work
>
> The amount of work to be allocated to the Contractor by the Company and to be performed by the Contractor in each year of the term of this Contract will, subject to the other terms of this Contract, be •% of Contracted Road Construction for that year where "Contracted Road Construction" means the total amount of road construction required by the Company in that year for the purposes of all timber harvesting operations carried out under Licences other than road construction carried out:
>
> (a) under replaceable contracts which pertain to the Licences other than this Contract and other volume independent contracts; and
>
> (b) by employees of the Company as part of one or more company operations that operate as an integrated unit performing a substantial portion of a timber harvesting operation under the Licences.
>
> Except as provided in this Contract the Company will not reduce that amount of work for any year of this Contract.

12. The percentage specified for each of the Claimants was:

| | |
|---|---|
| Cochrane | 25% |
| Dakins | 27% |
| Cardena | 38% |
| | 90% |

The remaining 10% was not allocated to the Claimants because, according to the Agreed Statement of Facts (Exhibit 1), Canfor wanted the flexibility to hire other than the Claimants in

circumstances where its immediate road building requirements exceeded the capacity of their crews and equipment to respond in a timely way. At the time the Claimants agreed to the terms of the 1997 Contract, each was assured by Canfor's General Superintendent of Contractors and Road Construction, Walter Infanti, that any such work would be offered to them first before being given to non-replaceable contractors.

13. The 1997 Contracts, like their predecessors, related to road building in the Fibre Basket, where Canfor continues to conduct all timber harvesting operations through its Englewood Division. The table at Tab 17 of Exhibit 2 sets out the amount of road construction by each of the Claimants, other non-replaceable contractors and Canfor employees, again in metres, together with the percentage of total road construction in the Fibre Basket which such amount represents for each for the three years 1997 through 1999 inclusive:

| | **1997** | | **1998** | | **1999** | |
|---|---|---|---|---|---|---|
| Cochrane | 7,907 | ( 9%) | 10,796 | (14%) | 7,638 | (10%) |
| Dakin | 12,506 | (15%) | 8,751 | (11%) | 9,544 | (13%) |
| Cardena | 12,395 | (15%) | 15,465 | (20%) | 14,194 | (19%) |
| Other | 9,195 | (11%) | 0 | | 429 | ( 1%) |
| Canfor | 42,500 | (50%) | 40,700 | (53%) | 41,500 | (57%) |
| Total | 84,500 | | 76,200 | | 73,500 | |

14. In late 1999 Canfor offered a replacement contract to each of the Claimants which contained substantially the same terms and conditions, including the specified amount of work clause, as the contract it was to replace. At or about the same time Canfor advised the Claimants that the overall amount of road construction required in the Englewood Division was likely to reduce significantly in the near future. The Company took the position that under the replaceable contracts it had with the Claimants it was entitled to maintain full employment of its own crews, and that the Claimants were only entitled to their respective percentages of the amount of road construction that Canfor contracted out after such full employment was achieved. The

Claimants, on the other hand, took the position that they were entitled to a proportionate share of all road building in the Englewood Division and that Canfor was bound to accept its share of the reduction in road construction.

**The Position of the Parties**

15. The Claimants argue that the 1997 Contracts failed to specify the appropriate amount of work as required by s. 18 of Reg. 22/96. They say that, properly construed, s. 18(5) of the Regulation entitles each of them, as volume independent contractors, to perform a proportionate share of the total amount of road building required to facilitate Canfor's timber harvesting operations in its Englewood Division. While they accept that under the formula in s. 18(5) they are entitled only to a percentage of a residue, they argue that Canfor's road building crews are not part of a Company operation that operates as an "integrated unit", as that expression is used in s. 18(5)(F)(c) of Reg. 22/96. Thus, they argue, under the s. 18(5) formula, the "residue" of road building available in the Englewood Division is, in fact, the total road building work required in any given year to facilitate Canfor's timber harvesting operations in the Englewood Division.

16. As I understand the Claimants' position on this branch of their argument, either the language of the 1997 Contract should be construed so as to achieve this result or I should resolve the amount of work dispute between the parties in accordance with s. 18(5) as required by s. 23(10)(g) and, as required by s. 23(10)(h), specify an amount of work that should be included in each of the 2000 Replacement Contracts in a manner consistent with the requirements of s. 18(5).

17. Alternatively, and not withstanding the admitted intention of all parties in 1997 to enter into volume independent contracts, the Claimants argue that both they and Canfor's road building crews should be regarded as dedicated phase contractors for the purpose of allocating the road building work in the Englewood Division between them.

18. Finally, the Claimants argue that the 10% of the residue of road building work reserved by Canfor to be contracted out to non-replaceable contractors should be divided

between them as Canfor can rely upon the temporary need exception, implicit in s. 12 of Reg. 22/96, if it is faced with a sudden need for road construction that the Claimants cannot immediately perform.

19. By one or more of these arguments the Claimants say they are entitled to 2000 Replacement Contracts which provide the following amounts of work to each, expressed as a percentage of the total road building work required in the Englewood Division in any given year of those contracts:

| | |
|---|---|
| Cochrane | 12.5% |
| Dakins | 13.5% |
| Cardena | 19.0% |

20. Canfor stresses the admitted intention of all parties that the 1997 Contracts be volume independent contracts together with what it calls the unambiguous language of Article 1.3 in each of those contracts. It argues that those contracts are capable of no other possible interpretation than that the Claimants are entitled to the specified percentages of "Contracted Road Construction", and that the definition of Contracted Road Construction in Article 1.3 conforms exactly to the "residue" created by the formula in s. 18(5) of Reg. 22/96. Implicit in Canfor's submission is the argument that having complied with s. 13(1) of Reg. 22/96, and s. 15 of the General Conditions of each of the 1997 Contracts, by offering replacement contracts to each of the Claimants on substantially the same terms as the 1997 Contracts, the Claimants are bound to accept the amount of work specified in the 2000 Replacement Contracts offered.

21. Next, Canfor points to Article XXV(a) of the Coast Master Agreement which governs its relationship with the I.W.A.:

**ARTICLE XXV –CONTRACTORS AND SUBCONTRACTORS**

> (a) As of the date of the signing of the Memorandum of Agreement the Industry agrees that as of the 5th day of December, 1986, the introduction of a Contractor or Sub-contractor into an operation will not result in the loss of full-time positions held by regular employees in the operation, except where justified by special circumstances.

22. According to paragraph 21 of the Agreed Statement of Facts, counsel for the I.W.A. has advised that any decrease in the number of full-time positions resulting from the Company contracting out road building work would constitute a violation of that provision and lead the Union to file a grievance. The desire to avoid labour strife with its unionized employees was a significant circumstance and the primary commercial consideration for Canfor in negotiating and entering into the amount of work provisions contained in the 1997 Contracts which, it argues, entitle it to maintain full employment in the face of decreasing road building requirements in the Englewood Division with the result that the residue of work available to the Claimants would necessarily absorb a major portion, if not the entirety of, the reduction in road building requirements.

23. Canfor agrees that the key issue in this dispute is whether its Englewood Division operates as an "integrated unit". Four arguments are advanced in support of the proposition that it does.

24. The first is that the phrase "integrated unit" must have been included in each of the 1997 Contracts for a reason. The second is that the conduct of the parties in the three years, 1997 – 1999, was consistent with the plain meaning of Article 1.3 of each of the 1997 Contracts in that, averaged over those years, each of the Complainants built within 1% of the "Contracted Road Construction" allocated to them in those Contracts. The third is that if the work performed by Canfor's employees is not work performed by an "integrated unit" then the specified percentages of road building work allocated to the Claimants in the 1997 Contracts totals 90% of all road building work in the Fibre Basket, a result which even the Claimants do not advance. All three of these arguments boil down essentially to the proposition that because a plain reading of Article 1.3 of the 1997 Contracts suggests that Canfor's road building employees operate as part of an integrated unit, it must be so. They do little to advance the inquiry into the proper meaning to be given to the phrase.

25. The fourth argument is that Canfor's road building crews operate as part of a co-ordinated process of timber harvesting in the Englewood Division. They have common management, common foremen who supervise both logging and road building, and a single

seniority list for unionized employees who work at both activities as the need arises. Accordingly, Canfor points to the meaning of "integrated" in the New Shorter Oxford English Dictionary and argues that Canfor's timber harvesting operation, including its road building crews, are "combined into a whole: united; undivided."

26. Referring to the "for greater certainty" clause in s. 18(5)(F)(c) of Reg. 22/96, which is not included in the language of Article 1.3 in the 1997 Contracts, Canfor argues that the road building performed by its employees cannot be characterized as work done under a volume independent contract because it is performed in conjunction with, and is incapable of being separated from, the logging functions performed by its employees. The essence of Canfor's position in this respect is summarized in paragraph 104 of its Brief of Argument:

> 104 The appropriate contract that reflects the combined nature of the integrated logging and road building performed by Canfor would be a contract which would include all of the phases of logging from falling, yarding, loading, hauling, sorting as well as road building. This contract would not properly be characterized as a volume independent contract because it does not meet the salient features of a volume independent contract. In particular it does not provide exclusively for work where the amount of work associated with that phase does not depend directly on a volume of timber. The true nature of the work performed by Canfor employees of the Englewood Division is a combination of logging and road building which cannot be efficiently or rationally separated. Accordingly, because the logging component depends directly on a volume of timber, such a notional contract is not a volume independent contract.

27. In response to the Claimants' alternative position that both they and Canfor's road building crews should be regarded as dedicated phase contractors, Canfor says that because Canfor's crews operate as part of an integrated unit they are, by definition, operating in a manner in which no contractor could operate. Further, and in any event, the language used in the 1997 Contracts explicitly identifies them as volume independent contracts and there is no replaceable contract or specified Company operation named in those contracts to which they could be said to be dedicated.

28. In the alternative, Canfor says that it does not matter if the amount of work provided for in the 1997 Contracts was not specified in the manner described in s. 18(5) of Reg. 22/96, because s. 18(8) enables the parties to agree to specify an amount of work in a manner different from that required in s. 18(5).

29. With respect to the Claimants' argument that they are entitled to the 10% of Contracted Road Construction reserved for non-replaceable contractors in the 1997 Contracts, Canfor points to the fact that historically other non-replaceable contractors have frequently been utilized by Canfor and argues that there is no basis upon which the Claimants can arrogate that portion of the contract work to their volume independent contracts. Canfor goes so far as to say it can contract that 10% out to another contractor on a replaceable contract basis if it so wishes.

30. Finally, Canfor argues that if the amount of work provisions in the 1997 Contracts are to be changed in the 2000 Replacement Contracts, the amount of work allocated to each of the Claimants should be the following percentages of the total amount of road building required in the Englewood Division in any given year:

| | |
|---|---|
| Cochrane | 9.41% |
| Dakins | 10.17% |
| Cardena | 14.31% |

31. The Union supports the various arguments advanced by Canfor and asserts that if the amount of contract road building work in the Fibre Basket is increased, the amount of work available to Company employees will decline. Any resulting layoffs by the Company would be a breach of Article XXV(a) of the Coast Master Agreement. The Union also argues that the phrase "integrated unit" in s. 18(5)(F)(c) of Reg. 22/96 should be interpreted in a manner consistent with the judgments in *North Mountain Helicopters Inc. v. British Columbia (Workers' Compensation Board)*, [1998] BCJ No. 2525, affirmed: [2000] BCJ No. 1295.

**Discussion**

32. Some preliminary observations are in order. The first relates to the legislative intent or purpose of Reg. 22/96. There was much argument by the parties over whether that

purpose was consistent with that of its predecessor, Reg. 258/91. The purpose of the earlier regulation was succinctly described by the Arbitral Panel in *Lineham Logging Ltd. v. Fletcher Challenge Canada Ltd., et al*, Award No. 1, February 28, 1994:

> It is clear from the evidence, and particularly from the extracts from Hansard tendered into evidence, that the *Forest Amendment Act* 1991, including s. 158.1, and the Timber Harvesting Contracts and Subcontracts Regulation were enacted in the summer of 1991 as remedial legislation in order to provide stability and security for independent logging contractors and subcontractors in their contractual relationships with the major licensees. It is, therefore, appropriate that this Board interpret the Regulation, and s. 158.1 of the *Forest Act* liberally, and in a manner consistent in this case with the achievement of its objectives.

33. I have reviewed the extraneous materials provided by the parties in support of their various arguments on this question and can find nothing that would lead me to conclude that the underlying purpose of Reg. 22/96 was any different. In fact, it seems apparent that Reg. 22/96 was intended to enhance and augment the original purpose of Reg. 258/91, the provisions of which had proved inadequate in a number of ways. Furthermore, I find nothing within the language of Reg. 22/96 that would defeat or dilute the original purpose attributed to Reg. 258/91 by the decision in the *Lineham Logging* case.

34. Regulation 258/91 sought to achieve its intended purpose by giving each independent logging contractor or subcontractor, who had performed six months or more of work under contract to a licensee, the right to a replacement contract that provided, *inter alia*, for either the same amount of work as the one it replaced or a greater amount of work. Thus, under Reg. 258/91, it was the "historical" amount of work a contractor or subcontractor had which was the basis upon which its amount of work entitlement under the replaceable contract was determined. No formula for defining that amount of work was included in that regulation.

35. While Reg. 22/96 has retained the same basic historical approach to the amount of work entitlement under a replaceable contract, it has supplemented that approach by identifying three types of such contracts and providing a formula by which the amount of work entitlement for each type can be calculated. Subject to the adjustment, if any, provided for in s. 18(7), that

amount must be equal to the amount of work the contractor had in the later of 1991 or the year in which it first became entitled to a replaceable contract.

36. The formulae for determining the amount of work to be specified in each type of replaceable contract are found in ss. 18(1), (3) and (5). Subsections 18(2), (4) and (6) provide the historical base or starting point for determining that entitlement. Thus, the formula to be utilized for determining the amount of work in a so called volume independent contract is set out in s. 18(5), while s. 18(6) determines the historical base which, in turn, determines that amount subject to any adjustment mandated by s. 18(7).

37. The next observation has to do with my function under s. 23 of the Regulation. Paragraphs (g) and (h) of subs. 23(10) mandate that I resolve this amount of work dispute having regard to the requirements of, and in a manner consistent with, the provisions of s. 18. The amount of work to which the Claimants are entitled under their respective 2000 Replacement Contracts, is that amount to which each was entitled under the provisions of s. 18 when, in 1996, they negotiated and agreed to the terms of the 1997 Contracts. Thus, if through mistake or other misadventure, the 1997 Contracts did not allocate the amount of work to which each Claimant was then entitled under s. 18, they are not bound to accept the 2000 Replacement Contracts notwithstanding that those replacement contracts, in compliance with s. 13(1)(b)(iv) of the Regulation, specify "substantially the same amount of work" as the 1997 Contracts. In that event, under s. 23(10)(g) and (h), I am bound to determine the amount of work to which each was in fact entitled in their respective 1997 Contracts and, unless that amount must be adjusted pursuant to s. 18(7), award that amount to each as the amount of work to which they are entitled in the 2000 Replacement Contracts. As a consequence, although Canfor stressed the proper construction to be given to the language of the 1997 Contracts, as being determinative of the issue between the parties, I find that language, which in all events is quite clear, to be of assistance only insofar as it establishes the amount of work each Claimant was in fact awarded, which may or may not be the amount of work to which each was then entitled.

38. That brings me to the agreed upon fact that the parties clearly intended to enter into volume independent contracts in 1997. Whatever clarity Reg. 22/96 may have brought to

the definition of the amount of work entitlement under volume dependent and dedicated phase contracts is not apparent when contemplating the amount of work entitlement under a volume independent contract.

39. To begin with, it is not clear that there is any meaningful definition of what constitutes a volume independent contract. It was explained during argument that a volume independent contract is a phase contract which applies when the amount of work associated with that phase does not depend directly on the volume of timber which is harvested under the licence. Logging road construction and log hauling were offered as examples. This explanation, of course, simply tracks the language of para. (c) of the definition found in s. 1(1), a definition which expressly has application only for the purposes of Part 6 of the Regulation.

40. From Tabs 1, 2 and 3 of Exhibit 2 it is clear that at least logging road construction can, and frequently will, be the subject matter of a dedicated phase contract, notwithstanding the fact that the amount of logging road construction required in any given year of such a contract does not depend directly on the volume of timber harvested under the licence in that year. At the same time, it is also clear that a volume independent contract cannot be the same as a dedicated phase contract. This follows not only from para. (b) of the definition, which applies only for the purposes of Part 6 of the Regulation, but also from the fact that the formula for calculating the amount of work entitlement under each type of contract is quite different.

41. Referring specifically to logging road construction, under a dedicated phase contract the amount of work entitlement will be a specified percentage of the total amount of road construction required to facilitate the timber harvesting carried out under either a volume dependent contract or a company operation to which the contract is dedicated. Subject to any adjustment mandated by s. 18(7), that specified percentage will be determined simply by dividing the amount of road construction performed by the contractor, in the later of 1991 or the year in which it first became entitled to a replaceable contract, by the total amount of road construction required to facilitate the timber harvesting carried out in that same year, under the volume dependent contract or the company operation as the case may be: $(C \div D) \times 100$.

42. In the case of a so called volume independent contract, the amount of work entitlement will be a specified percentage of the residue left after road construction carried out by any of the entities described in s. 18(5)(F)(a), (b) and (c) has been deducted from the total road construction required by the licence holder for the purpose of all timber harvesting operations under the licence. Subject again to any adjustment mandated by s. 18(7), the specified percentage will be determined by dividing the amount of road construction performed by the contractor, in the later of 1991 or the year in which it first became entitled to a replaceable contract, by the residue left after road construction carried out by the same entities has been deducted from the total road construction required by the licence holder in that year: $G \div (H - J) \times 100$.

43. Looking at the formula used to calculate the specified percentage for an amount of work in a volume independent road construction replaceable contract, $G \div (H - J) \times 100$, it will be seen that where J equals zero, that formula reduces to the same formula used to calculate the specified percentage of road construction to which the contractor would be entitled under a dedicated phase contract if, as is the case here, the road construction contract is one that is required to facilitate a company operation which, by itself, carries out all timber harvesting operations under the licence (in this case the Fibre Basket).

44. From the Agreed Statement of Facts, it is apparent that Canfor's Englewood Division is the only timber harvesting operation in the Fibre Basket. Apart from the Claimants, there are no other independent contractors with replaceable contracts that relate to timber harvesting operations carried out in the Fibre Basket. There is nothing before me to suggest that the situation was any different in 1993, when Cardena became entitled to a replaceable contract or in 1995 when Cochrane and Dakins became entitled to replaceable contracts. Thus, when calculating J in s. 18(6), there was no road building work carried out on behalf of Canfor "for the purposes of timber harvesting operations under the licence" pursuant to either replaceable contracts under s. 18(1) [i.e. s. 18(6)(J)(a)] or dedicated phase contracts under s. 18(3) [i.e. s. 18(6)(J)(b)]. There was, of course, road building carried out by Company crews which brings me back to what counsel agree is the real issue in this arbitration, namely whether such road

building work was "part of company operations that operate as an integrated timber harvesting operation".

45. This brings to light a second major problem with the whole concept of a volume independent contract, namely the ambiguity associated with the phrase "integrated unit". If Canfor's view of the meaning of that phrase prevails, it is difficult to envision a company operation that would not be said to operate as an integrated unit for the purposes of ss. 18(5) and 18(6), since company employees who perform one or more of the phases of work involved in timber harvesting, under common supervision, would surely be the rule in the industry rather than the exception. Furthermore, the fact that all Canfor employees in the Englewood Division are part of a single administrative unit, with a single seniority list, who are said to be "combined into a whole, united and undivided" is not persuasive as, again, it would be hard to imagine a licensee's timber harvesting operation in which that would not be the case. In short, if the meaning of "integrated unit" extends no further than as suggested by Canfor in argument, all of the language in ss. 18(5)(F)(c) and 18(6)(J)(c), beyond the words "licence holder", would be superfluous.

46. I pause to note as well that the logical extension of Canfor's interpretation of the phrase "integrated unit" leads to the very conclusion advanced by it in argument, namely that the phrase "Contracted Road Construction", as used and defined in Article 1.3 of each of the 1997 Contracts, accurately replicates the residue formula in s. 18(5) of the Regulation. If that were in fact so, then whether the Claimants were allocated any road construction work, in any given year of the Contract, and if so how much, would depend entirely on how much, if any, of such work Canfor decided to contract out. Based on Canfor's further argument that it is entitled to maintain full employment of its own employees, at the expense of the Claimants' entitlement to work, and given that in past years its employees have constructed as much, if not more, logging road than was required to facilitate its entire timber harvesting operation in the Fibre Basket in 2001, the prospect that the Claimants could be deprived of any work whatsoever, under Canfor's theory of a volume independent contract, is more than just a vague possibility. In my view, to give effect to such an argument would be contrary to the liberal interpretation required to enhance the achievement of the Regulation's objectives.

47. I should also say at this point that, for the reasons just stated, I do not find the decisions in the *Northern Mountain Helicopter* case of much assistance in determining the proper construction to be given to the phrase "integrated unit" in the Regulation. Furthermore, the finding of functional integration in that case was made in the context of a dispute involving the constitutional division of powers and was based upon the facts of that case. This case presents an entirely different factual context, including statutory language, from which it is necessary to derive the proper meaning to be given to the phrase "integrated unit". That being the case, it seems more likely that the phrase will take its meaning from the context in which it is used in the Regulation.

48. In my view, Canfor's approach to the phrase "integrated unit" does not give effect to the clarifying language found in s. 18(5)(F)(c) and 18(6)(J)(c). In particular, it overlooks the significance of the words "if performed by a contractor". The value of the "for greater certainty" clause is that it focuses the analysis on how the work done by Company employees would be characterized if that work were to be performed by a contractor under Reg. 22/96. In other words, the question which the clarifying language requires to be asked is how the work performed by Company crews would be characterized if it were performed by a contractor.

49. Work that, if done by a contractor, would be characterized as work performed under a volume independent contract, would not be work performed as part of a company operation that operates as an integrated unit. What then is meant by "work performed under a volume independent contract?" With no coherent definition of a volume independent contract available, the answer to that question must be found in an analysis of the context in which the expression is used.

50. For the purposes of the Regulation work is performed under one of the three types of contract it describes. Using that fact as the starting point for the analysis, it would seem that work performed by company crews that would be characterized as work performed under either a volume dependent contract or a dedicated phase contract, if that work were in fact performed by a contractor, would not be characterized as work performed under a volume independent contract and thus would not be caught by the exclusionary language of the "for greater certainty"

clause in ss. 18(5)(F)(c) and 18(6)(J)(c). Taking the analysis one step further, work performed by company crews that, if performed by a contractor, would be characterized as work performed under either a volume dependent contract or a dedicated phase contract would thus be work performed as part of company operations that operate as an integrated unit.

51. In order for the road construction work of Canfor crews to be work that, if performed by a contractor, would be work performed under a volume dependent contract, it would have to be work performed as though Canfor's Englewood Division operated as a full phase, stump to dump contractor. This is what Canfor argues is in fact the case, in para. 104 of its Written Brief of Argument as set out above. But is that an accurate description of how Canfor's crews apparently operate?

52. As I understand the term, under a stump to dump volume dependent contract, which is indeed a full phase contract, the contractor will provide 100% of all phases required to harvest the specified percentage of timber it is entitled to harvest under the contract. According to the Agreed Statement of Facts, Canfor's Englewood Division accounts for 100% of the timber harvesting operations in the Fibre Basket. In those circumstances, if the road building work of Canfor's employees were to be characterized as work performed under a full phase volume dependent contract, they would have to perform 100% of the road building work in the Fibre Basket. They do not and have not done so since at least 1991.

53. Alternatively, if the road building work of Canfor's employees were to be characterized as work performed under a dedicated phase contract, they would then perform part or all (i.e. a specified percentage) of the road building work required with respect to the timber harvesting operations of the Englewood Division. It is manifestly clear from the tables at Tab 17 of Exhibit 2 that, at least since 1991, Canfor crews have not performed a specified percentage of the total road building required in the Englewood Division. The percentage of such work performed by Company crews during the period from 1991 to 2001 has ranged from a high of 92.2% to a low of 45.2% of total road constructed in the Fibre Basket.

54. From this analysis, the only conclusion to be drawn is that from 1991 through 1996 inclusive, the work performed by Canfor's road building crews was work that, if performed

by a contractor, would not be characterized as work performed under either a volume dependent or a dedicated phase contract. That being so, it must therefore be characterized as work performed under a volume independent contract.

55. I return to the agreed upon fact that in 1997 the parties intended to enter into volume independent contracts. Given the fact that there is no coherent definition of such a contract, it is hard to know what the parties understood to be its essential ingredients. Whatever else may be said in that regard, it is clear they were not *ad idem* in that understanding, a fact which became obvious in late 1999 when Canfor announced that road construction would be significantly reduced in the near future and that it asserted the right to maintain full employment of its crews at the expense of the Claimants' entitlement to work.

56. Given that Canfor's Englewood Division accounts for 100% of the timber harvested in the Fibre Basket, and that, as I have found, its crews are not part of Company operations that operate as an integrated unit, the fact is that there were no deductions to be made from the total road construction required by the Company for the purposes of all of its timber harvesting operations in the Fibre Basket, in any of the years 1991 through 1996 inclusive, when calculating the specified percentage of work to which each of the Claimants were entitled in the 1997 Contracts by virtue of the formula in s. 18(5)(F)(c). Thus, the formula for calculating the specified percentage of total road construction work to which each of the Claimants were entitled in the 1997 Contracts was the formula for calculating the amount of work entitlement under a dedicated phase contract. Accordingly, notwithstanding the intention of the parties, I find that what the Claimants were entitled to when the parties negotiated the 1997 Contracts were dedicated phase contracts in which the work entitlement of each should have been determined by the provisions of s. 18(4) as adjusted, if any adjustment was mandated, by the provisions of s. 18(7).

57. At this point it is appropriate to deal with the argument advanced by Canfor that s. 18(8) of the Regulation entitled the parties in 1997 to agree to specify the amount of work to which the Claimants were entitled in a manner different than that set out in s. 18(5). The fact is that the parties have not agreed on the amount of work to be specified in the 2000 Replacement

Contracts, with the result that an amount of work dispute exists between them. As noted, I am bound to resolve that dispute having regard to, and in a manner consistent with, the provisions of s. 18. I am of the view that, in discharging that mandate, I am not required to give effect to an apparent agreement of the parties, if that agreement is inconsistent with both the legislative purpose of the Regulation and the specific requirements of s. 18(5). If I were so required, not only the provisions of s. 18(2), (4) and (5) but also the provisions of s. 23(10(g) and (h) of the Regulation would be rendered meaningless.

58. It is also appropriate at this time to consider the arguments of both Canfor and the Union based on Article XXV(a) of the Coast Master Agreement. I recognize the tension that may arise between that provision and the consequences of my decision that the Claimants have dedicated phase contracts entitling each of them to a specific percentage of the total road construction in the Fibre Basket throughout the term of the 2000 Replacement Contracts. However, again as noted, in resolving the amount of work dispute between Canfor and the Claimants, I am bound to have regard to and reach a conclusion consistent with the provisions of s. 18. While I found that the Union was entitled to participate in these proceeding, in the manner described in s. 23(10)(d) of the Regulation, I can find nothing in the Regulation that would entitle me to find that the provisions of the Coast Master Agreement should prevail over the explicit requirements of s. 18.

59. Having determined that the Claimants were entitled to replaceable dedicated phase contracts in 1997, it is obvious that the percentages of work specified in each of the 1997 Contracts was erroneous. The next step in resolving this amount of work dispute, therefore, is to determine what amount of work each Claimant is entitled to as a dedicated phase contractor under the terms of the 2000 Replacement Contracts.

60. The Claimants argue that the specified percentages of the total road construction work in the Fibre Basket, to which they are entitled in each year of the 2000 Replacement Contracts, should be based upon the average proportion of Canfor's total road building requirements in the Englewood Division which each of them performed throughout the term of the 1997 Contracts after crediting them with the 10% of such work held back by Canfor. Canfor

argues that the specified percentage should be calculated by applying the percentages actually recorded in the 1997 Contracts to the average amount of contracted road construction in the two years prior to the execution of those contracts. It is my view that neither of these approaches is correct, and that, once again, resort must be had to s. 18 of the Regulation.

61. The starting point for this inquiry is s. 18(4) of the Regulation. By applying the formula set out there to each of the Claimants, the following specified percentages of total road construction work in the Fibre Basket are determined in the year that each became entitled to a replaceable contract:

| | |
|---|---|
| Cochrane | 6% |
| Dakins | 12% |
| Cardena | 18% |

62. The next step is to determine whether any change in those specified percentages was mandated by s. 18(7) when each was negotiating their respective 1997 Contracts. The only circumstance there described, which might have application, is that found in s. 18(7)(a)(i):

> (7) The specified percentage calculated pursuant to subsection (2), (4) or (6) must be adjusted to fairly take into account circumstances in which
>
> (a) there is a significant difference between the specified percentage as calculated and either
>
> (i) the proportion of timber harvesting services that the contractor historically provided or was entitled to provide under previous contracts, or

63. I note that in the 4 years from 1993, when Cardena first became entitled to a replaceable contract, its share of total road construction in the Fibre Basket declined somewhat to an average of 15.5%. In the 2 years from 1995 when each first became entitled to a replaceable contract, Cochrane's share of total road construction in the Fibre Basket increased slightly to an average of 7.5%, while Dakins' share showed an even smaller increase to an average of 12.5%. I do not consider any of these variations to constitute the "significant difference" described in s. 18(7)(a)(i) which would require an adjustment of the original specified percentages for the

purposes of the 1997 Contracts. Accordingly, I find that had the Claimants received the replaceable dedicated phase contracts to which they were entitled in 1997, the specified percentages of total road construction work to which each was then entitled would have been:

| | |
|---|---|
| Cochrane | 6% |
| Dakins | 12% |
| Cardena | 18% |

64. Under the terms of s. 13(1)(b)(iv) of the Regulation, in 2000 each of the Claimants was entitled to a replacement contract on substantially the same terms and conditions as their respective 1997 Contracts. In light of what I have determined so far, of course, their entitlement under s. 13(1)(b)(iv) was to 2000 Replacement Contracts on the same terms and conditions to which I have concluded they were entitled in 1997 and not the contracts they in fact received.

65. I do not read the provisions of s. 13(1) as preventing either a contractor or a licensee from invoking the mandatory adjustment provisions of s. 18(7) in the event that any of the circumstances therein described would mandate a change in the amount of work entitlement to be included in a replacement contract. Thus, when considering the amount of work to which each of the Claimants is entitled in their respective 2000 Replacement Contracts, I must determine whether any such adjustment would have been warranted. Once again, the only relevant circumstance would be that described in s. 18(7)(a)(i). The relevant historical period in each case would be the 3 year term of the 1997 Contracts.

66. Averaging the actual percentage of total road construction work in the Fibre Basket, performed by each of the Claimants over the term of the 1997 Contracts, produces the following results:

| | |
|---|---|
| Cochrane | 11% |
| Dakins | 13% |
| Cardena | 18% |

67. In my view there is a significant difference between the percentage of total road construction work in the Fibre Basket to which I have found Cochrane was entitled in its 1997

Contract, and the average percentage of such work which it actually provided in the 3 years 1997 – 1999 inclusive. Thus, s. 18(7)(a)(i) mandates that the specified percentage of total road construction in the Fibre Basket to which Cochrane is entitled in its 2000 Replacement Contract be 11% rather than the 6% it was entitled to in its 1997 Contract. Although the average percentage for Dakins was slightly above that which should have been specified in its 1997 Contract, in my view the difference is not significant as that term is used in s. 18(7)(a)(i). Accordingly, I find that the specified percentages of total road construction work in the Fibre Basket to which each Claimant is entitled throughout the term of the 2000 Replacement Contracts is:

| | |
|---|---|
| Cochrane | 11% |
| Dakins | 12% |
| Cardena | 18% |

68. Given the conclusion I have reached on the amount of work to which each Claimant is entitled in their 2000 Replaceable Contracts, there is no basis upon which it would be proper for me to consider the Claimants' argument that they are entitled to the 10% of the "contracted road construction" which they understood was reserved to be allocated to non-replaceable contractors at Canfor's discretion. Canfor is left with 59% of the total road construction in the Fibre Basket throughout the term of the 2000 Replacement Contracts. How it chooses to allocate that road construction work is entirely up to it.

**Interim Award**

69. In the result:

1. I award Cochrane Contracting Ltd. a replaceable dedicated phase contract, for a term of 3 years commencing January 1, 2000, entitling it to 11% of the total amount of logging road construction work that is required in each year of the term of the contract to facilitate the timber harvesting operation of Canfor's Englewood Division in the Fibre Basket.

2. I award Dakins' Contracting a replaceable dedicated phase contract, for a term of 3 years commencing January 1, 2000, entitling it to 12% of the total amount of logging road construction work that is required in each year of the term of the contract to facilitate the timber harvesting operation of Canfor's Englewood Division in the Fibre Basket.

3. I award Cardena Forest Products Ltd. a replaceable dedicated phase contract, for a term of 3 years commencing January 1, 2000, entitling it to 18% of the total amount of logging road construction work that is required in each year of the term of the contract to facilitate the timber harvesting operation of Canfor's Englewood Division in the Fibre Basket.

70. Both parties have requested that I reserve for submissions by them at a further hearing the question of damages and costs. Accordingly, I retain jurisdiction to deal with those matters. In the event the Parties are able to agree on those matters, this interim award will become a final award.

DATED at Vancouver, British Columbia this 10th day of October, 2002

Josiah Wood, Arbitrator