Aug 13, 2001

IN THE MATTER OF AN ARBITRATION
PURSUANT TO THE *COMMERCIAL ARBITRATION ACT*, RSBC 1996, c. 55

AND IN THE MATTER OF
THE TIMBER HARVESTING CONTRACT
AND SUBCONTRACT REGULATION (BC REG. 22/96)

BETWEEN:

JOE MARTIN & SONS LTD.

(Claimant)

AND:

CARRIER LUMBER LTD.

(Respondent)

PARTIAL AWARD

Counsel for the Claimant:
Lindsay Kenney
Roy J. Stewart, Q.C.

Counsel for the Respondent:
Heather Sadler Jenkins
Lorne A.J. Dunn

Arbitrator:
Henri C. Alvarez

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I. INTRODUCTION

1. This arbitration concerns disputes between Joe Martin & Sons Ltd. ("JM&S" or the "Claimant") and Carrier Lumber Ltd. ("Carrier" or the "Respondent") arising from a replaceable logging contract between Keystone Logging Ltd. ("Keystone") and Carrier dated November 1, 1996 (the "Agreement"). Through a share purchase, JM&S acquired Keystone and its rights and obligations under the Agreement.

2. In its Amended Notice of Dispute, JM&S gave notice of disputes pursuant to the Timber Harvesting Contract and Subcontract Regulation, BC Reg. 22/96 (the "Regulation") with respect to the appropriate rate for "tree to truck" timber harvesting and hauling for the winter 1999/2000 season, as well as a number of other disputes including claims for additional costs, breach of contract, abuse of process and punitive damages.

3. Certain of these claims were abandoned by the Claimant and others were deferred by agreement of the Parties. The claims for abuse of process and punitive damages were the subject of a preliminary award and, subsequently, a decision by the British Columbia Supreme Court which determined that an arbitrator does not have jurisdiction under the Regulation to award punitive damages or to deal with claims for abuse of legal process.

4. The Parties agree that the Agreement and their remaining disputes in regard of the Agreement are governed by the Regulation. The Parties also agree that I have jurisdiction as a sole arbitrator to issue an Award with respect to the determination of rate disputes pursuant to Section 25 of the Regulation, as well as claims for breach of contract pursuant to Section 5 of the Regulation.

5. The issues in dispute which I address in this Award are the following:

   (a) the appropriate rate to be paid for "tree to truck" timber harvesting services provided pursuant to the Agreement by JM&S for the winter 1999/2000 season;

   (b) the appropriate rate to be paid for log hauling services provided pursuant to the Agreement by JM&S for the winter 1999/2000 season;

(c) the claim by JM&S for compensation for on-block road development and deactivation;

(d) the claim by JM&S for interest payable on any amounts found to be owing by Carrier.

6. The remaining claims, including each Party's claim for the costs of this arbitration, are deferred to a subsequent award. This is generally by agreement of the Parties, except in those limited instances where the Parties have failed to fully address an issue in dispute. Where an issue has been deferred, I retain jurisdiction to determine it at a later time in accordance with a schedule to be settled in consultation with the Parties.

II. PROCEDURAL BACKGROUND

7. The procedure in this case was commenced by JM&S' Notice of Dispute dated December 6, 1999. Subsequently, JM&S issued an Amended Notice of Dispute dated May 2, 2000. On July 31, 2000, counsel for the Claimant advised me that he and counsel for the Respondent had agreed that if the Parties were unable to resolve their dispute by mediation, they had agreed to have me serve as sole arbitrator in this dispute. My appointment as arbitrator was confirmed on November 6, 2000 when counsel advised that the Parties' attempts to settle their dispute by mediation had been unsuccessful.

8. After consultations with counsel, I issued procedural orders setting out the schedule and procedure for this arbitration.

9. On April 10, 2001, pursuant to Procedural Order No. 1, JM&S submitted its Statement of Case in which it abandoned three claims in respect of certain provisions of Schedule "A" to the Agreement. In its Statement of Case, JM&S maintained its request for determination of rates for "tree to truck" timber harvesting operations and log hauling operations for the winter 1999/2000 season, its claim for compensation for costs incurred in the winter 1999/2000 season imputable to Carrier, its claim for damages for breach of contract, its claim for damages for abuse of process and its claims for punitive and aggravated damages.

10. On June 29, 2001, I issued Procedural Order No. 2, which amended and extended the schedule previously established and fixed hearing dates of December 17 to 21, 2001 in Prince George, BC.

11. In response to Carrier's objection to my jurisdiction to award punitive damages, as had been requested by JM&S in the Amended Notice of Dispute, a procedure for the exchange of submissions on this issue was established. I rendered my Preliminary Award on Jurisdiction on July 11, 2001.

12. On August 23, 2001, I confirmed that in light of a possible application to appeal my Preliminary Award on Jurisdiction and related proceedings in a parallel arbitration, the Parties had agreed to proceed with only the rate dispute between them in the present proceedings and defer JM&S' claims for breach of contract, abuse of process and punitive damages.[1]

13. Hearings were held in Prince George on the following dates: December 17 to 21, 2001 and April 29 to May 2, 2002. On July 16 and 17, 2002, the hearings resumed in Vancouver to hear the expert accounting witnesses tendered by the Parties.

14. On October 10, 2002, to conclude the outstanding evidentiary issues, an additional, brief hearing was held by teleconference (with the agreement of the Parties) to conduct the cross-examination of two witnesses.

15. The Parties also submitted post-hearing statements. The Claimant submitted its Closing Argument on October 22, 2002 ("JM&S Closing") and the Respondent submitted its Closing Statement on November 21, 2002 ("Carrier Closing"). The Claimant's Closing Statement in Reply was submitted December 2, 2002 ("JM&S Reply"). After an objection was filed by the Respondent to certain aspects of the JM&S Reply, I authorized the filing of a sur-reply by the Respondent to address limited aspects of the JM&S Reply. The sur-reply was submitted on February 6, 2003 ("Carrier Sur-Reply"). Comments on the Carrier Sur-Reply were submitted by

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[1] My Preliminary Award on Jurisdiction, together with another preliminary award rendered by Arbitrator, Paul D.K. Fraser, Q.C., in related proceedings between the same Parties, dated January 23, 2002, became the subject of an appeal to the British Columbia Supreme Court. The Court's decision allowing the appeal from these two Awards was issued on July 2, 2003. See *Carrier Lumber Ltd.* v. *Joe Martin & Sons Ltd.* (2003), 16 B.C.L.R. (4th) 175, 2003 BCSC 1038 (the "Punitive Damages Appeal").

the Claimant on March 3, 2003. Finally, in light of a recent, relevant decision of the British Columbia Supreme Court and awards in other arbitrations, the Parties were offered a final opportunity to submit brief comments on these decisions to the extent relevant to these proceedings. The last of these submissions was submitted on March 18, 2003.

III. FACTUAL BACKGROUND

16. Carrier is a privately owned forestry company and the holder of Forest Licence No. A18158 (the "Licence"). The area covered by the Licence is in the interior of British Columbia, a fact which has some significance under the Regulation. Carrier's Annual Allowable Cut under this Licence was 266,284 cubic metres.[2]

17. JM&S is a privately owned company which provides full phase timber harvesting services as a logging contractor. It relocated to Prince George from the MacKenzie area of BC in 1995. In 1996, JM&S purchased the shares of another logging contractor, Keystone,[3] and thereby obtained the rights and obligations of Keystone under the Agreement at issue in these proceedings. Carrier consented to JM&S' acquisition of Keystone and confirmed the Agreement and its assignment to JM&S.[4]

18. In the spring of 1997, JM&S purchased the replaceable logging contract which Rahn Brothers Logging Limited held with Northwood Pulp and Timber Limited and thereby became a replaceable contractor for Northwood and its successor, Canadian Forest Products Limited.[5]

19. Pursuant to the terms of the Agreement, JM&S (Keystone) was to harvest in each logging season the volume of timber specified in Schedule "A", if available.[6] Schedule "A" to the

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[2] This is equivalent to 213,027.2 tonnes at a conversion rate of 0.8 of a tonne per metre.

[3] Keystone appears to have been owned at the time by another company, Jubilee Contracting Ltd., which was, in turn, owned by Robert Paul Alspaugh and Rebecca Alspaugh. For the purposes of these proceedings, the Parties treated Jubilee and Keystone as the same entity.

[4] See Consent to Change of Control, JM&S doc. #1726.

[5] Pursuant to the agreement between JM&S and Northwood, JM&S was entitled to harvest 250,000 cubic metres per year and the harvesting of this volume was divided between 60% in the winter season and 40% in the summer season.

[6] Article 3.2 of the Agreement provides as follows:

> **Amount of Work:** Subject to this Agreement and to the Contract Regulation, the Contractor shall, in each logging season, produce from the Lands the Amount of Work

Agreement for the 1996-97 winter season provided for harvesting of 114,095 tonnes of timber by the Contractor at rates which varied by cutting block. Schedule "A" was agreed between Carrier and Keystone on or about December 16, 1996.[7]

20. In the Consent to Change of Control Agreement (the "Consent Agreement") signed by Carrier, Keystone and its owners, and JM&S, the "Logging Contracts" which were the object of the agreement were defined to include two contracts. The first was the Agreement in this case, which was described in relevant part as follows:

> (a) FOREST LICENSE A18158-LOGGING AGREEMENT, PRINCE GEORGE TIMBER SUPPLY AREA, FIVE YEAR TERM, dated for reference November 1, 1996, together with attached "Schedule A for Replaceable Logging Contract", in which Carrier grants to Keystone the right to log ONE HUNDRED AND FOURTEEN THOUSAND AND NINETY-FIVE TONNES (114,095 T) PER YEAR of timber from Forest License A18158 as a replaceable contract in accordance with (the regulation).

The Consent Agreement also referred to a second, non-replaceable contract and its attached "Schedule A for Non-Replaceable Logging Contract" in which Carrier granted to Keystone the right to log 43,356 tonnes of timber from the same forest licence on a non-replaceable basis.

21. Pursuant to the terms of the Consent Agreement, JM&S undertook to perform all of the obligations of Keystone in accordance with the Logging Contracts as of November 1, 1996. JM&S and Keystone also acknowledged that the volumes of timber referred to in the definition of the Logging Contracts were subject to change in accordance with the terms and conditions of the Logging Contracts. The Consent Agreement was signed by all parties on January 21, 1997.

22. JM&S performed the timber harvesting and hauling work specified in Schedule "A" to the Agreement for the winter 1996-97 season at the rates agreed by Carrier and Keystone. Those rates were as follows:

> specified in Schedule "A", if available. The Contractor acknowledges that the Amount of Work is based upon estimates of the timber on the Lands and that the Company does not warrant or represent that sufficient timber is available for the production of the Amount of Work and that the Contractor shall not have any claim of any kind against the Company by reason that there is not sufficient timber available for production of the Amount of Work.

[7] See Schedule A for Replaceable Logging Contract, "Winter 1996-97", JM&S doc. #1674.

Timber mark	Long Wood $/t	Hauling Rate $/t	Short Wood $/t	Hauling Rate $/t
EH 7104-1	$19.00	$7.24	$20.50	$7.96
EH 7600-672	$19.00	$9.24	$20.50	$10.34
EH 7600-675	$19.00	$9.59	$20.50	$10.55
EH 7601-624	$20.57	$11.27	$22.07	$12.40
EH 7601-681	$19.47	$12.02	$20.97	$13.22
EH 7602-617	$25.24	$11.89	$26.74	$13.08
EH 7602-629	$19.90	$11.57	$21.40	$12.73
EH 7602-636	$25.53	$11.80	$27.03	$12.98
EH 7603-01	$24.22	$11.76	$25.72	$12.94
EH 7604-618	$19.65	$12.31	$21.15	$13.54
EH 7604-679	$19.32	$12.04	$20.82	$13.24
EH 7605-1	$19.64	$11.11	$21.14	$12.22
EH 7670-1	$19.00	$8.18	$20.50	$9.00

These rates for logging were premised upon a base rate of $19.00 per tonne which had been agreed between Carrier and Keystone and used by them in setting rates prior to the sale of Keystone to JM&S. The base rate included on-block road development by the Contractor and was adjusted, by agreement, for the relevant circumstances of the particular logging blocks to be harvested.

23. There was no offer by Carrier of summer logging for the summer of 1997. Although, in the past, summer logging had been available to Keystone, Carrier was in a volume shortfall position for the period 1995-2000 due, according to Carrier, to a lack of Ministry of Forests approvals[8]. As a result, Carrier did not have any blocks available for summer logging in 1997.

24. In September 1997, the Ministry of Forests approved Carrier's allocation request to access timber in the Blackwater River area suitable for summer logging.[9] However, Carrier's forest development plan for the area was not approved until November 20, 1998. Initial cutting permits for the blocks in that area, CP610 and CP611, were not received by Carrier from the Ministry of Forests until February 12, 1999.[10]

25. In November 1997, Carrier provided a breakdown of its base rate for conventional roadside logging. The breakdown was as follows:

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[8] See Witness Statement ("WS") of Terry Kuzma, paras. 17-45, 1996-2000.
[9] See Kuzma WS, Ex. A, Tab 12.

Activity	Percentage
Falling	± 24%
Skidding	± 16%
Processing	± 25%
Loading	± 12%
Development	± 5%
Supervision/Administration	± 5%
Profit/Other	± 13%
	$19/tonne (100%)[11]

26. For the 1997-1998 winter season, Carrier offered 80,820 tonnes of timber for logging by JM&S and the Parties agreed to the harvest of that amount at the following rates:[12]

Timber mark	Long Wood $/t	Hauling Rate $/t	Short Wood $/t	Hauling Rate $/t
EH 7067-1	$20.77	$8.94	$22.27	$9.83
EH 7119-1	$20.01	$9.22	$21.51	$10.14
EH 7700-1	$20.91	$19.62	$22.41	$21.58
EH 7700-2	$21.04	$19.62	$22.54	$21.58
EH 7700-4	$20.92	$19.62	$22.42	$21.58
EH 7725-1	$21.87	$19.15	$23.37	$21.07

27. During the fall of 1997, Mr. Martin of JM&S and Mr. Kuzma of Carrier discussed the possibility of summer work for JM&S in the Blackwater area. Mr. Martin maintains that Mr. Kuzma advised that 80,000 cubic metres of timber in the Blackwater area would be available for JM&S. Mr. Kuzma, on the other hand, states that he attempted to keep Mr. Martin informed as to the status of Carrier's forest development plan and his attempts to secure additional volume for summer harvesting. However, the forest development plan had not been approved by the Ministry of Forests, and therefore, he could not have offered JM&S any additional timber in the Blackwater area at that time.

28. In March 1998, additional volume of 22,592 tonnes was provided by Carrier for harvesting by JM&S by conventional methods, cable logging and helicopter logging. The Parties agreed to the following rates in regard of that additional volume:[13]

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[10] See Kuzma WS, paras. 42-45.

[11] See memorandum from Terry Kuzma of Carrier, JM&S doc. #805. The component for "Development" relate to in-block road construction and deactivation and amounted to approximately $0.95 per tonne.

[12] See Schedule A for Replaceable Logging Contract, dated November 21, 1997, JM&S doc. #1734. These rates were again based on a tree-to-truck base rate for conventional roadside logging of $19.00 per tonne.

[13] See Schedule A for Replaceable Logging Contract, dated March 2, 1998, JM&S doc. #1777.

Timber mark	Long Wood $/t	Hauling Rate $/t	Short Wood $/t	Hauling Rate $/t
EH 7549	$19.00	$10.48	$20.71	$11.42
EH 7303 (cable)	$32.18	$8.66	$33.89	$9.44
EH 7303 (Heli)	$75.90*	$8.66	$77.61	$9.44

* will be reconciled after delivery to $63.25/cubic meter based on actual stratum conversion

29. For the 1998-1999 winter season, Carrier offered 51,880 tonnes of timber at the following rates:[14]

Timber mark	Long Wood $/t	Hauling Rate $/t	Short Wood $/t	Hauling Rate $/t	Heli Logging
EH 7210-206	$19.20	$9.51	$20.91	$10.37	n/a
EH 7210-208	$18.00	$9.70	$19.71	$10.57	n/a
EH 7807-801	$20.85	$17.37	$22.56	$18.93	n/a
EH 7807-803	$21.10	$17.42	$22.81	$18.99	n/a
EH 7807-824	$20.50	$17.03	$22.21	$18.56	n/a
EH 7807-843	$22.22	$16.72	$22.83	$18.22	n/a
EH 7210-208	$62.00*	$18.00			Heli-logging

*per cubic meter

JM&S accepted these rates.

30. In the fall of 1998, Mr. Kuzma advised Mr. Vernon Martin of JM&S that prospects for logging in the summer of 1999 were better and that he believed that 80,000 cubic metres of timber would be available for harvesting in the Blackwater area.[15]

31. Some of the harvesting work for the 1998-1999 winter season was amended in February 1999 due to the exceptionally high snow levels in an area known as the "Angusmac". A further volume of 17,755 tonnes in the Colbourne Creek area, CP720-8, was added to the volume for the 1998-1999 winter season in February 1999. The adjusted, agreed rates in respect of this timber were as follows:[16]

Timber mark	Long Wood $/t	Hauling Rate $/t	Short Wood $/t	Hauling Rate $/t
EH 7720-8	*$20.54	$18.91	$22.25	$20.61
EH 7807-801	$21.13	$17.37	$22.84	$18.93
EH 7807-803	$21.75	$17.42	$23.46	$18.99
EH 7807-824	$21.00	$17.03	$22.71	$18.56
EH 7807-843	$20.68	$16.72	$22.39	$18.22

[14] See Schedule A for Replaceable Logging Contract, dated October 21, 1998, JM&S doc. #1787. This Schedule appears to have been signed by both Parties on or about November 19, 1998.
[15] See Vernon Martin WS, para. 27.
[16] See Schedule A for Replaceable Logging Contract, dated February 2, 1999, JM&S doc. #1798. *The rate actually paid by Carrier in respect of this cutblock was $21.54. See the Supplementary Rebuttal WS of George Martin.

32. In the spring of 1999, the Parties met to discuss logging for the 1999 summer season. At the meeting, among other things, Mr. Kuzma of Carrier advised JM&S that the new base rate for logging would be $16.52 per tonne and provided the following breakdown of that rate:

Activity	Price
Bunching	$4.50/tonne
Skidding	$2.14/tonne
Processing	$5.14/tonne
Loading	$2.04/tonne
Development	$1.00/tonne
Admin/Supervisor/Low Bedding	$1.70/tonne
Total	$16.52/tonne
Camp (if required)	$0.75/tonne
** Above includes: -Up to 10% cat skidding in a block -Up to 10% of timber in a Riparian Management area.[17]	

33. In June 1999, Carrier offered JM&S the following rates for the logging of 40,077 tonnes:

(a) Tree to Truck

Timber Mark/Block	$/t
EH 7611-1	$16.28
EH 7611-2	$15.88
EH 7611-3	$16.16
EH 7611-4	$16.52

(b) Hauling Rates

Timber Mark/Block	$/t
EH 7611-1	$11.13
EH 7611-2	$11.39
EH 7611-3	$11.89
EH 7611-4	$12.18[18]

34. JM&S proposed different rates for the harvesting for the summer 1999 season. Those rates were as follows:

Timber Mark/Block	$/t
EH 7611-1	$23.16
EH 7611-2	$22.63
EH 7611-3	$23.45
EH 7611-4	$22.94
Average	$23.02[19]

[17] See JM&S doc. #1916.
[18] See Schedule A for Replaceable Logging Contract, dated July 12, 1999, JM&S doc. #1842 at 1843.
[19] See JM&S letter to Carrier dated June 24, 1999, JM&S doc. #3665 at 3667.

35. Although summer logging work had been the subject of frequent inquiries by JM&S and a number of discussions between the Parties, this was the first summer harvesting work actually offered by Carrier to JM&S and performed by it. Carrier awarded the logging of about 40,000 cubic metres in the other block in the Blackwater area, EH-7611, to Eldorado Enterprises Ltd. ("Eldorado") on a non-replaceable basis.

36. The Parties were unable to agree to applicable rates for the 1999 season and Carrier filed a Notice of Dispute which eventually led to an arbitration heard by Arbitrator Fraser who rendered an award on July 18, 2000.[20] In that decision, Arbitrator Fraser determined that the base rate should be adjusted to $19.50 per tonne. In the Fraser Award, Arbitrator Fraser found that work JM&S performed in CP611 in the summer of 1999 was easier than the harvesting work it had previously performed for Carrier.[21]

37. On appeal, the British Columbia Supreme Court held that Arbitrator Fraser had erred and amended his award to substitute a base rate of $18.00 per tonne. On further appeal, the British Columbia Court of Appeal held that Arbitrator Fraser had not erred in law and restored the awarded base rate of $19.50 per tonne for the 1999 summer season.[22]

38. In the fall of 1999, the Parties discussed the programme for the winter of 1999-2000. On November 12, 1999, Mr. Kuzma of Carrier provided to representatives of JM&S a copy of an internal working document[23] which contemplated logging in the Missinka River and Colbourne Creek areas by two contractors, JM&S and Baer Enterprises Ltd. This document was not a formal contract offer and did not contain rates. However, rates were discussed between the Parties at that meeting. Mr. Kuzma advised JM&S that Carrier's proposed base rate would be $16.52 per tonne plus $1.00 per tonne as a "snow allowance". In response, it appears that JM&S discussed its "numbers" for the blocks in the Missinka area.[24] The Parties were unable to agree at their meeting. Later the same day, JM&S wrote to Carrier and advised, amongst other things,

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[20] See Arbitration Award of Paul D.K. Fraser, Q.C., of July 18, 2000 between *Carrier Lumber Ltd. and Joe Martin & Sons Ltd.* (the "Fraser Award").
[21] See the Fraser Award, p. 19.
[22] The citations for the Supreme Court and Court of Appeal decisions are: *Carrier Lumber Ltd.* v. *Joe Martin & Sons Ltd.*, 2003 BCSC 185, rev'd 2004 BCCA 26, 23 B.C.L.R. (4th) 136.
[23] See Kuzma WS, Ex. A, tab 58.
[24] See evidence of Terry Kuzma, Hearing Transcript ("Tr."), December 21, 2001, p. 98.

that the price that Carrier had offered to pay in regard of the winter 1999/2000 season was unacceptable.[25]

39. With its letter of November 12, 1999, JM&S also formally provided its rate proposal for logging the blocks located in the Missinka area. The rate quoted was $26.56 per tonne on the basis that Carrier would supply camp facilities at its cost.[26] JM&S prepared its proposal on the basis of its costs of logging block CP725-1 in the Missinka area for Carrier in the winter of 1997/1998.[27]

40. The evidence of the actual discussions between the Parties with respect to their initial position on the appropriate rates and what phases of work they included was limited. However, on the basis of the limited evidence available to me, it appears that there was a basic miscommunication between the Parties with respect to road development and deactivation work. JM&S asserts that Carrier informed it that third party contractors would develop all mainline and in-block roads for the blocks to be harvested in the winter 1999/2000 season. Although there was no direct evidence of this, there was some related documentary evidence to show that on November 12, 1999, JM&S amended the rate proposal it had prepared and deleted reference to "road construction" in the description of the work to be performed and reduced the proposed rate by the approximate amount of $1.12 per tonne which it had estimated as the cost of performing road development and deactivation work.[28] JM&S also submitted a copy of a later internal memo in which the determination of its original rate proposal was explained.[29] The amount deducted from the proposed rate in JM&S' draft proposal reflected JM&S' cost estimate for road development and deactivation work. JM&S then sent its proposal of $26.56 per tonne to Carrier. This tends to indicate that JM&S understood that road development work had or would be performed by a third party and presented its proposal on that basis.

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[25] See letter of November 12, 1999, JM&S doc. #1879.
[26] See Kuzma WS, Ex. A, tab 59.
[27] See Vernon Martin WS, p. 5; Yorke WS, p. 2; JM&S doc. #031.
[28] See JM&S Docs. #38 and #31.
[29] See JM&S Doc. #32, dated March 5, 2001. The rate proposal was based on JM&S' costs of logging block CP725-1 in the Missinka area in the winter of 1997-1998. In the memorandum, road development costs were estimated on the basis of 4 kilometres of road construction at a cost of $7,500 per kilometre and divided by the expected volume. To that was added a factor of 20% for profit and contingencies, with the result of an estimated cost of $1.128 per tonne. JM&S' original rate prepared was $27.69 per tonne.

41. On the other hand, it was clear from the evidence that the previously agreed base rate of $19.00 included road development work, as did Carrier's new base rate of $16.52.[30] Further, when Mr. Kuzma and others at Carrier prepared Carrier's rates for the winter 1999/2000 season, the component for road development contained in the Carrier base rate was reduced for certain blocks where roads had already been constructed or where road construction work would be performed by other contractors.[31] It is clear from Mr. Kuzma's evidence that by the time of the meeting on November 12, 1999 with JM&S, he anticipated that JM&S would perform road development and deactivation work and that this was reflected in the proposed rates he had prepared. These contained some reduction of the road development component where mainline roads running through the blocks to be harvested had already been built or were to be built by other contractors. As these roads went through the blocks to be harvested by JM&S, they would be used as in-block roads from which harvesting could be conducted.[32]

42. On November 16, 1999, Mr. Kuzma responded to JM&S' letter of November 12, 1999. In his letter, Mr. Kuzma stated that no formal rate offer for the winter 1999/2000 work had been communicated to JM&S and that the pre-work session for the blocks in question for that season had not been completed. Therefore, according to Carrier operating procedure, JM&S was not to commence harvesting operations until a formal offer had been put forward by Carrier and the pre-work session had been completed. Carrier also solicited further information on fuel price increases from JM&S.

43. On December 2, 1999, Mr. Kuzma of Carrier forwarded to JM&S a completed Schedule A to the Agreement which contained the rates offered by Carrier for the 1999/2000

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[30] See para. 25 and 32 above. See also the Evidence of George Martin, Tr., December 20, 2001, pp. 2-3, 5, 13, 63-64.

[31] See the evidence of Mr. Kuzma, Tr., December 21, 2001, pp. 86-88; and Kuzma W.S., Ex. E, Tabs 18 and 25. See also Kuzma W.S., para. 104, 122.

[32] The evidence available indicates that the mainline roads to and through the CP707 blocks in the Colbourne area were to be built by Eldorado and that the road to and through the CP706 blocks was to be built by NSR Site Prep. Ltd. In the Missinka area, it appears that a company known as Swede Creek Contracting was to build the mainline roads. The evidence indicated that the deductions made by Mr. Kuzma in preparing the rates set out in Schedule A for the winter 1999/2000 season were as follows: CP706-1: $0.36/tonne; CP706-2: $0.43/tonne; CP706-3: $0; CP707-1: $0; CP707-2: $0.21/tonne; CP707-3: $0; CP707-5: $0; CP726-2: $0.25/tonne; CP727-3: $0.15/tonne. See Kuzma W.S., Ex. E, Tabs 18 and 25.

winter season.[33] This provided for a total of 120,083 tonnes of timber for harvesting at the following rates:

Timber mark	Logging Rate $/t	Hwy. Hauling Rate* $/t	Off Hwy. Hauling Rate* $/t	O/H Short Logger Rate* $/t
EH 7726-2	$19.45	$19.18	$8.99	$9.79
EH 7727-3	$18.31	$19.88	$9.49	$10.34
EH 7706-1	$18.25	-	$10.10	$11.00
EH 7706-2	$18.18	$18.93	$10.12	$11.03
EH 7706-3	$18.49	-	$10.55	$11.50
EH 7707-1	$19.02	$20.21	$11.05	$12.05
EH 7707-2	$17.84	$19.82	$10.77	$11.74
EH 7707-3	$18.24	$20.13	$10.99	$11.98
EH 7707-5	$17.96	$19.75	$10.43	$11.37

* Spruce to be hauled to Canfor Polar Mill; Balsam from 706-1 and 706-3 to be hauled to Canfor Polar Mill; Remaining Balsam to Carrier Tabor Mill.
* Hauling Rates subject to adjustment based on actual cycle times at Carrier Lumber Ltd.'s discretion.

44. In his covering letter enclosing the Schedule A to the agreement, Mr. Kuzma advised that Carrier staff would inform JM&S when Carrier was in receipt of appropriate harvesting authority from the Ministry to allow for pre-development of in-block roads in the Colbourne.[34] Further, the Schedule A form enclosed indicated on its face that construction and maintenance of in-block logging roads was included in the work to be performed by JM&S. Sections H and N of Schedule A specifically dealt with the construction and maintenance of roads.[35]

45. On December 3, 1999, JM&S responded to Carrier advising that JM&S was prepared to carry out the log harvesting set out in the December 2, 1999 Schedule A, except that it was unable to agree with the rates proposed to be paid for the timber harvesting and hauling services. JM&S also gave notice that it was in disagreement with a number of other items which affected the rate. However, none of these related to in-block development and deactivation work. JM&S proposed that it commence and perform the logging work at a provisional rate equivalent to that paid by Carrier to JM&S in the Missinka area in the 1997/1998 season (cutblock CP725-1).

[33] See Kuzma WS, Ex. A, tab 62 and Schedule A for Replaceable Logging Contract, dated December 2, 1999, JM&S doc. #1893.
[34] See Kuzma W.S., Ex. A, Tab 62.
[35] See JM&S Doc. #1893.

JM&S also advised that a rate dispute had arisen between the Parties and that JM&S would forward a Notice of Dispute under separate cover.[36]

46. On December 6, 1999, JM&S issued its Notice of Dispute. On the same date, Carrier authorized JM&S to commence harvesting operations upon the completion of a pre-work meeting to be held with Carrier field staff. JM&S commenced work in the Missinka area on December 9, 1999.

47. In January 2000, when the cutblocks in the Colbourne area became available, JM&S advised that the rate it had offered for the logging in the Missinka would stand for the Colbourne as well.

48. In April 2000, Carrier and JM&S met and were able to reach agreement on certain disputes with respect to cat skidding and long skid distances for cat skidding and rubber-tired skidding in the Colbourne cutblocks harvested during the 1999/2000 winter season.[37] As a result of these agreements, Carrier recalculated the logging rates offered to JM&S in the Schedule A to the Agreement. The new rates calculated by Carrier were the following[38]:

CP/Block	Initial Contract $/tonne	Adjusted $/tonne	Difference $/tonne
706-1	18.25	20.42	2.17
706-2	18.18	18.22	0.04
706-3	18.49	18.60	0.11
707-1	19.02	19.29	0.27
707-2	17.84	18.07	0.23
707-3	18.24	19.72	1.48
707-5	17.96	19.03	1.07

49. Carrier was also prepared to offer a 2% increase on the hauling rates as a fuel adjustment. These adjustments were not, however, acceptable to JM&S.[39]

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[36] See Kuzma WS, Ex. A, tab 71. There was no agreement on JM&S' proposal of a provisional rate and JM&S was paid the rate set out by Carrier in Schedule A to the Agreement. See Kuzma Cross-Examination Tr., December 21, 2001, at pp. 64-65.

[37] Kuzma WS, paras. 109 – 111 and Kuzma WS, Ex. A, tabs 63 – 65.

[38] See Kuzma WS, para. 111 and Ex. A, tab 66.

[39] See Kuzma WS, paras. 111-112.

50. On May 2, 2000, JM&S provided to Carrier its proposed rate for the logging of the Colbourne blocks. JM&S' rate was $27.59 per tonne, which was stated to be based on JM&S' costs as determined after the completion of the logging.[40]

51. The actual volume harvested by JM&S in the Missinka and Colbourne cutblocks in the winter 1999/2000 season was 98,657.3 tonnes, as compared to the estimated volume of 120,083 tonnes set out in Schedule A to the Agreement for the 1999/2000 winter season.

52. On September 1, 2000, the Parties executed an agreement entitled "Termination of Contract and Release" pursuant to which JM&S agreed, amongst other things, to terminate the Agreement (and the Non-Replaceable Agreement).[41]

53. In the dispute before me for services provided in the 1999-2000 winter season, JM&S seeks a logging rate of $26.56 per tonne for each of the cutblocks harvested. It calculates that at this rate, the volume harvested would amount to payment due to it in the amount of $2,620,336.56. From this it subtracts the amount actually paid to it by Carrier, $1,716.749.34. JM&S claims that the difference, $903,587.22, is due to it as the difference between the rates actually paid and what it says is the appropriate rate. JM&S calculated a weighted average of the rate paid for all the blocks it harvested on the basis of the volume harvested and the payment vouchers received from Carrier. This weighted average rate is $17.401 per tonne.[42]

54. JM&S also claims an amount of $64,646.36, on account of road development and deactivation work which it says was not included in its proposed rate or the rate specified by Carrier and constitutes extra work assigned to it after logging commenced. The amount claimed by JM&S represents the difference between what JM&S estimates to have been its costs in performing the additional road development and deactivation work plus an allowance for profit and contingency ($149,624.84), and the amount actually paid by Carrier (as a component of the base rate) for the work performed in the winter 1999/2000 season ($84,978.48).

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[40] See JM&S letter of May 2, 2000, Kuzma WS, Ex. A, tab 69.
[41] See Kuzma WS, Ex. A, tab 47. Negotiations regarding the termination of the relationship between JM&S and Carrier appear to have commenced in the fall of 1999, see JM&S Doc. #1885.
[42] See JM&S Closing, p. 10 and the sources cited there.

55. JM&S also says it is entitled to be compensated for fuel price increases, which were extraordinary over the period in question, and says that it accepts Carrier's offer of a 2% increase, which it calculates to be $36,034.56.

56. With respect to hauling rates, JM&S claims the amount of $197,242.17, which represents the difference between the revenue from hauling at the rates specified by Carrier and JM&S' lump sum claim in respect of hauling. In addition, JM&S says it accepts Carrier's offer of a 2% increase in rates as a fuel adjustment with respect to hauling. It calculates that amount as $27,355.94.

57. The total amount claimed by JM&S in respect of these claims is $1,228,866.24 plus interest and costs.[43]

58. Carrier, on the other hand, says that the rates it offered in the December 2, 1999 Schedule A to the Agreement were the appropriate "tree to truck" harvesting rates and hauling rates. It says, in the alternative, that the most to which JM&S could be entitled with respect to harvesting rates are the modified "after the fact" rates offered by it to JM&S in April 2000. Similarly, with respect to hauling rates, Carrier says that, in the alternative, the most to which JM&S could be entitled is the additional 2% fuel allowance that was offered by Carrier after the fact. Carrier denies that JM&S is entitled to any of the other payments claimed and claims its costs as against JM&S.

IV. THE LAW

A. The Regulation

59. Section 25(1) of the Regulation sets out the mandatory criteria for determining an appropriate rate through arbitration.

> Rate disputes
>
> 25 (1) A replaceable contract must provide that if a rate dispute is referred to arbitration, the arbitrator must determine the rate according to what a licence holder and a contractor acting reasonably in similar circumstances would agree is a rate that
>
> (a) is competitive by industry standards, and

[43] JM&S Closing, p. 81.

> (b) would permit a contractor operating in a manner that is reasonably efficient in the circumstances in terms of costs and productivity to earn a reasonable profit.
>
> [Emphasis added]

60. On the other hand, section 25(2) lists a number of factors which may be considered in setting an arbitrated rate:

> (2) In determining a rate under subsection (1), an arbitrator may take into consideration the following:
>
> (a) rates agreed to by the licence holder and contractor for prior timber harvesting services;
>
> (b) the costs and productivity of the contractor for prior timber harvesting services carried out by the contractor;
>
> (c) relative to prior timber harvesting services, the impact on costs and productivity likely to arise from:
>
> (i) changes in operating conditions including, without limitation, changes to terrain, yarding distances, hauling distances, volume of timber per hectare;
>
> (ii) changes in the total amount of timber processed;
>
> (iii) changes in the required equipment configuration;
>
> (iv) changes in the law if the changes affect costs or productivity of the timber harvesting operation;
>
> (v) changes in the underlying costs of timber harvesting operation including, without limitation, the cost of labour and the impact of inflation on wages, fuel, parts and supplies;
>
> (d) the costs in the logging industry for each phase or component of a similar timber harvesting operation;
>
> (e) the rates in the logging industry for similar timber harvesting operations;
>
> (f) any other data or criteria that the arbitrator considers relevant in ascertaining the rate that a licence holder and a contractor acting reasonably in similar circumstances would agree to.

B. The Authorities

61. The authorities make it clear that s. 25 of the Regulation requires that an arbitrator take an objective and prospective approach to setting a rate. In *Hayes Forest Services Ltd.* v. *Pacific*

Forest Products Ltd. (2000), 133 B.C.A.C. 291, 2000 BCCA 66, Finch J.A. (as he then was) spoke for a unanimous court as follows:

> [43] The language of s. 25(1) indicates clearly that an arbitrator is required to take an objective approach in determining a rate. Section 25(1) refers to what "a licensee" and "a contractor" would agree to. It does not refer to the actual parties to the dispute. The section also refers to what a licensee and a contractor "acting reasonably ... would agree". The conduct of reasonable persons is an objective test. The words "would agree" also suggest a prospective, and therefore objective approach. Section 25(1) postulates a hypothetical scenario for the arbitrator, one in which the arbitrator places himself or herself in the position of the parties, acting reasonably, at the commencement of the contract year in the circumstances then known to both of them. Then, the task is to determine what such parties at that time and in those circumstances would have agreed to, bearing in mind the two criteria for such an agreement mandated by s. 25(1). Those criteria are (a) a rate that is "competitive by industry standards", and (b) a rate which will permit the contractor to earn "a reasonable profit".
>
> [44] However, the statutory scheme also clearly contemplates that the arbitration process will commence after logging operations for the contract year have begun, and quite possibly, as in this case, after the year's logging operation has concluded. After the fact arbitration must have been in the contemplation of the Regulation drafters given: the history of contract negotiations in the industry; the length and complexity of, and the preparation required for, such arbitration proceedings, including the practice of adducing expert evidence; and most importantly, the regulatory provision for payment of a provisional rate pending resolution of a rate dispute. The requirement for a provisional rate clearly contemplates commencement of logging for the contract year in dispute, before the rate for that year is set.
>
> [45] The result is that the arbitrator is required to take an objective-prospective approach in setting the year's rate, but he or she will be doing so either during the contract year or after the logging operations for that year have concluded, and when actual volumes logged, and hence unit costs, will be known either in whole or in part. The question is whether the arbitrator is required by the language of the Regulation to ignore, or permitted by its language to consider, evidence of how much timber has in fact been harvested and how much it cost per unit to do so.
>
> [Emphasis added]

62. The Court went on to consider the admissibility and relevance of the actual volumes and costs and commented as follows:

> [50] But evidence of actual volumes and rates may be relevant and admissible without treating that evidence as determinative of the rate. Actual logging harvest volumes are some indicia of whether the licensee's volume expectations, as expressed in the contract, will be realised. Actual volumes are after the fact evidence of a previous risk or chance. They show what is within the range of the possible. There is no "one-to-one" relationship between the actual and the previous contingency. The latter is a matter of prior judgment, which if exercised reasonably, takes into account those matters falling within the range of that which is possible in practice.
>
> [51] I am therefore of the view, taking all of these considerations into account, the evidence of actual volume harvested may be admissible as relevant to the contingency of the contract volume not being achieved. That contingency is a factor which reasonable parties would take into account in setting a rate in advance of the logging taking place.

> [56] I would conclude that evidence of actual volume of timber harvested in the contract year in question is not generally relevant to the arbitrator's task of fixing a rate for that year, nor is evidence as to the cause of volume shortfalls generally admissible. However, evidence of actual volumes harvested may be relevant to the issue of contingencies reasonably within the contemplation of the contracting parties prior to commencement of logging operations, and a consideration to be factored into the rate to the extent that reasonably [sic] contracting parties would consider it realistic to do so.
>
> [Emphasis added]

63. The application of an objective and prospective approach to setting logging rates where the parties themselves cannot agree is a task with which numerous learned arbitrators have grappled. As Arbitrator Clemens noted in *Hayes Forest Services Ltd.* v. *International Forest Products Limited*, November 14, 2003, arbitrators have taken different approaches to setting rates pursuant to s. 25 of the Regulation. They include:

(a) adjusting rates previously agreed to between the parties for the operation in questions (the previous rate approach) favoured by Arbitrator Taylor in *Lineham Logging Ltd.* v. *International Forest Products Ltd.*, December 3, 1999;

(b) deriving a rate based on the assessment of a properly qualified expert (the expert evidence approach) used by Arbitrator Pearlman in *Western Forest Products Limited* v. *Hayes Forest Services Limited*, May 6, 1999; and

(c) deriving a rate from the reasonable costs actually incurred with a reasonable profit margin (the reasonable cost/profit approach) used by Arbitrator Wallace in *Pacific Forest Products Limited* v. *Hayes Forest Services Limited*, August 15, 1997 and Arbitrator MacIntosh in *Hayes Forest Services Limited* v. *International Forest Products Limited*, August 25, 2000.

64. While a number of approaches to setting logging rates have been utilized, it appears there is a growing consensus that the rates previously agreed to by the parties in respect of the operation in question comprise the best starting point for determining, on an objective and prospective basis, a rate which satisfies the dual criteria of s. 25(1) of the Regulation.

65. In *Lineham, supra*, p. 11, Arbitrator Taylor held:

> Thus in deciding whether a rate is "competitive", and such as to permit a reasonably efficient contractor to earn a reasonable profit, as required by s. 25(1)(1) and (b), it seems, as I have said, that the most valuable guidance will be found in rates actually agreed to by the same parties for recent work as part of the same operation -- the criterion mentioned in s. 25(2)(a) -- in association with adjustment for the factors listed in clauses (b) and (c), and rates agreed between contractor and other licensees involved in the same operation. Because of the lack of any requirement for disclosure of rates and costs, agreed to or incurred under the Regulation, as well as the unique nature of each operation and the wide variation in expert opinion as to the adjustments which should be made between them, less assistance is likely to be found in costs and rates agreed to in *other* harvesting operations under clauses (d) and (e).
>
> [Emphasis added]

66. Arbitrator Taylor went on to explain the difficulties of comparing "similar harvesting operations", in applying s. 25(2)(e) of the Regulation. At pages 10-11 of *Lineham* v. *Interfor* Arbitrator Taylor held as follows:

> The unique nature of each operation makes comparison with those elsewhere possible only to persons with extensive expertise and full knowledge of all the relevant factors. The evidence shows that such judgment differs widely as between one expert and another, creating large difficulties, no doubt, even for arbitrators with expertise in the industry who have not themselves examined and compared the operations "on the ground". Making such comparisons has been described by other arbitrators as a "nebulous exercise", and this is certainly so in the present case.

67. This sentiment is expressed by numerous other arbitrators throughout the arbitral awards that address rate disputes.

68. I agree with Arbitrator Taylor that truly similar operations can provide a helpful comparative guide post for arbitrators setting a rate under the Regulation. However, I also agree with Arbitrator Taylor's observations, echoed by many other arbitrators, that often the number of factors and the level of subjective judgments which must be made in assessing the comparability of logging operations effectively limits the use to which comparable rates can be put.

69. In the recent decision of *Carrier Lumber Ltd. v. Joe Martin & Sons Ltd.*,[44] our Court of Appeal restored the award of Arbitrator Fraser in a proceeding related to the matter before me. Arbitrator Fraser had set a base rate for summer 1999 logging at $19.50 per tonne. However, Arbitrator Fraser's award was overturned by Mr. Justice Meiklem on appeal before ultimately being restored by the Court of Appeal.

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[44] *Supra*, note 22.

70. Mr. Justice Meiklem had found Arbitrator Fraser erred in law in applying the incorrect test under the Regulation by failing to give sufficient consideration to evidence led by Carrier of competitive rates for similar harvesting work performed by Eldorado Enterprises Ltd. Indeed, Carrier's position with respect to the appropriate base rate before Arbitrator Fraser, as it was before me as well,[45] was based on the $16.52 per tonne base rate accepted by Eldorado.

71. In restoring Arbitrator Fraser's award, Mr. Justice Low for the Court of Appeal held at paras. 23-27:

> I do not agree that the arbitrator's discussion of the wording of the statute led him into error. Nor do I see any link between the impugned passages (reproduced in [paragraphs] 12 and 13 above) and the arbitrator's consideration of the evidence relating to the Eldorado contract. Finally, I think it was open to the arbitrator, because of the evidence as to how the Eldorado contract came about, to give less weight to it than he might otherwise have given.
>
> I do not agree that the arbitrator's statement that competitive standards is a "broad and objective assessment of what is in the best interests of all the participants in the industry" introduced extraneous policy considerations. In my opinion, that comment was nothing more than an accurate restatement of the policy behind the Regulations as I have quoted above from the *Hayes* decision. It was not a misstatement of the law.
>
> ...
>
> In my opinion, the evidence supported the conclusion of the arbitrator that the Eldorado contract was something less than competitive.

72. As will be set out in greater detail later in this Award, I find that comparable rates from other operations are of less assistance than prior agreed rates between the Parties for work on the same Licence, notwithstanding that I am dealing in this case with an Interior rather than a Coastal contract. The greater scope for market determined rates in the Interior does not diminish the practical difficulties of comparing operations and drawing helpful conclusions from those "nebulous" comparisons of the logging itself, nor with regard to comparing the circumstances under which rates are agreed, as in the case of the Eldorado rate before Arbitrator Fraser. While I have considered and taken account of the evidence of the comparable rates from other

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[45]There was some discussion in the evidence whether Carrier's proposed base rate should be characterized as $16.52 per tonne or $17.52 per tonne. (See, Tr., December 20, 2001, pp. 93-95). However, it is clear the "Base Rate" relied on by Carrier in its rate build-ups was $16.52 per tonne with various additives, including a $1.00 per tonne "Snow Allowance" (See, Kuzma WS, Exhibit "E", Tab 18.)

operations, I have put less weight on that evidence than the evidence of prior agreed rates between the Parties for work on the same Licence.

73. Similarly, reliance on evidence of the actual costs experienced by logging contractors in setting a logging rate has been frequently characterized in arbitral awards and the authorities as a subjective, after-the-fact approach that is somewhat inconsistent with the objective and prospective test imposed by the Regulation. While there is scope for consideration of evidence of actual costs, the usefulness of this evidence is also of lesser assistance.

74. As other arbitrators have concluded, expert evidence may be helpful in the rate analysis both in the context of determining what adjustments, if any, are appropriate in respect of the past agreed rates, and as direct evidence of what is an appropriate rate.

V. THE LOGGING RATE

75. Applying the principles for establishing an appropriate rate, set out above, I turn to the evidence before me to determine a logging rate which satisfies the objective and prospective test of s. 25(1) of the Regulation.

A. Past Agreed Rates

76. As noted earlier, there is a history of agreed rates between the Parties, and between Carrier and Keystone, the contractor that preceded JM&S for work on the Licence.

77. According to Mr. Kuzma of Carrier, the base rate of $19.00 per tonne had been developed while Keystone (Jubilee) was the replaceable logging contractor for Carrier during the 1990s. In about 1994/1995, Keystone switched from conventional logging using predominantly landings to primarily roadside logging. The base rate of $19.00 per tonne did not change at that time and continued to be used between Carrier and Keystone up to and including the agreement to the logging rates for the winter of 1996/1997.[46] Carrier and JM&S then continued to use the base rate of $19.00 per tonne until the spring of 1999 when Carrier introduced its new base rate of $16.52 per tonne.

[46] See, cross-examination of Mr. Kuzma, Tr. December 21, 2001, pp. 1-3.

78. In addition to this general rate history, JM&S submits that certain blocks previously harvested are particularly comparable to the blocks JM&S was assigned to harvest in 1999/2000:

Winter 99/2000 Timber mark[47]	Prior Logging Timber mark[48]
EH 7726-2	725-1 (Missinka, 1997/98)
EH 7727-3	
EH 7706-1	725-1 (Missinka 1997/98)
EH 7706-2	67-1 (Tsus 1997/98)
EH 7706-3	
EH 7707-1	603-1 (Woodpecker 1996/97)
EH 7707-2	603-1 (Woodpecker 1996/97
EH 7707-3	601-624 (Woodpecker 1996/97)
EH 7707-5	210-206 (Tsus Creek 1998/1999)

JM&S says that the agreed rates for harvesting these blocks are the following:[49]

Winter 99/2000 Timber mark[50]	Logging Rate in Winter 1999/2000 Schedule A	Prior Logging Timber mark[51]	Long Wood	Short Wood
EH 7726-2	19.45	725-1 (Missinka, 1997/98)	$21.87	$23.37
EH 7727-3	18.31	No comparable		
EH 7706-1	18.25	725-1 (Missinka 1997/98)	$21.87	$23.37
EH 7706-2	18.18	67-1 (Tsus 1997/98)	$20.77	$22.27
EH 7706-3	18.49	No comparable		
EH 7707-1	19.02	603-1 (Woodpecker 1996/97)	$24.22	$25.72
EH 7707-2	17.84	603-1 (Woodpecker 1996/97)	$24.22	$25.7
EH 7707-3	18.24	601-624 (Woodpecker 1996/97)	$20.57	$22.07
EH 7707-5	$17.95	210-206 (Tsus Creek 1998/1999	$19.20	$20.91

JM&S notes that these rates preceded the increase in the base rate held to be appropriate by Arbitrator Fraser.

79. In contrast to JM&S' submissions with respect to the prior agreed rates, Carrier takes the position that the previously agreed rates must be adjusted to reflect the same logging phases in order to make a fair comparison. In Carrier's submission, the prior agreed rates for comparable blocks "as adjusted" are as follows:[52]

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[47] From Schedule A for the winter 1999/2000, JM&S, doc. #1893-1902.
[48] Eaglestone Report, Tab 61, p. 1 (cruise).
[49] See, JM&S Closing, p. 9.
[50] Schedule A, JM&S doc. #1893-1902.
[51] Eaglestone Report, Tab 61, p. 1 (cruise).
[52] See Carrier Closing, p. 12.

Schedule A Reference	Harvest Year	Operating Area	Cutting Permit	Harvest Rate Comparison for the Same Logging Phases
November 21, 1997	Winter 1998	Missinka	725-1	$19.70/tonne
November 21, 1997	Winter 1998	Colbourne	700-1	$19.18/tonne
November 21, 1997	Winter 1998	Colbourne	700-2	$19.24/tonne
November 21, 1997	Winter 1998	Colbourne	700-4	$19.18/tonne
February 2, 1999	Winter 1999	Colbourne	720-8	$20.00/tonne

80. Carrier submits that block CP 725-1 in the Missinka is particularly comparable to the work performed by JM&S in 1999/2000. Carrier submits that the rate of $21.87 per tonne was agreed to between the parties for block CP725-1 and that it included camp and roadside debris piling which were not required of JM&S for the 1999/2000 work. Therefore, Carrier has "adjusted" the rate to $19.70 per tonne, which it submits is the appropriate comparable previously agreed rate.[53]

81. JM&S also takes the position that block CP 725-1 in the Missinka is the most comparable block to the blocks harvested by it in the winter of 1999-2000.[54]

82. In their submissions, both Carrier and JM&S rely on, and emphasize the significance of, rates agreed to by the licence holder and contractor for prior timber harvesting services. This view of previously agreed rates accords with both the weight of arbitral authority and my own view of the appropriate approach. Consequently, as I will set out in greater detail, previously agreed rates will form the starting point for my assessment of logging and hauling rates which satisfy the two-part, objective and prospective test which I must apply pursuant to s. 25(1) of the Regulation.

B. Expert Evidence

83. Beyond the evidence of prior agreed rates, the Parties placed before me a great deal of expert evidence in respect of a variety of issues.

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[53] Carrier Closing, p. 40.

[54] See the evidence of Vernon Martin, Tr. December 17, 2001, p. 21 and p. 37, and the evidence of Al Yorke, Yorke W.S., p. 2 and JM&S Doc. #32. See also JM&S Closing, para. 345.

Mr. Eaglestone and Mr. Bedford

84. Mr. David Eaglestone, R.P.F. submitted a report and gave evidence on behalf of JM&S with respect to the logging chance for the blocks at issue as compared to the logging chance of blocks previously harvested by JM&S.

85. Mr. David Bedford, R.P.F. submitted a report and gave evidence on behalf of Carrier with respect to the blocks at issue in this case as well as for other blocks in the Colbourne and Missinka areas and selected blocks in two other areas.

86. Additionally, at my request, Mr. Eaglestone and Mr. Bedford issued a joint report in which they set out the points on which they were able to agree (the "Joint Report").[55] In the Joint Report, Messrs. Eaglestone and Bedford reached an agreed ranking of 17 cutblocks common to both of their original reports. These cutblocks included all of the blocks at issue in this arbitration as well as the cutblocks previously harvested by JM&S for Carrier at agreed harvesting rates in the Missinka and Colbourne areas. The blocks harvested by Eldorado Enterprises Ltd. in the winter 1999-2000 season in the Colbourne area were also included in the joint ranking.[56]

87. In Mr. Eaglestone's view, it was important to attribute a numerical value for logging difficulty in order to be able to quantify the degree of difficulty for each block and to quantify the differences between blocks.

88. Mr. Bedford, on the other hand, did not attempt to attribute point values to the logging difficulty of each block as Mr. Eaglestone had done in his model. Rather, Mr. Bedford compared the principal logging chance variables for each of the blocks he examined and ranked the blocks in order of difficulty. Mr. Bedford has significant experience in working as a logger, logging supervisor and forester in the general "wetbelt" area in which the blocks examined are located.

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[55] Joint Submission on Harvesting Difficulty by Majestic Forest Management Ltd. and DWB Forestry Services Limited, March 2002.

[56] See Joint Report, Appendix A. The original correlation in ranking by logging difficulty of the common blocks examined by the two experts was significant. After meetings and discussions, the experts agreed on the order of ranking by logging difficulty, although Mr. Bedford did not accept Mr. Eaglestone's point allocation methodology which did not correspond precisely with the agreed ranking by difficulty. The experts also agreed in a number of other areas, including that certain blocks in the Woodpecker area, where harvesting had been by partial cutting, were not directly comparable to the other blocks studied where harvesting had been by clear cutting.

While acknowledging that Mr. Eaglestone's report contained a very comprehensive listing of factors that influence logging chance, he disagreed with a number of aspects of Mr. Eaglestone's point allocation model.[57] In particular, Mr. Bedford took issue with Mr. Eaglestone's methodology which seeks to quantify the degree of difficulty in logging any particular block by using a point system. Mr. Bedford also disputed the variation in difficulty among the logging blocks compared, as, in his view, one would not expect the logging chance to vary by more than 30% within the group of blocks compared, and not more than 10 to 15% from the "median".[58]

89. In a submission filed in response to Mr. Bedford's opinion, Mr. Eaglestone defended his methodology, noting that the point system he utilized does not translate directly to degree of difficulty.[59] In other words, according to Mr. Eaglestone, a block with twice the points allocated is not necessarily twice as difficult. Nevertheless, in Mr. Eaglestone's opinion, a system of quantifying the differences among the blocks is necessary to give meaning to any comparison. Simple ranking, without accounting for the degree of difference among the blocks, Mr. Eaglestone opined, is unhelpful.

90. Mr. Eaglestone also took issue with Mr. Bedford's opinion that the difference in difficulty among the blocks would not vary more than 15% from the "median". In his separate, response report of April 25, 2002, Mr. Eaglestone stated that comparing the median cutblock, 707-1 with the highest ranked cutblock, 726-2, based solely on timber profile would impact the harvesting difficulty by more than 15%. According to Mr. Eaglestone, based solely on comparing the terrain, the impact would also be greater than 15%. When both features are combined, Mr. Eaglestone says that cutblock 726-2 will have harvesting difficulty that is more than 30% than that for cutblock 707-1[60]. As noted above, Mr. Bedford, on the other hand, says that all of the cutting permits are within the range of "normal" for wetbelt logging an that the total range of variance would probably be within 20%, with a maximum of 30%.

91. Finally, Mr. Eaglestone noted in his response report that the overall mix of easy and difficult logging chance is relevant in setting a logging rate. In other words, where a contractor

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[57] See, DWB Forestry Services Ltd. reports of December 12, 2001 and April 23, 2002. In Mr. Bedford's view, the range of difficulty of in excess of 300% for the blocks in question in Mr. Eaglestone's model was not realistic.
[58] See, DWB Forestry Services Ltd. report addendum dated April 23, 2003.
[59] See, Majestic Forest Management Ltd. report of April 25, 2002 at p. 4.

has a mix of easier and more difficult blocks, the overall logging rate can be "blended"; whereas, if the work assigned is comprised only of difficult blocks, the contractor has no ability to offset the cost of tougher blocks against the cost of easier blocks.

92. The agreed ranking set out in the Joint Report for the blocks at issue and comparable blocks in the Missinka and Colbourne areas was usefully summarized by Carrier as follows:[61]

Ranking	Block	Difficulty/ Rank (Bedford & Eaglestone)	Agreed To Rate Before Adjustment	Agreed To Rate For Same Phases Of Logging	Year of the Logging	Location of the Block	Parties Involved
1	CP 726-2	More difficult	At issue	At issue	Winter 2000	Missinka	Carrier and JM&S
2	**CP725-1**	More difficult	$21.87	**$19.70/tonne**	Winter 1998	Missinka	Carrier and JM&S
3	CP 706-3	More difficult	At issue	At issue	Winter 2000	Colbourne	Carrier and JM&S
4	CP 706-1	More difficult	At issue	At issue	Winter 2000	Colbourne	Carrier and JM&S
5	CP 727-3	More difficult	At issue	At issue	Winter 2000	Missinka	Carrier and JM&S
6	CP 706-2	Moderate difficult	At issue	At issue	Winter 2000	Colbourne	Carrier and JM&S
7	CP 707-2	Moderate difficult	At issue	At issue	Winter 2000	Colbourne	Carrier and JM&S
8	CP 707-3	Moderate difficult	At issue	At issue	Winter 2000	Colbourne	Carrier and JM&S
9	CP 707-1	Moderate difficult	At issue	At issue	Winter 2000	Colbourne	Carrier and JM&S
10	CP 720-8	Moderate easy	$20.54	**$20.00/tonne**	Winter 1999	Colbourne	Carrier and JM&S
11	CP 707-5	Moderate easy	At issue	At issue	Winter 2000	Colbourne	Carrier and Eldorado
12	CP 707-4	Moderate easy	$18.13	**$18.13/tonne**	Winter 2000	Colbourne	Carrier and Eldorado
13	CP 700-4	Moderate easy	$21.154	**$19.18/tonne**	Winter 1998	Colbourne	Carrier and JM&S
14	CP 712-4	Moderate easy	$18.52	**$18.52/tonne**	Winter 2000	Colbourne	Carrier and Eldorado
15	CP 712-5	Easy	$18.52	**$18.52/tonne**	Winter 2000	Colbourne	Carrier and Eldorado
16	CP 700-1	Easy	$21.122	**$19.18/tonne**	Winter 1998	Colbourne	Carrier and JM&S
17	CP 700-2	Easy	$21.246	**$19.24/tonne**	Winter 1998	Colbourne	Carrier and JM&S

[60] See, Majestic Forest Management Ltd. Report of April 25, 2002 at pp. 4-7.

[61] See, Carrier Closing, pp. 43-44. It should be noted that the blocks ranked 13 and 14 are not in the order contained in Carrier's summary but, rather, as set out in Table 1 of the Joint Report. In the Joint Report, the authors explain the change in the categories of each of block 700-4 and 712-4 on the basis of particular block characteristics. Further, the rate for block CP 720-8 has been amended to reflect the rate of $20.54 (and not $20.804 set out in Carrier's Table) contained in the agreed Schedule A to the Agreement (JM&S doc #1799). However, as noted in footnote 16 above, the rate actually paid was $21.54 per tonne.

93. From my review of Messrs. Eaglestone's and Bedford's respective reports, and the Joint Report and the supporting information, I have concluded that the logging performed by JM&S in the 1999-2000 winter season was, overall, more difficult than the conventional logging performed by JM&S for Carrier in previous seasons.

Mr. Klotz

94. Paul Klotz, R.P.F., was asked by JM&S to provide an opinion as to the degree of competition which exists among licence holders in the Prince George area. Carrier objected to Mr. Klotz's opinion on the bases that he was not truly independent and that he was not qualified to give the opinion he rendered.

95. Given the conclusions of our Court of Appeal in *Hayes Forest Services Limited v. Pacific Forest Products Ltd.*[62] and later in *Joe Martin & Sons Ltd. v. Carrier Lumber Ltd.*,[63] both cited above, with respect to the proper interpretation of the applicable test for determining a rate under s. 25 of the Regulation, and particularly with respect to what is a "competitive" rate, I do not find the expert evidence with respect to competition, or the lack thereof, to be necessary or, with great respect, particularly helpful. The exercise I am engaged in is an objective, notional one as to what a licence holder and a contractor acting reasonably in similar circumstances would agree is a rate which is both competitive and allows a reasonable opportunity to profit. Consequently, the objective analysis required by the Regulation renders the actual, subjective relationship between the Parties significantly less important.

96. Where principal guidance for appropriate rates is drawn from prior agreed rates, there may be some limited scope for an arbitrator to go behind the rates to examine the circumstances of the rate agreement to determine whether the previously agreed rates were in fact reasonably competitive and permitted a reasonably efficient contractor the opportunity to earn a reasonable profit. However, that limited scope of enquiry is not triggered by the evidence tendered by either the contractor or the licence holder in this case. In my view, more than the general evidence of limited competition tendered in this case would be required to justify an examination of whether the previously agreed rates were the result of economic duress such that those rates were not, at

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[62] *Supra*, para. 61.
[63] *Supra,* note 22.

minimum, an indication of what the Parties had previously, subjectively agreed was a competitive rate which provided the contractor with a reasonable opportunity to profit.

97. Such further evidence was not put before me. To the contrary, both parties relied on past agreed rates and urged me to draw guidance primarily from those rates. In circumstances where I have accepted that past agreed rates should be the first source for setting a rate and neither party has suggested the previous rates were the result of some form of economic duress, I cannot see much assistance to be drawn from an opinion with respect to the actual degree or lack of competition.

98. Consequently, I do not find Mr. Klotz's opinion necessary or of assistance. As a result, it is not necessary to deal with Carrier's objections, or Mr. Klotz's evidence as to the degree of actual competition which exists in the area.

Mr. Rahn

99. Mr. Rahn provided a detailed report on behalf of Carrier in which he set out the rates that his company would charge, in theory, to harvest the blocks at issue.

100. In regard of logging costs, Mr. Rahn estimated the amount of time required to perform each phase of the work basing his anticipated productivities on his experience in the industry. He also calculated the cost per hour in respect of machine costs and labour costs, including profit and ownership costs, again based on his experience. From these assumptions he converted the anticipated costs into a rate he would expect to charge for the work.

101. In order to determine an appropriate logging rate from his estimate of the costs of the harvest, Mr. Rahn assumed that his notional complement of logging equipment would be utilized for 2000 paid hours per year. From that assumption, Mr. Rahn assumed that a percentage of the contractor's overhead and supervision costs would be allocated among the various work assignments occupying a contractor during the year.

102. The net result of this allocation method, as Mr. Rahn acknowledged in his evidence, is that a smaller volume of harvest will result in a lower rate, and a larger volume will result in a

higher rate, as the greater the volume, the greater the proportion of the overhead and supervision costs are taken up by the work.

103. Mr. Rahn's opinion of appropriate rates (including road development) for the blocks at issue ranges from $17.17 per tonne for Block 706-2 to $20.28 per tonne for Block 706-1. The "blended rate" per tonne for all blocks according to Mr. Rahn's estimates is $18.61.

104. In cross-examination, Mr. Rahn acknowledged that a similar report he created in another matter assessing the appropriate rate for a larger volume resulted in higher unit rates than did his opinion in respect of the work at issue here. Again, this was because the higher volume took up a greater allocation of the overhead and supervision costs.

105. In general, Mr. Rahn was a good witness, and I accept much of his report, with one important caveat. While I believe Mr. Rahn's approach to estimating the machine and labour costs of performing the logging work may have been appropriate, I accept, at least in part, the objections raised by JM&S to Mr. Rahn's determination of the appropriate allocation of overhead and supervision costs Mr. Rahn assumed in coming to his conclusion as to an appropriate logging rate.

106. In particular, I am not convinced that a reasonable licence holder and contractor in truly similar circumstances would determine a logging rate for a particular work assignment based on Mr. Rahn's assumptions with respect to the allocation of equipment ownership and overhead costs based on a fixed amount of overall work for the year.

107. In addition to my own doubts in this regard, Mr. Rahn's assumptions with respect to additional work and allocation of costs were commented on by Mr. John Neels, R.P.F. in a reply report to Mr. Rahn's report, which I will describe in greater detail below.

108. To be clear, Mr. Rahn's method of costing a logging job is not incorrect, nor inappropriate, particularly in reviewing the overall business of a contractor. Rather, the difficulty I have with Mr. Rahn's methodology in respect of setting a rate is that the effect of this method of allocating overhead and ownership costs results in rates which do not accord with the

expectations of the Parties nor the industry, generally, that higher volumes will result in lower rates and smaller volumes will necessitate higher rates.

109. Our Court of Appeal has affirmed this general understanding of the relationship between volume and rates in the industry:

> It appears to be generally accepted as a fact in the forest industry that harvesting costs per unit diminish as the volume of harvest increases. Fixed costs are spread over a larger volume. Conversely, as volume cut diminishes, costs per unit may be expected to rise.[64]

110. Both Parties in this case expressed similar expectations with respect to the relationship between higher volume and rates. In its submissions, Carrier asserted that a larger than normal volume for 1999/2000 should have led to a reduction in the logging rate.[65] JM&S' principal criticism of Mr. Rahn's approach was precisely that his opinion with respect to a contract for the harvesting of 250,000 metres resulted in greater fixed costs and a higher rate than he concluded was appropriate in the case at issue when a significantly smaller volume was to be harvested.

111. There was evidence before me that JM&S did work for other licence holders, and performed other ad hoc work as it became available. There was, however, no evidence that the Parties had previously adjusted the rates higher or lower to account for the availability or unavailability of additional work for JM&S. Rather, the previous agreed rates were negotiated based on the nature and volume of the work Carrier assigned to JM&S for the year. There is no basis in the evidence or the authorities for me to conclude that this approach differs from what a reasonable licence holder and contractor would do.

112. Mr. Rahn's approach may have been more appropriate in circumstances where there was evidence that the Parties' past practice or, more importantly, that the objective expectation of licence holders and contractors generally was that rates would be negotiated for the particular work assigned in light of a fixed, overall volume expectation for the year beyond the work that was the subject of negotiation. However, there was no such evidence before me. Rather, all of the evidence and the authorities to which I was directed were to the effect that the rate ought to

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[64] *Hayes Forest Services Limited* v. *Pacific Forest Products Limited, supra*, para. 61 above at para. 21.
[65] See, Carrier Closing, p. 15, para. 35.

be set with reference to the agreed or planned volume between the Parties that was anticipated at the beginning of the year.

113. Moreover, Mr. Rahn's conclusions appear to be somewhat lower than, and do not accord with the general history of, the prior rates agreed between the Parties and the base rate as determined to be appropriate by Arbitrator Fraser.

114. In all of the circumstances, I conclude that Mr. Rahn's opinion provides some evidence of what might be considered a competitive rate in circumstances where other volume may be available to a contractor, and I will consider it as a factor in arriving at an overall rate. However, for the reasons I have set out above, I do not consider that Mr. Rahn's opinion, in and of itself, satisfies the test of what a reasonable licence holder and a reasonable contractor in similar circumstances would agree is a rate that is competitive by industry standards, and that will permit the contractor to earn "a reasonable profit".

Mr. Harding

115. Mr. Brian Harding, R.P.F. provided a report and gave evidence on behalf of Carrier with respect to the appropriate rates for the logging performed by JM&S in the winter of 1999/2000.

116. JM&S raised an objection to Mr. Harding's report based on its view that Mr. Harding had insufficient experience to be qualified as an expert in these proceedings. I ruled in the course of the hearing that I would admit Mr. Harding's evidence, but that I might place less weight on his opinion in light of his more limited experience compared to the other experts whose evidence I heard in the course of this matter. Mr. Harding's report, dated September 2001, concluded that the appropriate rates for logging in winter 1999/2000 ranged from $15.67 per tonne for logging and $0.62 per tonne for development in Cutting Block 707-2 to $19.75 per tonne for logging and $1.45 per tonne for development in Cutting Block 726-2.

117. Like Mr. Rahn, Mr. Harding based his rate assessment on his assumptions with respect to logging productivity and his opinion with respect to the hourly cost of performing the logging phases. However, unlike Mr. Rahn, Mr. Harding's assumptions with respect to hourly rates were not backed up by a breakdown of the various equipment and labour costs allocated over the anticipated operational hours. Rather, Mr. Harding based his hourly cost assumptions on

equipment information from Finning, discounted to remove the dealer profit, and based on his experience with respect to his understanding of the hourly rates utilized by other contractors. In cross-examination, Mr. Harding was unable to identify the breakdown of the hourly costs or identify what level of profit assumption was contained in the hourly rate assumptions.[66]

118. While Mr. Harding's report was of some assistance, overall it suffered from a lack of data to back up the assumptions with respect to hourly equipment rates. Absent greater information with respect to the critical assumptions underpinning Mr. Harding's report, I cannot place much weight on the opinions presented.

119. In addition to his principal report, Mr. Harding provided a reply report dated November 30, 2001, in response to Mr. Eaglestone's assessment of the relative difficulty of the various logging blocks.

120. Mr. Harding identified a number of factors considered by Mr. Eaglestone which he did not agree were relevant considerations in determining logging chance, except in extreme cases, and then only in circumstances where the risk actually materialized to impact logging.[67] In this regard, I am more inclined to agree with Mr. Eaglestone's approach of attempting to identify and account for risks, and the likelihood they will impact logging. It seems to me this is the approach a prudent logger would adopt, and moreover, one driven by the prospective and objective approach of the Regulation. Absent something in a logging contract which allows the contractor to seek compensation for exceptional conditions after the fact, such risks which may impact logging chance must be identified and reasonably accounted for by a reasonable logging contractor.

121. Mr. Harding also disputed the relative weighting of the attributes assessed by Mr. Eaglestone, and asserted that some factors considered resulted in "double counting" of particular factors. For example, Mr. Harding noted that Mr. Eaglestone's approach included a consideration of biogeoclimatic zones. However, since precipitation, and soil moisture were defining factors of a biogeoclimatic zone, they should not be considered again in the analysis in addition to the subzone classification as Mr. Eaglestone had done in his report.

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[66] Tr. May 1, 2002, p. 96.

122. As I noted above, I found Mr. Eaglestone's methodology and his presentation of it to be compelling, and I am willing to accept his opinion in large measure. However, I share with Mr. Harding the observation in his reply report that it is impossible from Mr. Eaglestone's report to derive a direct relationship between the logging chance assessment and an appropriate harvesting rate.[68] In light of this fact and the relative consensus between Messrs. Eaglestone and Bedford with respect to the relative difficulty of the logging blocks considered by them, it is unnecessary for me to seek to quantify the impact of the particular criticisms of Mr. Eaglestone's methodology.

Mr. Neels

123. Mr. John Neels, R.P.F. provided a reply report on behalf of JM&S in response to Mr. Rahn's and Mr. Harding's reports.

124. Carrier raised an objection to Mr. Neels' qualifications as an expert, and as was the case with Mr. Harding, I held that I would admit Mr. Neels' evidence, but that I might consider his more limited experience compared to the other experts whose evidence I heard in determining the weight to give his evidence.

125. With respect to Mr. Rahn's report, Mr. Neels had the following principal criticisms:

(a) Mr. Rahn's assumptions with respect to additional work beyond that allocated to JM&S by Carrier were unrealistic both in terms of the availability of summer work and the total anticipated hours for machine use in a given year;

(b) the assumptions with respect to ownership costs were unrealistic; and

(c) profit and risk allowances were not included in some phase costs such as administration and supervision.

126. As will be seen from my analysis of Mr. Rahn's report above, I accept Mr. Neels' criticism of Mr. Rahn's assumptions with respect to the expectation of additional work outside of the volume allocated by Carrier, and the effect that has on the allocation of fixed costs. I have

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[67] See, Quality Forest Consultants Ltd. Reply Report dated November 30, 2001, p. 5.

also noted that Mr. Rahn's assumptions led to proposed rates which are generally lower than, and not consistent with, both the range of past agreed rates and the appropriate base rate as determined by Arbitrator Fraser. In light of my conclusions stated above and Mr. Neels' criticisms, I have taken Mr. Rahn's report into account in my determination of a competitive rate, but I have done so with the significant caveats previously set out.

127. With regard to Mr. Harding's report, Mr. Neels' principal criticisms were the following:

(a) Mr. Harding assumed 12 hour days without accounting for the costs of working an additional four hours per day beyond the eight hours assumed by the manufacturer.

(b) Significant cost categories were omitted from the overhead expenses including mobilization and demobilization, insurance, transportation, storage. Additionally, Mr. Neels queried whether there was any allowance for profit and risk on the overhead costs.

(c) As with Mr. Rahn's report, Mr. Neels criticized Mr. Harding for assuming the availability of additional logging and the allocation of fixed costs in respect of the volume available.

(d) Mr. Harding's reliance on logging rates of other cutblocks without first assessing the degree of similarity of the logging chance.

128. As will be seen from my prior conclusions with respect to Mr. Harding's evidence, it is unnecessary for me to deal at length with Mr. Neels' criticisms. I accept that there is insufficient support for the assumptions underlying Mr. Harding's opinion. Given this, there is no reason to prefer Mr. Harding's approach to an analysis based on the history of rates agreed between the Parties, which is consistent with the opinions of Messrs. Eaglestone and Bedford.

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[68] See, Quality Forest Consultants Ltd. Reply Report dated November 30, 2001, p. 5.

C. Actual Logging Costs for the Work Performed

129. JM&S submits that the actual cost of logging it experienced for the work performed in 1999/2000 ranged from $22.95 per tonne on Block EH7706-2 to $35.24 per tonne on Block EH7726-2, for an average cost of $27.56 per tonne for the overall winter 1999/2000 logging program.

130. Beyond the particularly difficult logging, which JM&S submits it anticipated, JM&S attributes its high cost experience in the winter of 1999/2000 to significantly lower volumes actually harvested than had been projected in the cruise estimates and Carrier's proposed Schedule A.[69]

131. In addition, JM&S complains that its operations were hampered by the poor condition of the roads, which Carrier had undertaken to remedy; lack of camp space for its workers; and the poor layout of the blocks it was assigned to harvest.

132. In response, Carrier raises a number of objections to the costs claimed to have been incurred by JM&S. Further, Carrier objects to considering actual costs on the basis they comprise a subjective and after-the-fact approach.

133. On the other hand, Carrier submits that the cash flow projections prepared by JM&S for its bank ought to be considered JM&S' true, prospective anticipation of the logging rates, and Carrier seeks to rely on the projections to that effect.

134. In reviewing documents such as cash flow projections, I must have consideration to their context and the purpose for which they were created. I do not agree with the submission made by Carrier that cash flow projections prepared for a bank are necessarily a true reflection of what JM&S anticipated it would achieve in respect of rate negotiations. Clearly, such a document may have been influenced by a number of considerations, and likely had a degree of conservatism and margin-for-error built in to the projections.

135. In any event, this evidence, as with the evidence of actual costs, while it may be of some limited use, does not displace the history of rates for work performed on the same Licence.

136. With respect to JM&S' actual costs of performing the logging at issue in these proceedings, I have already referred to the limited use to which an arbitrator can appropriately put such evidence. The costs experienced by JM&S may be consistent with JM&S' expectation that the winter 1999/2000 logging work would be particularly difficult. Beyond that, however, JM&S' actual costs experience cannot supplant the prior agreed rate history as my principal source of guidance as to an appropriate logging rate.

137. With respect to the cruise information and the volume offered in Schedule A to the Agreement for the winter 1999/2000 (120,083 tonnes) and the volume actually harvested (98,657.25 tonnes), there was no indication in the evidence that the risk of a shortfall in volume was the subject of special consideration or discussion by the Parties prior to the commencement of logging in the winter 1999/2000 season. As a result, there is no basis to consider that the Parties attributed a particular degree of risk to this issue beyond the normal contingencies that may be within the contemplation of contracting parties prior to the commencement of logging. In my view, in the objective and prospective rate setting exercise described above, any such contingency is adequately accounted for in the past rates agreed between the Parties, including rates for cut blocks in the Missinka and Colbourne areas. This does not address, however, JM&S' claim against Carrier for an alleged breach of contractual representation or warranty relating to the volume of timber to be logged in the 1999/2000 winter season. I note that this is one of the breach of contract claims agreed to be deferred, and therefore, I express no further view in regard of that claim at this time.[70]

138. With respect to JM&S' complaints with respect to the poor condition of the roads, I have noted the evidence that the winter 1999/2000 season was unusually mild and wet and freeze-up was late.[71] I accept that these conditions likely contributed to the condition of the roads. In any event, there is no indication that the risk of unusual weather had been the subject of consideration or discussion between the Parties before the commencement of logging Nor was there evidence that weather risk is a contingency which a reasonable licence holder and

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[69] See JM&S Closing, p. 7.
[70] JM&S's deferred claims for breach of contract also include claims for damages flowing from alleged improper layout of cutblocks and poor condition of the roads. See JM&S Closing, pp. 38-39.
[71] See, for example, the sources cited at Carrier Closing, pp. 97-98.

contractor would take account of after-the-fact rather than as a risk factor to be built into agreed rates.[72]

D. Historical Logging Costs

139. JM&S led detailed evidence of its logging costs for logging work performed prior to the 1999/2000 season.

140. While still subjective information, the historical costs experienced by JM&S are pre-existing data to which a contractor would likely have reference in estimating costs and negotiating rates for work for the coming year. In this regard, the past cost evidence differs from evidence of the costs of the logging at issue in the proceedings.

141. I find JM&S' cost recording systems to be reasonable and the evidence as to those costs generally withstood cross-examination.

142. Consequently, I find that JM&S' evidence of its historical costs is reliable information which may be of some measure of assistance in determining what a contractor acting reasonably in similar circumstances may agree is a rate which satisfies the criteria of s. 25 of the Regulation.

143. However, in my view, unless it can be said that prior agreed rates do not properly reflect the historical costs experienced by logging contractors for reasons which would trigger the narrow jurisdiction of an arbitrator to go behind the agreed rates to which I have previously referred, the historical costs have already been accounted for, whether expressly discussed and considered or not, by the Parties in arriving at previously agreed rates.

144. In other words, the analysis preferred by other arbitrators, taking past agreed rates and adjusting them for the changes in the nature and volume of the work, already incorporates a degree of consideration of historical costs determined to be appropriate by the Parties, presumed to be acting reasonably. Considering past agreed rates and the changes necessary to adjust the rates so that they are appropriate for the work at issue minimizes the need for an arbitrator to embark on the far more subjective tasks of determining the appropriate level of consideration to

[72] Again, I do not address here the question of JM&S's claim for alleged breach of representation or warranty with respect to the adequacy or condition of the roads.

place on individual factors such as historical logging costs on the one hand, or comparable rates of other operations on the other.

145. In short, absent evidence to the contrary, previously agreed rates are the product of a balancing of all of the factors which a reasonable licence holder and a reasonable contractor would have considered in the past. In this case, Carrier and JM&S have each considered and relied on these rates.

146. This is likely the reason for the growing consensus among arbitrators and our Courts that principal, although not exclusive, reliance on past agreed rates is the best means of satisfying the objective and prospective test provided for in s. 25 of the Regulation. I concur with those arbitrators who have approached this task previously and concluded that the consideration of prior agreed rates ought to be the primary factor in setting a logging rate, while not entirely discounting the other factors set out in s. 25(2) to which an arbitrator may have reference.

E. Interior Appraisal Manual and Blue Book Rates

147. In addition to the evidence of its own logging costs and productivities, JM&S led evidence of industry average costs as expressed in the "Interior Appraisal Manual" and the "Blue Book" as corroborative of the reasonableness of its own historical costs of logging.

148. JM&S points out that its "Pool Rates" for its equipment are similar to the rates set out in the Blue Book, an equipment rental rate guide published by B.C. Hydro and Power Authority and B.C. Rail Ltd.

149. In response, Carrier led opinion evidence from Mr. Jamie McLennan, to the effect that the Interior Appraisal Manual is merely a tool for setting stumpage rates, not an expression of industry standard costs, and therefore, does not account for a number of significant cost considerations. Thus, Carrier submits, based on Mr. McLennan's opinion, that the Interior Appraisal Manual is not a reliable source to draw conclusions with respect to the reasonable costs of logging.

150. With respect to the Blue Book, Carrier submits that it is an inappropriate source for equipment rates in a long term logging contract for a variety of reasons, including that: (a) the

Blue Book is only a guide; (b) the Blue Book is principally for government projects; (c) the rates include mobilization and transportation of equipment; (d) other licence holders and logging contractors do not rely on Blue Book rates to set log harvesting rates; and (e) reliance on Blue Book rates was rejected by Arbitrator Wallace in Pacific Forest Products Limited and Hayes Forest Services Limited, and by Arbitrator Pearlman in Western Forest Products Limited v. Hayes Forest Services Limited.

151. As with the direct evidence of JM&S' actual historical costs, the evidence of average or standard costs is of limited assistance to me given the existence of prior agreed rates between the Parties for work on the licence. Average costs expressed in the Interior Appraisal Manual and Blue Book, while less subjective, are also by definition more general and less helpful than the contractor's historical costs. Therefore, as I have already held that JM&S' historical costs are implicitly considered in an analysis based in prior agreed rates, I find the more general evidence of industry costs is of little assistance to me, without the need to consider Carrier's specific objections to reliance on such sources.

F. Comparable Rates

152. Carrier led evidence of what it claimed were comparable logging rates paid to other contractors, including rates agreed between it and Eldorado for 1999/2000.

153. In some cases the Eldorado rates were adjusted "to obtain a true and accurate comparison of the logging rates to the logging work to be performed by JMS for Carrier". The agreed rates, as adjusted, were submitted to be $18.13 per tonne for one block and $18.52 per tonne for two other blocks.[73]

154. In 1999/2000, Eldorado was a non-replaceable volume contractor for Carrier, although it is now a replaceable volume contractor.

155. The principal of Eldorado gave evidence that the rates put in evidence were agreed to in anticipation of Eldorado earning a reasonable profit from that logging.[74]

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[73] See, Carrier Closing, p. 48.

[74] Mr. Lee Todd gave evidence by way of a witness statement and was not requested to attend at the hearing for cross-examination.

156. Carrier also led evidence of rates other licence holders in the general area had agreed to with other contractors. Some rates were "adjusted" by Carrier to reflect comparable phases of work and others were not.

157. In general terms, the rates and adjusted rates referred to by Carrier range between $17 and $20 per tonne, and Carrier relies on these rates as a reasonable range for rates in the area in question.

158. As I have previously stated, I share the unease expressed by other arbitrators in relying on rates agreed to between other Parties, on other licences and in other circumstances. Such comparisons are necessarily "nebulous", as Arbitrator Wallace described them. The need to "adjust" agreed rates to make them comparable and the myriad differences in the circumstances which lead Parties to agree to rates for a particular block adds a degree of subjectivity and makes such comparisons both difficult and dangerous. I find that is again the case here.

159. I am not persuaded that the comparable rates presented by Carrier were negotiated in respect of work that was substantially similar to the particularly difficult work performed by JM&S in 1999/2000.

160. Moreover, I am not convinced, based on the evidence submitted, that Eldorado, a non-replaceable contractor at the time it agreed to the 1999/2000 rates to which I was referred, was in "similar circumstances" to JM&S such that I could adopt those rates as truly comparable. As Arbitrator Fraser implicitly held, and the Court of Appeal later explicitly remarked, the rates agreed to by Eldorado during this period are not necessarily indicative of competitive rates of a contractor in similar circumstances.

161. Rather, as I have set out above, I will consider the evidence of the comparable rates as a factor in the analysis of appropriate rates. However, I place only limited weight on this evidence because:

(a) the work to be performed for these rates has not been established to my satisfaction to be truly comparable;

(b) the circumstances of the contractors and licence holders in respect of these rates have not been established to my satisfaction to be truly similar to those of Carrier and JM&S;

(c) some rates had to be "adjusted" by Carrier in order to be considered comparable; and

(d) most significantly, the comparable rates are not consistent with either the base rate of $19.50 per tonne, already found to be reasonable for these Parties, nor the history of agreed rates between these Parties.

G. Reasonable Efficiency

162. Both JM&S and Carrier led evidence critical of the other's performance in regard to their respective work under the Agreement. While I am certain that neither Party operated flawlessly, the Regulation does not impose a standard of perfection on either licence holders or logging contractors in respect of the rate setting provisions.

163. All in all, I found the evidence of the complaints with respect to the performance of both Parties to be insufficiently significant to account for in determining an appropriate logging rate. Rather, each Party's complaints were the sort of irritant that any Parties to a long term, ongoing relationship might anticipate, and that appeared to me to have been, not surprisingly, magnified and highlighted by both Parties as a result of the adversarial process on which they had embarked. To the extent the complaints raised by either Party may rise to the status of breach of contract, they may give rise to a claim for damages. However, the evidence presented to me does not, in my view, require me to consider it within the exercise of setting the appropriate logging rate.

164. In a similar vein, Carrier in its submissions made reference in a number of instances to the fact that JM&S was one of the few, if not the only, replaceable logging contractors in the area to initiate a rate dispute pursuant to the Regulation. Where a Party commences an unwarranted dispute, there are remedies available, including the award of costs. However, the mere fact that one party or another has exercised its rights under the Regulation is not evidence of unreasonableness or intransigence. The Legislature has made the dispute resolution provisions

of the Regulation available to licence holders and contractors alike, and there should be no prejudice to any Party for invoking its statutory rights.

165. Given the approach I have adopted, which is to rely principally on previously agreed rates as the source for appropriate rates for the logging at issue, Carrier's other criticisms of JM&S, such as the complaint that JM&S used too much equipment to conduct the harvesting operations in 1999/2000, or that JM&S has too much overhead, are of no consequence. Had I based my analysis on JM&S' actual costs, such criticisms might have been significant. However, building a rate from previously agreed rates, and adjusting those rates for the anticipated changes in the work, rather than basing a rate on how JM&S actually performed the work, makes considerations of the equipment actually employed during the period in dispute irrelevant.

166. On all of the evidence, I find that for the purposes of setting a logging rate neither JM&S nor Carrier acted in a manner which ought to affect how the logging rate is set. In fact, to consider such complaints in the rate setting process would undermine the prospective and objective approach required by the Regulation. Both Parties may have benefited by attempting to further reduce inefficiencies, but there was nothing in the evidence to justify a significant departure from the previously agreed rates on the basis of either Party's conduct of its obligations under the Agreement. If any of the Parties' complaints about the other's conduct satisfies the test for a breach of contract, damages may be available to the aggrieved Party.

H. The Rate

167. The past agreed rates for work in the Licence area performed by JM&S ranged from $18.00 per tonne to $25.53 per tonne for conventional logging and were negotiated from a base rate of $19.00 per tonne.[75] The past agreed rates for work performed by JM&S in the Missinka and Colbourne areas range from $21.12 per tonne to $21.87 per tonne. These are "unadjusted

[75] These were the actual rates agreed and paid in the past without adjustment to reflect the elements of work or phases performed by JM&S in the winter of 1999/2000 season. Certain blocks logged by JM&S in the winter of 1996/1997 season in areas known as the Willow-Wansa and Woodpecker involved high lead and select or partial cutting techniques. These techniques are not directly comparable to clear cutting and appear to be recognized as more expensive than conventional clearcut logging. See Carrier Closing, pp. 55-56 and the evidence cited there, including the evidence of the Parties' logging chance experts contained in their Joint Report at p. 3.

rates". The adjusted rates for the same phases of logging on elements of work are $19.18 per tonne and $19.70 per tonne respectively. See the Table set out at paragraph 89 above.

168. I find that in light of the emphasis the authorities have placed on prior agreed rates, the obvious starting point for a reasonable licensee and reasonable contractor negotiating logging rates would be the previous year's base rate for logging on the same Licence and the previously agreed rates for individual cutblocks which both Parties acknowledged in their submissions were of primary importance as a source of guidance.

169. In *Hayes v. Interfor*,[76] Arbitrator Clemens held that an arbitrated rate set under the Regulation should be treated in the same manner as an agreed rate for the purposes of subsequent rate disputes. I concur with Arbitrator Clemens on this point. Neither Party took a contrary position in this regard. Consequently, the starting point for notional, reasonable parties setting a rate would be the summer of 1999 base rate of $19.50 per tonne awarded by Arbitrator Fraser and upheld by the Court of Appeal.

170. The expert evidence placed before me established that the work performed by JM&S in 1999/2000 was, considered as a whole, more difficult than the conventional logging work performed in previous seasons and included less "easy" work to offset the cost of performing the more difficult logging.[77]

171. Since the previously agreed rates had been negotiated on the basis of a lower base rate ($19.00 per tonne), and since I accept the evidence that the work in the winter of 1999/2000 was more difficult overall than any conventional logging work JM&S had performed for Carrier in previous seasons, I find that a licensee, acting reasonably in these circumstances would agree to a rate higher than either the $19.50 per tonne base rate or the highest of the previously agreed rates for conventional clearcut logging. Any such rate, however, would be subject to adjustment

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[76] *Supra*, para. 63, p. 12.

[77] In this regard, I accept the evidence of Mr. Eaglestone respecting the importance of the "mix" of work available in a given year. See Eaglestone Report, Book 3, Tab 1 "Summary of All Blocks" and the supporting information attached, and Mr. Eaglestone's Supplementary Report of April 25, 2002, p. 5.

to ensure that the same phases or elements of work as performed in 1999/2000 were reflected in the prior rates and to account for exceptional conditions.[78]

172. The evidence indicated that JM&S determined its initial offer based on its estimate of the costs of the job and its hoped for profit. I heard no evidence which would lead me to conclude this was not an approach which a reasonable contractor in similar circumstances would take, or that the estimate led to an unreasonable starting point for the negotiations.

173. JM&S offered to perform the work in the Missinka area for $26.56 per tonne.[79] However, this appears to have been on the basis of its understanding that it would not be required to build on-block roads. As described above, JM&S reduced its original calculation of its proposed rate for the cut blocks of the Missinka area by approximately $1.12 per tonne which represented its estimate of the cost of road development work plus 20% for profit and contingencies. JM&S' original proposed rate, including an allowance for road development work, was $27.69 per tonne.[80] Consequently, JM&S must have believed, albeit subjectively, that $27.69 per tonne would have provided it with an opportunity to earn a reasonable profit, notwithstanding that this apparently did not turn out to be the case for a number of the blocks harvested, based on the evidence of its actual costs incurred.

174. However, I find that JM&S was mistaken in its understanding that it would not be required to perform any road development work in the blocks to be logged in the winter 1999/2000 season and that the rates specified by Carrier in regard of those blocks did not contain any allowance for such work. In view of the work done by Carrier in estimating the length of mainline roads which had previously been constructed or would be constructed by other contractors through the Missinka and Colbourne cutblocks and deducting a certain percentage from the road development allowance in the base rate as it applied to the relevant blocks, it is unlikely that Carrier would have advised JM&S that it would not be required to build any on-

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[78] For example, the evidence indicated that the rate agreed for certain cutblocks logged in the winter of 1998/1999 were adjusted, after the fact, to take into account the extraordinary levels of snow in a particular area that year. See para. 31 above and the Supplementary Rebuttal WS of George Martin.

[79] In January 2000, JM&S advised Carrier that the rate prepared for the Missinka would stand as its offer for the Colbourne area. Subsequently, in May 2000, JM&S prepared a rate of $27.59 per tonne for the work performed in the Colbourne, based on JM&S's costs determined after completion. The rates prepared by JM&S were apparently calculated as average rates for logging in the two areas in question.

[80] See JM&S Doc. #38.

block roads. It is more probable that Carrier advised JM&S that because of past work in the Missinka area and the fact that other contractors would be working in the Colbourne and Missinka areas and building mainline roads, the road development allowance for certain blocks would be reduced. Further, the Schedule A to the Agreement delivered to JM&S on December 2, 1999 clearly indicated that in-block logging road construction and maintenance formed part of the services to be provided by JM&S. In addition, the rates specified by Carrier and actually paid to JM&S each contained a component for road development and deactivation.[81]

175. Whether one accepts $27.69 or $26.59 per tonne as JM&S' initial offer, I find that a contractor acting reasonably in similar circumstances would acknowledge the need in the ordinary course of negotiations to offer a rate significantly lower than its initial offer, and would not expect its opening offer to be accepted outright.

176. Moreover, given the absence of certain elements or phases of work, such as debris piling and camp allowance, in the 1999/2000 winter season, there is nothing in the history of the agreed rates which supports a logging rate as high as that requested by JM&S, notwithstanding the greater difficulty of the work compared to previous years.

177. Also, while I heard evidence of JM&S' actual costs of performing the logging, and particularly that the costs of the work were ultimately higher than JM&S' estimates, there was nothing in the evidence of JM&S' actual costs which led me to conclude that a reasonable contractor would not have been satisfied at the outset of the work with a rate of $27.69 per tonne.

178. Therefore, negotiations between a notional and reasonable licensee and contractor would result in a rate somewhere between $19.50 and $27.69 per tonne.

179. Unfortunately, I was not provided with evidence which would assist me in determining in a principled way to adjust the past agreed rates on which both Parties and the authorities place primary importance, nor how the notional Parties may have bridged the gap between them.

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[81] The road development components in each rate were as follows: CP726-2: $0.75; CP727-3: $0.85; CP706-1: $0.64; CP706-2: $0.57; CP706-3: $1.00; CP707-1: $1.00; CP707-2: $0.79; CP707-3: $1.00; CP707-5: $1.00. See Kuzma W.S., Ex. E., Tabs 18 and 25. See also JM&S Doc. #811-816 and Yorke W.S., p.4 and JM&S Doc. #811-817, which calculate the amount paid to JM&S for road development work on the basis of the relevant component contained in the rate for each block.

180. From my review of other arbitral awards, it appears that evidence was led in some of those proceedings with respect to the appropriate adjustments which should be made to prior rates in order to account for differences in the logging.[82]

181. However, in this case, the evidence tendered leaves me with only a range within which I believe a reasonable licensee and a reasonable contractor would negotiate a rate. The lay and expert evidence does not assist me in determining where, specifically, the rate should fall.

182. As I have already noted, Mr. Rahn's opinion, while of some assistance, does not in my view indicate a rate which is consistent with the previously agreed rates, with the base rate held to be appropriate for these Parties, nor which satisfies the criteria of s. 25(1) of the Regulation.

183. In light of Mr. Eaglestone's evidence that overall the work was more difficult than work done by JM&S for Carrier in previous seasons, I am inclined to conclude that a fair rate falls somewhat above the base rate, particularly given Mr. Eaglestone's opinion that an allocation of difficult logging work without sufficient easier work to "make up ground" on costs will result in particularly high costs for a contractor. However, as noted above, Mr. Eaglestone's opinion, while helpful, does not address the specific rate which would be appropriate for these circumstances. In any event, a contractor acting reasonably would, in my view, be required to move a reasonable degree from its initial offer.

184. I am reinforced in my conclusion that the appropriate rate should be somewhat above the base rate by the fact that in this arbitration Carrier took the position that the appropriate rates for logging ranged from $17.84 to $19.45 per tonne calculated on a base rate of $16.52 per tonne, or $1.32 to $2.93 per tonne over its new base rate. Included in the Carrier proposed rates was the "automatic" snow allowance Carrier was willing to pay for all 1999/2000 winter blocks, which it obviously would not have added to the summer logging base rate.

185. Using the base rate determined to be appropriate by Arbitrator Fraser, $19.50 per tonne, and adding Carrier's proposed margin over this new base rate results in rates ranging from $20.82 to $22.43 per tonne.

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[82] See, for example, the award of Arbitrator Clemens in *Hayes Forest Services Limited* v. *Interfor, supra*, para. 63.

186. Since I accept that the nature of the work was particularly difficult, and in light of all of the other evidence presented, I find that this is an appropriate range of rates for the work performed by JM&S in the winter of 1999/2000 season. In my view, these rates are consistent with the range of prior agreed rates between the Parties for similar work and objectively satisfy the criteria of s. 25(1) of the Regulation. The specific rates which I conclude are appropriate for the logging work performed in the winter of 1999/2000 season are as follows:

BLOCK	RATE (PER TONNE)
CP726-2	$22.43
CP727-3	$21.29
CP706-1	$21.23
CP706-2	$21.16
CP706-3	$21.47
CP707-1	$22.00
CP707-2	$20.82
CP707-3	$21.22
CP707-5	$20.94

These rates are based on agreed base rates which included an allowance of approximately $1.00 per tonne for road development and deactivation work. As a result, subject to Section VI below which deals with additional road development work requested by Carrier, they properly cover the development and deactivation of in-block roads for which JM&S advances a separate claim. The rates set out above also cover any appropriate adjustment for increases in fuel prices over the course of the season in question.

187. I note that this range of rates is consistent with the Parties' joint view of the comparability of cutblock CP725-1 in the Missinka area logged by JM&S in the winter of 1997/1998 season. That cutblock was ranked as the second most difficult block in the agreed ranking set out in the Joint Report by the Parties' respective experts on logging chance. The rate agreed by the Parties for that block, adjusted to reflect the same phases of logging as in the winter of 1999/2000 season, was $19.70 per tonne at a time when the base rate between the Parties was $19.00 per tonne. Adjusting the rate of $19.70 per tonne to reflect the new base rate of $19.50 per tonne and taking into consideration the proportion of significantly more difficult

work performed by JM&S in the 1999/2000 winter season compared to the 1997/1998 winter season, would lead to a rate within the range of rates set out above.[83]

188. JM&S is entitled to be paid the difference between the amount determined by the rates set out in paragraph 186 above for the timber harvested in the winter 1999/2000 season and the amount actually paid by Carrier. I retain jurisdiction to determine the final amount in question in the event the Parties are unable to agree on the calculation of the appropriate sum.

VI. ROAD DEVELOPMENT AND DEACTIVATION

189. After the logging commenced in the winter 1999/2000 season, some of the road development work assigned to other contractors was re-assigned to JM&S. While the evidence was not clear on this point, it appears that at least the mainline construction work leading to and through the CP707 blocks originally assigned to Eldorado, were re-assigned to JM&S in approximately January 2000. According to Mr. McCullough, Logging Supervisor and Road Foreman for JM&S, Eldorado was unable to keep up with the road building requirements in the CP707 blocks and this delayed JM&S' logging. As a result, after discussions with Carrier, a price to perform Eldorado's remaining road construction work was agreed between JM&S and Carrier and JM&S performed the work.[84] It also appears that JM&S may have performed additional road construction work in the CP706 blocks.[85] It appears that this additional work was invoiced by JM&S and paid by Carrier on a kilometre basis or individual items outside the logging rate.[86]

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[83] In considering the rate agreed between the Parties for cutblock CP725-1 in the Missinka area, I have considered JM&S' position that Carrier induced it to accept this rate on the basis of a promise that there would be summer logging work for the summer of 1998. I am unable to find that there was any specific promise made by Carrier at the time although it appears that the possibility of such work was discussed. In any event, by the time the winter 1999/2000 logging was discussed between Carrier and JM&S in the Fall of 1999, Carrier's difficulties in obtaining summer logging volume had been resolved and it appears that Carrier and JM&S knew that there would be volume available for the summer of 2000 (see Kuzma W.S., paras. 131-132). Further, the issue of summer logging was discussed at a meeting held on April 18, 2000 between representatives of Carrier and JM&S and subsequent correspondence confirmed the intention of both Parties to proceed with a summer harvest program: See Kuzma W.S., Appendix A, Tabs 65, 70. As a result, the Parties negotiated the winter 1999/2000 logging rates with at least a comparable prospect of summer logging work. In any event, even if I were to make an allowance for what JM&S submits was a representation by Carrier in respect of summer logging work in the summer of 1998, the result would remain within the range of rates I have determined are appropriate.

[84] See McCullough W.S., para. 14, JM&S docs. #1549-1550 and Revised W.S. of V. Martin, p.4.

[85] See JM&S Docs. #1512-1513.

[86] See Kuzma Cross-Examination, p. 89, and Yorke W.S., p. 2, and JM&S Docs. #11-12.

190. However, it was not clear from the evidence how much of the additional work performed by JM&S was mainline construction work within blocks harvested by JM&S (and which served as in-block roads from which JM&S could harvest timber) as opposed to access roads to the various blocks. As a result, I am unable to determine how much additional mainline JM&S built within the blocks it harvested as opposed to access roads or other general road construction or repair work at the request of Carrier.

191. I have determined above that in-block road development and deactivation work is covered by the logging rates. However, I am unable to determine whether the construction of mainline roads was more expensive than the construction of normal in-block roads and, if so, by what factor. Further, it appears that there may exist a dispute between the Parties with respect to unpaid invoices submitted by JM&S for the additional road development work.[87] As this work was requested by Carrier as additional work to that originally contemplated by the Schedule A for the winter 1999/2000 season, JM&S may be entitled to advance a claim in regard of this work, separate from the determination of the appropriate rate. Any remaining disputes between the Parties in this regard are deferred to a subsequent award along with the other deferred claims.

VII. THE HAULING RATE

192. JM&S also seeks a determination of the appropriate hauling rates for the winter 1999/2000 season. It submits that the hauling rates proposed by Carrier for the winter 1999/2000 are rates which have not been adjusted for three years, despite cost increases, particularly in fuel. JM&S submits that Carrier tacitly acknowledges the increases in costs by offering a hauling fuel adjustment, but that the fuel adjustment alone is insufficient.

193. JM&S submits that the appropriate approach to the hauling issue is to award a lump sum based on the difference between its calculation of its hauling costs based on a "pool rate", and the amount actually paid to it by Carrier. JM&S calculated its hauling costs for the purposes of its claim on the basis of pooled truck hourly rates to March 31, 1999 for the highway and off-highway trucks used to do the hauling. From these costs, it developed tonne/hour rates of $2.53 (highway) and $1.83 (off-highway) and average cycle times to derive haul rates per tonne which

[87] See Yorke W.S., p. 2 and JM&S Doc. #011.

were then multiplied by the actual tonnes delivered to arrive at JM&S' total cost of $1,565,039.00.[88] JM&S set out the breakdown of its calculation and referred to its total costs as expected "hauling revenue". JM&S then subtracted from its total expected hauling revenue figure the amount actually paid by Carrier in accordance with the hauling rates set out in Carrier's proposed Schedule A for the 1999/2000 season.[89] This amount was $1,367,796.82. The difference, which JM&S claims in these proceedings, is $197,242.17.

194. JM&S led evidence on a number of factors which it alleged contributed to greater hauling costs for the 1999/2000 season. Among these were the fact that Carrier had reached a log trading agreement with Canadian Forest Products, which resulted in requiring JM&S to deliver logs harvested in the Missinka and Colbourne areas to two different destinations: Canadian Forest Products' Polar Mill and Carrier's Sawmill. According to JM&S, this was the first time that it had to deliver different species of logs to different locations and that both highway and off-highway trucks were used to haul wood from the same cutblock. According to JM&S, this significantly affected cycle times and increased its costs. JM&S also pointed to other factors such as the alleged poor state of the roads and having to haul through blocks being harvested by other contractors as affecting cycle times.

195. Carrier, on the other hand, submitted that it had agreed with JM&S on all hauling rates for previous logging seasons, including hauling rates for cutblocks in both the Missinka and Colbourne areas. This included agreement between Carrier and JM&S in regard of road junctions common to the logging in previous seasons and the winter of 1999/2000 season in these areas. Carrier also submitted that it had used the same system for 1999/2000 as it had in previous years when hauling rates had been agreed. According to Carrier, its highway hauling tonne/hour rate increased from $2.31 per tonne per hour in 1998/1999 to $2.35 per tonne per hour in 1999/2000. Its off-highway tonne per hour rate remained the same at $1.70 per tonne per hour.

196. Carrier submitted evidence showing that its hauling rates for 1999/2000, which were agreed to by other contractors, fell between the rates paid by Canadian Forest Products ($2.34

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[88] See JM&S Closing, para. 382.
[89] See JM&S doc #335A.

per tonne per hour highway; $1.74 per tonne per hour off-highway) and The Pas ($2.37 per tonne per hour highway; $1.67 per tonne per hour off-highway).[90] Carrier also led evidence with respect to the cycle times of other contractors hauling for it in the Colbourne area and for which it used the same process for setting hauling rates and the same hauling tonne/hour rates.

197. JM&S contested that Carrier's hauling rates for the 1999/2000 winter season had increased or remained the same. JM&S says that Carrier prepared its hauling rates for 1999/2000 on the basis of the use of a seven axle fleet of trucks which, due to their greater carrying capacity have increased productivity as compared to five and six axle trucks. However, at the relevant time, according to JM&S, the industry did not operate on the basis of a seven axle truck fleet and JM&S and its trucking subcontractors, in particular, had not converted to seven axle trucks and continued to use some five or six axle trucks. As a result, JM&S submitted that the hauling rate had effectively been reduced.[91]

198. In April 2000, Carrier offered JM&S a 2% increase on hauling rates as a fuel adjustment. The proposed adjustment would have resulted in increases to the tonne per hour rate for highway hauling to $2.40 and for off-highway hauling to $1.73 per tonne per hour.[92] The proposed adjustments were not accepted by JM&S.

199. The hauling rates proposed by Carrier for the 1999/2000 season, compared to the rates derived by JM&S using pool rates are as follows:[93]

[90] See Kuzma WS, Exhibit F, Tab 4 and the hauling rate information contained more generally in that Exhibit.
[91] See JM&S Reply, pp. 29-30.
[92] See Kuzma WS, para. 111, and Ex. F, Tabs 16 and 17.
[93] See JM&S docs. #335, 335A, 1894 and Kuzma WS, Ex. F.

LOCATION	BLOCK NO.	CARRIER TONNE/HR. RATE	CARRIER HAUL RATE PER TONNE	JM&S TONNE/HR. RATE	JM&S HAUL RATE PER TONNE
MISSINKA	EH7726-2	$2.35 $1.70	$19.18 $ 8.99	$2.53 $1.83	$21.51 $11.44
	EH7727-3	$2.35 $1.70	$19.88 $ 9.49	$2.53 $1.83	$21.88 $11.01
COLBOURNE	EH7706-1	$1.70	$10.10	$1.83	$12.38
	EH7706-2	$2.35 $1.70	$18.93 $10.12	$2.53 $1.83	$21.67 $12.66
	EH7706-3	$1.70	$10.55	$1.83	$13.51
	EH7707-1	$2.35 $1.70	$20.21 $11.05	$2.53 $1.83	$20.70 $11.90
	EH7707-2	$2.35 $1.70	$19.82 $10.77	$2.53 $1.83	$22.31 $12.60
	EH7707-3	$2.35 $1.70	$20.13 $10.99	$2.53 $1.83	$21.67 $12.41
	EH7707-5	$2.35 $1.70	$19.75 $10.43	$2.53 $1.83	$21.46 $11.96
	R07812-1	$2.35	$20.21 $11.05	$2.53	$20.70
	R07812-5	$2.35	$19.75 $10.43	$2.53	$21.46

The haul rate per tonne is calculated by multiplying the tonne per hour rate by the estimated cycle time.

200. The evidence indicated that there had not been any disputes between Carrier and JM&S in the past with respect to hauling rates which were set by Carrier and subject to adjustments, at Carrier's discretion, for significant variances in cycle times.[94] From my review of the evidence, there is little reason to depart from the previous hauling rates agreed between the Parties. While a number of JM&S' cycle times were longer than estimated, at least some of this increase can be explained by road conditions attributable to the weather in the 1999/2000 season. However, I do accept that some adjustment would be appropriate due to the fact that in the 1999/2000 winter

[94] See the evidence of Mr. Kuzma, Tr., December 21, 2001, pp. 119-20 and Mr. Vernon Martin, Tr., December 17, 2001, p. 10. According to Mr. Martin, adjustments in the rate could be made up or down. The Schedules A to the agreement for the summer 1999 season and the winter 1999/2000 season expressly state that "hauling rates subject to adjustment based on actual cycle times at Carrier Ltd.'s discretion." See JM&S docs. #1843 and 1894.

season, JM&S, for the first time, had to haul logs to two different locations and that, as a result, on a number of blocks, had to use both highway and off-highway trucks. I accept that this may have given rise to some backing up and delays of trucks, thereby extending some cycle times somewhat. Unfortunately, there was no evidence dealing with the extent to which the different hauling destinations as opposed to other factors such as the weather and road conditions, affected cycle times and costs such that I could determine whether these had a minimal or substantial effect or quantify that effect.

201. I have also considered the evidence that the original setting of hauling rates by Carrier for the 1999/2000 winter season was done on the basis of conversion in the industry to a seven axle hauling fleet. I have noted the evidence that, in fact, this only applied in the case of highway trucks and resulted in a reduction of one cent per tonne from the summer 1999 rate (from $2.36 to $2.35). However, when compared to the winter 1998/1999 rate, the highway hauling rate increased by four cents per tonne per hour to $2.35 for the winter 1999/2000 season. The off-highway rate did not vary. The evidence also indicated that although JM&S and its contractors did not all use seven axle trucks, at least some of them did.[95] Unfortunately, there was no indication of precisely how many of JM&S' trucks were of the seven axle variety nor what effect the precise makeup of JM&S' hauling fleet might have on setting the appropriate rate. I note that with respect to cycle times, it appears that loading and unloading a six axle truck takes less time than loading and unloading a seven axle truck.[96] This would appear to favour JM&S as it continued to operate during the 1999/2000 season with some six axle trucks. Again, however, I was not provided with the specifics of the makeup of JM&S' hauling fleet nor how it would affect the setting of the hauling rate. Certainly, it does not appear that the Parties considered this degree of detail prior to the commencement of hauling for the 1999/2000 winter season.

202. In these circumstances, I am unable to determine what, if any, adjustment to the hauling rates proposed by JM&S for the winter 1999/2000 season would be appropriate. I do find, however, that the 2% increase offered by Carrier as a fuel adjustment in April 2000 would be

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[95] See JM&S doc. #1883, letter from Carrier Lumber to JM&S dated November 16, 1999; evidence of Vernon Martin, Tr., December 17, 2001, p. 48.

[96] See JM&S Comments on Carrier Sur-Reply, p. 8; JM&S doc. #1883.

appropriate in light of the evidence of increasing fuel costs during the course of the season. This adjustment would increase the tonne per hour rates for highway hauling to $2.40 and for off-highway hauling to $1.73. In my view, a licensee and a contractor acting reasonably would accept those per tonne per hour rates for the winter 1999/2000 season. I note that these rates are consistent with the evidence of the hauling rates paid by other licensees in the area.

203. Accordingly, JM&S is entitled to payment for hauling during the winter 1999/2000 season at per tonne hauling rates based on per tonne per hour rates of $2.40 for highway hauling and $1.73 for off-highway hauling. The cycle times used by Carrier in calculating its proposed hauling rates for the 1999/2000 winter season are the appropriate times to use for calculating the per tonne rates. I retain jurisdiction to determine the appropriate amount in the event the Parties are unable to agree on the calculation of the sum owing to JM&S.

VIII. INTEREST

204. JM&S has claimed interest on any amounts owing to it. Interest is, in principle, payable on the sums due to JM&S. However, JM&S has not made any submissions as to the applicable interest rate nor the date from which interest should run, nor has Carrier addressed these items. Accordingly, I defer these issues to be considered with the question of costs in the event the Parties are unable to agree.

IX. COSTS

205. Both Parties have claimed costs. However, neither Party has made submissions on the basis upon which costs should be awarded nor the appropriate amounts in question. Accordingly, this issue is deferred to a subsequent Award pursuant to a procedure to be determined in consultation with the Parties.

X. CONCLUSIONS

206. For the reasons set out above, I make the following award:

(a) The appropriate rates to be paid to JM&S for "tree to truck" timber harvesting services for the winter 1999/2000 season are the following:

BLOCK	RATE (PER TONNE)
CP726-2	$22.43
CP727-3	$21.29
CP706-1	$21.23
CP706-2	$21.16
CP706-3	$21.47
CP707-1	$22.00
CP707-2	$20.82
CP707-3	$21.22
CP707-5	$20.94

(b) The appropriate rates to be paid to JM&S for hauling services during the winter 1999/2000 season are to be based on rates of $2.40 per tonne per hour for highway hauling and $1.73 per tonne per hour for off-highway hauling.

(c) I retain jurisdiction to determine the sums owing to JM&S on the basis of the rates awarded in the event the Parties are unable to agree on the calculation of the appropriate sums.

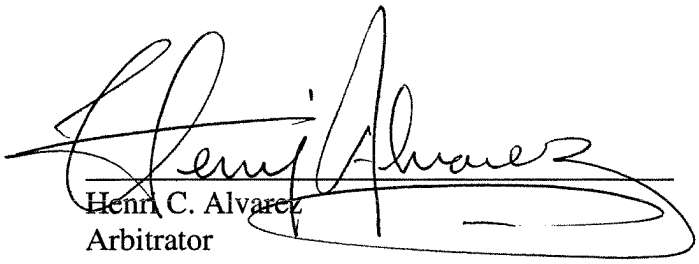
(d) JM&S' claim in respect of road development and deactivation is dismissed except to the extent that it relates to unpaid invoices or claims for payment in respect of work agreed between the Parties to be performed outside of the scope of work contained in Schedule A to the Agreement for the winter 1999/2000 season. Any such claims are deferred to a subsequent award.

(e) JM&S' claim to interest on the sums owing is deferred to a subsequent award.

(f) The Parties' respective claims for costs are deferred to a subsequent award.

(g) The remaining issues set out in JM&S' Amended Notice of Dispute and Statement of Case, except for those claims abandoned by JM&S and JM&S' claims for damages for abuse of process and punitive and aggravated damages, are deferred to a subsequent award.

Dated this 13th day of August, 2004 at Vancouver, British Columbia.



Henri C. Alvarez
Arbitrator