

COLIN TAYLOR, Q.C.*

Arbitrator and Mediator

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May 26, 2005

File: CT2607



Jim G - FYI

Mr. Doug Konkin
 Deputy Ministry
 Ministry of Forests
 PO Box 9049, Sqn. Prov. Govt.
 Victoria, BC V8W 9E2

Dear Sir:

Re: Western Forest Products Inc. -and-
 Hayes Forest Services Ltd.
 Re: Rate Dispute Arbitration

I enclose a copy of my Award on costs of May 19, 2005.

Yours truly,

Colin Taylor, QC

CT/cp
 Enclosure

June 8/05.
 copy of sent
 to CSS June ①
 pls marry
 up.

MINISTRY OF FORESTS, DMO	
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V6E 1Y5 • Telephone: (604) 608-6116 / Fax: (604) 608-6117

notes Professional Corporation

IN THE MATTER OF THE FOREST ACT. R.S.B.C. 1996, c.157,
TIMBER HARVESTING CONTRACT AND SUBCONTRACT REGULATION,
(B.C. Reg. 22/96) AND THE COMMERCIAL ARBITRATION ACT,
R.S.B.C. 1996, c.55

AND

IN THE MATTER OF AN ARBITRATION

BETWEEN:

WESTERN FOREST PRODUCTS INC.

("Western")

AND

HAYES FOREST SERVICES LIMITED

("Hayes")

APPLICATION FOR COSTS

SUBMISSIONS: April 25, May 5, 10,
and 11, 2005

COUNSEL:

Counsel for Western

Eric J. Harris, Q.C.
and
Paul McLean

Counsel for Hayes

Kenneth N. Affleck, Q.C.
and
Robert Hrabinsky

COLIN TAYLOR, Q.C.
Arbitrator

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[1] Western applies under section 11(5) of the Commercial Arbitration Act (the "Act") for an order for costs arising out of an arbitration award issued on April 11, 2005 (the "Award").

[2] Western seeks:

1. An order that Hayes pay Western's actual reasonable legal fees and disbursements, and
2. An order that Hayes pay the costs of the arbitration, including the arbitrator's fees, expert witness fees, court reporter fees and transcript costs.

[3] Hayes opposes the application. It submits that each party should bear their own costs and disbursements, including arbitrator's fees, expert witness fees and the costs incurred in holding the hearing.

II

[4] The arbitration was initiated by Western pursuant to section 25 of the *Timber Harvesting Contract and Subcontract Regulation*, B.C. Reg. 22/96, as amended by B.C. Reg. 278/2004 (the "Regulation") to determine the 2004 conventional logging rate for timber harvesting services provided by Hayes under a replaceable logging

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contract at Plumper Harbour which is situated in an area known as the Nootka Region on the western side of Vancouver Island.

[5] Hayes sought a rate of \$47.74/m³. The fair market rate was held to be \$43.77/m³. Western offered Hayes a conventional logging rate of \$44.39/m³ for its operations at Plumper Harbour for 2004 which was determined by the arbitration to be a fair market rate and was so awarded.

III

[6] Section 6(2) of the Regulation provides:

Subject to this Part and to sections 23, 25, 25.2, 32 and 33.5, the Commercial Arbitration Act applies to the arbitration of disputes arising under or in connection with a contract or subcontract, and for that purpose the Commercial Arbitration Act is adopted as part of the dispute resolution system under this Part 4.

[7] Section 11 of the Act provides:

Costs

11 (1) The costs of an arbitration are in the discretion of the arbitrator who, in making an order for costs, may specify any or all of the following:

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- (a) the persons entitled to costs;
- (b) the persons who must pay the costs;
- (c) the amount of the costs and how that amount is to be determined;
- (d) how all or part of the costs must be paid.

(2) In specifying the amount of costs under subsection (1)(c), the arbitrator may specify that the costs include

- (a) actual reasonable legal fees, and
- (b) disbursements, including the arbitrator's fees, expert witness fees and the expenses incurred for holding the hearing.

(3) In specifying how costs are to be determined, the arbitrator may refer the matter to a registrar of the Supreme Court for assessment.

(4) The registrar is not to assess the costs referred under subsection (3) as though they were costs in a proceeding in the Supreme Court but must assess them in the manner specified by the arbitrator.

[8] Pursuant to s.22 of the Act, the Domestic Commercial Arbitration Rules of Procedure of the British Columbia Commercial Arbitration Centre (the "Rules") apply to an arbitration unless the parties agree otherwise. Rule 38 provides:

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38. Costs

- (1) The arbitration tribunal shall determine liability for costs and may apportion costs between the parties.
- (2) In awarding costs, the arbitration tribunal shall take into account the principles set out in Rule 19(2), and the failure of any party to comply with these Rules or the orders of the tribunal. The tribunal shall provide reasons in the event it departs from the principle that costs follow the event.
- (3) In the event the arbitration tribunal awards costs, it shall specify the amounts of the fees and expenses so awarded or the method for the determination of those amounts.
- (4) Costs include:
 - (a) the fees of the arbitration tribunal which shall be separately determined and stated for each member of the tribunal, together with reasonable travel and other expenses incurred by the tribunal;
 - (b) the fees of any expert appointed by the arbitration tribunal, including travel and other reasonable expenses incurred;
 - (c) the legal and other expenses reasonably incurred in relation to the arbitration by a party determined by the arbitration tribunal to be entitled to recover such costs; and

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(d) the commencement fee, administration fees, and the expenses incurred by the Centre.

(5) The liability of parties for the tribunal's fees and expenses is joint and several between the arbitration tribunal and the parties.

IV

[9] Hayes submits that the circumstances of the arbitration justify a departure from the customary rule that costs follow the event and seeks an order that each party pay its own costs including the arbitrator's fees, expert witness fees and the expenses incurred in holding the arbitration.

[10] It is argued by Hayes that the arbitration was the first to be held under the June 21, 2004 amendment to the Regulation (B.C. Reg. 278/2004) and, therefore, there was no arbitral or judicial guidance to either party concerning the amended Regulation.

[11] Hayes contends that the circumstances of the arbitration justify depriving the successful party of its costs because the issues raised were matters of interest to all contractors and license holders in the Province. Since the arbitration was governed by the recently amended Regulation, Hayes argues it was in the nature of a test case. It points to paragraph 3 of the

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Award which characterizes the new rate test for conventional timber harvesting as of "singular significance" and argues that the question of interpretation had industry-wide implications.

V

[12] The principle that costs follow the event is expressly provided by Rule 38(2) to be applicable to domestic commercial arbitrations.

[13] Under the Act, the award of costs is discretionary but there is express authority to award a party its actual reasonable legal fees: s.11(2)(a).

[14] In International Forest Products Limited and Hayes Forest Services Limited (January 8, 2001) (hereafter "Interfor"), Arbitrator Macintosh considered s.11(2) of the Act in the context of a commercial relationship between a contractor and a licensee under the Regulation.

[15] At page 3 of his Award, Arbitrator Macintosh said:

My reading of section 11 of the Commercial Arbitration Act, and in particular subsection 11(2), leads me to conclude there is something close to a presumption that actual reasonable legal fees will be awarded. It is probably not a presumption as a matter of law. It is instead probably the legislature

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simply advising arbitrators not to be bound by the regime for costs prevalent in our courts. Nonetheless, the only example of costs the legislature chose to discuss in subsection 11(2) was actual reasonable legal fees.

[16] Arbitrator Macintosh went on to award costs to Hayes based on its actual reasonable legal fees.

[17] Western submits that the ordinary rule that costs follow the event applies to arbitrations under the Act. Western, it is argued, was entirely more successful and should, therefore, be entitled to its costs and disbursements incurred in the arbitration.

[18] The circumstances of this case do not, in my view, justify departure from the customary rule that costs follow the event.

[19] The issues raised were not so "special" or novel or a matter of public interest such that the successful party should be deprived of its costs.

[20] It is true that the arbitration fell under the amended Regulation which prescribed a new test for setting conventional logging rates. But, that didn't make it a test case as that term is generally understood in matters of this kind.

[21] The general concept of fair market price or fair market rate is not novel. It has been judicially

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considered on many occasions and described in much the same terms as are found in section 26.1 of the Regulation:

... the rate according to what a willing license holder and a willing contractor acting reasonably and at arm's length in similar circumstances would agree is a fair market rate ...

[22] The Award described the task of the arbitrator as one of discerning economic realities:

It requires appropriate objective criteria, the best evidence of which is the pattern of rates reached in freely negotiated contracts for similar timber harvesting services performed in similar working conditions. It is a rational matching of like circumstances.
(para.11)

[23] It is certainly correct to say that the new test of fair market rate was markedly different from the previous requirements under the Regulation which required that a rate be sufficient to permit a contractor to earn a "reasonable profit" and, to that extent, the Award could be said to be a matter of first instance. But, the general concept of fair market rate is not new and the "willing seller, willing buyer" approach is set out in the Regulation and is well known to the general law.

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[24] There was no issue between the parties as to the test which had to be met under the new Regulation. Nor was there any issue as to the appropriate objective criteria. The parties disagreed on the relevance and impact of the maintenance of a camp and demobilization/mobilization on the rates selected for comparison. Thus, the dispute can not be elevated to one of public interest or a test case which would justify depriving the successful party of its costs.

[25] The ordinary rule that costs follow the event applies to arbitrations under the Act. Western was entirely successful in that its position was upheld and awarded and Western should, therefore, be entitled to its costs and disbursements incurred in the arbitration. Moreover, Western asserts, without challenge from Hayes, that it has long been Hayes' practice to seek costs when it has been successful in an award issued under the Regulation on the same basis as is here claimed by Western.

[26] Western submits, without challenge from Hayes, that both parties exchanged settlement offers in advance of the arbitration. Western asserts the offers were exchanged with responsibility for costs in mind. Hayes' offer of \$46.10/m³ was well above the market rate set by the Award. Western's offer of \$44.59/m³ was higher than both the fair market rate and the rate of \$44.39/m³ which Western actually proposed as a fair market rate.

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[27] Under the Act, there is express authority to award a party its actual reasonable legal fees and disbursements: section 11(2)(a). There is a presumption in favour of an award of actual reasonable legal fees: Interfor, supra. In that case, Hayes was awarded its actual reasonable legal fees and disbursements.

[28] Similarly in International Forest Products Limited and Lineham Logging, 1999, unreported, (M.A. Taylor), the contractor was awarded its actual reasonable legal fees and disbursements despite the fact that it had not been entirely successful. In that case, the arbitrator said that to require a contractor to pay its legal fees when it has been forced to arbitration in order to enforce its rights under the Regulation, would defeat the purpose of the Regulation:

Where the contractor has been substantially successful but has been submitted to a sufficiently protracted and expensive arbitration proceeding, the result of requiring the contractor to bear part of the costs of the arbitration could well be to defeat the primary purpose of the Regulation by denying the contractor a proper return.
(p.92)

[29] In this arbitration, Western was the successful party. It is entitled to be fully compensated for the costs which it incurred in bringing the dispute to arbitration.

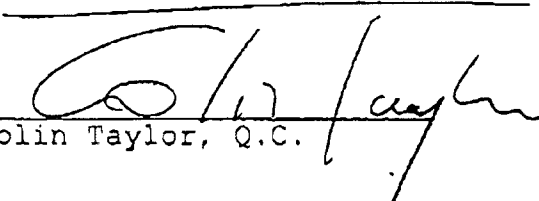
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[30] It is ordered:

1. THAT Hayes pay Western's actual reasonable legal fees and disbursements, and
2. THAT Hayes pay the full costs of the arbitration, including the arbitrator's fees, expert witness fees, court reporter fees and transcript costs.

[31] I remain seized of this matter in the event that the parties are unable to agree on the amount of costs and disbursements by June 6, 2005.

DATED at Vancouver, British Columbia, this 19th day of May, 2005.


Colin Taylor, Q.C.