IN THE MATTER OF THE *FOREST ACT*, R.S.B.C. 1996, c.157, as amended AND IN THE MATTER OF THE *TIMBER HARVESTING CONTRACT AND SUBCONTRACT REGULATION*, BC Reg. No. 22/96, as amended AND IN THE MATTER OF THE *ARBITRATION ACT*, RSBC 1996, C 55, AND IN THE MATTER OF A DISPUTE

BETWEEN:

GORMAC DEVELOPMENTS LTD.

CLAIMANT

AND:

TEAL CEDAR PRODUCTS LTD.

RESPONDENT

FINAL PARTIAL AWARD

BEFORE:	**Murray A. Clemens, Q.C. FCIArb**
Counsel for the Claimant:	**Stephen R. Ross** **Ashley Mitchell**
Counsel for the Respondent:	**Mark S. Oulton** **Jacqueline D. Hughes**
Hearing Date:	**August 24 – 27, August 31 and September 1, 2015**

INDEX

FINAL PARTIAL AWARD

I. THE PARTIES

A. The Claimant

1. Gormac Developments Ltd. ("Gormac") is a small family-owned and operated road building company operating in the Boston Bar area since 1975. During that time it has worked for a number of forestry companies which held forestry licenses in the Boston Bar area including British Columbia Forest Products ("BCFP") until approximately 1989, Fletcher Challenge Canada Limited ("Fletcher"), until 1992 and the Respondent, Teal Cedar Products Ltd. ("Teal") (formerly J.S. Jones Holdings/Timber Ltd. ("J.S. Jones")) to the present date. Gormac's principal and founder is Gord McDonald. In 2007, he was joined in Gormac's management by his son-in-law, Steven McClements.

B. The Respondent

2. Teal is a wood products company engaged in timber harvesting and the processing of harvested timber at sawmills and other facilities which it owns. Teal is an integrated company in the sense that it holds timber tenures, does some of its own logging "stump to dump", and processes its own timber.

II. BACKGROUND TO DISPUTE

3. This part of the award sets out briefly certain facts giving rise to the present dispute which are either not contentious or are stated as found.

4. The principal issue in this arbitration involves the interpretation of a contract dated April 7, 1992. The contract is titled "ROAD CONSTRUCTION AGREEMENT – 2 YEAR REPLACEMENT (COASTAL CROWN TENURE)" (the "Contract"). The parties to the Contract are Fletcher, which held a replaceable forest tenure, and Interline Construction Ltd. ("Interline"), a company which agreed to provide certain services pursuant to the Contract.

5. The Contract was required to be compliant with the Timber Harvesting Contracts and Sub-contracts Regulation, B.C. Reg 258/91 pursuant to the *Forest Act*, R.S.B.C. 1979 c. 140 (the "Regulation"). This legislation was sometimes called "Bill 13" by those involved in the forestry industry.

6. Section 152 of the *Act* defined "replaceable contract" to mean a contract:

> (a) that includes a requirement that the holder of the forest license, timber license or tree farm licence, as the case may be, by a prescribed time before expiry of the existing contract, must, if the contractor has satisfactorily performed the existing contract up to the time of the offer, make an offer to the contractor, conditional on the contractor continuing to satisfactorily perform the existing contract, of a replacement contract that
>
> (i) provides for payment to the contractor of the amounts agreed by the parties, or failing agreement, of the amounts settled by the method of dispute resolution provided under the existing contract at the time of the offer, and
>
> (ii) subject to a requirement as to the length of term prescribed under section 157 (d)(ii), is otherwise on substantially the same terms and conditions as the existing contract, and

7. Under the Regulation "Contract" and "Sub-contract" were defined in section 22 as meaning

> . . . a contract, as defined in section 158.1 of the Act, for the whole ***or a part of*** one or more phases of a timber harvesting operation, [. . .] as the case may be, where the contract or subcontract
>
> (a) is derived from any of the licenses to which section 23(1) applies, and
> (b) either
>
> (i) will take or is likely to take more than 6 months to complete, or
>
> (ii) when taken together with any previous contract or subcontract between the parties during a calendar year, will take or is likely to take more than 6 months in the aggregate to complete, and

> "contractor" and "subcontractor" have corresponding meanings." [emphasis added]

b) "Phases of a timber harvesting operation" was defined to include "…. logging, road construction, logging road maintenance, logging road access road construction and any other phases or combinations of them that are part of a timber harvesting operation under a license . . .".

8. It is common ground that the Contract is a replaceable contract which the original contracting parties entered into in order to meet the regulatory obligation requiring such contracts to be in writing.

9. Arbitrator Martin R. Taylor, Q.C., commented on the effect and purpose of the Regulation in *In the Matter of a Dispute concerning the Rate to be paid by International Forest Products Limited to Lineham Logging Ltd., in respect of 1999 logging in the Soo T.S.A., ("Interfor and Lineham")*, decided December 3, 1999:

> The effect of the Regulation, which was introduced in 1991 and to some extent revised in 1996, is to give security of tenure to logging contractors working for companies holding Crown timber cutting rights, by guaranteeing to the contractor, subject to satisfactory performance, a perpetually renewable right to log a prescribed proportion of the licensee's allowable cut over each five-year allowable-cut period at annual rates which, if not mutually agreed, are to be established by *ad hoc* arbitration under the *Commercial Arbitration Act*, now R.S.B.C. 1996, c. 55.
>
> . . .
>
> The broad legislative purpose of the Regulation was described by the Minister of Forests in the Legislature on June 24, 1991, during first reading of the enabling amendment to the *Forest Act* (Hansard p. 21985):
>
> > Independent contractors and subcontractors who harvest timber for larger forest companies are extremely important to British Columbia's forest sector. The stability of many families and, indeed, many communities is dependent on contractors maintaining *secure and fair* contracts with the holders of timber rights in their vicinity. This amendment will enable us to improve the balance in these contractual relationships. It will also provide a quick and inexpensive system for resolving contract disputes. This will ensure ***security and fairness*** for all parties involved in timber-harvesting in British Columbia.

> The British Columbia forest industry can be roughly grouped into sectors: the manufacturing sector and the logging sector. The manufacturing sector has the benefit of long-term replaceable and transferable licenses. This tenure security is necessary collateral for the very significant capital financing requirements associated with forest products manufacturing.
>
> By contrast, the logging sector, which is largely composed of contract operators, generally has limited tenure security. Yet – and this is a central point – the investment in the provincial logging sector is about equal to that of the sawmilling sector.
>
> Clearly, logging contractors and subcontractors need improved tenure security as a basis for financing their considerable equipment and operating costs. ***Greater contract certainty*** will mean improved stability not only for the contractors themselves but also for their many employees and the communities in which they live.
>
> This bill will enable us to write regulations to provide for written and replaceable contracts, contracts that may be transferred to third parties, and access to quick and inexpensive mediation and arbitration to resolve contract disputes.
>
> I can only say that when we extend the kind of protection a major licence offers the holder, and provisions for renewal of that contract and some provisions for appeal, it only makes sense that the same right be extended to the contractors. The reason we as government would do that is that it's all based on a resource owned by the Crown.
>
> [Emphasis added by Arbitrator Taylor]

10. In or about April 1993, Teal acquired Forestry License A19201 from Fletcher and took an assignment of Fletcher's interest in the Contract.

11. In or about November 1993, Gormac took an assignment of the Contract from Interline with the consent of Teal. Prior to November 1993, Gormac had performed some road construction services for Fletcher on a non-replaceable basis.

12. The Contract was for a term of two years from January 1, 1992 to December 31, 1993, and was subject to an obligation on the company to offer a replacement contract to the contractor, within 15 months of the expiry of the term, with "substantially the same terms" as the contract about to expire, where the contractor had satisfactorily performed its obligations under the

contract. The parties were unable to agree on the terms of a replacement contract for the next two year term, and have been unable to agree since.

13. By letter dated August 10, 1994, an agreement was entered into between J.S. Jones (Teal) and Gormac containing the following operative terms:

> Re: 1994 Road Construction Contract with J.S. Jones Holdings Ltd.
>
> The purpose of this letter is to set out the basis upon which Gormac Developments ("Gormac") will continue to build road in Forest License A19201 during 1994 contract year, while outstanding contract issues between J.S. Jones Holdings Ltd. ("Jones") and Gormac are resolved.
>
> The major outstanding issue is the form of road construction that will apply to govern the relationship between Gormac and Jones.
>
> 1. The rates to be paid by Jones to Gormac for road construction in 1994 and those roads to be constructed are as shown on the attached rate sheet.
>
> 2. The form of road construction contract that will apply to govern the relationship between Gormac and Jones.
>
> With respect to contract terms, we suggest that the terms of the last road construction contract between Gormac and Fletcher Challenge Canada Limited in 1992 apply until the terms of the new form of contract provided to you early in 1994 is settled.

14. Pursuant to the letter agreement and the parties conduct, the Contract continues to govern the relationship between the parties notwithstanding attempts over the years to enter into a replacement contract as contemplated by the legislation and the Contract.

15. Over the years since 1993, Teal has engaged in the harvesting of trees on its tenure, typically pursuing old growth stands first and then returning to previously harvested areas with second growth stands suitable for harvesting. During the early years of the relationship between the parties, new road construction was predominant given the need to access to old growth stands where, generally, there were no existing roads. In later years after first growth harvesting was largely completed Teal returned to harvest a second growth stands in previously harvested areas. In the re-harvested areas new road construction was either significantly reduced or in some

instances unnecessary given the previously constructed roads. Gormac's work has, over time, involved more road reconstruction and road rehabilitation than new road construction.

16. Recently, Gormac learned that Teal was using another contractor to perform road reconstruction and road rehabilitation work within the tenure. Gormac took the position that it was entitled to that work because of its rights under the Contract. Teal disagreed contending that road reconstruction and road rehabilitation are not included under the Contract and therefore Gormac was not entitled to that work on a replaceable basis. Accordingly, Teal argues that it was free to contract with any party it chose to do that work.

17. On June 21, 2013, Gormac delivered a Notice of Dispute and Request for Mediation and Arbitration. That notice included the following claim:

> (g) The Claimant is entitled under the Replaceable Contract to 51% of the reconstruction, rehabilitation, and maintenance of roads and landings done by the Respondent each year in the Forest Licence. The Replacement Contract must contain an amount of work entitlement provision that includes those phases of the Respondent's timber harvesting operations in the Forest License, as well as the new logging road construction phase which is agreed to by the parties.

18. The specific relief sought in respect of that claim is as follows:

> (c) an order that the Respondent produce and deliver to the Claimant all of its records relevant and necessary to establish the amount of new road construction that the Respondent, and its agents and contractors, has constructed and will construct in the Forest Licence in the current five year amount of work compliance period of the Forest Licence which expires on December 31, 2013, and the amount of that new road construction that the Respondent has allocated, and will allocate by that date, to the Claimant;

19. In its Statement of Claim delivered September 22, 2014, Gormac alleged that its entitlement to road reconstruction, rehabilitation and maintenance work arises directly out of the Contract, but also argued in the alternative, that it acquired replacement rights to road reconstruction and rehabilitation and maintenance as a result of its performance of those phases for a period for more than six months in a calendar year. Prior to 2004, performing work to that

threshold would entitle a contactor to a replaceable contract pursuant to the Regulation. Gormac abandoned this alternate theory for its claim at the conclusion of the evidence.

20. In paragraph 20 of its Statement of Claim Gormac advanced an alternate claim for entitlement to road reconstruction rehabilitation and maintenance road work. The operative portion of that paragraph reads as follows:

> 20. ... In the years after the Claimant acquired the 1992 replaceable contract in 1993, the Claimant performed road construction, road reconstruction and rehabilitation and road maintenance, in combination for more than six months every year under the Forest License, and thereby acquired replacement rights to those phases and combinations and components of them that are aspects of the Respondent's timber harvesting operations under the Forest License.

21. Teal's response to this claim is found at paragraph 29 of Teal's Statement of Defence which reads:

> 29. In further response to paragraph 9 and in response to paragraph 20 of the Claim, Teal admits that it has from time to time offered road reconstruction or road maintenance work to Gormac but says that such work was:
>
> (a) offered to Gormac on a non-replaceable basis,
>
> (b) offered independently of Teal's obligations under the Contract, and,
>
> (c) accepted by Gormac, in whole or in part, on a non-replaceable basis from time to time.

and in paragraph 51 as follows:

> 51. In further response to paragraphs 12(c), 13(b)(ii), 20 and 21 of the Claim, Teal expressly denies that Gormac performed road reconstruction and road maintenance work for Fletcher, or Teal independent of the Contract, which work was greater than six months to complete in any given year, so as to give rise to any right of a replaceable contract under the Regulation.

For clarity, Teal specifically denies that Gormac performs sufficient road reconstruction and/or road maintenance work at any material time to give rise to any replaceable work entitlement, either at the time the Regulation first came into force, or at any time thereafter and puts Gormac to the strict proof thereof.

22. This claim was advanced on the alternate theory that if reconstruction and rehabilitation work was not included in the original Contract, Gormac acquired the right because of the amount of work performed in 2003. This claim is based on the definition of the word "contract" found in section 1 of the Regulation as follows:

> "contract" and "subcontract" mean a contract or a subcontract, as defined in section 152 of the Act, if
>
> (a) the contract or subcontract provides that the contractor or subcontractor will carry out one or more phases of a license holder's timber harvesting operation under
>
> (i) a replaceable tree farm license,
>
> ...
>
> (b) one or more of the following applies:
>
> (i) the contract or subcontract is for a specified term of more than 6 months;
>
> (ii) the total specified terms of
>
> (A) the contract or subcontract, and
>
> (B) any previous contract or subcontract entered into during the same calendar year in relation to the same licence
>
> is more than 6 months;
>
> (iii) during a calendar year, the total of
>
> (A) the work performed by the contractor or subcontractor under the contract or subcontract, and
>
> (B) similar work performed by the contractor or subcontractor under previous contracts in relation to the

> same licence is more than the equivalent of 6 months full time work for a contractor or subcontractor performing similar work in similar circumstances
>
> And includes a market contract or market subcontract;

In this award, I will refer to the achievement of the requisite work establishing a right to a replaceable contract as the "threshold".

A. The Applicable Law

23. This dispute is governed by the laws of the province of British Columbia and the applicable laws of Canada.

B. The Arbitration Agreement

24. Section 24.01 of the Contract provides:

> 24.01 Where a dispute arises between the Company and the Contractor with respect to this Agreement, then either party may by notice in writing to the other require the dispute to be resolved in accordance with the Dispute Resolution Clause attached as Schedule "D" to this Agreement. Schedule "D" forms part of this Agreement.

25. Schedule "D" sets out a staged dispute resolution process beginning with mediation and proceeding, if necessary, or directly at the option of either party, to arbitration. The operative provision concerning arbitration reads:

> D3.01 The Company and the Contractor mutually agree that where a dispute is to be resolved by arbitration (the "Arbitration Proceeding"), it shall be resolved by a single arbitrator to be agreed on by the parties . . .
>
> . . .
>
> D3.03 The rules of procedure of the Arbitration Proceeding shall be the Domestic Rules of the British Columbia International Commercial Arbitration Centre as amended by the provisions of this Dispute Resolution Clause.

D3.04 Each party shall be entitled to only two days to complete its submissions to the arbitrator. Each party shall have the right of reply to the submission of the other for one hour only.

D3.05 In determining the arbitral award the arbitrator shall only consider the following matters:

(a) The substantive terms and conditions of this Agreement between the parties.

(b) The substantive terms and conditions of agreements of the same type as that between the Contractor and the Company, and between the Company and like contractors for like services in like circumstances.

(c) Where the dispute is over the rates to be paid by the Company to the Contractor under this Agreement, the conditions in the working area of the Contractor, the Services being performed by the Contractor and the equipment used to perform the Services, and the amounts which are paid to like contractors for like services in like circumstances, and including consideration of the efficiencies of production of each of the contractors relative to the Contractor.

(d) Where the dispute is over the termination of this Agreement by the Company, a comparison of the Contractor's performance and conduct with the performance and conduct of like contractors performing like services in like circumstances.

D3.06 The arbitrator shall state in the arbitral award the weight accorded to the matters set out at sub-paragraphs D3.05(a) through D3.05(d) and the weight accorded to any other factor relied on in determining the arbitral award.

D3.07 The arbitrator shall hand down the arbitral award within 7 days of the completion of the submissions and reply of the parties.

C. Amendment to Arbitration Agreement

26. The parties agreed to waive the limitations contained in Sections D3.04 and D3.07 and mutually agreed to a timeline for discovery of documents, delivery of will say statements and expert reports.

D. Appointment as Arbitrator

27. Following delivery of the Notice of Dispute and Request for Mediation and Arbitration, the parties decided to proceed with a mediation of all disputes and appointed me as the mediator. A full day mediation took place on February 6, 2014, however, for reasons unconnected with the efforts of the parties and their counsel, the disputes were not settled.

28. On or about October 3, 2014, I was appointed as the sole arbitrator to conduct an arbitration of the disputes raised in the Notice of Dispute and Request for Mediation and Arbitration dated June 21, 2013. In a Remuneration and Appointment Agreement dated October 3, 2014, the parties acknowledged and waived any objection to the fact that I was previously involved as a mediator and met privately with the parties and their counsel. The arbitration hearing was set to proceed commencing January 15, 2015, however, the hearing had to be adjourned due to the unavailability of a key witness.

29. The parties requested and I agreed to resume my role as mediator with respect to the issue involving the replacement contract offered by Teal to Gormac and whether it met the requirements of the legislation. That mediation proceeded on January 15 and 16, 2015. The matter did not resolve at that mediation, however, progress was made and I delivered a without prejudice report setting out a summary of the outstanding contractual terms with my comments and proposals for follow-up by the parties. Once again, by letter agreement dated January 14, 2015, notwithstanding my involvement in the second mediation and the fact that I would be communicating privately with each party and their counsel in the course of the mediation, both parties agreed that they would not object to my continued role as the arbitrator, either in respect of the replacement contract dispute or in respect of the disputes dealt with in this award.

E. History of this Proceeding

30. As noted above, the dispute resolution process has involved both mediation and arbitration. Following the mediation in February 2014, the unresolved issues included:

(a) Whether Teal had offered Gormac a replacement contract with substantially the same terms as the Contract and if not, what remedies were available to Gormac;

(b) A declaration that Gormac is entitled, under the Contract, to 51% of the construction, reconstruction; rehabilitation and maintenance of roads and landings;

(c) A claim for compensation or any shortfall in road construction, including reconstruction, rehabilitation and maintenance, depending on the ruling under the second issue for the five year compliance period which expired December 31, 2011 together with calendar years 2012 and 2013 to the extent that the work was less than 51% of the total; and

(d) A claim for payment of outstanding unpaid accounts.

31. During a pre-hearing administrative conference held on September 8, 2014, the parties indicated that the claim for outstanding unpaid accounts had been resolved. In respect of the remaining issues, it was agreed that the only issue to be determined at the hearing was whether Gormac was entitled to reconstruction, rehabilitation, and maintenance work under the Contract.

32. It was agreed that in the event it was determined that Gormac was entitled to reconstruction, rehabilitation and maintenance road work under the Contract, unless the parties were able to agree, a separate hearing would take place for the purposes of quantifying any deficiency in assigned work and associated compensation.

33. The issue concerning whether Teal had met its obligation under the Contract to offer a replacement contract which has substantially the same terms as the Contract and if not, what remedies might flow from that finding was agreed to be heard at a separate time. I reserve jurisdiction to deal with that dispute following the delivery of this award to the extent that the parties want to proceed to arbitrate that dispute.

III. POSITION OF THE PARTIES

34. It is Gormac's position that, properly construed, the Contract provides it with the right to perform 51% of all logging road reconstruction and rehabilitation work within the tenure on a replaceable basis. Gormac's claim for a declaration that it is entitled to road maintenance work on a replaceable basis was abandoned at the hearing. Gormac takes the position that there is no ambiguity in the words used to describe the services to be provided by it to Teal under the Contract and that on a plain reading, it is entitled to all components of road construction including new construction, reconstruction and rehabilitation. In construing the provisions of the Contract, Gormac relies on the surrounding circumstances at the time the Contract was entered into including the legislative intent of the underlying legislation as well as the evidence of two expert witnesses who testified at the hearing as to the technical meaning of certain of the words contained in the Contract.

35. Gormac also contends that, in the event there is a finding of ambiguity in the words used to describe the services to be provided under the Contract, the conduct of Teal and Gormac after they both acquired their rights by assignment under the Contract can and should be considered in resolving the ambiguity.

36. Teal's position is that the Contract, properly construed, entitles Gormac to 51% of the new road construction work only, with no entitlement under the Contract to replaceable road reconstruction or road rehabilitation work.

37. Teal contends that the determination of a proper construction of the Contract must be made with reference to the language of the Contract read in the context of the agreement as a whole and the surrounding circumstances at the time of contracting. In respect of post-contract conduct, it notes that the post-contract conduct adduced in evidence at the hearing related to the conduct of the assignees and not to the original contracting parties whose objective intentions at the time of entering into the Contract are at issue.

38. After the final argument was completed, Gormac sought and was granted leave to advance an argument that on the basis of documentary evidence, Gormac had achieved the "threshold" and

was entitled to a replaceable contract in respect of road reconstruction and rehabilitation work performed in 2003.

39. Teal contends that the evidence of road reconstruction and road rehabilitation work for 2003 clearly fails to meet the required statutory threshold to establish on entitlement to a replaceable contract for that work and, in the alternative, argues that the right to make such a claim is barred by the *Limitations Act* six-year limitation period which would have expired sometime in late 2009 or early 2010.

IV. THE CONTRACT

40. Below are individual provisions of the Contract primarily relevant to the interpretation issue. These extracts from the Contract are set out for convenience only. I do not suggest and have not approached this interpretation issue by looking only at these isolated provisions, but have considered them in the context of the Contract as a whole.

41. The Contract begins with the title as follows:

> ROAD CONSTRUCTION AGREEMENT – TWO YEAR REPLACEMENT (COASTAL CROWN TENURE)

42. The first recital states:

> WHEREAS:
>
> A. The Contractor has agreed to provide these services outlined in Schedule "A" on the terms and conditions following;

43. Section 2 sets out the Services and Specifications as follows:

> 2.00 Services and Specifications
>
> 2.01 The Contractor agrees to:
>
> (a) provide to the Company the services contained in Schedule "A" (the "Services");

(b) provide the Services diligently and continuously until the completion of the Term; and

(c) comply with specifications and any amendments thereof contained in Schedule "A".

2.02 Schedule "A" is attached to and forms part of this Agreement and may be amended from time to time upon the mutual consent in writing of the parties.

2.03 The Company agrees to:

(a) make those payments set out in Paragraph 4.0 hereto and Schedule "B"; and

(b) provide to the Contractor those services contained in Schedule "B".

2.04 Schedule "B" is attached to and forms part of this Agreement and may be amended from time to time upon mutual consent in writing of the parties.

...

2.06 The Contractor acknowledges and agrees that the Services will vary from working area to working area as these will change during the Term of this Agreement. The Company shall have the right, acting reasonably, to amend the services set out in Schedule "A" in response to any such change in working area.

44. The payment provision includes the following:

4.0 Payment

4.01 Payment will be specified in Schedule "B". The rate set out in Schedule "B" will be reviewed and may be amended upon the mutual Agreement in writing of the parties hereto on 15 June of each year of the Term.

45. Schedule "A", as referred to in Section 2.0, is as follows:

Schedule "A"

The Contractor will at the Company's Boston Bar Logging Operations:

(a) provide all the necessary construction equipment, labour and associated supplies to construct roads as specified and identified by the Company's Representative;

(b) construct all roads to a standard that meets or exceeds the criteria set forth by the Company or the Ministry of Forests as defined as a Class 5 road in the Forest Service Road construction guideline, whichever is greater;

(c) construct all weather roads with a gradable surface 5.5 metres wide with a .6 metre ditch and a minimum of 4 turnouts per kilometre. The bladed or disturbed area of the right-of way is to be kept as narrow as possible;

(d) construct the logging roads as shown in red on the attached maps marked Schedule "C1" and "C2";

(e) provide all fuel, fuel containment and accessories, room and board for its employees, as well as all crew transportation;

(f) construct landings and turnouts as specified by the Company's Representative. Landings are to be constructed to a minimum size of 900 square metres with minimum width of 20 metres. Maximum landing size is to be 1500 square metres including the cut and fill slopes;

(g) install all metal culverts as specified in the engineering plan;

(h) provide all equipment mobilization to and from the worksite, all workforce lodging, and all other associated charges connected with the said road construction activities at its own expense;

(i) construct only those roads authorized and approved by the Company's Representative;

(j) provide the following equipment and labour on hourly rates if requested by the Company's representative:

1. 1979 D-8K Tractor
2. 1974 D-8H Tractor
3. 1968 D-8H Tractor
4. 1979 D-6D Tractor
5. 1987 EX 220LC Backhoe
6. 1990 518 Skidder
7. Faller

(k) will negotiate specific jobs prior to commencement of work rather than an hourly basis if requested by the Company's Representative; and

(l) Fall, skid and deck right-of way logs. All merchantable Material, 10 cm (4.0 inches) at the top and 3 metres or longer in length must be piled in landings in such a way that they can be loaded out with a front end loader. Trees must be skidded before limbing, bucking and topping: minimum top diameter is 10 cm (4.0 inches). Maximum stump height is 30 cm (12 inches) on the uphill side of the stump. No merchantable logs are to be buried in the subgrade, but non-merchantable material may be used as puncheon in wet areas, with prior approval from the Company.

46. Schedule "B", referred to in Section 4.01 above, includes the following:

Schedule "B"

The Company will at it's *(sic)* Boston Bar operations:

(a) layout all roads, and clearly identify on the ground, such roads to be constructed by the Contract;

(b) submit to the Ministry of Forests, cutting and road permit applications for all roads constructed as required by the Forest Act;

(c) provide engineering plans, all maps or information required by the Contractor at all times during the Contract period;

(d) pay to the Contractor for all roads completed to the satisfaction of the Company's Representative:

BLOCK	ROAD NAME	NEW ROAD (meters)	BID PRICE ($/km)	New Landings	BID PRICE ($/landing)
U19	300	3,026	20.00 per meter	7	2,000.00 each
	312	75	20.00 per meter	1	2,000.00 each
	313	199	20.00 per meter	1	2,000.00 each
	314	416	20.00 per meter	1	2,000.00 each
U21	410	446	22.00 per meter	2	2,000.00 each
U2, U30	320	1,837	18.50 per meter	6	2,000.00 each
	330	1,728	18.50 per meter	6	2,000.00 each
	340	973	18.50 per meter	2	2,000.00 each
	341	134	18.50 per meter	1	2,000.00 each
	342	128	18.50 per meter		2,000.00 each

				1	
E127	300A	469	15.00 per meter	2	1,800.00 each
	300B	56	15.00 per meter	1	1,800.00 each
	300C	241	15.00 per meter	1	1,800.00 each
	310			1	1,200.00 each
	314	354	14.00 per meter	1	1,800.00 each

(e) supply metal culverts and deliver to the site for installation by the Contractor;

(f) pay the contractor $85.00 per culvert for installation;

(g) contract the gravelling of the sub-grade if required separately;

(h) be responsible for all drilling and blasting;

(i) be responsible for the falling of the right-of-way; and

(j) pay the following all found equipment rental and labour rates when the work is approved by the Company's Representative:

1.	1979 D-8K Tractor	136.00 per hour
2.	1974 D-8H Tractor	125.00 per hour
3.	1968 D-8H Tractor	110.00 per hour
4.	1979 D-6D Tractor	80.00 per hour
5.	1987 EX 220 LC Backhoe	112.00 per hour
6.	1990 518 Skidder	58.00 per hour
7.	Faller	28.00 per hour

47. Schedule C-1 is a 1:20,000 scale map of the Uztleug Creek portion of the tenure on which Blocks U2, U30, U19 and U21 are located. Schedule C-2 is a similar scale map for the Anderson Creek area of the tenure on which Block E127 is located. The legend on each of these maps is as follows:

LEGEND

_____ **ROADS TO BE CONSTRUCTED**

= = = = = = **ROADS TO BE RECONSTRUCTED**

48. Neither party was able to locate an originally signed or colour photocopy of the Contract and accordingly, Schedule C-1 and C-2 are black and white reproductions. The solid lines on the black and white copies were those indicated in sub-paragraph (d) of Schedule A, i.e. " .... Roads as shown in red ....".

V. PRINCIPLES OF CONTRACT INTERPRETATION

49. The law governing the proper approach to the construction of contracts is relatively well settled and, not surprisingly, counsel for the parties are in general agreement as to the principles which are applicable to the interpretation exercise before me. The principles may be stated in brief as follows:

(a) The objective intention of the parties to a contract is to be determined from the words used in the document. Those words are to be considered to have their ordinary meaning, unless the context in the contract directs otherwise. *Water Street Pictures Ltd. v. Forefront Releasing Inc.*, 2006 BCCA 459, applying *Melanesian Mission Trust Board v. Australian Mutual Providence Society* [1996] UKPC 53.

(b) The starting point is to examine the words used, in the context of the contract as a whole, in order to see whether they are clear and unambiguous. *Water Street, (supra).*

(c) The surrounding circumstances, often referred to as the factual matrix, at the time that the contract was entered into and which were known or ought to have been known by the parties to the contract, may be used to assist in this initial interpretative effort provided that the consideration of the surrounding circumstances does not overwhelm or contradict the words employed.
Water Street (supra) and *Sattva Capital Corp. v. Creston Molly Corp.*, 2014 SCC 53 at paras. 50 and 57.

(d) Expert evidence may also be admissible to assist in the interpretation of the contract for the purposes of construing the meaning of technical terms or phrases as they may be understood within a trade or industry.
Arbutus Software Inc. v. ACL Services Ltd., 2012 BCSC 1834 at para. 76.

(e) Where the objectives of the parties who entered into the transaction can be ascertained by reliable evidence, an interpretation consistent with those objectives should prevail over one which would defeat the objectives.

(f) A second stage of analysis begins only where the foregoing analysis results in more than one meaning for the provision to be construed, that is, where the words are ambiguous. As stated in *Water Street, (supra),* ambiguity can be said to exist only where, on a fair reading of the agreement as a whole, two reasonable interpretations emerge such that it cannot be objectively said what agreement the parties made. *Water Street, (supra),* at para. 26.

(g) Where an ambiguity has been found to exist, "extrinsic evidence becomes admissible for the purpose of resolving the ambiguity in determining what was actually agreed".
Water Street, (supra), at para 25.

(h) Extrinsic evidence may include "the parties' conduct in making their agreement, such as the course of their negotiations, but also the conduct of the parties in performing the agreement. It is, however, clear that evidence of that kind must be approached with caution."
Water Street, (supra), at para. 27.

VI. THE EVIDENCE

50. This part of the Award sets out the key findings of fact based on the documentary and testimonial evidence presented in this proceeding, all of which has been carefully considered.

A. Herb Scheudeliet's Journal

51. In establishing the history of rehabilitation and reconstruction work performed on the tenure, Gormac sought to adduce in evidence a journal kept by Herb Scheudeliet who was, at least for the period 1980 through 1991, employed by BCFP/Fletcher in directing and supervising road contractors in their field work. To that end he kept a daily journal recording what work was being performed, where it was being performed, and by whom it was performed. Mr. Scheudeliet worked closely with Brian Taylor (a witness called by Teal, whose evidence will be discussed further below) during this period as a road construction supervisor. When contractors tendered invoices, Mr. Scheudeliet performed the first review of the invoices, presumably checking the work claimed against the work recorded in his journal. Mr. Taylor testified that he was aware that Mr. Scheudeliet kept the journal as a contemporary record and had no reason to doubt its accuracy and even though there may have been some work missed, he considered it to be a reasonably accurate portrayal of the road building activities at the time. Mr. Taylor was referred to entries in the journal which appear to indicate road rehabilitation work being performed by Interline (referred to by the name of its principle, Mr. Scallon) in April, June, July and August, 1991. The relevant entries are as follows:

> April 24, 1991
> Uztlius
> SCALLON WITH SKIDDER, HOE AND D-8 STARTED REHAB OF UZTLIUS CR. M. LINE STARTING AT 6½ M. BRIDGE. RED WITH HOE AND SKIDDER INSTALLED BIG LOG CULVERT AT 7½ M. HOE PLUS D-8 PUSHING FILL FOR CULVERT, ALSO DITCHING PLUS ROAD REPAIRS.
>
> June 13, 1991
> Mowhokai
> RED PLUS CARL COMPLETED BRIDGE DECKING TODAY, D-6 SCALLON'S WENT UP BRCH. 130 TO CLEAN UP LANDINGS.
>
> BRCH 137 ERTL HOE PLUS D-8 MOVED TO 3RD CR. TO START REHAB PLUS CLEANUP TO LAST SPUR ACROSS 3RD CR.
>
> June 21, 1991
> 3RD CR. ANDERSON
> SCALLON WORKING ON DRCH 11 REHAB PLUS LANDING.
> August 13, 1991

Anderson – Uztlius
LOW BID MOVED SCALLON'S D-8 AND BACKHOE TO 6 ¼ M. UZTLIUS
(REHAB PLUS ENDHAUL BRCH 9)

August 18
Uztlius
SCALLONS HOE PLUS D-8 COMPLETED REHAB ON BRCH.

52. Pursuant to a document agreement process between the parties, counsel for Teal objected to the admissibility of this journal as proof of the truth of its contents. Mr. Scheudeliet is 85 years old and lives in the Fraser Valley where he cares for an ailing wife. He was not compelled to give evidence at the hearing and there was no discussion of an alternate means for his giving evidence such as by way of conference call or affidavit.

53. Gormac contends that the journal is admissible for the proof of the truth of its contents pursuant to section 42 of the *Evidence Act*, R.S.B.C. 1996, c. 24, which provides for the admissibility of business records. The operative portion of section 42 is sub-paragraph 2:

> (2) In proceedings in which direct oral evidence of a fact would be admissible, a statement of a fact in a document is admissible as evidence of the fact if
>
> > (a) the document was made or kept in the usual and ordinary course of business, and
> >
> > (b) it was in the usual and ordinary course of the business to record in that document a statement of the fact that the time it occurred are within a reasonable time after that.

54. Teal contends that as there was no evidence that Mr. Scheudeliet was required to keep his journal for Fletcher and the journal was not kept in the archives of Fletcher or its successor, it was not part of the records kept by Fletcher and, therefore does not qualify a "business record". With respect, I cannot accept this submission. Section 42 does not require that the document be retained by Mr. Scheudeliet's employer following its creation. All that is required is that it is a "document . . . made or kept in the usual and ordinary course of business". The evidence of Mr. Taylor confirmed that to be the case.

55. The second condition established by paragraph (b) that "it was in the usual and ordinary course of the business to record in that document a statement of the fact at the time it occurred or within a reasonable time after that" is also met. Recording facts such as what work was performed, by whom it was performed and the date upon which it was performed was obviously for the purposes of ensuring that the work billed by a contractor was actually performed by the contractor. Therefore, it was in the usual and ordinary course of Fletcher's business to record such facts. From reading the journal, it is apparent that the recording was made on a daily basis as the work was observed.

56. It is notable that this evidence indicates a minimal amount of rehabilitation and reconstruction work performed by Interline in the year immediately preceding the execution of the Contract. The amount does not come close to the threshold of six months' work set out in the Regulation.

B. Gord McDonald

57. Gord McDonald was called as Gormac's first witness. He is a director, the sole shareholder and the President of Gormac and has been directly involved in operating the company throughout the relevant period.

58. Mr. McDonald testified as to the acquisition of the Contract by way of agreement dated November 12, 1993 between Gormac and Interline following negotiations with Interline's principal, D.R. Scallon. It is notable that this agreement, which is a purchase of assets, does not specifically refer to the Contract by name or date, but only mentions it as Interline's "contractual interest in the *existing and replacement* contracts that it presently has or will have with J.S. Jones Timber Ltd., Boston Bar Division for the type of work outlined above in the Fraser and Kamloops timber supply areas . . ." [emphasis added]. The work "described above" was "the business of logging road construction, logging road maintenance, logging road access, road construction and various other phases of a timber harvesting operation . . .". The total consideration for the Purchase and Sale Agreement between Interline and Gormac was $128,000 of which $78,000 was paid for specific assets with $50,000 attributed to "the vendor's contractual interests with the forest license

holder in the form of replacement road building and maintenance contracts and good will which was payable in two increments, $25,000 on or before July 31, 1994 and the balance of $50,000 on or before November 15, 1994 provided that the license holder, J.S. Jones at the time, offered Gormac "a contract to construct for the 1994 season (a) 16 km of new logging road, and (b) 10 km of rehabilitative logging road construction, and (c) 50 landing sites;".

59. Teal was not privy to this contract between Interline and Gormac, nor did they see a copy of it until years later.

60. Also of note is the fact that Gormac was not provided a copy of the Contract until on or after October 4, 1995 when a copy was provided by Teal's solicitor to Gormac's solicitor at the request of the latter. Based on the evidence before me, it appears that this was the first opportunity for Gormac to review the specific terms of the Contract.

61. Mr. McDonald reviewed a number of historic maps prepared by Teal and its predecessor, J.S. Jones, describing work to be done by Gormac in various cut blocks beginning with maps for East Anderson Block E129 and Third Creek E8, both dated November 18, 1993, presumably for work to be undertaken in 1994. The November 18, 1993 map concerning East Anderson Block E129 set out .538 kilometres of new road construction and 6.2 kilometres of "rehab" was assigned. The Third Creek Block E8 map indicates new road construction totalling 1.29 kilometres together with 1.8 kilometers of "rehab".

62. Mr. McDonald was asked whether the work assigned on these maps was done and on what basis. He responded to that question and other similar questions with respect to subsequent years' work assignments of new road construction and "rehab" work to the effect that all of the work was done under the Contract. As noted above, at the time the 1994 work was assigned and performed Mr. McDonald had not seen the Contract. It was clear from Mr. McDonald's evidence that the rehabilitation road work was done under the Contract was at best an assumption on his part, or perhaps more accurately an expression of his position in this arbitration. There was no objective independent evidence verifying that fact.

63. Mr. McDonald was referred to minutes of a November 2, 1995 meeting he had with representatives of J.S. Jones and confirmed a note where J.S. Jones took the position that "all hourly work an[d] associated rates are not protected by Bill 13 and therefore not considered as part of the Replaceable Contractors' right to the work", and that "J.S. Jones maintains that it is entirely their discretion as to who they hire for any and all hourly work they let". This theme was repeated in other documents or correspondence such as an August 21, 1997 letter from counsel for Teal to counsel for Gormac concerning negotiations of a replacement contract. In that letter, Teal's counsel states:

> There appears to be a difference in opinion between your client [Gormac] and mine as to the work that your client is to provide. My client's position is that Gormac constructs sub-grade, including installation of drainage structures. Material handling, whether gravel or end hauling, road de-activation, temporary or otherwise, snow removal and road maintenance are not included in Gormac's replaceable contract. To the extent that Gormac may perform any of these functions, it is incidental to the contract, and does not give rise to any ongoing right to that work.

64. While there is no reference in the minutes or this letter to reconstruction or rehabilitation road work, it is not surprising as the evidence of all parties was that during this period the predominant road work was new construction given the harvesting plans' focus on old growth stands. By 1997 or 1998, the issue of whether reconstruction or rehabilitation was included in the replaceable aspects of the Contract came to a head following a mediation at which Teal expressly took the position that reconstruction and rehabilitation work was not replaceable. Mr. McDonald noted that drafts of new replaceable road construction agreements prepared by Teal following the unsuccessful mediation included references to new road construction as well as reconstruction, but not rehabilitation. Mr. McDonald candidly described this as a negotiating stance of Teal or "horse trading" in the negotiations. As noted above the terms of a replacement contract have never been settled between the parties. No weight is placed on this evidence except to identify when the issue of whether reconstruction and rehabilitation was part of the replaceable work under the Contract was clearly identified.

65. Mr. McDonald reviewed a Teal document found at tab 118 of the Gormac documents and asserted that in 2003, Gormac performed 18,221 meters of new road construction and 19,549 meters of road reconstruction, and that the work for that year was so substantial that at times three crews were required with the work extending into the winter. In cross-examination, Mr. McDonald acknowledged that as a result of the Pearlman Arbitration Award, which decided the allocation of work made available on an annual basis by Teal was to be on a ratio of 51% in favour of Gormac and 49% in favour Fraser Valley Construction the parties agreed to resolve the remains of the dispute about compensation for the shortfall on the basis that Teal assigned a disproportionately larger amount of new road and road reconstruction work to Gormac over a period of 2003 through 2005.

66. Mr. McDonald's assessment of road rehabilitation and reconstruction work performed by Gormac in 2003 was overstated as it included road maintenance as well as road reconstruction and rehabilitation. The actual record of road reconstruction and road rehabilitation work, by month, in 2003, as evidenced by tab 118, which is an annual summary of road construction progress in which the drainage area, block number, road number with a description of work and total meters constructed or reconstructed are identified for particular years. In summary, for the 2003 period, road reconstruction work proceeded in the Harrison drainage as follows:

(a) April – Road HC2, in association with new road construction – 2,491 meters;

(b) May – Nil;

(c) June – Road HC3D, no new road construction – 241 meters;

(d) July – Road WH17A in association new road construction – 1,396 meters;

(e) August – Nil;

(f) September –Road WC2A & B, no new road construction – 783 meters;

(g) October – Road WC2B, no new road construction – 1,340 meters;

(h) November – Road MC2B with new road construction – 1,764 meters.

67. The foregoing record discloses that a total of 8,015 meters of road was the subject of reconstruction or rehabilitation work by Gormac in 2003, over a period of 8 months during which 2 months (May and August) involved no reconstruction or rehabilitation work. Of the six months during which reconstruction and rehabilitation work was done, the amount of work, as measured by meters completed, varied by as much as a by factor of 10 (April 2,491 meters compared to June 241 meters).

68. I am satisfied that the 2003 road construction progress document found at Tab 118 of the Gormac documents is a business record kept in the ordinary course by Teal for the specific purpose of recording the amount of work on a temporal basis and therefore is evidence of the road reconstruction and/or road rehabilitation work performed by Gormac for Teal in the Harrison drainage in 2003.

C. Steve McClements

69. Steve McClements gave evidence on behalf of Gormac. Mr. McClements began working with Teal in 2007. He initially worked in the field, becoming familiar with day to day operation following which he became responsible for communications with clients and assisted Mr. McDonald with price estimates, quotes, invoicing and business analysis.

70. In late 2011, when he was reviewing certain new construction roadwork assigned by Teal in the Harrison area, he noted that there had been a substantial portion of reconstruction and rehabilitation work done to the existing roads performed by another contractor. He raised the issue with Teal and was advised that it was Teal's position that that was not part of the replaceable work to which Gormac was entitled. The Notice of Dispute and Request for Mediation and Arbitration followed.

71. Mr. McClements noted that given the transition from predominantly harvesting old growth to harvesting second growth, the amount of new construction work had reduced and the amount of reconstruction and rehabilitation roadwork had correspondingly increased.

72. Mr. McClements analyzed the annual road construction progress reports prepared by Teal and noted that Gormac had performed 66.5% of all reconstruction and rehabilitation work in the licensed area over the period of 2002 to 2006.

73. He also reviewed the records for the period 2007 to 2011, noting the significant portion of reconstruction and rehabilitation work assigned by Teal to and performed by Gormac.

D. Brian Taylor

74. Brian Taylor testified on behalf of Teal. Mr. Taylor has been a Registered Professional Forester since 1975 and was previously employed by BCFP during the period of 1974 through 1980 in Maple Ridge, Tofino and Campbell River. In 1980, he was transferred to Boston Bar as the regional engineer which included responsibility for road construction in respect of the lands covered by the forest license which is subject to this arbitration. In 1988, BCFP merged with Crown Zellerbach and was subsequently purchased by Fletcher. Mr. Taylor continued his employment with Crown Zellerbach, Fletcher and, ultimately, with Teal following its purchase of the Fletcher operation and license which is the subject of this dispute.

75. At Teal, Mr. Taylor as logging manager continued to track road construction as he had previously with BCFP and Fletcher. He was involved in the planning and direction of road work for Teal until his retirement in 2009.

76. Mr. Taylor described the circumstances extant when Bill 13 was enacted. Prior to the enactment of that legislation, road work was let on a competitive bid basis, but as of September 1991 when the legislation became effective, Fletcher was locked in with its existing contractors who met the statutory criteria for replaceable contracts. Mr. Taylor commented that this change gave rise to a significant loss of operational flexibility.

77. As a result of the introduction of Bill 13, Fletcher had two road building contractors in the subject area, Interline and Fraser Valley Construction. Mr. Taylor was personally involved with the negotiation of the Contract between Interline and Fletcher, and paid special attention to ensuring that the schedules to the Contract were correct.

78. Mr. Taylor was responsible for tracking Bill 13 compliance on behalf of his employer. This included tracking the work done by the contractors on annual documents entitled "Road Construction Progress" which separately recorded new road construction and road reconstruction by lineal measure assigned to and performed by Interline (subsequently Gormac) and Fraser Canyon Construction (in the earlier years sub-grade construction was used as the descriptive for new road construction). The data from these annual reports were used by Mr. McClements in his calculation of Gormac's performance of reconstruction work referred to above.

79. As is evident from documents referred to and as testified to by Mr. Taylor, care was taken to keep track separately of maintenance work and reconstruction and rehabilitation work performed by Gormac to ensure that the qualifications for a replaceable contract under Bill 13 was not met. Mr. Taylor referred to this as managing "the Bill 13 risk".

80. Mr. Taylor was referred to the Contract and Schedules C-1 and C-2, and noted that all of the work identified and required to be performed under the Contract for 1992 was new road construction.

E. John Pichugin

81. Teal called John Pichugin as its witness. Mr. Pichugin has been a Registered Professional Forester since 1982 and followed a somewhat similar employment history as did Mr. Taylor working initially for BCFP followed by Fletcher and ultimately, Teal where he continues to be employed. In 2003, Mr. Pichugin became the Manager of Engineering for Teal, which included responsibility for Teal's compliance with its licenses and road construction.

82. Mr. Pichugin gave evidence of his recent examination of aerial photographs produced by the Ministry of Forests which he compared to road work shown on Schedule C-1 and C-2 to the Contract. From a review of the aerial photographs placed into evidence, the existence or non-existence of existing roads could be readily observed. In particular, Mr. Pichugin was able to demonstrate that all of the work described in 1992 in the Contract was in old-growth stands such that the roads assigned and marked on Schedules C-1 and C-2 were all new road construction. Of the cut blocks assigned, only cut block 127 showed evidence of existing roads transiting the area.

83. Mr. Pichugin explained that when Schedules C-1 and C-2 were prepared they included a "legend" for "Roads to Be Constructed" and "Roads to be Reconstructed" which was prepared in standard form and pasted to the relevant map then the appropriate red or hatched lines would be placed on the map to identify the work to be done.

84. Mr. Pichugin also confirmed Mr. Taylor's evidence that road reconstruction and road rehabilitation was tracked separately from new road construction in the Boston Bar area.

F. Expert Evidence

85. Two expert witnesses were called, Stan Price, a Registered Professional Forester on behalf of Gormac and John Allen, a Registered Professional Forester on behalf of Teal. Both expert witnesses were qualified to give opinion evidence with respect to logging road construction, reconstruction, rehabilitation and maintenance and, in particular, the content and nomenclature of those activities in British Columbia coastal forest operations.

86. As at the time the contract was entered into, Mr. Allen had just begun providing engineering services in respect of road design and supervision of road construction contractors. Mr. Price has worked predominantly on Vancouver Island and had significant experience since the early 90s in respect of road construction, reconstruction, rehabilitation and maintenance.

87. Mr. Allen was asked to provide an overview of the similarities and differences between new road construction, road reconstruction, road rehabilitation and road maintenance. He was also asked to describe whether, and if so, how the nature of resource road construction activities in the forestry industry evolved or changed from 1992 to present, whether road maintenance is a separate and distinct category or phase of road building activity from new road construction, whether there is any difference or distinction between road reconstruction and road rehabilitation and, finally, whether road reconstruction and road rehabilitation are separate and distinct categories or phases of road building activities from new road construction.

88. Mr. Price was asked to describe the nature, purpose and characteristics of new logging road construction, logging road reconstruction, logging road rehabilitation and logging road

maintenance. He was also asked to opine as to whether the foregoing activities are aspects of a timber harvesting operation under a license. Mr. Price was then asked to discuss and describe the similarities and differences between each of the logging road activities.

89. Mr. Price was also asked to opine whether logging road contractors capable of performing new logging road construction are also capable of performing logging road reconstruction and rehabilitation and whether, in fact, in coastal B.C. logging, logging road contractors who perform new road construction also commonly perform logging road reconstruction and rehabilitation.

90. There was very little in difference and no material conflicts between the evidence of these two expert witnesses whose evidence was generally uncontroversial.

91. The evidence of the experts was also consistent with the evidence of the lay witnesses, both in terms of the transition from old growth to second growth harvesting within a license tenure and the fact that new road construction is, essentially, pioneering construction work while road reconstruction and rehabilitation relates to work performed on an existing and previously constructed logging road. Both experts agreed that a contractor capable of performing new road construction was capable of performing and was often assigned road reconstruction and rehabilitation work by the same license holder.

VII. ISSUE TO BE DETERMINED

92. As noted above, the issue to be determined on this arbitration is whether the Contract, properly construed, includes road reconstruction and road rehabilitation work within the ambit of the services to be provided under the Contract. Alternatively, has Gormac established an entitlement to a replaceable contract for road reconstruction and road rehabilitation as a result of its performance of that work in 2003.

VIII. ANALYSIS

93. From a grammatical point of view and drawing on common English usage as well as dictionary definitions, road construction, road rehabilitation and road reconstruction are all different albeit related activities. They all have the same purpose of producing a reliable facility

to transport equipment and crews. All three activities are engaged in the license holder's meeting certain license and other regulatory requirements for infrastructure. The inter-connectivity or close relationship of these activities, however, does not provide a simple answer to the issue to be determined, which is what did the parties intend at the time of the Contract.

94. Both parties in this arbitration were in agreement that the words were unambiguous and led to only one interpretation. They differed, however, in what that interpretation is. Gormac contends that the words "construct roads", "construct all roads", "construct all weather roads" and "construct only those roads" found in Schedule A must include reconstruction and rehabilitation work given the closely related nature of the activities all directed at the same purpose.

95. Teal contends that reading the Contract as a whole leads to the conclusion that the parties' intention was to include only new road construction particularly given the reference at sub-paragraph (d) of Schedule A which reads:

> (d) Construct the logging roads as shown in red on the attached maps marked Schedule "C1" and "C2".

Teal notes that only new road construction is identified on those schedules and while the legend provided for an indication of "roads to be re-constructed" none were assigned.

96. Teal also points to section 4.01 which provides for payment as specified in Schedule "B". Schedule "B", provides for unit payments for new road construction and new landing construction without any reference or apparent contemplation of rates payable for road reconstruction or road rehabilitation.

97. Schedule "A" includes the following additional elements:

> The contractor will at the Company's Boston Bar logging operations:
>
> . . .
>
> (j) provide the following equipment and labour on hourly rates if requested by the Company's representative:

1. 1979 D-8K Tractor
2. 1974 D-8H Tractor
3. 1968 D-8H Tractor
4. 1979 D-6D Tractor
5. 1987 EX 220LC Backhoe
6. 1990 518 Skidder
7. Faller

(k) **will negotiate specific jobs** prior to commencement of work rather than an hourly basis if requested by the Company's Representative; and . . . [emphasis added]

. . .

98. The corresponding provision in Schedule "B" is:

The Company will at it's *(sic)* Boston Bar operations:

. . .

(j) pay the following all found equipment rental and labour rates when the work is approved by the Company's representative:

1.	1979 D-8K Tractor	136.00 per hour
2.	1974 D-8H Tractor	125.00 per hour
3.	1968 D-8H Tractor	110.00 per hour
4.	1979 D-6D Tractor	80 per hour
5.	1987 EX 220LC Backhoe	112.00 per hour
6.	1990 518 Skidder	58.00 per hour
7.	Faller	28.00 per hour

99. From reading these provisions, it is apparent that the parties' intention was that "specific jobs" which were not included in the elements described at paragraphs (a) through (i) of Schedule "A" would be "*a la carte*"; subject to separate contracts for each "specific job" not covered by the ambit of items (a) through (i), which were to be paid for pursuant to the chart found at sub-paragraph (d) of Schedule "B". I am led to this conclusion by comparing sub-paragraph (a) with sub-paragraph (j) of Schedule "A". Sub-paragraph (a) requires the provision of "all necessary construction equipment, labour and associated supplies to construct roads" for which payment is agreed to according to the unit rates found in Item (d) of Schedule "B". The work envisaged by

sub-paragraphs (j) and (k) of Schedule "A" must therefore refer to work other than road construction. The price for this work is to be a lump sum to be negotiated or at hourly rates for equipment and manpower as set out in Item (j) of Schedule "B".

100. At all material times, timber harvesting required advance planning, regulatory approval and resource allocation before it was assigned or performed. This included not only which stands were to be harvested but how it was to be accessed including what existing roads could be used, whether and to what extent they required reconstruction or rehabilitation and what new roads required construction hence the reference in the "Standard Form" legend for both "Roads to be Constructed" and "Roads to be Reconstructed".

101. On this basis, it is apparent that the parties' intention at the time they entered into the Contract was that the work covered at items (j) and (k) of Schedule "A" and (j) of Schedule "B" related to work other than road construction, reconstruction or rehabilitation.

102. As I have noted, the words "road construction", "road reconstruction" and "road rehabilitation" from a grammatical and usage point of view are different albeit related activities. Reading the contract as a whole supports the view that the parties intended those activities to be separate for contracting purposes and the absence of any mention of road reconstruction and road rehabilitation in Schedule "A" reinforces that interpretation as do the payment provisions such that on a plain reading of the contract as a whole I find that the original parties agreed and intended at the time the contract was entered into to include only new road construction and not reconstruction and road rehabilitation work. This conclusion is bolstered by the circumstances surrounding the parties' entry into this Contract in April 1992. A key element of the new regime was that if contracts existed at the time of the introduction of the new legislation which took more than six months to complete or when taken together with any previous contract between the parties during a calendar year took more than six months in the aggregate to complete, the contractor was entitled to a written replaceable contract for that work. That was the genesis of the Contract in question here. As noted above the record of work performed by Interline for Fletcher included minimal reconstruction and rehabilitation work and in an amount insufficient amount to qualify for a replaceable contract.

103. There can be no doubt that the original parties to the Contract knew or ought to have known of the legislative context for the Contract. The outlook of the contractors and the license holders to this new regime would not have been congruent. Contractors would have seen the new regime as affording them, in the words of Arbitrator Taylor in *Interfor and Lineham*:

> "Security of tenure to logging contractors working for companies holding Crown timber cutting rights, by guaranteeing to the contractor, subject to satisfactory performance, a perpetually renewable right to log a prescribed proportion of the licensee's allowable cut over each five year allowable cut." . . .

104. The perspective of the license holder was that the new regime imposed limitations on its freedom to contract, with respect to certain qualifying work, by limiting them to existing contractors who qualified under the legislation by performing six months of that work.

105. It is reasonable to assume that the perspective of contractors was equally well known to license holders as was the perspective of license holders to contractors. I consider knowledge of these perspectives to be part of the circumstances surrounding the entry into the Contract which may be considered in the interpretative exercise. In this context, a license holder was bound to enter into written contracts with their existing qualifying contractors for the qualifying work, but only to the extent that they were required to do so.

106. On its face, the Contract concerns the quantity of new road construction and no reconstruction or road rehabilitation work. Road reconstruction and rehabilitation work was not a large part of work required to be done for the purposes of harvesting timber in this particular tenure at the time the Contract was entered into because of the commonly known preference to harvest old growth stands at that time. The definition of "contract" in the regulation, relates to ". . . the whole **or part of** one or more phases of a timber harvesting operation . . ." [emphasis added] a license holder's interest in maintaining as much flexibility over work to be contracted out by limiting the replaceable contract to only the work which qualified under the regulation for a replaceable contract.

107. This leaves for consideration Gormac's claim to a replaceable contract as a result of the road reconstruction and road rehabilitation work performed in 2003. Counsel placed before me

two arbitration awards which dealt with a consideration of the "threshold" set out in the Regulations.

108. The first was a decision of Arbitrator Daniel B. Johnston in *Terry Arsenault & Sons Contracting Ltd. and CRB Logging Co. Ltd.*, a 1993 ruling on a jurisdictional issue. In that award, Arbitrator Johnston considered the Regulation, which in material part is the same as the Regulation applicable to this case as follows:

> The six month test referred to above, which found in the definition of "contract" and "subcontract" section 1 of the Regulation, really has two separate parts to it.
>
> In order for a contract or subcontract to fall within its respective definition in the Regulation:
>
> (a) It must take, or be likely to take, more than six months to complete; or
>
> (b) when taken together with any other contract or subcontract between the parties in a calendar year, it must take or be likely to take more than six months to complete.
>
> If Arsenault satisfies either of these two tests, then there is a contract or subcontract as defined within the Regulation and I have jurisdiction. If not, even though he may have had a contractual relationship with CRB with respect to log hauling services provided from time to time, it is not one which falls within the definitions set forth in the Regulation. Accordingly, the Regulation would not apply and I would have no jurisdiction.
>
> I now turn to the first part of the six month test, namely was there a contract or subcontract which would take or is likely to take more than six months to complete. The Regulation is silent on how this test is to be applied. Accordingly, in order to meet this test, I have concluded that at the very least there must be either a contract with a clearly defined term of six months or more or a contract for a specified or determinable amount of work which would take a contract working the equivalent of full time in similar circumstances more than six months to complete.
>
> . . .
>
> I now turn to the second part of the six month test, namely whether or not a contract existed which, when taken together with any other contract between

> the parties in a calendar year, would in the aggregate take or was likely to take more than six months to complete.
>
> In my view, this part of the six month test was intended to apply, *inter alia*, to the very circumstances I am dealing with in these proceedings. In other words, situations where a contractor works on an as needs basis for a licensee at different times throughout the year in the sense that the contractor has a series of discrete contracts but has no contract entitling him to any specified or minimum amount of work during the year. The effect of the second part of the six month test is that if a contractor in such circumstances provides the equivalent of six months or work in total, then he will fall into that category of contractor or subcontractor to whom the Regulation applies.
>
> The first issue to deal with in applying the second part of the six month test is whether or not there is a requirement that this test be applied within a single calendar year. I am satisfied that the plain and ordinary meaning of the words used in the definition of "contract" and "subcontract" in Section 1 of the Regulation that this part of the six month test is to be applied within a single calendar year.
>
> The next issue to deal with is what constitutes "six months" for the purpose of applying the second part of the six month test. The Regulation is silent on this issue and the definition of a "month" contained in the *Interpretation Act* is of no assistance in the present circumstances.
>
> In interpreting what constitutes "six months" when applying this part of the "six month" test, there are several possibilities. The first is the one suggested by CRB, namely 180 actual working days. Another is the one suggested by Arsenault, namely that you simply count any month in which at least one day was worked. Another, and the one that I would prefer, is an amount of work equivalent to six months of steady work for a logging truck taking into consideration the number of loads a day, and number of days a month a logging truck working in similar circumstances would normally work.

109. The second decision is that of Vincent L. Ready in *T. Wilson Trucking Ltd. v. Tay Creek Logging Ltd.*, an October 16, 2000 award in which the arbitrator applied an interpretation of the "threshold" consistent with that of Arbitrator Johnston in *Arsenault* with the additional analysis that full-time work contemplates 40 hours per week, which, at a six-month equivalent of 26 weeks totals 1,040 hours. Accordingly, under the Regulation, 1,041 or more hours would be "more than the equivalent of six months full time work".

110. There was no evidence that the work done in 2003 by Gormac for Teal in respect of reconstruction and rehabilitation work was pursuant to a single contract for a "specified term" or whether the work was simply assigned on an as needed basis.

111. Nor is there any evidence about how many hours were worked per day and how many days were worked per month in each of the six months during which reconstruction rehabilitation work was performed by Gormac for Teal in the Harrison drainage.

112. Absent this evidence, I cannot find that the sub-contract was for a "specified term of more than six months" or that "the total specified terms of the contract and any previous contracts . . . [was] more than six months". In the result, the first and second temporal criteria for the section 1(b) definition of "contract" are not met.

113. The third criterion for the definition of contract during a calendar year, would require the total of the reconstruction and rehabilitation work performed by Gormac under a contract or previous contracts in relation to the same license to have been more than the equivalent of six months full time work for similar work in similar circumstances. The evidence before me only indicates a lineal measurement of the work completed without any indication of the time required by its performance. Given the great variance between the measured meters completed month to month, it is clear that a number of the months, such as June and September were nowhere near a full time operation. The best evidence would be the time records of Gormac for its crews in doing this work, however, given the passage of time I understand that evidence is no longer available. In the result, Gormac, which bears the burden of proof on this point, has been unable to prove that the amount of work threshold was met or exceeded in 2003.

114. For the foregoing reasons, I find that Gormac has not established that it achieved the required threshold to entitle it to a replaceable contract for road reconstruction and/or road rehabilitation work based on the work performed in 2003.

IX. AWARD

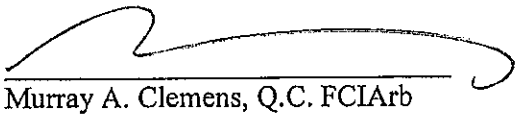
115. Based on the foregoing findings, I decide and declare that the Contract does not include replaceable road reconstruction or road rehabilitation work.

116. The parties have specifically requested that I reserve jurisdiction over the matter of costs. I note that the arbitration clause includes specific provisions with respect to costs which I anticipate counsel will want to make submissions on following receipt of this partial final award.

117. As noted throughout this award, there a number of other matters over which I have retained jurisdiction to decide.

THIS IS MY AWARD.

Made and Dated at place of Arbitration, Vancouver, British Columbia, this 26th day of November, 2015.



Murray A. Clemens, Q.C. FCIArb