

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

AND

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

AND

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

BETWEEN:

**INTERNATIONAL FOREST PRODUCTS LIMITED ("Interfor")**

AND:

**HAYES FOREST SERVICES LIMITED ("Hayes")**

**ARBITRATOR:**

George K. Macintosh, Q.C.

**COUNSEL FOR INTERFOR:**

Eric J. Harris, Q.C. and  
Jennifer A. Lamont

**COUNSEL FOR HAYES:**

D. Geoffrey G. Cowper, Q.C. and  
Brook Greenberg

**DATE OF HEARING:**

March 15, 1999

**A W A R D**

The parties are in agreement concerning the issue I am to resolve. In its written submission, Interfor asked: "Did Interfor breach the Logging Agreement by failing to allocate work to Hayes during 1998?" Hayes worded the issue slightly

differently in its submission: "The principle issue to be decided is whether Interfor is entitled, under either the Contract [the "agreement" referenced below in this Award] or the governing legislation, to allocate no logging or road construction work to Hayes in 1998."

Hayes and Interfor are the successor parties to an agreement originally dated January 1, 1990. When I reference the parties to that agreement, I will refer to Interfor and Hayes as though they were the original parties.

Under the agreement, in the opening paragraph, Hayes agreed to log timberlands, subject to the General Terms and Conditions of the agreement, except to the extent that any of the General Terms and Conditions conflict with the specific terms following the introductory paragraph.

The specific terms include, under paragraph (b) on page 1, the timberlands to be logged under the direction of Interfor and also the annual volume to be logged. (It was agreed between the parties before me that the annual volume of 150,000, which appears on page 1 of the agreement, is for the present purposes changed to 48,903.)

Hayes claims that for 1998, it was entitled to log at least "minus 50%" of 48,903 m<sup>3</sup>, or 24,452 m<sup>3</sup>, having reference to paragraph (b) on page 1 of the agreement, and that Interfor denied Hayes this contractual right with the result that Hayes is entitled to compensation.

One of Interfor's arguments against Hayes arises from the wording of the first general term and condition of the agreement. It reads as follows:

1. The Contractor will enter upon the timberlands described in the within agreement ("the lands") forthwith upon the commencement of the term of this contract with adequate equipment and personnel for the logging thereof and will commence at once and will, during the normal logging season for the region where the lands are situated, continuously carry on the felling, bucking and carrying away of all merchantable timber specified in the within Agreement standing, lying or being on the lands ("the timber") and all other logging operations required hereunder, and will complete said operations on or before the date of expiration of this contract PROVIDED THAT the Contractor's right and obligation to log continuously shall be suspended whenever, but only so long as the Contractor is prevented from logging by reason of fire, strike, weather conditions, acts of God, Government regulations, the requirements of the Company or other similar causes beyond the control of the Contractor, and the term of this contract shall be extended by the same length of time as the period or the sum of the periods that the Contractor is prevented from logging during said normal logging season for any of the reasons aforesaid. Unless otherwise provided in the within Agreement, the cost of transporting the Contractor's equipment, plant, and personnel to the lands and their removal following termination of this contract for any reasons shall be for the Contractor's account.

(my emphasis)

I have concluded that the first general term and condition does not save Interfor from the obligation to either permit Hayes the right to log 24,452 m<sup>3</sup> in 1998 or pay Hayes an amount to be determined in place of giving it this right to log.

As noted earlier, the agreement, in its first paragraph, stipulates that the General Terms and Conditions are to give way to the specific terms of the agreement where they conflict. Of at least equal significance is the point that the introductory

paragraph in the General Terms and Conditions stipulates that the Terms and Conditions are "[s]ubject always to the specific terms set forth" in the agreement, which specific terms "shall prevail against" the General Terms and Conditions which are in conflict.

In the result, when the first general term and condition provides that Hayes' right to log continuously shall be suspended whenever Hayes is prevented from logging by "the requirements of the Company", I believe that paragraph (b) on page 1 of the agreement constitutes an overriding obligation upon Interfor to ensure that the "Annual Volume" will be at least 24,452 m<sup>3</sup>, being 48,903 m<sup>3</sup> minus 50%.

Whatever is meant by the phrase, "the requirements of [Interfor]", in the first general term and condition, I do not interpret this term and condition as giving to Interfor the right to negate the Annual Volume it contracted to Hayes under paragraph (b) on page 1 of the agreement. If I were to do that, I believe I would be ignoring the introductory paragraph on page 1 of the agreement, which I have referenced above, and the introductory paragraph to the General Terms and Conditions, which I have also previously referenced. Furthermore, the first general term and condition speaks only of Hayes' right to log being suspended and extended, not negated. This too I believe is inconsistent with Interfor's position.

That however does not end the matter.

Certain sections are relevant from the *Timber Harvesting Contract and Subcontract Regulation* which was placed before me. It was common ground between the parties that the agreement in issue is a "replaceable contract" within the meaning of the *Regulation*. Section 17(1) of the *Regulation* provides that a replaceable contract

must specify an amount of work to be performed in each year during the term of the contract. Section 17(2) of the *Regulation* goes on to say that this work may be reduced by a party in Interfor's position if that is expressly provided for in the *Regulation* or in a clause in the agreement between the parties which is either required or permitted to be in the agreement by the *Regulation*.

I was referred to sections 21 and 22 of the *Regulation*.

Sections 21 and 22(1) read as follows: (22(2) is not relevant):

### **Compliance over time**

- 21** A replaceable contract must provide that the amount of work that the licence holder allocates to the contractor and that the contractor is required to perform in any year during the term of the contract may differ from the amount of work specified in the contract, provided that
- (a) the difference is attributable to bona fide business and operational reasons on the part of the licence holder, and
  - (b) the amount of work that the licence holder allocates to the contractor under each replaceable contract over each 5 year cut control period of the licence to which the contract relates is equal to or greater than 95% of the aggregate of the specific amount of work provided for under that contract during that 5 year cut control period, or such other cut control period as may be substituted for the licence by the regional manager, less the aggregate of any reductions in the amount of work imposed during that cut control period as permitted by sections 20 and 22.

## Events beyond control

- 22** (1) A replaceable contract must provide that the licence holder is not liable to the contractor for any failure to allocate to the contractor in any year the amount of work specified in the contract, as adjusted under section 20 or 21, if the failure results from changes in law, natural disasters, interference by a person who is not a party to the contract or any other event beyond the reasonable control of the licence holder other than a change in the market price of logs.

Hayes argues that only section 22(1) of the *Regulation* has application to the agreement between Interfor and Hayes. Interfor says that both sections 21 and 22(1) have application.

I believe that only section 22(1) applies.

Reading Part 7 of the *Regulation*, and in particular sections 48-51, together with section 160 of the *Forest Act*, I conclude that there is no legislative requirement to have incorporated in the agreement between Interfor and Hayes the contractual provisions referenced in section 21. As I read sections 48-51, the Lieutenant Governor-in-Council, acting pursuant to the provisions of the *Forest Act*, particularly section 160 of the *Act*, did not require the contractual provisions referenced in section 21 of the *Regulation* to be made part of the agreement but did require the contractual provisions referenced in section 22 to be made part of the agreement.

Interfor argues alternatively that section 21 of the *Regulation* has been incorporated by reference in section 22, by the words in section 22(1), "as adjusted under section . . . 21". However, by my reading of sections 21, 22 and 48-51, the reference in section 22 to section 21 was not intended to have application when section 21 itself is not made to apply. Accordingly, section 22(1) is to be read without reference to a section 21 adjustment.

If, as I have concluded, only section 22(1) applies, and Interfor has failed to allocate 24,452 m<sup>3</sup> to Hayes for 1998, Interfor is not liable to Hayes only. to use the words from section 22(1), "if the failure results from changes in law, natural disasters, interference by a person who is not a party to the contract or any other event beyond the reasonable control of the licence holder other than a change in the market price of logs".

I was asked by the parties not to make any factual findings which would serve to determine whether the provisions quoted above from section 22(1) have application in this case. In any event, evidence was not placed before me concerning that issue.

My conclusion from the above, subject to any argument by Interfor based on factual questions raised by the wording of section 22(1), is that Interfor has breached its obligation to Hayes to allow Hayes to log 24,452 m<sup>3</sup> within Tree Farm Licence No. 10 in 1998.

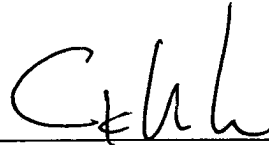
Hayes also argues that it has a right to compensation concerning a larger volume of logs, beyond 24,452 m<sup>3</sup>. As I understand this argument, it is based upon provisions found in section 64 and section 67 of the *Forest Act*. As I read those

provisions however, they do not give rights to Hayes. These statutory provisions address rights and obligations between Interfor and the government.

The parties did not present legal argument based on the concept that possible breaches by Interfor of obligations pursuant to provincial legislation give rise to a right of action by Hayes against Interfor in these circumstances. (I expect that the case law does not permit such an argument to succeed on the facts here, although I have not looked at that case law in some years. Nor should anything I say here be taken as any finding on my part that Interfor has breached any statutory provision. I did not address that question.)

In summary, I answer the issue before me in favour of Hayes by finding that Interfor was required to allocate logging to Hayes in 1998. The issue as framed by Hayes also addressed road construction. Argument concerning road construction was not presented to me and I make no findings in that regard. I gather, however, that topic is for a later phase of this arbitration.

DATED at Vancouver, British Columbia, this 25th day of March, 1999.



George K. Macintosh, Q.C.  
Arbitrator