

**IN THE MATTER OF AN ARBITRATION PURSUANT TO**

A Replaceable Full Phase Logging Contract for Tree Farm License 60 dated July 28, 2010  
(the "Contract")

**AND**

s. 8 of the *Timber Harvesting Contract and Subcontract Regulation*,  
promulgated pursuant to the *Forest Act*, R.S.B.C. 1996 C. 157

BETWEEN:

EDWARDS & ASSOCIATES LOGGING LIMITED

CLAIMANT

AND:

TAAN FOREST LIMITED PARTNERSHIP

RESPONDENT

**Editor's note: Corrigendum released on November 8, 2018. Original award has been corrected with text of the appended corrigendum.**

**PARTIAL FINAL AWARD**

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**HEARING: July 24-27, 30-31 and August 15, 2018**

**DATE OF THIS AWARD: October 31, 2018**

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**I. THE PARTIES**

**A. The Claimant**

1. The Claimant, Edwards & Associates Logging Limited (“Edwards”), is an experienced, privately-owned unionized logging contractor that operated on the islands of Haida Gwaii between 1971 and 2014.

**B. The Respondent**

2. The Respondent, Taan Forest Products Limited Partnership (“Taan”), is the licensee of Tree Farm License 60 (“TFL 60”), located within the traditional territory of the Haida Nation on Haida Gwaii. Taan is indirectly owned and controlled by Haida Enterprise Corporation, a company formed to provide economic development on Haida Gwaii for the benefit of the Haida Nation.

**II. THE CONTRACT**

3. This arbitration concerns the Replaceable Full Phase Logging Contract dated July 28, 2010 (the “Contract”) between Edwards and Western Forest Products Inc. in respect of TFL 60. Taan managed the Contract for Western Forest Products Inc. in 2010, 2011 and early 2012. All rights, title and interest of Western Forest Products Inc. under the Contract, together with TFL 60, were acquired by Taan in or about June 2012.
4. The Contract is governed by the *Timber Harvesting Contract and Subcontract Regulation*, BC Reg. 22/96, as amended (the “Regulation”). The Contract incorporates three schedules:
  - (a) Schedule A – Replaceable Contract General Conditions;
  - (b) Schedule B – Contract Rates; and
  - (c) Schedule C – Prime Contractor Agreement.

**III. MATTER IN DISPUTE**

5. Edwards claims that Taan is liable for damages arising out of a breach of “the 2014 Logging Plan” to make available an agreed-upon harvest volume for the 2014 logging year, or, alternatively, for negligent misrepresentations concerning log volumes to be made available to Edwards for logging in the 2014 logging year.
6. Taan defends the claims on the basis that there was no harvest volume agreed to and no actionable misrepresentation in respect of the 2014 harvest volume, and Taan contends that Edwards is not entitled to any of the relief sought in its claim. Taan asks that Edwards’ claim be dismissed with costs in accordance with Section 11(2) of the *Arbitration Act*.

**IV. GOVERNING LAW**

7. Section 1.11 of the General Conditions incorporated into the Contract provides:
  - 1.11 This Contract will be governed and construed in accordance with all regulations and laws of the Province of British Columbia and Canada where applicable.

**V. THE ARBITRATION AGREEMENT**

8. The arbitration agreement found at Part 25 of the Contract and provides:

**Disputes**

25.1 All disputes that have arisen or may arise between the parties under or in connection with this Contract are to be referred to mediation and, if not resolved by the parties through mediation, are to be referred to arbitration in accordance with the dispute resolution system established by the Regulation.

**VI. PROCEDURAL HISTORY**

**A. Notice of Arbitration**

9. This arbitration was commenced by the Claimant by notice dated March 30, 2017 filed with the British Columbia International Commercial Arbitration Centre (“BCICAC”).

**B. Appointment of Tribunal**

10. I was appointed as arbitrator with the consent of the parties on June 16, 2017.

**C. Procedural Directions**

11. The first procedural meeting was held by teleconference on June 16, 2017 at which directions were given with respect to:

- (a) My administration of the arbitration in the place of the BCICAC;
- (b) The process for delivery of reliance documents by each party, as well as requests for additional documents and their production;
- (c) A request that the parties consider whether and to what extent oral examinations for discovery would be conducted and whether expert reports would be exchanged;
- (d) A direction that direct written evidence would be admitted in evidence with those witnesses subject to oral cross examination and re-direct.

12. Further to these directions, the parties agreed to conduct examinations for discovery of one representative of each party and agreed to dates for the production of documents requested and the delivery of expert reports. The arbitration hearing was set for January 8-12, 2018. Those dates were subsequently reset by consent to May 14-18, 2018 and subsequently adjourned by consent to July 24-31, 2018 for the evidentiary hearing.

13. The second procedural teleconference took place on April 27, 2018 at which a schedule for delivery of witness statements was set and a provisional date for delivery of the Claimant's expert report discussed. Subsequent directions clarified the dates for the delivery of the Claimant's expert report and a revised expert's report, as well as the Respondent's reply report.
14. Subsequently, directions were given setting August 15 as the date for post-evidence submissions by the parties.

**D. Claimant's Statement of Claim**

15. In its Statement of Claim, Edwards made the following allegation with respect to the provisions of the Contract:

7. On or about July 28, 2010, Edwards entered into a logging Contract in respect of TFL 60 (the "**Contract**"). The Contract provides, among other things, that:

- (a) Taan will prepare logging plans from time to time to specify the timber harvesting work to be performed by Edwards on TFL 60 under the Contract, and these logging plans are final and binding on the parties to the extent they are not inconsistent with the other provisions of the Contract;
- (b) the parties will meet quarterly in each year of the term of the Contract to review Taan's logging plans for the next calendar year;
- (c) Taan is solely responsible for determining the volume of timber to be harvested and where work will be performed;
- (d) Taan has complete authority over, and responsibility for, the planning and permitting processes, and is solely responsible for constructing and providing logging roads in connection with Edward's operations.

16. In respect of the 2014 Logging Plan, Edwards alleged:

10. In or about late 2013 or early 2014, the Edwards and Taan met on several occasions to develop a logging plan for TFL 60 for the 2014 calendar year (the "**2014 Logging Plan**").

11. Taan represented to Edwards that it would make at least 340,000 m<sup>3</sup> available to Edwards to log in 2014, and in about November of 2013 provided Edwards with engineering information which represented the approximately 340,000 m<sup>3</sup> would be available to Edwards to log on TFL 60 in 2014. Taan also advised Edwards that further volume beyond 340,000 m<sup>3</sup> could be made available to log in 2014.

12. Taan also advised Edwards that, consistent with its goal to log in excess of 300,000 m<sup>3</sup>, it planned to have the necessary road permits, cutting permits and completed roads in place.

13. The agreed-upon 2014 Logging Plan provided for a total harvest volume of 341,900 m<sup>3</sup> across three operating areas. Per the terms of the Bill 13 Contract, the volume to be harvested was determined exclusively by Taan.

...

23. In late February 2014, Taan advised Edwards that it had reduced the total harvest volume for 2014 from 341,900 to 312,000 m<sup>3</sup>. In March 2014, Taan further [and] *sic* reduced the total harvest volume to 302,000 m<sup>3</sup>.

24. In April 2014, Taan provided Edwards with a revised engineering report that, for the first time, included information about the current status of road and logging permits which were lagging far behind schedule. As a result, the 2014 harvest volume was reduced to 246,000 m<sup>3</sup>, representing approximately a 30% reduction of the volume Taan had agreed to provide just four months earlier. Notwithstanding the revision and its prior inability to provide the agreed-upon 341,900 m<sup>3</sup>, Taan repeatedly assured Edwards it was committed to achieving this harvest volume and had the elements in place to do so.

25. Based on the reduced harvest volume, Edwards further revised its log plans, in terms of rates, timing, and order, to try to maintain a viable and profitable operation for the balance of 2014 (the "**April 2014 Revised Logging Plan**").

17. Edwards also pled the following in respect of its ability to meet production targets through 2014:

37. In summary, Edwards' ability to meet production targets throughout 2014 was undermined by a combination of:

- (a) Taan's incorrect volume estimates in the first areas to be logged, which (together with lack of finished roads in replacement areas) led to shutdowns in March and April of 2014;
- (b) Taan's significant delay in submitting applications for road permits and cut permits;
- (c) Taan's inadequate management of road construction even when the permits were issued;
- (d) Taan's incorrect or inadequate engineering reports which misidentified the kind of harvesting that specific cutblocks would permit.

No claim is specifically made by Edwards in respect of the conduct particularized in this paragraph of their Statement of Claim. Edwards' claims are for breach of volume commitments either as a matter of contract or liability for misrepresentation.

18. In respect of contractual damages, Edwards pled:

45. Edwards says that Taan breached the 2014 Logging Plan, and thus the Bill 13 Contract, and it is entitled to be put in the position that it would have been had Taan fulfilled its obligations and the 2014 Logging Plan been properly performed, i.e., compensation for the loss incurred and payment of the profits that would have been realized.

19. In respect of damages for misrepresentation, Edwards pled:

53. Had Taan not misrepresented the volume it would make available to Edwards to log, and the times at which permits would be obtained, Edwards would have, as they have done on occasion for other licensees, proceeded in a significantly different manner, including:

- (a) configuring its people, equipment and resources to maximize profitability based on the actual, and significantly smaller, volume available;
- (b) retaining the bulk of its Island Timberlands contract, which it had contracted out in order to carry out the 2014 Logging Plan itself; and



- (c) not embarking on an ambitious equipment upgrading program, funded by loans.

**E. Statement of Defence**

20. Taan delivered a defence pleading as follows:

15. The contract is volume-based. Section 6.1 of the Contract expressly entitles Edwards to harvest “not less than 34.95% of the total amount of timber processed by the Licence Holder under the Licence in that calendar year...” (the “**Work**”).

16. There is no obligation under the Contract that Taan make a minimum volume of work be made available to Edwards in any given year, only that of the total volume harvested by Taan, Edwards must perform at least 34.95% of the total work performed.

17. The express language of the Contract clearly provides that whether and how much timber Taan under the Licence in any given year are discretionary decisions made solely by Taan. This also includes determining the nature, extent and content of any logging plans (see, for example: s.1.1(g), “**Work**”; “...matters relating to such logging plans will be determined by the Licence Holder in its sole discretion...”; General Conditions, ss. 11.1, 12.1).

21. Taan denied there was a breach of contract or any negligent misrepresentation. It also raised the limitation of liability clause at s. 27.1 of Schedule A to the Contract (the “**General Conditions**”) as a complete bar to the claims.

**F. Claimant’s Reply Statement**

22. In a Reply Statement dated September 13, 2017, Edwards joined issue with Ttan on the factual and legal issues raised in the Statement of Defence.

**G. Arbitration Rules**

23. Pursuant to s. 22 of the *Arbitration Act*, the Domestic Commercial Arbitration Rules of Procedure apply to this arbitration, subject to modification pursuant to the provisions of Part IV – Dispute Resolution of the Timber Harvesting Contract and Subcontract Regulation.

**H. Seat of Arbitration Hearing and Hearing Locale**

24. The seat of this arbitration and its hearing locale is Vancouver, British Columbia.

**VII. MATTER TO BE DETERMINED IN THIS ARBITRATION**

25. The matter to be determined is whether Edwards has made out its claim for damages for breach of contract or, alternatively, negligent misrepresentation and liability for the costs of this arbitration.

**VIII. WITNESSES FOR THE CLAIMANT**

26. Direct evidence and reply evidence was provided by Stan Schiller, Edwards' President, in his affidavits of May 28 and July 3 and by Brad Billings, Edwards' controller, in his affidavits of May 28 and July 3.
27. Edwards' evidence as to damages was contained in an expert report prepared by Richard Crosson, CPA, CA, CBV, dated April 23, 2018 and revised July 10, 2018. Each of Messrs. Schiller, Billings and Crosson appeared at the hearing for cross examination.

**IX. WITNESSES FOR THE RESPONDENT**

28. Direct evidence was provided in support of the Respondent by Dave Jepson, Edwards' former Contract Manager, in his affidavit of June 19, 2018, Bernie Zimmermann, Taan's Acting General Manager (August 2013-October 2014) in his affidavit of June 19, 2018, William Robert Brash, Taan's Chief Executive Officer, in his affidavit of June 18, 2018, and Richard Jones, Taan's current General Manager, in his affidavit of June 18, 2018, as well as an expert commentary on the report tendered by Richard Crosson by Michael D. Bowie, CPA, CA, FCBV.

29. Messrs. Jepson, Zimmermann, Brash and Jones were all cross examined before me at the hearing. Mr. Bowie's report was tendered in evidence by consent without cross examination.

**X. THE CONTRACT**

30. As noted above, the Contract is a Replaceable Full Phase Logging Contract dated July 28, 2010, with effect as of the 15<sup>th</sup> day of January, 2010. The Respondent Taan is the successor to Western Forest Products Ltd. as the License Holder under the contract with the Claimant Edwards in its capacity as Contractor.
31. Replaceable Full Phase Logging Contracts of this kind followed two independent public enquiries directed at the Forest Act and involved close consultation with all parties of interest, including licence holders and contractors. This led to the *Forest Amendment Act*, 1991, commonly described as Bill 13. On the introduction of Bill 13 to the Legislature, the Minister of Forests stated:

The other part of this bill deals with legal contracts between major tenure-holders and the operators that harvest timber on these tenures.

The British Columbia forest industry can be roughly grouped into two sectors: the manufacturing sector and the logging sector. The manufacturing sector has the benefit of long-term replaceable and transferable licences. The 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 contractor 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.

The 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.

32. The regulation referred to by the Minister of Forests is the Regulation.

33. The relevant terms of the Contract include the following:

#### 1.1 Definitions

“Area of Operation” means the area within the License as set out in Part 7 [being that portion of the License within the Queen Charlottes Forest Operation as may be determined by the License Holder and communicated to the Contractor from time to time]

[...]

“Logging Plans” means the plans prepared by the License Holder from time to time to specify Work that will be performed by the Contractor in the Area of Operation;

[...]

“Work” means the falling, bucking, limbing, topping, yarding, loading and hauling to the dryland sort ... and sorting and sealing of all merchantable, accessible and loggable timber and logs standing, lying and being on such parts of the Area of Operation as are determined by the License Holder in its sole discretion from time to time during the Term on notice to the Contractor pursuant to the License Holder’s Logging Plans ... Construction of logging roads and related improvements is specifically excluded from the Work and will be performed by other contractors.

[...]

#### 6.1 Amount of Work

Subject to the terms of this Contract, in each full calendar year of Term the Licence Holder will allocate to the Contractor, and the Contractor will perform, the Work that is required to process not less than 34.95% of the total amount of timber processed by the

Licence holder under the Licence in that calendar year of the Term....

[...]

The Contractor acknowledges that the parts of the Area of Operation where Work will be performed will be determined by the Licence Holder in its sole discretion from time to time pursuant to Logging Plans provided by the Licence Holder to the Contractor, and may be amended by the Licence Holder from time to time for *bona fide* business or operational reasons, and that the Contractor will not have exclusive rights to harvest timber in the Area of Operation.

[...]

#### 7.1 Area of Operation

The Area of Operation is that portion of [TFL 60] within the Queen Charlotte Forest Operation as may be determined by [Taan] and communicated to Edwards from time to time.

[...]

#### 8.6 Review of Logging Plans

Quarterly in each year during the Term, the parties will meet to review the Licence Holder's logging plans for the next succeeding calendar year. All matters relating to such logging plans will be determined by the Licence Holder in its sole discretion and will be final and binding on the parties to this Contract to the extent that such determinations are not inconsistent with the provisions in this Contract.

[...]

#### 9.2 Logging Roads

The Licence Holder, in its sole discretion, will construct and provide logging roads in connection with the Contractor's logging operations under this Contract, such road system to provide for reasonable grapple yarding and high-lead yarding distances.

[...]

### 11.1 Shut Down or Curtailment

The Contractor will carry on a continuous operation provided, however, that the Licence Holder may at any time, in its sole discretion and without liability, require the Contractor to shut down or curtail the performance of the Work.

### 11.2 Work Entitlement

Subject to Part 16, any shut down or curtailment of Work under §11.1 is not to derogate from the amount of Work that the Contractor is entitled to perform under its Contract and in accordance with the Regulation.

### 11.3 No Claim for Compensation

The Contractor will not have any claim against the Licence Holder for compensation due to any shut down or curtailment pursuant to §11.1.

## 12. Changes in Operation

### 12.1 Changes

Subject to §12.2, the Licence Holder may, for *bona fide* business and operational reasons and on reasonable notice to the Contractor, require the Contractor to do one or more of the following:

- (a) use different timber harvesting methods, technology or silviculture systems,
- (b) move to a new area of operation,
- (c) comply with different operating specifications, or
- (d) undertake any other operating change necessary to comply with a direction made by a government agency or lawful obligation imposed by a federal, provincial or municipal government, and the Contractor will comply with these requirements.

### 12.2 Substantial Changes

If a requirement made by a Licence Holder under § 12.1 results in a substantial change in the Work, the Contractor may, within 15 days of receiving notice under § 12.1 and by notice to the Licence Holder, terminate this Contract without liability to the Licence Holder.

### 12.3 Rate Review

If a requirement is made under § 12.1, and the Contractor does not elect to terminate this Contract under § 12.2, either party may, within 30 days of the Contractor receiving notice under § 12.1, request a review of the rate then in effect.

### 12.4 Rate Dispute

If either party requests a rate review pursuant to § 12.3 and the parties are unable to agree upon a new rate, a rate dispute is deemed to exist and must be resolved in accordance with the Regulation.

[...]

## 15 Allocation of Work

15.1 In any year during the Term, the Licence Holder may allocate to the Contractor and the Contractor must perform an amount of Work that differs from the amount of Work specified in this Contract, provided that

- (a) the difference is attributable to *bona fide* business and operating reasons on the part of the Licence Holder, and
- (b) the amount of Work that the Licence Holder allocates to the Contractor and that the Contractor is required to perform under this Contract over each amount of work compliance period of the Licence is equal to or greater than 95% of the aggregate of the specified amount of work provided for during that amount of work compliance period, less the aggregate of any reductions in that amount of work imposed during that amount of work compliance period as permitted by a provision of this Contract required or permitted by the Regulation.

[...]

### 27.1 Limitation of Liability

Notwithstanding anything else in this Contract, the Licence Holder and its respective officers, directors, employees, consultants and agents will not be liable to the Contractor or anyone claiming through or under it, whether by way of indemnity or by reason or breach of contract or in tort, including liability for negligence and breach of statutory duty, or on any other legal or equity basis for

- (a) special, indirect or consequential loss or damage,
- (b) loss of present or prospective profits, overhead, expenditures, investments, or commitments made in connection with this Contract or on account of any other reason or cause, or
- (c) loss of any contract or other work that may be suffered by the Contractor or its Workers.

34. The Regulation expressly applies to the Contract pursuant to s.2 of the Regulation. Part 5, Division 2 of the Regulation, reads in material part:

### **Division 2 – Amount of Work**

#### **Amount of work must be specified**

- 17 (1) A replaceable contract must specify an amount of work to be performed in each year during the term of the contract.
- (2) A replaceable contract must provide that the specified amount of work to be performed in each year of the replaceable contract may not be reduced by a licence holder except as expressly provided for in the regulation or in a clause required, or permitted to be in the contract by this regulation.
- (3) A replaceable contract may provide for work to be performed in relation to timber harvesting operations carried out under more than one licence.

#### **Amount of work for coastal contracts**

- 18 (1) Except as otherwise provided in this Part, the amount of work specified in a replaceable contract that pertains to a licence for the coastal area, other than a dedicated phase contract or a volume independent contract, must be expressed as the amount of work required to process an amount of timber where the amount of timber is expressed as a specified percentage of the total amount of timber processed by the licence holder under the licence in that year.

...

- (8) If, on or after April 1, 1996,
- (a) a holder of a licence for the coastal area, and



(b) each contractor with a replaceable contract that relates to timber harvesting operations carried out under that licence,

agree, the amount of work provided for in any or all of the replaceable contracts referred to in paragraph (b) may be specified in a manner different from that required under this section.

35. Part 5, Division 3 of the Regulation relates to disputes over the amount of work and reads in material part:

### **Division 3 – Amount of work disputes**

#### **Amount of work dispute**

23(1) If the parties to a replaceable contract that relates to a licence for the coastal area have not agreed upon the amount of work to be specified in the contract, and the amount has not been determined in accordance with this section, either party may provide the other with a notice in writing stating the amount of work that party believes should be specified in the contract.

(2) A contractor who receives a notice from a licence holder in accordance with subsection (1) must, within 30 days of receiving the notice

(a) advise the licence holder in writing that it agrees that the amount of work stated in the notice is the amount which should be specified in the contract, or

(b) provide a notice in writing to the licence holder stating the amount of work the contractor believes should be specified in the contract.

(3) A contractor who fails to comply with subsection (2) is deemed to have agreed with the amount of work stated in the licence holder's notice, and the replaceable contract is deemed to be amended to specify that amount of work.

(4) A licence holder who receives a notice from a contractor in accordance with subsection (1) or (2)(b) must, within 30 days of receiving the notice

- (a) advise the contractor in writing that it agrees that the amount of work stated in the notice is the amount of which should be specified in the contract, or
  - (b) make an amount of work proposal.
- (5) A licence holder who fails to comply with subsection (4) is deemed to have agreed with the amount of work stated in the contractor's notice, and the replaceable contract is deemed to be amended to specify that amount of work.
- (6) An amount of work proposal made by a licence holder under subsection (4)(b) must
- (a) be made in writing,
  - (b) be delivered to each contractor who has a replaceable contract to which the proposal relates,
  - (c) describe the nature of the amount of work dispute,
  - (d) state the amount of work that the licence holder proposes to be specified in each replaceable contract relating to the licence,
  - (e) state the amount of work that the licence holder claims it has historically conducted through company operations, and
  - (f) state how the amount of work proposal takes into account the provisions of section 18.
- (7) Repealed. [B.C. Reg. 278/2004, s. 15.]
- (8) If a contractor who receives an amount of work proposal objects to the proposal, the contractor must give written notice to the licence holder within 30 days of delivery of the proposal to that contractor.
- (9) If no contractor who receives an amount of work proposal objects to the proposal in accordance with subsection (8), the proposal is deemed to be accepted, and the replaceable contracts of each contractor to whom the proposal was delivered are deemed to be amended to the extent necessary to implement the proposal.

(10) If a licence holder receives a notice of objection with respect to an amount of work proposal in accordance with subsection (8), a dispute is deemed to exist with respect to each of the replaceable contracts that the proposal relates to and must be resolved by mediation and, if necessary, by arbitration under the system established in Division 2 of Part 4, subject to the following:

(a) the licence holder and each contractor with a replaceable contract to carry out one or more phases of the licence holder's timber harvesting operations under the licence to which the proposal relates must be parties to the mediation and, if the mediation is not successful, to the arbitration, and any reference to "party" and "parties" in Division 2 of Part 4 must be read accordingly;

(b) the licence holder and any contractor with a replaceable contract to which the amount of work proposal relates may commence proceedings by delivering a notice of dispute as provided in section 8(13)(b);

(d) a licence holder or any contractor with a replaceable contract to which the amount of work proposal relates who refers an amount of work proposal to mediation or arbitration must deliver a notice of the time and place of the mediation to each union whose members may be affected by the disposition of the amount of work dispute;

(e) each contractor that is a party to an arbitration regarding an amount of work dispute may make an amount of work proposal;

(f) the arbitration of an amount of work dispute must be conducted by a sole arbitrator;

(g) an arbitrator must resolve a dispute regarding the amount of work to be specified in a replaceable contract having regard to the requirements of section 18;

(h) in adjudicating the dispute, an arbitrator must express the amount of work to be specified in the contract in a manner consistent with the provisions of section 18.

**If no party issues notice to arbitrate**

24 After the end of mediation of an amount of work dispute involving an amount of work proposal made by a licence holder, if the amount of work dispute is not resolved and no party issues a notice to arbitrate within 14 days, the amount of work proposal made by the licence holder is deemed to be accepted and the replaceable contracts of each contractor to whom the proposal was delivered are deemed to be amended to the extent necessary to implement the proposal.

36. It is important to note that this arbitration is not an amount of work dispute as described in the Regulation.

**XI. APPLICABLE LEGAL PRINCIPLES**

37. This matter involves the interpretation of the contract. The parties are in agreement as to the applicable principles of contractual interpretation which were recently summarized by Mr. Justice Baird in *Canaccord Genuity Corp. v. Reservoir Minerals Inc.*, 2018 BCSC 674, at paras. 36-39 as follows:

[36] Contractual interpretation is a matter of practicality and common sense: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 47. I must determine the intent of the parties and the scope of their understanding by “read[ing] the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract” (*Sattva* at para. 47).

[37] The court in *RBC Dominion Securities Inc. v. Crew Gold Corp.*, 2016 ONSC 5529, aff’d 2017 ONCA 648, provided a helpful overview of the law in the context of a fee dispute at para. 52:

- (1) When interpreting a contract, the court aims to determine the intentions of the parties in accordance with the language used in the written document and presumes that the parties have intended what they have said.
- (2) The court construes the contract as a whole, in a manner that gives meaning to all of its terms, and avoids an interpretation that would render one or more of its terms ineffective.

(3) In interpreting the contract, the court may have regard to the objective evidence of the "factual matrix" or context underlying the negotiation of the contract, but not the subjective evidence of the intention of the parties.

(4) The court should interpret the contract so as to accord with sound commercial principles and good business sense, and avoid commercial absurdity.

(5) If the court finds that the contract is ambiguous, it may then resort to extrinsic evidence to clear up the ambiguity.

(6) While the factual matrix can be used to clarify the intention of the parties, it cannot be used to contradict that intention or create an ambiguity where one did not previously exist.

[38] The "factual matrix" referred to in *RBC* and the "surrounding circumstances" referred to in *Sattva* consist only of "objective evidence of the background facts at the time of the execution of the contract...that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting" (*Sattva* at para. 58, citations omitted). This information should not be allowed to overshadow the wording of the agreement: *Sattva* at para. 57.

[39] If I find the FSA to be ambiguous, I may consider what the court in *RBC* called "extrinsic evidence", which goes beyond the "factual matrix", and includes evidence of the contracting parties' conduct subsequent to their execution of an agreement: see *Shewchuk v. Blackmont Capital Inc.*, 2016 ONCA 912. If this extrinsic information is admitted, the Court of Appeal in *Shewchuk* cautioned that it should be given limited weight (see paras. 51 and 52).

38. The plain and ordinary meaning of the contract or a particular provision must be given to the words in a contract unless doing so would result in an absurdity. A decision maker should assume that the words in the contract are there for a purpose, and not to render another of the contract's terms ineffective: *Agfa Photo Canada Inc. v. Overwaitea Food Group Ltd.*, 2008 BCSC 1113 at para. 19.

39. Where the contract is a negotiated commercial document, it should be construed in accordance with sound commercial principles and good business sense. An interpretation that is commercially absurd is to be avoided. An interpretation that promotes commercial certainty is to be favoured: *Athwal v. Black Top Cabs Ltd.*, 2012 BCCA 107 at para. 42.

## **XII. ISSUES**

40. The principle contractual issue to be determined is whether the Contract and the 2014 Logging Plan or the April 2014 Revised Logging Plan established a contractual obligation on Taan to provide a specific quantity of timber to be harvested by Edwards during the 2014 logging year and, if so, what was the quantity of that contractual commitment?
- (a) If it is found that a contractual commitment for a specific volume of timber was made by Taan to Edwards to be harvested in the 2014 logging year, did Taan breach its contractual obligation and, if so, by what volume?
- (b) If it is found that Taan breached its contractual obligation to provide a specific volume of timber for harvesting by Edwards in the 2014 logging year, what contractual damages has Edwards suffered?
41. In the alternative, did Taan make an actionable misrepresentation of the volume of timber it would make available to Edwards to harvest in the 2014 logging year?
- (a) If an actionable misrepresentation of the volume of timber was made by Taan to Edwards, what damages has Edwards suffered?
42. Are Edwards' contractual or tort claims barred by the limitation of liability clause found in the contract's General Conditions at s.27.1?

### **XIII. THE EVIDENCE**

43. This part of the Award sets out my findings of fact based on the documentary and testimonial evidence presented in this proceeding, all of which has been carefully considered. Additional findings of fact are set out in the course of analyzing the issues.
44. Edwards was a well-established, privately owned, unionized logging contractor that operated on the islands of Haida Gwaii between 1971 and 2014. Prior to 2010, Edwards logged on TFL39, a tree farm licence held by Western Forest Products Ltd. and its predecessor licence holders. TFL39 encompassed both Haida Gwaii and roughly 360,000 hectares of land on northern Vancouver Island in the vicinity of Sayward, north Broughton Island and the mainland coast in the vicinity of Powell River and Phillips Arm.
45. In 2003, Edwards harvested approximately 400,000 m<sup>3</sup>, with subsequent annual volumes ranging from 250,000 m<sup>3</sup> to 300,000 m<sup>3</sup>.
46. In 2007, a labour strike limited Edwards' operations, resulting in the grant of protection from its creditors under the *Canadian Creditors' Arrangement Act*, a status which continued until Edwards' bankruptcy in late 2014.
47. Edwards' operations were limited to volume under the Contract until it secured harvesting work with Island Timberlands on Haida Gwaii in 2008, a relationship which continued through 2014.
48. In January 2010, the Haida Gwaii portion of TFL39 was separated to create TFL60, leading to the execution of the Contract.
49. The logging environment on Haida Gwaii is challenging from a geographic, environmental and terrain point of view. It is remote and requires careful planning to ensure that the available local work force is augmented by off island workers and suppliers. Logging on Haida Gwaii is not only subject to

adherence to British Columbia regulatory supervision but also from the Haida Nation through the Haida Gwaii Land Use Objectives Order. While logging on Haida Gwaii is complex and perhaps more difficult than elsewhere in British Columbia, it is not a “Bermuda triangle”. Edwards, with its many years of experience in harvesting on Haida Gwaii, set the profit and risk component of its pricing at 12% which is generally in line with logging throughout the Province.

50. Taan took over management of TFL60 from Western in the late spring of 2010, followed by a formal transfer of TFL60 to Taan in June 2012. The allowable annual cut for TFL60 is approximately 340,000 m<sup>3</sup>.
51. The following harvest volumes for the period 2010-2012 were substantially below the allowable annual cut:
  - 2010: 57,000 m<sup>3</sup>
  - 2011: 107,1800 m<sup>3</sup>
  - 2012: 75,692 m<sup>3</sup>
52. It is common ground that Taan did not prepare any logging plans in respect of TFL60 and logging was performed on an “ad hoc” basis.
53. In these reasons, I shall refer to “logging plans” where that term has been used in the pleadings or in the party’s argument in describing certain documentation. Where that documentation has a written title, such as “production forecast” I shall use that title.
54. In 2013, Taan presented Edwards with a 2013 production forecast identifying approximately 205,770 m<sup>3</sup>, broken down by cutblock and anticipated month of harvest. Edwards ultimately harvested approximately 175,000 m<sup>3</sup> during the 2013 logging year.



55. The production forecast was referred to by Edwards in this arbitration as a “logging plan”. It is important to note that, as compared to what Edwards describes as the 2014 Logging Plan, the 2013 document was prepared by Taan and provided to Edwards at a time when 8 of 12 of the cutting permits required were in hand.
56. In April 2013, Taan presented Edwards with an updated 2013 harvest plan identifying a total of approximately 201,770 m<sup>3</sup> available to Edwards for harvesting.
57. No claim was made by Edwards for the apparent shortfall between the January 2013 production forecast of 205,770 m<sup>3</sup> or the April 22, 2013 updated 2013 harvest of 201,770 m<sup>3</sup> plan and the ultimate volume harvested of 175,000 m<sup>3</sup>. Edwards earned an operating profit of \$986,400.32 in respect of the 2013 logging year.
58. Edwards logged approximately the following volumes for Island Timberlands between 2010 and 2014:
- (a) 70,000 m<sup>3</sup> in 2010;
  - (b) 60,000 m<sup>3</sup> in 2011;
  - (c) 94,804 m<sup>3</sup> in 2012;
  - (d) 106,288 m<sup>3</sup> in 2013; and
  - (e) 96,433 m<sup>3</sup> in 2014.
59. The contractual arrangements between Edwards and Island Timberlands are not in evidence in this proceeding.
60. During the 2013 logging year on February 22, 2013, Mr. Schiller received a letter from Taan’s general manager, Mike Richardson, stating in part:

As communicated to you on previous occasions and reiterated on February 19, 2013 Taan Forest has presented harvesting plans for our activities in 2013. In this plan, we have mutually agreed the volumes projected will dictate E&A's full attentions and efforts.

The purposes of this letter are to confirm your commitments to this plan but also concurrently state Taan Forest's concern regarding the commitment and ability of Edwards & Associates to achieve the 2013 logging plan.

I have had several phone conversations with you regarding the plan and specifically on January 22, 2013 you have indicated that this was a good plan that would keep your crews busy for the coming year. You also said that you had told Island Timberlands that E&A had a full program with Taan and that you did not have the capacity to log their volume. You said that IT had requested a meeting with E&A on January 25, 2013 that was later rescheduled to January 29, 2013.

On January 28, 2013 I emailed you to request that you finish falling Cutblock DAT 006 and to begin falling Cutblock DAT 005 and Cutblock FLO 003. Flo 003 was released to your Supervisor/Dave Jepson on February 1, 2013. At that time I told Dave that the new maps would be ready for DAT 005 early the next week for release.

On February 1, 2013 I called you again because I had heard that your fallers were to begin falling timber for Island Timberlands. You told me that they were not falling for Island Timberlands. I told you that as long as there was wood to fall for Taan Forest you were obligated to meet our needs first. You agreed to this. I asked you then what was your plan regarding Island Timberlands. You told me that you had told Island Timberlands that you may be able to fall timber for them once the amalgamation with Fedge was complete but you did not have the equipment to do their harvesting as it would all be working for Taan Forest. I asked what their plan was for harvesting and you said you didn't know.

I continued to hear the rumors that E&A was going to be harvesting the Island Timberlands volume this year. On February 8, 2013 I called Island Timberlands to see when they thought they might be utilizing the Skidegate sort because I had a customer that wanted to rent it. They informed me that E&A was going to be watering wood within two weeks. I asked when this had come about. I was told that you, Brad Billings and Dave Jepson had met with them on January 29, 2013 and had said that you could meet all of their production requirements for the year.

On February 6, 2013 E&A started falling for Island Timberlands with six fallers, yet Taan's falling needs have not been met. Cutblocks FLO 003 and DAT 005 have not been felled and your hoechucker in FLO 002 is right on top of the fallers. It is our expectation that you will move fallers back into our blocks as you had agreed to.

Taan Forest has worked diligently for the benefit of each of us to get cutting permits and road construction ahead so there are no interruptions in production flow for the year.

As I stated to you on February 19, E&A must meet the volume targets that are identified in the plan. With the recent loss of one grapple yarder and one of your log loaders, all of your current equipment is going to be required to meet these targets.

Therefore, we require confirmation from you by March 1, 2013 that E&A is able to meet the targets identified in the 2013 Logging Plan.

Conversely, if you are unable to commit as such, we require similar confirmations by March 1, 2013 in order for us to proceed with other options to meet our annual requirements.

We will deem a non-response to mean that you are unable to meet our requirements and we will proceed diligently with other options to augment your production shortfalls.

Additionally we will be closely monitoring your production throughout the upcoming months and a failure to meet monthly targets will result in appropriate actions by Taan Forest.

I look forward to your response.

61. It is apparent that Taan was giving notice to Edwards that it expected priority in their efforts in harvesting on TFL 60 to any work that Island Timberlands may have asked them to perform.
62. There is no evidence concerning any reply by Edwards to Mr. Richardson's letter of February 22, 2013 or any "consequences" visited upon Edwards by Taan, given the failure to achieve the forecast volumes in either the January 13, 2013 production forecast or the updated 2013 harvest plan, nor is there any evidence as to any fault alleged by either party in respect of the approximate 31,000 m<sup>3</sup> harvest shortfall.

63. In the fall of 2013, Bernie Zimmermann was appointed As Taan's acting general manager, replacing Mike Richardson. On a balance of probabilities, I find that Mr. Zimmermann was enthusiastic about the prospects of achieving improved volume targets for the 2014 logging year approaching the AAC and made statements to the effect that Taan was going to make at least 300,000 m<sup>3</sup> available to Edwards, and more if Edwards could handle it, for that year.
64. Mr. Schiller acknowledges, in the context of his evidence concerning developing a 2014 logging plan, "at the end of the day, Taan had sole discretion as to what cutblocks it would make available to Edwards."
65. In November 2014, Mr. Zimmermann asked Mr. Schiller and Dave Jepson "if Edwards could come up with a harvesting sequence or "flow" of the cutblocks. Taan's engineering department sent Edwards its available engineering information for various cutblocks on TFL60 on or about November 20, 2013, and Edwards began preparing a proposed harvesting sequence. The engineering information was contained in an untitled document which identified approximately 25 cutblocks marked "E&A" with a total "harvest volume" from those blocks of approximately 475,000 m<sup>3</sup>. Of those cutblocks, cutting permits were available for only 11 blocks with the remainder described as "EC" (engineering complete) or "E" (engineering in progress) for 9 cutblocks with 7 cutblocks marked "WL". As a result, it was obvious to both Taan and Edwards that achieving the hoped for volume was subject to contingencies beyond the control of either Taan or Edwards insofar as once the completed applications for permits were submitted the processing time and permit issue date was up to the Haida Nation and the Ministry of Forests. The ability to harvest on cutblocks was contingent on cutting permits being granted. There was no contractual obligation alleged or argued requiring Taan to obtain cut permits within a specified or "reasonable" period of time. That is not surprising given that once the permit applications were filed, Taan had no control over how promptly the applications might be processed and permits issued.

66. On November 24, Mr. Jepson sent an email to Mr. Schiller advising as follows, based on the information provided by Taan's engineering department:

I've worked on a 2014 block analysis, taken a stab at Taan 2014 forecast for the 300,000 m<sup>3</sup> plus that Mr. Zimmermann has requested, in this sequence we should have the roads developed for harvest.

The spreadsheet also included work anticipated to be performed by Edwards for Island Timberlands during the same period. There is no evidence that this document was ever provided to Taan.

67. A meeting took place on November 27, 2013 among Mr. Schiller, Mr. Jepson, Mr. Zimmermann and Mr. Jones at Taan's Skidegate office. It was at this meeting that Edwards contends that the 2014 logging plan with a volume of "roughly" 341,900 m<sup>3</sup> was agreed to, including volumes by cutblock and sequence of production. Mr. Zimmermann's recollection of the meeting was that there was an agreement "in principle to a flow, or order, of cutblock harvesting that, under a best case scenario, could be how Edwards' operations progressed going forward. ... I did not understand or intend or agree that the forecast was final and binding."

68. Mr. Schiller's evidence about this meeting is as follows:

80. The goal of the meeting was to ensure that there was an efficient order, or "flow", to cutblocks from Edwards' point of view, and to confirm that Taan would be able to meet the corresponding targets for submission, approval, and release of cut permits and road permits, and be able to construct the necessary roads [in] a sufficient time ahead of the harvesting in a specific cutblock.

81. At the conclusion of the meeting we had agreement on a logging plan for TFL60 for the 2014 year that provided for a total harvest volume of roughly 341,900 m<sup>3</sup> across three operating areas – Ferguson, McClinton and Skidegate. These agreed upon numbers and areas were entered into the Edwards Production Spreadsheet and was provided to Taan.

69. These paragraphs give evidence of what Mr. Schiller believed happened as a result of what took place at the November 27<sup>th</sup> meeting. He does not describe what was said by each party which led him to this observation. There was no direct evidence of any commitment or agreement on the part of Taan to any volume at this meeting. Mr. Jepson did not consider that the meeting resulted in any commitments or agreements being made by or reached with Taan. His evidence is like Mr. Schiller's, conclusionary, and does not describe what was actually said or done. Mr. Zimmermann denied making any such commitments or agreements on behalf of Taan. Contrary to Mr. Schiller's statement at the end of paragraph 81 of his affidavit, there is no evidence that the December 19, 2013 "Edwards 2014 Production Forecast", which Mr. Schiller stated encapsulated the 2014 logging plan, was ever provided to Taan.
70. One would have thought that, in the unusual circumstances alleged by Edwards where the "2014 Logging Plan" had contractual force and contained a binding commitment on Taan, Edwards would have sent the "2014 Logging Plan" to Taan with a cover letter or email confirming the alleged agreement and Taan's commitment or even a discussion between Mr. Schiller and Mr. Zimmermann where such an agreement was confirmed. This is particularly so given that under the contract it was Taan, not Edwards, who was to prepare the logging plan.
71. Mr. Schiller addresses this point in his affidavit as follows:
85. While I appreciate, and appreciated then, that the agreement provides that Taan (as licence holder) is to provide logging plans to Edwards (as contractor), I was not concerned that Edwards "had the pencil" in terms of preparing the document setting out the volume or selecting the cutblocks (and timing). The important point was that Taan and Edwards were preparing a logging plan for 2014.
72. Again, this statement has little, if any, evidentiary value. It is presumptive and conclusionary in content and underscores that Mr. Schiller recognized that having a contractor prepare a logging plan was unusual.

73. In his affidavit Mr. Schiller attributes a statement to Mr. Zimmermann that “Taan planned to have the necessary road permits, cutting permits and completed roads in place before harvesting the cutblocks.” Mr. Zimmermann does not contest this, stating that he wanted to have as much timber harvested as was possible. The statement attributed to Mr. Zimmermann does not constitute, nor is it alleged to be, a warranty or representation that all necessary road permits, cutting permits and completed roads would be in place to enable Edwards to harvest all of the cutblocks they wanted to. The statement was no more than Mr. Zimmermann’s hopes. Both individuals knew that the grant of permits was not wholly within the control of Taan.
74. Mr. Jepson, who is no longer employed by Edwards, gave evidence on behalf of Taan. His recollection of the November 27 meeting differs from Mr. Schiller. He recalls that Edwards and Taan agreed on a direction that Edwards would try to work toward, recognizing that there were a number of hurdles that had to be addressed to make the plan happen, such as permits and road construction, which he understood was not entirely within Taan’s control.
75. Mr. Jones was also at the November 27, 2013 meeting. At the time of this meeting he was a contract supervisor for Taan, responsible for supervising contractors including Edwards, ensuring that they followed Taan’s standard operating procedures and were logging according to plan and were following Taan’s FSC certification guidelines. Mr. Jones’ recollection of the November 27 meeting is vague and of limited assistance, expressing conclusions, such as, there was no “definitive 2014 logging plan that guaranteed specific volume that Taan would make available to Edwards,” rather than a recollection of what was said by each participant at the meeting. His evidence is of little assistance in respect of this meeting.
76. Mr. Schiller testified that he received an email from Mr. Jepson on December 19, 2013 attaching a new version of the “Edwards 2014 Production Forecast.” Mr. Jepson stated in his email:

I've attached the 2014 forecast and the revised sequence of the Harvest and road development plan and on the second tab of this sheet is a stab at a falling date forecast for the first quarter that could provide Neminishan [the road builder] with a little guidance.

He also discusses keeping a harvest block described as the "gold block" out of the plan for the first quarter and includes the location by cutblock, timing and volume of harvesting to be performed by Edwards for Island Timberlands. There was no evidence that this email or the attached "Edwards 2014 Production Forecast" or even that portion of the forecast which related to Taan.

77. In his affidavit, Mr. Schiller refers to this document as follows:

The log plan to which we had agreed with Taan (the 2014 logging plan) was encapsulated in that document.

78. As to the "finality" of the volume identified in the document Mr. Schiller describes as the 2014 logging plan, he acknowledges at para. 86 of his affidavit that:

86. There is obviously going to be some variation in logging plans as a given year progresses. That was our experience with Western, and has been our experience in 2013 with Taan. Certain cutblocks may need to be swapped in, or out, as circumstances arises. There may well be some variation between the volume projected and the volume harvested. In my experience, variation around 10% could be expected. However, Edwards had used its best efforts to determine the volumes to be harvested, knowing that we would be held to it. Further, Edwards budgeted its own operations for 2014, and made decisions on staffing and procurement based on the 2014 logging plan. (emphasis added)

79. Mr. Schiller acknowledges that when 2014 started, Edwards was aware that not all of the required permits for road construction and harvesting had been approved by the Ministry. Early into 2014, it was apparent to all that road construction was falling behind, impacting the logging plan sequence as prepared by Edwards.



80. I conclude that there was no meeting of minds with respect to a 2014 logging plan. All that happened was that Edwards prepared a document which set out an “efficient order, or ‘flow’ to cutblocks from Edwards’ point of view...” and with that information both parties proceeded with the 2014 harvest.

81. It is alleged by Edwards that:

The 2014 Logging Plan was developed specifically on Taan’s stated ability to deliver the necessary permits and roads completed as well as numerous other factors.

This statement is not alleged to constitute an actionable representation nor a collateral contract. It is not alleged that Taan was negligent in obtaining the cut permits necessary to log the blocks identified on the November 27, 2013 logging forecast. While it was clear that there were delays in obtaining cut permits, there is insufficient evidence of negligence or misconduct on the part of Taan to support a finding, even if it were made.

82. There is no doubt that tensions existed within Taan concerning the efficiency and effectiveness of the Taan engineering department in terms of preparing cut permit applications in a timely manner.

83. Mr. Zimmermann was cross examined on an email exchange he had in April 2, 2014 with Taan’s CEO, Bob Brash, beginning with a question by Mr. Brash of Mr. Zimmermann concerning the engagement of another manager. Mr. Zimmermann responded with an attack on the “source” who provided the information to Mr. Brash commenting on problems he perceived were limiting the engineering department’s performance in obtaining cutting permits on a timely basis including the following statements:

The “indirect” source that you are hearing from is really aggravating me! If that source were to spend as much energy getting cutting permits approved as there is agitating, creating conflict, discrediting and doing end-runs on management, Taan wouldn’t have lost 2 production months already so far this year (at the very least).

...

There is a general lack of “on the ground” tenure knowledge within the engineering and forestry department, feeding the notion that Taan’s AAC is not achievable. Jeff and Jerome do not get out into the field much. I get the sense that both would prefer to see Taan run at a comfortable snails pace rather than to AAC capacity.

...

Taan’s standard cut block layout procedures are not being followed, therefore we discover at the SP stage, after months of field work has been completed, that the block doesn’t meet LUO standards...something that should have been assessed in the very early stages of layout. Engineered cut blocks are not getting to CP submission stage in a timely manner.

84. The emphasis placed on the contents of this email by Edwards in final submissions was to the end that the fault for failing to achieve either the 341,900 m<sup>3</sup> forecast or the revised 246,000 m<sup>3</sup> forecast was caused by Taan’s inefficient and ineffective engineering department in applying for cut permits in a timely fashion.
85. The position taken by Edwards at the arbitration is somewhat inconsistent with the contemporaneous statements made by Edwards during the course of the logging year as set out in paragraphs 101 and 109 below.
86. On balance, I find that Taan, because of its problems with its engineering, contributed to the delay in obtaining cut permits in a timely fashion, however, it remains to be seen whether that finding gives rise to a basis upon which liability can be imposed on Taan to Edwards in the context of this claim.
87. Another problem arose early in the new year as a result of an over-estimation by Taan’s engineering department of volume on the COW and LYK blocks, creating an under-run of approximately 15,000 m<sup>3</sup>. Mr. Schiller told Mr. Zimmermann that as a result of the under-run and the lack of road access to other cutblocks, Edwards would have to shut down operations.

88. By late February 2014, Taan engineering advised that volume estimates for cutblocks AWN005 and AWN006 had been reduced.
89. In March 2014, Taan provided Edwards with a spreadsheet identifying the status of cut permit and road permit applications with anticipated approval dates.
90. In Mr. Schiller's view, permits and road construction were lagging far behind the schedule on which the "2014 logging plan" had been prepared. In effect, the anticipated dates for cut permits and road construction set out on the Edwards' drafted 2014 "logging plan" were not being met as of April 2014.
91. On or about April 5, 2014, Taan provided an updated engineering report which indicated that the majority of cutblocks listed on the 2014 Edwards 2014 production forecast had not been issued and were still in Taan's engineering department and not yet submitted. This led to a revised schedule of cutblocks to be harvested being prepared by Edwards on May 21, 2014. The total volume anticipated to be harvested was 278,800 m<sup>3</sup>. As with the November 27, 2013 "logging plan" there is no evidence of any contractual commitment by Taan to make this volume available during the 2014 logging year. The document is simply Edwards' plan of what it hoped it might achieve in the balance of the year given the circumstances.
92. During this period, Edwards began to experience cashflow problems and sought financial assistance from Taan. On or about April 17, 2014, Taan agreed to pay certain supplier invoices by way of advances to Edwards, which would then be paid back at \$3 per m<sup>3</sup> from future harvested volumes.
93. Recognizing the production difficulties being experienced by Edwards due to the shortfall of timber available for harvest, Mr. Zimmermann had conversations with his counterpart at Island Timberlands, which resulted in Edwards being assigned and logging approximately 23,000 m<sup>3</sup> in March and April of 2014 for Island Timberlands.

94. In these circumstances, Mr. Schiller states in his affidavit “Edwards further revised its log plans in terms of rates, timing and order to try to maintain a viable and profitable operation for the balance of 2014 (the April 2014 Revised Logging Plan).” The revised total harvest volume was 246,200 m<sup>3</sup>, which to Mr. Schiller appeared to be the largest volume that was possible, given the delays in obtaining permits and road construction and taking into account the inherent challenges of logging in Haida Gwaii. Edwards resumed its harvesting for Taan in May of 2014 with a target of 500 m<sup>3</sup> per day, which according to Mr. Schiller was about half the company’s harvesting capacity. The work was performed in McClinton Blocks 001 and 002 which, according to maps provided at the time by Taan to Edwards, were to be 100% hoe chucking blocks. The assessment of the method of harvesting taken from the maps provided by Taan was not accurate, and more than 25% of the harvest of those of those blocks would require grapple yarding, necessitating additional crews with attendant increases in expenses for room and board and overhead.
95. By May, both Mr. Schiller and Mr. Zimmermann were frustrated by the pace of cutting and road construction permits. In his evidence, Mr. Schiller acknowledged that there were difficulties in the Taan engineering department which contributed to the delay but that ultimately there was very little to be done to speed the process up once the applications were in the hands of the Ministry or the Haida Nation for processing, which was beyond the control of either of the parties. By July 1, 2014, Edwards reduced the anticipated volume to be harvested to 238,003 m<sup>3</sup>.
96. On July 1, 2014, Mr. Schiller sent a letter to Mr. Zimmermann reporting on operational and financial issues facing Edwards, identifying three primary issues:
- (a) manpower – shortages of skilled labor and the need to hire and pay accommodation charges for off island employees;
  - (b) equipment – Edwards’ program to upgrade and repair the equipment was expensive. Edwards requested a short-term loan

of \$150,000 payable at \$1 per m<sup>3</sup> to be repaid from the planned production volume for the rest of the year;

(c) financing/CCAA – in light of the company’s status under the CCAA, it has had no ability to obtain a line of credit, as explained by Mr. Schiller:

I know that you and your staff are doing everything in your power to move ahead on the engineering as well as the approval process and you are making good progress. Edwards & Associates and its staff are trying their best as well to bring the equipment and its people back up to be able to meet your production goals, but we need your help.

I do realize that this may be an unusual request, given the practice in the past, however under the present circumstances we need to find another way which in turn should benefit both parties.

Thank you for giving this request your consideration.

(emphasis added)

97. When he did not have a response to his July 1, 2014 letter by August 13, Mr. Schiller renewed his request for a \$150,000 loan and assistance in paying for out of town employee costs, stating:

We did have abnormal rash of breakdowns and seems that things are settling down but I am sure I could use whatever assistance you can provide at this time. If none is available please let me know either way.

98. No mention was made by Mr. Schiller in this correspondence of an issue with the reduction in volume to be harvested.
99. By September, Edwards was still working in MCL001 and MCL002, which were the only cutblocks permitted and accessible at that time. He sent an email on September 2, 2014 to Mr. Jones asking for news or expected dates on cutting permits for certain blocks. Mr. Jones responded the next day advising that a permit had been issued for one of the cutblocks, applications had been submitted for others and were expected “any day”, while other blocks would be submitted next “as they are for the new year”.

100. On September 12, Mr. Schiller told Mr. Jones that Edwards would have to shut down in October once it had finished its work on MCL001 and MCL002.
101. On October 5, Mr. Jepson sent a series of production forecasts to Mr. Schiller:
- “...that show what we started out with when they first gave us the list of blocks in November 2013 and asked us to come up with a harvest plan for 2014 to where we actually are now as of today. I thought I’d send along a few of the Word forecast sheets (2014 plan and 2014 falling forecast) as they kind of illustrate what we need to be doing where and when in order to facilitate the 2014 plan and how we were forced to change as permits and road development were continually being delayed.”
102. The revised forecast indicated a total volume of approximately 176,900 m<sup>3</sup>.
103. On October 8, 2014, Mr. Schiller, with Edwards’ controller, Brad Billings, met with Kevin Ainsworth at Edwards’ office in Surrey and explained that the planned volume had been decreased by more than 50% which was an amount which was impossible to simply absorb and which wreaked havoc with Edwards because it had based its operations and plans on the original volumes. The meeting was followed by an email from Mr. Schiller to Mr. Ainsworth with what he described as “the highlights of our discussion as of October 8, 2014 at our office in Surrey”, as follows:
- (a) Room and board – costs to be passed on to Edwards for the period May 1, 2014 to September 2014;
- (b) USW settlement indicating that a portion was due to be paid by Taan over the next 60 days;
- (c) Fixed cost – “there is a cost to be borne when stated logging plans/volumes are reduced by a material amount. For 2014, the planned volume has been reduced by more than half. As discussed, we base our operation on the stated plan/volumes. Minor changes are expected, but it is not possible to reconfigure your operation to less than half in a space of a few months. You were shown examples of some of the past practices. These included fixed cost payment of \$9.60 per m<sup>3</sup> (in 2003), or rates negotiated to reflect the actual operating conditions provided. What we request is

that we get together as soon as possible next week to discuss the additional costs of logging incurred due to the 2014 plan changes”;

(d) Inventory advance “...neither the volume, nor the continuous operation was achieved this year, so we are advising you that we require a system of inventory advances.”

104. Mr. Ainsworth responded that the October 10 email “only covered the four financial issues that were raised in the meeting and many other important issues were missed. I was also shocked and a little disappointed to find a retroactive invoice in [the email]. The invoice was not discussed in our meeting and it’s a bit presumptuous and very misleading to represent this invoice as an outcome of the meeting.”
105. Mr. Schiller responded by email of October 21, addressing the operational issues discussed at the October 8 meeting, stating in part:

**Log Plan:** At the start of the Year we were given a plan of 345,000 cubic meters with possibility of more being available. At present it looks like we shall end the Year with 160,000 cubic meters at best.

**What happened:** When the plan was formulated it was based on certain engineering time lines of submissions as well Ministry of Forest approval, unfortunately projected time lines were not met.

**What needs to Happen:** The log plan will need to be based on more conservative time lines for approval and submission.

...

**Engineering:** At the start of the Year the engineering provided us with information on the blocks including volumes, volumes per HA, yarding configuration etc.

**What happened:** The engineering estimates on the volumes specifically in Cow blocks as well as McClinton blocks were dramatically below the projected volume. We all expect variations between estimates and actual but in these cases the volumes were 40% of the projections. This

in turn did throw already tight log plan and development plan into disarray.

**[refer to contract re walking the blocks]**

...

A couple of my observations this Year are

I believe that the engineering is gaining ground and that the approvals are forth coming as there was a great effort by TAAN to beef up their engineering.

...

When there are significant material changes to the plan there are also significant changes to the cost structure.

For the 2014 volume has been reduced by more than half, and the lack of development limited options for the harvesting therefore reducing efficiency and increasing costs. This has happened in the past and we did provide examples of how previous licensees addressed this.

As we near the end of the year, it is apparent that these significant material changes to the plan will not be overcome, and it is time to address the costs issues for 2014.

(emphasis added)

106. On or about November 7, 2014 Taan loaned Edwards \$100,000 for the purposes of working capital in connection with its obligations under the Contract.
107. On November 18, Canada Revenue Agency issued third party demands for amounts claimed to be owed by Edwards. The demands were in error and were withdrawn the next day, however, the demands interrupted certain payments and caused Edwards to miss its payroll. On November 21, 2014, Edwards shut down operations and declared bankruptcy in December 2014.



#### **XIV. DISCUSSION AND CONSIDERATION OF ISSUES**

***Was there a contractual obligation on Taan to provide a specific quantity of timber to be harvested by Edwards during the 2014 logging year?***

108. In my review of the evidence, I found that there was no meeting of minds with respect to a 2014 logging plan. As a result, there was no 2014 logging plan as that term is defined in the contract.
109. While that determines the issue against Edwards, I consider it appropriate to express my finding with respect to whether, if a 2014 logging plan were issued, containing a specific volume to be harvested, the Contract would impose contractual liability on Taan if it failed to provide the specified volume to Edwards for harvest in 2014.
110. Edwards' argument is premised on a reading of ss. 6.1 and 8.6 of the Contract to establish the contractual commitment by Taan to provide a specific volume specified in a logging plan.
111. I do not accept this submission as it is contrary to a reading of the Contract as a whole, particularly in the context of the *Timber Harvesting Contract and Subcontract Regulation*.
112. The legal basis for the contractual claim advanced by Edwards is set out at paras. 42 through 45 of its statement of claim as follows:

#### **VI. LEGAL BASIS: BREACH OF CONTRACT AND MISREPRESENTATION**

##### **A. Breach of Contract**

42. Under the Bill 13 Contract, log plans are agreed to in advance of the season in question, and are to be binding upon the parties. The 2014 Logging Plan was negotiated and agreed to, and formed a binding part of the Bill 13 Contract for logging on TFL 60 in 2014. The rates Edwards and Taan agreed to in 2014 were based on the volumes, schedule and operating environment that Taan agreed to provide in the 2014 Logging Plan. Taan was required to take all reasonable steps to obtain the required permits and

approvals in a timely way so that the commencement or continuation of Edwards' operations would not be affected, i.e.: the operating environment would be that which was agreed to.

43. In breach of the Log Plans, Taan only made available a fraction of the harvest volume it had agreed to provide. While some reasonable scheduling and volume variation over the term of a logging contract is understood and expected in the forestry industry, in this case, Taan repeatedly reduced the logging volume unilaterally, with the result that less than 50% of the agreed upon amount was ultimately made available to Edwards to log. Edwards was required to log the reduced volumes at rates that had been agreed to in respect of far larger volumes, and on the basis of efficiencies dependent upon factors including but not limited to the timely issuance of permits, timely road construction, accuracy of specific logging methods, and the ability to log specific cut blocks at specific times of year. Fixed costs, particularly given the remoteness of TFL 60, however, do not decrease on a straight line basis with volume, and operations could not simply start and stop as certain cut blocks were made available or removed from the logging plan, with the result that the profitability declined precipitously for the volumes actually made available.

44. Further, Taan's consistent failure to have the necessary road and cutting permits in place at required times, or in an otherwise orderly and timely fashion, meant that the volume that was in fact made available could not be logged in an efficient or orderly way. The type of logging to be done at specific times and in specific areas changed, efficiencies in volume could not be realized, and necessary phases of preparation overlapped. This led to higher than necessary operating costs. Ultimately, Edwards turned no profit on the amounts logged.

45. Edwards says that Taan breached the 2014 Logging Plan and thus the Bill 13 Contract, and it is entitled to be put in the position that it would have been had Taan fulfilled its obligations and the 2014 Logging Plan had been properly performed, i.e.: compensation for the loss incurred and payment of the profits that would have been realized.

113. Taan responds in its defence on the contractual issue as follows:

14. The Regulation prescribes certain requirements for replaceable contracts, including that certain contractual terms (or their substantive equivalent) be included in such contracts. The Regulation includes schedules of standard terms that, absent the parties agreeing to the contrary, are conclusively deemed by s. 160 of the *Forest Act* to form part of replaceable contracts. Section 1.1(a) of the Contract expressly incorporates those standard terms, which are attached as Schedule A to the Contract (the “**General Conditions**”).

15. The Contract is volume-based. Section 6.1 of the Contract expressly entitles Edwards to harvest “not less than 34.95% of the total amount of timber processed by the Licence Holder under the Licence in that calendar year...” (the “**Work**”).

16. There is no obligation under the contract that Taan make a minimum volume of work be made available to Edwards in any given year, only that of the total volume harvested by Taan, Edwards must perform at least 34.95% of the total work performed.

17. The express language of the Contract clearly provides that whether and how much timber Taan under the Licence in any given year are discretionary decisions made solely by Taan. This also includes determining the nature, extent and content of any logging plans (see, for example: s.1.1(g), “**Work**”; s.8.6, “...matters relating to such logging plans will be determined by the Licence Holder in its sole discretion...”; General Conditions, ss. 11.1, 12.1).

114. Edwards’ argument is premised on a reading of ss. 6.1 and 8.6 of the Contract to establish a contractual commitment by Taan to provide 341,900 m<sup>3</sup> specified in the logging plan it alleges was agreed to on March 27, as evidenced by the internal “Edwards 2014 Production Forecast” dated December 19, 2013.
115. Edwards contends that as a result of discussions which took place on November 27, Taan, through Mr. Zimmermann, approved the 2014 logging plan prepared by Edwards.
116. Edwards acknowledges that, under the Contract, it is the licence holder which is tasked with the preparation of a logging plan, prior to the commencement of the

logging year setting out the cutblocks to be harvested and the sequence in which the harvest was to be executed.

117. Relying on s. 8.6 of the contract, which states in material part, “All Matters relating to such logging plans will be determined by the Licence Holder in its sole discretion and will be final and binding on the parties to this contract to the extent that such determinations are not inconsistent with the provisions of this contract” (emphasis added), Edwards contends that all elements of the logging plan and in particular the total volume described for harvest in the logging year is a contractual obligation of Taan to Edwards and the failure to provide that volume constitutes a breach for which Edwards is entitled to be compensated in damages.
118. Part 2 of the Regulation imposes obligations on the parties to conform with the Regulation in respect to contracting with each other. It states:

**Part 2 – Written Contracts and Subcontracts Required**

**Contracts and subcontracts must be in writing**

3 (1) Persons entering into a contract or subcontract must do so in writing.

(2) Each of the parties to a contract or subcontract that does not comply with a requirement of this regulation must make reasonable efforts to cause the contract or subcontract to conform to the requirement.

(3) With the consent of the parties or intended parties to a contract or subcontract, the minister may by order relieve those parties from the application of subsection (1) in respect of their contract, subcontract, intended contract or intended subcontract, until a specified date or generally.

119. There is nothing in the Regulation which contemplates an annual harvesting volume being defined in a logging plan.

120. To the contrary, the Regulation, Division 2, specifies the “amount of work to be performed in each year during the term of the contract” is to be specified as follows:

**Division 2 — Amount of Work**

**Amount of work must be specified**

**17** (1) A replaceable contract must specify an amount of work to be performed in each year during the term of the contract.

(2) A replaceable contract must provide that the specified amount of work to be performed in each year of the replaceable contract may not be reduced by a licence holder except as expressly provided for in the regulation or in a clause required, or permitted to be in the contract by this regulation.

121. The mandated method for specifying the amount of work in a replaceable contract, to be performed in the coastal area, is as follows:

**Amount of work for coastal contracts**

**18** (1) Except as otherwise provided in this Part, the amount of work specified in a replaceable contract that pertains to a licence for the coastal area, other than a dedicated phase contract or a volume independent contract, must be expressed as the amount of work required to process an amount of timber where the amount of timber is expressed as a specified percentage of the total amount of timber processed by the licence holder under the licence in that year.

...

(8) If, on or after April 1, 1996

(a) a holder of a licence for the coastal area, and

(b) each contractor with a replaceable contract that relates to timber harvesting operations carried out under that licence,

agree, the amount of work provided for in any or all of the replaceable contracts referred to in paragraph (b) may be specified in a manner different from that required under this section.

122. While it is possible under s. 18(8) that parties might agree that the amount of work in a replaceable contract be specified as a volume of timber, Edwards did not contend that the volume commitment it alleges under the Contract comes within the ambit of s. 18(8). Clearly that argument is not open to Edwards as the amount of work provision, as mandated by s. 18(1), is in the Contract.
123. In effect, Edwards' argument is that the volume commitment arising out of a logging plan provides a "floor" of volume contractually committed by the licence holder to the contractor on an annual basis in addition to the commitment to provide at least 34.95% of the total amount of timber processed by the licence holder under the Licence in that calendar year of the term.
124. This contractual commitment arising from a Logging Plan's description of a total volume is not one which is to be negotiated between the parties but rather one which is set by the licence holder under its authority to unilaterally create a logging plan. It is not clear whether the volume attributed to the individual blocks would give rise to a similar contractual commitment on a block by block basis. It is also important to note that based on the definition of "Logging Plan" there is no requirement to even state volumes by block or in the aggregate.
125. Further, the Regulation does not provide any mechanism to resolve disputes between the parties concerning the unilateral imposition of a volume under the logging plan or the consequences which may flow from the failure to attain that volume. This is particularly telling given that the Legislature, in enacting the Regulation, has provided for mechanisms to resolve disputes between the parties at the various points where disputes may arise.
126. For example, where the parties have not agreed upon the amount of work to be specified, Division 3 of the Regulation provides a mechanism by which one of the parties may state "the amount of work that party believes should be specified in the contract", which notice precipitates a dispute resolution process (an amount of work dispute). Under this process an amount can be achieved by

agreement, by default of a party in responding to the notice in a timely fashion, by mediation or through arbitration.

127. As noted above, this is not an amount of work dispute under Division 3 of the Regulation. That is not a surprise given that the parties have in fact agreed upon the amount of work in s. 6.1 which states:

“Not less than 34.95% of the total volume of timber processed by the licence holder under the Licence in that calendar year of the Term...”

128. Logging Plans do not deal with volume but rather with work. Logging Plan is defined in the Contract as follows:

“**Logging Plans**” means the plans prepared by the Licence Holder from time to time to specify Work that will be performed by the Contractor in the Area of Operation;”

129. Under this definition, Taan was obligated “from time to time to specify work that will be performed by” Edwards.

130. “Work” is defined as:

“**Work**” means the falling, bucking, limbing, topping, yarding, loading and hauling to the dryland sort at Ferguson/Skidegate/Dinan/McClinton (or to such other area as designated by the Licence Holder) and sorting and sealing of all merchantable, accessible and loggable timber and logs standing, lying and being on such parts of the Area of Operation as are determined by the License Holder in its sole discretion from time to time during the Term on notice to the Contractor pursuant to the License Holder’s Logging Plans, and will include all equipment and crew mobilization and de-mobilization, brush piling, road grading, maintaining the flow of culverts and ditches concurrent with harvesting and temporary and season road de-activation required for or in relation to such services, all subject to Part 6 of this Contract and as more fully described herein, including section 8.16. Construction of logging roads and related improvements is specifically excluded from the Work and will be performed by other contractors.

131. The definition of Work describes the means and activities involved in harvesting and processing for a particular contract year and makes no reference to volume. It is the means and activities involved in harvesting and processing the timber described in the Logging Plan which, pursuant to s. 8.6 of the Contract, is “final and binding on the parties...”
132. The inclusion of volumes, on a block-by-block basis and cumulatively in a logging plan “determined by the Licence Holder in its sole discretion” does not give rise to a contractual obligation to provide those volumes – either individually by block or collectively – binding on the parties.
133. The only contractual commitment for an amount of work is found in s. 6.1 of the Contract and nowhere else.
134. This analysis is consistent with the scheme of the contract as mandated by the Regulation. As noted above, the contractual commitment to volume arising out of the unilaterally-set logging plan, does not have a follow on dispute resolution process either in the Contract or the Regulation. For example, General Condition 12 of the Contract concerns “change in operation” such as harvesting methods, areas of operation, changes in specification and regulatory changes affecting the work. This section provides mechanisms available to the parties when changes in operation are considered to be “substantial” including access to rate reviews and contract termination by the contractor.
135. General Condition 15 provides for differing amount of Work. This provision provides a process to provide relief to Taan to allocate less than 34.95% of the total cut to Edwards provided that certain proscribed conditions are met.
136. On a reading of the Contract as a whole, together with the Regulation, it is apparent that the contractual relationship between the contractor and the licence holder is highly regulated with points of dispute anticipated and resolution procedures provided for in the Contract as mandated by the Regulation. The



proposed contractual interpretation asserted by Edwards is inconsistent with the contractual scheme and framework under the legislation and Regulation.

137. To accept the interpretation advanced by Edwards would be inconsistent with this regime. For example, if there was a dispute over liability for a shortfall in the volume total in the initial Logging Plan and what was made available during the logging year, one would have expected a dispute resolution process similar to the other processes found in the Regulation to be available to the parties for that type of dispute.

***Is Taan liable to Edwards for the misrepresentations alleged?***

138. Edwards alleges that:

(a) Taan represented to Edwards in December 2013 that it would provide Edwards with 341,900 m<sup>3</sup> to log in 2014 on the terms set out in the 2014 logging plan which included a schedule for availability of specific cutblocks and dates at which permits would be received and roads would be completed; and

(b) In April 2014 that it would provide 246,000 m<sup>3</sup> to log in 2014.

139. Edwards pleads that these representations were made with the intention that Edwards would rely on them when entering into agreements with Taan in respect of logging rates, determining the order in which certain areas would be logged, and other logistics, but also in terms of its larger plans regarding equipment upgrades and other work it did not take on.

140. Counsel for both parties agree that a successful action for negligent misrepresentation requires the following:

- (a) A duty of care based on a “special relationship” between the representor and the representee;
- (b) an untrue, inaccurate, or misleading representation;
- (c) negligence, on the part of the representor, in making the misrepresentation;

(d) reasonable reliance, by the representee, on the negligent misrepresentation; and

(e) a detriment (that is, damage) to the representee, resulting from the reliance.

*Sharbern Holding Inc v Vancouver Airport Centre Ltd.*,  
2011 SCC 23 at para. 121

141. In considering the evidence, I have serious doubt as to whether a duty of care based on a “special relationship” existed between Edwards and Taan or that there was negligence on the part of Taan in making the alleged misrepresentations, however, as will be discussed below, I have found that, on the evidence, Edwards has not established that an untrue, inaccurate or misleading representation was made. As outlined above, I have found that Edwards 2014 Production Forecast described by Edwards as the “2014 Logging Plan” in this arbitration did not create a contractual commitment to provide Edwards with 341,900 m<sup>3</sup> to log in 2014. The evidence is clear that Taan wished to log 340,000 m<sup>3</sup> or more in 2014 but did not make a representation that it would provide either the 341,900 m<sup>3</sup> or the 246,000 m<sup>3</sup> alleged.
142. In November, when Taan provided the engineering information in the document described as the “2014 Logging Projection” it was conveying nothing more or less than the current status of cutblocks that might be available for harvesting during the 2014 logging year with a description of the status of cutting permits which indicated that only a minority had been approved, while other were either in progress or anticipated for submission. There is no mention of when or how long it would take for the permits to be prepared, processed and granted nor, on the evidence, was Taan in a position to provide any reliable information as to that timing.
143. The document does not identify the status of road permits or applications nor the order for construction. Notwithstanding this limited information, Edwards at Taan’s request prepared what they felt was a workable order for the work which

it described as “Edwards 2014 Production Forecast”. There was no express or overt representation that 340,000 m<sup>3</sup> would be made available during the 2014 harvest year. The Edwards 2014 Production Forecast prepared by Mr. Jepson on or about December 19, 2013 identified 341,900 m<sup>3</sup> for harvest. There is no evidence that that document was provided to Taan or that it adopted the calculation prepared by Edwards.

144. Mr. Jepson’s evidence is consistent with my finding that no representation was made. Mr. Jepson, who was responsible for planning Edwards’ work program, considered the “raw engineering information” provided by Taan, identified “the status of blocks that had been approved to that point, as well as those Taan hoped to develop in the upcoming months.” He testified that Mr. Zimmermann asked him to develop the best plan for Edwards’ business, which he did with his understanding that it was not a guarantee as to how Edwards’ operations would proceed in 2014 because “I understood further that any planning, whether developed by Edwards or Taan was contingent on factors such as weather, permits, road construction and First Nations approval.” He considered the engineering information provided as being “optimistic, and would be really a stretch to achieve” and that he “did not rely on the information as a firm commitment by Taan to provide a specific volume of work to Edwards”, and that he “had doubts about whether the anticipated volume was achievable.”
145. I accept Mr. Jepson’s evidence as to the circumstances in which the discussions took place about the November 20 engineering data provided to Edwards by Taan and the internal Edwards 2014 Production Forecast document which he prepared was simply an effort to work on a collaborative approach in undertaking the 2014 harvest.
146. Mr. Schiller’s testamentary evidence concerning the alleged representations does not describe express statements, whether in writing or orally, which could prove the making of a representation. At best, his evidence is conclusionary. For example, he states at paragraphs 80 and 81:

The goal of the (November 27) meeting was to ensure there was efficient order, or “flow” to cutblocks from Edwards’ point of view, and to confirm that Taan would be able to meet the corresponding targets for submissions, approval and release of cut permits and road permits, and be able to construct the necessary roads a sufficient time ahead of harvesting in a specific cutblock.

At the conclusion of the meeting, we had agreement on a logging plan for TFL 60 for the 2014 year that provided for a total harvest volume of roughly 341,900 m<sup>3</sup> across three operating areas.

147. As noted above, the representations alleged include not only the volume but also “a schedule for availability of specific cutblocks, and dates at which permits would be received and roads would be completed” was information not included in the engineering data of November 20 nor was there evidence of such statements being made orally by Mr. Zimmermann or anyone else with Taan to Edwards. Practically speaking, as is apparent from the November 20 Taan engineering data, it would not possible to make such representations because of the lack of apparent progress with respect to permits and roads for a majority of the cutblocks. In this context, any professed reliance would be unreasonable.
148. In his direct evidence, Mr. Schiller testified as follows:

When developing the 2014 Logging Plan with Taan, we had discussed with them whether the dates were “hard” dates, or whether there would be some variance in the timing. We were consistently told by the Taan representatives at these meetings, whether it was Berni Zimmermann, or Jerome Benoit, or another, that the dates in the 2014 Log Plan would vary at most by a couple of weeks. All of this was factored into the plan. At these meetings, Taan was assuring us of their ability to deliver not only the cutting permits, but the road development as well.

149. This evidence is disputed by Mr. Jepson, Mr. Schiller and Mr. Jones. I find it is unreliable because there is no evidence that a document embodying the “2014 log plan” was ever provided to Taan so as to enable either Mr. Zimmermann, Mr. Benoit or others with Taan to comment on the dates for road construction

and permits which were not stated and could only be inferred from that plan, if that was even possible.

150. The same analysis applies to the misrepresentation plea relating to the April 2014 representations. In the result, I find that neither of the alleged representations set out in paragraphs 46 and 49 of the statement of claim have been proven.

***Are Edwards' contractual and tort claims barred by the limitation of liability clause found in the Contract, General Conditions, Section 27.1?***

151. Section 27.1 of the General Conditions states as follows:

**Limitation of Liability**

27.1 Notwithstanding anything else in this Contract, the Licence Holder and its respective officers, directors, employees, consultants and agents will not be liable to the Contractor or anyone claiming through or under it, whether by way of indemnity or by reason or breach of contract or in tort, including liability for negligence and breach of statutory duty, or on any other legal or equitable basis for

(a) special, indirect or consequential loss or damage,

(b) loss of present or prospective profits, overhead, expenditures, investments, or commitments made in connection with this Contract or on account of any other reason or cause, or

(c) loss of any contract or other work that may be suffered by the Contractor or its Workers.

152. In light of my findings on liability in contract and tort, it is not necessary for me to deal with the other issues including the applicability of the limitation of liability clause.

**XV. COSTS OF THE ARBITRATION**


153. The Respondent, Taan Forest Products Limited, is entitled to its costs as described in Rule 41(4) of the *Domestic Commercial Arbitration Rules of Procedure*. In the event that the parties have reached a different agreement on costs or there are matters affecting the award of costs of which I am not aware, I reserve my jurisdiction to reconsider the order for costs upon being notified by either party within 30 days of this Award.
154. The quantum of costs is to be either agreed by the parties, failing which they may apply for directions as to the manner of determining the quantum of costs.

**XVI. PARTIAL FINAL AWARD**

155. The claims of Edwards & Associates Logging Limited made in this arbitration are dismissed.
156. Taan Forest Products Limited Partnership is entitled to be paid its costs by Edwards & Associates Logging Limited on the terms described herein.
157. I reserve jurisdiction to further consider the award of costs and quantify the amount of costs awarded.
158. This is my Partial Final Award.

**THIS IS MY PARTIAL FINAL AWARD.**

Dated at Vancouver, British Columbia, this 31<sup>st</sup> day of October, 2018.

  
Murray A. Clemens, Q.C., FCI Arb.

**BCICAC File No.: DCA-1866**

**IN THE MATTER OF AN ARBITRATION PURSUANT TO**

A Replaceable Full Phase Logging Contract for Tree Farm License 60 dated July 28, 2010  
(the "Contract")

**AND**

s. 8 of the *Timber Harvesting Contract and Subcontract Regulation*,  
promulgated pursuant to the *Forest Act*, R.S.B.C. 1996 C. 157

BETWEEN:

EDWARDS & ASSOCIATES LOGGING LIMITED

CLAIMANT

AND:

TAAN FOREST LIMITED PARTNERSHIP

RESPONDENT

**CORRIGENDUM to PARTIAL FINAL AWARD**

**ARBITRATOR: MURRAY A. CLEMENS, Q.C., FCIarb**

**Counsel for the Claimant, Edwards & Associates Logging Limited**

**Attention: Mark Fancourt-Smith and Anna Paczkowski**

Lawson Lundell LLP

1600 Cathedral Place

925 West Georgia Street

Vancouver BC V6C 2L2

**Counsel for the Respondent, Taan Forest Limited Partnership**

**Attention: Mark S. Oulton and Nicole C. Gilewicz**

Hunter Litigation Chambers

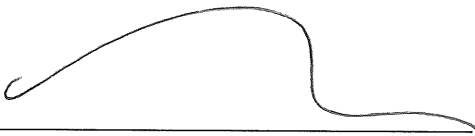
Suite 2100 – 1050 West Georgia

Vancouver BC V6E 4H1

**HEARING: July 24-27, 30-31 and August 15, 2018**

**DATE OF CORRIGENDUM: November 8, 2018**

159. This is a corrigendum to my partial final award dated October 31, 2018.
160. Paragraph 16 is corrected to replace “Taan” with “Edwards”.
161. Paragraph 63 is corrected to replace “Mr. Richardson” with “Mr. Zimmermann”.
162. Paragraph 115 is corrected to replace “Mr. Schiller” with “Mr. Zimmermann”.
163. Paragraph 124 is corrected to replace “value” with “volume”.
164. Paragraph 141 is corrected to replace “Taan” with “Edwards”.
165. All references to “Mr. Zimmerman” in the award are corrected and replaced with “Mr. Zimmermann”.



Murray A. Clemens, Q.C., FCI Arb.