

IN THE MATTER OF an arbitration pursuant to
the *Timber Harvesting Contract and Subcontract Regulation*

BETWEEN:

WEYERHAEUSER COMPANY LIMITED

LICENCE HOLDER

AND:

**TRI-VALLEY CONSTRUCTION LTD., DENNIS COOK HOLDINGS LTD.,
JEBWAY CONTRACTING LTD., G.R. (MAC) LIND LOGGING LTD.**

LOGGING CONTRACTORS

ARBITRATION AWARD

SOLE ARBITRATOR:	Paul J. Pearlman, Q.C.
DATE OF AWARD:	March 30, 2006
COUNSEL FOR WEYERHAEUSER.:	Mr. Dev Dley Law Corporation 202 - 180 Seymour St. Kamloops, BC V2C 2E3
COUNSEL FOR TRI-VALLEY CONSTRUCTION LTD., DENNIS COOK HOLDINGS LTD., JEBWAY CONTRACTING LTD.	Mr. John M. Drayton Gibraltar Law Group #102 - 418 St. Paul Street Kamloops, BC V2C 2J6
COUNSEL FOR G.R. (MAC) LIND LOGGING LTD.:	Mr. Robert R. Wicks 213 Vermilion Ave. Box 760 Princeton, BC V0X 1W0

IN THE MATTER OF an arbitration pursuant to
the *Timber Harvesting Contract and Subcontract Regulation*

BETWEEN:

WEYERHAEUSER COMPANY LIMITED

LICENCE HOLDER

AND:

**TRI-VALLEY CONSTRUCTION LTD., DENNIS COOK HOLDINGS LTD.,
JEBWAY CONTRACTING LTD., G.R. (MAC) LIND LOGGING LTD.**

LOGGING CONTRACTORS

ARBITRATION AWARD

The Issue

1. The issue on this arbitration is whether Weyerhaeuser Company Limited (the “Company” or “Weyerhaeuser”) may demand, pursuant to its replaceable Wood Services Agreement with each of the Respondent Contractors, that they install Multi-Dat recording devices on their core production logging equipment, and provide to the Company reports containing the machine utilization data recorded by the Multi-Dats and sought by Weyerhaeuser in this case.
2. The Multi-Dat is a data recorder which may be mounted in the cab of a feller-buncher, skidder, processor, or any other piece of logging equipment. The device records machine activity. It has the capability to permit entry of operator codes, to distinguish between different machine operators; activity codes, to record different phases of the logging operation; and stop codes, to identify non-productive time. By use of a hand-held transfer shuttle, such as a Personal Data Assistant, information may be periodically downloaded from the Multi-Dat, and then used to generate an equipment utilization report.
3. The reports sought by Weyerhaeuser in this case would show machine utilization by phase, and identify, by phase, any opportunities for Weyerhaeuser to remove bottlenecks or constraints on the efficient use by the Contractors of their production equipment.

4. Weyerhaeuser originally sought to have the Contractors provide reports showing how they intended to improve their own equipment utilization. However, the Company withdrew that request before the arbitration hearing. At the arbitration, Weyerhaeuser took the position that it would leave it to the Contractors to take such steps as they saw fit to improve machine utilization, based on their own analysis of the Multi-Dat data. The form of equipment utilization report which Weyerhaeuser seeks from each of the Respondent Contractors (Exhibit 3) is attached as Schedule A to my Award.

5. I have concluded that the terms of the replaceable Wood Services Agreement in force between the Company and each of the Respondent Contractors authorize Weyerhaeuser to require the installation of the Multi-Dat devices, and that by necessary implication, Weyerhaeuser is entitled to obtain from each of the Respondents the equipment utilization data, and the form of summary utilization report that it seeks in this case.

The Parties

6. Weyerhaeuser is a licence holder within the meaning of the *Timber Harvesting Contract and Subcontract Regulation*, B.C. Reg. 22/96 as amended by B.C. Reg. 278/2004. Each of the Respondents, Tri-Valley Construction Ltd., Dennis Cook Holdings Ltd., Jebway Contracting Ltd. and G.R. (Mac) Lind Logging Ltd. hold replaceable logging contracts with Weyerhaeuser. Pursuant to those contracts, each performs stump to dump timber harvesting services for the Company, and has done so for many years. Each Contractor is a party to Weyerhaeuser's standard form of Woods Services Agreement (BC Interior).

Relevant Terms of the Contract

7. The Agreement made between the Company and Dennis Cook Holdings Ltd., dated April 1, 2005 (Exhibit 1, Tab 4), contains the following provisions relevant to this dispute:

1. **Definitions:** In this Agreement, the following terms shall have the following meanings unless the context otherwise requires:
 - (a) **“bona fide business and operation reasons”** includes but is not limited to
 - short, medium and long-term economic concerns;

- inability to generate profit or cover costs of operations;
- health and safety concerns;
- any situations where in the opinion of management curtailment or suspension of any part of the Company’s operations is required;
- temporary or permanent shut down of a Company mill; and
- factors beyond the reasonable control of the Company including act of God, fire, flood, natural catastrophe, act of public enemy, war, insurrection, riot, sabotage, vandalism, authority of law (including injunction whether actual or threatened), fire or explosion, lock-out, strike or other labour dispute, derailment or road closure.
- in the opinion of the Company, acting reasonably, the contractor is or will be unable to complete the Work in the time required.

(emphasis added)

... ..

- (e) **“reasonable notice”** for the purposes of subsections 3(a) and 5(b) and section 11 means the minimum period of time within which a reasonable contractor could be expected to respond to the notice and shall not exceed thirty (30) working days unless in the reasonable opinion of the Company, a longer notice period is warranted.

... ..

- (i) **“significant default”** when referring to a default by the Contractor, includes a default by the Contractor which results in increased cost to or decreased efficiency of the Company or which involves a failure by the Contractor to comply with any law, legislation, regulation, procedure, standard, guide, field guide, policy, procedure, permit, plan or licence referred to herein.

... ..

2. **Work**

- (a) **“Work”**, unless otherwise specified in this Agreement or in Schedule I or both, means all activities, including any ancillary activities identified in Schedule I, required for the harvesting and

delivering of logs to destinations identified by the Company to the Contractor, including providing all machinery, equipment and personnel and removing them at the end of the term of this Agreement. Work is deemed to include both Replaceable Work and Non-Replaceable Work.

- (b) The amount of Replaceable Work shall be as set out in Schedule II. The amount of Replaceable Work can be adjusted from time to time as otherwise provided herein or as provided in the Forest Act or the Regulation.

... ..

3. **Changes**

- (a) Subject to subsection (b), the Company 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:

- (i) use timber harvesting methods, technology or silviculture systems that are different than those historically used by the Contractor under the Agreement;
- (ii) move to a new operating area;
- (iii) comply with different operating specifications of the Company;
- (iv) 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;
- (v) suspend its operations under this Agreement.

and the Contractor will comply with the requirements.

- (b) Despite subsection (a), if a requirement made by the Company under subsection (a) results in a substantial change in the timber harvesting services provided by the Contractor, the Contractor may, within 60 days of receiving notice of the requirement, and by written notice, to the Company, terminate the Agreement without liability for the termination to the Company.
- (c) If a requirement is made under subsection (a) and the Contractor does not elect to terminate this Agreement under subsection (b),

either party may, within 30 days of the Contractor receiving notice under subsection (a), request a review of the rate then in effect.

(emphasis added)

7. **Term:** The term of this Agreement shall be 5 years beginning on the date first written above.

... ..

14. **Obligations of the Contractor:** The Contractor shall:

- (a) Safely, diligently and continuously perform the Work;
- (b) Subject to any schedule, harvest and manufacture logs in strict conformance with:
 - Schedule I: Part I “Harvest and Haul Rates”
 - Schedule I: Part II “Logging Plan”
 - Schedule I: Part II “Road Standards”
 - Schedule I: Part IV “Contractual Obligations” attached hereto and
 - the Company’s “Log Quality Guide” as amended from time to time by the Company;
- (c) Comply and ensure its employees and subcontractors comply with:
 - (i) Safe, good and established practices in carrying out the Work,
 - (ii) any applicable cutting permit, plan, permit or agreement,
 - (iii) any instructions provided by the Company,
 - (iv) the terms and conditions of this Agreement including schedules,
 - (v) the standards and requirements of any governmental authority having jurisdiction including without limitation the Workers’ Compensation Board,
 - (vi) all applicable legislation including without limitation the *Forest Act*, the *Forest and Range Practices Act*, the *Wildfire Act* and their regulations and standards, thereunder

and any applicable plans, permits or licences issued pursuant thereto;

- (d) Adequately supervise and train all of its employees and subcontractors to ensure its operations and those of its subcontractors are conducted in a first class safety manner and to ensure understanding and compliance with all Company and Workers Compensation Board safety measures and with all legislation applicable to the Work including, without limitation the *Forest and Range Practices Act* and the *Wildfire Act*, and make evidence of such training available for review by the Company prior to execution of this Agreement and otherwise upon request;
- (e) Maintain and keep all such books, logs and records as are required by law or may reasonably be required by the Company to evidence compliance with this Agreement, including a list of contraventions of any forest practice, and make these available for review by the Company prior to execution of this Agreement and otherwise upon request. For certainty such records shall include contraventions by the Contractor whenever and wherever they shall have occurred, including when performing work other than the Work;

... ..

- (i) Perform the Work and maintain any “multiple-employer workplace” associated with is performance of the Work in a manner that will ensure that the Company is in compliance with its obligations under Part 3 of the *Workers’ Compensation Act* as an “owner” towards all persons at or near the multiple-employer workplace, and is in compliance with its obligations under Part 3 of the *Workers Compensation Act* as an “employer” towards all persons who are not employees of the Company;

... ..

- (l) The Contractor shall be the “prime contractor” for purposes of Part 3 of the *Workers Compensation Act* in respect of any “multiple-employer workplace” associated with the Contractor’s operations under this Agreement. The Contractor has reviewed, and is familiar with, the *Workers Compensation Act* and the *Occupational Health and Safety Regulation* made pursuant to that Act (the “OHS Regulation” for purposes of this section), and is qualified to serve as the “prime contractor” in respect of any “multiple-employer workplace” associated with the Contractor’s operations under this Agreement, in accordance with s. 20.1A of the OHS Regulation. The Contractor will immediately advise the Company if, for any reason, it becomes unqualified to serve as the

“prime contractor” in accordance with s. 20.01A of the OHS Regulation. In this section, the “prime contractor” and “multiple-employer workplace” have the same meanings given to those terms under Part 3 of the *Workers Compensation Act*.

... ..

21. Independent Relationship: The Contractor is an independent contractor. Subject to compliance herewith, the Contractor is fully responsible for the manner in which the work is carried out. Except as required by law, the Company is under no obligation to extend or renew this Agreement before, at or after its expiry, or to award or offer the Contractor other contracts, agreements or work. The Contractor has not relied on any representation, promise or commitment other than those specifically set out in this Agreement. In entering into any obligations, whether to lenders, equipment suppliers or others, the Contractor relies solely on the contractor’s own judgment. The Contractor understands and acknowledges that the Contractor alone is liable for any such obligations and that these obligations are in no way guaranteed or backed by the Company.

(emphasis added)

The following numbering is done with the Awards & Factums (Alt na) macro. The numbered paragraphs use List Number styles (shortcuts Alt p1 to Alt p8).

8. Each of the Respondent Contractors is party to a Replaceable Wood Services Agreement with the Company containing identical terms.

Positions of the Parties

9. Weyerhaeuser maintains that in order to improve its competitive position in relation to other major licence holders operating in the British Columbia interior, and maintain the economic viability of its business, it must improve the overall efficiency of its operations. The Company has shut down three interior saw mills since 1998. Mr. Bob Taylor, the General Manager for Weyerhaeuser’s interior operations, testified that while the Company’s log costs have increased since 1997, the amount Weyerhaeuser recovers on the lumber it sells is no more than it was in 1997. Log costs represent a substantial percentage of the Company’s total saw milling costs. While Weyerhaeuser cannot control lumber prices, or currency exchange rates, it does want to improve the efficiency of log production. The Company contends that use of the Multi-Dat technology provides a means for measuring production logging equipment utilization

and of identifying, for both Weyerhaeuser and the Contractors, ways and means of maximizing the Contractors' productive utilization of their logging equipment. That, contends Weyerhaeuser, will ultimately reduce the costs per cubic metre of timber delivered to the mills. Simply put, the Company says that its concerns about improving its competitive position are legitimate "short, medium and long term economic concerns" that constitute a bona fide business reason for requiring the installation of the Multi-Dats. Weyerhaeuser argues that paragraph 3(a)(i) of the Wood Services Agreement entitles the Company to require the Respondents to install these devices, and to provide the machine utilization data now sought by Weyerhaeuser.

10. The Contractors submit that because this technology is neither a new timber harvesting method, nor related to new silviculture systems, it does not fall within paragraph 3(a)(i) of the Woods Services Agreement, properly construed. Further, the Contractors say that Weyerhaeuser's efforts to compel them to install this technology on their machines and to provide the equipment utilization data, constitutes an unwarranted intrusion on their rights as independent contractors. The Respondents argue that as independent contractors, they may perform timber harvesting services for the Company using the equipment they choose, in the way they see fit, in order to harvest the volumes of timber they have each contracted to log annually. The Contractors also perceive Weyerhaeuser's requirement for the installation of this technology as the "thin end of the wedge", in terms of its capability to record and produce information concerning the relative efficiencies of individual machine operators. They say paragraph 3 of the Wood Services Agreement should not be construed in such a way as to permit Weyerhaeuser to interfere with the Contractors' right to manage their own work force, or to intrude upon the privacy of the Contractors and their employees. The Contractors also express concerns that the Multi-Dats, which prompt the machine operator to enter a stop code to record the reason why a machine is not in motion each time that it stops, will impose an additional, and burdensome level of stress on their operators.

The Hearing

11. At the outset of the arbitration, the parties requested that they use the first day of the hearing to attempt to mediate a resolution to this dispute. The mediation was unsuccessful.

However, following the mediation, all parties agreed that facts stated by them during joint sessions would be treated as evidence for the purposes of the arbitration.

12. At the commencement of the actual arbitration hearing, Weyerhaeuser produced Mr. Bob Taylor, its General Manager for interior operations, and its principal spokesperson during the mediation, for cross-examination by the Contractors' counsel. In addition, Weyerhaeuser called Mr. Merl Fitchner, its Kamloops Lands Manager, to explain and demonstrate the Multi-Dat device.

13. The Contractors elected to call no evidence, beyond the information they provided during the course of the mediation.

The Facts

14. Mr. Taylor, who also manages Weyerhaeuser's operations in New Brunswick, explained that the Company has used the Multi-Dat technology in New Brunswick since 1999, and in Ontario since 2001. He testified that in New Brunswick, when the Multi-Dats were first installed on contractors' logging equipment, the results showed that the contractors in question were utilizing their equipment at about 65% of available machine hours. Since then, according to Mr. Taylor, use of the Multi-Dat has been instrumental in increasing the contractors' rates of equipment utilization, and reducing costs.

15. Mr. Taylor testified there are now about 2,000 Multi-Dat units in operation across Canada, in both company saw milling and logging operations, and on equipment owned and operated by Weyerhaeuser's logging contractors. According to Mr. Taylor, in New Brunswick, the contractors who have installed these devices are now doing their own time and motion studies to determine how they can improve their productivity.

16. In British Columbia, Weyerhaeuser and its successor, Cascadia, have installed Multi-Dats on 22 pieces of production machinery operated by company crews on the British Columbia coast, on Tree Farm Licences 44 and 39. In addition, contractors of Weyerhaeuser, other than the Respondents in this proceeding, operating in the Okanagan area, have agreed to the installation of 29 Multi-Dat units. Apparently, these units, which were introduced with a new

software package, went through teething problems, and have only recently begun to produce reliable information.

17. Through the use of the Multi-Dats, Weyerhaeuser anticipates that equipment utilization rates will increase and that, where the data generated by the Multi-Dats shows under utilization of logging production equipment, it will assist in identifying whether that under utilization is attributable to problems at Weyerhaeuser's end, or at the Contractor's end. Ultimately, Weyerhaeuser hopes to establish a local utilization standard based on local conditions.

18. The Respondent Contractors were not reassured by this evidence. They maintain that their operations are already efficient. They suspect that Weyerhaeuser is attempting to micro-manage their operations, and question how much more room there is for improvement in their own equipment utilization. The Contractors also fear that information derived from the Multi-Dats will be used by Weyerhaeuser in rate negotiations, to their disadvantage. It is evident that these Contractors, at this stage, trust neither the technology, nor the uses to which the Company will put the data the Multi-Dats generate.

19. In cross examination, Mr. Taylor was asked about previous initiatives by Weyerhaeuser to have contractors adopt new timber harvesting equipment. He referred to the change to roadside systems of loading. In that case, Weyerhaeuser went to the contractors, discussed what the Company wished to do, sought their input, and in most cases, obtained agreement from the contractors to acquire and use new roadside loading equipment. However, Mr. Taylor emphasized that the change to roadside loading was Weyerhaeuser's decision, although the selection of the particular pieces of equipment purchased by the contractors to perform the roadside loading was ultimately their decision. The change to roadside logging was a clear example of a change in timber harvesting methods required by Weyerhaeuser and falling within paragraph 3(a)(i) of the Wood Services Agreement.

20. Mr. Taylor acknowledged that while Weyerhaeuser expected the Contractors to produce the contract volume of logs, how they do it is their own business. The Company trusts the Contractors to know what works in the bush. Mr. Taylor testified that the Contractors generally produce according to Weyerhaeuser's expectations, although in some cases, Weyerhaeuser has had to push the Contractors to adopt changes.

21. Mr. Taylor also acknowledged that how the Contractor's employees operate a particular piece of equipment, such as a feller buncher, is a matter for the Contractors, except where safety or the environment are involved. However, he pointed out that the Multi-Dat, as Weyerhaeuser intends to use it, does not assess the individual operator. Rather, it records how effectively the piece of equipment is being utilized. Weyerhaeuser wants to have information from the Contractors to enable it to analyze machine downtime, and to identify what Weyerhaeuser can do differently to increase productivity. It also believes that this technology provides an opportunity for the Contractors to identify and make improvements in their operations.

22. With respect to the Multi-Dat device, Weyerhaeuser first approached the Contractors in June 2004 in an attempt to convince them to install this technology.

23. Each of Weyerhaeuser's Forests Lands Managers made a presentation to their contractors. They explained that the Multi-Dat records machine activity, or perhaps, more accurately, machine inactivity. Whenever the machine is not in motion, the Multi-Dat prompts the machine operator to enter a "stop code". The operator then inputs a code for the reason why the machine is not operating. This provides a means of analyzing and understanding non-productive time. Exhibit 1, Tab 1, from the June 2004 Multi-Dat presentation, contains the following formula for measuring machine utilization:

"Utilization & Productivity

- Scheduled Machine Hours (SMH): Total hours/day the machine is scheduled to work.
- Available Machine Hours (AMH): SMH less coffee breaks, lunch and regular minor maintenance (fuel & lube).
- Productive Machine Hours (PMH): Time machine is doing work.
- Machine Utilization: = PMH/SMH
- Example: SMH = 10
AMH = 9.0
PMH = 8.0
Utilization = 8.0/10 = 80%
- Productivity = Productivity/hour (S,A or P)"

24. Weyerhaeuser relies upon the Contractor to determine and provide an accurate statement of the Scheduled Machine Hours, which serves as the denominator for the machine utilization calculation.

25. In June 2004, when Weyerhaeuser initially proposed to its contractors that they install Multi-Dats on all production logging equipment, it offered to purchase the data recorders. The Company proposed that data be downloaded weekly by the contractor and made available to Weyerhaeuser. The Company would then generate a report of equipment utilization for review by the contractor and Weyerhaeuser. Weyerhaeuser anticipated that the contractors would enjoy any benefits of improved production for a six to twelve month transition period, after which logging rates would be adjusted to reflect the average efficient utilization of logging equipment, as derived from Multi-Dat data for the previous year.

26. In April 2005, some nine months after its initial presentation, Weyerhaeuser wrote to the Respondent Contractors, asserting its right under the Wood Services Agreement to require the Contractors to install the technology (Exhibit 1, Tab 5).

27. Mr. Taylor testified that Weyerhaeuser told the Contractors that unless they installed the equipment after spring break-up, the Company might not have work for them. However, it withdrew this implicit threat of termination of contract, according to Mr. Taylor, in recognition of the importance of its relationship with these Contractors.

28. In June of 2004, and as recently as September of 2005, Weyerhaeuser wanted the Contractors to submit improvement plans and rationales where the Multi-Dat data indicated that equipment was not being fully utilized, to explain what steps the Contractors intended to take to improve utilization (Exhibit 1, Tab 5).

29. However, Weyerhaeuser is not now requiring the Contractors to submit improvement plans for their operation of their core logging production machines. Rather, Weyerhaeuser wants to know that each Contractor understands the reasons for machine down time. It also wants to receive, through the monthly equipment utilization reports, recommendations from the Contractor about how Weyerhaeuser may improve its planning, engineering, or other matters for which it is responsible, so as to increase the Contractors' machine utilization. The Company

now says that each Contractor may make its own decisions about improvements the Contractor may be able to make in operating its equipment.

30. Mr. Taylor was cross examined at some length by Mr. Drayton regarding Weyerhaeuser's competitive position *vis-à-vis* other major licensees. This cross-examination was based largely upon extracts from PricewaterhouseCoopers' annual BC Interior Logging and Forestry Competitive Position Report for 2004. Weyerhaeuser disclosed this report to counsel for the Contractors on the condition that the contents of that report be kept confidential. I have reviewed the extracts from the PricewaterhouseCoopers report disclosed by Weyerhaeuser for the purposes of this arbitration. Given the sensitive nature of the information contained in that report, and the agreement of counsel that it be kept confidential, I do not propose to comment at any length on the contents of the PricewaterhouseCoopers report. Suffice it to say that I find that this report contains information supporting the Company's position that there is room for improvement in its performance and competitive position relative to other interior licence holders. I also accept Mr. Taylor's evidence that the Company seeks to improve its efficiency, and that of its logging contractors, and legitimately believes that the Multi-Dat is a tool that may assist in improving the overall efficiency of logging operations conducted on Weyerhaeuser's forest licences. I am satisfied that Weyerhaeuser is motivated by bona fide economic concerns in seeking to introduce the Multi-Dats.

31. Mr. Taylor testified that Weyerhaeuser hopes that over time, the Company and its contractors will become more competitive, and logging rates will not continue to rise. I have no doubt, based on Mr. Taylor's evidence, that if the Contractors improve their efficiency and productivity as a result of information generated by the Multi-Dats, Weyerhaeuser, in future rate negotiations, may endeavour to argue that logging rates should be adjusted to reflect a notional average efficient operator's productivity. However, the question of whether information derived from the Multi-Dats is, or may be relevant to the determination of a fair market rate under s. 26.01 of the *Timber Harvesting Contract and Subcontract Regulation*, although raised by the Contractors in the course of argument on this arbitration, is not an issue which I must or should decide in this case. If, as a consequence of the introduction of the Multi-Dats, Weyerhaeuser at some time in the future, were to seek to reduce logging rates, that would be a matter for negotiation, or resolution under the mediation and arbitration provisions of the *Regulation*.

There was no suggestion by any party to this arbitration that if I determine that paragraph 3(a)(i) of the Wood Services Agreement authorizes Weyerhaeuser to require the Contractors to use the Multi-Dats, that would trigger a request for a rate review under paragraph 3(c) of the Wood Services Agreement. There was no evidence that introduction of the Multi-Dats would have any immediate impact on the logging rates currently paid by Weyerhaeuser to the Contractors.

32. Weyerhaeuser also called Mr. Merl Fitchner, its Kamloops Lands Manager. Mr. Fitchner explained that various versions of the Multi-Dat device have been in use since 1999. He testified that the device can record electric impulses on four channels. Thus, it has the capacity to record the motions of different components of a piece of logging machinery, as well as time spent by the machine on particular activities over the course of the day. It can also record the identity of the operator of the machine on any given day, if the Contractor chooses to provide this level of detail.

33. Mr. Fitchner explained that the Multi-Dat operates on the basis that motion of the machine equates to machine utilization. Productive time is time the machine is operating. The objective is to identify opportunities to improve machine utilization.

34. Each Multi-Dat may be programmed to record a variety of stop codes, such as servicing, mechanical repairs, low-bedding, or waiting for other equipment. It can be programmed to record up to ten different stop codes. Each stop code identifies a particular reason for why the machine is not working. The Multi-Dat may also be programmed for the length of time that the device waits before it emits a “beep” to prompt the machine operator to enter a stop code. For example, it may be programmed to wait five minutes, so that very short interruptions in the motion of the machine are not recorded.

35. The information recorded on the Multi-Dat is downloaded through a portable transfer shuttle, which enables the data from the Multi-Dat to be transported to, and then stored on, the personal computer of the person who prepares the equipment utilization reports.

36. Weyerhaeuser wants an equipment utilization report, on a monthly basis, from each contractor, in the form shown on Exhibit 3. This is a utilization summary showing, by logging

phase, the percentage of available machine time each piece of production logging equipment is utilized.

37. The equipment utilization report also contains a section which the Contractor is to complete, to identify, again by phase, any opportunities for Weyerhaeuser to improve the equipment utilization. Examples include ensuring that cut block boundaries are well marked, or reviewing sorting strategy where, during the loading phase, multiple sorts require the loader to “walk” between small decks.

38. Ultimately, the accuracy of the equipment utilization reports depends upon the diligence of the machine operator in entering the correct stop code information.

39. Multi-Dats currently cost 1,200 dollars per unit. Weyerhaeuser has agreed to pay the purchase price for each unit and to provide the software. The Contractors would be responsible for installing the units on their machines, a relatively simple task.

40. As noted above, when Weyerhaeuser first proposed that its Contractors install the Multi-Dats, the Company took the position that it would collect the data and prepare the equipment utilization reports, which it would then share with the Contractors. Weyerhaeuser has now agreed to pay for the services of a third party, selected by the Respondent Contractors, who would receive the data downloaded from the Multi-Dat devices, and produce the equipment utilization summaries sought by Weyerhaeuser. Weyerhaeuser has agreed to do this in order to accommodate the Contractors’ privacy concerns.

Analysis and Award

41. The question that I must decide is whether Weyerhaeuser’s interior Wood Services Agreement enables the Company to require its logging contractors to install the Multi-Dat devices, and provide the particular equipment utilization data now sought by the Company.

42. For each of reference, I reproduce here the relevant provisions of paragraph 3(a) of the Wood Services Agreement.

3. Changes

- (a) Subject to subsection (b), the Company 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:
 - (i) use timber harvesting methods, technology or silviculture systems that are different than those historically used by the Contractor under the Agreement;

... ..

and the Contractor will comply with the requirements.

43. The full text of paragraph 3 of the Wood Services Agreement is set out above, at page 4 of this Award.

44. Paragraph 3 is incorporated in the Wood Services Agreement to meet the requirements of s. 14 of the *Regulation*, which provides:

- 14. (1) A replaceable contract must provide that, upon reasonable notice to the contractor, the licence holder may require, for bona fide business and operational reasons, that the contractor
 - (a) use different timber harvesting methods, technology or silvicultural systems,
 - (b) move into a new operating area,
 - (c) comply with different specifications, or
 - (d) undertake any other operating change necessary to comply with a direction made by a government agency or lawful obligation imposed by any federal, provincial or municipal government.
- (2) A replaceable contract must provide that if a requirement made pursuant to subsection (1) results in a substantial change in the timber harvesting services provided by the contractor, the contractor may, within 15 days of receiving notice under subsection (1), elect by notice in writing to the licence holder to terminate the replaceable contract without incurring any liability to the licence holder.
- (3) a replaceable contract must provide that, if a requirement is made pursuant to subsection (1) and the contractor does not elect to terminate the replaceable contract as provided for in subsection (2),

either party may, within 30 days of the contractor receiving notice under subsection (1), request a review of the rate then in effect.

- (4) If, after any changes in timber harvesting services required by the licence holder under subsection (1), the parties are unable to agree upon the rate to be paid for timber harvesting services, a rate dispute is deemed to exist and must be resolved in accordance with Part 5, Division 4.

45. Section 48 of the *Regulation* provides:

- 48. To comply with the requirements of each of the sections listed below, a contract or subcontract must contain either the provisions set out in the Schedule listed beside the section below, or a provision agreed to by the parties that is consistent in all material ways with the requirement represented by that section.

Section	Schedule
...	...
14	5

On a comparison of paragraph 3 of the Wood Services Agreement with Section 14 of the *Regulation*, it is apparent that paragraph 3 of the Wood Services Agreement is consistent in all material ways with the requirements of s. 14 of the *Regulation*.

46. In order to invoke paragraph 3(a)(i), Weyerhaeuser must show (a) that it has bona fide business and operational reasons for requiring the installation of the technology, and (b) that it has provided the Contractors with reasonable notice before requiring them to “use timber harvesting methods, technology or silviculture systems that are different than those historically used by the Contractor under the Agreement”.

47. Weyerhaeuser has established a bona fide business and operational reason for requiring the installation of the technology. Its concerns regarding its competitive position clearly constitute a “short, medium and long term economic concern”, within the meaning of the definition of “bona fide business and operational reasons” in paragraph 1(a) of the Wood Services Agreement, reproduced above at page 2 of this Award.

48. The Company has also met the requirement of providing reasonable notice. Commencing in June 2004, it initially sought to persuade the Contractors, based on its business case for the installation of this technology. Although Weyerhaeuser made a demand upon the contractors for the installation of the Multi-Dat devices in the spring of 2005, and raised the prospect of terminating their contracts if they failed to comply with that demand, it subsequently modified its position, and then made further efforts to persuade these Contractors to install the Multi-Dats, before this dispute was referred to arbitration in October 2005. This was clearly a case where the Company concluded that a longer notice period than the 30 working days contemplated as reasonable notice by section 1(e) of the Wood Services Agreement was warranted.

49. I must interpret the language of 3(a)(i) of the Wood Services Agreement objectively. In determining how a reasonable person having all of the background knowledge that would reasonably have been available to the parties would understand this provision, I may consider the factual matrix, or background to the dispute, which I have already described in this Award.¹

50. On a plain reading, the parties have agreed by paragraph 3(a)(i) of the Wood Services Agreement that Weyerhaeuser may, for bona fide business and operational reasons, require its contractors to use timber harvesting methods, technology or silviculture systems that are different from those historically used by its contractors under the agreement. The terms “timber harvesting methods”, “technology”, or “silviculture systems” are used disjunctively. Provided Weyerhaeuser has bona fide business and operational reasons for doing so, and gives reasonable notice to the Contractor, it may require the Contractor to use different timber harvesting methods, different technology, or different silviculture systems than those historically used by the Contractor under the Wood Services Agreement. In most cases, where paragraph 3(a)(i) is involved, one would expect that Weyerhaeuser would require its contractors to use new technology where that technology as directed related to a change in timber harvesting methods or silviculture systems. However, paragraph 3(a)(i) does permit the Company to require its contractors to use technology that is not simply a component of a timber harvesting method or a

¹ Cheshire, Fifoot and Furmston’s Law of Contract, Fourteenth Edition, pp. 134-136, citing *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*, [1998] 1 All E.R. 98 at 114-115.

silviculture system, where the Company has a bona fide business and operational reason for doing so.

51. The Multi-Dat is clearly technology that is intended to assist both the Company and its contractors in improving the efficiency of timber harvesting through identifying opportunities for improvement in the efficient utilization of production logging equipment.

52. The requirement to “use ... technology ... different than [that] historically used by the Contractor under the Agreement” would only be understood by a reasonable person having the background knowledge regarding the Multi-Dats available to the parties to this dispute, as including both the installation of the device on the Contractors’ logging equipment, and the production of the equipment utilization reports sought by Weyerhaeuser in this case.

53. If I am wrong in concluding that the express language of the agreement comprehends both the installation of the device and the production of the report, then, as a matter of business efficacy and by necessary implication, I find that it is an implied term of the agreement that the Contractors will provide Weyerhaeuser with the information derived from the Multi-Dat sought by the Company on this arbitration.

54. A term may be implied in a contract based on the presumed intention of the parties where the implied term is necessary to give business efficacy to a contract or otherwise meet the ‘officious bystander’ test, as a term which the parties would say, if questioned, that they had obviously assumed.² The Multi-Dat technology would be useless without the equipment utilization report. This is a case where it is obvious that the parties, if questioned by the ‘officious bystander’ would agree that paragraph 3(a)(i) must be considered to include a term that following installation of the Multi-Dats, the Contractors will provide to the Company the data now sought by Weyerhaeuser.

55. The Respondent Contractors argue that to give the Company the right to demand use of the Multi-Dat technology would constitute an unwarranted interference with their rights to

² *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Limited*, [1999] 1 S.C.R 619; *Head v. Scott-Bathgate Ltd.*, (1994) 99 B.C.L.R. (2d) 319 (BCCA), paras. 9 and 11;

control their business. They contend that to so interpret the Agreement would, in effect, shift their status from that of independent contractors to dependent contractors, or even employees of Weyerhaeuser. In effect, they ask me to find that paragraph 3 of the Wood Services Agreement, viewed in the context of that Agreement as a whole, and the underlying policy of the *Regulation*, which aims to redress the imbalance of bargaining power as between contractors and licence holders³, does not authorize Weyerhaeuser to require use of the Multi-Dats.

56. The Contractors also referred me to the common law tests for determining whether a party is an independent contractor, as stated in *Montreal v. Montreal Locomotive Works*⁴:

It has been suggested that a fourfold test would in some cases be more appropriate, a complex involving (1) control; (2) ownership of the tools; (3) chance of profit; (4) risk of loss. Control in itself is not always conclusive. ... In many cases, the question can only be settled by examining the whole of the various elements which constitute the relationship between the parties. In this way, it is in some cases possible to decide the issue by raising as the crucial question whose business is it, or in other words by asking whether the party is carrying on the business, in the sense of carrying it on for himself or on his own behalf and not merely for a superior.

57. The Respondents went so far as to submit that if the Wood Services Agreement authorizes the installation of the Multi-Dats, the Contractors' status would be analogous to that of the log haulers who were found to be dependent contractors, for the purposes of the *Labour Relations Code*, in *Weyerhaeuser v. IWA-Canada, C.L.C., Local Union 1-417*, B.C.L.R.B. No. B237/95. That decision is readily distinguishable. As Vice Chair Bruce held at paragraph 62, the log haulers, unlike an independent contractor (and the Contractors in this case) had virtually no say in the determination of the rates paid by Weyerhaeuser. Here, by virtue of the *Regulation*, and the standard provisions incorporated in the Wood Services Agreement, the Contractors have recourse to a mandatory dispute resolution system if rate negotiations fail.

Empress Towers Ltd. v. Bank of Nova Scotia, (1990) 50 B.C.L.R. (2d) 126 (BCCA), 1994 Can. LII 1817 (BCCA) at pp. 4-5.

³ *Hayes Forest Services Ltd. v. Pacific Forest Products Ltd.*, (2000) BCCA 66 at para. 17.

⁴ [1947] 1 D.L.R. 161 at 169.

58. With respect, the submissions of the Contractors regarding their status miss the mark. Paragraph 21 of the Wood Services Agreement, reproduced above at page 7 of this Award, clearly provides that the Respondents are independent contractors. However, it goes on to provide:

Subject to compliance herewith, the Contractor is fully responsible for the manner in which the Work is carried out.

(emphasis added)

59. The parties have expressly provided in the Wood Services Agreement for some constraints on the degree of control that the Contractors exercise over the manner in which they perform the work. For example, Schedule III, dealing with Steep Slope Operations, sets specific standards and requirements for the operation of the Contractors' logging equipment on steep slopes. Schedule IV, dealing with environmental matters, imposes additional fetters on the manner in which the Contractor provides timber harvesting services under the Wood Services Agreement. Paragraph 14 of the Agreement, dealing with the obligations of the Contractor, imposes duties and standards on the Contractor regarding the supervision and training of its employees. It also requires the Contractor to perform the work in a manner which ensures that not only it, but also the Company, is in compliance with the *Workers Compensation Act*, and requires the Contractor to maintain and keep certain records regarding its operations, and to disclose those records to the Company.

60. Paragraph 3 of the Wood Services Agreement, dealing with changes, imposes further constraints on the Contractors' freedom to perform timber harvesting services as they see fit by enabling the Company to require the Contractor to use different timber harvesting methods, technology or silviculture systems than those historically used by the Contractor. As noted above, Weyerhaeuser has required the Contractors to adopt roadside loading systems, clearly a new timber harvesting method, although it left the choice of the particular pieces of roadside logging equipment to the Contractors. Here, Weyerhaeuser is requiring the Contractors to install and use a technology that is different from any historically used by the Contractor under the Agreement, for the purpose of identifying opportunities for improved machine utilization, and to thereby improve the overall efficiency of timber harvesting operations on Weyerhaeuser's

tenures. In my view, paragraph 3(a)(i) clearly provides the authority for Weyerhaeuser to do just that.

61. However, the Contractors continue to retain substantial control over the manner in which they perform timber harvesting services. The Contractors provide their own equipment and tools. They continue to manage and direct their own work force, and to engage in a business involving chance of profit and risk of loss. I conclude that an interpretation of paragraph 3 of the Wood Services Agreement that authorizes Weyerhaeuser to require the Contractors to use the Multi-Dats in the manner sought by the Company in this case is not inconsistent with their status as independent contractors under that Agreement.

Remedy

62. Weyerhaeuser, in its Statement of Claim delivered February 9, 2006, sought the following relief.

- a) A Declaration that the Contractors be ordered to install Multi-Dat units on those machines designated by the Company from time to time;
- b) A Declaration that the Contractors provide data in a summary form to the Company, which data shall set out the utilization of each phase of the logging operation using machinery equipped with a Multi-Dat;
- c) A Declaration that the data in summary form be accompanied by monthly recommendations to improve utilization; and
- d) Such other and further relief that may be deemed necessary in order to give effect to the installation of the Multi-Dat units and the disclosure of the data summaries.

63. In light of the more restrictive position taken by Weyerhaeuser during the course of the arbitration regarding the utilization data it now requires from the Contractors, I award:

- a. a declaration that the Contractors are required to install Multi-Dat units, purchased by Weyerhaeuser, on those machines designated by the Company from time to time;
- b. a declaration that the Contractors provide data in the form of the equipment utilization report marked as Exhibit 3 on this arbitration, a copy of which is

attached as Schedule A to this Award, which data shall set out the utilization for each phase of the logging operation using machinery equipped with a Multi-Dat;

- c. a declaration that the Contractors shall provide monthly equipment utilization reports, and each Contractor shall include in those reports any recommendations that the Contractor is able to make regarding opportunities for Weyerhaeuser to improve machine utilization;
- d. the Contractors may select a third party consultant to whom they will provide equipment utilization data which they download from their logging machinery, and who will prepare and submit the monthly equipment utilization reports to Weyerhaeuser. Weyerhaeuser will pay the reasonable fees and expenses of the third party consultant for preparation of the monthly equipment reports.

Costs

64. Although the Company has succeeded on this arbitration, I have concluded that the Company and the Contractors should each bear their own costs and disbursements. I have done so on the basis that this case raised an important question of interpretation of the terms of Weyerhaeuser's interior Wood Services Agreement, and which affects the rights and interests not only of the Contractors named as Respondents in this arbitration, but also, potentially, relations between the Company and its other contractors throughout the interior of British Columbia.

65. It is so awarded.

DATED at the City of Victoria, in the Province of British Columbia, this 30th day of March, 2006.

PAUL J. PEARLMAN, Q.C.
Arbitrator