IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Western Forest Products Inc. v. Hayes Forest Services Limited,*** 2009 BCSC 424

Date: 20090331
Docket: S087285
Registry: Vancouver

Between:

Western Forest Products Inc.

Petitioner

And

Hayes Forest Services Limited

Respondent

Before: The Honourable Mr. Justice Pitfield

Reasons for Judgment

Counsel for the Petitioner:	D.R. Bennett R.V. Aldridge
Counsel for the Respondent:	C.F. Willms K. Grist
Date and Place of Hearing:	February 16, 2009 Vancouver, B.C.

Introduction

[1] Western Forest Products Inc. ("Western") applies by petition for leave to appeal from an arbitrator's ruling fixing the rate Western must pay to Hayes Forest Products Ltd. ("Hayes") for logging services under a replaceable logging contract. The *Timber Harvesting Contract and Subcontract Regulation*, B.C. Reg. 22/96 (the "*Regulation*") requires disputes arising under such contracts to be resolved by an arbitration to which the provisions of the *Commercial Arbitration Act*, R.S.B.C. 1996, c. 55 (the "*Act*") apply. Section 31 of the *Act* restricts the right of appeal to a question of law in respect of which the court has granted leave:

> Appeal to the court
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> 31 (1) A party to an arbitration may appeal to the court on any question of law arising out of the award if
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> (a) all of the parties to the arbitration consent, or
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> (b) the court grants leave to appeal.
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> (2) In an application for leave under subsection (1) (b), the court may grant leave if it determines that
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> (a) the importance of the result of the arbitration to the parties justifies the intervention of the court and the determination of the point of law may prevent a miscarriage of justice,
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> (b) the point of law is of importance to some class or body of persons of which the applicant is a member, or
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> (c) the point of law is of general or public importance.

[2] The dispute between Western and Hayes pertains to the rate Western should pay Hayes for "stump to dump" and "dump and boom" services rendered by Hayes as a contractor in respect of timber harvested from Tree Farm Licence 44, which conferred timber harvesting rights on Western over a portion of Vancouver Island.

Stump to dump work entails the transport of timber from the point of harvest to the log dump. Dump and boom work entails the transfer of timber from the log dump to water, and the booming thereof for transport by water.

[3] The parties or their predecessors operated under the replaceable logging contract, apparently without significant disagreement, until January 2003. At that time, the contract was suspended and subsumed by a Timber Supply Execution Agreement which was not subject to the *Regulation*. That contract was terminated in January 2008, whereupon the replaceable logging contract again became operative.

[4] The question of the rate for services, which was not a concern under the Timber Supply Execution Agreement for its term of five years, arose because the replaceable contract did not stipulate a rate for 2008. Before the arbitrator, Western claimed it should pay a rate of $49.57 per cubic meter of timber as a blended rate for all services provided by Hayes. Hayes claimed a rate of $58.67 per cubic meter for stump to dump work, and $4.75 per cubic meter for related dump and boom. The arbitrator set a provisional rate of $49.07 per cubic meter for the former, and a rate of $3.35 per cubic meter for the latter. The final rate determined by the arbitrator was $55.73 per cubic meter for stump to dump services, and $4.13 per cubic meter for dump and boom services.

[5] Section 26.01 of the *Regulation* provides direction regarding the manner in which rate disputes are to be resolved by an arbitrator:

Rate test

26.01 (1) If a rate dispute is referred to arbitration, the arbitrator must determine the rate according to what a willing licence holder and a willing contractor acting reasonably and at arm's length in similar circumstances would agree is a fair market rate, on the earlier of

(a) the date the rate proposal [setting forth a proposed rate] was delivered to the contractor, and

(b) the date the timber harvesting operations commenced.

(2) In determining a fair market rate under subsection (1), an arbitrator may take into consideration the following:

(a) rates agreed to by the licence holder and contractor for prior timber harvesting services;

(b) rates agreed to under another contract by either the licence holder or contractor for similar timber harvesting services;

(c) rates agreed to under another contract by either the licence holder, the contractor or another person for each phase or component of a similar timber harvesting operation;

(d) rates agreed to by other persons for similar timber harvesting services;

(e) if necessary to make meaningful comparisons to any of the rates agreed to in paragraphs (a), (b), (c) and (d) above, the impact on fair market rates likely to arise from differences between the timber harvesting operations that pertain to the rate in dispute, and the timber harvesting operations that pertain to any rate described in paragraphs (a), (b), (c) and (d), including the following:

(i) differences in operating conditions including, without limitation, differences in terrain, yarding distances, hauling distances, volume of timber per hectare;

(ii) differences in the total amount of timber processed;

(iii) differences in the required equipment configuration;

(iv) differences in required phases;

(v) differences in operating specifications;

(vi) differences in law;

(vii) differences in contractual obligations;

(viii) differences in the underlying costs of timber harvesting operations in the forest industry generally which would affect fair market rates, including changes in the cost of labour, fuel, parts and supplies;

(ix) differences in the cost of moving to a new operating area, if any;

(f) any other similar data or criteria that the arbitrator considers relevant.

(3) In determining fair market rates under subsection (1) an arbitrator must not include any consideration or goodwill associated with purchasing a replaceable contract or otherwise acquiring the right to provide timber harvesting services pursuant to a replaceable contract.

(4) In determining a fair market rate under subsection (1), an arbitrator may consider rates for timber harvesting services on land other than Crown land.

[6] The arbitrator explained his determination of the rate as follows:

In the result, I am drawn to the conclusion that the rolled forward rate of record and the adjusted [Island Pacific Logging] rate, when blended, provide a more objective indication of a fair market rate in this case. The comparable IPL rate, adjusted for hauling distance, and excluding dry land sort, is $52.38/$m^3$. The 2002 rolled forward rate is $59.07/$m^3$. The average of the adjusted IPL rate and the 2002 rolled forward rate is $55.73/$m^3$.

[7] Western seeks leave to appeal alleging that the arbitrator erred in law by:

(a) wrongly interpreting the market rate test prescribed by section 26.01 of the *Regulation* as demonstrated by his use of a "rolled forward historical rate" as a basis to determine a market rate;

(b) relying on the Timber Supply Execution Agreement as a basis for adjusting historical rates of record for inflation to derive a market rate;

(c) finding that the "rates of record" asserted by Hayes were properly considered in determining the market rate; and

(d) determining the dump and boom rate by reference to rates not in effect at January 25, 2008, which was the date the rate dispute arose and the operative date for rate determination as prescribed by section 26.01 of the *Regulation*.

[8] Counsel summarizes Western's position as follows:

> The errors in law committed by [the arbitrator] arose from a misinterpretation of the rate test. The errors can be categorized as either interpretation errors relating to proper inputs (i.e. using evidence that was not properly considered under the rate test) or interpretation errors relating to the appropriate process (employing methods that are contrary to the provisions of the statutory rate test). The former errors were [the arbitrator's] use of the rate of record and the dump and boom rates not in effect as at the operative date; the later [sic] errors were rolling forward historical rates and the blending of the adjusted IPL rate with the rolled forward historical rate.

[9] In response, Hayes says that the matters of which Western complains in relation to the arbitrator's decision are not questions of law, but questions of fact or mixed fact and law in respect of which leave cannot be granted.

Analysis

a) General Principles

[8] Before considering whether to grant leave to appeal under s. 31, the court must be satisfied that it is dealing with a question of law. The reasoning of the Court of Appeal in *Domtar Inc. v. Belkin Inc.* (1989), 39 B.C.L.R. (2d) 257 at 260, 62 D.L.R. (4th) 530 applies:

> As a matter of practice, it is essential that the petition for leave under s. 31 should state the question or questions of law on which leave to appeal is requested. In my opinion, leave should not be granted except on specific questions of law, identified and stated in the petition. If the applicant for leave does not state a precise question of law which can be argued about in relation to s. 31, neither the opposing party nor the judge will be able to come to grips with the issues that must be considered under the section.

[9] The Supreme Court of Canada has set out the distinction between questions of fact, law, and mixed fact and law in *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*, [1997] 1 S.C.R. 748, 144 D.L.R. (4th) 1 at paras. 35–36:

> 35 Briefly stated, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests. A simple example will illustrate these concepts. In the law of tort, the question what "negligence" means is a question of law. The question whether the defendant did this or that is a question of fact. And, once it has been decided that the applicable standard is one of negligence, the question whether the defendant satisfied the appropriate standard of care is a question of mixed law and fact. I recognize, however, that the distinction between law on the one hand and mixed law and fact on the other is difficult. On occasion, what appears to be mixed law and fact turns out to be law, or vice versa.
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> 36 For example, the majority of the British Columbia Court of Appeal in *Pezim*, *supra*, concluded that it was an error of law to regard newly acquired information on the value of assets as a "material change" in the affairs of a company. It was common ground in that case that the proper test was whether the information constituted a material change; the argument was about whether the acquisition of information of a certain kind qualified as such a change. To some extent, then, the question resembled one of mixed law and fact. But the question was one of law, in part because the words in question were present in a statutory provision and questions of statutory interpretation are generally questions of law, but also because the point in controversy was one that might potentially arise in many cases in the future: the argument was about kinds of information and not merely about the particular information that was at issue in that case. …

[10] The issue on appeal in *Southam* was whether a determination by the Competition Tribunal — that two kinds of newspapers were not in the same relevant

product market so that Southam's acquisition of several community newspapers and affiliated businesses did not substantially lessen competition in the market for retail print advertising in the Lower Mainland of British Columbia — should be accorded deference. The Federal Court of Appeal had said no, and had substituted its own findings for those of the Tribunal.

[11] The Supreme Court of Canada concluded that the appeal was concerned with a question of mixed fact and law:

> 41 …If the Tribunal did ignore items of evidence that the law *requires* it to consider, then the Tribunal erred in law. Similarly, if the Tribunal considered all the *mandatory* kinds of evidence but still reached the wrong conclusion, then its error was one of mixed law and fact. …
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> [emphasis added]

[10] The Supreme Court allowed the appeal, saying that the Tribunal's decision was entitled to deference and it must be allowed to stand because it was not unreasonable: para. 91.

[11] In this application for leave to appeal, the analysis must therefore begin by considering the structure of s. 26.01 of the *Regulation*. The legal test to be applied is contained in s. 26.01(1), which requires the arbitrator to determine a rate that is a "fair market rate":

> …the arbitrator must determine the rate according to what a willing licence holder and a willing contractor acting reasonably and at arm's length in similar circumstances would agree is a fair market rate…

[12] The definition of fair market rate in subsection (1) conforms to the longstanding meaning of fair market value. The meaning of the term "fair market

value" or "fair market rate" is a question of law, as it is the legal test that must be applied by the arbitrator. It is generally accepted, however, that the ultimate determination of "fair market value" in each case is a question of fact or, at best, a question of mixed fact and law. In *CIT Financial Ltd. v. Canada*, 2004 FCA 201, 323 N.R. 186, the Federal Court of Appeal said the following at para. 13:

> The jurisprudence is clear that the determination of fair market value is a question of fact rather than a question of law. See for example *Gold Court Selection Trust Limited v. Humphrey (Inspector of Taxes)*, [1948] A.C. 459 at 473. As a result, according to *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, the standard of review with respect to findings of fact is palpable or overriding error. There is ample authority for the proposition that a trial judge is entitled to arrive at his own opinion as to value. *Connor v. The Queen*, 79 DTC 5256 (FCA), *R. v. Whent*, 2000 DTC 6001 (FCA). …

[13] Section 26.01(1) sets forth the legal test to be applied in the determination of the rate. The section is mandatory. No other test may be used to arrive at a fair market rate.

[14] Section 26.01(2) of the *Regulation*, by contrast, describes the kind of evidence the arbitrator *may* take into account in the determination of the rate. Nothing in the subsection imposes a mandatory obligation on the arbitrator to consider any particular evidence. The section permits, but does not compel, consideration of: rates agreed to by the licence holder and contractor for prior timber harvesting services; rates agreed to under another contract by the licence holder or the contractor for similar services; rates agreed to under another contract by the licence holder, the contractor or another person for each phase of the operation; and rates agreed to by another person for similar services.

[15] Sections 26.01(2)(e)(i) to (ix) describe factors the arbitrator may take into account for the purpose of making meaningful comparisons of different agreed rates. Of note is the fact that s. 26.01(2)(f) stipulates that in addition to considering agreed rates and adjustments thereto, the arbitrator may take into consideration *any other similar data or criteria that the arbitrator considers relevant*.

[16] On this application for leave, I am not faced with the circumstances that prevailed in *Southam*, a case in which the legal test in question *required* the tribunal to consider certain types of evidence, thereby elevating the question under review to either one of law or mixed fact and law.

[17] Questions regarding the arbitrator's treatment of or weight to be given to the evidence available to him in this case are questions of fact. In *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, the Supreme Court of Canada addressed the standard of review to be applied to questions of fact:

> 22 …Although we agree that it is open to an appellate court to find that an inference of fact made by the trial judge is clearly wrong, we would add the caution that where evidence exists to support this inference, an appellate court will be hard pressed to find a palpable and overriding error. As stated above, trial courts are in an advantageous position when it comes to assessing and weighing vast quantities of evidence. In making a factual inference, the trial judge must sift through the relevant facts, decide on their weight, and draw a factual conclusion. Thus, where evidence exists which supports this conclusion, interference with this conclusion entails interference with the weight assigned by the trial judge to the pieces of evidence.
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> 23 We reiterate that it is not the role of appellate courts to second-guess the weight to be assigned to the various items of evidence. If there is no palpable and overriding error with respect to the underlying facts that the trial judge relies on to draw the inference, then it is only where the inference-drawing process itself is palpably in error that an appellate court can interfere with the factual conclusion. The appellate court is not free to interfere with a factual conclusion that it disagrees with where such disagreement stems from a difference of opinion over the weight to be assigned to the underlying facts.…

[12] A finding of fact may only be set aside on appeal in the event of palpable and over-riding error. A mixed question of fact and law will be afforded deference unless the conclusion is unreasonable. Western does not ground its application on either basis as, indeed, it could not. Any such complaint would involve a question of fact in respect of which no appeal lies under the *Regulation*.

b) The Specific Errors Alleged

[18] The fact that the issues complained of do not raise questions of law is apparent from the arbitrator's reasons.

[19] The arbitrator considered the rate to which the parties or their predecessors had agreed in 2001 under the replaceable logging contract. He stated that he recognized that the rate had been determined under the previous regulatory regime which emphasized cost rather than market rate. He took into account discussions between the parties regarding a rate for 2002. He concluded that discussions between the parties, whether or not formally amounting to an agreement, afforded some evidence of what a willing contractor would require if it were to provide services. At para. 9 of his reasons, the arbitrator said:

> While there may be a lack of evidentiary certainty as to the proof of whether [Western] had accepted Hayes' stipulated 2002 "rate of record", there is no real reason to doubt it did, or that the purpose of setting the rate of record was to establish a baseline for future rate negotiations.

[20] The question of whether or not there actually was an agreement between the parties in this particular case is a question of fact that cannot be appealed.

[21] Having determined that the 2001 rate or the 2002 so-called baseline rate would not be directly applicable in 2008 because of inflation in the intervening period, the arbitrator concluded that it was appropriate to “roll” the rates forward to reflect what they might have been had inflation been fully accounted for.

[22] He then compared the rolled forward rates to the rate which was being paid by Western to another contractor for comparable services, and made adjustments that could reasonably be considered appropriate because of the differences between the two logging operations that were the subject of the contracts. In the end, the arbitrator “blended” or averaged the rates to arrive at what he found to be a “fair market rate.” The arbitrator considered the evidence he had before him and made a finding of fact or at best, from the petitioner's perspective, a finding of mixed fact and law.

[23] In relation to the determination of a dump and boom rate, Western says that the arbitrator erred by relying on dump and boom quotes developed after January 25, 2008, the reference date for the determination of the fair market rate.

[24] It was within the arbitrator's discretion to determine whether any quotes offered in evidence could or should be regarded as evidence of a “fair market rate,” and if so, what weight should be accorded to them. Again, consideration of that evidence led to a finding of fact from which no appeal lies.

[25] Finally, the question of whether dump and boom rates that were agreed to after the date the rate dispute arose should have been considered by the arbitrator pertains not to the arbitrator’s interpretation of the test set out in s. 26.01(1), but to

his exclusive domain to determine the weight, if any, to be given to such rates. The criticism of his use of those rates does not raise a question of law.

Conclusion

[26] In sum, the difficulty with the argument advanced by Western is that it criticizes the arbitrator's reliance upon, or treatment of, evidence of various kinds, none of which he was obliged to consider or precluded from considering under s. 26.01(2). It was within the arbitrator's domain to consider all of the evidence tendered, to determine its relevance and the weight to be afforded to any of it, and thereafter to arrive at a rate that a willing licence holder would pay to a willing contractor acting at arm's length.

[27] For the foregoing reasons, the application for leave to appeal is dismissed with costs.

"Mr. Justice Pitfield"