

IN THE MATTER OF THE *FOREST ACT*, R.S.B.C. 1996, c. 157,
TIMBER HARVESTING CONTRACT AND SUB-CONTRACT REGULATION,
B.C. REGULATION 22/96 AND THE
COMMERCIAL ARBITRATION ACT, R.S.B.C. 1996, c. 55

AND

A DIFFERENCE CONCERNING A LOGGING CONTRACT AND RATES
RELATING TO PLUMPER HARBOUR

BETWEEN:

WESTERN FOREST PRODUCTS LIMITED

Claimant

AND:

HAYES FOREST SERVICES LIMITED

Respondent

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Dates of Hearing: September 30, October 3, 4, 7-9, 28, 29 & 31, November 1 & 4-6,
February 6 & 7, 10 & 11, and May 6 & 7, 2003

INDEX

	Page
I. SUMMARY	1
II. BACKGROUND	4
III. ISSUES	6
IV. REGULATORY BACKDROP	6
V. TERMS OF REPLACEMENT CONTRACT	10
Proper Parties	10
Default Provision	11
Fibre Basket Agreement	18
Unallocated Helicopter Volume	24
VI. CONVENTIONAL LOGGING RATES, 1998 TO 2001	28
Roll Forward Approach	29
Special Circumstance Rates	32
Inflation and IWA Wage Increases	38
Volume of Timber Harvested	40
Changes to Logging Chance	52
Expert Opinion	56
Independence	57
Methodology and Assumptions	58
Similar Operations	68
The Comparables	71
Expert Comparison	76
Conclusion	78
Actual Costs	80
Conclusion	89
VII. ROAD CONSTRUCTION RATES, 1997 to 1999	89
Conclusion	92
VIII. HOURLY EQUIPMENT & LABOUR RATES, 1997 to 2001	95
Conclusion	96

IX.	INTEREST & COSTS	99
X.	APPENDICES	
	A. SIGNIFICANT DATA FOR 1998 CONVENTIONAL LOGGING RATE	
	B. SIGNIFICANT DATA FOR 1999 CONVENTIONAL LOGGING RATE	
	C. SIGNIFICANT DATA FOR 2000 CONVENTIONAL LOGGING RATE	
	D. SIGNIFICANT DATA FOR 2001 CONVENTIONAL LOGGING RATE	
	E. PARTIES' POSITIONS ON 1997 ROAD CONSTRUCTION RATES	
	F. PARTIES' POSITIONS ON 1998 ROAD CONSTRUCTION RATES	
	G. PARTIES' POSITIONS ON 1999 ROAD CONSTRUCTION RATES	
	H. WESTERN'S PROPOSED HOURLY EQUIPMENT AND LABOUR RATES 1997 TO 2001	
	I. HAYES' PROPOSED HOURLY EQUIPMENT AND LABOUR RATES 1997 TO 1999	

I. SUMMARY

This is an arbitration to settle terms of a replacement contract, as well as conventional logging rates, road construction rates, and hourly equipment and labour rates, between 1997 and 2001, for logging and road building services performed by Hayes Forest Services Limited under licences in the area of Plumper Harbour on Nootka Island managed by Western Forest Products Limited:

Terms of Five Year Replacement Contract, as of January 1, 1997

Proper Parties

It is sufficient to name Western, as agent, to create a direct contractual relationship with its disclosed principal.

Default Provision

The parties retain the default provision in Clause 17 of the Kent Contract.

Fibre Basket Agreement

Hayes cannot be compelled to agree to termination provisions for the fibre basket, and the fibre basket agreement cannot be terminated except with the consent of all the contractors within the Nootka Contract Administration.

Unallocated Helicopter Volume

Western's commitment in respect of the unallocated volume, as reflected in its letter to Hayes of October 11, 2000, without a requirement that it be put up for bid on an annual basis, should be reflected in the replacement contract.

Conventional Logging Rates for 1998, 1999, 2000 and 2001

The conventional logging rates between Hayes and Western, for the years from 1998 to 2001, are:

YEAR	CONVENTIONAL LOGGING RATE
1998	\$44.50/ m ³
1999	\$46.90/ m ³
2000	\$45.00/ m ³
2001	\$46.10/ m ³

Road Construction Rates for 1997, 1998 and 1999

The road construction category rates between Hayes and Western, for the years from 1997 to 1999, are:

Construction Category	1997	1998	1999
O.M.I	\$55.09 /m	\$55.77 /m	\$56.28 /m
O.M.II	\$67.76 /m	\$67.69 /m	\$67.69 /m
O.M.III	\$100.77 /m	\$99.84 /m	\$99.33 /m
Toe	\$74.22 /m	\$80.68 /m	\$80.68 /m
Medium	\$99.55 /m	\$99.48 /m	\$99.48 /m
Heavy	\$121.55 /m	\$120.10 /m	\$120.10 /m
X Heavy	\$131.78 /m	\$131.59 /m	\$136.14 /m
Metal Culvert	\$312.74 /culvert	\$303.88 /culvert	\$303.88 /culvert
Wood Culvert	\$1,016.21 /culvert	\$932.41 /culvert	\$932.41 /culvert
Large Wood Culvert	\$1,016.21 /culvert	\$932.41 /culvert	\$932.41 /culvert

Hourly Equipment and Labour Rates for 1997, 1998, 1999, 2000 and 2001

The hourly equipment and labour rates between Hayes and Western, for the years from 1997 to 2001, are:

Machine or Labour	1997 (\$/hr)	1998 (\$/hr)	1999 (\$/hr)	2000 (\$/hr)	2001 (\$/hr)
Hitachi 270	\$140.63	\$142.40	\$145.10	\$149.67	\$151.84
Articulated Truck D300B	\$129.11	\$130.73	\$133.22	\$137.42	\$139.41
Articulated Truck 25D	\$114.88	\$116.32	\$118.53	\$122.26	\$124.03
Cat 235	\$164.70	\$166.76	\$169.93	\$175.28	\$177.82
D7	\$154.53	\$156.47	\$159.44	\$164.46	\$166.85
D8	\$157.07	\$159.04	\$162.07	\$167.18	\$169.60
Dump Truck	\$96.26	\$97.46	\$99.32	\$102.45	\$103.94
FEL 980	\$140.04	\$141.80	\$144.50	\$149.05	\$151.21
Grader	\$105.73	\$107.06	\$109.09	\$112.53	\$114.16
Hitachi 400	\$238.49	\$241.48	\$246.07	\$253.82	\$257.50
JD 690 ELC	\$126.10	\$127.68	\$130.10	\$134.20	\$136.15
Lift Truck	\$61.00	\$61.76	\$62.94	\$64.92	\$65.86
Lowbed	\$136.24	\$137.96	\$140.58	\$145.01	\$147.11
Off Highway Truck	\$127.08	\$128.68	\$131.12	\$135.25	\$137.21
Tank Drill One Man	\$192.15	\$194.56	\$198.25	\$204.49	\$207.46
Line Log Loader/ American 5675	\$162.66	\$164.71	\$167.83	\$173.12	\$175.63
Loader	\$140.04	\$141.80	\$144.50	\$149.05	\$151.21
Loader	\$77.77	\$78.75	\$80.25	\$82.78	\$83.98
JD690ELC Bare	\$85.43	\$86.50	\$88.14	\$90.92	\$92.24
FEL980 Bare	\$99.38	\$100.62	\$102.54	\$105.77	\$107.30
Labour: Mechanic	\$55.92	\$56.62	\$57.69	\$59.51	\$60.37
Labour	\$40.67	\$41.18	\$41.96	\$43.28	\$43.91
Misc: Room & Board	\$75.00	\$75.00	\$75.00	\$75.00	\$75.00

II. BACKGROUND

[1] In 1991, Kent Logging & Equipment Ltd. ("Kent") and Canadian Pacific Forest Products Ltd. ("Pacific") entered into a five year replaceable "stump to dump" contract ("Kent Contract"), for Kent to perform logging and road building services in the area of Plumper Harbour on Nootka Island under Forest Licence A19231 and Timber Licence 892.

[2] In January 1997, Hayes Forest Services Limited ("Hayes") bought the assets of Kent, and assumed its obligations under the Kent Contract.¹

[3] In December 1997, Doman-Western Lumber Ltd. ("Doman-Western") purchased the assets of Pacific, becoming the holder of its licences.²

[4] The licences are managed for Doman-Western by its wholly owned subsidiary, Western Forest Products Limited ("Western"), which manages various timber resources in the Nootka Region defined by Forest Licence A19231 ("FL A19231"), Tree Farm Licence 19 ("TFL 19"), and ten other Timber Licences outside TFL 19, ("Licences").

[5] The Nootka Region, which is on the west side of Vancouver Island, is comprised of two Western timber harvesting operations, and six independent full-phase logging contractor operations known as the Nootka Contract Administration ("NCA"), which includes the Hayes operation at Plumper Harbour.

¹ The assets were purchased in the name of Hayes Holdings Services, and transferred to Hayes Forest Services Ltd.

² The background information refers to both Doman-Western and Western in respect of the purchase of Pacific (e.g. trans. Ron Todd, Oct. 29, 2002, pp. 1061-62; Donald Hayes, Feb. 10, 2003, pp. 2158-59). There appears to be no dispute, however, that Doman-Western is the licence holder of the licences in issue (e.g. trans. Ron Todd, Nov. 1, 2002, p. 1383; Donald Hayes, Feb. 10, 2003, p. 2191), and it was Doman-Western which consented to Hayes' assignment to Upland Excavating under the Kent Contract (Ex. 114, Tab 3).

[6] The other contractors operating in the NCA are by agreement of the parties referred to collectively as the "Other Contractors" and their operations identified by designated reference.

[7] Since they became successors to the Kent Contract, Hayes has performed logging services for Western under the Licences. And, together with the other contractors in the NCA, they share a fibre basket agreement³ in relation to the Licenses.

[8] Hayes also provided road building services to Western until 1999, when Hayes sold its interest in the road building work to Upland Excavating ("Upland"), who continues to provide road building services to Western under a replaceable contract.

[9] The only rates Hayes and Western have agreed to between themselves since Hayes assumed the Kent Contract, however, are the 1997 conventional logging rate, the 1997 heli support rate, and the 1997 heli falling and yarding rates.

[10] Western agreed with the other contractors in the NCA on the form and content of a five year replaceable logging contract, and on rates for 1997 to 2001, and has proposed a similar replacement contract to Hayes ("Proposed Replacement Contract").⁴ Their negotiations have not resulted in an agreement to replace the expired Kent Contract but, they have continued their relationship on the basis that it is governed by a replaceable contract as mandated by the *Timber Harvesting Contract and Subcontract Regulation* ("*Regulation*"),⁵ without all the terms being settled.

³ Referring to a number of timber tenures that have been combined for the purposes of allocating work and which are treated as one tenure for the purposes of Part 5 of the *Timber Harvesting Contract and Subcontract Regulation*.

⁴ Exs. 83 and 80.

⁵ The parties have relied on the *Regulation* as set out in B.C. Reg. 22/96, amended up to B.C. Reg. 83/97. Unless otherwise noted, references to the *Regulation* are to that consolidation, dated Jun. 13, 1997.

III. ISSUES

[11] The issues in this arbitration relate to:

- a. The terms of the five year replacement contract, as of January 1, 1997;
- b. Conventional logging rates for 1998, 1999, 2000 and 2001;
- c. Road construction rates for 1997, 1998 and 1999; and
- d. Hourly equipment and labour rates for 1997, 1998, 1999, 2000 and 2001.⁶

[12] The controversial terms of the replacement contract relate to:

- a. the proper parties;
- b. the default provision;
- c. termination of the fibre basket agreement; and
- d. the treatment of unallocated helicopter volume.

IV. REGULATORY BACKDROP

[13] The arbitration is governed by the *Regulation*, which applies to all contracts and subcontracts in effect on April 1, 1996, and those made after.⁷

[14] In regard to dispute resolution, the *Regulation* requires:

⁶ Western addressed the hourly equipment and labour rates for 1997 to 2001, while Hayes only addressed those rates for 1997 to 1999.

⁷ S. 2.

5. Every contract or subcontract must provide that all disputes that have arisen or may arise between the parties to the contract or subcontract under or in connection with the contract or subcontract will be referred to mediation and, if not resolved by the parties through mediation, will be referred to arbitration.

[15] The Kent Contract provided:

- 33.1 If there is a dispute between the parties regarding a term, condition or obligation under this Agreement and either party gives notice to the other party of such dispute, then each party will designate an officer or manager to deal with the dispute and will cause such person to meet at a mutually convenient time and place within sixty days of the notice to discuss and attempt to resolve the dispute. If the dispute is resolved, the parties will confirm the resolution of the dispute in writing within such sixty day period.
- 33.2 If a dispute between the parties regarding a term, condition or obligation under this Agreement is not resolved in accordance with para 33.1 hereof within sixty days of the first written notice of the dispute and either party gives notice to the other party to that effect, the dispute will be resolved by arbitration under the Commercial Arbitration Act.

[16] Although of the Kent Contract pre-dates the dispute resolution requirements of the *Regulation*, it is deemed by the *Forest Act* ("Act")⁸ and the *Regulation*⁹ to incorporate the dispute resolution system of the *Regulation*.

[17] In addition to general rules¹⁰ that govern the arbitration, the *Regulation* contains specific rules¹¹ for determining rates under a replaceable contract.

[18] Section 25(1) prescribes the test that *must* be applied. And Section 25(2) acknowledges factors which *may* be considered in applying the test:

⁸ R.S.B.C. 1996, c. 157, s. 160.

⁹ S. 48 to 51, Sch. 3; also S. 2.

¹⁰ Ss. 6 and 8.

¹¹ Part 5, Division 4.

25 (1) A replaceable contract must provide that if a rate dispute is referred to arbitration, the arbitrator must determine the rate according to what a licence holder and a contractor acting reasonably in similar circumstances would agree is a rate that

- (a) is competitive by industry standards, and
- (b) would permit a contractor operating in a manner that is reasonably efficient in the circumstances in terms of costs and productivity to earn a reasonable profit.

(2) In determining a 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) the costs and productivity of the contractor for prior timber harvesting services carried out by the contractor;
- (c) relative to prior timber harvesting services, the impact on costs and productivity likely to arise from:
 - (i) changes in operating conditions including, without limitation, changes to terrain, yarding distances, hauling distances, volume of timber per hectare;
 - (ii) changes in the total amount of timber processed;
 - (iii) changes in the required equipment configuration;
 - (iv) changes in law if the changes affect costs or productivity of the timber harvesting operation;
 - (v) changes in the underlying costs of timber harvesting operation including, without limitation, the cost of labour and the impact of inflation on wages, fuel, parts and supplies;
- (d) the costs in the logging industry for each phase or component of a similar timber harvesting operation;
- (e) the rates in the logging industry for similar timber harvesting operations;
- (f) any other data or criteria that the arbitrator considers relevant in ascertaining the rate that a licence holder and a contractor acting reasonably in similar circumstances would agree to. ...

[19] The *Regulation* defines a "rate dispute" to occur when parties to a replaceable contract cannot agree on the amount to be paid for "timber harvesting services," which are defined as those provided in respect of phases of a timber harvesting operation. A "phase" is defined as:

"... felling, bucking, yarding, skidding, processing, decking, loading, hauling,

unloading, non-mill or non-custom dryland sorting or booming, logging road construction, logging road maintenance including temporary road deactivation, logging access road construction and any other phases or combinations or components of them that are aspects of a timber harvesting operation under a licence, but does not include catering, cruising, forest engineering, semi-permanent or permanent road deactivation, towing, barging, mill or custom dryland sorting or booming, reforestation, scaling, equipment rental, equipment maintenance or providing support services relating to timber harvesting”

[20] The scope of the *Regulation* has been the subject of judicial consideration. In *Troubridge Towing Co. v. Fletcher Challenge Canada Ltd.*,¹² the Supreme Court of British Columbia concluded that “in drafting the Regulation, care has been taken to include all phases of what is characterized as a stump to dump operation”. The Court also observed that, in regard to replacement contracts, the *Regulation* constitutes a “significant incursion into existing contractual rights”, and should therefore be strictly construed.

[21] Although the definition of “phase” in the *Regulation* expressly excludes “equipment rental”, it seems to me it intends to exclude only the bare equipment rental, and not hourly equipment rates which are integral “aspects of a timber harvesting operation” within the definition of “phase”.¹³ The hourly equipment rates at issue include an operator and the fuel required to operate the equipment, which reflects a manner of paying for work by the operating hour, as opposed to “piece” rates by the lineal metre or cubic metre. So, in my view, where equipment rentals are “services provided in respect of one or more phases of a timber harvesting operation” so as to constitute “timber

¹² [1996] B.C.J. No. 669 (B.C.S.C.), addressing the 1991 version of the Regulation - B.C. Reg. 258/91.

¹³ Several arbitral awards have determined hourly equipment rates under S. 25 in the context of logging and road building services without considering the jurisdiction to determine those rates: *Pacific Forest Products Ltd. and Hayes Forest Services Ltd.* (15 Aug. 1997) (W.J. Wallace, Q.C.); *Hayes Forest Services Ltd. and Western Forest Products Ltd.* (5 Jun. 1999) (Paul J. Pearlman, Q.C.), *Ray Savidan Enterprises Ltd. and Weldwood of Canada Ltd.* (22 Mar. 1999) (Paul J. Pearlman, Q.C.). One award declined to conclude the *Regulation* confers jurisdiction to determine hourly rates for equipment for “extra work” in relation to the logging contract, or for work under separate road building contracts, in the absence of a specific agreement between the parties to arbitrate them: *Hayes Forest Services Limited and Timberwest Forest Limited* (15 Dec. 1997) (Donald R. Munroe, Q.C.) [unreported].

harvesting services”, the amounts to be paid for them can properly be the subject of a “rate dispute” under Section 25 of the *Regulation*. This is consistent with the Court decision in the *Troubridge* case, in that it excludes the base rental contracts from the purview of the *Regulation* while capturing those services often included in contracts characterized as “stump to dump” within the industry.

[22] The form and content of a replacement contract, however, do not meet the definition of a “rate dispute”, and therefore do not come under Section 25 of the *Regulation* for determination. The terms of the replacement contract need to be determined under the general dispute resolution mechanism of Sections 5 and 6 of the *Regulation*, and in consideration of Part 5, which governs the replaceability of contracts.¹⁴

V. TERMS OF REPLACEMENT CONTRACT

Proper Parties

[23] The Proposed Replacement Contract purports to be between Hayes and Western, as agent for Doman-Western.¹⁵

[24] Hayes is concerned that Doman-Western needs to be a direct party to the contract to comply with the requirements of the *Act*, since it is the licence holder for the main tenures in the fibre basket. Hayes notes Section 152 of the *Act*, which defines a “contractor” as:

a person who has an agreement with the holder of a forest licence, timber licence, timber sale licence or tree farm licence to carry out one or more aspects of the holder’s timber harvesting operations under the licence, ...

¹⁴ This case is unlike *Pacific Forest Products Ltd. and Hayes Forest Services Ltd.* (15 Aug. 1997) (W.J. Wallace, Q.C.); also *Pacific Forest Products Ltd. v. Hayes Forest Services Ltd.* [1998] B.C.J. No. 2368 (S.C.), *Pacific Forest Products Ltd. v. Hayes Forest Services Ltd.* [2000] B.C.J. No. 237 (C.A.), which required separate proceedings for matters arising under ss. 5 and 25. Here, like *Hayes Forest Services Limited and International Forest Products Ltd.* (14 Nov. 2002) (Murray A. Clemens, Q.C.), the dispute has, from the outset, been submitted to arbitration on the basis of a variety of issues, including rate disputes.

¹⁵ Ex. 83.

[25] Western contends that as its agent, it can bind Doman-Western to a contract, and notes that Doman-Western will actually be a signatory to the Proposed Replacement Contract.

[26] Although ensuring technical compliance is always prudent, it is preferable to avoid raising form over substance unnecessarily. And, it seems to me the law is clear that:

... where the agent has made a contract with a third party on behalf of a disclosed principal who actually exists and has authorised the agent to make such contract, the principal can sue and be sued by the third party on such contract. A direct contractual relationship is thereby created between principal and third party by the acts of the agent... This, indeed, is the very purpose and rationale of agency.¹⁶

[27] In my view, therefore, a direct contractual relationship will be created by operation of law between Hayes and Doman-Western under the Proposed Replacement Contract, which is sufficient to satisfy Section 152 of the *Act* that there be "an agreement" between the contractor and licence holder.¹⁷

Default Provision

[28] Western proposes a new default provision which varies from the Kent Contract:

14.1 Default by Contractor:

If any of the following occurs:

- a. the Contractor fails to diligently prosecute or complete the work, or performs the work in a negligent or unsafe manner, and fails to rectify such failure or performance within 14 days after notice to the Contractor by the Company; or
- b. the Contractor abandons the work in whole or in part; or
- c. upon any misrepresentation or breach by the Contractor of any applicable

¹⁶ G.H.L. Fridman, *The Law of Agency* (Toronto: Butterworths, 1996) p. 216.

¹⁷ Even in the absence of privity, arbitrators acting under the *Regulation* strive for justice between the parties in the circumstances. For example, in *Lineham Logging Ltd. and Fletcher Challenge Canada Ltd. and International Forest Products Ltd.* (12 Sept. 1994) (Paul J. Pearlman, Q.C., Bruce E. Welch, Cecil Salmon), despite an absence of privity between the assignee of a licence and the contractor, the panel found jurisdiction over the dispute under the doctrine that a trustee of a promise may sue to enforce the promise.

federal, provincial or municipal laws, regulation, standard or order; or

d. the Contractor fails to observe or perform any material term or condition of this Agreement and such default continues for fourteen days after the Company has given the Contractor written notice specifying such default; or

e. the Contractor fails to observe or perform any material term or condition of this Agreement after written notice by the Company to the Contractor of a previous failure within the previous twenty-four month period;

then the Company may terminate this Agreement forthwith or at any time while such default continues by giving the Contractor written notice to that affect.¹⁸

[29] Since the other five contractors in the NCA agreed to a similar term,¹⁹ Western contends that is the best evidence of what a reasonable contractor would have agreed to at the time the five year contract period commenced in 1997.

[30] If this contention does not prevail, Western is willing to continue with the default provision in the Kent Contract:

17. Default by Contractor

17.1 If, in the opinion of the Company, the Contractor fails to diligently prosecute or complete the work, or performs the work in a negligent or inefficient manner, or abandons the work in whole or in part, or fails to observe or perform any of the covenants, terms or conditions of this Agreement, and if such default continues for 14 days after the Company has given the Contractor written notice, specifying the default, or if such default recurs, the Company may terminate this Agreement forthwith or at any time while such default continues by giving the Contractor written notice to that effect.

17.2 In addition to the foregoing, if the Contractor violates the provisions of any statute or governmental regulation, the Company may by notice suspend the Contractor's operations forthwith.

17.3 The rights and remedies of the Company contained in paragraphs 17.1 and 17.2 hereof are in addition to and not in substitution for any other remedies available to the Company at law.

¹⁸ Ex. 83.

¹⁹ Exs. 79, Tab 4; 80; 114, Tab 6, and trans. Donald Hayes, Feb. 10, 2003, p. 2166 (Hayes' provision with its subcontractors).

[31] Hayes contends that because the default provision in the Proposed Replacement Contract is more stringent than the Kent Contract, it does not comply with the *Regulation*, which requires a replacement contract to be on “substantially the same terms and conditions” as the contract it replaces, and on balance “no less favourable to the contractor than those in the contract being replaced”.²⁰

[32] Hayes also contends that an objective and prospective approach is not appropriate for settling contract terms. Unlike determining a rate, a replacement contract relates to the interests of the contractor relative to a prior agreement, and the test requires it to be substantially the same and no less favourable to the contractor, regardless of what anyone else may be willing to be agree to.

[33] Instead, Hayes proposes the default provision contained in the Roderick Island Contract,²¹ another agreement between Hayes and Western, that Hayes is satisfied is not less favourable to it than the Kent Contract:

Termination

GC 25.1 Subject to each party’s right to the dispute resolution procedures set out herein, the Contract will be terminable or will terminate, without liability to the Licence Holder, at the Licence Holder’s election, prior to the expiry of the Term, upon any of the following events:

- (a) where the Contractor is in breach of any covenant or warranty under the Contract, and fails to remedy that breach within 30 consecutive days following written demand from the Licence Holder that the breach is to be remedied, provided that if the Contractor has used and continues to use all reasonable efforts to cure a breach, but is reasonably not able to do so with such 30 day period, then the 30 day period will be extended by a further period of time which is

²⁰ Ss. 13(1)(b)(iv) and 1(7)(f)

²¹ Ex. 79, Tab 19.

reasonably sufficient to cure the breach, and

- (b) immediately upon the Contractor's election to dissolve, dissolution, insolvency, commission of any act of bankruptcy, general assignment for the benefit of creditors, or the filing of any petition in bankruptcy or application for relief under the provisions of any bankruptcy laws.

[34] If this proposal does not prevail, then, like Western, Hayes is willing to continue the default provision in the Kent Contract.²²

[35] The requirements of a replaceable contract are prescribed by Part 5 of the *Regulation* which includes Section 13:

13 (1) A replaceable contract must provide that

(a) if the contractor has satisfactorily performed its obligations under the contract, and conditional on the contractor continuing to satisfactorily perform the existing contract, the licence holder must offer a replacement contract to the contractor, and

(b) the replacement contract must

(i) be offered 3 months or more before the expiry of the contract being replaced,

(ii) provide that it commences on or before the expiry of the contract being replaced,

(iii) provide for payment to the contractor of amounts in respect of timber harvesting services as agreed to by the parties or, failing agreement, as determined under section 25, and

(iv) otherwise be on substantially the same terms and conditions as the contract it replaces.

(2) If a replaceable contract does not provide for an expiry date, the contract expires on the second anniversary of the date on which the contract commenced.

²² Western claims that even though the default provision in the Roderick Island Contract is more generous to Hayes than the Kent Contract, it had offered to use the entire Contract, but Hayes declined (trans. Ron Todd, Oct. 29, 2002, p. 1109). Hayes denies that it was offered the entire Roderick Island form of contract for Plumper Harbour, and claims it would have responded favourably if the offer been made.

[36] Like with dispute resolution, a contract that did not comply with Section 13 by August 1, 1996, would be deemed by the *Act*²³ and the *Regulation*²⁴ to incorporate its standard provision for replacement contracts:²⁵

Provided that the contractor has satisfactorily performed the contractor's obligations under this contract, and subject to the contractor continuing to do so, the licence holder will, at least 3 months before the expiry of this contract, offer the contractor a replacement contract that

- (a) commences on or before the expiry of this contract,
- (b) except as provided for in paragraph (c) and in the regulation, has substantially the same terms and conditions as this contract, and
- (c) provides for payment to the contractor of amounts to be agreed upon by the parties, or failing agreement, determined by the method of dispute resolution provided for in the contract.

[37] The Kent Contract, however, did provide for replacement "consistent in all material ways" with Section 13 of the *Regulation*:²⁶

1.3 Provided the Contractor has satisfactorily performed the Contractor's obligations under this Agreement, and subject to the Contractor continuing to do so, the Company, on or prior to the date set out in Schedule "A", will offer the Contractor a replacement agreement which

- (a) is for a term as set out in Schedule "A";
- (b) except as provided for in paragraph (d) and in the Timber Harvesting Contracts and Subcontracts Regulation, has substantially the same terms as this Agreement;
- (c) commences at the time set out in Schedule "A";
and
- (d) provides for payment to the Contractor of amounts to be agreed upon by the parties, or failing agreement, of the amounts settled by the method of dispute resolution, including mediation or arbitration, provided for under this Agreement,

and such offer will be open for acceptance for 14 days from the date of receipt by the Contractor.

²³ *Forest Act*, R.S.B.C. 1996, c. 157, s. 160.

²⁴ Ss. 48, 50, 51, Sch. 4.

²⁵ Sch. 4

²⁶ S. 48.

[38] Section 1(7) of the *Regulation* defines a replacement contract to be on “substantially the same terms and conditions” as the contract it replaces if the replacement contract:

- (a) pertains to the same area as the one it replaces, or to a similar area,
- (b) provides the same term as the one it replaces, or for a longer term, expressed as a number of whole years,
- (c) provides for a specified amount of work that is the same as or greater than the amount of work specified in the one it replaces,
- (d) subject to the provisions of section 14, provides for the same type of work as the one it replaces or a similar type,
- (e) is a replaceable contract or a replaceable subcontract as the case may be, and
- (f) subject to any changes in government enactments or policies affecting the licence holder's timber harvesting operations, provides for other operational terms and conditions that on balance are no less favourable to the contractor or subcontractor than those in the contract or subcontract being replaced.

[39] Section 13 specifically contemplates Section 25 rate disputes in 13(b)(iii), and otherwise requires substantially the same terms and conditions as the contract it replaces in 13(b)(iv). The test for the content of a replacement contract is, therefore, not what a “reasonable contractor” would have agreed to prospectively, as for a Section 25 rate dispute, but whether its terms and conditions are substantially the same as the contract it replaces, and on balance are no less favourable to the contractor.

[40] Section 1(7)(f) provides for an exception relating to “changes in government enactments or policies affecting the licence holder's timber harvesting operations”,²⁷ which contemplates objectively determinable factors, and thereby adds a prospective element of foreseeing the need to respond to changes affecting a licence holder’s operation, but Western did not invoke the exception by reference to other contracts in the industry to support a claim that changes in law or government policy have affected, or

²⁷ It creates a mechanism to deal with change within the replaceable contract framework, and reflects the view of industry stakeholders that there should not be a rigid application of replaceability that results in unfairness, uneconomic units or an inability of licensees to respond to change (Coastal Joint Review Report and Recommendations to the Ministry of Forests, Jan. 1994; also S. 14 of the Regulation).

will affect, its operations.²⁸ And the form of the proposed default provision in Clause 14.1 of the Proposed Replacement Contract²⁹ differs from that accepted by the other contractors in the NCA.³⁰

[41] It also appears that Hayes repeatedly sought to add a qualifier to the default provision to the effect that if it had taken all reasonable steps to cure a default, the default continuing after the notice period would not be cause for termination.³¹ This is contrary to the consequence contemplated in Clause 14.1, as proposed by Western, which is that “the Company may terminate this Agreement forthwith or at any time while such default continues by giving the Contractor written notice to that affect.”

[42] In the result, I am not inclined to conclude that Clause 14.1, as proposed by Western, should form the default provision of the replacement contract. I am similarly not inclined to replace it with Clause GC 25.1 of the Roderick Island Contract. The related indemnity provision of that contract, for example, is drafted more precisely than in the Proposed Replacement Contract so as to allow Western to recover a wide variety of losses and damages from Hayes.³² It would also add a needless element of uncertainty to propose re-drafting an agreement for Plumper Harbour in the form of the Roderick Island Contract.

²⁸ During the negotiations, Counsel for Western wrote to Counsel for Hayes about the default provision, and observed that recurring *Forest Practices Code* (R.S.B.C. 1996, c. 159) violations by a contractor could lead to severe and possibly incurable consequences for Western, like rejecting cutting permit applications under the new regulatory framework of the *Performance Based Harvesting Regulation* (B.C. Reg. 175/95) (Ex. 79, Tab 8). The version of the draft default provision at the date of the letter, November 30, 1998, is somewhere between the provision accepted by the other contractors in the NCA (Ex. 80), and Clause 14.1 of the Proposed Replacement Contract (Ex. 83).

²⁹ Ex. 83.

³⁰ Ex. 80.

³¹ Ex. 79, Tabs 4, 7.

³² For “any negligence, breach, violation, non-performance or non-observance by the Contractor or its Workers of any laws, ordinances, regulations, rules, requirements, orders, or permits, including, but not limited to the Code, the Forest Act, the Environmental Laws, the Licence or the Ministry’s permits relating to the Work and/or the Area of Operation”.

[43] I am generally of the view that unless required by law, or by agreement of the parties, arbitrators ought to be extremely reluctant to make agreements for the parties they have not made for themselves. It therefore seems to me to be preferable that the parties retain the default provision in Clause 17 of the Kent Contract. Both parties are content with it as their alternative choice, and it meets the replaceability requirements of the *Regulation*.

Fibre Basket Agreement

[44] At issue is Western's ability to terminate a fibre basket agreement.

[45] The *Regulation* permits a fibre basket by allowing a licence holder with more than one licence to agree with all affected contractors to treat two or more licences as one:³³

16 (1) A licence holder and one or more contractors may enter into an agreement in which the parties agree

- (a) to treat more than one licence held by the licence holder as a single licence for the purposes of Part 5 of this regulation, and
- (b) to treat all contracts that are
 - (i) between the licence holder and any of the contractors, and
 - (ii) to carry out any phase of the licence holder's timber harvesting operations under any of the licences

³³ Before the 1996 amendments to the *Regulation* incorporating Section 16, stakeholders in the industry were of the view that the prior *Regulation*, which dealt with contracts on a licence by licence basis, restricted the operational flexibility of licence holders while adversely affecting contractors in some circumstances. As a result, it was agreed that it would be beneficial for both licence holders and contractors to have the ability to agree to a "wood basket" arrangement where the replaceability obligations would correspond to the volume of timber available from a defined operating area, and not the individual licences making up the timber within that area. The stakeholders recommended that where a license holder and a group of contractors agree to a "wood basket" arrangement, the *Regulation* ought to permit the agreement to supersede the replaceability provisions. It was not intended to permit parties to contract out of the replaceability provisions of the *Regulation* - but to permit them to treat the volume of timber from a "wood basket" as though it were from a single licence for the purpose of the replaceability provisions of the *Regulation* (Coastal Joint Review Report and Recommendations to the Ministry of Forests, Jan. 1994).

as contracts to carry out phases of the licence holder's operations under that single licence.

...

(3) Subsections (1) and (2) apply only if every contractor who has a replaceable contract that may be affected by the agreement is a party to the agreement.

(4) If a fibre basket agreement does not expressly provide for termination, the fibre basket agreement may be terminated only with the consent of all parties.

[46] In 1992³⁴ Pacific proposed in a letter to Kent, Pat Carson Bulldozing Ltd.,³⁵ and some of the Other Contractors, that it remove 28,000 m³ from the 75,000 m³ gross annual "helicopter and other systems" volume and apply it to the annual Gold River cut, with the remaining 47,000 m³ of opportunity volume available only to the seven named contractors on a bid proposal basis. The proposal showed the "current" and "proposed" cut volume breakdown for each operation to a total of 1,471,000 m³ gross. Under the proposal, Kent was entitled to 85,000 m³ gross, or approximately 5.777% of the total gross volume.

[47] Before the *Regulation* amendments in 1996 formalized "fibre basket agreements", the Pacific letter constituted a fibre basket arrangement, and the parties acted in accordance with it.³⁶ Throughout 1997 to 2001, Western, Hayes, and the other contractors in the NCA, continued to act as though a fibre basket agreement was in place in respect of the Licences,³⁷ with Hayes' allocation being 5.777%³⁸ of the fibre basket ("Fibre Basket Agreement").

³⁴ Ex. 60.

³⁵ Later Hayes, in relation to the Gold River operation, subsequently sold to Beban.

³⁶ Trans. Ron Todd, Oct. 29, 2002, pp. 1074-75 and Nov. 1, 2002, pp. 1311-12; Donald Hayes, Feb. 10, 2003, pp. 2126, 2191-95.

³⁷ Trans. Donald Hayes, Feb. 10, 2003, p. 2193-94; Ron Todd, Oct. 29, 2002, pp. 1074-82; Ex. 58; trans. Robert Craven, Oct. 9, 2002, pp. 725-29.

³⁸ Trans. Ron Todd, Oct. 29, 2002, pp. 1076-82 and Nov. 1, 2002, p. 1317; Robert Craven, Oct. 9, 2002, pp. 729, 742-43; Donald Hayes, Feb. 10, 2003, p. 2158; Harold Hayes, Nov. 5, 2002, p. 1700.

[48] Western emphasizes that the provision relating to the Fibre Basket Agreement and its termination in the replaceable contracts it made with the other contractors in the NCA is identical to what is proposed in the Proposed Replacement Contract:³⁹

A14 Fibre Basket Agreement

By signing this Schedule, the Contractor agrees as follows with the Company and all other contractors ("Other Contractors") who from time to time hold replaceable contracts pertaining to the licences described in Item A1 of this Schedule (the "Licences") which involve the same or substantially the same phases or a timber harvesting operation under the Licences as this Agreement which include this provision:

- (a) to treat the Licences as a single licence for the purposes of Part 5 of the Timber Harvesting Contract and Subcontract Regulation; and
- (b) to treat all contracts between the Company and any of its contractors to carry out any phase of the Company's timber harvesting operations under any of the Licences as contracts to carry out phases of the Company's operations under such a single licence.

This agreement in this Item A14 may be executed in counterparts and shall remain in effect until the expiration or termination of one of the Licences or until the Company terminates the agreement on not less than six months notice to other parties to the agreement as at the date the Company gives such notice.

[49] To avoid re-opening the contracts it negotiated with the other contractors, Western proposes a separate agreement to its replacement contract with Hayes that would provide:

WFP hereby confirms that pursuant to A-14 (Fibre Basket Agreement) of the signed Logging Contract between WFP and Hayes at Plumper Harbour dated for reference January 1, 1997 (the "Contract"), WFP will not terminate the Fibre Basket Agreement during the term of the Contract.⁴⁰

[50] Hayes contends that the whole of the Fibre Basket Agreement either needs to be incorporated in the replacement contract, or dealt with as a separate agreement. Hayes is particularly concerned that the termination provision in Clause A14 could defeat the replaceability of the contract,⁴¹ and if the Fibre Basket Agreement was terminated, Hayes

³⁹ Exs. 83 and 80.

⁴⁰ Ex. 79, Tab 13.

⁴¹ It notes Ron Todd, Western's Nootka Contract Manager, understood Hayes to not have a contract if the fibre basket was terminated (trans. Ron Todd, Nov. 1, 2002, p. 1396).

would only be left with an acknowledgement by Western that they ought to negotiate a new arrangement.

[51] Hayes refers to Sections 13⁴² and 15⁴³ of the *Regulation*, which provide for the circumstances in which a replaceable contract can be terminated. It contends they do not contemplate termination on six months notice and, to be consistent with the *Regulation* and the original fibre basket agreement, the agreement should say:

The agreement in this Item A14 may be executed in counterparts and shall remain in effect until the expiration or termination of all of the Licences.⁴⁴

[52] Western disagrees that termination of the Fibre Basket Agreement would terminate the contract or the replaceability of the contract. If the Fibre Basket Agreement was terminated, Western's view is that it would have to agree with all the contractors on another fibre basket, or provide them individually with the same percentage of work entitlement on the remaining licences, so the replaceability of the contract would not be affected. Western sees Clause A4 of the Proposed Replacement Contract⁴⁵ as guaranteeing Hayes 5.777% of the total amount of timber processed by Western each year under the Licences described in Clause A1, regardless of the Fibre Basket Agreement.

[53] Western also points to Clause 1.4 of the Proposed Replacement Contract,⁴⁶ which provides for replaceability in accordance with Section 13, as ensuring that even if the Fibre Basket Agreement was terminated during the term of the replacement contract, it would not alter the existence of a replaceable contract. Western urges the replaceable five year logging contract not be confused with the Fibre Basket Agreement, the intent of

⁴² If a contractor fails to satisfactorily perform its obligations under a contract, the licence holder need not offer a replacement contract.

⁴³ A replaceable contract terminates, to the extent it relates to the licence, on the cancellation, expiration or surrender of the licence under which the timber harvesting services provided by the contractor are carried out.

⁴⁴ Ex. 79, Tab 17.

⁴⁵ Ex. 83.

⁴⁶ Ex. 83.

which is only to treat a group of licences as one for the purpose of timber allocation, and not to, in itself, create a replaceable contract.

[54] In my view, a fibre basket agreement as contemplated in Section 16(1) of the *Regulation* is formed once the licence holder and all the affected contractors agree as required in Section 16(1), and to the allocation of work among them.

[55] In this case, it seems to me that all the elements of a fibre basket agreement are in place, even though Hayes has not agreed to the terms of a replacement contract. Western has entered into replaceable contracts with each of the other contractors in the NCA specifying their respective amount of work entitlement as a percentage of the total amount of timber processed by Western⁴⁷ each year under the Licences. There are parallel provisions in Clauses A1 and A4 of the Proposed Replacement Contract,⁴⁸ with which Hayes takes no issue. Hayes does not dispute its allocation of 5.777% of the fibre basket, as set out in Clause A4, and has conducted itself as though a fibre basket agreement was in place from 1997 to 2001 in respect of the Licences.

[56] Section 3(1) of the *Regulation* requires a contract to be in writing. However, Section 3(2) directs parties to a contract not in compliance with the *Regulation* to make reasonable efforts to cause the contract to conform, and settling the terms of the Fibre Basket Agreement and the replacement contract is an object of this proceeding.

[57] Although there is an agreement between Western and all of the contractors in the NCA, including Hayes, about the basic elements of a fibre basket agreement, Hayes has not agreed to the termination provision in relation to the agreement. Without the

⁴⁷ As required by S. 18(1) of the *Regulation*.

⁴⁸ Clause A1 of the Proposed Replacement Contract, Ex. 83, lists FLA19321, as opposed to FLA19231 as listed in Clause A1 of the other NCA contracts, Ex. 80. According to Ex. 79, Tab 4 and other documents, this appears to be an error which should read FLA19231. Also, Clause A1 of the Proposed Replacement Contract lists 11 Timber Licences, one more than the 10 Timber Licences listed in Clause A1 of the other NCA contracts (adding TO381). It appears this too may be an error, as there are only 10 Timber Licences outside of TFL 19 which are contained in the fibre basket. There also appears to be nothing in Clause 20.5 of the Proposed Replacement Contract which effects the *existence* of a fibre basket agreement.

agreement of all the affected contractors, the termination provision proposed by Western cannot in my view form part of the Fibre Basket Agreement between Western and any of the NCA contractors.⁴⁹ Therefore, despite the replacement contracts Western has entered into with the other contractors in the NCA, Section 16(4), which provides that the Fibre Basket Agreement can “be terminated only with the consent of all parties”, takes effect.

[58] The advantage of the fibre basket concept is that it offers operational flexibility to licence holders, while providing a measure of security to contractors by allowing them to share the work in the whole of the fibre basket as a hedge against industry risks. As a practical matter, it would be unworkable, as well as inequitable, for contractors to a fibre basket agreement to be subject to differing terms. For example, where some licences in the fibre basket have been more heavily logged than others, termination could have a differential impact on the contractors involved if logging was to revert to a licence by licence basis.

[59] It would also undermine the concept of a fibre basket agreement if Western was able to terminate it on six months notice with all of the contractors in the NCA, except Hayes. It would similarly not be sensible if Western could terminate the Fibre Basket Agreement, but the contractors would continue to be entitled to their specified allocation under the Licences, as that is the essence of the agreement.

[60] I am also of the view that it is not necessary for a fibre basket agreement to be contained wholly in a side-agreement, or wholly in the replacement contract, since the replacement contract itself may be recorded, and thereby evidenced, in one or more documents in compliance with the requirements of Section 3(1).

⁴⁹ S. 16(3) requires every contractor who has a replaceable contract that may be affected by the fibre basket agreement to be a party to the agreement reached.

[61] For example, the effect of the letter that created the original fibre basket agreement⁵⁰ was to modify the Kent Contract to the extent of the letter. Since an agreement can supersede a prior agreement, the modification could occur by agreement between the parties at any time regardless of the 'entire agreement clause' in the Kent Contract. Section 16(1)(b) of the *Regulation* also contemplates a fibre basket agreement being separate from the replaceable contract, yet it may affect replaceable contracts existing at the time the fibre basket agreement is entered into, and, possibly, those made after.

[62] However, anything affecting the allocation of work within an agreed fibre basket is integral to the operation of each replaceable contract. And, as a matter of practical implication, the consistency of terms among affected contractors with respect to the replaceability or duration of a fibre basket agreement is critical. So, although a fibre basket agreement can be recorded under the *Regulation* in more than one document, it is only valid if the licence holder and all affected contractors have agreed to the same terms.

[63] In the result, Hayes cannot be compelled to agree to a termination provision and is not bound to the termination provision agreed to by the other contractors in the NCA. And, in the absence of an agreement on termination between Western and all the contractors in the NCA, the Fibre Basket Agreement, according to Section 16(4) of the *Regulation*, cannot be terminated by Western without the consent of all of them.

Unallocated Helicopter Volume

[64] The Pacific letter that established the fibre basket arrangement⁵¹ said "the remaining 47,000 m³ gross annual 'helicopter and other systems' opportunity volume will be available only to the seven above named contract operators on a bid proposal basis".

⁵⁰ Ex. 60.

⁵¹ Ex. 60.

While not stated as a percentage in the letter, 47,000 m³ of the total volume of 1,471,000 m³ is 3.195%

[65] In a letter to Hayes, dated October 11, 2000,⁵² Western confirmed it will fulfill the commitment made by Pacific,⁵³ "namely, that 3.194% of the projected volume of the Nootka Region Fibre Basket will remain unallocated (helicopter and other systems) to a particular contractor or company operation. If this unallocated volume is made available by Western Forest Products Limited, then it will be available only to the Seven Contractors on a bid proposal basis".

[66] The controversy is that Western claims its commitment was always to make the unallocated volume available only if it chose to, while Hayes claims the unallocated volume was to be made available for bid by the contractors each year.⁵⁴

[67] The *Regulation* recognizes a licensee's prerogative to determine, within prescribed limits, how much work it will take, from where and by what systems. Section 18 requires the amount of work to be expressed as a percentage of the total amount of timber processed by the licensee under the licence each year.⁵⁵ Section 21 gives a licensee

⁵² Ex. 79, Tab 14.

⁵³ In its submissions, Western refers to a proposal dated Oct. 1, 1996 as the previous commitment (Ex. 79, Tab 2). However, the letter of Oct. 11, 2000 confirms the commitment made on Nov. 5, 1992 (Ex. 60).

⁵⁴ Donald Hayes explained that, at the time of the original commitment, it was agreed the unallocated volume would be put up for bid every year (trans. Donald Hayes, Feb. 10, 2003, p. 2126). Ron Todd explained that Western did not, in fact, put the unallocated volume out to tender on an annual basis, and that Hayes had recently shared in a successful bid proposal (trans. Ron Todd, Nov. 1, 2002, pp. 1342, 1345, 1394).

⁵⁵ Historically, the licensee determined the total amount of timber that it would harvest under a licence in each year and in a five year cut control period, with regard to the cut control requirements previously in S. 64 of the *Act*, which, before it was amended in Nov. 2003, required the holder of certain replaceable agreements or tree farm licences to ensure that the volume of timber harvested during a calendar year was not less than 50% nor more than 150% of the allowable annual cut authorized or available, and that the volume of timber harvested during a five year cut control period was not less than 90% nor more than 110% of the total allowable annual cuts authorized or available during that five year period. Failure to comply with S. 64 attracted penalties and consequences for the

authority to vary the amount of work allocated to a contractor each year, if the adjustment is attributable to valid business and operational reasons, and at least 95% compliance is achieved over the five year cut control period. And, Section 14 provides that a licensee may require, for valid business and operational reasons, that a contractor use different timber harvesting methods, technology or silvicultural systems.

[68] So, unless Western had clearly agreed, it would not in my view be appropriate to hold Western committed to allocate 3.194% to heli or any other system each year. That would be contrary to the need for operational flexibility recognized in the *Regulation* and would require a certainty of annual allocation that is not commercially reasonable in the industry. There is also no indication that the unallocated volume was actually put up for bid on an annual basis,⁵⁶ or that Kent, Hayes, or any of the other contractors, ever raised with Western a concern about not making the unallocated volume available on an annual basis in accordance with an agreement or any contractor's expectations.

[69] Instead, when Pacific offered Kent a replacement contract for the five year period from 1997 to 2001,⁵⁷ an attached schedule shows 3.194% as "helicopter/unallocated", of a total projected annual cut of 1,350,000 m³ gross. Neither the offering letter, nor the schedule, mentions bid proposals for the unallocated volume. A similar schedule, indicating 3.194% as "helicopter/unallocated" of a total 1,350,000 m³ gross, is appended to each of the replacement contracts Western has with the other contractors in the NCA,⁵⁸ none of which refer to bid proposals.⁵⁹

licence holder under Ss. 65 to 67 of the *Act*. Ss. 64 to 68 of the *Act* have been repealed and replaced by the *Forest (Revitalization) Amendment Act*, 2003, S.B.C. 2003, c. 30, ss. 8,13. Amendments to the *Regulation* to accommodate the changes are expected.

⁵⁶ Ex. 18, Tab 7; trans. Ron Todd, Nov. 1, 2002, pp. 1342, 1394.

⁵⁷ Ex. 79, Tab 2.

⁵⁸ Ex. 80.

⁵⁹ Aside from the replacement contracts, there is little to indicate the understanding of the other contractors within the NCA about the treatment of unallocated volume from 1997 to 2001. It is not clear whether their view is that the unallocated volume bid proposal arrangement flows from the original commitment, whether any separate side-letters

[70] In view of all the circumstances, I am unable to conclude that Western is obligated to offer the unallocated volume on an annual basis.

[71] However, Western is obligated to the commitment it confirmed in its letter to Hayes dated October 11, 2000. Western and all of the contractors in the NCA shared a common understanding for the 1997 to 2001 period about the continued treatment of the unallocated volume of 3.194% in accordance with Pacific's original commitment. In regard to how that commitment should be expressed, Hayes prefers, for the purposes of the 1997 to 2001 period, to incorporate it into the Proposed Replacement Contract. Western proposes to use a side-agreement. Since the commitment is integral to the work allocation, and is part of the Fibre Basket Agreement, in my view it forms part of the replacement contract whether it is recorded in one document or two. Since a side-agreement would be an agreed modification to the Proposed Replacement Contract, it would be effective regardless of an 'entire agreement clause' in the Proposed Replacement Contract.

[72] Although it makes no difference in law if Western's commitment is recorded, in one document or two, it seems to me to be preferable to reflect the legal relationship between the parties in one, if that is not inconvenient. Therefore, Western's commitment in respect of the unallocated volume, as understood by Western and without a requirement that it be put up for bid on an annual basis, should in my view be reflected in the Proposed Replacement Contract.

confirming the previous arrangement were also provided to them, or whether the schedules to their replacement contracts confirming the 3.194% unallocated volume are considered sufficient. It is apparent, however, that, on occasion between 1997 and 2001, the unallocated volume has been put out to tender to the contractors, with bid proposals having been received, including from Hayes.

[73] Since this commitment comprises part of the Fibre Basket Agreement, it also seems to me that it applies to the other contractors in the NCA even though it is not expressly reflected in their replacement contracts.

VI. CONVENTIONAL LOGGING RATES, 1998 to 2001

[74] The parties' claims in regard to conventional logging rates are:

YEAR	WESTERN	HAYES
1998	\$40.59/m ³	\$51.74/m ³
1999	\$40.59/m ³	\$56.29/m ³
2000	\$41.65/m ³	\$54.25/m ³
2001	\$43.52/m ³	\$63.49/m ³

[75] In settling rates under Section 25 of the *Regulation*, arbitrators have considered a variety of approaches. For example⁶⁰:

- (a) The previous rate approach: adjusting rates previously agreed to between the parties for the same operation, favoured by Arbitrator Taylor in *Lineham Logging Ltd. and International Forest Products Ltd.*, (December 3, 1999);
- (b) The expert opinion approach: deriving a rate from the assessment of a qualified expert, used by Arbitrator Pearlman in *Western Forest Products Limited and Hayes Forest Services Limited*, (May 6, 1999); and
- (c) The reasonable cost/profit approach: deriving a rate from the reasonable costs actually incurred by the contractor plus a reasonable profit and risk margin, used by Arbitrator Wallace in *Pacific Forest Products Limited and Hayes Forest Services Limited*, (August 15, 1997), and Arbitrator MacIntosh in *Hayes Forest Services Limited*, (August 25, 2000).

⁶⁰ As characterized in *Hayes Forest Services Limited and International Forest Products Ltd.* (14 Nov. 2002) (Murray A. Clemens, Q.C.).

[76] The British Columbia Court of Appeal has also said that Section 25 requires an arbitrator to take an objective and prospective approach:

The language of s.25(1) indicates clearly that an arbitrator is required to take an objective approach in determining a rate. Section 25(1) refers to what "a licensee" and "a contractor" would agree to. It does not refer to the actual parties to the dispute. The section also refers to what a licensee and a contractor "acting reasonably . . . would agree". The conduct of reasonable persons is an objective test. The words "would agree" also suggest a prospective, and therefore objective approach. Section 25(1) postulates a hypothetical scenario for the arbitrator, one in which the arbitrator places himself or herself in the position of the parties, acting reasonably, at the commencement of the contract year in the circumstances then known to both of them. Then, the task is to determine what such parties at that time and in those circumstances would have agreed to, bearing in mind the two criteria for such an agreement mandated by s.25(1). Those criteria are (a) a rate that is "competitive by industry standards", and (b) a rate which will permit the contractor to earn "a reasonable profit".⁶¹

[77] The Court of Appeal recognized, however, that some subjective analysis may be necessary:

Nor do I see any error arising from the fact that the arbitrator turned to subjective elements to make an overall objective determination. A certain amount of subjective analysis is permitted by s.25(2) of the Regulations within the overall objective analysis mandated by s. 25(1). ...

In my view, the arbitrator was free to take into account subjective information about the actual practices of these parties as long as the end result conformed to the objective stipulations found in s. 25(1). ...⁶²

Roll Forward Approach

[78] Both parties agree that a "roll forward approach", an application of the "previous rate" approach, is appropriate. But, they differ on how it should be applied.

⁶¹ *Hayes Forest Services Ltd. v. Pacific Forest Products Ltd.*, 2000 B.C.C.A. 66, para. 43.

⁶² *Hayes Forest Services Limited v. TimberWest Forest Ltd.*, 2000 B.C.C.A. 67, paras. 22, 23.

[79] Western looks to the prior conventional logging rates agreed to between Western and Kent, as well as the conventional logging rate negotiated between Western and Hayes in 1997, to show modest rate increases from time to time that account for IWA wage increases and inflation, without large fluctuation.⁶³ In Western's roll forward approach, the rates are derived by increasing the 1997 rate, which was agreed to between Western and Hayes, by the average percentage increase agreed to by the other contractors in the NCA for each of the years 1998 through 2001.⁶⁴

[80] Western also uses the rates agreed to with other contractors in comparable operations as a "check" on the proposed rates, and as support for its claim that the rates proposed by Hayes are excessive.

[81] Hayes prefers to roll forward the agreed 1997 conventional logging rate, with adjustments for changes in special circumstance rates, inflation and IWA increases, the actual volume impact on its actual fixed costs for each year, and for profit and risk.⁶⁵ And, it contends that the reasonableness of the rates it proposes is best checked against its actual costs of doing the work, as reflected in its audited financial statements and accounting records, plus a profit and risk margin of a 15%, which it purports to be the industry standard.

[82] Western contends that Hayes is using a modified "cost-plus" approach, which is based on its actual costs of logging, and grosses-up the 1997 agreed rate on the basis of the approximately 114,000 m³ of heli and conventional volume it actually harvested in 1997 (instead of its projected annual cut within the fibre basket of approximately 74,400 m³ net), as well as on the basis of special circumstance payments, an approach which Western contends is not prospective.

⁶³ Ex. 18, Tab 13.

⁶⁴ Ex. 18, Tabs 14, 15.

⁶⁵ Ex. 113, Tab 2.

[83] Hayes maintains it is using the previous rate approach, which was the one preferred by Arbitrator Taylor, in *Lineham Logging Ltd. and International Forest Products Ltd.*, and involves taking the last agreed logging rate and rolling it forward by making arithmetic adjustments for changes in circumstances⁶⁶:

Thus the general intent of the regulation appears to be: (i) that the rate set be one to which a reasonable licence holder and contractor *would agree*; (ii) that it be both *competitive* and *such as to permit* the contractor a reasonable profit *when operating efficiently*; (iii) that the *first* source of guidance is to be sought from rates previously *agreed to* by the *same* parties, adjusted for relevant differences between the nature, cost and productivity of the prior work and economic circumstances relevant to that work, on the one hand, and those pertaining to the work for which the rate is to be set, and circumstances relevant to it, on the other; (iv) that a *second* source of guidance is to be sought in costs and rates paid in *similar* operations; (v) that other information may be considered which is relevant to ascertaining the rate that a licence holder and a contractor acting reasonably *would agree to* in *similar circumstances*; and (vi) that in setting the rate no regard is to be had to the special value conferred by the regulatory scheme on contracts which enjoy its protection.

It is of course necessary to have in mind that the criteria listed in sub-section (2) above can be relevant only insofar as they assist in achieving the objectives stated in sub-section (1), that is to say, in arriving at a rate which *would be agreed to* for the work in question by parties acting reasonably, that is to say as being competitive by industry standards and offering the contractor a reasonable profit opportunity.

It is in my view apparent that the most useful guide in arriving at such a rate is likely to be those rates agreed to in recent years under the Regulation by the same or other parties for the same or truly *similar* operations.

...

Thus in deciding whether a rate is "competitive", and such as to permit a reasonably efficient contractor to earn a reasonable profit, as required by s. 25(1)(a) and (b), it seems, as I have said, that the most valuable guidance will be found in rates actually agreed to by the same parties for recent work as part of the same operation -- the criterion mentioned in s. 25(2)(a) -- in association with adjustment for the factors listed in clauses (b) and (c), and rates agreed between contractor and other licensees involved in the same operation. ...⁶⁷

⁶⁶ Trans. Donald Hayes, Feb. 10, 2003, pp. 2128-29; Ron Todd, Oct. 31, 2002, pp. 1166, 1172.

⁶⁷ *Lineham Logging Ltd. and International Forest Products Ltd.* (3 Dec. 1999) (M.R. Taylor, Q.C.), pp. 4, 5, 11.

[84] The parties agree that there are commonly four factors which affect logging rates: 1) IWA wage increases; 2) inflation; 3) volume of timber harvested; and 4) changes in logging chance. Each of these factors is contemplated by Section 25(2)(c) of the *Regulation*. But, both of their two roll forward approaches differ from the approach contemplated by Arbitrator Taylor, whereby previously agreed rates under Section 25(2)(a) are adjusted for factors in Sections 25(2)(b) and (c), followed by a consideration of the factors in Sections 25(2)(d) to (f).⁶⁸

[85] Western adjusts the previous rate by the average percentage increase in rates for the other contractors in the NCA as rates for "similar timber harvesting operations" under Section 25(2)(e), while Hayes adjusts the previous rate on the basis of "other data or criteria" under Section 25(2)(f), like actual volume and costs,⁶⁹ and special circumstance payments agreed to in 1997.

Special Circumstance Rates

[86] Hayes considers all of the rates agreed to in 1997 as relevant to understanding the parties' intentions in 1997. It does not contest that \$40.59/m³ was the conventional logging rate agreed to for the full phase conventional component of the overall work performed in that year. However, Hayes claims the conventional rate was agreed to in conjunction with the settlement of other "special circumstance" rates, as a negotiated way to enable Hayes to achieve its overall revenue objectives, while allowing Western to stay within its limits for increases in the conventional rate.

⁶⁸ Notably, however, because of the lack of evidence about previously agreed rates in *Lineham*, Arbitrator Taylor was largely unable to apply his stated preferred approach.

⁶⁹ *Hayes Forest Services Limited v. Pacific Forest Products Limited*, 2000 B.C.C.A. 66, para. 46.

[87] In particular, Hayes claims the 1997 heli rates were artificially inflated to circumvent Western's internal decision to cap conventional rate increases at 5%, so that Western paid excessive rates for heli support and heli falling services. Hayes observes that, exclusive of heli yarding, the 1997 rates Western paid for heli support and heli falling services are higher than those paid for conventional services inclusive of yarding, which, it contends would not otherwise make sense given the additional work involved in the latter. Hayes also notes that, for the conventional logging of some blocks in 1997, Western agreed to pay \$48.03/m³.

[88] In the result, Hayes claims the use of special circumstance rates in 1997, and their later absence, is a consideration that a reasonable contractor and licensee would take into account in subsequent rate negotiations, so they may be considered under Section 25(2)(f) of the *Regulation*, and that the rate of \$40.59/m³ agreed to in 1997 for conventional logging ought to be adjusted by a factor of \$5.16/m³,⁷⁰ for a 1997 base of \$45.75/m³, which Western observes would be \$5.41/m³ higher than the average conventional logging rate for the other contractors in the NCA.⁷¹

[89] Western points to the award in *Pacific Forest Products Limited and Hayes Forest Services Limited*⁷² for rejecting Hayes' contention that the negotiated conventional logging rate for 1997 was not the 'real' rate, and vigorously contests the recasting of the negotiating history some five years later.

[90] That history, however, may be instructive.

⁷⁰ Ex. 113, Tabs 2, 3.

⁷¹ Ex. 18, Tab 17.

⁷² *Pacific Forest Products Ltd. and Hayes Forest Services Ltd.* (15 Aug. 1997) (W.J. Wallace, Q.C.), para. 5.2.

[91] In 1997, Western agreed to maintain a previous commitment to Kent by paying an interim rate of \$48.03/m³ for conventional logging in blocks B109, B90, and B90A,⁷³ until the final 1997 conventional logging rate was negotiated.⁷⁴

[92] The final 1997 rates agreed to between Western and Hayes were⁷⁵: 1) \$40.39/m³ conventional logging rate for all blocks (\$40.59/m³ after IWA increase); 2) \$32.11/m³ heli support rate for blocks B90 and B91; 3) \$59.57/m³ heli yarding rate for block B90; 4) \$65.54/m³ heli yarding rate for block B91; 5) \$9.56/m³ heli falling rate for block B90; and 6) \$9.25 heli falling rate for block B91; with all rates to be adjusted by 50% of the IWA increase effective June 15, 1997, as calculated by Forest Industrial Relations.

[93] The parties agree they were approximately \$73,000 apart in their overall negotiations, and that the gap was ultimately bridged by increasing the heli support rate by \$0.36/m³ and each of the heli yarding rates by \$1.00/m³, rather than increasing the conventional logging rate.⁷⁶

[94] The question is whether that amount was applied to the heli-rates because, as Western claims, they represented mobilization and demobilization costs properly

⁷³ Exs. 32; Ex. 18, Tab 88; trans. Ron Todd, Nov. 1, 2002, pp. 1296-97; Donald Hayes, Feb. 10, 2003, pp. 2156-57.

⁷⁴ Exs. 18, Tab 88; 95; 96; trans. Ron Todd, Nov. 1, 2002, p. 1303-06; Harold Hayes, Nov. 5, 2002, pp. 1685-86. While there is some debate as to whether the amounts owing on these blocks at the interim rate of \$48.03/m³, as well as some amounts owing on block B116 at the final rate of \$40.39/m³, was fully paid, a debt owing to Hayes by Western would properly be the subject of a claim under the general dispute resolution mechanism of ss. 5 and 6 of the *Regulation*, rather than a rate dispute under Section 25, and Hayes has not advanced a claim for debt in these proceedings. (Exs. 91; 108, Tab 16; trans. Ron Todd, Nov. 1, 2002, pp. 1301-06; Harold Hayes, Nov. 5, 2002, pp. 1685-87; Mary Robinson, Feb. 6, 2003, pp. 1887-89, 1944-48).

⁷⁵ Ex. 35; Ex. 36; Ex. 96; trans. John Veerman, Oct. 9, 2002, pp. 763-65; trans. Harold Hayes, Nov. 4, 2002, pp. 1527-29, and Nov. 5, 2002, p. 1684; trans. Ron Todd, Oct. 31, 2002, pp. 1187-1190, Nov. 1, 2002, pp. 1332-33, 1374-76.

⁷⁶ Ex. 96; trans. Harold Hayes, Nov. 4, 2002, pp. 1526-29, and Nov. 5, 2002, p. 1677-84, 1687-93; trans. Ron Todd, Oct. 31, 2002, pp. 1184-90, 1194, Nov. 1, 2002, pp. 1371-76, 1381.

characterized as heli expenses,⁷⁷ or whether, as Hayes claims, to enable Western to negotiate a conventional rate above its internal limit.⁷⁸

[95] The \$5.16/m³ adjustment⁷⁹ proposed by Hayes to account for the special circumstance rates is calculated on the basis of the difference between what Hayes was paid for heli support and heli falling in 1997 (after IWA increases), and what Hayes claims Western regarded as the "going rate" for those services,⁸⁰ applied over the actual volumes Hayes claims to have logged in 1997.⁸¹

[96] While I am generally inclined to agree with the view of Arbitrator Wallace in *Pacific Forest Products Limited and Hayes Forest Services Limited*,⁸² that an arbitrator should not ordinarily look behind the previous rate agreements reached by the parties, I am also of the view it may be appropriate in some circumstances where, for example, it is clear the parties intended a special arrangement or adjustment to impact beyond the year. It seems to me that would be a factor properly considered as "any other data or criteria" under Section 25(2)(f).⁸³

⁷⁷ Trans. Ron Todd, Oct. 31, 2002, pp. 1188-90, 1194, Nov. 1, 2002, pp. 1374-76; Exs. 95; 18, Tab 78.

⁷⁸ Trans. Harold Hayes, Nov. 4, 2002, pp. 1528-29, Nov. 5, 2002, pp. 1683-84, 1689-90, 1693; Donald Hayes, Feb. 10, 2003, pp. 2131-33, 2213-14; Ron Todd, Oct. 31, 2002, pp. 1184-85; Exs. 36, 96.

⁷⁹ Ex. 113, Tabs 2, 3; trans. Donald Hayes, Feb. 10, 2003, pp. 2131-33.

⁸⁰ Trans. Donald Hayes, Feb. 10, 2003, pp. 2131-33, 2212-14; Ron Todd, Oct. 31, 2002, p. 1175 (regular conventional vs. heli support), Nov. 1, 2002, pp. 1330-33; John McLaughlin, Oct. 29, 2002, pp. 995-96; Exs. 18, Tab 11; 36, 37, 38, 45, 47, 69, 93.

⁸¹ The actual 1997 helicopter and conventional volume figure utilized by Hayes is 114,697 m³, as opposed to Western's figure of 114,781 m³s (Ex. 18, Tab 4). Where such minor volume discrepancies occur, I am inclined in view of all the information and documentation presented to use the volume figures of Western.

⁸² *Pacific Forest Products Ltd. and Hayes Forest Services Ltd.* (15 Aug. 1997) (W.J. Wallace, Q.C.), para. 5.2. Also, in *Hayes Forest Services Limited v. Pacific Forest Products Limited* [1998] B.C.J. No. 2368 (S.C.), paras. 36-45, the B.C. Supreme Court held that Arbitrator Wallace had admitted evidence of the past rate negotiations, but had declined to give weight to the evidence as a matter of discretion under S. 25 to decide what factors, other than those mandated, and what related evidence, to take into account. This was upheld by the B.C. Court of Appeal.

⁸³ Also S. 6 of the *Regulation*, and S. 6(2)(a) and (b) of the *Commercial Arbitration Act*, R.S.B.C. 1996, c. 55, the latter of which provides that the arbitrator must admit all evidence that would be admissible in a court, and may

[97] However, in these proceedings, I am unable to conclude that there are compelling special circumstances to look beyond the rate of \$40.59/m³ negotiated and agreed to by the parties as the conventional logging rate for 1997.

[98] Hayes' claim that allocation was moved to overcome Western's internal limit on increasing the conventional rate is possibly supported by inferences that might be drawn from comments⁸⁴ suggesting reasons for not recording all of the agreed rates in one document for internal reporting. On the other hand, Western's claim that the additional amount was put into the heli-rates because it represented mobilization and demobilization costs properly characterized as heli expenses, is supported by the way Hayes characterized the expenses in the initial proposal it made on April 9, 1997.⁸⁵ The proposal also included average heli falling and yarding rates for blocks B90 and B91 that are quite close to the average that was ultimately agreed to.⁸⁶

[99] Overall, I am mindful of the likelihood that each party may well have had its own views, and differing intentions, about why it decided to agree on the rates it did. Mr. Todd did not state his reasons,⁸⁷ and properly characterizing expenses as heli-expenses while staying within his limited discretion to negotiate the conventional logging rate are not mutually exclusive.

[100] It also appears that Mr. Donald Hayes specifically referred to the impact of the

admit in addition other evidence that the arbitrator considers relevant to the issues in dispute.

⁸⁴ Exs. 36, 96.

⁸⁵ \$75,323.81 for mob & demob and fuel barge expenses in relation to heli-logging (Ex. 95).

⁸⁶ The average set out in the initial proposal Ex. 95 is \$71.67, whereas the average of \$59.57 + \$9.56 (totalling \$69.13), and \$65.54 + \$9.25 (totalling \$74.79), is \$71.96.

⁸⁷ Trans. Donald Hayes, Feb. 10, 2003, pp. 2213-14.

volume on future rates,⁸⁸ but did not focus in the same way on the relationship between the heli and conventional logging rates, which favours the view that any special arrangements which may have been made were not intended to go beyond 1997. This is also the case for the interim rate of \$48.03/m³ for conventional logging in blocks B109, B90, and B90A. The temporary nature of that rate was made clear in Western's letter of April 8, 1997,⁸⁹ as well as in the negotiations of April 9 and April 23, 1997.⁹⁰

[101] And, although other contractors in the NCA may have negotiated heli support and heli falling services in the range of \$30/m³, that is not consistent with the rates actually proposed by Hayes in its negotiations with Western in 1997.⁹¹ The adjustment calculation made by Hayes shows a difference of approximately \$410,000, over actual conventional volume of 79,554 m³. At most, the difference of approximately \$73,000 between the \$40.39/m³ conventional rate proposed by Western (and ultimately agreed to), and Hayes' last proposed conventional rate of \$41.28/m³ in respect of the proposed conventional volume of 81,400 m³, might reasonably be taken into account.⁹² In all the circumstances, it is this calculation which would right any discrepancy which may have occurred through the transfer of monies from the conventional logging rate to the heli rates, and would result in an adjustment factor of approximately \$0.89/m³ for subsequent years.

⁸⁸ Ex. 96; trans. Ron Todd, Oct. 31, 2002, pp. 1193-94, Nov. 1, 2002, pp. 1376-78; Harold Hayes, Nov. 4, 2002, pp. 1529-30, Nov. 5, 2002, pp. 1538-39, 1696-99; Donald Hayes, Feb. 10, 2003, p. 2215.

⁸⁹ Ex. 18, Tab 88. The original arrangement with Kent for the rate of \$48.03 in these blocks was based on exceptional circumstances which were not intended to have effect beyond 1996: trans. Ron Todd, Oct. 29, 2002, pp. 1068-71, Oct. 31, 2002, pp. 1182-83, Nov. 1, 2002, pp. 1295-96; Ex. 32.

⁹⁰ Exs. 95, 96.

⁹¹ Exs. 95, 96; trans. Donald Hayes, Feb. 10, 2003, pp. 2212-14.

⁹² Ex. 96; trans. Harold Hayes, Nov. 4, 2002, pp. 1526-29, and Nov. 5, 2002, pp. 1677-84, 1687-93; Ron Todd, Oct. 31, 2002, pp. 1184-90, Nov. 1, 2002, pp. 1371-76.

[102] Hayes' observation that it is not sensible for the 1997 rates paid for heli support and heli falling services (exclusive of heli yarding) to be higher than those paid for conventional services (inclusive of yarding), also does not harmonize with the April 23, 1997 negotiations⁹³ which, before the claimed "transfer" into heli logging, contemplated heli support at \$31.75/m³ (B90 and B91), with heli falling at \$9.56/m³ (B90) and \$9.25/m³ (B91), and a conventional logging rate of \$41.28/m³ - that rate being lower than the combined total of \$31.75 and \$9.56 (\$41.31/m³) for heli support and heli falling services in block B90.

[103] Similarly, Hayes' contention that the additional helicopter work should be taken into account, whether or not any portion of the helicopter support rate was actually paid in consideration for conventional work, because it affects a contractor's overall costs, does not compel a different conclusion. To the extent that Hayes' helicopter work in 1997 affected its economies of scale - which is to say its fixed costs, like overhead and depreciation - that is already accounted for in its adjustment based on the effect of the additional helicopter volume on its fixed costs.⁹⁴

Inflation and IWA Wage Increases

[104] Western acknowledges that inflation and IWA increases commonly factor into rate negotiations, but contends that increases are not automatically assumed, and in times of financial difficulty, no IWA or inflation increases will likely be offered by a licence holder.⁹⁵

⁹³ Ex. 96.

⁹⁴ Ex. 113, Tab 2.

⁹⁵ Trans. Ron Todd, Oct. 31, 2002, p. 1166. For example, Western notes that Hayes' own subcontractor, Chinga Ventures, did not receive an increase in its falling rate between 1997 and 2001 to compensate it for IWA increases or inflationary pressures. (Ex. 106).

[105] Hayes contends the industry standard is to increase logging rates to reflect annual inflation and IWA increases,⁹⁶ and that 50% of the inflation rate and 50% of the IWA wage increase, multiplied against the rate, is the appropriate industry standard.⁹⁷

[106] The support for Hayes' position is extensive,⁹⁸ and it can be seen in the practice of the parties during the 1997 negotiations. Despite statements by Western during the April 9, 1997 negotiations about its financial performance, the IWA increase was part of the negotiated rate.⁹⁹

[107] Western also contends the industry began to experience difficulty in 1998 and 1999,¹⁰⁰ with market conditions that deteriorated over the five year period,¹⁰¹ and notes the average annual increases for the other contractors in the NCA were 0% in 1998 and 1999, and 2.6% and 4.5% respectively in 2000 and 2001.¹⁰² Those increases, however, do not easily correlate with increasingly poor market conditions (resulting in curtailments) for those years,¹⁰³ and the other contractors may well have had their own reasons for agreeing to the rates.¹⁰⁴

⁹⁶ Trans. Donald Hayes, Feb. 10, 2003, pp. 2134-35; John Waring, Oct. 7, 2002, pp. 474-75; John McLaughlin, Oct. 28, 2002, pp. 838-39, 908-10, Oct. 29, 2002, p. 984; Ex. 69.

⁹⁷ Ex. 113, Tab 2. Trans. Donald Hayes, Feb. 10, 2003, pp. 2134-35; John McLaughlin, Oct. 28, 2002, pp. 838-39, 908-10. In regard to Chinga Ventures, Hayes claims the rates noted by Western were not necessarily final. Trans. Donald Hayes, Feb. 10, 2003, pp. 2161-63.

⁹⁸ Trans. Donald Hayes, Feb. 10, 2003, pp. 2134-35; John Waring, Oct. 7, 2002, pp. 474-75; John McLaughlin, Oct. 28, 2002, pp. 838-39, 908-10, Oct. 29, 2002, p. 984; Ex. 69.

⁹⁹ Exs. 95, 96.

¹⁰⁰ Trans. Ron Todd, Oct. 31, 2002, pp. 1214-15.

¹⁰¹ Trans. Ron Todd, Nov. 1, 2002, pp. 1318-19.

¹⁰² Ex. 18, Tab 14.

¹⁰³ Exs. 86, 87, 88; 18, Tab 100.

¹⁰⁴ For example, one of the Other Contractors had agreed to reduce some rates in exchange for Western's approval to sell a road contract. Trans. John McLaughlin, Oct. 29, 2002, pp. 1050-51.

[108] In the result, I am inclined to the view that IWA and inflation increases are an industry standard consistent with Section 25(1)(a) and (b) of the *Regulation*, and there seems to be no compelling reason to conclude an exception would be appropriate during the 1998 to 2001 years so as to deprive Hayes of the benefit of that standard.

Volume of Timber Harvested

[109] At issue with regard to the impact of volume on the roll forward approach is: 1) the appropriateness of using anticipated volume, instead of actual volume; and 2) the appropriateness of using the projected annual cut within the fibre basket of approximately 74,400 m³ (net) as the basis for the 1997 rate, instead of the approximate 114,000 m³ of heli and conventional volume actually harvested in 1997.

[110] In its roll forward approach,¹⁰⁵ Hayes adjusts the 1997 conventional logging rate for the yearly actual volume impact on its actual fixed costs taken from its audited financial statements, and adds 15% for profit and risk.¹⁰⁶

[111] Western contends that Hayes' calculations gross-up the 1997 rate on an assumption that the \$40.59/m³ rate was based on the approximate 114,000 m³ of heli and conventional volume actually harvested in 1997, rather than its projected annual cut within the fibre basket of 74,400 m³ net (or 78,000 m³ gross) according to its 5.777% allocation under the Fibre Basket Agreement.

¹⁰⁵ Ex. 113, Tab 2; also trans. Donald Hayes, Feb. 10, 2003, pp. 2135-36.

¹⁰⁶ Relying on *Western Forest Products Limited and Hayes Forest Services Ltd.* (6 May 1999) (Paul J. Pearlman, Q.C.), pp. 22-23; *Hayes Forest Services Limited and International Forest Products Limited* (25 Aug. 2000) (George K. MacIntosh, Q.C.), p. 10; *Pacific Forest Products Ltd. and Hayes Forest Services Ltd.* (15 Aug. 1997) (W.J. Wallace, Q.C.), pp. 19-20; trans. Donald Hayes, Feb. 10, 2003, p. 2136; John McLaughlin, Oct. 28, 2002, p. 858.

[112] Western maintains that a prospective assessment requires the rate to be based on the anticipated volume, or planned cut, and that a rate determined according to Section 25 of the *Regulation* should not reflect losses resulting from fluctuations in volume arising during the logging year. It refers to the B.C. Supreme Court decision in *Hayes Forest Services Ltd. v. Pacific Forest Products Limited*,¹⁰⁷ and notes that, while the B.C. Court of Appeal in *Hayes Forest Services Ltd. v. Pacific Forest Products Limited*¹⁰⁸ considered actual volume to be relevant in regard to the contingency of the contract volume not being achieved, the actual volume itself is not the appropriate basis for determining the rate, as it is an after-the-fact indicator of the risk, or the potential for profit, if the planned volume is not achieved, or is exceeded.

[113] Western contends that an approach to rates based on anticipated or planned cuts is consistent not only with Section 25, but also with the amount of work rules¹⁰⁹ in the *Regulation*, which require contracts to express the amount of work as a percentage, rather than a contractual volume for a specific amount.

[114] Western's view is that it is of no particular consequence if Hayes experienced rising and falling volume over the five year cut control period, even if that increased or decreased its fixed costs, as long as Hayes received at least 95% of its entitlement during the period, which Western claims it did. Western refers to the awards in *Lineham Logging Ltd. and International Forest Products Ltd.*¹¹⁰ and *Hayes Forest Services Ltd. and Western Forest Products Limited*.¹¹¹ It also looks to the decision of the B.C. Supreme Court in *Hayes*

¹⁰⁷ [1998] B.C.J. No. 2368 (S.C.), paras. 30-31.

¹⁰⁸ 2000 BCCA 66, para. 56.

¹⁰⁹ Specifically, Ss. 18 and 21 of the *Regulation*.

¹¹⁰ *Lineham Logging Ltd. and International Forest Products Ltd.* (3 Dec. 1999) (M.R. Taylor, Q.C.), p. 82.

¹¹¹ *Hayes Forest Services Ltd. and Western Forest Products Limited* (17 July 2000) (F.S. Borowicz, Q.C.), p. 19.

*Forest Services Ltd. v. International Forest Products Ltd.*¹¹² to support the proposition that the *Regulation* and contract do not create a minimum annual volume of work, since it is the licensee, not the contractor, who determines how much timber is cut in a given year, and that the volume a contractor is entitled to receive is dependent on the volume of work performed by the licence holder.

[115] Western's approach is premised on rates in the industry being negotiated on a five year basis. It points to the rates negotiated by the other contractors in the NCA, as well as the expert opinion of John McLaughlin, in support of rates which are consistent and competitive, despite annual fluctuations in volume.

[116] Western specifically contests Hayes' claim that the 1997 rate negotiations were conducted on the basis of approximately 114,000 m³ of heli and conventional volume,¹¹³ and points to the 1997 conventional logging rate of \$40.65/m³ derived by Mr. McLaughlin in support of its claim that the 1997 agreed conventional logging rate of \$40.39/m³ (\$40.59/m³) was reasonably competitive, having regard to similar conventional volumes.¹¹⁴

[117] In Western's view, Hayes was not taken by surprise by the actual volumes it received from 1998 through 2001, except that, due to market conditions, 2001 was curtailed before Hayes could achieve its scheduled volume, with curtailments that were undertaken in good faith for valid business and operational reasons and affected all the contractors in the NCA.

[118] Hayes contends that, if Western has no obligation to provide a particular volume in a given year, in high volume years like 1997, it can seek a lower rate based on the actual volume agreed to, and, in low volume years, it can seek the same rate based on the

¹¹² 2003 BCSC 500.

¹¹³ Observing that Mr. Donald Hayes' reference to this came after the agreement was reached.

¹¹⁴ Exs. 69, 96.

"average cut", which is not consistent with acting reasonably as required by the *Regulation*.¹¹⁵

[119] So, Hayes claims the rates should be set on the basis of the volume mutually anticipated by the parties at the beginning of the year on an objective and prospective basis, or, in the absence of an agreed volume, on the basis of the actual volume. For this view, Hayes points to the award in *Western Forest Products Limited and Hayes Forest Services Ltd.*¹¹⁶, where Arbitrator Pearlman set rates based on the actual volume logged, because he concluded there was no contractually agreed volume for the year, since there was no agreement between the parties as to the amount to be logged. Hayes considers Arbitrator Pearlman to have adopted the same approach as Madam Justice Baker in *Hayes Forest Services Ltd. v. Pacific Forest Products Limited*,¹¹⁷ that rates should be based on volumes both parties anticipate will be cut in a given year.

[120] Hayes contends the appropriate approach in this case is to use the actual volume logged, since there was no agreed or mutually anticipated volume in any year from 1998 to 2001. Hayes notes that Western's planned volumes changed constantly and urges a licensee's changing guesstimates of harvest ought not to be the basis for rate setting.

[121] Hayes also refers to the B.C. Court of Appeal decision in *Hayes Forest Services Ltd. v. Pacific Forest Products Ltd.*,¹¹⁸ where the Court said "it appears to be generally accepted as a fact in the forest industry that harvesting costs per unit diminish as the volume of harvest increases. Fixed costs are spread over a larger volume. Conversely, as volume cut diminishes, costs per unit may be expected to rise". Hayes contends this reality is evidenced in the parties' 1997 negotiations.

¹¹⁵ *Carrier Lumber Ltd. v. Joe Martin & Sons* [2003] B.C.J. No. 259 (S.C.); also, *Carrier Lumber Ltd. v. Joe Martin & Sons*, 2004 BCCA 26.

¹¹⁶ *Western Forest Products Limited and Hayes Forest Services Ltd.* (6 May 1999) (Paul J. Pearlman, Q.C.).

¹¹⁷ [1998] B.C.J. No. 2368 (S.C.), paras. 30-31.

¹¹⁸ *Hayes Forest Services Ltd. v. Pacific Forest Products Ltd.*, 2000 BCCA 66, para. 21.

[122] Hayes claims those negotiations were based on 114,000 m³, not 78,000 m³, and that it was understood the rate had come down because the volume had gone up, and that the converse would be true in subsequent years.

[123] Since the volumes assigned to it were lower in each year after 1997, Hayes claims its fixed costs had to be defrayed over fewer units, and, therefore, the per unit rate must increase.¹¹⁹ And in the analysis of its financial statements, Hayes observes that, although the volume assigned to it dropped, its fixed costs for Plumper Harbour remained generally consistent relative to 1997. In 1998 and 1999, they were lower. In 2000, they were approximately the same. And only in 2001, were they higher. If the circumstances were different, Hayes contends it would claim the total fixed cost figure ought to be assumed to be the same as 1997, the last year in which rates were agreed, and thereby be completely prospective in approach, which, as in *Hayes Forest Services Limited and International Forest Products Limited*,¹²⁰ would negate any criticisms of Hayes' fixed costs. However, because it was able to lower its fixed costs compared to 1997 in subsequent years, Hayes considers it appropriate under Section 25(2) to take account of the reduction in its fixed costs, which it contends favours Western, rather than rely on its historical fixed costs from 1997.¹²¹

[124] The background is again instructive.

¹¹⁹ Hayes distinguishes the award in *Lineham Logging Ltd. and International Forest Products Ltd.* (3 Dec. 1999) (M.R. Taylor, Q.C.), p. 82., on the basis that Arbitrator Taylor's assumptions about fixed cost recovery were not made in circumstances where the contractor was assigned a higher volume in a particular year to bring rates down. In circumstances where a contractor and licensee know there will be no extra recovery of fixed costs in a high volume year, Hayes claims the same rationale is not applicable. It also notes that Mr. McLaughlin acknowledged that a drop in volume from one year to the next is unusual in the industry, (Trans. John McLaughlin, Oct. 28, 2002, pp. 839-40.)

¹²⁰ *Hayes Forest Services Limited and International Forest Products Limited* (14 Nov. 2002) (Murray A. Clemens, Q.C.).

¹²¹ Exs. 108, 113, Tab 2; 100, pp. 114-115, 117-118, 119-120; trans. Mary Robinson, Feb. 6, 2003, p. 1991.

[125] There is no issue between the parties that Hayes' allocation was 5.777% of the fibre basket, or a projected annual cut of approximately 78,000 m³ (gross).¹²² Over the five year cut control period, 1997 to 2001, Hayes achieved 6.369% of the total gross volume billed by Western and 110% of its fibre basket entitlement.¹²³

[126] Western contends that it was able to provide the contractors in the NCA with more than their contractual volume in some years, and that their volume in other years would be correspondingly reduced. Some contractors, like Hayes, received extra volume early, while others caught up in later years.¹²⁴ It also contends some contractors received volume in addition to their fibre basket entitlement due to cut control targets which had to be met within TFL 19, and, since Hayes was logging outside TFL 19, that additional volume was not available to it.¹²⁵

¹²² Trans. Ron Todd, Oct. 29, 2002, pp. 1076-82 and Nov. 1, 2002, p. 1317; Robert Craven, Oct. 9, 2002, pp. 729, 742-43; Donald Hayes, Feb. 10, 2003, pp. 2157-58; Harold Hayes, Nov. 5, 2002, p. 1700.

¹²³ Trans. Robert Craven, Oct. 9, 2002, pp. 729-31, and generally; Exs. 58, 82; Ex. 18, Tab 5. While Mr. Craven was questioned about using gross volume, inclusive of trim, waste and residue, and not using the total volume available under the allowable annual cut, in his calculations, his figures were not seriously challenged by Hayes: trans. Robert Craven, Oct. 9, 2002, pp. 755-56; Ron Todd, Nov. 1, 2002, pp. 1313-20; Ex. 92. The original informal fibre basket arrangement (Ex. 60), as well as the schedules appended to the replacement contracts for the other contractors in the NCA (Ex. 80), contemplate fibre basket entitlement as a percentage of the total gross volume. Clause A4 of the Proposed Replacement Contract (Ex. 83) specifically entitles Hayes to 5.777% of the "total amount of timber processed" (the wording is consistent with S. 18(1) and Sch. 8 of the *Regulation*) in each year under the Licences - not to 5.777% of the total available allowable annual cut (trans. Donald Hayes, Feb. 10, 2003, pp. 2157-58, 2203-04).

In addition to questions raised by Hayes about Western's calculation of Hayes' achievement under the Fibre Basket Agreement for the cut control period, there was also a question raised during the 1997 negotiations about Hayes' entitlement in relation to a shortfall in the previous cut control period (trans. Ron Todd, Oct. 31, 2002, pp. 1174-77, Nov. 1, 2002, p. 1313-20, 1360, 1365-67; Harold Hayes, Nov. 4, 2002, pp. 1522, 1529-31, Nov. 5, 2002, pp. 1702-06; Donald Hayes, Feb. 10, 2003, pp. 2157-58, 2203-04; Exs. 92, 94, 95, 96). Hayes has not advanced a claim for the shortfall in these proceedings, and a claim for loss due to volume shortfall from fluctuations in volume arising during the year, whether in the cut control period in issue or any other cut control period, would properly be the subject of a claim under the general dispute resolution mechanism in Ss. 5 and 6 of the *Regulation* (*Hayes Forest Services Ltd. and Western Forest Products Limited* (17 July 2000) (F.S. Borowicz, Q.C.)).

¹²⁴ Trans. Ron Todd, Oct. 31, 2002, pp. 1181-82, 1191-92.

¹²⁵ Trans. Ron Todd, Oct. 31, 2002, pp. 1279-80.

[127] While Western claims that yearly rates are typically determined over the five year contract period, with historical rates carried forward in a consistent manner,¹²⁶ it also acknowledges that volume is taken into account as an important factor in rate negotiations, since contractors have fixed costs which do not vary with the amount of logging in a given year,¹²⁷ which is illustrative of how the 1997 negotiations unfolded.

[128] At a meeting on April 9, 1997, Hayes made a proposal for 92,674 m³, plus an additional 15,500 m³ to catch up on shortfall volume from the previous cut control period, for a total of 108,174 m³,¹²⁸ In his notes of the meeting, Ron Todd recorded, "ask how we can get the price down - Hayes says the whole thing is vol. driven", and "Hayes builds their rate from bottom up annually based on logging plan".¹²⁹ After the meeting, Western wrote Hayes proposing a volume of 114,000 m³ (net) for 1997.¹³⁰ Then, at a meeting on April 23, 1997, Hayes made a proposal, based on 32,600 m³ of heli-logging volume and 81,400 m³ of conventional logging volume, for a total of 114,000 m³,¹³¹ and the rates were agreed to.

[129] Both parties emphasize what occurred during the 1997 negotiations. Mr. Todd explained that he did not specifically say the rate was based on the annual 78,000 m³, over

¹²⁶ Trans. Ron Todd, Oct. 31, 2002, pp. 1164-66, Nov. 1, 2002, p. 1323-24; Harold Hayes, Nov. 5, 2002, pp. 1699-1700, 1712. Western's assertion of consistent, competitive and "smooth" conventional logging rate increases, despite fluctuations in volume relative to fibre basket entitlement, is supported to some extent by the rates negotiated with the other contractors in the NCA, as well as by the expert opinion of Mr. McLaughlin, (Exs. 58 and 18 (Tabs 10-14)); Ex. 69; trans. John McLaughlin, Oct. 28, 2002, pp. 838, 907-12, 924-935, Oct. 29, 2002, pp. 979-84, 1024-1028, as to his "smoothing" method and averaging fixed costs over the five year period.

¹²⁷ Trans. Ron Todd, Oct. 31, 2002, p. 1172, Nov. 1, 2002, pp. 1307, 1311. Which is consistent with Donald Hayes' explanation of the importance of volume, and its effect on fixed costs. Trans. Donald Hayes, Feb. 10, 2003, pp. 2130-31, 2135-36.

¹²⁸ Ex. 95; trans. Ron Todd, Oct. 31, 2002, pp. 1177-80, Nov. 1, 2002, pp. 1365-71; Harold Hayes, Nov. 4, 2002, pp. 1519-25, Nov. 5, 2002, 1675-77.

¹²⁹ Ex. 94.

¹³⁰ Ex. 26; trans. Ron Todd, Oct. 31, 2002, pp. 1180-82, Nov. 1, 2002, p. 1371; Harold Hayes, Nov. 4, 2002, p. 1525, Nov. 5, 2002, 1694-95.

¹³¹ Ex. 96.

five years because he took for granted Hayes knew it.¹³² He acknowledged the 1997 rates were negotiated in the context of 114,000 m³,¹³³ but believed there was a clear understanding that the extra volume in 1997 would be taken into account in later years.¹³⁴

[130] Mr. Donald Hayes confirmed that Mr. Todd did not say the extra volume was being given to reduce the rate.¹³⁵ And Mr. Harold Hayes confirmed that, before signing the memorandum of agreed rates, no one said the only reason for the rate was the extra volume.¹³⁶ In his notes of the meeting of April 23, 1997,¹³⁷ he records "Ron then went on to state that since our last meeting, both he and John Waring had gone back to review their options and had come up with a plan. He said one of the main areas that they addressed was the opportunity to add more conventional volume in order to average down the overall cost of logging as a result of the heli component. He said that coming up with the additional volume allowed them to average down the heli cost."

[131] Mr. Harold Hayes' notes¹³⁸ also record that, after the rates were agreed to, Mr. Donald Hayes said the 1997 rate was achieved by amortizing depreciation and other fixed costs over 114,000 m³, which could not be sustained if the volume was reduced in future years. And the notes show John Waring answered that it was not Western's intent to claw-back the volume in the next year, and that there would be ways to deal with Hayes' concerns.

¹³² Trans. Ron Todd, Nov. 1, 2002, p. 1323-24, 1379-80.

¹³³ Trans. Rod Todd, Nov. 1, 2002, pp. 1375-76.

¹³⁴ Trans. Ron Todd, Oct. 31, 2002, pp. 1191-92; Harold Hayes, November 5, 2002, p. 1698.

¹³⁵ Trans. Donald Hayes, Feb. 10, 2003, pp. 2215-16.

¹³⁶ Trans. Harold Hayes, Nov. 5, 2002, pp. 1696-97.

¹³⁷ Ex. 96; also trans. Ron Todd, Nov. 1, 2002, p. 1372.

¹³⁸ Ex. 96; trans. Harold Hayes, Nov. 4, 2002, pp. 1525-32, Nov. 5, 2002, pp. 1696-1706; Ron Todd, Oct. 31, 2002, pp. 1193-94, Nov. 1, 2002, pp. 1375-79; Donald Hayes, Feb. 10, 2003, pp. 2215-16; John Waring, Oct. 7, 2002, p. 430.

[132] The use of logging plan forecasts is less controversial. Western usually gave them to contractors at the start of negotiations, and updated them throughout the year as unexpected weather, overruns in a block, machine breakdowns, approval status, budget reviews, or other unanticipated events occurred.¹³⁹ Although the "draft" plans represented Western's best guess of the production target for the year, rather than an assurance,¹⁴⁰ contractors used the logging plans during negotiations to build annual rates.¹⁴¹

[133] For the 1998 logging season, draft logging plans were given to Hayes in July 1997 showing a volume of 70,000 m³; in October 1997 showing a volume of 73,000 m³; and in April 1998 reducing the volume to 64,000 m³.¹⁴² The amount actually logged was 64,515 m³ (net scaled volume).¹⁴³

[134] For the 1999 logging season, a draft logging plan was given to Hayes in November 1998 showing a volume of 59,000 m³.¹⁴⁴ The amount actually logged was 53,106 m³(net scaled volume).¹⁴⁵

[135] For the 2000 logging season, a draft logging plan was given to Hayes in October 1999 showing a volume of 70,000 m³.¹⁴⁶ The amount actually logged was 70,345 m³ (net scaled volume).¹⁴⁷

¹³⁹ Trans. John Waring, Oct. 3, 2002, p. 133.

¹⁴⁰ Trans. John Waring, Oct. 7, 2002, pp. 428-29.

¹⁴¹ Trans. Harold Hayes, Nov. 4, 2002, p. 1516; Ex. 94; John McLaughlin, Oct. 29, 2002, p. 1048.

¹⁴² Ex. 5; trans. John Waring, Oct. 3, 2002, p. 173.

¹⁴³ Ex. 18, Tab 4; Ex. 113, Tab 2; trans. John Waring, Oct. 3, 2002, p. 173.

¹⁴⁴ Ex. 6; trans. John Waring, Oct. 3, 2002, p. 186.

¹⁴⁵ Exs. 18, Tab 4; 113, Tab 2. There is a minor discrepancy between the actual volume figures of Western and Hayes for 1999: Western's figure is 53,106 m³; Hayes' is 52,001 m³. Trans. John Waring, Oct. 3, 2002, p. 188.

¹⁴⁶ Ex. 7; trans. John Waring Oct. 3, 2002, p. 196.

¹⁴⁷ Exs. 18, Tab 4; 113, Tab 2; trans. John Waring, Oct. 3, 2002, p. 197. There is a minor discrepancy between the actual volume figures of Western and Hayes for 2000: Western's figure is 70,345 m³; Hayes' is 70,348 m³.

[136] For the 2001 logging season, a draft logging plan was given to Hayes in February 2001 showing a volume of 65,000 m³.¹⁴⁸ The amount actually logged was 48,788 m³ (net scaled volume).¹⁴⁹

[137] In view of the evidence, the authorities, and the scheme of the *Regulation*, there is no doubt that, despite amount of work rules which do not guarantee a minimum annual volume, the mutually anticipated annual volume to be processed under applicable licenses is an important factor taken into account by reasonable contractors and licensees when negotiating rates. Section 25(2)(c)(ii) would otherwise be deprived of meaning in rate disputes involving a comparison of years in the same cut control period. While it is a licensee's prerogative to determine, within prescribed limits, the total amount of timber that it will harvest under a licence in a given year and in a five year cut control period, those decisions directly affect the costs of the contractor's timber harvesting operation.

[138] The term "mutually anticipated" annual volume is in my view preferable to "agreed" annual volume, so as not to confuse the annual expectation with specific agreed annual amounts of work, either pre-dating the *Regulation* or established by agreement under Section 18(8).¹⁵⁰ And, in the circumstances of this case,¹⁵¹ it seems to me the parties mutually anticipated the annual volume by reference to the draft logging plans provided

¹⁴⁸ Ex. 8; trans. John Waring's, Oct. 3, 2002, p. 206.

¹⁴⁹ Exs. 18, Tab 4; 113, Tab 2.

¹⁵⁰ Which provides that, if, on or after Apr. 1, 1996, a licence holder for the coastal area, and each contractor with a replaceable contract that relates to timber harvesting operations carried out under the licence, agree, then the amount of work provided for in any or all of the replaceable contracts may be specified in a manner different from that required by S. 18.

¹⁵¹ Unlike in *Western Forest Products Limited and Hayes Forest Services Ltd.* (6 May 1999) (Paul J. Pearlman, Q.C.).

by Western. While those plans were periodically updated to provide year-to-date status, that is not an obstacle in the analysis. Section 25(1) postulates a hypothetical scenario, in which the arbitrator is placed in the position of the parties, acting reasonably, at the commencement of the contract year and in the circumstances then known to both of them.¹⁵²

[139] With that in mind, I am inclined to conclude that the mutually anticipated volume at the commencement of each year was: 1) 73,000 m³ in 1998; 2) 59,000 m³ in 1999; 3) 70,000 m³ in 2000; and 4) 65,000 m³ in 2001.

[140] While the 1997 rate negotiations occurred in the context of 114,000 m³ of mutually anticipated volume,¹⁵³ it does not necessarily follow that a reasonable contractor and licensee would later agree to rate increases proportionate to volume reductions. The evidence and authorities indicate a tendency in the industry to average the recovery of fixed costs over the five year cut control period as a "competitive" factor to be considered in relation to Section 25(1)(a), and, although volume reductions would be taken into account, the impact would likely be ameliorated by the competitive pressure to spread the fixed cost recovery over the entire five year period.¹⁵⁴

[141] It also seems to me that the statements by Mr. Donald Hayes and Mr. Waring after the 1997 rates were agreed to, about Hayes' expectation of volume in future years is not determinative of mutually anticipated volumes. The 1997 rate was negotiated with regard to the additional volume anticipated in that year, not in the anticipation of higher volumes for each subsequent year. The rate for each subsequent year needs, in turn, to be

¹⁵² *Hayes Forest Services Ltd. v. Pacific Forest Products Ltd.*, 2000 BCCA 66, para. 43.

¹⁵³ To be processed under the Licences in the fibre basket.

¹⁵⁴ I am also unable to conclude that there was no "extra" recovery of fixed costs by Hayes in the high volume year.

determined with regard to the mutually anticipated volume at the commencement of that year. And over the five year period, the mutually anticipated volumes reflect an overall volume expectation which is not dissimilar to the volume expectation under the Fibre Basket Agreement.

[142] If Hayes had negotiated yearly rates on the strength of an assurance from Western of additional total volume above the Fibre Basket Agreement, and that additional volume did not come to bear, it would not likely be sufficient for Western to show it provided Hayes with its' entitlement under the Fibre Basket Agreement. Hayes might nonetheless be able to claim against Western for licensee-caused damage under Section 5 for breach of a collateral contract or misrepresentation. Similarly, if there was a previous pattern of overestimating volume, above the overall fibre basket entitlement, Hayes could claim it as a factor under Section 25 that a reasonable contractor and licensee would likely take into account during rate negotiations. But neither is the case.

[143] I am also unable to conclude as a general proposition that, where fixed costs may be assumed to be the same as they were in relation to previously agreed rates, those costs are immune from scrutiny. In my view, an agreement on a rate is not an automatic endorsement of the appropriateness of any costs relating to it, in the absence of a clear intention of the parties to that effect. In *Hayes Forest Services Limited and International Forest Products Limited*¹⁵⁵ Arbitrator Clemens declined to consider criticisms of prior costs, which had been the subject of a previous rate arbitration in which they were found to be reasonable, but that is not the case here. While evidence of actual fixed costs is relevant to the extent it demonstrates what was within the range of possible,¹⁵⁶ I am also doubtful that a prospective approach, over the entire five year period, requires an assumption that the fixed costs would remain the same as in 1997. It seems to me that, at the commencement of each year, the actual fixed costs from the previous year would be a

¹⁵⁵ *Hayes Forest Services Limited and International Forest Products Limited* (14 Nov. 2002) (Murray A. Clemens, Q.C.).

¹⁵⁶ *Hayes Forest Services Ltd. v. Pacific Forest Products Limited*, 2000 BCCA 66, paras. 46-56.

factor then known, and properly taken into account on a prospective basis for the subsequent year.

[144] In the result, I am of the view that Western's logging plans, at the commencement of each year, provide the best basis for determining the annual volume mutually anticipated by the parties. While the impact of that volume is clearly important to the rate determination for the year, it is not readily calculable by a mathematic formula of volume to fixed costs, due, among other reasons, to ordinary competitive business pressures to average gains and losses over the entire five year period.

Changes to Logging Chance

[145] The parties agree that the factors to be considered in determining logging chance are location, terrain, climate, accessibility, weighted average haul distance, weighted average adverse haul, dryland sort size, total production volume by percentage species, net volume per hectare harvested, average piece size, yarding distances, weighted average sideslopes, timber development position, cutting permit position, and volume harvested by various logging methods. They differ, however, as to the appropriate method of measuring many of these factors, and about some of their aspects.

[146] Hayes claims the logging chance was less favourable from 1998 to 2001, than in 1997, because it was negatively affected by reduced volume and piece size, increased haul distance, need for stumpage set logging, delays in obtaining permits, the imposition of curtailments, and problems with the degree of timber development, including issues with road building and access to blocks, in the logging program assigned by Western. Hayes, however, did not calculate an adjustment to the 1997 rate to account for the poorer

logging chance in later years,¹⁵⁷ because it considered the main factor negatively affecting logging after 1997 to be volume.

[147] Nonetheless, Hayes contends Western caused it to log inefficiently. For example, Hayes notes it was required to log part of block B115 in the spring of 1998 and the remainder later in the same year after the stumpage anniversary date, which increased its mobilization and demobilization costs.¹⁵⁸ In regard to timber development, Hayes points to blocks where fallers had to walk in because of road development issues, and situations where timber was developed without a cutting permit, or vice versa.¹⁵⁹ For example, Hayes notes there was a permit to cut in block B136, but no road built to it through B137, while there was a permit to build roads in B137, but no permit to cut in that block.¹⁶⁰

[148] To the contrary, Western contends that Plumper Harbour was a stable operation with a consistent and predictable operating environment, and that Hayes' logging chance improved after 1997,¹⁶¹ with increased productivity.¹⁶² And since it was able to use more cost-effective logging methods, like cherry picking, instead of tower yarding, in the years after 1997, its cost of logging should have decreased.

[149] In regard to logging block B115, Western contends that no stumpage set logging occurred at Plumper Harbour.¹⁶³ And, in regard to timber development generally,

¹⁵⁷ Ex. 113, Tab 2, trans. Donald Hayes, Feb. 10, 2003, pp. 2130-37; Harold Hayes, Nov. 4, 2002, pp. 1427-30.

¹⁵⁸ Trans. Harold Hayes, Nov. 4, 2002, pp. 1463-65.

¹⁵⁹ Trans. John Waring, Oct. 4, 2002, p. 387; Ex. 11.

¹⁶⁰ Trans. Harold Hayes, Nov. 4, 2002, pp. 1499-1500.

¹⁶¹ Trans. John Waring, Oct. 3, 4, 7, 2002; Brian Sommerfeld, Oct. 7, 2002; Ron Todd, Oct. 29, 31 and Nov. 1, 2002; Exs. 11, 12, 13, 15, 17, 18 (Tabs 1,2, 23, 32, 50, 54, 57, 63, 72), 25, 85, 111(Tab 6); John McLaughlin, Oct. 28, 29, 2002, Ex. 69.

¹⁶² Exs. 18; Tab 59; 25; Harold Hayes, Nov. 5, 2002, pp. 1727-30.

¹⁶³ Trans. Harold Hayes, Nov. 5, 2002, pp. 1709-11; John Waring, Oct. 7, 2002, p. 441.

Western contests that it had any significant impact on the logging chance at Plumper Harbour or Hayes' ability to log efficiently, and notes that at no time from 1997 to 2001, did Hayes express any concern or dissatisfaction about the logging shows.¹⁶⁴

[150] In regard to road building and access to blocks, specifically, Western observes that Hayes confines its concerns to 2000 and 2001 when Upland had taken over those services, and when Western considered road construction productivity to be at its highest.¹⁶⁵

[151] In all the circumstances, I am inclined to conclude that the logging chance at Plumper Harbour was relatively constant. To the extent it did vary, it was slightly less favourable in 1998, and more favourable in 1999, 2000 and 2001, than it was in 1997. It also seems to me that this would have been largely within the contemplation of the parties on a prospective basis, since Hayes did not simply rely on Western's logging maps. It went out to review the blocks and made its own determination about the accuracy of the maps.¹⁶⁶ While changes in anticipated volume were certainly a "material" factor for Hayes, changes in logging chance were not necessarily so.¹⁶⁷

[152] With respect to block B115, regardless of whether or not it was "stumpage set logging", it is evident from Western's logging plan of October 1997, that it was in the

¹⁶⁴ Trans. Brian Sommerfeld, Oct. 7, 2002, p. 523; John Waring, Oct. 4, 2002, pp. 312-21, 386; Ex. 11.

¹⁶⁵ Exs. 18; Tab 81; 19; Tab 3; trans. Ron Todd, Oct. 31, 2002, pp. 1266-67. Western also notes that the reflections of Mr. Harold Hayes, about the impact of lack of road construction in blocks B100 (2000), B132 and B111 (2001), needs to be considered in light of the reflections of Mr. Sommerfeld and Mr. Waring. Mr. Sommerfeld recalled Mr. Pletti raising concerns in 1999 and 2000 about road construction in block B136, but that this happened after Hayes had reached its production target for the year, and related to volume that was subject to the Roderick Island settlement, and had no bearing on the logging chance at Plumper Harbour. He also recalled Mr. Pletti raising a concern in 2001 about B132, but that Western had Upland construct a second road, and he did not observe any restrictions to Hayes' logging activity. Mr. Waring also indicated that he was unaware of any impact on block B132 in 2001 when road construction and logging operations were being carried out simultaneously. Western also contends that any minor inconvenience that Hayes might have experienced in blocks B100, B111 and B132 was countered by the piece sizes achieved in those blocks. Trans. Harold Hayes, Nov. 5, 2002, pp. 1542-44.; Brian Sommerfeld, Oct. 7, 2002, pp. 521-23; John Waring, Oct. 7, 2002, p. 463; Ex. 18, Tab 92.

¹⁶⁶ Trans. Harold Hayes, Nov. 5, 2002, pp. 1664-65.

¹⁶⁷ Trans. Donald Hayes, Feb. 10, 2003, pp. 2130-31.

contemplation of the parties at the start of the year that Western intended to log block B115 in two separate phases. The additional mobilization and demobilization costs are therefore a factor that a reasonable contractor and licensee would consider in their negotiations, and is one of the factors that resulted in a slightly reduced logging chance in 1998.

[153] Difficulties related to timber development (including road construction), cutting permit approval, and curtailments, are in my view examples of risk factors inherent in the industry which may or may not be compensated for by the risk and profit component of the logging rate.¹⁶⁸ The extent to which they affect rate negotiations at the start of each year depends largely on the circumstances known to the parties at the time. If it was known at the outset of a given year that a particular inherent risk, within the range of possible, was either highly likely or highly unlikely to materialize, that seems to me to be a matter a reasonable contractor and licensee would be expected to take into account in negotiating a rate inclusive of a risk component under Section 25 of the *Regulation*.¹⁶⁹

[154] In this case, the parties have been mainly focussed on the impact of some risks that actually materialized, and not the extent to which increased risks were within their contemplation at the commencement of any year. In the result, I am unable to conclude there were exceptional difficulties related to timber development (including road construction), cutting permit approval, or curtailments that would likely have been viewed prospectively by the parties as adversely affecting the logging chance for the 1998, 1999, 2000 and 2001 logging seasons.

¹⁶⁸ *Hayes Forest Services Ltd. and Western Forest Products Limited* (17 Jul. 2000) (F.S. Borowicz, Q.C.), pp. 19-20. Depending on the circumstances, they may form part of a Section 25 rate dispute or a Section 5 claim for licensee-caused damage, or they may not be recoverable at all.

¹⁶⁹ If a particular risk actually comes to fruition causing damage, however, the assessment of who is to bear the loss will likely fall to be determined under S. 5 by reference to the terms of the agreement between the parties and the relevant provisions of the *Regulation: Hayes Forest Services Ltd. and Western Forest Products Limited* (17 Jul. 2000) (F.S. Borowicz, Q.C.); also *Pacific Forest Products Ltd. and Hayes Forest Services Ltd.* (15 Aug. 1997) (W.J. Wallace, Q.C.), paras. 7.1-7.3.

Expert Opinion

[155] The only expert opinion about the conventional logging rates at Plumper Harbour tendered in the proceedings was that of John McLaughlin. Mr. McLaughlin has over 40 years of experience in coastal logging, with 23 years of management experience, including management of Frank Beban Logging Ltd.

[156] Mr. McLaughlin used two methods in his calculations.¹⁷⁰ He independently estimated the cost to carry out each year's logging plan. He also "rolled forward" his estimated 1997 rate to include IWA and inflation increases, which he referred to as the "smoothing" method". In his view, the fluctuating rates resulting from his annual cost estimates were not consistent with his experience, so he preferred the "smoothing" approach as being more consistent with the way contract rates are negotiated in the industry. His suggested rates are, therefore, based on the latter.

[157] Mr. McLaughlin was not informed of the 1997 rate agreed to by the parties. His own estimate established a rate of \$40.65/m³ for conventional logging in 1997. He used that rate as the starting point to "roll forward" annual rates to include IWA and inflation increases under the "smoothing" method.

[158] Using these two methods, Mr. McLaughlin calculated the rates for Plumper Harbour to be:

¹⁷⁰ Ex. 69; trans. John McLaughlin, Oct. 28 & 29, 2002.

YEAR	RATE USING ESTIMATED COST METHOD	RATE USING "SMOOTHING" METHOD
1998	\$44.22/m ³	\$41.40/m ³
1999	\$41.95/m ³	\$41.97/m ³
2000	\$40.25/m ³	\$42.95/m ³
2001	\$43.85/m ³	\$43.99/m ³

Independence

[159] Hayes contests Mr. McLaughlin's independence. It contends he was, in effect, an employee of Western, in reference to what he was paid,¹⁷¹ and the 16 months of almost full-time work it took to complete his report.¹⁷²

[160] Hayes relies on the B.C. Supreme Court decision in *Hughes v. Haberlin*¹⁷³ for the proposition that even the perception of bias in relation to excessive remuneration is sufficient cause to disregard an expert report. Western replies with reference to the decision of the Ontario Supreme Court in *Interamerican Transport Systems Inc. v. Canadian Pacific Express and Transport Ltd.*¹⁷⁴ for the view that a financial relationship is, of itself, insufficient to taint the opinion of an expert.

[161] Western also reflects that Mr. McLaughlin spoke in a frank and forthright manner, freely acknowledging those aspects of his report that favoured Hayes, and that he

¹⁷¹ Ex. 109, trans. John McLaughlin, Feb. 6, 2003, p. 1858.

¹⁷² Trans. John McLaughlin, Feb. 6, 2003, p. 1857.

¹⁷³ (1997), 49 B.C.L.R. (3d) 366 (S.C.).

¹⁷⁴ [1995] O.J. No. 3644 (S.C.).

at no time displayed any bias or lack of neutrality. As to his fees, Western observes their manifest reasonableness in view of the magnitude and scope of his inquiry, which included the preparation of seven separate reports within his main report. Western also notes that Mr. McLaughlin had other sources of income while preparing his report, and that his fees were actually higher for some other consulting services.¹⁷⁵

[162] In my view, Mr. McLaughlin was a credible and unbiased expert, whose report was insightful and helpful.

Methodology and Assumptions

[163] Mr. McLaughlin undertook an exhaustive review of the operation at Plumper Harbour. He reviewed the information given to him by Western,¹⁷⁶ and spent five days at Plumper Harbour viewing it first hand.

[164] For each year, Mr. McLaughlin built an independent financial model of how a "reasonable contractor" would conduct logging operations at Plumper. His report contains exhaustive summaries of each block logged by Hayes. He considered adverse haul, long yarding, deflection, broken ground, switchbacks, selective logging, and rock bluffs, and included those factors in the logging costs for the block.¹⁷⁷ His analysis was also based on a stand-alone operation, assuming no management staff or equipment would be used for any other show,¹⁷⁸ which yields higher costs than if those expenses were factored across more than one operation.¹⁷⁹

¹⁷⁵ Trans. John McLaughlin, Feb. 6, 2003, pp. 1860-61; 1858-59.

¹⁷⁶ The information Mr. McLaughlin received from Western was limited to: approved logging maps of the blocks that were logged each year; year-end production numbers by logging method and area, including number of logging truckloads and pieces; average haul distance calculation; list of logging equipment that was used on the job; and confirmation that Plumper Harbour was an IWA union operation. Ex. 69, Tab 1. Mr. McLaughlin did not receive any information about the actual logging rates paid by Western to any of its contractors.

¹⁷⁷ Trans. John McLaughlin, Oct. 28, 2002, pp. 827-32.

¹⁷⁸ Trans. John McLaughlin, Oct. 28, 2002, pp. 811-12.

¹⁷⁹ Hayes was able to do so. Trans. John McLaughlin, Oct. 28, 2002, p. 836; Ex. 69, Tab 3, p. 5.

[165] Western contends Mr. McLaughlin calculated depreciation by estimating the machinery required to service the contract. He assumed all equipment was purchased in 1997 for market value and then depreciated the equipment.¹⁸⁰ He factored in the cost of curtailments,¹⁸¹ assumed 15% profit and risk, and his cost analysis for each year is independent of the previous year.¹⁸² He also assumed one full-time and one part-time administrative position, an outside accounting firm for all accounting functions,¹⁸³ and general/administration costs of \$2.33/m³ over the five year period as reasonable costs.¹⁸⁴

[166] On this basis Mr. McLaughlin estimated a 1997 rate for conventional logging of 79,675 m³ at \$40.65.¹⁸⁵

[167] Hayes contends that Mr. McLaughlin's report is neither objective nor prospective in its approach; that he relied on inaccurate data given to him by Western; and that his methodology was flawed.

[168] Hayes notes that, although Mr. McLaughlin was given the prospective logging plan maps for each year showing the planned harvest and logging method,¹⁸⁶ he did not use those maps, and used instead the "Actual Logging Method" maps he was given by Western¹⁸⁷ which purported to show how the logging had actually been done. Hayes also

¹⁸⁰ Trans. John McLaughlin, Oct. 28, 2002, p. 820; Ex. 69, Tab 2.

¹⁸¹ Trans. John McLaughlin, Oct. 29, 2002, pp. 1057-59.

¹⁸² Trans. John McLaughlin, Oct. 28, 2002, pp. 858-59.

¹⁸³ Trans. John McLaughlin, Oct. 28, 2002, p. 822.

¹⁸⁴ Trans. John McLaughlin, Oct. 29, 2002, pp. 989-90.

¹⁸⁵ Which is remarkably close to the actual rate of \$40.59 that Western negotiated with Hayes in 1997.

¹⁸⁶ Trans. John McLaughlin, Oct. 28, 2002, pp. 944-45.

¹⁸⁷ Trans. John McLaughlin, Oct. 28, 2002, pp. 809, 946.

notes that Mr. McLaughlin was not given the logging plans which Western gave to Hayes showing Western's estimates of what might be harvested in the year.¹⁸⁸

[169] Hayes therefore claims Mr. McLaughlin's report was based on information compiled after the logging was actually done, with regard to exact volumes and actual yarding methods,¹⁸⁹ and was therefore subjective and retrospective.¹⁹⁰ Hayes also claims that Mr. McLaughlin used a combination of assumed retrospective information given to him by Western, such as haul data and harvest by area,¹⁹¹ and actual retrospective information, such as scale data and piece size,¹⁹² while Western did not give him other retrospective data which would have indicated a poorer logging chance for Hayes. For example, where the road to a block was not built, requiring fallers to walk in, or where permits were not in place for the block.¹⁹³ If a "check" on rates is to be premised on a retrospective and subjective approach, then Hayes contends its actual costs of logging in a given year are the best indicators of logging costs.¹⁹⁴

[170] Hayes also contends the Actual Logging Method maps given to Mr. McLaughlin by Western showed some yarding mix volumes that were not correct, since there appeared to be areas which could not have been logged as indicated. They did not distinguish

¹⁸⁸ Trans. John McLaughlin, Oct. 29, 2002, pp. 1030-31, 1048-49. Hayes also emphasized that Mr. McLaughlin confirmed he had not seen an "Actual Logging Method" map during his years at Beban when they logged for Western: Trans. John McLaughlin, Oct. 28, 2002, pp. 945-46.

¹⁸⁹ Trans. John McLaughlin, Oct.29, 2002, pp.s 1048-49.

¹⁹⁰ Hayes also points to Mr. McLaughlin taking 16 months to assess the logging chance and to roll forward a rate for five years, relying partly on information which took Rob Bugden, Western's operations accountant, one and one half months to compile (trans. Rob Bugden, Feb. 11, 2003, pp. 2296-97), as underscoring the retrospective approach. And, if a licensee and contractor adopted that methodology for negotiating rates, Hayes contends no timber would be harvested until late in any year and with high administrative costs.

¹⁹¹ Trans. John McLaughlin, Oct. 28, 2002, p. 947, Oct.29, 2002, pp. 953-55; Exs. 74-78.

¹⁹² Trans. John McLaughlin, Oct. 28, 2002, p. 913, Oct. 29, 2002, pp. 963-64; Exs. 74-78.

¹⁹³ Trans. John McLaughlin's, Oct. 29, 2002, pp. 1034-35.

¹⁹⁴ Relying on *Pacific Forest Products Ltd. and Hayes Forest Services Ltd.* (15 Aug. 1997) (W.J. Wallace, Q.C.).

between hoe chucking to roadside and hoe forwarding to a grapple yarder, and some of the yarding mix methods did not reflect Hayes' actual yarding mix. So, Hayes advances the award in *Western Forest Products Limited and Hayes Forest Services Ltd.*,¹⁹⁵ to support the proposition that expert opinion premised on incorrect yarding mixes should be given no weight.

[171] In regard to his methodology, Hayes contends that instead of the \$40.65/m³ rate Mr. McLaughlin calculated for conventional logging in 1997, a reasonable licensee and contractor would begin with the actual 1997 agreed rate of \$40.59/m³, for conventional logging. Hayes also observes that Mr. McLaughlin's derived combined rate of \$38.37/m³¹⁹⁶ is lower than each of the rates agreed to by the parties in 1997, and that he was aware that an agreed rate existed,¹⁹⁷ which he would ordinarily use going forward.¹⁹⁸

[172] In regard to depreciation, Hayes claims that in other cases where expert evidence has been accepted, the expert approached the equipment rate calculation using his own assumed complement of equipment, not the actual equipment used. And, since Mr. McLaughlin did not personally inspect the equipment, and was not given photos or the age of the equipment,¹⁹⁹ he assumed it was all owned by Hayes and used, even though some of it was leased and new. As a result, Hayes contends, he assigned unrealistically low values for calculating depreciation costs.²⁰⁰

¹⁹⁵ *Western Forest Products Limited and Hayes Forest Services Ltd.* (6 May 1999) (Paul J. Pearlman, Q.C.); trans. John McLaughlin, Oct. 29, 2002, p. 953-954.

¹⁹⁶ Trans. John McLaughlin, Oct. 28, 2002, p. 842-43; Ex. 69, Tab 4, p. 13.

¹⁹⁷ Trans. John McLaughlin, Oct. 28, 2002, p. 933.

¹⁹⁸ Trans. John McLaughlin, Oct. 29, 2002, pp. 1021-22, 24.

¹⁹⁹ Trans. John McLaughlin, Oct. 29, 2002, pp. 958-62, 977-78.

²⁰⁰ Hayes also points to Mr. McLaughlin's acknowledgment that it was appropriate to depreciate leasehold equipment over the life of a lease, after deducting any buyout, emphasizing that he did not do so in this case: trans. John McLaughlin, Oct. 29, 2002, pp. 962-63.

[173] In respect of labour burden, Hayes contends Mr. McLaughlin "rolled forward" his calculated 1997 labour burden of 47% without taking into account actual labour burden increases in the following years,²⁰¹ although he recognized that rate adjustments on a roll forward basis should take into account IWA increases, inflation, and other cost increases such as fuel.²⁰²

[174] In regard to profit and risk, Hayes contends that although Mr. McLaughlin confirmed the appropriate margin is 15%,²⁰³ he excluded it on falling in his derived rate for 1997. Similarly, Hayes points to Mr. McLaughlin's acknowledgment that the fixed cost per metre of logging decreases as volume increases,²⁰⁴ but notes that in his derived rate the fixed cost per metre did not vary with anticipated volume.²⁰⁵ Hayes also observes that Mr. McLaughlin spread the insurance cost over the conventional and helicopter support for his derived rate, but recognized that the helicopter support would not have changed the insurance cost.²⁰⁶ Similarly, that he allocated grapple yarder depreciation to helicopter support²⁰⁷ even when the grapple yarder was not used.

[175] In short, Hayes claims that because Mr. McLaughlin's derived rate has some errors in calculation, departs from his own past practice, and does not recognize the rates actually agreed to in 1997, it ought to be rejected.

²⁰¹ Trans. John McLaughlin, Oct. 29, 2002, p. 1018-19.

²⁰² Trans. John McLaughlin, Oct. 28, 2002, pp. 838-39, 908-09, Oct. 29, 2002, p. 1050.

²⁰³ Trans. John McLaughlin, Oct. 28, 2002, p. 858. And, that while he was at Beban he had added mark-up to falling: trans. John McLaughlin, Oct. 29, 2002, p. 991.

²⁰⁴ Trans. John McLaughlin, Oct. 28, 2002, p. 916.

²⁰⁵ Trans. John McLaughlin, Oct. 29, 2002, pp. 979, 989-90.

²⁰⁶ Trans. John McLaughlin, Oct. 29, 2002, p. 986.

²⁰⁷ Trans. John McLaughlin, Oct. 29, 2002, p. 989.

[176] Western contests Hayes' efforts to re-cost Mr. McLaughlin's report to reflect Hayes' "actual" costs of logging at Plumper Harbour. It points to the award in *Hayes Forest Services Limited and International Forest Products Ltd.*²⁰⁸ as disapproving of the exercise of adjusting the assumptions of an expert without giving the expert an opportunity to comment. Western also contends that such a re-costing undermines the prospective approach required by the *Regulation*. Western emphasizes that Mr. McLaughlin used contractual volume to build a model logging operation for each year, and then derived conventional logging rates using costs involved in the model operation. In Western's view, transposing Hayes' actual logging costs does not help in assessing if the rates determined by Mr. McLaughlin were competitive.

[177] In particular, Western opposes the use of Hayes' re-costing in relation to Mr. McLaughlin's analysis of depreciation and labour burden. In regard to depreciation, Western claims that using Hayes' actual costs does not take into account Mr. McLaughlin's assessment for repair and maintenance of older equipment.²⁰⁹ In the absence of a corresponding analysis by Hayes of the impact of repair and maintenance for each piece of equipment at Plumper Harbour over the five year period, Western contends any assessment of increased costs for depreciation is incomplete and of little practical benefit. And, it contends a similar problem results from Hayes' analysis of the labour burden assumed by Mr. McLaughlin.²¹⁰

[178] In general, Western contends that absent an error in Mr. McLaughlin's methodology or underlying assumptions, his rates are a valid objective assessment of what a reasonable contractor should have received for the logging show at Plumper Harbour, and they support Western's proposed rates, since he adopted a "worst case" scenario in his calculations.

²⁰⁸ *Hayes Forest Services Limited and International Forest Products Ltd.* (14 Nov. 2002) (Murray A. Clemens, Q.C.), para. 65.

²⁰⁹ Trans. John McLaughlin, Oct. 29, 2002, p. 1055.

²¹⁰ Exs. 113, Tab 8; 114, Tab 10, p. 6.

[179] While the essential approach mandated by Section 25 of the Regulation is prospective and objective, it is an exercise which often occurs after logging operations have been completed. As a result, arbitrators usually have the benefit of knowing what actually happened during the season. And, in *Hayes Forest Services Ltd. v. Pacific Forest Products Limited*,²¹¹ the B.C. Court of Appeal confirmed that, without being determinative of the rate, evidence of actual costs and actual volume is relevant and admissible under Section 25(2)(f), at least for showing what was within the range of possible.

[180] With this in mind, I am of the view that an expert opinion premised on after the fact information may be considered and given the attention it deserves in the circumstances. This was done in *Hayes Forest Services Limited and International Forest Products Limited*,²¹² where, although the opinion of the expert was based on the actual volume logged, the arbitrator accepted the opinion and considered it inappropriate in the circumstances to adjust the rate to account for the planned volume.

[181] In this case, Mr. McLaughlin's expert opinion is a helpful factor to be considered in the overall analysis, being mindful of differences between the assumptions he made and the prospective information that would have been available to the parties at the commencement of each year.

[182] For example, it is apparent that Mr. McLaughlin's calculations, for his 1997 derived rate and for his estimated costs approach to the 1998 to 2001 rates, take into account the actual volume logged, rather than the contractual volume or the anticipated volume.²¹³

²¹¹ 2000 BCCA 66, paras. 46-56.

²¹² *Hayes Forest Services Limited and International Forest Products Limited* (25 Aug. 2000) (George K. MacIntosh, Q.C.), pp. 9-10. Expert opinions in other arbitrations have been criticized for equipment assumptions too far afield from the contractor's actual complement of equipment (*Lineham Logging Ltd. and International Forest Products Ltd.* (3 Dec. 1999) (M.R. Taylor, Q.C.), pp. 90-91), and for not considering actual conditions and circumstances encountered by the contractor (*Hayes Forest Services Ltd. and Western Forest Products Ltd.* (6 May 1999) (Paul J. Pearlman, Q.C.), p. 17).

²¹³ Ex. 69; John McLaughlin, Oct. 28 and 29, 2002.

While the mutually anticipated annual volume to be processed under applicable licenses is a factor that reasonable contractors and licensees would take into account, and Mr. McLaughlin was not asked to adjust his opinion on the basis of the anticipated numbers, that in my view is not a basis for rejecting his opinion. Instead, like with other differences, it simply needs to be recognized in the overall analysis.

[183] In regard to yarding mix, while Mr. McLaughlin utilized the Actual Logging Method maps to determine yarding mix assumptions, he also distinguished between hoe-chucked areas and areas where timber was hoe-forwarded to a yarder.²¹⁴ It also appears that any differences between the actual yarding mix estimates asserted by Western in the Actual Logging Method maps, and those asserted by Hayes on the basis of their load slips, are largely immaterial,²¹⁵ and that those kinds of yarding mixes would have been in the contemplation of the parties prospectively.²¹⁶ On a block-by-block basis, some variations favour Western, and some favour Hayes, but they are not of a magnitude to be significant to the yarding mix as a whole. I am of the same view about piece size and haul distance.²¹⁷ And since there were no exceptional difficulties related to timber development, cutting permit approval, or curtailments that would have likely been viewed prospectively by the parties as adversely affecting the logging chance, during any of the logging seasons, Mr. McLaughlin's opinion is not deficient for not taking them into account.

²¹⁴ Even though they were only marked as "hoe-chucked" on the maps. For example Mr. McLaughlin's comments and report on blocks B115, B160 in 1999 and block B100 in 2000, and the Actual Logging Method maps for those blocks in Exs. 6 and 7.

²¹⁵ Ex. 85. It is to be expected that the two approaches produce different numbers for yarding mix since Western's figures are based on area, while Hayes' are based on volume. To the extent that the area measurement involves particular assumptions, those assumptions will sometimes work in Hayes' favour and sometimes not, but will, on average, yield reliable results. This is confirmed by the comparison in Ex. 85 which shows the variance to be substantially 1% over the five year period.

²¹⁶ As Hayes did not rely on Western's logging maps in building up its rates, but rather went out to review the blocks and made its own determination about the accuracy of the maps. (Trans. Harold Hayes, Nov. 5, 2002, pp. 1664-65).

²¹⁷ Exs. 13, 18 (Tab 23), 69, 74-78, 103; trans. Harold Hayes, Nov. 4, 2002, pp. 1427-31, Nov. 5, 2002, 1602-25.

[184] In regard to Mr. McLaughlin's depreciation analysis, while based on the same complement of equipment used by Hayes, it does not assume the equipment was identical with regard to being new or used, owned or leased. Hayes' proposed adjustment recalculates Mr. McLaughlin's depreciation spreadsheet according to Hayes' depreciation policies, and adjusts Mr. McLaughlin's derived rate of \$40.65/m³ for 1997, by a factor of \$5.03, for a total adjusted 1997 rate of \$46.94/m³.²¹⁸ As with other asserted differences, Mr. McLaughlin was not asked to adjust his opinion on the basis of Hayes' actual equipment and depreciation policies, which leaves uncertain the extent to which the depreciation costs for Hayes' "newer" equipment would be offset by Mr. McLaughlin's anticipated costs of repair and maintenance for "older" equipment²¹⁹.

[185] In regard to Mr. McLaughlin's labour burden calculation, it was independently established for each year under his estimated costs approach, at 47% for 1997, 50% for 1998, 52% for 1999, 51% for 2000, and 53% for 2001.²²⁰ Under the "smoothing" method, his 1997 derived rate of \$40.65/m³, established at a 47% labour burden, was rolled-forward taking into account IWA and inflation increases.²²¹ Hayes' proposed adjustment: 1) averages the labour burden rates which Hayes claims to have actually experienced from 1998 to 2001, at 51.79%; 2) calculates the resulting labour burden impact on the rate at \$0.56/m³; and 3) substitutes the adjusted 1997 rate of \$46.94/m³ into Mr. McLaughlin's roll forward formula.²²² This does not seem to me to be appropriate. It adjusts the 1997 base rate with regard to the labour burden experienced in subsequent years,²²³ which is not

²¹⁸ Inclusive of various other adjustments. Ex. 113, Tab 8; trans. Donald Hayes, Feb. 10, 2003, pp. 2145-51.

²¹⁹ Trans. John McLaughlin, Oc. 29, 2002, p. 1055.

²²⁰ Ex. 69.

²²¹ Ex. 69; trans. John McLaughlin, Oct. 28, 2002, pp. 908-10.

²²² Inclusive of other adjustments. Exs. 113, Tab 8, 114, Tab 10; trans. Donald Hayes, Feb. 10, 2003, pp. 2143-45, 2182-85.

²²³ Western also disputes the labour burden claimed.

prospective in approach, and does not recognize that applying IWA increases each year already takes into account the annual percentage increase of the total labour cost per hour, inclusive of benefits.²²⁴

[186] To accord with industry practice²²⁵ and the approach required under the *Regulation*, however, Mr. McLaughlin's roll forward approach needs to begin with the rate the parties actually agreed to in 1997. It can be readily substituted in Mr. McLaughlin's roll forward analysis, with a resultant decrease in revenue to the contractor of approximately \$21,000. Mr. McLaughlin's original revenue figure for the "roll forward" method favoured the contractor in that it was approximately \$15,400 higher than in the estimated cost approach. If it was to be adjusted to account for the actual 1997 rate, the revenue figure would be approximately \$6,000 lower than in the estimated cost approach.²²⁶

[187] Although Mr. McLaughlin's roll forward approach does not appear to take into account the material changes in anticipated volume between 1997 and the later years, which a reasonable contractor and licensee would likely have taken into account,²²⁷ that also does not seem to me to be a basis for rejecting his opinion, but rather another consideration that relates to the appropriate attention it deserves in the circumstances. I am also not inclined to reject Mr. McLaughlin's opinion because of differences between his 1997 derived rates, and the agreed 1997 rates. Although his 1997 derived rate may not be the appropriate starting point for a roll-forward analysis, it does not seem to me to

²²⁴ Ex. 113, Tab 2 (attachments). Also, where minor discrepancies exist between the IWA and inflation rates used by John McLaughlin and those used by Donald Hayes, I am inclined to use the latter on the basis of the supporting documentation.

²²⁵ Trans. John McLaughlin, Oct. 29, 2002, pp. 1021-24.

²²⁶ Mr. McLaughlin accepted the roll forward approach in part because it resulted in "approximately the same amount of money changing hands" as his estimated cost approach. In my view, this difference can be regarded as the same so as to satisfy Mr. McLaughlin's check on his suggested rates. Ex. 69, Tab 3; trans. John McLaughlin, Oct. 28, 2002, pp. 908-912.

²²⁷ Trans. John McLaughlin, Oct. 29, 2002, pp. 979-81, 1030-31, 1048.

reflect adversely on his expertise on the overall value of his analysis. On the contrary, his independently derived 1997 conventional rate of \$40.65/m³ is certainly close to the actually agreed rate of \$40.59/m³, and his 1997 rate of \$33.19/m³ for heli support and heli falling services is also relatively close to the approximately \$30/m³ "going rate" for those services paid to the other contractors in the NCA at the time.

Similar Operations

[188] Western looks to rates agreed to in comparable operations as a check on the rates it proposes, and those proposed by Hayes. It observes that while Section 25(1)(a) of the *Regulation* requires rates to be "competitive by industry standards," Section 25(2)(e) permits an arbitrator to consider rates "for similar timber harvesting operations." For this purpose, it contends that whether or not an operation is similar is a matter of fact, and proffers the operations of the other contractors in the NCA which are proximate and comparable in geography and logging chance, to be sufficiently similar as to make comparison between them no more difficult than comparing one show in the same cut over a period of years.²²⁸

[189] Hayes contests the use of comparables, claiming no arbitration award has relied on comparable operations of the licensee as a means of establishing a rate under Section 25 of the *Regulation*, and that several have considered it not to be helpful.²²⁹ It invokes

²²⁸ Western also contends there is little to be gained from a province-wide or industry-wide assessment of contractor logging rates, particularly those outside the coastal region where 50% of the market remains open to competition: relying on *Carrier Lumber Ltd. v. Joe Martin & Sons* [2003] B.C.J. No. 259 (S.C.), paras 13-14; also, *Carrier Lumber Ltd. v. Joe Martin & Sons*, 2004 BCCA 26.

²²⁹ *Pacific Forest Products Ltd. and Hayes Forest Services Ltd.* (15 Aug. 1997) (W.J. Wallace, Q.C.), p. 31; *Western Forest Products Limited and Hayes Forest Services Ltd.* (6 May 1999) (Paul J. Pearlman, Q.C.), p. 24; *Lineham Logging Ltd. and International Forest Products Ltd.* (3 Dec. 1999) (M.R. Taylor, Q.C.), pp. 10-11; *Hayes Forest Services Limited and International Forest Products Limited* (25 Aug. 2000) (George K. MacIntosh, Q.C.), p. 12; *Hayes Forest Services Limited and International Forest Products Ltd.* (14 Nov. 2002) (Murray A. Clemens, Q.C.), p. 13.

dictionary definitions of "competitive", "industry" and "standard", to support its view that reference to rates from selected operations of one licensee is not enough to determine a rate that is "competitive by industry standards", and relies on the B.C. Supreme Court decision in *Carrier Lumber Ltd. v. Joe Martin & Sons*.²³⁰

[190] In general, Hayes contends that Western's comparable information is subjective and retrospective, and does not comprise information which a reasonable licensee and contractor would typically have in mind when negotiating rates at the start of a contract year.²³¹ It points to the Actual Logging Method maps and other data relied on by Western as being retrospective, in that they are based on what actually happened during the logging season, and that factors like "adverse haul"²³² and "long yarding",²³³ are dependent on subjective definitions, which can change the comparability of operations depending on the definitions used.

[191] In response, Western points to documentation²³⁴ it gave to Hayes in their 1998 negotiations which listed various common factors used to assess logging chance, including, total volume, piece size, sideslope, deflection, feathered edges, weighted average haul, topography, decking room, weighted average adverse haul, species, logging systems, equipment moves required, camp, accessibility, dryland sorts, and weighted average yarding.

²³⁰ [2003] B.C.J. No. 259 (S.C.), paras. 51-53; also, *Carrier Lumber Ltd. v. Joe Martin & Sons*, 2004 BCCA 26.

²³¹ Trans. Ron Todd, Oct. 31, 2002, pp. 1172-73.

²³² Trans. John Waring, Oct. 4, 2002, pp. 375-76.

²³³ Trans. John Waring, Oct. 4, 2002, pp. 365-67.

²³⁴ Ex. 24, which contains information used to assess the logging chance for Hayes at Plumper Harbour. Western also challenges Hayes' suggestion that Western does not rely on the comparable evidence presented when setting a rate, and says it makes use of the data albeit not in the same form presented at the arbitration.

[192] Western also observes that in the award in *Pacific Forest Products Ltd. and Hayes Forest Services Ltd.*,²³⁵ where Arbitrator Wallace refers to the use of comparables as a "nebulous exercise", that he went on to say the exercise has value in showing the range of rates for which members of the industry are prepared to pay and perform services of a relatively similar nature, and concluded the rate he fixed for conventional logging fell within the range of adjusted rates of other contractors for those services as could properly be characterized as competitive.

[193] In my view, regardless of how other arbitrators may have viewed the evidence of comparables in the circumstances they were considering, Section 25(2)(e) of the *Regulation* clearly allows an arbitrator to consider similar operations. I am therefore confident it is entirely appropriate to do so, and that to be similar, they need not be identical.

[194] It is also useful in this regard to distinguish between Section 25(1) and Section 25(2) of the *Regulation*. Section 25(1) postulates a hypothetical scenario for the arbitrator, one in which the arbitrator is placed in the position of the parties, acting reasonably, at the start of a contract year, in the circumstances known to both of them. The task is to determine what the parties at that time and in those circumstances would likely have agreed to, bearing in mind the two criteria for the agreement mandated by s.25(1): (a) a rate that is "competitive by industry standards"; and (b) a rate which will permit a contractor to earn "a reasonable profit".²³⁶

[195] Section 25(2) identifies specific factors an arbitrator may take into account as if they were in the contemplation of the parties, if that would assist in understanding the

²³⁵ *Pacific Forest Products Ltd. and Hayes Forest Services Ltd.* (15 Aug. 1997) (W.J. Wallace, Q.C.), pp. 31-32.

²³⁶ *Hayes Forest Services Ltd. v. Pacific Forest Products Ltd.*, 2000 BCCA 66, para. 43.

reasonableness of what they would likely do or identify related factors that might explain a difference with what others did. In particular, if there would have been circumstances known to the parties at the commencement of the year which would reasonably cause them to deviate from any rates considered under Section 25(2)(e), that would be a matter to be taken into account in satisfying the objective standard of Sections 25(1)(a) and (b).

[196] In regard to the retrospective nature of the comparable information, it seems to me that operations may be "similar" as a matter of fact under Section 25(2)(e) by reference to any point in time, and the extent to which that is factored into the result is also determined through the prospective analysis under Section 25(1).

[197] Similar operations are also likely to be derived from a circumscribed segment of the entire industry. And, if they relate to operations that are sufficiently similar, then the other negotiated rates in the NCA region would be appropriately and usefully indicative, albeit not determinative, of what is "competitive by industry standards".²³⁷

The Comparables

[198] Western contends that the rates for other contractors in the NCA indicate that conventional logging rates have, for over ten years, been negotiated on a roll-forward basis and are within a consistent range that is demonstrably competitive. It contrasts the blended rate history for conventional logging rates in the NCA region²³⁸ with the rates proposed by Hayes, and questions why Hayes would require much higher rates to earn a reasonable profit.

²³⁷ Recognizing that other contractors may have had particular reasons for agreeing to the rates. For example, trans. John McLaughlin, Oct. 29, 2002, pp. 1050-51, to the effect that one of the Other Contractors had agreed to reduce some rates in exchange for Western's approval to sell a road contract. *Carrier Lumber Ltd. v. Joe Martin & Sons*, 2004 BCCA 26 para. 23.

²³⁸ Western's Submissions, Tab 6; Ex. 18, Tabs 14, 15, 17, 21.

[199] Western also contends that the NCA is unique with regard to the close geographic proximity of the six contractors. It points to photographic evidence showing the topography throughout the NCA operating area is uniform in nature, characterized by valleys with long continuous slopes, and with a terrain that is often continuously forested from valley bottom to ridge top, and claims the combination of consistent topography, climate and timber has enabled its forest management activities in the NCA to be predictable and efficient.²³⁹

[200] To facilitate a comparison between their operations, Western presented comprehensive data for each of the contractors in the NCA, which included, piece size, weighted average haul distance, weighted average significant adverse haul, yarding distance greater than 200 metres, weighted average side slope, percentage of right of way wood harvested, wood harvested by hoe chucking, wood harvested by grapple-yarder, wood harvested by tower, total production volume by species, net volume per hectare, total average volume logged per day, dryland sort summary, dryland sort trim waste, cubic metres of timber developed, timber development status, and cutting permit approvals.²⁴⁰ In addition, Western compared the general logging chance of the other five operations to Plumper Harbour, reviewing the data on a block-by-block basis.

[201] In assessing the data,²⁴¹ Western contends the logging chance was comparable for each of the six contractors in the NCA and that the graphical summaries²⁴² indicate the Hayes operation at Plumper Harbour was actually above average when compared to the others. Overall, Western contends that the similarity in operations is substantiated by the

²³⁹ Ex. 18, Tabs 2, 3.

²⁴⁰ Trans. John Waring, Oct. 3-7, 2002, generally; trans. Doug Meske, Oct. 8, 2002, generally; Exs. 4-18, 27-30, 42-44, 50, 52-57, 89.

²⁴¹ Western's Submissions, Tabs 27, 28; Ex. 18, Tabs 23, 26, 29, 32, 35, 38, 41, 44, 47, 50, 53, 57, 63, 66, 69.

²⁴² Western's Submissions, Tabs 11-26.

rates paid to each contractor²⁴³ which for the NCA contractors, other than Hayes, increased an average of 0% in 1998 and 1999, 2.6% in 2000, and 4.5% in 2001.

[202] In response, Hayes contends that Western's comparable evidence is inaccurate or incomplete, and that the operations of the other contractors in the NCA were materially different than Hayes' operation at Plumper Harbour. For example, Hayes challenges Western's Actual Logging Method maps as reflecting overzealous colouring,²⁴⁴ and not distinguishing between the additional expense of hoe forwarding to a grapple yarder, and hoe chucking to the road,²⁴⁵ so that they presented disadvantageous yarding methods required of Hayes as comparable to the more favourable yarding mixes of other contractors.

[203] Hayes also contends that, since yarding is not done by area, but by volume,²⁴⁶ area based calculation methodology depends on an accurate estimate of the amount of timber within the map area,²⁴⁷ so that showing the method by which an area was harvested is at best an estimate, with the amount of timber in the area also being only an estimate.

[204] Hayes claims that after 1997 the mix of yarding methods shown on Western's Actual Logging Method maps is more favorable than the actual harvesting methods used by Hayes as recorded in its load slips, which it claims are more reliable as a source

²⁴³ Western's Submissions, Tabs 3, 4; Ex. 18, Tab 15.

²⁴⁴ Trans. Doug Meske, Oct. 8, 2002, pp. 635-36, although in respect of the Beban operation.

²⁴⁵ Trans. John Waring, Oct. 7, 2002, p. 480-83, although this explanation was given in respect of one of the Other Contractor's operations. Hayes also contests Western's assertion that some of the Other Contractors had or used the Actual Logging Method maps. For example, it asserts that Hayes, like some of the others, had not requested the Actual Logging Method maps, that Mr. McLaughlin never saw them in his time with Beban, and that some were not reviewed in a timely manner by the contractors who performed the logging, as in the case of the 1997 map which was reviewed in 2002 in preparation for arbitration: trans. John Waring, Oct. 7, 2002, pp. 497-98.

²⁴⁶ Trans. John Waring, Oct. 4, 2002, pp. 380-81, Oct. 7, 2002, pp. 420-23.

²⁴⁷ Trans. Harold Hayes, Nov. 4, 2002, p. 1515.

document since they record the timber's treatment contemporaneously with harvesting.²⁴⁸

Hayes also challenges Western's efforts to minimize the errors in its Actual Logging Method maps by trying to average out the differences between Western's and Hayes' approaches.²⁴⁹

[205] Hayes claims that the negotiated conventional rates for the other contractors in the NCA remained within a close range, despite the variances in volume, haul distances, yarding methods, piece size, camp costs and transportation costs, because Western ameliorated its unilaterally imposed cap on conventional rates by offering the other contractors special circumstance payments, additional helicopter support work, volumes beyond their entitlements and volume outside the fibre basket area.²⁵⁰ So those conventional logging rates ought not to be regarded as competitive by industry standards or as allowing a reasonably efficient contractor to earn a reasonable profit in isolation of related collateral agreements. And, Hayes challenges Western's efforts to minimize the effect of the special circumstance rates paid to the other contractors by spreading the rates over the total volumes, including the helicopter volumes provided to other contractors,²⁵¹ rather than taking them into account in the manner they were actually paid to the contractors for particular work in a given year.

[206] In general, Hayes contends the logging chance of the other contractors was significantly better than its own,²⁵² and that the comparable approach does not account for

²⁴⁸ Trans. Donald Hayes, Feb. 10, 2003, pp. 2152-53, as to the importance of load slips and the care that Hayes' employees are instructed to take in filling them out accurately; trans. Harold Hayes, Nov. 4, 2002, pp. 1515-16, to the effect that yarding mixes can significantly affect logging costs.

²⁴⁹ Ex. 85.

²⁵⁰ Trans. Ron Todd, Nov. 1, 2002, pp. 1352-53, 1381-83, 1386; also, trans. Harold Hayes, Nov. 5, 2002, p. 1549-58.

²⁵¹ Ex. 61.

²⁵² Trans. Harold Hayes, Nov. 5, 2002, p. 1549-58; Ron Todd, Nov. 1, 2002, pp. 1352-53. Hayes asserts that Western's analysis of the dryland sorts of all the contractors ignores the shape of the sorts, which could have an impact on productivity; trans. John Waring, Oct. 4, 2002, p. 382; Harold Hayes, Nov. 4, 2002, p. 1516-17. Hayes also asserts that it, unlike many of the other contractors, had to operate a camp, which has significant cost implications; trans. Harold Hayes, Nov. 5, 2002, pp. 1550-51.

the inherent inefficiencies of the logging plans assigned to it by Western. For example, it does not quantify the cost impact of Western's requirement that Hayes log a block twice in one year, or of needing fallers to walk into blocks because of inadequate development of the blocks assigned to it by Western.

[207] In response, Western points to how the Actual Logging Method maps were prepared and distributed²⁵³: that following the completion of logging, they would typically meet with the contractor's camp management and agree on the logging methods used to harvest each block; that the methods were coloured onto a map which was then digitized to produce an Actual Logging Method map; that except for 1997, Hayes filled out the Actual Logging Method maps; and that the maps were then provided to the contractors. In regard to the reliability of the maps in relation to Hayes' load slips, Western notes Hayes acknowledge that the load slips might also not be completely reliable if wood was decked and left at roadside, with the operator having no certainty about how the wood was actually harvested.²⁵⁴ Moreover, regardless of which approach to determining actual logging methods is preferred, the largest variance between them for any given harvesting method over the entire five year period was only 2%,²⁵⁵ which is not a material difference.

[208] Western also contests the suggestion by Hayes that the negotiated rates with the other NCA contractors are distinguishable because of special circumstance payments made to them between 1997 and 2001, since they were all identified and the calculation of their impact on the conventional logging rates,²⁵⁶ showed it was minimal.

²⁵³ Trans. John Waring, Oct. 3, 2002, pp. 146-47, Oct. 4, 2002, p. 261; Doug Meske, Oct. 8, 2002, p. 566-67.

²⁵⁴ Trans. Harold Hayes, Nov. 5, 2002, p. 1633.

²⁵⁵ Ex. 85.

²⁵⁶ Western's Submissions, Tab 29 (calculation on conventional volume only); Ex. 61 (calculation inclusive of heli volume); trans. John Veerman, Oct. 28, 2002, p. 797.

[209] In regard to volume, Western acknowledges that Hayes received less volume after 1997, but notes that Hayes' volume over the five-year cut control period was above its entitlement. In regard to Hayes' requirement to maintain a camp, Western notes that other contractors had multiple camps and barge moves²⁵⁷ and that the "town show" for one of the Other Contractor's operations was actually more expensive to log, as highway trucks had to be utilized.²⁵⁸

[210] And, in regard to logging chance differences and the effect of special circumstance payments on the conventional logging rates negotiated with the other NCA contractors, Western notes that Hayes received the largest special circumstance payment, when Western agreed to continue a \$48.03 m³ rate for some specific blocks, and that Hayes did not request any other special circumstance payments from 1998 to 2001 for difficulties encountered with their operations beyond the normal scope of the logging contract,²⁵⁹ which would tend to confirm that Hayes' logging chance at Plumper Harbour was not poor.

Expert Comparison

[211] In support of the particular similarities between Plumper Harbour and another operation in the NCA ("TC"), Western also relies on the expert opinion of Mr. McLaughlin,²⁶⁰ who spent 5 days at Plumper Harbour and 4 days at TC, conducted a day review of both operations by helicopter, and reviewed their respective logging plans from 1997 to 2001.

²⁵⁷ Ex. 18, Tabs 61, 72.

²⁵⁸ Trans. Ron Todd, Oct. 31, 2002, p. 1231-33.

²⁵⁹ Trans. Ron Todd, Oct. 31, 2002, p. 1221-22.

²⁶⁰ Ex. 69, Tab 9.

[212] Mr. McLaughlin concluded that the overall logging chance for Plumper Harbour was better than most areas of the NCA due to the absence of gullies and rock outcroppings which made it easier for harvesting.²⁶¹ He also concluded that the Plumper Harbour and TC operations were “very similar”, and that the larger contract volume at TC would reduce fixed costs, resulting in a slightly lower rate for TC.²⁶²

[213] Western also observes that its proposed conventional logging rates for Plumper Harbour and its negotiated logging rates in regard to TC reflect Mr. McLaughlin’s assessment:²⁶³

Year	Western Proposed Plumper Rates	TC Related Signed Rates
1997	\$40.59/m ³	\$38.71/m ³
1998	\$40.59/m ³	\$38.71/m ³
1999	\$40.59/m ³	\$38.71/m ³
2000	\$41.65/m ³	\$39.86/m ³
2001	\$43.52/m ³	\$42.43/m ³

[214] Hayes challenges Mr. McLaughlin’s opinion because he was asked by Western to compare Plumper Harbour to TC, and did not choose it as a comparable operation.²⁶⁴ Hayes also notes that Mr. McLaughlin acknowledged the TC volume was higher than

²⁶¹ Ex. 68, Tab 3, p. 5.

²⁶² Ex. 68, Tab 9.

²⁶³ Western notes the historical rates negotiated with Kent are also consistent with Mr. McLaughlin’s conclusion that the operations are similar. Ex. 18, Tabs 13, 14.

²⁶⁴ Trans. John McLaughlin, Oct. 28, 2002, pp. 912-13, Oct. 29, 2002, pp. 1046-47.

Plumper Harbour and that the haul distances were shorter,²⁶⁵ both indicators that TC presented a more favourable logging chance, and that he was given it's yarding mix based on the Actual Logging Method maps, and not told that the TC contractor was given more than its volume entitlement.

Conclusion

[215] In my view, Mr. McLaughlin's opinion supports the sensible and functional approach contemplated by Section 25 of the *Regulation*, of recognizing that differences may exist between operations which justify a variation in rates, without impairing the conclusion that they are similar. I am therefore unable to conclude that there is a basis to reject or discount Mr. McLaughlin's opinion about the comparability of the TC and Plumper Harbour operations.²⁶⁶

[216] Although there will always be differences between any two operations, in all the circumstances, I am inclined to conclude that the operations tendered by Western as comparable to Hayes' Plumper Harbour operation are sufficiently similar for their related rates to be considered under Section 25(2)(e) of the *Regulation*. In regard to related special circumstance payments, I am also inclined to agree with Western's view that the impact of those payments on the negotiated conventional logging rates is minimal, and, at most, amounts to a \$0.15 difference on average over the five year period²⁶⁷.

[217] I am also of the view that the definitions and standards applied by Western in comparing the various operations were reasonable from an industry perspective, and that any minor variations would not have made a material difference. To make a comparative

²⁶⁵ Trans. John McLaughlin, Oct. 29, 2002, pp. 1044-45.

²⁶⁶ I am also not certain that Onion Lake actually received far more than its volume entitlement; Ex. 58, and trans. Ron Todd, Oct. 31, 2002, pp. 1279-80.

²⁶⁷ In view of all the information generally, and, in particular, Western's Submissions, Tab 29 (calculation on conventional volume only) and Ex. 61 (calculation inclusive of heli volume).

analysis, some objectively measurable standards need to be adopted, and applied consistently. In this regard, it seems to me that Western selected definitions and standards which were reasonable from an industry perspective, and that those objectively measurable standards were consistently applied to its analysis and presentation of the operations it purported to be comparable.

[218] In regard to the differences between Plumper Harbour and the other operations in respect of volume entitlement inside the fibre basket, heli support work, and additional volume outside of the fibre basket,²⁶⁸ and their effect on reducing fixed costs, I am of the view that those differences are indeed considerations that a contractor and licensee acting reasonably in the circumstances would agree relate to what is "competitive by industry standards" and would permit a contractor to earn "a reasonable profit" under Section 25(1), resulting in a reasonable deviation from the rates that may be considered under Section 25(2)(e). Those differences, however, do not compel the conclusion that the operations are not sufficiently similar for the rates to be considered under Section 25(2)(e).

[219] In my view, the other contractor operations in the NCA are sufficiently similar under Section 25(2)(e) for their rates to be considered as indicative, albeit not determinative, of what is "competitive by industry standards" and would permit a contractor to earn "a reasonable profit" under Section 25(1).

[220] Having regard to the general scheme of the *Regulation*, however, I am not able to completely adopt Western's roll forward approach, since the resulting rates are derived by increasing the 1997 rate agreed to between Western and Hayes by the average percentage increase agreed to by the other contractors in the NCA for each year.²⁶⁹ In my view, that approach does not sufficiently focus on the circumstances known to the parties at the commencement of the year, and the ability of a contractor to earn "a reasonable profit" in those circumstances.

²⁶⁸ Ex. 18 (Tabs 7, 10-12), 58; trans. Ron Todd, Oct. 31, 2002, pp. 1279-80, Nov. 1, 2002, pp. 1381-83.

²⁶⁹ Ex. 18, Tabs 14, 15.

Actual Costs

[221] Western contends that Hayes originally proposed a “cost-plus” rate, based simply on its audited cost/m³ plus 15% for risk and profit,²⁷⁰ an approach not favored by arbitrators²⁷¹ and courts²⁷² as a valid basis to objectively set competitive rates under the *Regulation*.

[222] Western notes that Section 25(1) of the *Regulation* requires the rate to be one that a licence holder and contractor acting reasonably would agree is a rate that would permit the contractor “operating in a manner that is reasonably efficient in the circumstances in terms of costs and productivity to earn a reasonable profit”. It also notes that Section 25(2)(d) contemplates consideration by an arbitrator of “costs in the logging industry for each phase or component of a similar timber harvesting operation”. Although Hayes advances its costs for 1997 through 2001 as an indication of the appropriate rate, Western contends that without comparative indicators of costs in the logging industry for each “phase or component of similar timber harvesting operations”, Hayes is unable to establish that its costs are those of a reasonably efficient contractor in the circumstances.

[223] For example, Western contends Hayes’ infrastructure and overhead costs are higher than what would be reasonably required for its fibre basket allocation of a net annual cut of 74,000 m³ at Plumper Harbour²⁷³:

- (a) Hayes’ administration department has over 15 employees involved in financial operations;
- (b) It has an IT Manager, who holds an MBA and has a dedicated assistant;

²⁷⁰ Ex. 114, Tab 8, Hayes’ Statement of Position.

²⁷¹ *Lineham Logging Ltd. and International Forest Products Ltd.* (3 Dec. 1999) (M.R. Taylor, Q.C.), pp. 77-78.

²⁷² *Hayes Forest Services Ltd. v. Pacific Forest Products Ltd.*, 2000 BCCA 66, para. 49; *Weldwood of Canada Ltd. v. Ray Savidan Enterprises Ltd.*, [1999] B.C.J. 2554 (S.C.).

²⁷³ Trans. Mary Robinson, Feb. 6, 2003, pp. 1891-99, 1903-09; Feb. 7, 2003 pp. 2019-2020, 2047; Ex. 110, Tabs 1, p. 4; 7, pp. 107-09; 11, pp. 180, 201; 15; 17; 19, pp. 311-13.

- (c) It has an employee for "special projects", which includes development of the Hayes website, designed to develop Hayes into a more broadly based forest company than a Bill 13 contractor;
- (d) It has an employee to advance business development with First Nations, which is non-Bill 13 work, with a salary charged to general administration and overhead;
- (e) Its administration department's salary and benefit costs during 1997 to 2001 ranged between \$900,000.00 to \$1,000,000.00;
- (f) Its divisional audits, performed for the purposes of rate arbitrations have an annual cost of approximately \$80,000.00;
- (g) Its overhead includes depreciation on computer hardware and software that has a cost base in excess of \$2,000,000, and requires an average of \$55,000 per year to maintain;
- (h) From 1997 to 2001, its employees' salaries increased 40% compared to 1995 and 1996;
- (i) It maintains dwellings in Duncan, Shawnigan Lake and Vancouver, and includes related furniture in its depreciation costs;
- (j) Its five year average cost for Travel & Promotion was \$246,000.00, and in 1999 included the costs of an expired option on property to which Hayes had considered relocating its office;
- (k) Payments made as an unfunded pension plan were costed to administration overhead.

[224] Western contends this demonstrates that Hayes' costs as reflected in its "general and administration" accounts from 1997 to 2001 are not entirely attributable to its operation at Plumper Harbour. It notes the employment of a First Nations Consultant does not relate to logging operations at Plumper Harbour, that the timber harvested under the replaceable contract is "evergreen", so that travel and promotion costs, as well as other "business development" costs, do not relate to Plumper Harbour, and that the size of Hayes' accounting department is disproportionate to the size of the cut at Plumper Harbour.

[225] Western also contests Hayes' accounting treatment of some of its income and expenses over the five year period,²⁷⁴ which Western claims had the effect of inflating Hayes' conventional logging costs. It also contests Hayes' system of allocations, claiming Hayes grossed-up its divisional direct costs for the "contractually committed volumes", while its fixed costs did not proportionally decrease with the volume.²⁷⁵ Western observes that Hayes allocated all of its overhead costs to all of its operations each year, so that, while its "general and administration" expenses and "Central Shop" costs were fixed in nature and not dependent on the volume of non-Bill 13 work, Plumper Harbour's allocated share of those costs fluctuated with Hayes' non-Bill 13 work.²⁷⁶

[226] Western also contends that Hayes' application of the accounting policies noted in its audited financial statements for Plumper Harbour was not always consistent. For example, while the policy is "to capitalize major repairs as additions to the related assets and review the estimated remaining useful life at that time", the useful lives of assets were sometimes changed when no major repairs or additions were made.²⁷⁷ And, the useful life of the majority of its assets were changed in 1998, which increased depreciation for conventional logging by \$46,252.88 that year, and then continued to affect depreciation costs from 1998 to 2001, as most of the affected assets, like camp buildings and equipment, were there for the entire period.²⁷⁸

²⁷⁴ Trans. Mary Robinson, Feb. 6, 2003, pp. 1956-57, Feb. 7, 2003, pp. 2068-79; Ex. 111 (Tab 6, p. 536); Rob Bugden, Feb. 10, 2003, pp. 2276-77; Ex. 114 (Tab 9, pp. 15-19, 28-29); Donald Hayes, Feb. 10, 2003, p. 2173.

²⁷⁵ Trans. Mary Robinson, Feb. 6, 2003, pp. 1934-38; Brian Lamb, Nov. 6, 2002, p. 1778.

²⁷⁶ Trans. Mary Robinson, Feb. 6, 2003, pp. 1934-38; Brian Lamb, Nov. 6, 2002, p. 1778-82.

²⁷⁷ Exs. 108 (Tab 6), 110 (Tab 38).

²⁷⁸ Exs. 110 (Tab 39), 111 (Tab 6, pp. 531-32); Western also identified examples of depreciation on some leased equipment being charged both to roads and to logging costs. Trans. Mary Robinson, Feb. 7, 2003, pp. 2111-13; Ex. 111 (Tab 6, p. 534, 537).

[227] Western also emphasizes that, for the purpose of rate arbitrations, the focus of Hayes' audits was to verify that there was no material misstatement in the Plumper Harbour financial statements. They did not express an opinion about the validity of the methods used to allocate direct and indirect costs within Hayes' various operational divisions. Those methods, in relation to "General and Administration", and "Central Shop", for example, were developed at the discretion of Hayes' management. The auditors reviewed compliance with the methods, but not the logic or fairness underlying the process. So while the audits may be valid and appropriate financial and accounting audits, they were not a management or performance audit, and included no check on factors like the reasonableness of the costs, the efficiency of the logging, the competitiveness of the operation, or a comparison of Plumper Harbour's divisional costs to similar industry operators.²⁷⁹

[228] In essence, Western characterizes Hayes as a large growing corporate entity with financing and other interests well beyond that of a Bill 13 contractor, and as using an analysis that is based on a cost-plus approach to setting rates, that is neither prospective nor appropriate in the circumstances.

[229] From its perspective, Hayes acknowledges that in *Lineham Logging Ltd. and International Forest Products Ltd.*,²⁸⁰ Arbitrator Taylor declined to rely on the contractor's actual costs in arriving at a rate, being of the view that the *Regulation* should not be interpreted to create a "costs-plus" pricing regime in which the rates are simply comprised of the contractor's actual costs with a percentage addition for "profit and risk". Hayes, however, contests the characterization that its claim for logging rates is based on its actual

²⁷⁹ Trans. Colin Campbell, Nov. 6, 2002, p. 1841. Western also notes that the 1997 audited financial statements erroneously attributed some revenue to the Plumper Harbour Conventional Logging Division. (Ex. 108, Tab 1; trans. Brian Lamb, Nov. 6, 2002, pp. 1788-90).

²⁸⁰ *Lineham Logging Ltd. and International Forest Products Ltd.* (3 Dec. 1999) (M.R. Taylor, Q.C.).

costs, plus 15%. It purports to apply the approach taken in Arbitrator Wallace's award in *Pacific Forest Products Ltd. and Hayes Forest Services Ltd.*,²⁸¹ of assessing the actual reasonable costs of the logging performed and adding the standard industry profit and risk margin, as an effective check on the reasonableness of the rates proposed by each party. It relies on that award to support the proposition that its actual costs are the "best evidence" of the costs of logging in a given year and, in that context, refers to its audited costs as corroborating the reasonableness of the logging rates it proposes, while illustrating the unreasonableness of the rates proposed by Western.

[230] Hayes also looks to the decision of the B.C. Court of Appeal in *Hayes Forest Services Ltd. v. Pacific Forest Products Limited*,²⁸² which held that evidence of actual costs and actual volume is relevant, without being determinative of the rate, and which sustained Arbitrator Wallace's approach on the basis that he was satisfied the rate ultimately set complied with the overall objective criteria of the *Regulation*.

[231] Hayes also refers to a similar approach taken in *Western Forest Products Limited and Hayes Forest Services Ltd.*,²⁸³ and to the respective awards of Arbitrators Macintosh²⁸⁴ and Clemens²⁸⁵ in *Hayes Forest Services Limited and International Forest Products Limited*, where rates were determined on the basis of previous agreed rates, the actual

²⁸¹ *Pacific Forest Products Ltd. and Hayes Forest Services Ltd.* (15 Aug. 1997) (W.J. Wallace, Q.C.), pp. 5-6.

²⁸² 2000 BCCA 66, paras. 43-46, 50.

²⁸³ *Western Forest Products Limited and Hayes Forest Services Ltd.* (6 May 1999) (Paul J. Pearlman, Q.C.), pp. 6-7. Where actual audited logging costs, in conjunction with expert testimony as to their reasonableness, were considered in setting a rate under Section 25 by Arbitrator Pearlman, who made some adjustments, and added the standard industry 15% profit and risk margin to the costs, including the cost of depreciation.

²⁸⁴ *Hayes Forest Services Limited and International Forest Products Limited* (25 Aug. 2000) (George K. MacIntosh, Q.C.), pp. 4-12.

²⁸⁵ *Hayes Forest Services Limited and International Forest Products Limited* (14 Nov. 2002) (Murray A. Clemens, Q.C.), pp. 16-20.

costs of the contractor, and expert opinion. Hayes emphasizes that Arbitrator Macintosh agreed with Arbitrator Wallace's approach to the effect that actual costs of logging incurred by the contractor were appropriate to consider in setting a rate, to which Arbitrator Macintosh added the standard industry 15% profit and risk margin, including the cost of depreciation, and that Arbitrator Clemens rejected a number of the licensee's criticisms of Hayes' costs which were similar to those raised by Western in this case.

[232] Observing that Western is not critical of Hayes' efficiency or its direct costs of logging, describing it as "a pretty good logging company",²⁸⁶ Hayes challenges Western's suggestion that its overhead costs are greater than required for the Plumper Harbour contract.²⁸⁷ It contends that its non-Bill 13 work subsidizes the Bill 13 work, not vice versa,²⁸⁸ and emphasizes that its depreciation policies and allocations are themselves audited each year²⁸⁹ and are inherently reasonable and appropriate because they are confirmed by Hayes' actual experience.²⁹⁰

[233] Hayes contends Western's criticisms of its fixed costs are misplaced, since they were lower or consistent, in each subsequent year but one, to its fixed costs in 1997 when the rates were agreed. Hayes also observes that Arbitrator Taylor in *Lineham Logging Ltd. and International Forest Products Ltd.*²⁹¹ noted that the licensee in that case made no attempt to adjust the contractor's cost projections – it simply rejected the contractor's approach in favour of its own, and that here, Western similarly criticizes Hayes' overhead

²⁸⁶ Trans. John Waring, Oct. 7, 2002, p. 446.

²⁸⁷ Trans. Mary Robinson, Feb. 6, 2003, p. 1874.

²⁸⁸ Trans. Rob Bugden, Feb. 11, 2003, pp. 2302-03.

²⁸⁹ Trans. Colin Campbell, Nov. 6, 2002, pp. 1834-35.

²⁹⁰ Trans. Donald Hayes, Feb. 10, 2003, p. 2154.

²⁹¹ *Lineham Logging Ltd. and International Forest Products Ltd.* (3 Dec. 1999) (M.R. Taylor, Q.C.).

costs by referring only to particular items, without examining the overall reasonableness of Hayes' costs as compared to 1997.

[234] In this regard, Hayes claims that in 1998 its audited direct costs of harvesting 64,515 m³ of timber were \$38.12/m³, which represents only the direct costs of logging not challenged by Western, and does not include any allowance for fixed costs or profit. And that, inclusive of fixed costs, its total cost of performing the logging in 1998 was \$47.95/m³, which, in relation to the rates proposed by Western, would result in a loss of \$5.88/m³ for the 1998 logging season.²⁹²

[235] For 1999, Hayes claims it was necessary to break out the Roderick settlement volume from the Plumper Harbour volume in order to determine the actual costs of logging attributed to the contract. The result is that its audited direct costs of harvesting 53,113 m³ of timber were \$30.32/m³, and with fixed costs of \$19.69/m³, totalled a cost of performing the logging in 1999 of \$50.00/m³.²⁹³

[236] For 2000, Hayes claims the audited direct costs of harvesting 70,347 m³ of timber were \$32.50/m³, with a total cost of performing the logging, inclusive of fixed costs, of \$42.31/m³, resulting in a profit before taxes and interest of \$0.34/m³.²⁹⁴

[237] For 2001, Hayes claims the audited direct costs of harvesting 48,788 m³ of timber were \$37.92/m³, with a total cost to Hayes of performing the logging, inclusive of fixed costs, of \$53.79/m³, resulting in a loss to Hayes of \$12.20/m³.²⁹⁵

²⁹² Ex. 108 (Tab 3, p. 3; Tab 4, p. 3).

²⁹³ Ex. 108 (Tab 15, p. 3).

²⁹⁴ Ex. 108 (Tab 5, p.3; Tab 6, p. 3).

²⁹⁵ Ex. 108 (Tab 6, p. 3).

[238] From this perspective, Hayes contends Western's proposal would cause it to lose money on its logging operations in 1998, 1999 and 2001, and earn less than 1% margin on the work performed in 2000 and that, even by Western's own calculation, it would only receive \$70,000 for each year for all central shop costs, general and administration expenses, and profit margin.²⁹⁶

[239] Hayes supports the reliability of its actual costs by reference to its sophisticated cost accounting system and the annual audits of its financial statements which confirm its accounting records, procedures and policies are all in accord with generally accepted accounting principles,²⁹⁷ especially in regard to the overhead expenses allocated to Plumper Harbour.²⁹⁸

[240] In essence, Hayes contests Western's suggestion that its costs are not those of a reasonably efficient contractor, and asserts that where a contractor's productivities are reasonable, its audited direct costs are not questioned as to their reasonableness, and its fixed costs were lower than or consistent with those in 1997, no other conclusion can be drawn than its actual costs of logging are those of a reasonably efficient contractor.

[241] As confirmed by the B.C. Court of Appeal,²⁹⁹ Hayes' costs are relevant to show what was within the range of possible. Alone, however, they do not in my view completely satisfy the requirements of reasonableness and competitiveness in Section 25(1) and cannot be decisive of the rate to be determined.

²⁹⁶ Trans. Rob Bugden, Feb. 11, 2003, pp. 2312-13.

²⁹⁷ Trans. Mary Robinson, February 6 & 7, 2003; Colin Campbell, Nov. 6, 2002; trans. Brian Lamb, Nov. 6, 2002.

²⁹⁸ Trans. Colin Campbell, Nov. 6, 2002, pp. 1831-32; Brian Lamb Nov. 6, 2002, pp. 1777, 1819; Mary Robinson, Feb. 6, 2003, p. 1938.

²⁹⁹ *Hayes Forest Services Ltd. v. Pacific Forest Products Ltd.*, 2000 BCCA 66.

[242] From an accounting perspective, I have no doubt that Hayes' accounting and financial records and policies are completely proper, and their adherence to generally accepted accounting principles has been certified by auditors. But the questions of reasonableness and competitiveness in the industry go beyond verification of compliance with appropriate principles of accounting, and require rates to be either demonstrably within the range of rates of comparable operations,³⁰⁰ or to otherwise withstand the test of objective scrutiny under Section 25(1).³⁰¹ For example, Mr. McLaughlin observed that in his experience in the industry, it is not usual to depreciate large costs for leased equipment over a short period of time.³⁰² Although this may be permissibly in accord with generally accepted accounting principles, it does not necessarily equate to reasonable efficiency.

[243] In the result, I am not certain of the reasonableness and competitiveness under Section 25(1) of charging a licensee with some of the fixed cost expenses included in Hayes' actual costs, like the depreciation of artwork and the cost of promotional and development activities, which are of doubtful benefit to a licensee.

[244] As to the retrospective nature of Hayes' actual costs, differences between the realities that generated actual costs retrospectively and the circumstances within the contemplation of the parties prospectively need to be taken into account in the assessment of its actual costs. The differences between the costs that would have been expected when building rates during negotiations on the basis of anticipated volumes, and the actual costs incurred on the basis of actual volumes, are important considerations. To not take these differences into account would be to guarantee a profit on actual costs, without any prospect of loss, instead of setting a rate that would, when viewed prospectively, permit a reasonable profit as required by the *Regulation*.

³⁰⁰ *Pacific Forest Products Ltd. and Hayes Forest Services Ltd.* (15 Aug. 1997) (W.J. Wallace, Q.C.), pp. 30-32.

³⁰¹ *Hayes Forest Services Limited and International Forest Products Limited* (14 Nov. 2002) (Murray A. Clemens, Q.C.), p. 22; *Western Forest Products Limited and Hayes Forest Services Ltd.* (6 May 1999) (Paul J. Pearlman, Q.C.), pp. 16-18; *Hayes Forest Services Limited and International Forest Products Limited* (25 Aug. 2000) (George K. MacIntosh, Q.C.), pp. 9-10.

³⁰² Trans. John McLaughlin, Oct. 29, 2002, pp. 1055-56.

[245] To the extent that Hayes' roll forward approach incorporates its actual fixed costs, it is subject to the same vulnerabilities.

Conclusion

[246] Appendices A to D are tables showing, for each year from 1998 to 2001, the rates proposed by the parties, the rates derived from Mr. McLaughlin's two approaches, and readily calculable adjustments.

[247] Having regard to the whole of the extensive and comprehensive information presented, the conventional logging rates between Hayes and Western, for the years from 1998 to 2001, are respectfully settled in accordance with Section 25 of the *Regulation* at:

YEAR	CONVENTIONAL LOGGING RATE
1998	\$44.50/m ³
1999	\$46.90/m ³
2000	\$45.00/m ³
2001	\$46.10/m ³

VII. ROAD CONSTRUCTION RATES, 1997 to 1999

[248] At issue, are road construction rates for 1997, 1998 and 1999. Appendices E to G³⁰³ are tables showing the rates proposed by the parties.

[249] Western's view is that the road construction category rates should be rolled-forward to account for inflationary pressures and wage increases. It notes that, in contrast with Hayes' roll-forward rate approach on logging rates, Hayes has for this purpose proposed a

³⁰³ To the extent of minor discrepancies in the measurements noted in Appendices E and F, I am inclined to use Western's in view of all the information and documentation presented.

flat lineal rate approach. Western also looks to the road construction category rates agreed to by the other contractors in the NCA in regard to road construction being comparable in the NCA, and for showing the rates proposed by Western are reasonable and competitive in the industry.³⁰⁴ In particular, Western contends that the best indicator of the reasonableness of the road construction category rates is that Upland, after purchasing the road construction contract for Plumper Harbour from Hayes, kept the same road construction category rates paid by Western to Hayes.

[250] Western also contends that particular road construction categories are generally accepted in the industry,³⁰⁵ and that throughout its dealings with Hayes at Plumper Harbour, and later with Upland, road construction rates were set on a category rate basis.³⁰⁶ Western emphasizes that a lineal metre rate overlooks the historical practice, which was to measure-up the road by walking it and agreeing on the road categories in the field at the time of construction.³⁰⁷ Western also observes that the actual road construction permits and maps for all road constructed by Hayes from 1997 through 1999,³⁰⁸ were reviewed and signed by a representative of Hayes confirming the road to be constructed.

[251] Since Kent and the other contractors in the NCA operated under category rates,³⁰⁹ and there was no suggestion by Hayes from 1997 until the road contract was sold to Upland in 1999 that it was opposed to category rates, Western contends the parties would have agreed on a category-based method if they had concluded negotiations for road construction in 1997. Western also claims that Hayes changed its proposed road

³⁰⁴ Ex. 19, Tabs 2-4.

³⁰⁵ Trans. John Waring, Oct. 4, 2002, pp. 346-47.

³⁰⁶ As well as with the other contractors in the NCA. Ex. 19, Tab 2; Ex. 80.

³⁰⁷ Trans. John Waring, Oct. 4, 2002, pp. 347-48, 351-55.

³⁰⁸ Ex. 19.

³⁰⁹ Except Upland at Head Bay in 1999.

construction rates during the arbitration, from a flat lineal rate of \$128.90 in 1997, \$133.95 in 1998 and \$134.28 in 1999, to \$138.06 in 1997, \$140.64 in 1998 and \$130.50 in 1999,³¹⁰ based on a "cost-plus" approach, which is not a prospective.

[252] Western also notes that in 1997, the largest category of road constructed was agreed by Hayes to be category O.M. III at 2741 metres, with the balance being either O.M. I or O.M. II, so that at the proposed category rates for O.M. I, O.M. II and O.M. III of \$52.47, \$64.53, and \$95.97, respectively, a flat rate of \$138.06/lineal metre would result in a windfall to Hayes.

[253] From its perspective, Hayes claims there is no objective way to define or estimate costs by category.³¹¹ It prefers the lineal metre approach because of the difficulty in setting category rates without physically viewing and measuring up the actual road work done, and contends that a simple roll forward approach could not be calculated, as it would not reflect the increase in costs resulting from the *Forest Practices Code*,³¹² which it could not address until the 1997 rate negotiations.

[254] In this regard, Hayes focuses on Sections 25(2)(b) and (c)(iv) of the *Regulation*, for placing more emphasis on costs, as was done by Arbitrator Wallace in *Pacific Forest Products Ltd. and Hayes Forest Services Ltd.*,³¹³ to comply with Section 25(1) and to avoid incurring losses³¹⁴ caused by changes in road building and related costs due to the implementation of the *Code*, despite its reasonable efficiency as a road construction contractor.

³¹⁰ Exs. 114, Tab 8; 113, Tabs 4-6; trans. Donald Hayes, Feb. 10, 2003, pp. 2167-68, 2197-98, 2205-08.

³¹¹ Trans. Donald Hayes, Feb. 10, 2003, pp. 2139-40.

³¹² Trans. Donald Hayes, Feb. 10, 2003, pp. 2140-41; Rob Bugden, Feb. 11, 2003, pp. 2295-96; John McLaughlin, Oct. 28, 2002, p. 840, Oct. 29, 2002, pp. 984-85.

³¹³ *Pacific Forest Products Ltd. and Hayes Forest Services Ltd.* (15 Aug. 1997) (W.J. Wallace, Q.C.).

³¹⁴ Exs. 113, Tabs 4-6; 108, Tab 7, p. 3, Tab 8, pp. 3, 6.

[255] Western challenges the notion that category rates could not be rolled forward due to the *Code*,³¹⁵ since it came into effect in 1995, and, by 1997, Hayes had almost two years to assess its impact on road construction. Western notes that in *Pacific Forest Products Ltd. and Hayes Forest Services Ltd.*³¹⁶ there was no mention of increased costs due to the *Code* in respect of settling road construction category rates for 1996, and that the situation is more similar to that in *Hayes Forest Services Ltd. and Western Forest Products Ltd.*³¹⁷

Conclusion

[256] In all the circumstances, I am of the view that it is appropriate to settle the road construction rates on the basis of road categories. While it is evident from the decision in *Hayes Forest Services Ltd. and Western Forest Products Ltd.*³¹⁸ that road construction rates may be set on a lineal metre basis, without regard to particular categories, I am inclined to conclude that a contractor and licensee acting reasonably would have agreed prospectively in the circumstances of this case, that road construction category rates were the appropriate basis for negotiations. The historical practice of Kent, the practice of the parties themselves, the practice of the other contractors in the NCA, and the practice of Upland after taking over Hayes' road construction contract, tend to compel that conclusion.

³¹⁵ Trans. Donald Hayes, Feb. 10, 2003, pp. 2140-41.

³¹⁶ *Pacific Forest Products Ltd. and Hayes Forest Services Ltd.* (15 Aug. 1997) (W.J. Wallace, Q.C.).

³¹⁷ *Hayes Forest Services Ltd. and Western Forest Products Ltd.* (5 Jun. 1999) (Paul J. Pearlman, Q.C.).

³¹⁸ Which did not distinguish between lineal and category road construction rates, but rather between global rates (inclusive of lineal road construction rates and hourly rates) and two-part rates (separately addressing lineal road construction rates and hourly rates), and where the latter approach was preferred.

[257] The result is somewhat similar to the predicament of Arbitrator Wallace in *Pacific Forest Products Ltd. and Hayes Forest Services Ltd.*,³¹⁹ where he declined to rely on actual cost because no information had been presented of construction costs related to the specific categories of road built. However, in view of the nature of the information in this arbitration, I am inclined, despite their frailties, to take the actual costs into account.

[258] As with the logging rates, I am also inclined to include consideration of the road construction category rates of the other contractors in the NCA as relating to sufficiently "similar" operations to be indicative, albeit not determinative, of what is "competitive by industry standards", and to consider the extent to which a reasonable contractor and licensee might in the circumstances reasonably deviate from those rates in satisfying both tests under Section 25(1) (a) and (b) of the *Regulation*.

[259] And, like with logging rates, Western's roll forward approach seeks to derive road construction category rates by adjusting the 1996 rates agreed to between Western and Kent by the average percentage increase or decrease agreed to by the other contractors in the NCA for each year.³²⁰ So, I am similarly unable to conclude that this approach fully accounts for all aspects of the Section 25(1) analysis, in particular, that it incorporates all the circumstances that might reasonably be known to the parties or that it permits a contractor to earn "a reasonable profit" in those circumstances. For example, it is not certain whether those rates were intended to cover basic IWA and inflation increases, which I am inclined to include,³²¹ or any cost implications of the *Code*.

³¹⁹ *Pacific Forest Products Ltd. and Hayes Forest Services Ltd.* (15 Aug. 1997) (W.J. Wallace, Q.C.); *Hayes Forest Services Ltd. v. Pacific Forest Products Ltd.*, 2000 BCCA 66, paras. 65-73.

³²⁰ Ex. 19, Tabs 2, 4-6.

³²¹ And, which Western appears to acknowledge are properly included in a roll forward approach for these rates (Submission; par. 223).

[260] In my view, the cost implications of the *Code* in relation to road construction category rates, are no more an impediment to the roll forward approach than they would be in relation to logging rates. In agreeing on a rate which is both competitive by industry standards, and which would permit a contractor to earn a reasonable profit, it seem to me that a reasonable contractor and licensee would consider the cost implications of the *Code*, and Hayes' first opportunity to prospectively address the cost implications of the *Code* in respect of Plumper Harbour was likely during the 1997 negotiations.

[261] Having regard to the whole of the extensive and comprehensive information presented, the road construction category rates between Hayes and Western, for the years from 1997 to 1999, are respectfully settled in accordance with Section 25 of the *Regulation* at:

Construction Category	1997	1998	1999
O.M.I	\$55.09 /m	\$55.77 /m	\$56.28 /m
O.M.II	\$67.76 /m	\$67.69 /m	\$67.69 /m
O.M.III	\$100.77 /m	\$99.84 /m	\$99.33 /m
Toe	\$74.22 /m	\$80.68 /m	\$80.68 /m
Medium	\$99.55 /m	\$99.48 /m	\$99.48 /m
Heavy	\$121.55 /m	\$120.10 /m	\$120.10 /m
X Heavy	\$131.78 /m	\$131.59 /m	\$136.14 /m
Metal Culvert	\$312.74 /culvert	\$303.88 /culvert	\$303.88 /culvert
Wood Culvert	\$1,016.21 /culvert	\$932.41 /culvert	\$932.41 /culvert
Large Wood Culvert	\$1,016.21 /culvert	\$932.41 /culvert	\$932.41 /culvert

VIII. HOURLY EQUIPMENT & LABOUR RATES, 1997 to 2001

[262] At issue, are the hourly equipment and labour rates for 1997 to 2001.³²² Appendices H and I³²³ are tables showing the rates proposed by the parties.

[263] Since hourly rates for the use of equipment were not affected by the *Code*, Hayes contends that a roll forward approach to settling the hourly rate for road building equipment is possible by adding inflation and IWA increases to the hourly rates agreed to between Hayes and Western in 1996.³²⁴

[264] Western claims that hourly rates for work outside the contractual logging or road construction rates, including the cost of operator, fuel, transportation and machine costs,³²⁵ are generally rolled-forward each year, with inflation and IWA increases being considered, but not being automatic. Western notes that other contractors in the NCA agreed to hourly rates with no increases from 1997 to 2000, and a modest increase in 2001.³²⁶

[265] Western contends that it derives its proposed rates by rolling forward the equipment rates charged to Kent, and comparing them to the rates paid to other contractors in the NCA.³²⁷ It relies on its comparison of the rental rates paid for specific

³²² Western addressed the hourly equipment and labour rates for 1997 to 2001, while Hayes' only addressed them for 1997 to 1999.

³²³ There are minor discrepancies between Western's proposed hourly equipment rates set out in para. 246 of its Submissions (stated to be from its Statement of Position; Ex. 19, Tab 21), and Tab 2 of its Submissions (stated at para. 5 to be its proposed rates).

³²⁴ Trans. Donald Hayes, Feb. 10, 2003, pp. 2208-09; Ex. 113, Tab 7.

³²⁵ Trans. Ron Todd, Oct. 31, 2002, p. 1255-56.

³²⁶ Ex. 19.

³²⁷ Trans. Ron Todd, Oct. 31, 2002, pp. 1255-56, also explaining that an indication of "N/A" in Western's proposed rates means the equipment was not used for that period.

pieces of equipment for each contractor over the five year period, and uses "equivalents" to represent a comparison of different makes or models of essentially the same equipment.³²⁸

[266] Western notes that the hourly equipment rates prepared by Hayes at the arbitration³²⁹ differed from those advanced by Hayes prior to the arbitration.³³⁰ For example:

Equipment	Pre Arbitration	Arbitration
JD 690 ECL	\$167.04/hr	\$126.10/hr
FEL Cat 980	\$168.86/hr	\$140.04/hr
Grader	\$135.21/hr	\$105.73/hr

It contends Hayes re-cast the rates in light of comparable equipment rates, by applying a "costs plus" calculation for road construction based on lineal metres.

[267] In contrast, Western contends that its proposed hourly equipment and labour rates are prospectively based, as well as competitive by industry standards, with comparable rates for comparable equipment demonstrating that they are manifestly reasonable.³³¹

Conclusion

[268] As with the road construction rates and logging rates, I am inclined to consider the hourly equipment and labour rates of the other contractors in the NCA, as relating

³²⁸ Ex. 19, "Rental Rates Equivalents" (also showing actual hours each piece of equipment was used by Hayes) and "Summary" (more detailed breakdown of each piece of equipment used by Hayes); trans. Ron Todd, Oct. 31, 2002, p. 1262.

³²⁹ Ex. 113, Tabs 4-6.

³³⁰ Ex. 114, Tab 8.

³³¹ Western also contends that during the arbitration Hayes accepted the proposed rates for the Hitachi, D300B, 25B, 235 CAT, B7, B8, dump truck, front-end loader and grader; trans. Ron Todd, Nov. 1, 2002, p. 1408-09.

sufficiently "similar" operations to be indicative, albeit not determinative, of what is "competitive by industry standards", and to consider the extent to which a reasonable contractor and licensee might in the circumstances reasonably deviate from those rates in satisfying both tests under Section 25(1) (a) and (b) of the *Regulation*.

[269] Consistently, Western's roll forward approach seeks to derive hourly equipment rental and labour rates by adjusting the 1996 rates agreed to between Western and Kent by reference to the rates agreed to by the other contractors in the NCA for each year.³³² And, I continue to be unable to conclude that this approach fully accounts for all aspects of the Section 25(1) analysis. In particular, I am inclined to favour Hayes' view that basic IWA and inflation increases should be included.

[270] The practical difficulty in determining the hourly equipment and labour rates arises less from the appropriate approach, and more from the need to reconcile some inconsistencies. For example, Western addressed rates from 1997 to 2001, while Hayes only addressed rates from 1997 to 1999, although similar increases in rates for 2000 and 2001 can be readily determined by the addition of IWA and inflation increases.³³³ There are also minor discrepancies in Western's proposed rates,³³⁴ and some pieces of equipment on Western's list(s) of proposed rates are absent from Hayes' list and vice-versa.³³⁵

[271] I am, however, inclined to settle rates for all equipment and labour listed by both

³³² Ex. 19, "Rental Rates".

³³³ Calculation of percentage IWA and inflation increases for 2000 and 2001, Ex. 113, Tab 2.

³³⁴ As noted in fn 323. For example, at para. 246 of its Submissions, the \$137.57 rate for the FEL 980 in 1997 appears to be a mistaken inversion of \$137.75, having regard to the documents in Exs. 19 and 68. There are also discrepancies between the various "N/A" designations in Western's rate proposals, which are further complicated by the invoice summary (Ex. 68) indicating that some equipment was used, or not used, in particular years, which is not completely consistent with either set of Western's rate proposals. And, Hayes' proposals do not assist in this regard as they do not indicate the years during which equipment was used.

³³⁵ For example, Western's proposal(s) include "Lowbed", "Line log loader" and "Room & Board", while Hayes' proposal includes "American 5675", "JD690ELC bare" and "FEL980 bare".

parties for all years, inclusive of IWA and inflation increases,³³⁶ and to adopt the invoice summaries³³⁷ as the most accurate to indicate those years in which the rates are to be applied. If this approach creates any anomalies the parties are unable to reconcile between themselves, I invite them to refer it back for clarification.

[272] In this context, having regard to the whole of the extensive and comprehensive information presented, the hourly equipment and labour rates between Hayes and Western, for the years from 1997 to 2001, are respectfully settled in accordance with Section 25 of the *Regulation* at:

Machine or Labour	1997 (\$/hr)	1998 (\$/hr)	1999 (\$/hr)	2000 (\$/hr)	2001 (\$/hr)
Hitachi 270	\$140.63	\$142.40	\$145.10	\$149.67	\$151.84
Articulated Truck D300B	\$129.11	\$130.73	\$133.22	\$137.42	\$139.41
Articulated Truck 25D	\$114.88	\$116.32	\$118.53	\$122.26	\$124.03
Cat 235	\$164.70	\$166.76	\$169.93	\$175.28	\$177.82
D7	\$154.53	\$156.47	\$159.44	\$164.46	\$166.85
D8	\$157.07	\$159.04	\$162.07	\$167.18	\$169.60
Dump Truck	\$96.26	\$97.46	\$99.32	\$102.45	\$103.94
FEL 980	\$140.04	\$141.80	\$144.50	\$149.05	\$151.21
Grader	\$105.73	\$107.06	\$109.09	\$112.53	\$114.16
Hitachi 400	\$238.49	\$241.48	\$246.07	\$253.82	\$257.50
JD 690 ELC	\$126.10	\$127.68	\$130.10	\$134.20	\$136.15
Lift Truck	\$61.00	\$61.76	\$62.94	\$64.92	\$65.86
Lowbed ³³⁸	\$136.24	\$137.96	\$140.58	\$145.01	\$147.11
Off Highway Truck	\$127.08	\$128.68	\$131.12	\$135.25	\$137.21

³³⁶ Except for Room & Board.

³³⁷ Ex. 68.

³³⁸ A downward adjustment has been made in respect of the "Lowbed" rate, having regard to both Western's invocation of comparable rates and the IWA and inflation increases.

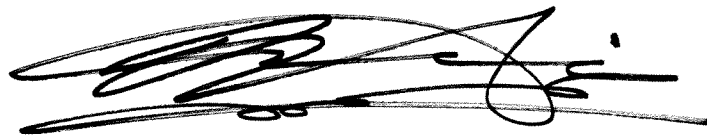
Machine or Labour	1997 (\$/hr)	1998 (\$/hr)	1999 (\$/hr)	2000 (\$/hr)	2001 (\$/hr)
Tank Drill One Man	\$192.15	\$194.56	\$198.25	\$204.49	\$207.46
Line Log Loader/ American 5675 ³³⁹	\$162.66	\$164.71	\$167.83	\$173.12	\$175.63
Loader	\$140.04	\$141.80	\$144.50	\$149.05	\$151.21
Loader	\$77.77	\$78.75	\$80.25	\$82.78	\$83.98
JD690ELC Bare	\$85.43	\$86.50	\$88.14	\$90.92	\$92.24
FEL980 Bare	\$99.38	\$100.62	\$102.54	\$105.77	\$107.30
Labour: Mechanic	\$55.92	\$56.62	\$57.69	\$59.51	\$60.37
Labour	\$40.67	\$41.18	\$41.96	\$43.28	\$43.91
Misc: Room & Board ³⁴⁰	\$75.00	\$75.00	\$75.00	\$75.00	\$75.00

IX. INTEREST & COSTS

[273] Jurisdiction is reserved in respect of any issue relating to the calculation of interest and in respect of the determination, allocation and payment of costs.

[274] Jurisdiction is also retained to clarify this award, as well as to correct errors and omissions.

DATED in Vancouver, British Columbia on the 12th day of February, 2004.



Frank S. Borowicz, Q.C.
Arbitrator

³³⁹ Assuming that the "Line Log Loader" and the "American 5675" are the same piece of equipment on the basis of Ex. 19, "Rental Rates Equivalents", and using Hayes' proposed rates.

³⁴⁰ Although Hayes did not specifically request "Room & Board" rates to be set, they have been at the basic rate proposed by Western without IWA and inflation increases.

APPENDIX A

SIGNIFICANT DATA FOR 1998 CONVENTIONAL LOGGING RATE

	Source	Comments	Rate (\$/m ³)
[1]	Western Proposal (and Average Comparables Increase)	Derived by "rolling forward" 1997 agreed rate of \$40.59 by the average 0 percent increase agreed to by other contractors within the NCA in 1998.	<u>\$40.59</u>
[2]	Adjusted Western Proposal	Adjusted to include Hayes' IWA and inflation increases (at 1.26%).	\$41.10
[3]	Adjusted McLaughlin Rate ("Smoothing" Method)	Actual 1997 rate of \$40.59 "rolled forward" to include IWA and inflation increases (at 1.83%).	\$41.33
[4]	Base McLaughlin Rate ("Smoothing" Method)	Assumed 1997 rate of \$40.65 "rolled forward" to include IWA and inflation increases (at 1.83%).	\$41.40
[5]	McLaughlin Rate (Estimated Cost Method)	Based largely on experience, on-site inspection, costing discussions with others in the industry, Western's Actual Logging Method maps, list of logging equipment used by Hayes, year-end production numbers, average haul distance calculations.	\$44.22
[6]	Adjusted Hayes Proposal (b)	Eliminating the \$5.16 "special circumstance" rate adjustment, and resulting IWA/inflation increases (after adjustment based on anticipated volumes).	\$44.84
[7]	Adjusted Hayes Proposal (a)	Adjusted to reflect mutually anticipated volumes rather than actual volumes (without any additional "smoothing" out of fixed cost recovery over five year period).	\$50.06
[8]	Hayes Proposal	Derived by "rolling forward" 1997 agreed rate of \$40.59, with adjustments for changes in special circumstance rates, inflation and IWA increases, and the actual volume impact on its actual fixed costs (plus 15 percent profit and risk).	<u>\$51.74</u>

APPENDIX B

SIGNIFICANT DATA FOR 1999 CONVENTIONAL LOGGING RATE

	Source	Comments	Rate (\$/m ³)
[1]	Western Proposal (and Average Comparables Increase)	Derived by "rolling forward" 1997 agreed rate of \$40.59 by the average 0 percent increase agreed to by other contractors within the NCA in 1999.	<u>\$40.59</u>
[2]	Adjusted Western Proposal	Adjusted to include Hayes' IWA and inflation increases (at 1.26% and 1.90%).	\$41.88
[3]	Adjusted McLaughlin Rate ("Smoothing" Method)	Actual 1997 rate of \$40.59 "rolled forward" to include IWA and inflation increases (at 1.83% and 1.37%).	\$41.90
[4]	McLaughlin Rate (Estimated Cost Method)	Based largely on experience, on-site inspection, costing discussions with others in the industry, Western's Actual Logging Method maps, list of logging equipment used by Hayes, year-end production numbers, average haul distance calculations.	\$41.95
[5]	Base McLaughlin Rate ("Smoothing" Method)	Assumed 1997 rate of \$40.65 "rolled forward" to include IWA and inflation increases (at 1.83% and 1.37%).	\$41.97
[6]	Adjusted Hayes Proposal (b)	Eliminating the \$5.16 "special circumstance" rate adjustment, and resulting IWA/inflation increases (after adjustment based on anticipated volumes).	\$48.83
[7]	Adjusted Hayes Proposal (a)	Adjusted to reflect mutually anticipated volumes rather than actual volumes (without any additional "smoothing" out of fixed cost recovery over five year period).	\$54.15
[8]	Hayes Proposal	Derived by "rolling forward" 1997 agreed rate of \$40.59, with adjustments for changes in special circumstance rates, inflation and IWA increases, and the actual volume impact on its actual fixed costs (plus 15 percent profit and risk).	<u>\$56.29</u>

APPENDIX C

SIGNIFICANT DATA FOR 2000 CONVENTIONAL LOGGING RATE

	Source	Comments	Rate (\$/m ³)
[1]	McLaughlin Rate (Estimated Cost Method)	Based largely on experience, on-site inspection, costing discussions with others in the industry, Western's Actual Logging Method maps, list of logging equipment used by Hayes, year-end production numbers, average haul distance calculations.	\$40.25
[2]	Western Proposal (and Average Comparables Increase)	Derived by "rolling forward" 1997 agreed rate of \$40.59 by the average 2.6 percent increase agreed to by other contractors within the NCA in 2000.	<u>\$41.65</u>
[3]	Adjusted McLaughlin Rate ("Smoothing" Method)	Actual 1997 rate of \$40.59 "rolled forward" to include IWA and inflation increases (at 1.83%, 1.37%, and 2.33%).	\$42.88
[4]	Base McLaughlin Rate ("Smoothing" Method)	Assumed 1997 rate of \$40.65 "rolled forward" to include IWA and inflation increases (at 1.83%, 1.37%, and 2.33%).	\$42.95
[5]	Adjusted Western Proposal	Adjusted to include Hayes' IWA and inflation increases (at 1.26%, 1.90%, and 3.15%).	\$43.20
[6]	Adjusted Hayes Proposal (b)	Eliminating the \$5.16 "special circumstance" rate adjustment, and resulting IWA/inflation increases (after adjustment based on anticipated volumes).	\$48.78
[7]	Hayes Proposal	Derived by "rolling forward" 1997 agreed rate of \$40.59, with adjustments for changes in special circumstance rates, inflation and IWA increases, and the actual volume impact on its actual fixed costs (plus 15 percent profit and risk).	<u>\$54.25</u>
[8]	Adjusted Hayes Proposal (a)	Adjusted to reflect mutually anticipated volumes rather than actual volumes (without any additional "smoothing" out of fixed cost recovery over five year period).	\$54.27

APPENDIX D

SIGNIFICANT DATA FOR 2001 CONVENTIONAL LOGGING RATE

	Source	Comments	Rate (\$/m ³)
[1]	Western Proposal (and Average Comparables Increase)	Derived by "rolling forward" 1997 agreed rate of \$40.59 by the average 2.6 percent and 4.5 percent increase agreed to by other contractors within the NCA in 2000 and 2001, respectively.	<u>\$43.52</u>
[2]	Adjusted Western Proposal	Adjusted to include Hayes' IWA and inflation increases (at 1.26%, 1.90%, 3.15% and 1.45%).	\$43.83
[3]	McLaughlin Rate (Estimated Cost Method)	Based largely on experience, on-site inspection, costing discussions with others in the industry, Western's Actual Logging Method maps, list of logging equipment used by Hayes, year-end production numbers, average haul distance calculations.	\$43.85
[4]	Adjusted McLaughlin Rate ("Smoothing" Method)	Actual 1997 rate of \$40.59 "rolled forward" to include IWA and inflation increases (at 1.83%, 1.37%, 2.33%, and 2.43%).	\$43.92
[5]	Base McLaughlin Rate ("Smoothing" Method)	Assumed 1997 rate of \$40.65 "rolled forward" to include IWA and inflation increases (at 1.83%, 1.37%, 2.33%, and 2.43%).	\$43.99
[6]	Adjusted Hayes Proposal (b)	Eliminating the \$5.16 "special circumstance" rate adjustment, and resulting IWA/inflation increases (after adjustment based on anticipated volumes).	\$51.60
[7]	Adjusted Hayes Proposal (a)	Adjusted to reflect mutually anticipated volumes rather than actual volumes (without any additional "smoothing" out of fixed cost recovery over five year period).	\$57.99
[8]	Hayes Proposal	Derived by "rolling forward" 1997 agreed rate of \$40.59, with adjustments for changes in special circumstance rates, inflation and IWA increases, and the actual volume impact on its actual fixed costs (plus 15 percent profit and risk).	<u>\$63.49</u>

APPENDIX E

PARTIES' POSITIONS ON 1997 ROAD CONSTRUCTION RATES

YEAR: 1997			
Construction Category ³⁴¹	Meters/Units ³⁴²	Western Proposed Rates ³⁴³	Hayes Proposed Rate ³⁴⁴
O.M.I	1011 m	\$52.47 /m	-
O.M.II	1121 m	\$64.53 /m	-
O.M.III	2741 m	\$95.97 /m	-
Toe	532 m	\$70.69 /m	-
Medium	278 m	\$94.81 /m	-
Heavy	152 m	\$115.76 /m	-
X Heavy	10 m	\$125.50 /m	-
XX Heavy	0 m	-	-
Metal Culvert	70	\$297.85 /culvert	-
Wood Culvert	23	\$967.82 /culvert	-
Large Wood Culvert	2	\$967.82 /culvert	-
Total 1997:	5845 m		\$138.06/m

³⁴¹ Ex. 19, Tab 1.

³⁴² Derived from Western's records at Ex. 19, Tab 3. There are minor discrepancies in Hayes' measurements found at Ex. 113, Tab 4.

³⁴³ Ex. 19, Tab 6.

³⁴⁴ Ex. 113, Tab 4.

APPENDIX F

PARTIES' POSITIONS ON 1998 ROAD CONSTRUCTION RATES

YEAR: 1998			
Construction Category ³⁴⁵	Meters/Units ³⁴⁶	Western Proposed Rates ³⁴⁷	Hayes Proposed Rate ³⁴⁸
O.M.I	136 m	\$53.11 /m	-
O.M.II	527 m	\$64.47 /m	-
O.M.III	2278 m	\$95.09 /m	-
Toe	1505 m	\$76.84 /m	-
Medium	485 m	\$94.74 /m	-
Heavy	110 m	\$114.38 /m	-
X Heavy	20 m	\$125.32 /m	-
XX Heavy	0 m	-	-
Metal Culvert	27	\$289.41 /culvert	-
Wood Culvert	10	\$888.01 /culvert	-
Large Wood Culvert	2	\$888.01 /culvert	-
Total 1998:	5061 m		\$140.64/m

³⁴⁵ Ex. 19, Tab 1.

³⁴⁶ Derived from Western's records at Ex. 19, Tab 3. There are minor discrepancies in Hayes' measurements at Ex. 113, Tab 5.

³⁴⁷ Ex. 19, Tab 6.

³⁴⁸ Ex. 113, Tab 5.

APPENDIX G

PARTIES' POSITIONS ON 1999 ROAD CONSTRUCTION RATES

YEAR: 1999			
Construction Category ³⁴⁹	Meters/Units ³⁵⁰	Western Proposed Rates ³⁵¹	Hayes Proposed Rate ³⁵²
O.M.I	0 m	\$53.60 /m	-
O.M.II	115 m	\$64.47 /m	-
O.M.III	787 m	\$94.60 /m	-
Toe	0 m	\$76.84 /m	-
Medium	0 m	\$94.74 /m	-
Heavy	0 m	\$114.38 /m	-
X Heavy	0 m	\$129.66 /m	-
XX Heavy	0 m	-	-
Metal Culvert	5	\$289.41 /culvert	-
Wood Culvert	1	\$888.01 /culvert	-
Large Wood Culvert	0	\$888.01 /culvert	-
Total 1999:	902 m		\$130.50/m

³⁴⁹ Ex. 19, Tab 1.

³⁵⁰ Ex.19, Tab 19.

³⁵¹ Ex. 19, Tab 6.

³⁵² Ex. 113, Tab 6.

APPENDIX H

WESTERN'S PROPOSED HOURLY EQUIPMENT AND LABOUR RATES 1997 TO 2001

Machine or Labour	1996 Agreed (\$/hr)	1997 (\$/hr)	1998 (\$/hr)	1999 (\$/hr)	2000 (\$/hr)	2001 (\$/hr)
Hitachi 270	138.33	138.33	N/A	N/A	N/A	N/A
Articulated Truck D300B		127.00	127.00	127.00	N/A	N/A
Articulated Truck 25D	113.00	113.00	113.00	N/A	N/A	N/A
Cat 235	162.00	162.00	162.00 <u>N/A</u>	162.00 <u>N/A</u>	N/A	N/A
D7	152.00	152.00	152.00	N/A	N/A	N/A
D8	154.50	154.50	154.50	154.50	N/A	N/A
Dump Truck	94.68	94.68	94.68	94.68	94.68	96.57
FEL 980	137.75	137.57 <u>137.75</u>	N/A <u>137.75</u>	N/A	N/A	N/A
Grader	104.00	104.00	104.00	104.00	104.00	106.08
Hitachi 400	234.58	234.58	N/A	N/A	N/A	N/A
JD 690 ELC	124.03	124.03	124.03	124.03	124.03	126.51
Lift Truck	60.00	60.00	N/A	N/A	N/A	N/A
Lowbed	158.00	110.00	110.00	110.00	110.00	112.20
Off Highway Truck	125.00	110.00	110.00	110.00	110.00	112.20
Tank Drill One Man	189.00	189.00	189.00	189.00	N/A	N/A
Line Log Loader <u>Two Separate Loaders</u>	213.25	N/A <u>76.50/</u> <u>160.00</u>	N/A <u>N/A/</u> <u>160.00</u>	N/A	N/A	N/A
Labour: Mechanic	55.00	55.00	55.00	55.00	55.00	56.10
Labour	40.00	40.00	40.00	40.00	40.00	41.00
Operator	N/A	N/A	N/A	N/A	N/A	N/A
Misc: Room & Board	75.00	75.00	75.00	75.00	75.00	75.00

* Underlining indicates discrepancies in Western's submissions as reflected in footnotes 323 and 334.

** N/A indicates equipment not used in the year as reflected in footnotes 327 and 334.

APPENDIX I

HAYES' PROPOSED HOURLY EQUIPMENT AND LABOUR RATES 1997 TO 1999

Machine or Labour	1996 Agreed Rates Advanced (\$/hr)	1997 Inflation	1997 Rate Request (\$/hr)	1998 Inflation	1998 Rate Request (\$/hr)	1999 Inflation	1999 Rate Request (\$/hr)
IPPI %		0.70%		0.40%		1.80%	
IWA %		2.63%		2.11%		2.00%	
Average		1.67%		1.26%		1.90%	
1 Hitachi 270	\$138.33	\$2.30	\$140.63	\$1.76	\$142.40	\$2.71	\$145.10
2 Art Truck D300B	\$127.00	\$2.11	\$129.11	\$1.62	\$130.73	\$2.48	\$133.22
3 Art Truck 25 D	\$113.00	\$1.88	\$114.88	\$1.44	\$116.32	\$2.21	\$118.53
4 Cat 235	\$162.00	\$2.70	\$164.70	\$2.07	\$166.76	\$3.17	\$169.93
5 D7 or Flat Allis	\$152.00	\$2.53	\$154.53	\$1.94	\$156.47	\$2.97	\$159.44
6 D8	\$154.50	\$2.57	\$157.07	\$1.97	\$159.04	\$3.02	\$162.07
7 Dump Truck	\$94.68	\$1.58	\$96.26	\$1.21	\$97.46	\$1.85	\$99.32
8 FEL 980	\$137.75	\$2.29	\$140.04	\$1.76	\$141.80	\$2.69	\$144.50
9 Grader	\$104.00	\$1.73	\$105.73	\$1.33	\$107.06	\$2.03	\$109.09
10 Hitachi 400	\$234.58	\$3.91	\$238.49	\$2.99	\$241.48	\$4.59	\$246.07
11 JD 690ELC	\$124.03	\$2.07	\$126.10	\$1.58	\$127.68	\$2.43	\$130.10
12 Labour	\$40.00	\$0.67	\$40.67	\$0.51	\$41.18	\$0.78	\$41.96
13 Lift Truck	\$60.00	\$1.00	\$61.00	\$0.77	\$61.76	\$1.17	\$62.94
14 Loader	\$137.75	\$2.29	\$140.04	\$1.76	\$141.80	\$2.69	\$144.50
15 Loader	\$76.50	\$1.27	\$77.77	\$0.98	\$78.75	\$1.50	\$80.25
16 Off Highway Truck	\$125.00	\$2.08	\$127.08	\$1.59	\$128.68	\$2.44	\$131.12
17 Tank Drill	\$189.00	\$3.15	\$192.15	\$2.41	\$194.56	\$3.70	\$198.25
18 American 5675	\$160.00	\$2.66	\$162.66	\$2.04	\$164.71	\$3.13	\$167.83
19 Mechanic	\$55.00	\$0.92	\$55.92	\$0.70	\$56.62	\$1.08	\$57.69
20 JD 690ELC Bare	\$84.03	\$1.40	\$85.43	\$1.07	\$86.50	\$1.64	\$88.14
21 FEL 980 Bare	\$97.75	\$1.63	\$99.38	\$1.25	\$100.62	\$1.91	\$102.54