

## Rate Arbitrations Under Bill 13— Distinction Without A Difference

**O** ON JUNE 21, 2004, THE BC GOVERNMENT AMENDED THE *Timber Harvesting Contract and Subcontract Regulation* (Bill 13) and replaced the rate dispute mechanism. The Government's motive was to establish "a new method to set contract rates that reflect market conditions..."

Undoubtedly, these amendments have implemented some changes of note. For example, they have expedited the completion of rate disputes with mandatory, short-fuse time frames. More obnoxiously, the procedure now requires an arbitrator to limit an arbitration award to five pages. A more childish and short-sighted rule is difficult to imagine. As one arbitrator has already commented, this is "a limitation that does not permit an exposition of the evidence and the submissions which the case deserves." The existence of the five-page rule is unlikely to reduce the efforts of a party to win a rate dispute; it will merely ensure that those efforts are not reflected in the decision, and ensure that the decision provides little guidance in future rate disputes. But at least it's a quick read (and, if necessary, an arbitrator is still free to reduce font and margin sizes).

However, whether the amendments changed the substance of a rate dispute is not so certain—at least on the coast. The new test for an appropriate rate is what "a willing licence holder and a willing contractor **acting reasonably** and at arm's length would agree is a **fair** market rate [boldface added]." Apparently, this language will ensure that the process focuses on market rates. But what does the word 'fair' add to the equation: what is the difference between a 'fair market rate' and merely a 'market rate'?

The old test provided for a rate that "a licence holder and a contractor **acting reasonably** in similar circumstances **would** agree is a rate that ... is competitive by industry standards, and ... **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 [boldface added]." This test was said to have led to a subjective 'cost-plus' approach to rates (and, admittedly, a cost-plus approach was taken in many arbitration awards under the old test).

However, with all respect to the many who have suggested otherwise, there is nothing in the old test that mandated subjective cost-plus: it was as objective and market-oriented as the new test. Like the new test, it speaks of license holders and contractors 'acting reasonably' and what they 'would' agree upon if they acted reasonably (as opposed to how they actually operate). While an arbitrator could consider a contractor's actual costs, those costs only had relevance insofar as the contractor was reasonably efficient under the circum-

stances. Cost-plus rate awards were the product of the evidence and submissions that licence-holders and logging contractors placed before arbitrators; they were not a necessary product of the old test.

In both cases, the tests attempt to establish a rate that reflects what the market would set under the 'circumstances.' Under the new mechanism, an arbitrator may still have regard for 'costs' (see section 26.01(2)(e) and (f) of the new mechanism); and under the older mechanism, previous rates that the parties agreed upon were of primary importance (see section 25(2)(a) of the old mechanism).

The simple fact is that the goal of a pure market rate illusory in circumstances where the parties are unable to agree upon that rate. As noted in a recent rate award released under the new mechanism, available comparables may "necessitate so many adjustments and extrapolations that they are not practically meaningful as comparables." If the parties are unable to agree upon a rate, an arbitrated rate will necessarily involve a measure of artificiality. Whether that artificiality is described in terms of a 'fair' market rate as under the new test, or in terms of a rate that "is competitive by industry standards, and ... would permit a contractor operating in a manner that is reasonably efficient to earn a reasonable profit" as under the old test, seems a distinction without a difference. 🐦

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