

Gibraltar Law Group's

13 THINGS YOU SHOULD KNOW ABOUT BILL 13, AFTER DECEMBER 3, 2004

(The Timber Harvesting Contract and Subcontract Regulation was amended effective June 21, 2004, and was further amended effective December 3, 2004. Please disregard previous versions of this document which pre-date December 3, 2004.)

1. **There are to be no new evergreen contracts.** All existing replaceable contracts are *grandfathered*. So, if you have one now, it continues to exist. That is the case regardless of whether the replaceable contract is in writing or not. And, like before, you can still sell them. If the licence holder doesn't like the proposed purchaser, the onus is now on the licence holder to give valid reasons (within 30 days) for opposing the transfer.
2. **There is a new rate provision.** The regulation used to provide for a rate that was competitive and that provided for a reasonable profit. That is no longer the case. Now, the rate is a *fair market rate*. In other words, in an open and competitive market, what would a willing licensee and a willing contractor agree is a reasonable rate? Primarily the answer to the question will revolve around an examination of comparative rates. In a rate dispute, both sides may be required to disclose rates paid or earned in other blocks. Actual contractor costs have little importance in the equation, although cost adjustments for inflation and living-out expenses might be considered.
3. **You have 15 days to dispute a rate.** The new regulation now provides that the licence holder must make a written rate proposal that describes the services to be performed, the rate to be paid, the estimated quantity of work, and things of that nature. In fact, a contractor can demand that a licence holder produce a written rate proposal. Once the rate proposal is delivered to the contractor, the contractor has 15 days to dispute the rate. If he doesn't, he is deemed to have accepted the rate. The contractor may reject the licence holder's rate and may propose his own rate instead—the licence holder then has 7 days to accept the contractor's rate, or else the two parties become engaged in a rate dispute.
4. **There is a new fast-track rate dispute mechanism.** The old rate dispute mechanism was cumbersome, costly, and slow. And, it usually resulted in a saw-off award by the arbitrator, i.e. halfway between what the licensee was offering and what the contractor demanded. Under the new mechanism, the arbitrator can only choose between the licensee's rate and the contractor's rate—he must pick the one that best represents the fair market rate. The idea is that the parties are going to take more reasonable positions from the beginning. In addition, the entire process is to be much faster and less expensive. In theory, the entire dispute can be resolved in 45 business days. As before, the possibility exists for the contractor to be working, for a provisional rate, while the rate dispute remains unresolved.

5. **Beware of the waiver provisions!** There is now an ability on the part of contractors to waive, in writing, most of the benefits provided to them under the regulation. This would include, for example, the right to a replaceable contract. So, a contractor can now sell his replaceable contract back to his licensee. Or, he could agree to a different dispute resolution mechanism, or to different provisions about assignability. In theory, licensees and contractors hold equal bargaining power, and a contractor will only waive his rights if appropriately compensated, or if the replacement provision is as good for the contractor as the one that is waived. In truth, there is an inequality of bargaining power, and a contractor should be cautious when being presented with any new version of his contract, to ensure that he is not inadvertently waiving his rights.

6. **Protections for licence transfers or subdivisions.** The Minister of Forests has made it clear that he wants to reduce barriers to licence transfers and subdivisions. If a forest licence or a tree farm licence gets transferred from one licensee to another, then the replaceable contractors go with the licence. If one large licence gets subdivided into two smaller licences, then the replaceable contractors are divided between the two (entirely as the licensee decides). These protections relate only to harvesting volumes under replaceable contracts. The regulation does nothing to protect non-replaceable volumes in those circumstances.

7. **The licensee can move contractors outside of the licence area.** Replaceable contracts will refer to specific forest licences and/or tree farm licences. The ability now exists for licensees to have contractors harvest timber outside of these licences, such as on private lands, or under short-term licences (such as B.C. Timber Sales). The licensee may dictate that this harvesting is deemed to be done under the replaceable contract, in the place of work done under the named forest licence or tree farm licensee.

8. **Minimum cut control is gone.** Often volumes under replaceable contracts are described in terms of “the contractor will harvest x% of the timber cut under forest licence A123456.” It used to be that the licensee was obligated to cut at least 50% of its AAC over any given year, and 90% over five years. In theory, then, contractors could expect some minimal level of work in any year. But, the Minister of Forests has made it clear that government is not going to force licensees to harvest at a loss. So, the minimum cut control obligations are gone. (Technically this doesn’t relate to the regulation, but instead to other changes to the *Forest Act*.)

If your contract provides that you are entitled to harvest 45,000 cubic metres of timber per year, then you are in a slightly stronger position, although not ironclad. In any one year, the licensee can vary from that for *bona fide* business and operational reasons. But, over the course of five years, the licensee must have given at least 95% of your five year entitlement. Again, some of that can be on private land or under short-term licences.

9. **Terminated replaceable contracts must be re-issued.** A concern was raised that if licence holders were not obligated to give out additional replaceable contracts, then they would look for excuses to terminate existing replaceable contracts. In order to remove that incentive, the regulation now provides that replaceable contracts terminated for default must be issued again, either to existing contractors or new ones.

10. *Forestry Revitalization Act* proposals. Pursuant to Bill 28, government is taking back 20% of its volume under replaceable forest licences and replaceable tree farm licences. This is 20% per licence holder, not 20% per licence. In other words, some licences might be completely unaffected; some licences might be completely eliminated; and some licences may have reductions as little as a few percent, and others up to 60% or 80%.

It is up to licencees to propose a method by which the replaceable contracts are affected by the Bill 28 takebacks. Possibly that means that some replaceable contractors will be completely eliminated, and some will have their work reduced by more than a proportionate share. Licencees can make these proposals on a licence-by-licence basis, or they can group two or more licences together for a proposal.

If a replaceable contractor stands to lose more than his proportionate share of his work, then he *might* be able to challenge the proposal. That contractor must gather enough support from his fellow contractors, such that one third of all of the replaceable contractors object. Or, the contractor must gather enough support such that contractors having, in total, at least one third of the pre-reduction replaceable volume object. In either case, they can force the matter to arbitration. (As a result of the December amendments to the Regulation, volume held by a conventional harvester under a replaceable contract is equivalent to volume held by a cable yarding harvester, for the purpose of assessing volume reductions, and for the purpose of mustering votes to reject a reduction proposal. Volume held by phase contractors, such as replaceable hauling contracts with the licence holder, are quantified for reduction proposal purposes in accordance with a table set out in Regulation.) At arbitration, the issue is one of efficiency, i.e. is the proposed new contractor mix the most efficient one?

If there are not sufficient objectors to the licencee's proposal, then the only opportunity to complain is based on fairness, e.g. whether the licencee is punishing the contractor for past challenges under the contract, such as disputing rates. That will be a very tough case for a contractor to prove.

As some consolation, the provincial government has established a trust fund and \$23 million has been allocated as compensation for lost replaceable volumes. It is too soon to translate this into a dollar value per cubic metre lost. The fund's trustee must first decide how much of that fund will go to Coastal contractors, and how much to Interior contractors. Then, the trustee will arrive at a dollar figure for each cubic metre taken back from a licence. Those dollars are then to be shared fairly amongst the replaceable contractors who have lost volume. (So, if one licence has 100% of its cut under replaceable contracts, and another licence has only 50% of its cut under replaceable contracts, then on a *per cubic metre basis* the first contractors will get half of what the second contractors get.) My guess is that interior contractors will see compensation of between \$2.00 and \$2.50 per replaceable cubic metre lost where 100% of the licencee's cut is under replaceable contracts, and between \$4.00 and \$5.00 where only 50% of the cut is under replaceable contracts. If there are replaceable hauling contracts involved as well, the money will have to be spread even thinner.

It appears that the southern Interior licences are last on the government's agenda for final takeback, with the Minister finalizing those takebacks by March 2005. Shortly following that one should expect to see Forestry Revitalization Plan AAC reduction proposals being issued by the licencees. The Ministry has made it clear, however, that the harvesting volume will only be

taken from the licence holders once there is capacity on the part of B.C. Timber Sales, and the First Nations, to take up the volume and actually harvest it. So, for many contractors, it may be *business as usual* into 2006.

11. **All replaceable contracts need to be amended immediately.** Actually, the regulation says that all replaceable contracts in place on June 21, 2004, had to be amended by the end of that day. Obviously that didn't happen. But, there is an obligation upon the parties to amend their existing contracts to make them conform with the new regulation. I would expect licencees to present contractors with amended contracts shortly.

12. **Non-replaceable contracts continue to offer few protections.** Despite the best efforts of the three interior logging associations (the ILA, the CILA, and the NWLA), non-replaceable contracts continue to receive few protections. (Some contractors will harvest part of their usual volume under a replaceable contract, and part under a non-replaceable contract. Others have entirely non-replaceable contracts.)

When working under a non-replaceable contract, there is no ability to demand a rate proposal from a licencee. There is no ability to access the fast-track rate dispute mechanism. Non-replaceable contracts are not protected in the event of licence transfer or subdivision. No ability exists to challenge a *Forest Revitalization Act* AAC reduction proposal if it results in lost non-replaceable volume. No money is available in the trust fund for lost non-replaceable volume.

Contractors who feel that they have been treated unfairly in regards to their non-replaceable volume may have some redress under the ordinary rules of contract law. Ordinary contract law does not, however, have the same strength as the regulation.

13. **Seniority systems.** In some cases, log haulers have replaceable hauling contracts directly with their licence holders. And, in many cases, those contracts incorporate a seniority system. As a result of the December 2004 amendment to the Regulation, any Bill 28 volume reduction will be borne by those at the bottom of the seniority list first, rather than everyone on the list sharing equally in that reduction.

This paper itemizes some of the highlights of the new regulation. It is only a summary of those highlights. The regulation is very lengthy and very complicated, and I invite you to contact me if you have any questions as to its application to your own particular situation.

The above document describes the licencee-contractor relationship. Many of the provisions similarly apply to the contractor-subcontractor relationship. But, the subcontractors have no ability to challenge the Forestry Revitalization Act AAC reduction proposal. Nor are they entitled to compensation from the trust fund.

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