UNDERSTANDING THE MYSTERIOUS "INDUSTRY STANDARD RATE"

By Jim Girvan

At a recent meeting of contractors, the discussion eventually got around to rates and costs and the inability of most in the room to negotiate better rates at the hands of the major licensees they worked for. They wondered, "How did we get to this point?"

Some complained that the Bill 13 *"fair market rate test"* was anything but fair given there was only one licensee in many of their areas of operations. And there was no point in pushing for arbitration because the costs to arbitrate were never worth the rewards. Arbitration under Bill 13 was simply not a way to improve rates.

In law, "fair market value" is the underlying premise to the Bill 13 fair market rate test. Justice Cattanach[1] articulates the concept as follows:

"…That common understanding I take to mean *the highest price an asset (or service) might reasonably be expected to bring if sold by the owner* in the normal method applicable to the asset in question in the ordinary course of business *in a market not exposed to any undue stresses and composed of willing buyers and sellers dealing at arm's length and under no compulsion to buy or sell.* I would add that the foregoing understanding as I have expressed it in a general way includes what I conceive to be the essential element which is *an open and unrestricted market* in which the price is hammered out between willing and informed buyers and sellers on the anvil of supply and demand. These definitions are equally applicable to "fair market value" and "market value" and it is doubtful if the word "fair" adds anything to the words "market value."" [emphasis added]

After much discussion of these key characteristics that define a fair market in law, everyone concluded that there is no fair market in the BC forest industry given the level of tenure consolidation, as well as the compulsory aspect of Bill 13 contracts. As a result, it came as no surprise that the fair market rate test was meaningless and had totally skewed "the market" for contractor services in favor of the major licensees in BC.

Other contractors then pointed out that despite efforts to discuss specific site conditions and equipment compliments required for proposed logging, the response was the usual, "We can only pay the industry standard rate."

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So, what is the *industry standard rate* asked one contractor? We all stopped to think, realizing that no one actually knew. Well, it must be the rate that reflects the average of all the contractors in the area? That led to the conclusion that a major license holder would be hesitant to pay a contractor more than the standard rate for fear of being non-competitive on the logs they were receiving and if it was higher than the average, that all contractors would then want that rate.

But just how does one major licensee come up with the industry standard rate? Of course, it couldn't be that the major licensees talk amongst themselves and then agree upon "standard rates" to be paid to contractors since everyone knows that this would be a form of price fixing which is illegal under the *Competition Act*. And further, the Competition Bureau—the independent law enforcement agency under the Act—has a maximum fine of up to $25 million and imprisonment for up to 14 years for price fixing offenses.

The Competition Bureau guidelines describe price fixing as: agreements to fix prices at a predetermined level, to eliminate or reduce discounts, to increase prices, to reduce the rate or amount by which prices are lowered, to eliminate or reduce promotional allowances and to eliminate or reduce price concessions or other price-related advantages provided to customers.

In fact, any collaborative effort on the part of the major tenure holders or contractors to discuss and fix prices or rates is illegal under the *Competition Act*. Group discussions about safety reporting or conditions of work, for example, can be undertaken by either party without Competition Bureau scrutiny. However, any discussion that affects rates for services cannot be entertained. This likely includes the potential for contractors to collective bargain rates with their tenure holder, despite the fact that collective bargaining by individual employees is legal.

That said, your local logging association—advocating on behalf of its members generally—may not face the same scrutiny by the Competition Bureau since they are not party to either side of any specific contract negotiations. This is why support for the work the TLA does to promote the need for contractor sustainability; to address the Bill 13 rate dispute mechanism; to develop rate models that reflect the reality of contractor's experience; to establish Blue Book type all-found rates for equipment use; and to collect data that shows on balance the financial position of the contractor community relative to the major licensees are all of benefit to contractor members.

Feeling like you are stuck in your rate negotiations and can't turn to anyone for help? Turn to the TLA. They may be your new best friend when you are at the negotiation table. And, next time you hear that your rate is above the industry standard rate ask: "Hey, how did you determine that rate?"

[1]Wikipedia: in Henderson Estate, Bank of New York v. M.N.R., (1973) C.T.C. 636 at p. 644