Forest Appeals Commission

Citation: *Halfmoon Bay Ventures Corp. v. Government of British Columbia*, 2023 BCFAC 2

Decision No.: FAC-FRP-21-A004(b)

Decision Date: 2023-04-28

Method of Hearing: Conducted by way of written submissions concluding on April 4, 2023

Decision Type: Preliminary Decision

Panel: Darrell Le Houillier, Chair

Appealed Under: *Forest and Range Practices Act,* SBC 2002, c. 69

Between:

Halfmoon Bay Ventures Corp.

Appellant

And:

Government of British Columbia

Respondent

Appearing on Behalf of the Parties:

For the Appellant: Greg Cranston, Representative

For the Respondent: Steven Davis, Counsel

PRELIMINARY DECISION

INTRODUCTION

[1] This preliminary decision arises from an application by the Appellant in this case, Halfmoon Bay Ventures Corp. ("Halfmoon Bay"), to "stay" the decision under appeal. "Stay", in this case, does not refer to delaying the legal effect of the decision, as this was stayed automatically upon the filing of the appeal. Rather, the Appellant has asked the Forest Appeals Commission (the "Commission") to rescind that decision in a preliminary decision.

BACKGROUND

[2] On October 5, 2021, Derek Lefler, the District Manager in the Sunshine Coast Natural Resource District (the "Respondent"), in the Ministry of Forests, Lands, Natural Resource Operations and Rural Development (the "Ministry"), issued a letter (the "Determination"). Mr. Lefler imposed an administrative penalty on Halfmoon Bay in the Determination.

[3] In the Determination, the Respondent concluded that Halfmoon Bay, and others, had engaged in the unlawful cutting and removal of Crown timber without authority, in contravention of sections 52(1) and 52(3) of the *Forest and Range Practices Act*, S.B.C. 2002, c. 69 (the "*Act*"). The Respondent concluded that Halfmoon Bay conducted this unauthorized activity in December 2017 and early 2018.

[4] The following chronology is significant, leading up to the Determination:

- on February 21, 2018, an officer from the Canadian Department of Fisheries and Oceans ("DFO") attended the location of the alleged unauthorized activity to investigate a complaint about potential damage to fish habitat;
- on February 23, 2018, the DFO officer submitted a complaint report describing the allegedly unauthorized activity;
- on February 28 and March 6, 2018, a Natural Resource Officer from the Ministry attended the site and noted that there was evidence of contraventions of numerous statutes, including the *Act*;
- on September 16, 2019, the Ministry attempted to schedule an Opportunity to Be Heard ("OTBH") with Halfmoon Bay, which is required before an administrative penalty can be issued;
- on January 7, 2021, the Respondent wrote a letter stating that he was extending a legislated time limit for levying an administrative penalty under the *Act* until February 28, 2022;

- after some correspondence, on February 25, 2021, the Respondent convened the OTBH relevant in this appeal;
- on June 9, 2021, Halfmoon Bay provided additional evidence to be considered by the Respondent; and,
- on October 6, 2021, the Respondent issued the Determination, and levied a penalty totaling $55,150.60 in respect of the unauthorized cutting and removal of Crown timber .

[5] Halfmoon Bay appealed the Determination and, among the issues raised in its appeal, argued that the Determination was issued after the expiry of a legislated time limit defined at section 75(1) of the Act. As a result, Halfmoon Bay argued that the Determination must be "stayed" generally.

[6] Section 75(1) of the Act defines a three-year limitation period for levying an administrative penalty under sections 71(2) or 74(3)(d) of the Act, beginning on the date when the facts that led to the determination that the contravention occurred first came to the knowledge of an official.

[7] The parties agreed that the Commission should decide that issue as a preliminary decision. Halfmoon Bay filed submissions on this preliminary issue on March 27, 2022. The Commission allowed the Respondent until April 13, 2022, to file his submissions, which he then did. The Commission provided Halfmoon Bay until April 20, 2022, to provide a final reply, but Halfmoon Bay did not do so.

[8] The Commission ultimately decided the preliminary issue in Halfmoon Bay Ventures Corp. v. Government of British Columbia, Decision No. FAC-FRP-21-A004(a), August 25, 2022 [the "Delay Decision"].

[9] In the Delay Decision, the panel concluded that the facts leading to the Determination came to the attention of an official on March 6, 2018. The three-year limitation period for levying an administrative penalty, as provided in section 75(1) of the Act, was accordingly to end on March 6, 2021. However, the panel found that the Respondent had appropriately extended this timeframe to February 28, 2022, using powers granted in the COVID-19 Related Measures Act, S.B.C. 2020, c. 7. The administrative penalty levied in the Determination was accordingly in compliance with the legislated time limitation under found in section 75(1) of the Act.

[10] The panel in the Delay Decision also considered common law principles, noting that Halfmoon Bay had taken particular issue with delays in investigating the alleged contraventions, and in completing the Determination after all evidence and submissions were provided. The panel found there was insufficient evidence of prejudice to warrant "staying" the Determination as a result of these delays.

[11] Halfmoon Bay has asserted once more that the Determination should be "stayed" for delay.

ISSUES

[12] I have characterized the issues raised by Halfmoon Bay in this, its latest application to "stay" the Determination, as follows:

- Should the Determination be "stayed" because more than 5.5 years have elapsed since an official first learned the fact that gave rise to the determination, in contravention of section 75(1) of the *Act*?
- Should the Determination be "stayed" because the Commission delayed in issuing the Delay Decision?
- Does the Commission have sufficient grounds to reconsider the Delay Decision?
- If so, should the Commission reconsider the Delay Decision?

SUBMISSIONS

Halfmoon Bay's Position

[13] Halfmoon Bay says that roughly 5.5 years have passed since the Ministry learned of the facts that gave rise to the Determination, without a final decision on the question of its administrative penalty. Halfmoon Bay argues that this is far in excess of the time limit referred to in section 75(1) of the *Act*.

[14] Halfmoon Bay also says it took the Commission "far too long" to complete the Delay Decision.

[15] Halfmoon Bay also provided further information with respect to the Delay Decision:

- the reasoning why it did not respond to the September 16, 2019 letter from the Ministry, asking about possible hearing dates for the OTBH;
- stating that a follow-up to the September 16, 2019 letter from the Ministry was not sent until November 24, 2019, and unilaterally imposed a hearing date for the OTBH of December 3, 2019, only eight days later;
- stating that, in response to the November 24, 2019 letter, Halfmoon Bay advised that it could be ready for a hearing in late January or early February 2020, but the Ministry unilaterally selected a hearing date in late February 2020, further delaying the process by a month;
- the reasoning why it did not object to the hearing date set for the OTBH in late February, 2020;
- the decision by the Ministry on January 7, 2021 to extend the statutory time limit to February 28, 2022 "makes no sense" and the only outcome that "makes sense" is if the intended date of extension is February 28, 2021.

[16] Halfmoon Bay also argued that the panel chair made an incorrect finding of fact at paragraph 21 of the Delay Decision, and asserted that the unilateral decisions made by the Ministry in this case were "clearly contrary to fundamental justice."

[17] Halfmoon Bay says that, based on the findings made in the Delay Decision, the calculation of the time period relevant to section 75(1) of the *Act* started on March 6, 2018, and the hearing was not until February 25, 2021. This is days' short of the three-year time limit set in section 75(1) of the *Act*, yet the decision under appeal was not made until October 5, 2021, after the expiry of the three-year time limit.

The Respondent's Position

[18] The Respondent supported the Delay Decision and argued that the Determination should not be "stayed", either as a result of expiry of the time period in section 75(1) of the Act, or common law principles.

ANALYSIS

Should the Determination be "stayed" because more than 5.5 years have elapsed since an official first learned the fact that gave rise to the determination, in contravention of section 75(1) of the Act?

[19] As noted above, section 75(1) of the Act defines a three-year limitation period for the levying of an administrative penalty under sections 71(2) or 74(3)(d) of the Act, beginning on the date when the facts that led to the determination that the contravention occurred first came to the knowledge of an official.

[20] The administrative penalty was levied on October 6, 2021, and the Commission has concluded, in the Delay Decision, that this was not in contravention of the statutory time limit in section 75(1). The administrative penalty is one subject of this appeal; however, the time limit in section 75(1) does not continue to be relevant to the Commission's processes.

[21] As a result, I deny Halfmoon Bay's application on this ground. The Determination should not be "stayed" because more time has elapsed than is authorized for the imposition of an administrative penalty under section 75(1) of the Act, as additional time to resolve the appeal of the Determination is not considered when assessing that limitation period.

Should the Determination be "stayed" because the Commission delayed in issuing the Delay Decision?

[22] Halfmoon Bay says that the Commission took "far too long" to complete the Delay Decision once submissions on that issue were complete.

[23] As noted in the Delay Decision, the central case on the issue of administrative delay is Blencoe v. British Columbia (Human Rights Commission), 2000 SCC 44 ("Blencoe").

Blencoe addresses stays of proceedings for administrative delay, both under common law principles and under the Canadian Charter of Rights and Freedoms.1

[24] Blencoe sets out a framework for the analysis of whether alleged delay rises to the level of abuse of process, and so warrants a stay of proceedings. As noted in paragraph 51 of the Delay Decision, referencing paragraph 102 of Blencoe, a stay is only appropriate in the clearest of cases, and where there is proof of significant prejudice.

[25] While Halfmoon Bay complained about the time the Commission took to issue the Delay Decision, there was no additional information provided that persuasively establishes that Halfmoon Bay experienced any significant prejudice. As a result, I deny Halfmoon Bay's application on this ground, and conclude that a "stay" is not warranted, as a result of any delay on the Commission's part in issuing the Delay Decision.

Does the Commission have sufficient grounds to reconsider the Delay Decision?

[26] Halfmoon Bay argues that the Delay Decision is wrong, and should be redecided. This raises the question of whether the Commission has the authority to reconsider its own decisions.

[27] The Commission operates in a way as authorized by the portions of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 (the "*ATA*") that apply to the Commission.[2]

[28] Section 26(1) of the *ATA* allows the Chair of the Commission to designate panels of one or more members. A one-member panel was designated under this authority to consider Halfmoon Bay's earlier application for a "stay", and issued the Delay Decision. Because this one-member panel was convened, it was empowered, through section 26(5) of the *ATA*, in two important ways:

(a) the panel has the jurisdiction of, and may exercise and perform the powers and duties of, the tribunal, and

(b) a decision of the panel is a decision of the tribunal.

[29] Section 26(9) of the *ATA* also allows the Chair of the Commission to name a delegate, to hear and decide any interim or preliminary matter in an application. The Chair used this authority to delegate the preliminary matter dealt with the Delay Decision to the panel convened to consider that issue.

[30] Reading these provisions together, I conclude that the Delay Decision is a decision of the Commission, exercised with the authority of the Commission, with respect to the preliminary matters addressed in that decision.

[31] I am aware of no authority in the *ATA*, the *Act*, or elsewhere in legislation, that grants to the Commission the authority to reopen or reconsider its decisions, once they are made. Neither party has presented any evidence that such power exists and, as a

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[1] The *Canadian Charter of Rights and Freedoms* is Schedule B to the *Canada Act 1982 (UK)*, 1982, c. 11.

[2] The portions of the *ATA* which apply are defined in section 140.2 of the *Act*.

result, I can only consider whether the Commission has such a power granted by the common law.

[32] In assessing this power, it is important to bear in mind the context surrounding the Delay Decision. This decision was not intended to be an interim matter that could be opened to being re-addressed. With the agreement of the parties and the Commission, this was intended to definitively decide the delay issue, so that the appeal could proceed efficiently. It was not intended for the matter to be re-argued a second time before a "final decision" was issued; the Commission was intended to decide the issue with finality, and to be *functus officio* with respect to the delay issue, after the Delay Decision was issued.

[33] The Supreme Court of Canada addressed such circumstances in Chandler v. Alberta Association of Architects, [1998] 2 SCR 848 ("Chandler"). At paragraph 22, the Court stated:

> As a general rule, once [an administrative] tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change in circumstances. It can only do so if authorized by statute or if there has been a slip or error within the exceptions enunciated in *Paper Machinery Ltd. v. J.O. Ross Engineering Corp.* [i.e., where it commits an error in "expressing the manifest intention" of the tribunal].

[34] This reasoning was explained well in Fraser Health Authority v. Workers' Compensation Appeal Tribunal, 2014 BCCA 499 (CanLII) ("Fraser Health"), at paragraph 141:

> On the authority of *Chandler*, the power to reopen a proceeding at common law is limited to non-substantive slips and to errors which result in the tribunal not exercising the jurisdiction given to it. In my view, it is apparent from a reading of *Chandler* that the authority of a tribunal to reopen a proceeding is an exception to the finality and to the principle of *functus officio*. It flows out of the limited review of administrative decisions and the obligation on administrative tribunals to fulfill the task given to them. It does not flow to errors made within jurisdiction, which is what reasonableness is all about.

[35] As a result, the Commission only has the power to reconsider the Delay Decision, based on common law authority, if the Delay Decision involved an error of jurisdiction; not an error made within the Commission's jurisdiction. In this case, Halfmoon Bay has provided additional information, made arguments about a lack of procedural fairness leading up to the Determination, and argued that one aspect of the Delay Decision "makes no sense" and led to an incorrect conclusion.

[36] Halfmoon Bay's submissions do not persuade me that the Delay Decision was made without jurisdiction.

[37] First, Halfmoon Bay provided additional explanations with respect to evidence presented to the panel chair that completed the Delay Decision, but did not assert that these facts were presented to the panel and ignored. As a result, there is insufficient reason to conclude that the Delay Decision was not made unfairly, and so without jurisdiction. The additional information provided by Halfmoon Bay does not properly fall within the Commission's narrow ability to reconsider its own decisions at common law. They beg the question of whether the Delay Decision was reasonable, not whether it was made without jurisdiction.

[38] Second, Halfmoon Bay described what it perceived as an unfair process leading up to the Determination. The process leading up to the Determination was not within the ambit of the Delay Decision and, in any event, will be cured within the appeal before the Commission, if it proceeds (as most do) as a de novo hearing, or can be raised as a ground of appeal otherwise. I disagree that Delay Decision makes any findings about the fairness of the process leading up to the Determination, in paragraph 21 or otherwise, and Halfmoon Bay has not provided sufficient support for this contention to persuade me otherwise.

[39] Lastly, I disagree that the Delay Decision "makes no sense" where the extension of the statutory timeframe under section 75(1) is concerned. The panel in the Delay Decision outlines a clear rationale in support of that conclusion, and there are insufficient grounds to conclude there was any procedural fairness error or other error going to the jurisdiction of the Commission in the Delay Decision.

[40] For these reasons, I deny Halfmoon Bay's application on this issue. I conclude that the Commission does not have sufficient grounds to reconsider the Delay Decision in the circumstances of this case.

[41] As a result, there is no need to consider the last issue defined in this decision.

DECISION

[42] For the reasons provided above, I dismiss Halfmoon Bay's application.

[43] In reaching this conclusion, I considered all evidence and submissions provided by the parties, whether or not they were specifically referenced in this decision.

"Darrell Le Houillier"

Darrell Le Houillier, Chair
Forest Appeals Commission