



Forest Appeals Commission

Citation: *367079 BC Ltd. DBA Pro-Link Logging v. Government of British Columbia*, 2023 BCFAC 7

Decision No.: FAC-FRP-21-A005(b)

Decision Date: 2023-12-27

Method of Hearing: Conducted by way of written submissions concluding on October 13, 2023

Decision Type: Decision on Costs Application

Panel: Linda Michaluk, Panel Chair
Reginald Whiten, Panel Member
Gary Lin, Panel Member

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

Between:

367079 BC Ltd. DBA Pro-Link Logging

Appellant

And:

Government of British Columbia

Respondent

Appearing on Behalf of the Parties:

For the Appellant: Grant A. Zimmerman, Counsel

For the Respondent: Christine Bant, Counsel
Rolf Warburton, Counsel

DECISION ON COSTS APPLICATION

INTRODUCTION

[1] This decision determines whether the Forest Appeals Commission (the “Commission”) should order the Appellant to pay the costs incurred by the Respondent in this appeal. The Appellant appealed a Determination made by Josh Pressey (the “District Manager”), who is the District Manager, Quesnel Natural Resource District. The District Manager works for the Ministry of Forests, Lands, Natural Resource Operations and Rural Development. The Appellant withdrew their appeal on day 2 of the oral hearing of the appeal.

[2] The Respondent submits that the Appellant failed to diligently pursue the appeal and to adequately prepare their case. As a result, the Respondent argues that the Appellant’s conduct throughout the proceeding was unreasonable and necessitated disproportionate use of the resources of the parties and of the Commission.

[3] In response, the Appellant asserts that it had the right to appeal the determination and that it met all deadlines established in the appeal process. The Appellant submits that it withdrew the appeal when it did to reduce costs for all parties.

BACKGROUND

[4] 367079 BC Ltd. (the “Appellant”) appealed the November 5, 2021, Determination (the “Decision”) of the District Manager. Following an Opportunity to be Heard (the “OTBH”) the District Manager found that that the Appellant damaged and destroyed Crown timber without authority in an area adjacent to an area defined as Block F (the “Block”) in Forest License A20013 Cutting Permit 390 Block 7F. The District Manager found that this was done in contravention of s. 52(1) of the *Forest and Range Practices Act*, SBC 2002, c. 69 (the “Act”), and levied a penalty of \$30,160.26 against the Appellant. The amount of the penalty included a \$3,094.14 compensatory component for the loss of biodiversity arising from trespass and unauthorized logging in an Old Growth Management Area (“OGMA”) and a \$27,066.08 deterrent component based on a fine attached to a previous contravention in 2016.

[5] The Appellant admitted the trespass and did not put forward any defenses with respect to the trespass. The Appellant did not dispute that the trespass area totaled approximately 0.79 ha, 0.3 ha of which was in two OGMA’s and that the total volume of timber coming out of the trespass area was 197.6 m³.

[6] The Appellant disputed the amount of the penalty assessed for the contravention and asked the Commission to significantly reduce the penalty. A component of the Appellant’s argument was that the amount of the penalty directly relating for the loss of

biodiversity should be removed. The Respondent asked the Commission to dismiss the appeal and confirm the penalty awarded by the District Manager.

[7] Between the filing of the appeal on December 2, 2021, and the first day of the appeal hearing on September 27, 2023, the Commission held a total nine pre-hearing conferences (“PHCs”), with the final one taking place after the hearing dates had been set. The Appellant advised it would be seeking legal advice at the third PHC, held on March 23, 2022.

[8] The subsequent five PHCs (April 13, June 9, July 26, September 14, and Oct 26, 2022) addressed issues including (but not limited to): the Appellant filing an amended notice of appeal; the retention of experts and the filing of expert reports; the Appellant advising it was considering a request for document disclosure; the timeline for submissions; and the nature and timing of the hearing—an oral hearing held over three days in September 2023. At the final PHC conducted on September 6, 2023, the parties agreed that two additional hearing days should be scheduled. The hearing dates were ultimately confirmed as September 27–29, and October 3–4, 2023.

[9] On September 26, 2023, the Commission received a letter from the Appellant dated September 22, 2023, (the “September 22 Letter”) requesting the Commission take certain actions prior to the start of the hearing. As the hearing was to commence on September 27, 2023, the Commission directed the Appellant to raise the requests with the Panel at the start of the hearing.

[10] The Appellant raised the issues from the September 22 Letter in the oral hearing, as directed. The Appellant made several procedural requests.

[11] First, the Appellant asked that the Panel determine, prior to commencing with the hearing, whether or not the Respondent must prove there was an actual loss of biodiversity as a result of the unauthorized harvesting to warrant finding that the magnitude of the contravention was high and assess penalties accordingly. The Appellant argued that, if the Panel were to make this determination, it could reduce the penalties accordingly.

[12] The Panel found it would be inappropriate to grant the Appellant’s application to require the Respondent to provide proof of loss of biodiversity as a preliminary matter. If the Panel had done so, it would have determined a crucial aspect of the appeal that was squarely before the Panel in this appeal. To determine this issue before the parties presented evidence and argument within the appeal process would be administratively unfair, given the parties had notice that this issue was to be argued during the oral hearing.

[13] Following the denial of this application, the Appellant asked the Panel to adjourn the hearing for a period to allow the Appellant to assess its position and properly prepare for the hearing. The Appellant had argued that it had insufficient notice of the

Respondent's Expert Rebuttal (received by the Appellant on August 16, 2023) and Statement of Points (received by the Appellant on September 8, 2023).

[14] The Panel refused the Appellant's request to adjourn the proceeding to allow for additional preparation time, noting that the date for this hearing and the schedule for tendering expert reports were set at a pre-hearing conference on December 2, 2022, by agreement of the parties. The Appellant did not, prior to the hearing, raise the issues of the burden of proof or that there was insufficient time for the Appellant to prepare for the hearing.

[15] The Appellant also asked that the Panel address the order of witnesses and evidence presentation before the hearing. The Appellant's counsel, Mr. Zimmermann, advised that as an inexperienced litigator who not appeared before the Commission, he assumed that the hearing would begin with the Respondent presenting its material. He sought clarification on the order of proceedings.

[16] The Panel found that the order of proceedings would be the ordinary process described in the Commission's Rules, with the Appellant presenting its case first. While the Appellant's counsel set out that, in his inexperience, he believed that the Respondent should be first in the order of proceedings, there was no compelling rationale presented to support this application. The onus in this proceeding was on the Appellant to prove its case and, therefore, it was appropriate that the Appellant be the first party to present evidence.

[17] The Appellant also requested that a Map which was attached to the September 22 Letter be included in the Appellant's document package and used only as a reference document, notwithstanding it was not filed as required in advance of the hearing. The Panel granted this request, noting that the map could not be entered as an exhibit in the proceedings.

[18] In the oral hearing, the Appellant also addressed witnesses it wished the Commission to certify as experts. The two witnesses were Mr. Geisbrecht and Mr. Mills who were employees of Industrial Forestry Services Ltd. ("IFS"). The Appellant had provided a single expert report prepared by IFS and dated August 3, 2022 (the "IFS Report") in advance, as required by the Commission's Rules. The IFS Report appeared to contain contributions of both Mr. Geisbrecht and Mr. Mills but did not set out which individual was responsible for which report sections. Accordingly, the Panel decided to proceed to examine both witnesses as regards expert status prior to any decision regarding the IFS Report.

[19] The Panel qualified Mr. Geisbrecht as an expert in "timber cruising and the assessment of merchantable timber and stand attributes", as requested by the Appellant (the Respondent had not objected). The Panel did not certify Mr. Mills as an expert in "the assessment of site ecology and the evaluation of how changes to forest sites through resource use or natural events can impact the site ecology and ecosystem function". The

Panel was not satisfied that Mr. Mills had the appropriate experience or training to provide expert opinions on the subject matter in question.

[20] After the Panel made its decisions on the qualification of the Appellant's experts, the Appellant withdrew its appeal.

[21] The appeal having been withdrawn, the hearing concluded on September 28, 2023.

[22] On October 10, 2023, the Respondent submitted an application for costs.

[23] Under section 47(1)(a) of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 (the "ATA"), the Commission may order a party to pay some or all of the appeal costs of another party or an intervener.

ISSUE

[24] The issue the Panel must decide is whether the Appellant should be required to pay the Respondent's costs, and if so, the appropriate amount that the Appellant should pay.

THE RESPONDENT'S SUBMISSIONS

[25] The Respondent submits that the Commission should award costs in this appeal because the Appellant's conduct was unreasonable. The Respondent argues that the Appellant:

- did not proceed expeditiously or efficiently;
- did not inform themselves of Commission Practice and Procedure;
- caused a disproportionate use of resources; and
- failed to adequately prepare their case.

[26] The Respondent submits that the multiple PHCs in this appeal were required because of the Appellant's failure to take genuine steps to advance the appeal. For example, the Appellant repeatedly advised it intended to file an amended notice of appeal but did not do so until the Commission set a deadline for it to do so.

[27] The Respondent argues that the Appellant's failure to inform themselves of Commission Policy and Procedure ultimately resulted in the unnecessary use of the resources of the parties and of the Commission. The Respondent points to the Appellant's use of hearing time to address their request for an initial determination and to explain procedures that are set out in publicly available materials. Further, had the Appellant informed itself of the Commission's authority to conduct a *de novo* hearing early in the proceeding, the matter likely would have unfolded more efficiently.

[28] The Respondent submits that the Appellant did not give regard to the proportionate use of public resources. The Appellant's focus on the biodiversity

component of the penalty (\$3,094.18) required expert evidence and what was anticipated to be a five-day oral hearing before the Commission. The Respondent asserts that the Appellant chose to continue with the biodiversity focus rather than focusing on the deterrent component (\$27,066.08), which could have been determined by way of written submissions.

[29] The Respondent submits that ultimately, even with the narrow focus, the Appellant failed to adequately prepare its case, which hinged entirely on the conclusions of a single expert report. The Respondent argues that despite its significance to the Appellant's case, the IFS Report did not comply with any of the basic substantive or procedural requirements for expert evidence in that it:

- was prepared by multiple authors, including two individuals who were not called to testify and whose curriculum vitae were never disclosed,
- did not contain any attestation of the authors' duty of impartiality to the Commission,
- did not include counsel's instructions to the authors,
- did not identify the facts and assumptions underlying the report,
- inappropriately conveyed the authors' own general policy views; and
- contained improper advocacy and opined on the ultimate issue before the Commission.

[30] In addition, Mr. Mills advised at the hearing that he considered the IFS Report to be a preliminary report for the lawyer and that he did not understand that it was to be submitted as an expert report during the hearing. The Respondent submits that it sent the Appellant a letter on September 12, 2023, setting out that the IFS Report did not comply with the substantive and procedural requirements of expert evidence and was, in its view, inadmissible. The Respondent also advised the Appellant, in the same letter, that should the Appellant continue to challenge the \$3,094.18 biodiversity portion of the penalty and if the matter was required to proceed by way of the scheduled five-day oral hearing, that the Respondent intended to seek costs against the Appellant because of unreasonable conduct.

[31] The Respondent submits that it first raised the possibility of seeking costs with the Appellant in an email on July 18, 2023, in which the Respondent also sought clarification that the Appellant was continuing to challenge the amount of the penalty awarded for the loss of biodiversity.

[32] The Respondent asserts that an award of costs in these circumstances would further the Commission's cost objectives and deter similar unreasonable conduct in future appeals.

THE APPELLANT'S SUBMISSIONS

[33] The Appellant submits that it had a right to appeal the Decision if it disagreed with it. The Appellant did not fail to meet any deadlines and submits that all such deadlines were set at various PHCs with the agreement of the parties and the Commission. The Appellant did not dictate any of the process or scheduling of the hearing.

[34] The Appellant submits that it has always stated it disagreed with the Decision. The Appellant has always taken the position that the quantum of penalties was excessive and was based on the "high" magnitude determined by the Decision Maker because of the stated loss of biodiversity. The Appellant asserts it has never limited its dispute over the quantum to the \$3,094.18. The Appellant's disagreement with the quantum of the penalty is based on page 7 in the Decision where the Decision Maker sets out that "the magnitude of the contravention is high. The unauthorized harvest area included portions of an OGMA with accompanying environmental values that, in my professional opinion, no financial amount will equate to the biodiversity lost."

[35] The Appellant argues that the IFS Report was dated August 3, 2022, and was provided to the Respondent on September 20, 2022, as an expert report. Based on this report, the Appellant believed it had evidence that the Respondent erred in its conclusion on the loss of biodiversity, which subsequently led to the increased penalty amount. The Appellant asserts that it did not know Mr. Mills would not be accepted as an expert by the Commission. The Appellant argues that neither Mr. Geisbrecht nor Mr. Mills, nor anyone else who contributed to the IFS Report, advised that Mr. Mills may not be qualified to give the opinions set out in the report. Furthermore, it was not until the hearing that the Appellant learned that Mr. Mills regarded the report as a "preliminary report". The Appellant advised that it had attempted, on numerous occasions starting in December 2022, to retain the services of a Registered Professional Biologist to review the IFS Report and testify at the hearing but was unable to do so before the July 2023 expert evidence submission date.

[36] The Appellant submits that although the Respondent received the IFS Report in September 2022, it did not raise any issues related to the report until August 16, 2023. The Appellant asserts that it expected to receive evidence from the Respondent supporting that there was a loss of biodiversity up to the time it received the Respondent's rebuttal expert report on August 16, 2023.

[37] The Appellant submits that during the September 6, 2023 PHC it asked about how things should proceed at the hearing, and whether the hearing Panel would take judicial notice that harvesting within an OGMA results in a loss of biodiversity. The Appellant was advised by the PHC Chair to raise these issues at the beginning of the hearing, which it did.

[38] The Appellant submits it withdrew the appeal after having its preliminary requests denied and after failing to qualify Mr. Mills as an expert. The Appellant states that it took this action in order to reduce costs for all parties.

[39] The Appellant asserts it did not appeal the Decision on frivolous or vexatious grounds. The Appellant believed the Decision Maker had made an error and it wanted the error corrected.

THE RESPONDENT'S REPLY

[40] The Respondent argues that it was the Appellant's responsibility to ensure those retained to provide expert advice were qualified to do so, and that the responsibility does not reside with the proposed expert witness. The Respondent submits that according to the Appellant's submissions, it was aware in December 2022 that its evidence may be flawed. The Respondent takes this position because the Appellant attempted to retain additional experts to review the Decision and the IFS Report, and to provide opinions with respect to the loss of biodiversity.

[41] The Respondent replies that it has expended resources preparing the case and that the Appellant's decision to withdraw mid-hearing does not remedy the Appellant's unreasonable conduct.

DISCUSSION AND ANALYSIS

[42] As noted above, subsection 47(1)(a) of the ATA allows the Board to order a party to pay some or all of the appeal costs of another party or an intervener.

[43] The Commission has not adopted a policy of "loser pays the winner's costs" as in a civil court practice. Instead, the Commission's policy, found under section 13.0 of the *Manual* - Application for Costs, is to award costs only in special circumstances so as to encourage responsible conduct throughout the appeal process and to discourage unreasonable conduct.

[44] The Commission's *Manual* provides a non-exhaustive list of situations that might amount to "special circumstances" including: a frivolous or vexatious appeal; where a party's action or inaction results in prejudice to another parties; where a party fails to provide notice they will not be attending a hearing; where a party unreasonably delays a proceeding; where a party's failure to comply with an order of the Commission results in prejudice to the another party; and where a party continues to deal with issues the Commission has advised are irrelevant. The Panel is not bound to order costs when one of the listed examples occurs, nor does it have to find that one of the examples occurred to order costs.

[45] The Panel notes that it is unusual for the Commission to make an award for costs. Statutes such as the *Forest and Range Practices Act*, S.B.C. 2002, c. 69, have provisions for affected parties to appeal certain decisions made by statutory decision makers. This is an inherent aspect of statutory decisions made under these statutes. If the Commission adopted the civil court practice of “loser pays the costs”, recipients of statutory decisions may feel discouraged against the legitimate exercise of their appeal rights; that is, experience a “chilling effect”. The costs incurred by government in defending the decisions of statutory decisions makers are one of the costs of doing business. That is not to say that government or any party should be forced to expend resources inappropriately if a party acts unreasonably in addressing their appeal. Rather, the usual course of participating in an appeal from a decision made under statutory authority is not a special circumstance which would attract an order of costs.

[46] The Respondent has alleged that the Appellant’s conduct and lack of appeal preparation resulted in an unnecessary expenditure of resources. The Panel notes the Respondent advised the Appellant by letter on September 12, 2023, that it would seek costs for unreasonable conduct if the Appellant continued to challenge the \$3,094.18 portion of the penalty and the appeal was required to proceed by way of the five-day hearing.

[47] As regards the September 12, 2023, letter, the Panel notes in particular two paragraphs:

In our view, the appellant’s challenge to the \$3094.18 portion of the penalty requires a disproportionate use of party and Commission resources. Further, and in any event, the appellant has failed to tender any cogent evidence to support a finding that the decision ought to be varied or set aside: the appellant’s primary evidence, the IFS Report, fails to comply with the substantive and procedural requirements of expert evidence and is therefore in our view inadmissible.

In light of the above, if the appellant discontinues its challenge to the \$3094.18 portion of the penalty regarding biodiversity and agrees the parties can address the remaining \$27,066.08 at issue by way of written submissions before the commission, the Province will agree not to seek costs of the appeal against the appellant.

[48] A review of the PHC summaries shows that the parties both agreed to the hearing being set down as a five-day oral proceeding. The Panel notes that the summaries do not indicate that the Respondent objected to the matter proceeding in this way. Regardless of the Respondent’s position on the admissibility of the IFS Report, that decision is made by the Panel, and only by the Panel. In this appeal, the Panel qualified one of the Appellant’s witnesses as an expert, and not the other. The Panel did not consider whether the proffered IFS Report was qualified as an expert report as the Appellant withdrew its appeal before that matter could be considered. The issue of the IFS Report was never

placed before the Panel to evaluate. Accordingly, the Panel finds that the prospect of a five-day hearing to decide the appeal and any concerns over the admissibility of the IFS Report do not warrant an order for costs.

[49] During the oral hearing, Counsel for the Appellant stated, numerous times, that he was an inexperienced litigator and he was not clear as to certain process issues. The Panel notes that many of the Appellant's Counsel's questions and procedural uncertainties could have been addressed by viewing the Commission's website had he decided to inform himself.

[50] The hearing concluded when the Appellant decided that as its main witness was not qualified as an expert, it had little prospect of success and so withdrew its appeal. The Panel notes that this was not the only option available to the Appellant. For example, the Appellant could have called Mr. Mills as a fact witness and requested that the Panel accord the appropriate weight to his testimony. The Appellant could have proceeded to present non-expert evidence (as well as evidence from its qualified expert) and participated in cross-examining the Respondent after the Respondent's case was presented. This scenario could have resulted in far more time and resources being expended than did the Appellant's decision to simply withdraw the Appeal. In this regard, the Panel finds that the Appellant attempted to minimize the expenses incurred by all parties once it decided its appeal was unlikely to succeed. The Panel also notes that there was no determination of the merits of the appeal. The Appellant was legally entitled to bring its appeal and when it believed that the evidence that it could introduce would not support the outcome it desired, the Appellant stopped the appeal process. This was a reasonable decision on the part of the Appellant.

[51] It is also clear that while the Respondent has expressed displeasure at the length of some submission schedules, it is equally clear that the Appellant met all established deadlines.

[52] The Panel accepts that there were other ways in which the Appellant could have possibly minimized costs for the Commission, for the Respondent, and for the Appellant itself. This is true for all appeals when they are examined with the benefit of hindsight. It is not for the Panel, however, to set out how the Appellant's case could have been otherwise presented or to comment on its choice of representative. It is for the Panel to consider whether there are special circumstances warranting an order of costs be made in favour of the Respondent. The Panel has found that the Appellant attempted to minimize the expenses incurred by all parties once the Appellant decided it would not continue its appeal, and has found there are no special circumstances to warrant an order for costs.

DECISION

[53] The Panel has considered all facts presented and all submissions made, whether or not they have been specifically referenced in this decision.

[54] For the reasons provided above, the Panel finds that the Appellant should not be required to pay the Respondent's costs.

[55] The Respondent's application is denied.

"Linda Michaluk"

Linda Michaluk, Panel Chair
Forest Appeals Commission

"Reginald Whiten"

Reginald Whiten, Panel Member
Forest Appeals Commission

"Gary Lin"

Gary Lin, Panel Member
Forest Appeals Commission