Forest Appeals Commission

Citation: *Cassiar Forest Corp. v. Government of British Columbia,* 2024 BCFAC 5

Decision No.: FAC-FRP-22-A001(a)

Decision Date: 2024-05-03, amended by correction 2024-07-04

Method of Hearing: Conducted by way of written submissions concluding on November 6, 2023

Decision Type: Preliminary Decision on Document Production

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

Between:

Cassiar Forest Corp.

Appellant

And:

Government of British Columbia

Respondent

And:

Fortec Consulting Ltd.

Intervenor

Appearing on Behalf of the Parties:

For the Appellant:	Dean Dalke, Counsel
For the Respondent:	Marina Goodwin, Counsel Sarah Bevan, Counsel
For the Intervenor:	Vince Aldridge, Counsel

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Preliminary Decision on Document Production

INTRODUCTION

[1] This appeal stems from a decision dated December 17, 2021 (the "Decision"), by Jevan Hanchard (the "Respondent"), then an Acting Executive Director with the Ministry of Forests, Lands, Natural Resource Operations and Rural Development (the "Ministry"). The Ministry is a component of the government of British Columbia (the "Province").

[2] The Respondent had been delegated authority from the Minister of Forests, Lands, Natural Resource Operations and Rural Development (as the title then was) to make determinations, pursuant to section 71 of the *Forest and Range Practices Act*, S.B.C. 2002, c. 69 (the "*Act*"), to make determinations on contraventions of, among other things, the *Forest Act,*[1] and to levy administrative penalties in respect of any contraventions.

[3] The Decision addresses circumstances surrounding forestry operations by Cassiar Forest Corp. ("Cassiar") and two forestry consulting companies that had contracted with it—Fortec Consulting ("Fortec") and Brinkman Consulting ("Brinkman")[2] (collectively, the "Companies"). The Decision concludes that Cassiar violated provisions of the *Forest Act*. First, the Decision concludes that Cassiar had contravened section 105(5.2) of the *Forest Act* ten times by failing to submit information required under a variety of cutting permits (numbers 113, 114, 115, 118, 119, 120, 122, 123, 124 and 125; collectively, the "Cutting Permits") that Cassiar held under Non-Renewable Forest Licence A64561 (the "Licence"). Second, the Decision concludes that Cassiar contravened section 105.1(3) of the *Forest Act* by providing incomplete or inaccurate information where required, with respect to waste and residue data across "… multiple years and harvest authorities." The Decision also levies a penalty of $1,528,410.87 in respect of all those contraventions.

[4] The *Act* sets out that, where contraventions are alleged or a penalty imposed, the person making those determinations must first give the person against whom the determinations may be made or the penalty levied an "opportunity to be heard" ("OTBH"). In this case, Cassiar's OTBH was held on May 26, 2020.

[5] Cassiar appealed the Decision to the Forest Appeals Commission (the "Commission"). The appeal is in a pre-hearing phase, and both Cassiar and the Respondent have applied to the Commission for an order to require the other party to

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[1] R.S.B.C. 1996, c. 157 (the "*Forest Act*").

[2] Brinkman has reportedly undergone some corporate change, and a successor corporation, Northpac Forestry Group Ltd., now continues operations previously carried out by Brinkman. For simplicity, both corporations are referred to as Brinkman throughout this preliminary decision.

produce certain documents or classes of documents. This preliminary decision addresses those requests.

BACKGROUND

The Decision

[6] The Licence allowed Cassiar to harvest and remove timber from a defined area of Crown land (that is, land owned by the Province), from 2014 to 2018. The right to harvest and remove timber was subject to Cassiar obtaining cutting permits, which define specific areas within the licenced area where timber can be cut and removed. These specific areas are called “cut blocks”.

[7] One of the conditions of the Licence was that Cassiar must pay to the Province a fee called stumpage. Stumpage is calculated by multiplying the volume of timber harvested and an applicable stumpage rate.

[8] The stumpage rate depends on a number of factors, including the anticipated quality of timber available for harvesting, the costs associated with harvesting the timber, and the distance (and method) of travel required for the timber to be brought to a mill for processing. Timber that is of a higher quality, more easily accessible, or more easily transported to a mill for processing will be charged a higher stumpage rate than timber that is of lesser quality, more expensive to harvest, and more expensive to bring to a mill. The stumpage rate is initially based on the licence-holder’s estimates and projections for timber extraction when using the most efficient available method for harvesting and transporting timber. Estimates related to the size and quality of timber are based on field-based assessment called “cruising.”

[9] After the timber is harvested, the licence-holder must submit information describing any significant deviations from the circumstances contemplated in its estimates and projections used to calculate the stumpage rate. Development costs associated with accessing and harvesting at a site, for example, may not have been incurred (or may be significantly lesser or greater than expected), and this information is described in an update. Similarly, where a harvested area ends up being larger or smaller in size by a certain proportion than was shown on a map defining the area, updates must also be provided. These updates may be provided in an “appraisal data submission for a changed circumstance” (an “Appraisal”) and may result in the stumpage rate increasing or decreasing.

[10] For example, where a licence-holder initially projects to harvest timber that includes less valuable trees that are more difficult to access, but then does not harvest those trees, the stumpage rate is increased to reflect that only more valuable and easily accessed timber was harvested. This updated harvest information must also be included in an Appraisal. In addition to possible changes to stumpage rates resultant from these

circumstances, licence holders are also required to pay the government waste assessments for any timber that the licence-holder was authorized to cut and remove, but chose not to.

[11] According to the Respondent, the areas harvested by Cassiar were inspected by the Ministry in June 2018. The Respondent says that the actual development costs were less than projected, at least in part because some development infrastructure that was planned was not actually built. Furthermore, according to the Respondent, certain areas containing low-value timber and covered by the Licence were not harvested, and this increased the profitability of the harvest. The Respondent says these changes were not reported in an Appraisal, but should have been. All of these deviations from the projected activity resulted in a lower stumpage rate than should have been applied, according to the Respondent.

[12] Section 72 of the *Act* provides that, even if a person (including a company) contravened the *Forest Act*, they will be considered to not have done so if:

- the person exercised due diligence to prevent the contravention;
- the person believed in mistaken facts that, if true, would have established that the person did not contravene the relevant provision(s); or
- the person's actions resulted from officially induced error.

[13] The Decision also concludes that none of the defenses listed under section 72 apply to Cassiar in this case.

[14] In the Decision, the Respondent calculated the administrative penalty to achieve two goals: to recover outstanding revenue that he thought the province should have received as a result of stumpage paid by Cassiar, and to serve as a deterrence against further noncompliance with the *Forest Act*. With respect to the first goal, the recovery of revenue from the government, the Respondent referred to three heads of economic benefit that Cassiar realized through its contraventions.

[15] First, the Respondent has calculated that Cassiar underpaid its stumpage fees by $194,111.69 by not building all the access requirements it had projected needing and by not reporting those changed circumstances in Appraisals. The Ministry had collected that amount through a stumpage reappraisal process (the "Reappraisal"), so the Respondent did not include that amount in the administrative penalty.

[16] Second, the Respondent says that the government has calculated that Cassiar was charged an additional $61,554.09 in waste assessments for not harvesting some timber that it was authorized to harvest under the Licence. As this had also been recovered under a separate process, the Respondent did not include that amount in the administrative penalty.

[17] Third, the Respondent says the stumpage rate was artificially depressed because Cassiar preferentially did not harvest lower-value timber (hemlock) left behind as waste.

The Respondent estimates the losses associated with the artificially low stumpage rate at $383,395.83. This figure was to be recovered through the administrative penalty, as it had not yet been recovered.

[18] With respect to the second goal, deterrence, the Respondent calculated the amount of the administrative penalty separately for the ten failures to submit Appraisals from the one provision of incomplete or inaccurate information in an Appraisal.

[19] For the ten instances of non-reporting, the Respondent decided that deterrence should be achieved by using twice the total amount of economic benefit Cassiar realized through its non-reporting, other than the amount recovered through waste assessments (i.e. the $194,111.69 for underpaid stumpage fees and the $383,395.83 for an artificially low stumpage rate). The Respondent made a typographical error in finding the sum of these numbers, however. Instead of a total of $577,507.52 (the value estimated), the Respondent wrote this sum as $557,507.52 (the value recorded on the Determination) and multiplied that figure by two to determine the deterrent component for the ten instances of non-reporting. This gave an overall quantum for the deterrence of non-reporting equal to $1,115,015.04.

[20] For the one episode of incomplete or inaccurate reporting, the Respondent calculated the appropriate sum for deterrence at $30,000, being roughly half the economic benefit from that incomplete or inaccurate reporting (the $61,554.09 recovered in a waste assessment).

The Appeal

[21] Cassiar argues that the Respondent, when completing the Decision, relied upon information that was not known to Cassiar during the OTBH. According to Cassiar, the OTBH does not comply with the requirements of the *Act* and therefore the Respondent lacked the authority to make the Decision.

[22] Cassiar also argues that the Respondent "… erred in making factual findings … that were without a sufficient, or any, evidentiary basis and which were clearly incorrect." In particular, Cassiar says:

1) the contraventions were not deliberate or intentional, and were not done to reduce the stumpage fee or for economic gain;
2) the alleged failure to submit some or all Appraisals did not benefit Cassiar;
3) the amount of the alleged economic benefit associated with the alleged contraventions was inaccurate;
4) the timber sale price estimates and economic benefits obtained under the Licence were incorrectly estimated; and

5) the Respondent incorrectly identified one person (Cathy Craig) as an officer of Cassiar.

[23] Cassiar also says that it qualifies for a defence of due diligence under section 74 of the *Act*. Furthermore, Cassiar says that the Respondent levied a penalty against Cassiar more than three years after the facts leading to the contravention came to the knowledge of an official, contrary to section 75 of the *Act*.

[24] Finally, Cassiar argues that the penalty is excessive in that it is unsupported by the law, inconsistent with prior penalties, unreasonable in the circumstances, and unfair in its magnitude. In particular, Cassiar says the Respondent relied on information associated with irrelevant harvest areas unassociated with the alleged contraventions and considered data and calculations that were not made available to Cassiar prior to the Decision being issued. Cassiar also argues that some of this data and information was also irrelevant.

The Applications

[25] In May 2023, the Respondent filed an application with the Commission, requesting that the Companies be ordered to produce eleven classes of documents within their possession or control and which were not previously provided to the Respondent.

[26] In July 2023, Cassiar filed an application with the Commission, requesting that the Respondent be ordered to produce a class of documents not previously provided to Cassiar.

[27] Both applications followed requests, by the respective parties, for voluntary production of documents from the other parties named in the requests.

[28] The Commission is able to order the production of documents through authority vested with it by section 34(1)(b) of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 (the "*ATA*").

ISSUE(S)

[29] The issue in this preliminary decision is whether the Commission should order:

- the Companies to provide to the Respondent any or all of the eleven classes of documents sought by the Respondent; or
- the Respondent to provide to Cassiar any or all of the documents sought by Cassiar.

REASONS AND ANALYSIS

The Respondent's Application

The Respondent's initial application

[30] The Respondent requests an order that each of the Companies be required to produce to the Respondent all documents within their possession or control which fall within eleven categories:

1) in respect of the Cutting Permits, all records (including notes, spreadsheets, ledgers, correspondence with contractors, correspondence with Indigenous Nations, and administrative documents in cutting files) documenting why and when Cassiar chose not to:
    - proceed with all road building and other development for which it had reported cost estimates to the Ministry in its original appraisal data submissions for the Cutting Permits, and
    - harvest areas of standing timber that subsequently became the subject of Ministry initiated waste assessments;
    - and specifically including all versions of site plan documents and logging plans, and any other working files related to the formulation of logging and road-building plans for the associated cut blocks (the "Cut Blocks"), including any records showing changes to plans and instructions over time;
2) records showing any alleged additional actual costs incurred by Cassiar as a result of changing its logging and development plans in the manner that led to the Ministry-initiated changed circumstance reappraisals in 2020;
3) all cruise compilations that Cassiar and its consultants generated with respect to the Cut Blocks other than those it submitted to the Ministry's Electronic Commerce Appraisal System;
4) raw cruise data collected in the field (also referred to as "cruise plot cards");
5) all additional versions of cruise plans for the Cut Blocks, beyond those already submitted to the Province, including any records of cruise plans associated with alternative cruise grids or blanket cruises that Cassiar, its consultants, and its subcontractors may have used or performed on the Cut Blocks;
6) records documenting any stumpage scenarios that Cassiar, or its consultants or subcontractors, ran in software systems to determine stumpage impacts of different options and configurations of logging and development;

7) contractor invoices for logging and development on the Cut Blocks;

8) records of all communications, including internal communications, communications between Cassiar and its consultants, and communications between the consultants and other consultants or subcontractors performing work on the Cut Blocks), related to:

    - the scope of logging and development on the Cut Blocks,
    - anticipated stumpage and waste liability,
    - stumpage management or optimization, and
    - tracking of harvested volumes for cut control purposes;

9) all log scale agreements and export agreements that Cassiar entered into in connection with timber harvested from the Cut Blocks (or, alternatively, all records referring to hemlock sales);

10) bucking specifications[3], bucking cards, log quality manuals, and any other similar records recording instructions or specifications with respect to the species and qualities of timber that Cassiar or its consultants instructed to be cut and removed from the Cut Blocks; and,

11) all records containing analyses of profit estimates and the calculations used to derive those estimates, including return-to-log calculations, total chance plans, or logging profitability tests, with respect to the Cut Blocks.

[31] The Respondent argues that these documents are relevant, insofar as they will help to establish whether Cassiar:

- changed development or harvesting plans during the life of the Licence resulted from unanticipated external events, as it argues on appeal, or represented intentional stumpage rate suppression at the outset (document classes 1 and 8);
- experienced unexpectedly high development costs relative to what was projected for the purposes of setting the stumpage rate (document classes 2 and 7);
- used different cruise data sets and/or stumpage scenarios to determine the ideal configuration of timber for the purposes of reducing stumpage during the setting of the stumpage rate (document classes 3 through 6, inclusive);

[3] "Bucking" is the process of cutting felled timber into logs.

- ever had plans to harvest or sell low-value hemlock that was included in the initial setting of the stumpage rate (document classes 9 and 10); and
- planned the economics of its harvesting operations based on not harvesting low-value hemlock or constructing the appraised developments (document class 11).

[32] The Respondent says that, after he asked Cassiar to voluntarily produce documents identified above, Cassiar responded that the Commission could not order it to do so, given that it is the appellant. The Respondent says that Cassiar is not entitled to documents on a different basis than the Appellant is under section 34(3)(b) of the *ATA*. The Respondent says the right to access relevant and admissible documents should be symmetrical between the parties.

[33] The Respondent describes his requested document production as directly relevant to key issues under appeal, as reasonable, and as proportionate. He says that to deny this application to compel document production would be to deny the Respondent the ability to test the veracity and reliability of central factual assertions that have been raised on appeal. The Respondent says he cannot meaningfully cross-examine the witnesses of Cassiar and Fortec without the requested documents, and this would impair the fact-finding function of the Commission.

[34] The Respondent also responded to what he characterized as the Appellant's position during discussions around an earlier request for voluntary production of the documents now sought by the Respondent. I note Fortec adopted the same objections to voluntary production of documents as Cassiar made, and Brinkman did not respond to the voluntary production request of the Respondent.

[35] First, the Respondent notes that the hearing in this case will be a hearing *de novo*, as it is scheduled to take place over 10 days and involve testimony from several witnesses, including those that will be put forward as experts. Thus, it is contemplated that any party may present further evidence in addition to what was provided at the OTBH.

[36] Second, the Respondent argues that any assertion of a right against self-incrimination is wholly misplaced. The Respondent says that such a right is granted under section 11 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") as a protection in cases involving the prosecution of offenses or a "true penal consequence." Additionally, the Respondent says that section 7 of the *Charter*, which provides for "life, liberty and security of the person" does not apply to corporate entities like Cassiar and does not apply to purely economic interests.

[37] The Respondent argues that both parties are, rather, entitled to procedural fairness, including the right to meaningfully cross-examine the witnesses of the party, informed through pre-hearing document production. Further, the Respondent referenced

two instances in which the Commission has ordered both appellants and respondents to produce documents for one another.[4]

[38] Third, the Respondent says that the existence of record-inspection powers under the *Forest Act* does not displace the ability to request orders for the production of documents under the *ATA*. The Respondent argues these powers can be exercised on different scopes of documents and are for different purposes.

[39] The Respondent argues that, as required for document production processes under the *ATA*, the documents are potentially relevant to the issues described in Cassiar's notice of appeal, are admissible to the Commission, and are likely within the care or control of the Companies.

Cassiar's Position

[40] Cassiar describes the Respondent's application as an impermissible attempt to extend document inspection powers conferred on the Province in forestry legislation into a civil standard of document production. Cassiar says the Respondent's application is an inappropriate attempt to buttress the case it made at the OTBH. Alternatively, Cassiar argues the Respondent has not established the relevance of the documents it wishes the Companies to produce. Cassiar describes the Respondent's request as a "fishing expedition."

[41] Cassiar says that it would undermine the Respondent's burden of proof if Cassiar were required to hand over all documents that the Respondent hopes will support the assertions it makes on appeal. In support of this argument, Cassiar relies on a labour arbitration award from Ontario: *Central Park Lodges and S.E.I.U., Loc. 210*, 2001 CanLII 62023 ("*Central Park*").

[42] Cassiar notes that the Province has significant powers of document inspection with respect to forestry operations.[5] Cassiar says the Respondent had the opportunity to inspect its records before the OTBH, and to broaden that power on appeal would be an abuse of power and a violation of the rule of law by allowing a statutory decision-maker to expand beyond the powers conferred upon them by law.

[43] Cassiar also argues that this is contrary to the presumption of coherence, which assumes that the provisions of legislation are meant to work together as a whole, in a rational and internally consistent framework. Additionally, because the framework has a purpose, the parts are assumed to work together dynamically, toward that purpose. This presumption also dictates that the whole body of legislation enacted by a legislature is

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[4] Specifically, *Robert Unger v. Government of British Columbia*, 2013 BCFAC 2 (CanLII)(*Unger*) and in an unpublished decision (*Canfor*), written by then-Chair of the Commission, Alan Andison, on September 11, 2014, and attached to the Respondent's submission.

[5] See sections 59(2), 59(4), 61(1) and 62(2) of the *Act*.

presumed to not contain contradictions or inconsistencies, such that each provision is capable of operating without coming into conflict with any other.[6]

[44] Cassiar argues that this presumption would be violated if the Respondent were allowed access to broader rights to document production than were available to it through forestry-related legislation. According to Canfor, this would contradict the province's desire for the Respondent to have particular document inspection and copying powers granted under forestry-related legislation.

[45] Cassiar also relies upon a recent decision of the Environmental Protection Tribunal of Canada (the "EPT"): *BGIS O&M Solutions Inc. v. Canada (Environment and Climate Change)*, 2021 EPTC 9 (CanLII) ("*BGIS*"). That decision relates to an appeal from a decision by the Canadian Minister the Environment and Climate Change Canada, issuing a notice of violation and an administrative monetary penalty. These are both done with authority granted under the *Environmental Violations Administrative Monetary Penalties Act*, S.C. 2009, c. 14, s. 126 (the "*EVAMPA*").

[46] Section 10(1) of the *EVAMPA* says that, in order to impose a notice of violation, the decision-maker must believe on "… reasonable grounds that a person, ship or vessel has committed a violation …" as defined in the regulation.

[47] According to Cassiar, the circumstances in *BGIS* are similar to those in the present case. Both involve *de novo* appeals. Panels of the EPT, like the Commission, can issue summons to witnesses and order the witness to produce documents or things that the panel considers necessary to decide the appeal. The EPT's rules allow the EPT to require any person to provide information, documents, or other things it considers necessary to "… obtain a full and satisfactory understanding of the subject matter …" of the appeal.

[48] Furthermore, Cassiar says that the respondent in *BGIS* had the opportunity to gather information and documents from the appellant, while investigating and before issuing a notice of violation. The appellant in that case argued that the respondent of that case was inappropriately seeking to bolster its decisions to issue the notice of violation, the monetary penalty, or both.

[49] The EPT decided in *BGIS* that the requirement for the decision-maker to have "reasonable grounds" for believing that a violation had occurred required information-gathering steps to be taken before issuing a notice of violation or associated monetary penalty. Such investigations include the power to order production of documents, as set out in *EVAMPA* and at least one other piece of legislation.[7] The EPT stated that "… that power should qualify and power the [EPT] has which the Minister may seek to use to achieve the same ends, given that the Minister is obliged in any event to develop

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[6] As described in both *The Construction of Statutes, 7th ed.* (Toronto: LexisNexis Canada, 2022) and *Friends of the Oldman River Society v. Canada (Minister of Transport)*, 1992 CanLII 110 (SCC).

[7] The *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33.

'reasonable grounds' before a Request for Review is made." The EPT ruled that any request by the Minister for documents which existed when the notice of violation was created should accordingly be subject to an "appropriately demanding standard" and to "additional limitations." Specifically, the Minister should be required to show that they made reasonable efforts to obtain the identified information before asking the Tribunal to exercise its power to order the production of documents.[8]

[50] Cassiar says that to grant the Respondent's request for an order requiring document production would allow the Province to reopen its investigation, eliminate the incentive for the Province to properly investigate before the OTBH, and defeat the purpose of the OTBH process. Cassiar says it is impermissible for the Province to, after proceeding with an OTBH, use the Commission's broad power to require document production, years later, and shore up its case or recruit Cassiar to assist in the Province's investigation.

[51] Cassiar adds that granting the Respondent's request would be procedurally unfair and would violate the rules of natural justice. Cassiar references *Prassad v. Canada (Minister of Employment and Immigration)*, [1989] 1 S.C.R. 560, [1989] 1 R.C.S. 560, to say that the Commission, while master of its own procedure within the rules established under statute or regulation, must also comply with rules of fairness and, when "… exercising judicial or quasi-judicial functions, the rules of natural justice."[9]

[52] Turning to the Respondent's submissions, Cassiar argues that *Unger* can be distinguished as it involves a request for document production from, and not to, the Province. Furthermore, it was based on different legislation, now repealed, which granted to the Commission the same power the Supreme Court of British Columbia had to order the production of documents in civil actions.

[53] Cassiar argues the same, broader power to order document production existed in *Canfor*. Furthermore, Cassiar notes that the case in *Canfor* related to the calculation of a stumpage rate. Specifically, the appellant (Canadian Forest Products Ltd.) had argued certain landing sites were not suitable for the purposes of stumpage rate calculations, and argued the calculated stumpage rates were in error as a result. According to Cassiar, "Canfor had the burden to prove the positive assertions it made that the landing sites were not suitable and that the stumpage determinations were in error on that basis." Cassiar further argues that the Commission has recently clarified that appellants need not prove all issues, including to disprove any contraventions.[10]

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[8] *BGIS*, at para. 55.

[9] See page 569.

[10] See *Lone Prairie Livestock Association v. Government of British Columbia*, 2023 BCFAC 1 [*Lone Prairie*], at para. 55–58.

[54] Finally, Cassiar says that any voluntary document production processes, whereby parties agree to provide the Province with certain documents in their possession or control, does not assist in deciding whether the Commission should order the production of documents in this case.

[55] With respect to the Respondent's submissions on procedural fairness, Cassiar responds that procedural fairness is provided where an administrative decision "… affects 'the rights, privileges or interests of an individual.'"[11] Cassiar argues that the Crown is not an individual and advances the public interest, not a private interest that gives rise to a right to procedural fairness.[12] As a result, in this case, Cassiar argues that the Respondent's concerns about fairness should not sway the Commission, and any concern about reasonableness or proportionality in document production should not be afforded weight as those are not qualities that are relevant to a request for an order compelling document production from the Province.

[56] Alternatively, Cassiar argues that the eleven classes of documents are not relevant (a point which Cassiar says it never conceded). Cassiar says that, in assessing the breadth of documents requested by the Respondent, one should consider the "restrictive wording" contained in section 34(3)(b) of the *ATA*: that documents must be relevant and admissible in an appeal. This is in contrast with the wording governing document production during civil matters in the B.C. Supreme Court, which allow the Court to order the production of any documents "…relating to any matter in question in the action."

[57] Further, Cassiar references *Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Association*, 1993 CanLII 31 (SCC), [1993] 3 S.C.R. 724 ("*CP Air Lines*"). This case considers a decision by the Canada Labour Relations Board (the "CLRB") to order the production of documents as part of its "investigative/administrative role." In that case, the CLRB had ordered the production of documents to obtain information from various employers (respondents), who later sought judicial review of those orders.

[58] At page 738, the Court noted that the CLRB's power it used to compel document production is coercive, as it allows enforcement by registration with the Federal Court as though decisions made under that provision were judgments of the Court. The Supreme Court of Canada noted that this is not a power inherent to administrative law bodies but is rather an exceptional one conferred through legislation. As a result, "special attention" must be paid to the limits of the power, as described in the legislation.

[59] In this case, Cassiar relies on *CP Air Lines* to say that special attention must be paid to the requirement that documents must be relevant for the Commission to order their

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[11] *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), quoting from *Cardinal v. Director of Kent Institution*, 1985 CanLII 23 (SCC) ("*Baker*").

[12] *Kachkar (Re)*, 2014 ONCA 50 (CanLII), at para. 40–46 ("*Kachkar*").

production. In appeals, relevance is determined with reference to the points raised in the appellants' statements of points.

[60] Cassiar says that because the Respondent cannot appeal his own decision, he cannot bring additional issues into the scope of the appeal beyond those advanced by Cassiar. Cassiar argues that the Respondent's request for document production amounts to a "fishing expedition" that would capture an inappropriate number of documents under a vague assertion that those documents may be relevant to the issues advanced by Cassiar in this appeal. Furthermore, Cassiar says that the Respondent placed these issues under appeal by including them as relevant factors to consider in determining the appropriate monetary penalty imposed in the Decision.

[61] Addressing the Respondent's eleven classes of documents specifically, Cassiar argues specifically that the Respondent's request for documents:

- is overbroad (classes 1 and 8);
- pertains to an issue that Cassiar has not put in issue (all classes of documents);
- is based on speculation or an inadequately explained rationale that relevant information will be produced (classes 3 through 8, inclusive, as well as 11); and
- is irrelevant (classes 3, 4, 5, 8, 9, and 10).

Fortec's position

[62] Fortec argues that the Respondent's request for documents is improper, as the documents requested are irrelevant to the grounds of appeal advanced by Cassiar. Fortec says that, based on the wording in section 34(3)(b) of the *ATA*, the Commission cannot order the production of those documents.

[63] Fortec says that even if the appeal proceeds by way of a new hearing (which it argues is not the default proposition), the Commission may not expand the scope of relevance beyond the issues advanced by Cassiar.

[64] Fortec also argues that some information provided by the Respondent is unsupported by the evidence and is inappropriate for the purposes of this application.

The Respondent's Reply

[65] The Respondent replies that it is incompatible with the legislated appeal scheme that he should bear the burden of proving contraventions in his role as respondent. He also argues that this is incompatible with the authority on the subject across a range of contexts.

[66] The Respondent, starting from first principles, asserts the burden of proof may be established by legislation, but otherwise there is no "set formula" for allocating the burden. While one formula suggests that it may lie with whomever affirmatively asserts an

issue, some issues may be framed negatively or positively. Furthermore, some questions may require a party to prove a negative (the lack of consent in assault prosecutions, for example). Accordingly, the idea that the one who affirmatively asserts an issue should bear the burden of proof should be considered "… a guide for determining the incidence of a burden rather than as a rule of construction." The assignment of the burden is based on considerations of policy, fairness, and probability.[13]

[67] In the administrative law context, the Respondent notes that there is a common law principle that the party making an assertion must prove it, and that this is the case even where there are hearings *de novo*.[14] The Respondent also notes, in tax cases (which he argues is similar to stumpage as it is a self-reporting scheme), an initial burden of proof lies with an appellant to show faulty assumptions on the part of the assessor of the tax, then shifts to the respondent to show that the tax assessment is valid, despite any faulty assumptions.[15]

[68] The Respondent also argues, referencing an Ontario tribunal decision respecting workers' compensation,[16] that not having the burden of proof on the appellant would require the respondent to prepare to address every legal basis on which a decision is premised and all aspects of the evidence. The Respondent says that fairness requires that any respondent know how to properly and efficiently tailor its response to the appeal.

[69] The Respondent says that the Commission has generally followed this practice of having the Appellant bear the burden of proof, referencing a number of prior decisions.[17] The Respondent also refers specifically to *Apollo Forest Products Ltd. v. Government of British Columbia*, 2018 BCFAC 3 (CanLII) ("*Apollo*"), in which the appellant appealed a determination that they had contravened a requirement to submit "complete and accurate" cruise data to allow the calculation of a stumpage rate. The Commission stated, at paragraph 268, that it was not unfair for an appellant to bear the burden of proving that cruise information it had submitted to the government was accurate at the time it was submitted, or that some statutory defense applied.

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[13] See Sidney N. Lederman, Michelle K. Fuerst and Hamish C. Stewart, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada,* 6th Ed. (Toronto: LexisNexis, 2022), specifically at paragraphs 3.8, 3.13, 3.14, 3.24, 3.27, 3.74, and 3.82.

[14] See *Nova Scotia (Director of Assessment) v. Knickle*, 2007 NSCA 104 (CanLII) ("*Knickle*").

[15] See *Northland Properties Corporation v. British Columbia*, 2010 BCCA 117, at para. 10.

[16] *Decision. 362/20*, 2020 ONWSIAT 1713 (CanLII).

[17] *Abitibi-Consolidated Company of Canada v. Government of British Columbia*, 2004 BCFAC 22 (CanLII)("*Abitibi*"); *Reierson*; *Kalesnikoff Lumber Co. Ltd. v. Government of British Columbia*, 2007 BCFAC 16 (CanLII) ("*Kalesnikoff 2")*; *Ryan Bowes v. Government of British Columbia*, 2007 BCFAC 17 (CanLII)("*Bowes*"); and *Atco Wood Products Ltd. v. Government of British Columbia*, 2012 BCFAC 2 (CanLII).

[70] The Respondent conceded that some of the Commission's decisions involved a shifting of the burden of proof to the respondent in those cases on certain issues. The Respondent referenced *Allan Therrien v. Government of British Columbia*, 2002 BCFAC 10 (CanLII) ("*Therrien*") and *Kalesnikoff 2*, where a contravention was to be proven by the respondent.

[71] The Respondent notes that the burden of proof lies with the one asserting a fact even in situations where a driver is issued a roadside driver prohibition for failing a blood alcohol screening device measurement or refusing to provide a breath sample for such a device. The BC Court of Appeal has noted that the assignment of a burden of proof does not mean there is any presumption in favour of the evidence from the respondent.[18]

[72] The Respondent urged caution in relying on *Lone Prairie* for the proposition that the respondent should bear the burden of proof. He argues that the burden of proof did not need to be decided in that case, as the panel decided the appeal based on the evidence available. Furthermore, that appeal involved a question of who started a wildfire, and the Commission could have framed the issue as the appellant asserting that none of its members started the wildfire, contrary to the decision under appeal, rather than the respondent asserting that one of the members had. This would not have altered the outcome and would have been consistent with the appellant having to lead evidence first and asserting that the decision under appeal was made in error. The Respondent says that the panel in that case recognized that if the appellant in that case had not presented evidence, the decision under appeal would not have been confirmed.

[73] The Respondent argues that the Commission could have similarly framed the issue advanced by the appellant in *Apollo* either negatively or positively, without affecting the outcome. Considering the mirror-image formulations of issues does not advance the analysis, in the Respondent's view.

[74] The Respondent also says that *BGIS* can be distinguished because it involved a first-instance hearing, where a review of an enforcement officer's notice of violation is heard for the first time. Under the *Act*, the OTBH process separates the investigative phase from the decision-making which leads to an appeal to the Commission. The Respondent argues that placing the burden of proof on the enforcement officer under the federal scheme makes sense in that context, whereas in an appeal under the *Act* the appeal is a second-level hearing and so a different burden of proof is appropriate.

[75] Furthermore, the authority by which the EPT can order the production of documents extends to those that are "necessary for the purpose of the review." Such a necessity requirement is not present in the *ATA*, which only requires that the documents be relevant, admissible, and within the possession and control of the subject of an order.

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[18] See *Lemieux v. British Columbia (Superintendent of Motor Vehicles)*, 2019 BCCA 230, leave to appeal refused in 2020 CanLII 25170 (SCC).

[76] Additionally, the monetary penalty provisions under the *EVAMPA* are relatively modest compared to those available under the *Act*, as *EVAMPA* was intended to deal with relatively minor offenses and modest penalty amounts.[19] This all gives meaning to the decision, by the legislature, to require an OTBH process.

[77] The Respondent also noted that *BGIS* was written by an "administrative-law academic", providing a novel analysis in its particular statutory context. The Respondent adds that courts had yet to weigh in on this analysis, and that *BGIS* was a relatively recent decision from a fairly new tribunal, dating back to 2019.

[78] Furthermore, the Respondent argues, imposing the burden of proof on Cassiar does not deprive it of the right to a meaningful appeal. The appeal will be decided on the available evidence. Accordingly, the consideration of policy, fairness, and probability favour that the appellant should bear the burden of proof.

[79] The Respondent says, in any event, that the burden of proof is irrelevant to this application. The issue is whether the Province is entitled to document production. Even if the Respondent bears the burden of proof, there is nothing inconsistent with it having the right to access documents so that it may meet that burden; in fact, this burden only heightens the requirement that the party bearing the onus have reciprocal document production. The purpose behind document production is, fundamentally, truth-finding.

[80] Furthermore, the Respondent says that a plain reading of the *ATA* does not support Cassiar's position, which is at its heart an assertion that it cannot be compelled to provide evidence before the Commission. If the legislature had intended to provide an appellant immunity from giving evidence to the Commission, it would have said as much in the *ATA* (as the Parliament of Canada did, for example, in the *Aeronautics Act*, R.S. 1985, c. A-2). The Respondent says that, while a statute may be "read down" to narrow its scope so that what is implicit in the legislative text can be made explicit, Cassiar seeks a more expansive interpretation of the *ATA*, as this document production power is shared with other administrative tribunals in British Columbia. Cassiar's position amounts to a request that the Commission unacceptably rewrite section 34(3)(b) of the *ATA* by the Commission.

[81] Additionally, the Respondent argues, administrative penalty proceedings, being civil matters, do not attract the same protections for appellants as do alternative streams of offence proceedings, which are quasi-criminal. The Respondent also says that *Central Park* is not a persuasive authority, describing it as "… an obscure and dated decision of a

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[19] The Respondent referenced "Bill C-16, An Act to amend certain Acts that relate to the environment and to enact provisions respecting the enforcement of certain Acts that relate to the environment", 2nd reading, *House of Commons Debates*, 40-2, No. 31 (March 23, 2009) at 1745 (Mr. Mark Warawa (Parliamentary Secretary to the Minister of the Environment, CPC)) and House of Commons, Standing Committee on Environmental and Sustainable Development, *Evidence*, 40-2, No. 11 (March 26, 2009) at 0915 (Mrs. Cynthia White (Acting Assistant Deputy Minister, Environmental Stewardship Branch, Department of the Environment)).

labour arbitrator in Ontario decided over 20 years ago ….” The Respondent points out that even subsequent labour arbitration cases in Ontario have not followed suit.[20]

[82] The Respondent also says that the implications of Cassiar’s position are extraordinary and are reason to not adopt their position. Specifically:

- if a respondent is unable to buttress its case through document production, logically it should also be precluded from introducing new evidence, such as expert reports (which respondents regularly introduce in appeals before the Commission);
- the OTBH process can be rendered meaningless by requiring a respondent to re-prove all the factual elements of the infractions on appeal;
- the Province would be denied the very procedural safeguards required for it to satisfy the burden of proof; and
- the appellant is afforded an immunity from providing information in the appeal, despite the fact that there is no basis in legislation and no applicability of sections 7 and 11 of the *Charter* to justify that immunity.

[83] The Respondent also argues that Cassiar misinterprets *Kachkar*. According to the Respondent, the comments about the Crown not being entitled to procedural fairness were made in *obiter* and were also restricted to the specific legislative context at issue in that case: section 672.54 of the *Criminal Code*, R.S.C. 1985, c. C-46. That section specifically balances the needs and interests of an accused against “the safety of the public.” The Respondent says the analysis from *Kachkar* has not been generalized beyond its specific statutory context, but notes that trial fairness in criminal proceedings include “… the public interest in fairness to the prosecution and its witnesses.”[21] The Respondent also says there is no principled reason to deny a government actor procedural fairness, referencing a critique of that aspect of the case: Anton Dantowitz, “*Re Kachkar: Is the Public Interest Entitled to Procedural Fairness?*” (March 2015) 28 Can. J. Admin. L. & Prac. 99 at 103–104.

[84] The Respondent adds that the criminal law context is different from the administrative law context, as “… a judge’s deviation from joint submissions in the criminal context (e.g., in relation to sentencing) attracts a specialized analysis that the Supreme Court of Canada has chosen to frame in terms apart from procedural fairness.”[22]

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[20] See *Toronto District School Board and C.U.P.E., Loc. 4400 (2001-B-01)*, 2002 CanLII 79047 (ON LA), *Kaiser Aluminum & Chemical of Canada Ltd. v. United Steelworkers of America, Local 4885*, 2004 CanLII 66487 (ON LA), and *Board of Governors of Laurentian University v. Laurentian University Faculty Association*, 2011 CanLII 8978 (ON LA).

[21] See *R. v. Rutigliano*, 2013 ONSC 2514, at 13. Also see *R. v. Corbett*, 1998 CanLII 80 (SCC), at para. 165.

[22] The Respondent references *R. v. Nahanee*, 2022 SCC 37, at para. 51–61, in support of that position.

[85] Regardless, the Respondent says that a cursory review of case law establishes that government actors representing the public interest are afforded procedural fairness within multi-level administrative decision-making processes.[23]

[86] The Respondent disagrees with Cassiar that *Unger* and *Canfor* could be distinguished on the basis of the applicable legislation. The Respondent notes that the Commission was empowered to order document production under the *ATA* when the *Act* was amended along with 43 other statutes to grant the same power to various provincial tribunals. The Respondent references introductory language from the legislative assembly during the second reading of the legislation that amended those statutes[24] to support that there was no professed intention to change the powers of the Commission, but rather the intention was to allow clustering and modernization of tribunals, resulting in administrative efficiencies and access to justice, and to allow the imposition of reporting requirements on tribunals, through regulation.

[87] The Respondent says the changed language authorizing the Commission to order the production of documents is merely a change in wording, with no practical change. The current language, which requires that documents be in the possession or control of a person, relevant to an issue in an appeal, and admissible to the Commission, is unchanged from the previous wording.

[88] That wording allows the Commission to order document production with the same power as the Supreme Court of British Columbia. The Respondent says that rules 7-1(11) and 7-1(14) from the *Supreme Court Civil Rules* provide detail on the extent of that power. Those rules require that the documents relate to "any or all matters in question in the action," which the Respondent says raises the same question of relevance. Additionally, the Respondent notes the Board determines relevance with reference to the same legal test as the Supreme Court.[25]

[89] The Respondent adds that appeals before the Commission are distinct from the OTBH process. In addition to being based on different evidence, appeals often include new expert opinions (including that which is put forward by respondents). Such evidence has even been introduced to cure procedural defects in the process preceding the

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[23] See, for example, *British Columbia (Minister of Forests, Lands and Natural Resource Operations) v. Western Forest Products Inc.*, 2016 BCCA 80 (CanLII) ("*Western Forest*"), affirming 2014 BCSC 2192 (CanLII); *Knickle*, at para. 39–40; and *Ishankova v. Chief Animal Welfare Inspector*, 2023 ONACRB36, at para. 27–38 (CanLII).

[24] "Bill 18, Administrative Tribunals Statutes Amendment Act, 2015", 2nd reading, Official Report of Debates of the Legislative Assembly, Vol. 22, No. 3 (March 24, 2015) at 6860–6861 (Hon. S. Anton).

[25] See *Tolko Industries Ltd. v. Government of British Columbia*, 2020 BCFAC 5 (CanLII), *J. Sarver Trucking Ltd. v. Government of British Columbia*, 2020 BCFAC 4, and *Global Pacific Concepts Inc. v. Strata Plan NW 141*, 2011 BCSC 1752 (CanLII), at para. 9.

appeal.[26] The Respondent argues that Cassiar is not seeking fairness but rather the impairment of the Commission's truth-finding function and diminishment of its role.

[90] The Respondent asks, if the Commission limits document production as urged by Cassiar, for permission to provide evidence of the evidentiary efforts the Province made in this case, and practical difficulties and safety concerns related to the use of the entry and inspection powers in sections 59 and 61 of the *Act*. The Respondent notes that a requirement to demonstrate adequacy of investigation is not referred to in the Commission's rules or in its *Practice and Procedure Manual*. The Respondent also specifically denies conceding that sections 59 and 61 of the *Act* could never have authorized the inspection of any documents that are the subject of his application.

[91] The Respondent says the "fishing expedition" analogy is unhelpful and ought not to be used. In processes like appeals before the Commission, where pre-hearing document production is available only to the extent requested by parties, an effective request must be framed in terms of categories of documents. The Respondent denies that its request is overly broad and describes Cassiar's characterization of his request as hyperbolic.

[92] The Respondent says that some of Cassiar's other concerns—those related to the lack of procedural fairness owed to government actors and to the burden of proof—have already been addressed. The true question of relevance is whether a document may enable a party to advance their own case, damage the opposing case, or to lead that party on a train of inquiry that leads to either consequence.[27] In this case, the Respondent says the requested documents may assist him to test the evidence of Cassiar's witnesses as to the intentionality of the contraventions at issue in the appeal. The Respondent says the documents requested are as limited as possible to satisfy that objective.

[93] The Respondent adds that relevance may be restricted or expanded based on proportionality, as discussed in *Edwards v. Ganzer*, 2012 BCSC 138 (CanLII), at para. 41(g). Lastly, the Respondent says Cassiar has not argued that the production of requested documents would impose an undue burden or be disproportionate. The Respondent says he is open to working with Cassiar on logistics to mitigate the effort and expense involve in making documents available to him.

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[26] See, for example, *O'Brien and Fuerst Logging Ltd. v. Government of British Columbia*, 2019 BCFAC 5 (CanLII)("*O'Brien*"), at para. 74, *Burns Lake Community Forest Ltd. v. Government of British Columbia*, 2022 BCFAC 2 (CanLII)("*Burns Lake*"), at para. 182, and *Madeline Oker v. Government of British Columbia*, 2017 BCFAC 2 (CanLII)("*Oker*"), at para. 34.

[27] The Respondent references *Global Pacific Concepts Inc. v. Owners of Strata Plan NW 141*, 2011 BCSC 1752 (CanLII), at para. 9, in support of this argument.

Cassiar's sur-reply

[94] Cassiar argued that the Respondent's reply in his application exceeds its proper scope because it denies Cassiar the opportunity to respond to all arguments, including by splitting his case, and re-argues his initial submissions. Cassiar says it is telling that the Respondent's reply submissions were longer than its initial submissions and that the length of submissions on specific issues were also longer in reply than they were in the initial application.

[95] In particular, Cassiar says that the Respondent improperly re-argued the question of the applicable burden of proof by re-referencing authorities from its earlier submissions and by raising twelve new authorities (some of which Cassiar says do not support the Respondent's position).

[96] With respect to the burden of proof, Cassiar argues that *R. v. Sault Ste. Marie*, 1978 CanLII 11 (SCC), establishes that, for strict liability offenses, the Crown must provide the accused committed the prohibited act. Only afterward does the burden of proof shift to the accused to prove a defense of due diligence or mistake of fact.

[97] Cassiar also distinguishes prior Commission decisions referenced by the Respondent. First, *Abitibi* did not involve a contravention proceeding. Second, *Therrien* and *Kalesnikoff Lumber Co. Ltd. v. Government of British Columbia*, 2006 BCFAC 15 (CanLII), found that the respondent in that case bore the burden of proof in appeals. Third, the Commission held in *Edward William Reierson v. Government of British Columbia*, 2006 BCFAC 20 (CanLII) ("*Reierson*"), that the respondent in that case bore the burden of proving an unauthorized harvesting of trees before the appellant was required to show that the harvest was authorized. Fourth, the Commission held in *Bowes* that the Province was obliged to show that logs in the possession of the appellant in that case came from Crown land, before the burden shifted to the appellant to offer a credible explanation. Further, Cassiar references *Lone Prairie*, at paragraph 56, for the proposition that the burden of proof lies with the party that makes an affirmative assertion.

[98] Cassiar also says that cases from other legislative schemes (property value assessments, tax assessment appeals, and workers' compensation) may be distinguished because they do not involve a person defending themselves. Tax-payers bear the burden of proof under several legislative schemes because of the wording of that particular legislation (including, for example, the *Tobacco Tax Act*, R.S.B.C. 1996, c. 452; the *Income Tax Act*, R.S.B.C. 1996, c. 215; and the *Forest Act*, R.S.B.C. 1996, c. 157).

[99] Cassiar also notes that, at paragraph 17 of *Knickle*, the court stated that the Nova Scotia Utility and Review Board bore the burden of proof based on the language of its home statute and on "binding judicial precedent." Cassiar says that the Respondent did not identify any such precedent in this case and, furthermore, the statutory scheme at issue in *Knickle* gave the Province of Nova Scotia no statutory right of appeal, either to or from a decision of the Nova Scotia Utility and Review Board. For these reasons, *Knickle* can be distinguished from the present appeal. Furthermore, Cassiar notes that the statutory

regime at issue in *Lemieux* includes express language that clarifies and may alter the burden of proof, unlike the *Act* in this case.

[100] The Respondent did not seek to file any response to Cassiar's sur-reply.

The Panel's Findings

[101] The parties provided detailed submissions spanning a number of issues. I will provide my findings with respect to:

- the burden of proof and issues under appeal;
- rights to documents given the Respondent's statutory powers of document inspection;
- procedural rights and the right to procedural fairness in the context of the appeal process
- relevance concerns; and
- other concerns.

[102] Before entering into that analysis, however, I wish to address concerns over the submission process with respect to the Respondent's application. Cassiar argues that the Respondent's reply exceeded the proper scope for a reply because it denied Cassiar the opportunity to respond to all arguments and it re-argues points made in the Respondent's initial submissions.

[103] I consider that the Respondent's initial submissions demonstrated an intention to predict and respond to the concerns that he expected Cassiar would make based on the discussions between the parties as to whether Cassiar would voluntarily produce any documents. There were some elements of Cassiar's reply that the Respondent did not speak to in his initial submissions. Addressing unexpected submissions from Cassiar is not improper. I also recognize, however, that in reply submissions, the Respondent elaborated on arguments made in initial submissions in a way that was concerning for Cassiar.

[104] The Commission provided Cassiar the opportunity to provide a sur-reply, which it did. Cassiar had the opportunity to respond to all arguments addressed in both phases of the Respondent's submissions, including any circumstances in the reply submissions where the Respondent expanded upon or re-argued any of the reasoning contained in his initial submissions. I conclude that any fairness concerns arising from the Respondent's reply submissions have been addressed and Cassiar has had a complete opportunity to respond to the case put forward by the Respondent.

[105] I note that I do not consider the length of submissions or the amount of digital information they represent in electronic form to be relevant to my analysis. The appropriate scope of submissions and reply is decided by the content of the submissions and responses at issue.

[106] Finally, for the sake of simplicity, I have referred only to Cassiar's arguments in my reasoning. While Fortec also provided submissions, they lacked the detail contained in Cassiar's arguments and were more general reflections of some positions taken by Cassiar with respect to the Respondent's application. For clarity, I have considered those submissions in the reasoning below, even though I have only explicitly reproduced Cassiar's arguments.

The Burden of Proof and Issues Under Appeal

[107] The parties spent considerable effort in their submissions in discussing the applicable burden of proof in the appeal. However, I do not need to address that question when determining these applications. The requirements of production under section 34(3)(b) of the *ATA* are only that documents be admissible, relevant, and within the possession or control of a "party or another party" in the proceeding.

[108] What is important for the purposes of this appeal is what issues are under appeal. Appellants before the Commission define the issues under appeal, subject to any applicable orders by the Commission, including those stemming from applications for particulars or applications to strike specific issues. To the extent that any aspects of an appealed decision are not raised as an issue in an appeal, the Commission will not address them.

[109] The rights to document production are symmetrical as between the parties. The appellant is not entitled to one level of production and the respondent to another. For each, the test for relevance is the same; what is relevant and admissible for one party is relevant and admissible for the other. This enables each party to obtain the information it requires to advance its own case and to meet the case raised by its adversary.

[110] While Cassiar relied upon *Central Park* for the proposition that the Respondent should not be afforded the same rights to document production as Cassiar, I do not find *Central Park* to be helpful. *Central Park* considers an application for document production within the context of a grievance within a collective bargaining framework. The panel in *Central Park* describes the concern which gave rise to a limiting of document production at page 203, saying:

> I share the concern expressed by union counsel that the production process should not become a device to undermine the burden of proof placed on the employer to prove just cause in discipline cases. The grievance arbitration process does not require the employer to prove just cause prior to implementing discharge or discipline.

[111] The panel goes on to say, at page 204:

> The one feature of the arbitration process which stands out as the main protection for employees against unjust discipline and discharge and improper use of an employer's disciplinary powers is the arbitral principle

> which requires the employer to bear the burden of proof in discipline and discharge cases....

[112] In short, the concern addressed in *Central Park*—which resulted in delayed production, not denied production—is that the employer in that grievance arbitration system bears the burden of proof in discipline and discharge cases. As I have said, that is not the case here. In an appeal before the Commission, there is no requirement for the respondent to prove every aspect of the decision. Appellants must prove to the requisite standard the positive assertions they put forward in their pleadings. At times, the burden of proof may shift to respondents with respect to any positive assertions they make in the course of their submissions or as required in response to issues proven by appellants; however, the central concern in *Central Park* does not exist in appeals to the Commission.

[113] In this case, as the appellant in *Canfor* did in that case, Cassiar has made assertions in its pleadings. Specifically, Cassiar has argued that:

- the OTBH was procedurally unfair,
- Cassiar is entitled to the defense of due diligence,
- the Respondent was statute-barred because of the expiry of a time limit established in section 75 of the *Act*,
- Cathy Craig was inaccurately identified as an officer of Cassiar, and
- and the penalty was excessive because
    - the contraventions were not deliberate or intentional,
    - the alleged failure to submit some or all Appraisals did not benefit Cassiar, and
    - the alleged economic benefit and timber sale price estimates were both inaccurately estimated.

[114] It will be up to the panel that considers the merits of this appeal to decide whether Cassiar bears the burden of proof with respect to these issues.

[115] The Respondent may also make assertions of its own or may be required to respond to pleadings proven by Cassiar, for which it may bear the burden of proof. Again, the panel that decides the appeal on its merits will need to consider and address that question.

[116] While the parties dedicated significant effort to the question of burden of proof in this appeal, I have concluded that I do not need to answer it and I do not consider it appropriate to do so, given that I expect it will be a live issue when the appeal is decided on its merits. I have, however, reviewed and considered the arguments presented by all parties on this point.

[117] I have, however, concluded that the Respondent bears the burden of proof for its request for an order compelling Cassiar to produce documents. In assessing whether the Respondent satisfies that burden of proof, relevance will be assessed based on the issues put forward by Cassiar in its notice of appeal.

Rights to Documents and Statutory Powers of Document Inspection

[118] Cassiar has argued that the Respondent is not entitled to any document production because of the document inspection powers granted under the *Act*. I do not find this argument persuasive.

[119] It is irrelevant to this current appeal that the Respondent was able to order the production of documents under the *Act* in advance of the OTBH. The Commission generally holds hearings *de novo*, where, among other actions, the Appellant is free to present new and additional evidence and the Respondent is entitled to document disclosure and production in order to prepare a response to that evidence and to any arguments made before the Commission. The Commission's powers to order disclosure and production of documents are not limited or defined by the powers the government has in other statutes, for which appeal rights exist to the Commission.

[120] I note, furthermore, that the document inspection powers referenced by Cassiar (those found in sections 59 and 61 of the *Act*) are limited in scope. For example, under section 59, an official can enter land or premises that:

(a) has located on it timber that is required to be scaled or marked with a timber mark under the *Forest Act*,

(b) is the site of a forest or range practice that is regulated under the Acts or is carried on by a person who is required under the Acts to hold a licence or permit to carry out that practice,

(c) is the site of trading in botanical forest products, or

(d) [Repealed 2004-31-88.]

(e) is the site of an activity that under the Acts requires a licence, a permit, a plan or an approval.

[121] A "range practice" has meaning with respect to the *Range Act*, S.B.C. 2004, c. 71, and is not relevant to this application. A "forest practice" has a defined meaning in the *Act* and must take place on private land that is either subject to a tree farm licence, a community forest agreement, a woodlot licence, or is forest land owned by the Crown. Accordingly, if documents were held in a location that was not subject to any such authorization; was not the site of an activity that requires a licence, permit, plan, or approval; did not feature timber that was required to be scaled or mark; and was not a site for the trading in forest products, section 59 would not apply. For example, records housed in an office removed from forestry operations may not be subject to inspection powers under section 59.

[122] Section 61 of the *Act* allows the minister responsible for the *Act* to order production of "specified records that are related to an activity that requires a licence, a permit, a plan or an approval under the Acts or under [an] agreement [to which they are a party, under the *Act* or the *Forest Act*]." It would be entirely inappropriate for the Commission's ability to order document disclosure and production to be curtailed by the minister's discretion in the way suggested by Cassiar. The Commission controls its own process and must have the freedom to determine its own practices and procedures, both in general and in the circumstances of any given case, with respect to the disclosure and production of documents in advance of hearings.[28]

[123] Absent specific language to the contrary in the applicable legislation, there is insufficient reason to limit the rights of document disclosure and production under the Commission's practices or under the *ATA* simply because the Respondent has document inspection powers under the *Act*. I do not consider it appropriate to infer a relationship between these pieces of legislation because the purposes of the *ATA* (which empowers the Commission to make its rules and procedures, and to make decisions in the particular circumstances of any given case) and of the *Act* are different. Furthermore, even where both address the same factual circumstances, the questions addressed by the Commission in an appeal and the Government in an investigatory process that results in such an appeal may be different, given the *de novo* nature of proceedings typically brought before the Commission.

[124] Cassier also relied on *BGIS* in support of its argument that the Respondent's request for an order compelling document production should be denied because of the Respondent's authority, under the *Act*, to inspect documents. I do not find *BGIS* persuasive.

[125] The statutory context in which *BGIS* occurred was significant. As noted by the panel in *BGIS*, a statutory decision-maker who imposes a violation ticket under *EVAMPA* must have "reasonable grounds" to do so, such that the decision-maker must have a "solid contemporaneous basis" to issue a ticket.[29] Consequently, while the tribunal in that case had the ability to order the production of any documents it considered "necessary," it was appropriate for it to limit its use of that authority when the decision-maker requested production of documents pre-dating the investigation to satisfy the "reasonable grounds" requirement. It is also significant to me that in appeals under *EVAMPA*, the statutory decision-maker bears the burden of proof as a function of section 20(2) of *EVAMPA*.

[126] The statutory context in *BGIS* is not analogous to the statutory context involved in this appeal. As I have stated, the Respondent does not bear the burden of proof generally, but may be required to prove certain aspects of issues raised, depending on the issues raised by Cassiar. Furthermore, there is no "reasonable grounds" requirement in the *Act*.

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[28] See sections 11(1), 11(2)(c), 11(2)(d), 14, 34(1)(b), and 34(3)(b) of the *ATA*.

[29] See *BGIS*, at para. 10.

The Respondent had a limited power to inspect documents before holding the OTBH, as discussed above. Cassiar had an opportunity to present documents in the OTBH. The Respondent may ask the Commission to order production of relevant documents during an appeal process, not to retroactively shore up its case but to respond effectively to whatever issues are raised and defined by Cassiar in its pleadings, and to advance whatever issues the Respondent puts forward as part of the discussion of the issues raised in the pleadings.

[127] I acknowledge Cassiar's concern that the Respondent's request is inappropriately broad; however, that concern will be addressed through consideration of the relevance of the classes of documents sought. Relevance will be assessed based on issues advanced by Cassiar and any assertions made in response by the Respondent.

Procedural Rights and the Right to Fairness in this Appeal

[128] While the Respondent anticipated *Charter* arguments from Cassiar, Cassiar did not raise any such arguments. Rather, the Cassiar raised concerns with respect to procedural fairness. As noted by Cassiar, the Commission must exercise its procedure and rules in a way that is procedurally fair and accords with the rules of natural justice.

[129] Cassiar argues, based on *Baker*, that procedural fairness is owed only to individuals and not to the Respondent in his role as a statutory decision-maker. Cassiar references *Kachkar* to say that the Crown does not qualify as an individual and so does not benefit from a right to procedural fairness.

[130] It is important to recognize that, in *Kachkar*, the Crown appealed a decision made by the Ontario Review Board, granting some community access to an individual who had been found not criminally responsible for a crime because of a mental disorder. In *Kachklar*, the Ontario Court of Appeal notes, at paragraph 43, that the Crown did not:

> … purport to rely on a Crown right of privilege to trigger the duty of procedural fairness. Rather, the Attorney General argues that the Crown is owed procedural fairness because of its interest in ensuring as far as possible a board disposition that is least onerous and least restrictive to the respondent consistent with public safety.

[131] This appeal, by contrast, involves whether an administrative penalty is payable to the Crown and, if so, how large a penalty is appropriate. This includes consideration of whether Cassiar deprived the Crown of revenue by contravening the *Forest Act*. These circumstances are not analogous to the situation in *Kachkar*. Depending on the circumstances, the Crown may or may not advance an individual interest and so may or may not attract a duty of procedural fairness. In this case, as the appeal involves a penalty payable to the Crown which seeks, in part, to recover revenue that the Crown says it should have received, I am satisfied that the Crown is advancing a personal interest. The Crown is entitled to procedural fairness in this appeal. I note this is consistent with several authorities referenced by the Respondent, including *Western Forest*, which contemplates

the Government having a right to procedural fairness in the context of an appeal brought under the *Forest Act*.

[132] The right to procedural fairness grants the parties the right to know the case they must meet and to have a reasonable opportunity to present evidence and make submissions to both make their case and to challenge the cases of their adversaries. These rights include a right of access to documents that are relevant to the arguments being put forward by either side.

[133] While both parties referenced *Unger* and *Canfor*, I do not consider those decisions to be persuasive authorities on this issue or on any other dealt with in this preliminary decision. Neither decision offers sufficiently strong analysis on the issues put forward by the parties and, accordingly, I do not base the outcome of this preliminary decision on the analyses put forward within either of those prior decisions of the Commission.

Relevance Concerns

[134] As noted by Cassiar, the Commission has previously (including in *Tolko*) adopted the standard for relevance as expressed in *Louisiana-Pacific*. A document is relevant where it "… would be useful to the party seeking that information during the preparation and presentation of that party's case before the Commission."[30] Furthermore, as described in *Tolko*, the Commission has relied upon the test of relevance from paragraph 12 of *Fraser Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, 2002 BCCA 19, to assess this utility. That case specifies that a document is relevant where it "… directly or indirectly *may* enable the party to advance his own case or destroy that of his adversary or which may fairly lead the party to a train of inquiry or disclose evidence which may have either of these consequences."[31]

[135] The Commission must find that this test for relevance is satisfied by the party seeking production of documents before it can issue an order to that effect under the *ATA*. This is in keeping with comments from *CP Air Lines*, but I note that there is no "special attention" that is to be paid in this case: either a document is relevant, and so the Commission can order its production (if the other criteria from the *ATA* are met), or it is not, and the Commission cannot order its production.

[136] The burden rests with the applicant for document production, to establish the relevance of the documents (or classes of documents) sought. In this case, the Respondent seeks eleven classes of documents. Cassiar says none of these documents are relevant to the issues it has raised in this appeal. Cassiar says the Respondent has not adequately explained the relevance of many of these classes of documents.

[137] Before addressing the classes of documents, however, I note that the Respondent did not argue any of the eleven classes of documents he sought were relevant to Cassiar's claim that the OTBH was procedurally unfair, that the Respondent was statute-barred

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[30] *Louisiana-Pacific*, at para. 6.

[31] See paragraph 12, reproduced as written, with emphasis in the original.

from issuing a penalty because of the operation of section 75 of the *Act*, or that Cathy Craig had been misidentified as one of Cassiar's officers. As such, I will not refer to those issues any further while discussing the Respondent's application for an order compelling document production.

[138] I turn to consider the eleven classes of documents requested by the Respondent.

Class One

[139] The first class of documents sought is for all records related to the Cutting Permits, which document why and when Cassiar chose not to proceed with developments for which it had reported cost estimates to the Ministry in its original appraisal data submissions and to harvest areas of standing timber that subsequently became the subject of waste assessments by the Ministry.

[140] The Respondent says this class of documents will help to establish whether Cassiar sought to supress stumpage rates when submitting its initial timber harvesting estimates in support of obtaining the Cutting Permits or whether its timber harvesting plans changed during the lifespan of the Licence. In addition to arguing that the class of documents is irrelevant to the issues advanced in this appeal, Cassiar also asserts this class of documents is overbroad. Cassiar argues the Commission should not order its production in any event.

[141] I agree that the first portion of this first class of records (those which relate to when and why Cassiar chose not to proceed with developments for which it had reported cost estimates to the Ministry) may be relevant to establishing whether Cassiar had a legitimate reason to not proceed with certain developments. The contraventions and penalties at issue, however, are not related to whether or why Cassiar did not complete those developments. They relate to Cassiar's failure to submit Appraisals at all, or to submit Appraisals that accurately reflect the changed circumstances as compared to when Cassiar submitted development plans when applying for the Cutting Permits.

[142] The same issue arises when considering the second portion of the first class of records: those which document why and when Cassiar chose not to harvest areas of standing timber that subsequently became the subject of waste assessments by the Ministry. This appeal does not consider whether Cassiar did not harvest certain areas authorized for harvesting under the Cutting Permits, but rather Cassiar's failure to report—or to accurately report—the changed circumstances, whether its actions were duly diligent, and whether the amount of the penalty was properly assessed.

[143] I find that neither portion of the first class of records is likely to assist the Respondent in making his case or destroying the case put forward by Cassiar. The first class of documents does not have any apparent relevance to whether Cassiar was duly diligent in not filing accurate Appraisals, or whether the penalties imposed were excessive for any of the reasons described by Cassiar. The first class of documents relates to

operational decisions and to the extent of any strategy for harvesting timber under the Cutting Permits.

[144] While I appreciate that decision-making about what timber harvesting strategies would be employed under the Cutting Permits precedes decision-making about whether, how, and what to report in Appraisals and in waste reporting, the request for documents on the earlier harvesting decision-making is a broad request on a discrete issue. It is significant, in my view, that this requested class of documents is sought to provide information related to the timber harvesting strategy and not whether and how to report on whatever strategies were chosen. I do not consider the Respondent's submissions persuasive as to the relevance of this requested class of documents. Those submissions do not establish that information as to the decision-making process surrounding the timber harvesting strategy may, beyond a speculative basis, provide information on any of the issues in this appeal. The Respondent's request on this class is overbroad and focused on an issue that is not under appeal.

[145] The next question is whether the documents sought in this class might lead the Respondent to a train of inquiry which advance his case or destroy Cassiar's case. I conclude that it would be speculative to answer this question in the affirmative with respect to the first class of documents. There is an insufficient basis to conclude that documents giving information about when and why Cassiar engaged in any cost-cutting of development or selective harvesting (not contraventions at issue in this appeal) would lead to a train of inquiry that might reasonably be expected to describe why it allegedly failed to accurately report its changed circumstances or wastage (the contraventions at issue). My finding is the same with respect to the question of whether the requested documents would assist the Respondent to destroy Cassiar's case that any contraventions were not deliberate or intentional, as part of its argument in favour of a reduced penalty. There is similarly insufficient reason to conclude, beyond speculation, that the first class of documents would lead to a train of inquiry that may assist in the destruction of Cassiar's arguments that it was duly diligent despite the contraventions, that the contraventions did not benefit Cassiar, or that the economic benefit and timber sales prices were inaccurately estimated in this case.

[146] For these reasons, I deny the Respondent's request for an order compelling Cassiar to produce the first class of documents.

Class Two

[147] The second class of documents contains all records showing any alleged additional actual costs incurred by Cassiar as a result of changing its logging and development plans, and which led to the changed circumstance reappraisals in 2020. The Respondent says these documents are relevant because they will show whether Cassiar experienced unexpectedly high development costs relative to what was projected for the purposes of setting the stumpage rate.

[148] I find this class of records is relevant. Cassiar has argued that its failure to submit Appraisals was not to its own benefit. If the documents show that Cassiar's actual development expenditures were less than originally estimated, even with any alleged additional costs incurred as a result of its changed logging and development plans, this could assist the Respondent in establishing that Cassiar benefited from its non-reporting noncompliance. As a result, I order Cassiar to produce the second class of documents.

Class Three

[149] The third class of documents contains all cruise compilations that Cassiar and its consultants generated with respect to the Cut Blocks, other than those it submitted to the Ministry's Electronic Commerce Appraisal System. The Respondent says this class of documents is relevant because it may show whether Cassiar used different cruise data sets and/or stumpage scenarios to determine the ideal configuration of timber for the purposes of reducing stumpage during the setting of the stumpage rate.

[150] I do not find the Respondent's submissions on this point to be persuasive. As I have noted, Cassiar determining the ideal configuration of timber for the purposes of harvesting under the Cutting Permits is not in issue. It was not a contravention for it to do so. The various timber harvesting strategies Cassiar considered does not help to determine whether Cassiar had deliberately or intentionally not reported the different timber harvesting strategies it ultimately pursued in this case. For substantially the same rationale as for my denial of an order for production of the first class of documents, I find that the Respondent's request on this class is overbroad and is focused on an issue that is not under appeal.

[151] There may be other reasons why this class of documents could be relevant to the present appeal; however, the Respondent did not argue those reasons. It would not be appropriate for me to make the Respondent's case for him, so I constrain my analysis to the reasons provided by the Respondent. As such, I deny the Respondent's request for an order compelling production of the third class of documents.

Class Four

[152] The fourth class of documents contains all raw cruise data collected in the field. The Respondent says this class of documents is relevant because it may show whether Cassiar used different cruise data sets and/or stumpage scenarios to determine the ideal configuration of timber for the purposes of reducing stumpage during the setting of the stumpage rate.

[153] I find this class of documents to extend naturally form the third class of documents. This is the raw cruise data, whereas the preceding class consisted of cruise compilations. My reasoning in respect of this class of documents is the same as for the third class of documents. For the same reasons, I conclude that the reasons argued by the Respondent are insufficient to establish that the fourth class of documents are relevant to the issues in

this appeal. Additionally, for substantially the same rationale as for my denial of an order for production of the first class of documents, I find that the Respondent's request on this class is overbroad and is focused on an issue that is not under appeal. As a result, I deny the Respondent's request for an order compelling production of the fourth class of documents.

Class Five

[154] The fifth class of documents is comprised of all additional versions of cruise plans for the Cut Blocks, beyond those already submitted to the Province. The Respondent says this class of documents is relevant because it may show whether Cassiar used different cruise data sets and/or stumpage scenarios to determine the ideal configuration of timber for the purposes of reducing stumpage during the setting of the stumpage rate.

[155] My conclusion with respect to the fifth class of documents is similar to my conclusion on the previous two classes of documents. It is not an issue in this appeal whether Cassiar sought to decrease the costs associated with its timber harvesting activities under the Cutting Permits. This was not the contravention. As above, it would be speculative for me to conclude the fifth class of documents is relevant to whether Cassiar was duly diligent despite the alleged contravention, deliberately or intentionally committed the contraventions, or benefited from the alleged contraventions. It would be similarly speculative to conclude that this class of documents is relevant to determining whether the alleged economic benefit and timber sale price estimates in this case were accurate. For substantially the same rationale as for my denial of an order for production of the first class of documents, I find that the Respondent's request on this class is overbroad and focused on an issue that is not under appeal. For these reasons, I deny the Respondent's request for the fifth class of documents.

Class Six

[156] The sixth class of documents is comprised of any records documenting any stumpage scenarios that Cassiar, or its consultants or subcontractors, generated in software systems to determine stumpage impacts of different strategies for the harvesting of timber under the Cutting Permits. The Respondent says this class of documents is relevant because it may show whether Cassiar used different cruise data sets and/or stumpage scenarios to determine the ideal configuration of timber for the purposes of reducing stumpage during the setting of the stumpage rate.

[157] As previously stated, it was not a contravention for Cassiar to seek to minimize its expenditures in timber harvesting under the Cutting Permits. The contravention was failing to report the changed circumstances of that timber harvesting. The issues by which relevance is assessed are whether Cassiar was duly diligent despite the alleged contraventions, whether the alleged contraventions were deliberate or intentional, whether Cassiar benefited from the alleged contraventions, and whether the economic

benefits and timber sales prices were accurately estimated. For substantially the same rationale as for my denial of an order for production of the first class of documents, I find that the Respondent's request on this class is overbroad and focused on an issue that is not under appeal. For these reasons, I deny the Respondent's request for the sixth class of documents.

Class Seven

[158] The seventh class of documents is comprised of any contractor invoices for logging and development on the Cut Blocks. The Respondent says these documents are relevant because they will show whether Cassiar experienced unexpectedly high development costs relative to what was projected for the purposes of setting the stumpage rate.

[159] I find the seventh class of documents to be relevant. These documents can be compared against the estimated harvesting and development costs submitted by Cassiar before it was granted the Cutting Permits, to assess whether there was an economic benefit to Cassiar arising from its alleged failure to submit Appraisals or from its alleged failure to submit accurate Appraisals.

Class Eight

[160] The eighth class of documents contains records of all communications related to the scope of logging and development on the Cut Blocks, anticipated stumpage and waste liability, stumpage management optimization, and tracking of harvested volumes for cut control purposes.

[161] As with the first class of documents, the Respondent says this class of documents will help to establish whether Cassiar sought to supress stumpage rates when providing its original estimates in support of its application for the Cutting Permits or whether its timber harvesting plans changed during the lifespan of the Licence. In addition to arguing that the class of documents is irrelevant to the issues advanced in this appeal, Cassiar also argues this class of documents is overbroad. Cassiar argues the Commission should not order its production in any event.

[162] I find that the eighth class of documents is not relevant to this appeal. As I have already indicated, whether and why Cassiar may have changed its timber harvesting strategy and its development construction on the Cut Blocks is not an issue under appeal. The questions to be addressed are why Cassiar did not report these changes and what benefits (including economic benefits), if any, it experienced by its non-reporting. The question of benefits includes a question of whether the economic benefits Cassiar allegedly experienced and the timber sales prices were accurately estimated.

[163] I further find that there is insufficient reason to conclude, beyond speculation, that the eighth class of documents may lead on a train of inquiry that would allow the Respondent to advance his position or to destroy the case being presented by Cassiar. I

see insufficient reason to infer that communications about the scope of logging and development in the Cut Blocks, the anticipated stumpage and waste liability, stumpage management optimization, or tracking of harvested volumes for cut control purposes would lead to any information about why Cassiar did not submit Appraisals, or about the repercussions of it not doing so. For these reasons, I deny the Respondent's request for an order compelling the production of the eighth class of documents.

Class Nine

[164] The ninth class of documents consists of all log scale agreements and export agreements that Cassiar entered into in connection with timber harvested from the Cut Blocks or, alternatively, for all records referring to sales of hemlock harvested from the Cut Blocks. The Respondent says this class of documents is relevant because it may establish whether Cassiar ever intended to harvest or sell low-value hemlock that was included in the initial setting of the stumpage rate.

[165] I find that the ninth class of documents is not relevant for the reason articulated by the Respondent. Whether Cassiar intended to harvest or sell low-value hemlock is not relevant. Even if Cassiar did not intend to harvest or sell hemlock when it applied for the Cutting Permits, the contravention at issue is not whether Cassiar provided false information in support of its applications for Cutting Permits. The contraventions at issue relate to the accuracy in reporting, or reporting at all, deviations from the harvesting plan Cassiar set out in those applications. These are separate issues.

[166] I understand that the Respondent is concerned that Cassiar may have intentionally created artificially low stumpage rates by filing harvesting plans that it did not intend to pursue, or deciding to not follow the harvesting plans that it had filed after receiving the Cutting Permits. The intention that matters, however, is with respect to the contraventions: Cassiar's alleged failures to file Appraisals and its allegedly inaccurate waste assessments. As I have said previously, Cassiar seeking to minimize its harvesting expenditures is not relevant. The relevance arises if and when Cassiar opted to not submit the Appraisals required and/or to inaccurately convey its wastage under the Cutting Permits after timber harvesting was complete.

[167] As noted previously, while this class of documents may be relevant for other purposes in this appeal, the Respondent did not argue as much. It would be inappropriate for me to consider an aspect of possible relevance not proposed by the Respondent, so I have not considered any other potential areas of relevance.

[168] For these reasons, I deny the Respondent's request for an order compelling the production of the ninth class of documents.

Class Ten

[169] The tenth class of documents consists of all records documenting instructions or specifications for the species and qualities of timber that Cassiar or its consultants instructed to be cut and removed from the Cut Blocks. The Respondent says this class of documents is relevant because it may establish whether Cassiar ever intended to harvest or sell low-value hemlock that was included in the initial setting of the stumpage rate.

[170] I find that the tenth class of documents is not relevant to the appeal. As above, Cassiar's decision to not harvest portions of the Cut Blocks is not an issue. The wastage has been recovered through another process. The central issues pertain to why Cassiar's alleged contraventions by failing to submit Appraisals in light of any significant changes to its logging plan and development construction and by failing to accurately report its waste, as well as to any benefits Cassiar received (including those based on estimates of timber sales prices) as a result of those contraventions. I consider it speculative to suggest that documented instructions or specifications for cutting and removal would provide any information to support or refute those arguments, or would lead to any train of inquiry that may do so. For substantially the same rationale as for my denial of an order for production of the first class of documents, I find that the Respondent's request on this class is overbroad and is focused on an issue that is not under appeal.

[171] For these reasons, I deny the Respondent's request for an order compelling the production of the tenth class of documents.

Class Eleven

[172] The eleventh class of documents is comprised of all records containing analyses of profit estimates, including their underlying calculations. The Respondent says this class of documents is relevant because it may establish whether Cassiar planned the economics of its harvesting operations based on not harvesting low-value hemlock or constructing the appraised developments.

[173] Even if Cassiar planned its harvesting operations to avoid low-value hemlock and to reduce its expenditures, these are not the contraventions at issue in this appeal. The alleged contraventions pertain to Cassiar reportedly failing to submit Appraisals as required and to accurately report its waste under the Cutting Permits. For substantially the same rationale as for my denial of an order for production of the first class of documents, I find that the Respondent's request on this class is overbroad and is focused on an issue that is not under appeal.

[174] As noted previously, while this class of documents may be relevant to other issues under appeal, it is only appropriate for me to address the claims of relevance made by the Respondent. For these reasons, I deny the Respondent's request for an order compelling the production of this class of documents.

Admissibility and Possession or Control

[175] As noted above, section 34(3)(b) of the *ATA* requires that the Commission only issue an order for the production of documents that are admissible as evidence to the Commission. Cassiar has not asserted that any of the documents in the classes above contain records that are inadmissible, including for reasons of privilege. As a result, I find that it is appropriate to make no provision in my order for any documents that are not admissible to the Commission.

[176] The relevant section of the *ATA* also requires that any documents that are the subject of an order for production are within the possession or control of the person (including a corporation) to whom the order is issued. Again, Cassiar has not argued that any of these classes of documents are not within its possession or control, so I find that no provision for possession or control is required within the order for production of documents.

[177] In making these findings, I note that an applicant for document production cannot be expected to show, on a balance of probabilities, that the documents are not likely in the possession or control of another party or that the documents are admissible. As an applicant does not have access to the documents, the best they can do is to appropriately frame their request for document production and explain why it is reasonable to assume that the documents as described are admissible and within the possession or control of the party against whom the production order is sought.

[178] It then falls to the person against whom the production order is sought to respond and to provide sufficient evidence to establish that the documents are, in fact, inadmissible to the Commission or are not within their possession or control. This shifting burden of proof is consistent with the general practice, described in the Commission's *Manual of Practice and Procedure*, and with prior decisions of the Commission.[32] Both apply the long-standing test from *Cie Financière et Commerciale du Pacifique v. Peruvian Guano Co. (1882), 11 Q.B.D. 55, called the "Peruvian Guano test." It is that well-established analysis which I follow here.*

Proportionality

[179] While the Respondent argued that the scope of documents he requested was reasonable and proportionate, I found that several classes of documents were inappropriately broadly defined and that some were irrelevant; however, any concerns about reasonability and proportionality have been addressed by the limited scope of document production I have found above to be compellable by the Commission.

[180] I also consider Cassiar's concern about the manageability of the scope of document production sought to be effectively addressed by my findings that some classes of

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[32] See, most recently, *Lone Prairie Livestock Association v. Government of British Columbia*, 2023 BCFAC 1 (CanLII).

documents are not relevant. I appreciate that even this limited scope of document production may impose some logistical and administrative burdens on Cassiar; however, the Respondent had indicated a willingness to work with Cassiar to manage these impacts. I will leave the timing and details of the document production to the parties, as neither suggested any particular timeframe or made any submissions on what timing should be included in the order.

[181] As a result, I conclude that I should not make any specific order for timing of document production, other than to say that Cassiar should endeavour to complete production of the classes of documents described above as soon as is reasonably practicable. If necessary, the Respondent may apply for a subsequent order setting a specific timeframe.

The Appellant's Application

Cassiar's initial submissions

[182] Cassiar asks the Commission to order the Respondent to produce all records and documents not previously produced which relate to inspections carried out by Ministry staff on the Licence, including but not limited to, drafts and final versions of:

- photographs,
- notes,
- email communications,
- data collected,
- summaries, and
- reports.

[183] Cassiar asks, in the alternative, that the Commission order an employee or employees of the Ministry, and Todd Deveau[33] specifically, to provide, within 21 days, an affidavit attesting to efforts made to identify and locate those documents and any efforts made by the Ministry to locate a tablet on which digital images of the investigation were saved. This affidavit is also requested to provide information attesting to efforts made to identify and locate those image files, including from backup or cloud-based file storage.

[184] Cassiar says that these documents are necessary to explore a possible defense based on the limitation period for imposing an administrative penalty under the *Act*, which Cassiar says is critical to ensure procedural fairness in its appeal. Cassiar also argues that

[33] Mr. Duveau was the lead investigator and author of the Investigation Report, which was relied upon by the Respondent, in issuing the Decision.

the documents it requests may be relevant to the question of whether the contraventions occurred, which Cassiar asserts must be proven by the Respondent on appeal.

[185] Cassiar says that the test the Commission has used and should use to determine relevance is whether there is "… a reasonable possibility that the information sought would be useful to the party seeking that information during the preparation and presentation of that party's case before the Commission."[34]

[186] Cassiar acknowledges that the Respondent has produced some documents but takes issue with the extent of the production. Cassiar says that the Respondent selected December 18, 2018, as an "arbitrary date" from which the limitation period ran, but argues that investigations began well before that date. Cassiar says document production obligations should exist from an earlier date given the limitation period defense being pursued in the appeal.

[187] According to Cassiar, the Ministry assembled a six-person investigation team to carry out a field inspection of the Licence in June 2018. Cassiar says that the investigation team comprised Mr. Deveau, Rob Willows, Diana Vanderstar, Rob Stuart, Lauri Deveau, and Greg Jonuk. Cassiar says there were two inspection reports generated, but no notes were included. The investigation report includes, for each cutting permit that was the subject of a contravention, a compilation of "all data", which include a typed document entitled "Cassiar A64561 Appraisal Field Check" and seems to include observations from the field inspection regarding development, harvesting, and waste. It is not indicated who made these observations, and when.

[188] Cassiar says the Respondent has produced two collections of emails, but none from May 15, 2018, to July 4, 2018, and none to or from Mr. Deveau between May 10, 2018, and December 12, 2018. The Respondent advised he would not send "investigative files" because he understood "essentially the entirety" of the information in those files had been produced leading up to the OTBH, and anything additional was contained in the two collections of emails subsequently produced.

[189] Cassiar says, contrary to the Respondent's comments, no photo images had been produced. Cassiar queried whether there were any emails to and from the lead investigator, handwritten notes, or photo images, as none had been provided. Cassiar also noted it had received limited documentation from the field inspection.

[190] In response, the Respondent provided further emails sent or received by Mr. Willows in connection with the investigation, as well as notes (one page handwritten, two pages of typed) by Mr. Deveau. The Respondent also assured Cassiar that all discoverable emails had been produced, and stated it was not reasonable to infer any incompleteness in the email production by this point. The Respondent added that the photo images had

[34] This test was quoted from *Louisiana-Pacific*.

been taken on a tablet but were never extracted. The Respondent advised that the tablet was no longer in the possession or control of the province.

[191] Cassiar says no emails which it has received refer to any efforts by Ministry staff to download the photos taken during the field inspection, and no handwritten notes made during the field inspection have been produced. Cassiar further advises that the Respondent did not respond to its requests for further notes, data, or summaries or reports of the investigation. Cassiar says the Respondent did not advise whether there were any such documents to produce or the steps he took to uncover such documents.

[192] Cassiar later requested production of any documents pertaining to the investigation stored in any databases or tracking systems, including a Complaint Report referred to in an email previously produced by the Respondent. The Complaint Report was produced, but the Respondent did not reply to the balance of the request. According to Cassiar, the Complaint Report says it was delivered to Mr. Deveau on May 11, 2018, but that email was not produced.

[193] The Respondent subsequently delivered a printout of information contained in the province's Enforcement Action, Administrative Review and Appeal Computer Tracking System (the "ERA") pertaining to the investigation on the Licence.[35] The ERA printout had not been previously produced. The ERA printout lists three members of the investigation: Mr. Deveau, Rebecca Misener, and Patrick Day.

[194] Cassiar subsequently wrote to the Respondent and requested all documents created, sent, or received by Ms. Misener and Mr. Day in relation to the investigation, but the Respondent had not replied before Cassiar filed its application for an order for document production.

[195] Cassiar submits that the Commission, applying the test for relevance from *Louisiana-Pacific*, should conclude that the documents are relevant because the field inspections were the foundation for the allegations made in the investigation report that was relied upon by the Respondent in finding that Cassiar had contravened the *Forest Act*. Beyond that, because the Respondent concluded that Cassiar intentionally manipulated the stumpage system for financial gain, investigations that did not result in any administrative penalty are also relevant because the question arises as to why Cassiar would not have conducted itself similarly with respect to other cutting permits not at issue in this appeal.

[196] Furthermore, Cassiar argues that procedural fairness requires that the evidence gathered during the investigation, plus any communications occurring during the course of the investigation, be produced for Cassiar. This includes not only the information helpful to the Respondent's case, but also the information that helps Cassiar make its

[35] The Respondent has explained that the ERA is "… an internal tracking system for dates and other administrative information."

case. Cassiar asserts that the information it seeks is "particularly relevant" to a defense Cassiar intends to raise: that the Decision imposed administrative penalties contrary to a three-year limitation period defined in section 75 of the *Act*.

[197] This section provides that an administrative penalty under section 71(2) or 74(3)(d) of the *Act* may only be levied within three years of when the facts that led to the determination that there was a contravention first came to the knowledge of an official. Cassiar takes the position that the Respondent and any Natural Resource Officers constitute officials for this purpose.

[198] Cassiar argues that its ability to establish this defence would be severely limited if its document request is not granted. Cassiar says documents that establish when any officials became aware of the facts which led to the determination that there was a contravention are within the sole knowledge and possession of the Respondent. Cassiar also argues that the Respondent is obligated to produce information that is harmful to its case, not only information that it intends to produce.[36]

[199] Cassiar says that document production should be proportionate to the importance of issues under appeal and the complexity of the proceedings, referencing *Masjoody v. Burnaby Beacon*, 2023 BCSC 528, at para. 13. Cassiar says that because establishing a defense under section 75 of the *Act* would provide an absolute defence to significant administrative penalties, a significant degree of document production is appropriate.

[200] Cassiar notes that, in the criminal law context, the aim of the prosecutor is not to secure a conviction, but rather to provide to the trier of fact (the judge or jury) what the Crown considers to be credible evidence relevant to what is alleged to be a crime.[37] Cassiar notes that this notion or similar ones have been applied in other contexts, including human rights proceedings (*Christian v. Northwestern General Hospital*, 1993 CarswellOnt 1903) (Ont. C.J.) and professional disciplinary proceedings (*Markandey v. Ontario (Board of Ophthalmic Dispensers)*, 1994 CarswellOnt 2601) and *Hu v. British Columbia (Securities Commission)*, 2010 BCCA 306).

[201] Cassiar says that the Respondent has provided little meaningful production despite repeated requests. For example, while documents have established that a meeting was scheduled for May 15, 2018, between the Respondent and staff on the ongoing investigation of Cassiar, no notes taken during the meeting, nor were subsequent communications about the meeting disclosed or produced.

[202] Cassiar is also concerned that the production of emails between May 15 and July 4, 2018, is incomplete, as there only non-substantive emails pertaining to field inspections which have been produced. Cassiar says that, while the Respondent has said that because

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[36] See *Brown v. Canada (Citizenship and Immigration)*, 2020 FCA 130, at para. 130.

[37] *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 at 333, citing with approval from *Boucher v. The Queen*, [1955] S.C.R. 16.

staff were in the field investigating together and so would not be expected to be emailing, this does not indicate that they did not email each other. Furthermore, even if they did not email each other or other individuals while in the field together, that timespan was five days within the broader time period and there are many other days during which substantive email communications may have occurred.

[203] Cassiar is also concerned that no hand-written notes or raw data had been produced by the Respondent, despite a 5-day field inspection by staff on 11 cutting permits and 50 cut blocks. There are, however, standardized forms such as the "Cassiar A64561 Appraisal Field Check," which Cassiar says does not seem to have been completed in the field but which contain measurements and observations that likely required field notes to accurately record on the forms. Additionally, emails produced by the Province show that various staff members were being asked to input observations or information obtained during the field inspection into a document created by one staff member after the inspections occurred.

[204] Cassiar is also concerned that there were no emails to or from the lead investigator, Mr. Deveau, between the May 15, 2018, meeting and December 18, 2018, when he communicated to another staff member that he would be putting together an OTBH based on data gathered during the field inspection. Cassiar says it "defies belief" that Mr. Deveau would not have sent or received any emails on the investigation during that period of time, which Cassiar says was the most active phase of the investigation.

[205] Cassiar notes that, while the Respondent has indicated that it understands that Mr. Deveau did not recall any email correspondence with other Ministry employees on the Cassiar investigation, Mr. Deveau was reportedly emailed a Complaint Report on May 11, 2018, but that email was not produced.

[206] Cassiar also expresses a concern that, while the Respondent has indicated that all pictures taken during the field inspection were stored on a tablet device that is no longer in the possession or control of the Respondent, the Respondent has not indicated any efforts it undertook either to obtain the lost tablet or to search any backup drives to see if the pictures can be recovered. Additionally, Cassiar notes that one email already produced by the Respondent indicates that there were at least two tablets used during the field inspection and the status of additional tablets is unknown.

[207] Cassiar adds that the number of documents, or the size of electronic files, that have been produced is not a valid measure of whether document production is complete. Cassiar also notes that it is reasonable to be skeptical about the Respondent's document production because of the gaps in the document production provided to date without adequate explanation of these gaps.[38]

[38] Cassiar references *Canreal Management Corporation v. Mercedes-Benz Canada Inc.*, 2010 BCSC 642, at para. 26, which says that skepticism about the completeness of production is understandable

[208] Cassiar asks, if the Commission is unwilling to order the broad production that Cassiar requests, that the Commission require a Ministry employee or Ministry employees to verify efforts taken to locate documents in this case and to confirm that document production has been completed. Cassiar notes that such a remedy is available in the British Columbia Supreme Court under the Court's Rule 7-1(8). Cassiar notes that the Court has found it appropriate to issue an order under Rule 7-1(8) where:

- documents that are significant to one party's claim are not produced without adequate explanation,
- there are plain and obvious gaps in document production, suggesting an inadequate search for documents,
- a party showed a "dilatory or casual attitude" to document production, or
- counsel have assumed conduct of a file and the efforts to obtain relevant documents can only be described by the represented party.[39]

[209] Cassiar says that the facts of this case satisfy those requirements, as Cassiar had to request notes from the Respondent twice before some were produced, and that production may yet be incomplete. Furthermore, Cassiar had to specifically request the Complaint Report for it to be provided after it was referenced in an email that had been produced previously. Additionally, Cassiar notes that the Respondent seems to be represented by counsel, while Ministry employees are the ones best able to describe the steps taken to ensure complete document disclosure and production have been achieved. Lastly, Cassiar says that the importance of the investigation documents to Cassiar's appeal warrants completion of an affidavit.

Respondent's position

[210] The Respondent says he has worked diligently to produce relevant documents since receiving Cassiar's request for voluntary production, and has uncovered and produced photographs from a field investigation in June 2018. The Respondent is willing to continue working with Cassiar on a voluntary basis and says the Commission does not need to be involved.

[211] The Respondent says that it has provided 265 documents to Cassiar through voluntary production, in addition to the 165 documents provided during the OTBH. The Respondent says that the fact that Cassiar has not found the evidence it wishes to, so that it might establish a limitation defence, does not mean that the production provided has not been meaningful.

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where responses to requests for documents have been "dilatory and piecemeal" without adequate explanation.

[39] Cassiar references *Araya v. Nevsun Resources Ltd.*, 2019 BCSC 1941, at para. 10.

[212] The Respondent says that he selected December 18, 2018, as the start date for the production of communications with Mr. Deveau because that was when Mr. Deveau first received an analysis of a changed circumstance appraisal from Ministry Revenue Business Analysis Forester Rob Willows, although that analysis had been sent to Mr. Deveau on December 12, 2018. The implication seems to be that it was receipt of the changed circumstance appraisal that started the limitation period Cassiar is relying on as one element of its appeal.

[213] Additionally, with respect to the stumpage rate redeterminations, the Respondent argues that Cassiar did not appeal those decisions, but rather paid the calculated redetermination amounts. Furthermore, the Respondent says Cassiar has its own records of where it left standing waste. The Respondent says those records formed the basis for the reappraisal calculations. The Respondent says that information is also available via satellite imagery. Lastly, the Respondent says there is no reason to provide documents related to cutting permits issued under the Licence for which there were no changed circumstance reappraisals or additional waste assessments.

[214] The Respondent made arguments why some of Cassiar's specific requests were unfounded:

- The "Cassiar A64561 Appraisal Field Check" documents from the OTBH represented the field notes from June 25–29, 2018 (both transcribed and in original, electronic form). The Respondent denies that any handwritten notes were taken during the field inspection.
- There was no email to Mr. Deveau on May 11, 2018, providing him with Complaint Report 85869; he accessed it via ERA. The email delivery notation refers to how Mr. Deveau intended to deliver the document to a recipient.
- The ERA Printout was provided with the Respondent's reply submissions to Cassiar's request for an order compelling the production of documents, and it is not relevant to the issues under appeal in any event.
- Despite being designated as "members" of the ERA Case, Ms. Misener and Mr. Day were not members of the inspection team.
- The Respondent has provided 49 emails from May 7, 2018, to January 9, 2019, which show the path of information gathered during the June 2018 field inspection, up to Mr. Deveau.

[215] The Respondent also noted that several documents were located while preparing his response to Cassiar's application. These documents, either provided with the response or to be provided shortly thereafter, were:

- an email received by Rob Stewart, confirming his submission of Complaint Report 85869 into ERA on May 11, 2018;

- an appraisal map for block 79 of cutting permit 118 that Mr. Stewart attached to that Complaint Report;
- an Outlook meeting invitation for May 18, 2018;
- notes taken by Bernard Mattie during the May 18, 2018, meeting;
- a collection of 25 electronic images from the June 25–29, 2018, field inspection, recovered from Rob Stewart's Google storage[40]; and
- three emails between Mr. Deveau and Ms. Misener, each written on one of November 13, 2019, or February 3, 2019.

[216] The Respondent also advised that it had retained specialist employees to attempt to locate and extract additional electronic copies of records. This process was projected to continue to mid-September 2023, and counsel for the Respondent would then review the records for relevance and privilege. Any relevant and non-privileged documents that were not previously produced will be voluntarily produced, according to the Respondent. The Respondent specifically described those relevant documents as including:

- email correspondence between Ministry employees from May 2018 to December 18, 2018, relating to whether appraisal "changed circumstances" and incomplete waste reporting occurred on cutting permits under the Licence; and
- any "real evidence," such as notes or images, from the June 25–29, 2018, field inspection.

[217] The Respondent referenced its earlier submissions, related to its request for document production from Cassiar, that the asymmetrical production obligations described in *R. v. Stinchcombe*, 1991 CanLII 45 (SCC) ("*Stinchcombe*"), should not be imported into the Commission's document production test, as the *Charter* rights (from sections 7 and 11) that underly the asymmetry in *Stinchcombe* are not present here.

[218] The Respondent adds that the Commission's powers to order document production are discretionary, and both relevance and proportionality should inform the exercise of that power. This allows the Commission to "calibrate the scope of the disclosure that it will order," according to the Respondent. The Respondent points to a decision of the Ontario Labour Board, *Amalgamated Transit Union, Local 113 v. Toronto Transit Commission*, 2016 CanLII 87623 ("*Amalgamated*"), as an example of how pre-hearing document disclosure and production interests might be balanced.

[219] The Respondent says that Cassiar's request in this case is imprecise, overreaching, and untethered from any meaningful assessment of relevance to the issues under appeal.

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[40] The Respondent says Google storage was checked for all tablets used during the June 2018 field investigation and no other records were available.

The Respondent further argues, for the reasons it provided with respect to his own request for an order compelling document production, that he does not bear the burden of proof on the merits of the appeal. He emphasizes that Cassiar conceded the contraventions in the OTBH and did not appeal the reassessment of the stumpage rate based on changed circumstances. Those matters have been decided and are not in issue in this appeal.

[220] The Respondent also asserts that any procedural fairness concerns at the OTBH are not a suitable issue, as a hearing *de novo* will generally cure any breaches of procedural fairness by an original decision-maker.[41] The Respondent argues that the issues under appeal, properly framed, are whether:

- Cassiar has a limitation defence, and
- the amount of the administrative penalty was appropriate, in particular considering whether the contraventions were deliberate and whether Cassiar derived any economic benefit from the contraventions.

[221] Compared to those issues, Cassiar's request for an order compelling document production involves all inspections carried out on the Licence. This could mean both field inspections and desk reviews of any of the 28 cutting permits under the Licence, on any regulatory or administrative issue, since the Licence was issued in 2002. The Respondent says the document collection and review for a request of this scope would not be manageable for him.

[222] The Respondent says that Cassiar should better define any further documents that it seeks, beyond those the Respondent has agreed to voluntarily produce. Cassiar should describe the relevance of those documents as well, according to the Respondent.

[223] With respect to the relevance of the requested documents, the Respondent disagrees with Cassiar about the extent of "officials" as defined in the *Act*, conceding only that Natural Resource Officers have been legislatively assigned the roles and duties of officials under the *Act*. The only Natural Resource Officer who participated in the field inspection was Mr. Deveau. Beyond that, the Respondent provided a document describing ministerial delegation under the *Act*, which allows District Managers and Regional Executive Directors the power to designate certain officials as defined in section 1 of the *Act*. The only officials for which the power of designation has been delegated to the Respondent were those involved in timber scaling: scaling supervisors, revenue technicians, and check scalers. District Managers and Regional Executive Directors are not

[41] The Respondent referred to *British Columbia (Attorney General) v. 992704 Ontario Limited*, 2023 BCCA 346 (CanLII) and the Commission's prior decisions, which he previously referenced in submissions related to his request for an order compelling document production from the Companies.

designated as officials under the *Act*, according to a ministerial delegation matrix provided to the Commission by the Respondent.

[224] The Respondent adds that Cassiar has failed to identify any authority that would allow the Commission to order an affidavit verifying documents. In the event such authority exists, the Respondent says the order is unnecessary and inappropriate, and the Respondent has been diligent in producing documents. The Respondent notes that the Human Rights Tribunal has made such an order in the past. The Respondent notes, however, that that decision says such orders should not be made "as a matter of course." This is particularly so, according to the Human Rights Tribunal, where there are alternative options available and where the primary issue is not the efforts taken to locate documents, but rather differing views on what documents are relevant and ought to be produced.[42]

[225] Even if the Commission has the authority to order such an affidavit to be produced, the Respondent says it does not need to here. The Respondent says such an order would be inappropriate because of the evidence the Respondent provided in its application response. The Respondent says this demonstrates the investigative steps taken, including efforts taken to locate images from the June 25–29, 2018, field inspection, which are stored on tablets. The Respondent says that many of the documents described by Cassiar in its application are irrelevant, so an affidavit need not be produced to address those documents.

[226] The Respondent also emphasizes that Cassiar's argument that the Respondent bears the burden of proof is legally incorrect, misguided, and nonsensical in the context of the appeal. Cassiar conceded the contraventions at its OTBH and did not contest the finding that there were "changed circumstances" in the ten cutting permits at issue in this appeal during a separate statutory decision-making process, despite having the opportunity to do so. Taken together, it has already been established in other proceedings that there were "changed circumstances" and that Cassiar contravened its reporting obligations. The Respondent argues these facts are *res judicata* ("a matter already judged") and cannot be redetermined by the Commission.

[227] The Respondent says that any violations of procedural fairness are generally cured by a *de novo* appeal, as confirmed by *British Columbia (Attorney General) v. 992704 Ontario Limited*, 2023 BCCA 346, and by the Commission in repeated instances.[43]

[228] Despite all of the above, the Respondent submitted it would be willing to voluntarily produce the following documents:

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[42] The Respondent refers specifically to *Bauer v. Ministry of Transportation and Highways*, 2003 BCHRT 45 (CanLII), at para. 15–18, and to *CFO v. The Organization (No. 4)*, 2022 BCHRT 55 (CanLII), at para. 17.

[43] The Respondent also referenced *O'Brien*, *Burns Lake*, and *Oker* in support of this point.

- email correspondence and notes of communications between Ministry employees between May 2018 and December 18, 2018, that were not previously produced and which relate to whether appraisal "changed circumstances" and incomplete waste reporting occurred on cutting permits issued under the Licence; and
- any "real evidence" such as notes or photographs not previously produced from the June 25–29, 2018, field inspection.

Cassiar's reply

[229] In reply, Cassiar maintained its position as set out in its application. Cassiar says that a review of the metadata related to the document entitled "Cassiar A64561 Appraisal Field Check" supported that it was not created in the field, but rather made afterward, in July 2018, by Diana Vanderstar. Cassiar says it carefully reviewed the documents already produced, as established by its subsequent requests based on the revelations from previous document tranches produced by the Respondent.

[230] Cassiar argues that the Respondent's history of document production in this case does not support that its efforts have been adequate. Cassiar notes that tranches of documents have been produced in response to repeated requests, and more specific requests have been made possible by the review of documents produced previously. Cassiar says that it does not matter how many documents have been produced or what electronic file sizes have been made available, the test for ordering production is whether requested documents (or classes of documents) are not privileged and have a reasonable possibility of being useful to Cassiar.[44]

[231] Cassiar then notes, however, that the additional discovery of files by the Respondent between January and September 2023 amounts to 167 files and over 366 megabytes of data. Cassiar says this exceeds the total file size of all previously produced documents. This tranche of documents includes digital pictures taken during the field investigation, despite the fact that Cassiar had previously requested such images. Cassiar asserts the images were only provided because it had applied to the Commission for an order to produce such images.

[232] With respect to the Respondent's argument about proportionality, Cassiar notes the penalty under appeal is for more than $1,500,000 and Cassiar had limited time between when it was informed of the allegations against it (February 4, 2020) and its opportunity to be heard (May 26, 2020). Cassiar argues that the Commission's process should offer a greater opportunity for Cassiar to prepare and present its case. Cassiar says

[44] Cassiar references *Louisiana-Pacific*, at para. 6, in support of this argument.

that this should mean a greater opportunity to satisfy itself that it has obtained all relevant documents for the appeal hearing, than it had in advance of the OTBH.

[233] Cassiar also says that the Respondent's reliance on *Amalgamated* is misplaced, as it is an arbitration decision operating in a different context than the Commission's processes.

[234] Cassiar argues that three criteria must be present to establish *res judicata* on an issue: the issue must be same as the one previously decided; the prior decision must have been final; and the parties to the decision must have been the same, or the privies of those involved in the ongoing issue. Cassiar refers to *Giles v. Westminster Savings Credit Union*, 2006 BCSC 1600, at para. 27–29, in support of that position.

[235] Cassiar also says that the earlier administrative decision pertaining to the changed circumstance invoice is not *res judicata* as it did not result from a contested or judicial process. Nothing can be inferred form Cassiar's decision not to appeal that invoice, as there may be many reasons why it would not have done so.

[236] With respect to the contravention decision, Cassiar says that the conclusion that it contravened the *Act* is part of the decision under appeal. Cassiar says, even if admissions were made during the OTBH, Cassiar retains the right to revisit those admissions on a *de novo* basis. Cassiar says it had little time to prepare for the OTBH and admissions may have been made in error.

[237] Cassiar says that its request for an order compelling the production of documents is only as broad as is required. Cassiar argues the breadth of the request is necessary because the Respondent has previously not produced relevant documents when Cassiar worded its requests more specifically. Cassiar also says it does not know exactly what documents the Respondent has with respect to its inspections of the Licence. Similarly, Cassiar says it is unaware what investigations the Respondent has undertaken with respect to the Licence, and if there was more than the one which led to the Determination the Respondent should describe those investigations and, if he thinks they are irrelevant, why. Cassiar considers that any investigations for which penalties were not proposed may undermine the Respondent's claim that Cassiar intentionally contravened the *Act* for financial gain. Cassiar emphasizes that it considers the standard of production described in *Stinchcombe* to be appropriate in these circumstances.

[238] Cassiar says that the extent of production now offered by the Respondent is insufficient, as it is both date-limited and does not contemplate production of documents other than email correspondence, notes of communications, and "'real evidence' … from the June 25–29 field inspection."[45]

[239] Furthermore, Cassiar emphasizes that its request for production of documents ensures its procedural fairness within the present appeal, so whether the appeal would

[45] Paragraph 32 of Cassiar's reply submissions, dated September 1, 2023.

cure procedural defects from the preceding administrative process is irrelevant. Furthermore, fairness in the appeal is the only means by which such defects in the OTBH process can be cured.

[240] Cassiar says that the Commission, given its power to control its own process, has as a corollary of its power to order document production, the power to require someone to confirm if they do not have a document being sought. Cassiar says it is entirely appropriate for the Commission to require an affidavit to that effect. Cassiar finds it telling that the Respondent submitted affidavit evidence to establish the efforts it made to identify documents for further production in response to Cassiar's application to the Commission for an order compelling document production.

The Panel's Findings

The Existence of Documents

[241] There is some question between the parties as to whether certain documents, or certain classes of documents, exist. Generally, these questions have not been adequately addressed by the parties to allow me to reach a final conclusion on the matter.

[242] I am satisfied that at least one document described by Cassiar does not exist. While Cassiar stated that Mr. Deveau received a Complaint Report on May 11, 2018, the Respondent explained that the Complaint Report was uploaded to ERA, from which Mr. Deveau accessed it without the use, or generation of, any associated email. The Respondent provided sufficient evidence to support the non-existence of any covering email to Mr. Deveau on May 11, 2018.

[243] I also understand that the Respondent has made considerable efforts to identify documents requested by Cassiar and that these efforts continued at least into the late months of 2023, after the conclusion of submissions for these applications. The parties agree that the Respondent has provided a significant number of documents to Cassiar already. These include an Outlook meeting invitation; meeting notes from May 18, 2018; electronic images taken during the field investigation; and various emails. The Respondent argues that this means no order for production is required; however, I am concerned that there may remain undiscovered documents for which Cassiar might be entitled to production. Accordingly, I do not accept that the widening document production provided by the Respondent precludes any need for a document production order. To put it another way, I am not satisfied that all relevant documents have been produced. There may exist more documents relevant to this appeal.

[244] At times, some of the Respondent's documents produced were provided in response to specific requests by Cassiar. Such documents ought to have been provided based on previous requests but were only provided in response to more specific inquiries, prompted by earlier tranches of document production. While the source of the difficulty is unclear, it is evident that the Respondent was facing challenges locating all relevant and

produceable documents. The Respondent admits that several documents, which would have been caught by earlier requests for documents by Cassiar, but which were only discovered in preparing a response for Casssiar's application to the Commission.

[245] I am also concerned about some of the responses the Respondent has made concerning the existence of documents. One example of this is where the Respondent has replied only that it would not be expected for there to be emails between investigating staff during the field investigation. Further, I am concerned that the Respondent's inquiry into whether Mr. Deveau sent or received any emails about the investigation between May 15, 2018, and December 18, 2018, seemingly ended with Mr. Deveau not recalling any such communications. I do not consider this to be a sufficient inquiry.

[246] I am also concerned that there were likely some form of notes (including transitory electronic documents) created during the field investigation, and which formed the basis for the Cassiar A64561 Appraisal Field Check, which were not produced to Cassiar. The number of entries in the document, plus the emails between staff members prompting some staff to provide information for entry into that document, satisfy me that some form of records likely exist or existed which predated the A64561 Appraisal Field Check. I recognize that some information may be recorded on the digital images that have been produced by the Respondent, but there is not a sufficient basis to conclude that this is likely the case. Again, however, such notes have not been shown to exist. Whether such records exist remains unclear, and this remains concerning to me.

[247] Overall, I find that there is insufficient reason to limit any document production order that the Commission may make in favour of Cassiar because of the non-existence of any documents, other than the lack of a covering email to Mr. Deveau on May 11, 2018. The extent of any order, however, must still be addressed, chiefly with respect to the relevance of the class of documents requested by Cassiar.

Relevance

[248] Cassiar has requested what it characterizes as a broad category of documents: all records and documents (including photographs, notes, email communications, data collected, summaries, and reports) relating to any inspection under the Licence that has not already been produced.

[249] As described above, the Commission can only issue an order for the production of documents which are relevant to the issues to be raised in an appeal. That is to say, it must be possible (beyond a speculative basis) that the documents either assist in supporting Cassiar's case or in destroying the Respondent's case, or that they lead on a train of inquiry that results in either of those possibilities.

[250] I have already summarized the issues in this appeal as put forward by Cassiar. While Cassiar has said that the Respondent bears the burden of proof that the contraventions occurred, I do not agree for the reasons provided above. Cassiar has not disputed that the contraventions took place when framing issues in its notice of appeal.

The Respondent is not obligated to start from a blank slate on appeal; rather, the Commission will consider any appropriately-framed issues raised by the Appellant. With respect to those issues, the Commission owes the Respondent no deference and may receive new evidence. I emphasize, however, that this does not mean that the Respondent must prove all elements of its decision-making: only the elements that have been appropriately put in issue by the Appellant. Cassiar's grounds of appeal do not put the contraventions in issue, as a result there is no need to consider the impact of Cassiar having admitted to contraventions during the OTBH. Accordingly, for the reasons provided above, I will not consider the issue of proving the contraventions occurred when assessing the relevance of the documents sought by Cassiar.

[251] I also do not agree with Cassiar that procedural fairness requires that all evidence gathered during the investigation, plus any communications made during the investigation, must be produced for Cassiar. Cassiar is entitled, by procedural fairness, to know the case it must make and to have a reasonable opportunity to do so. This requires production of all relevant documents. The scope of relevance is, as I have said, informed by the issues under appeal, as advanced in this case by Cassiar. It does not extend to all evidence gathered and all communications made over a prolonged period of time where that evidence and that time period are not in issue in an appeal. Cassiar's position on this point is consistent with its belief that the Respondent needs to establish all aspects of the contraventions and associated penalty during the appeal; however, that position is incorrect for the reasons I have already provided. Cassiar's position on the scope of documents to which it is entitled under the rules of procedural fairness is similarly incorrect.

[252] I also do not agree with Cassiar that any document pertaining to any investigation is relevant because the Respondent's position is that Cassiar intentionally manipulated the stumpage system for financial gain. The Respondent's position was not that Cassiar intentionally did so in every circumstance. Neither party has suggested that Cassiar intentionally manipulated the stumpage system, or engaged in any contraventions, in any operations other than in its operation under the Cutting Permits. I do not consider the question of whether Cassiar did so under the Cutting Permits to be informed by whether or not Cassiar did so in other cases. Cassiar's conduct under one cutting permit does not help to establish whether there were any contraventions, or any intentional contraventions, under any other cutting permit.

[253] I also have concerns about the scope of relevance as described by the Respondent. Specifically, the Respondent has argued Cassiar should not be provided documents that were relevant to the stumpage redetermination that followed a different administrative process. That concern is immaterial to the question I must decide, however. If the documents are relevant to the appeal before the Commission, it does not matter if they were also relevant to the stumpage redetermination. If the documents are not relevant to the appeal before the Commission, the Commission cannot order their production.

[254] That said, the breadth of Cassiar's request cannot be curtailed into something suitable for this case. This is not a case where limiting the scope of an order to the documents and records related to the inspections of forestry activities carried out under the Cutting Permits or which led to the conclusion that Cassiar had committed the Contraventions would safeguard against the overly broad nature of Cassiar's request. Cassiar's request is so all-encompassing that it is beyond saving by the Commission.

[255] In reaching that conclusion, I rely on my earlier explanation that all inspections under the Licence are not relevant. Furthermore, every inspection under the Cutting Permits may not be relevant, based on the issues advanced by Cassiar in this appeal. The only documents that I am willing to accept are relevant, based on Cassiar's pleadings and it submissions, are those that may assist it to make a case (or destroy the Respondent's case) as to:

- Cassiar's deliberateness or intention in not submitting accurate Appraisals,
- whether the non-submission of those Appraisals benefited Cassiar,
- whether the Respondent accurately estimated Cassiar's economic benefit from not submitting the Appraisals and the timber sales prices realized under the Cutting Permits,
- whether Cathy Craig was an officer of Cassiar, and
- whether the Respondent was time-barred from levying the administrative penalties.

[256] It is not possible or appropriate for the Commission to constrain a request for all documents and records relating to inspections carried out under the Licence to some subset that would be relevant to the issues identified above. That is the role of Cassiar, and it has not fulfilled that role. As such, I deny Cassiar's request for being overly broad. I disagree that the Respondent bears the burden of demonstrating that records of investigations conducted with respect to the Licence are irrelevant to the appeal.

[257] I wish to note that this decision is not based on any concerns about documents being otherwise available to Cassiar. While the Respondent argues that some document production should not be ordered because some information, particularly that concerning standing waste, is available to Cassiar through other means (existing documents in Cassiar's position and satellite imagery), I do not find that consideration material to the question before me. If the Respondent has an admissible document that is relevant to the issues under appeal, it does not matter whether Cassiar can obtain that information from another source; Cassiar should be entitled to confirm whether the Respondent's documents are consistent with any other information Cassiar has (or may obtain) and, if not, explore why not. This may be part of the exercise of advancing Cassiar's own case or destroying the case put forward by the Respondent. However, as I have noted, Cassiar has not established that the broad class of documents it requests are relevant to any issues under appeal, and the Commission cannot fairly and appropriately narrow its request to identify a subset of that class.

[258] I also wish to note that the discussion between the parties about the concept of *res judicata* was not persuasive to my decision. As I have said, Cassiar's request for an order compelling the production of documents is unworkably broad given the issues it has advanced under the appeal. I do not consider it necessary to consider whether there were "changed circumstances" that required Cassiar to submit Appraisals because Cassiar did not put that question in issue. Cassiar asserted that the Respondent had to prove the elements of the contraventions; however, as I have said, that is not true. Accordingly, I make no further comments on the issue of *res judicata*.

Other Considerations

[259] The parties have discussed proportionality in terms of Cassiar's application. As I have denied the request in total, I do not need to address the question of proportionality.

[260] I also appreciate that Cassiar would like the Respondent to provide an affidavit to describe what it has done to identify documents for further production and to locate a tablet containing digital images from the field investigation (or the images themselves). The parties note that the Commission does not have an explicit power to do so and disagree whether the power is implicit.

[261] Because I consider Cassiar's request for documents to be unworkably broad and extend beyond the appropriate scope of relevance given the issues under appeal, I do not consider it appropriate to require the Respondent to provide an affidavit in response to this overly broad request. I have been unable to constrain the request to relevant documents and records, and as a result do not consider it appropriate to require the Respondent to address Cassiar's request.

CONCLUSION

[262] I have read and considered all evidence and submissions provided by the parties with respect to both applications, whether or not they were specifically referenced.

[263] For the reasons provided above, I grant the Respondent's request for an order compelling the Companies to produce documents, in part. I order the Companies to produce the following classes of documents:

- records showing any alleged additional actual costs incurred by the Companies as a result of changing its logging and development plans in the manner that led to the Ministry-initiated changed circumstance reappraisals in 2020; and
- contractor invoices for logging and development on the Cut Blocks.

[264] The Companies are ordered to complete the production of these documents as soon as is reasonably practicable. If necessary, the Respondent may apply for a subsequent order setting a specific timeframe.

[265] I deny Cassiar's application for an order compelling document production from the Respondent for the reasons provided above.

"Darrell Le Houillier"

Darrell Le Houillier, Panel Chair
Forest Appeals Commission