Forest Appeals Commission

Citation: *Tolko Industries Inc.*, 2024 BCFAC 14

Decision No.: FAC-FRP-22-A005(a)

Decision Date: 2024-11-15 amended with a correction on 2024-12-03

Method of Hearing: Conducted by way of written submissions concluding on June 3, 2024

Decision Type: Preliminary Decision

Panel: Jeffrey Hand, Panel Chair

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

Between:

Tolko Industries Inc.

Appellant

And:

Government of British Columbia

Respondent

And:

Forest Practices Board

Third Party

Appearing on Behalf of the Parties:

For the Appellant:	Dean Dalke
	Erin Hunter
For the Respondent:	Sarah Bevan
	Monica Salt
For the Third Party:	Nathan Murray

PRELIMINARY DECISIONS REGARDING AN APPLICATION FOR DOCUMENT PRODCUTION, REQUEST FOR A COSTS ORDER, AND METHOD OF HEARING

INTRODUCTION

[1] The Appellant, Tolko Industries Inc., appeals a determination made by the Acting District Manager of the Okanagan Shuswap Natural Resource District of the Ministry of Forests (the "District Manager"), who found that the Appellant had contravened sections 46(1) and 52(1) of the *Forest and Range Practices Act ("FRPA")* and sections 37, 39(1), and 57 of the *Forest Planning and Practices Regulation ("FPPR").*

[2] The contraventions relate to the construction of a logging road by the Appellant, completed in September 2011 and said to have caused a landslide in May 2017, referred to as the Rosemond Slide. The landslide is said to have resulted in damage to crown timber, the ecosystem, fish, and fish habitat. The District Manager imposed an administrative penalty under section 71 of *FRPA* in the amount of $75,000.

[3] On June 30, 2022, the Appellant filed this appeal seeking to set aside the penalty on the basis of 11 grounds of appeal.

[4] On November 21, 2023, the Respondent filed an application with the Forest Appeals Commission (the "Commission") seeking production of five classes of documents said to be in the possession or control of the Appellant or its consultant, Westrek Geotechnical Services Ltd.

[5] On February 1, 2024, the Appellant filed an application with the Commission seeking production of various documents relating to any slide inspections, surveys, or assessments relating to a May 2017 storm event anywhere within the Okanagan Shuswap Natural Resource District in the possession or control of the Respondent.

[6] On April 4, 2024, the Appellant withdrew its application for document production, and it amended its Notice of Appeal to abandon all but four grounds of appeal.

[7] Following a direction from the Panel of the Commission, the Appellant provided further particulars of two of its remaining grounds of appeal on August 13, 2024.

[8] On August 28, 2024, the Respondent provided a further submission in response to those particulars.

[9] The Appellant submits that the requested documents are no longer relevant to the issues remaining to be determined in the appeal, and that the Respondent's application has become moot.

[10] Further, the Appellant asks that the Commission direct that this appeal proceed by written submissions with an oral argument component.

[11] The Respondent says its application should be decided because the requested documents are relevant and as such the application is not moot.

[12] Alternatively, if the application is moot, the Respondent says the Commission should exercise its discretion to decide the application.

[13] The Respondent also seeks an order for costs against the Appellant for having narrowed the grounds of appeal at this stage of the appeal.

THE APPEAL

[14] Since the applications for document production were filed before the Appellant amended its grounds of appeal, it is helpful to clarify what is and is not in issue.

[15] The original grounds of appeal, paraphrased for brevity and clarity, were:

1. There was insufficient evidence to determine that the Appellant's road construction caused the landslide.
2. There was insufficient evidence to find that there had been any contraventions.
3. The Decision Maker did not give sufficient weight to whether other factors beyond road construction caused the landslide.
4. The contraventions are based on the same unlawful conduct and offend the rule against multiple contraventions for the same conduct.
5. The Decision Maker misinterpreted section 52(1) of the *FRPA*, which provides that a person must not cut, damage, or destroy Crown timber without authorization. The Appellant says the damage is indirect damage, incidental to a forest practice, and not captured by section 52(1).
6. The Appellant exercised due diligence to prevent the contraventions.
7. The contraventions were the result of a reasonable mistake of fact.
8. The penalty was levied after the limitation period contemplated in section 75(1) of the *FRPA* had expired.
9. The Decision Maker erred in application of section 71(5) as it relates to the considerations to be taken into account in levying a penalty:
    a. Incorrectly found that the Appellant had previous contraventions of a similar nature.
    b. Erred in finding that the size of the slide and the resulting damage made the gravity of the contravention significant.
    c. Erred in finding the Appellant derived economic benefit from the contraventions.

10. The amount of the penalty is excessive.

[16] On April 4, 2024, the Appellant narrowed its grounds of appeal to issues 4, 5, 9, and 10.

ISSUES

1) Should some or all of the documents requested by the Respondent be produced?
2) Are the two document production applications moot, and if they are, should the Panel exercise discretion to render a decision in each application?
3) Is the Respondent entitled to a cost award against the Appellant?
4) Should the appeal now proceed by way of written submissions?

POSITIONS OF THE PARTIES

Appellant

[17] The Appellant has withdrawn its document application seeking documents from the Respondent and says that this application should not be decided.

[18] The Appellant submits that none of the documents requested by the Respondent are relevant to the issues to be resolved in this appeal. The Appellant says those documents relate only to the issues of causation of the slide and the Appellant's liability (due diligence and mistake of fact) which are no longer issues to be decided in the appeal.

[19] Further, the Appellant requests that, given the narrowed the grounds of appeal, this appeal should now proceed on written submissions and oral argument, and without an in-person hearing.

[20] The Appellant says that its decision to narrow the grounds of appeal should not be penalized with a cost award and its conduct in any event does not represent a marked departure from typical conduct and cannot be considered a special circumstance warranting a cost award.

Respondent

[21] The Respondent says that the Appellant is entitled to withdraw its application, but the Respondent nonetheless says that the Commission should exercise discretion to decide the issues raised by the Appellant.

[22] The Respondent says its application for document production has not been rendered moot, because the documents it seeks, while primarily relevant to the issues of causation and due diligence, could still be relevant to the assessment of the penalty. In particular, it says a proper assessment of the gravity and magnitude of the contravention,

which is one of the factors to be considered in assessing the penalty, requires an understanding of the mechanism of causation of the slide. Those documents might also reveal something about the Appellant's forest practices which could be considered in determining the gravity and magnitude of the contravention.

[23] Further, the Respondent says the documents may shed light on the Appellant's own knowledge of the seriousness of the contravention and its efforts to cooperate and correct the contravention.

[24] Alternatively, the Respondent says that if both applications have become moot, the commission should exercise discretion to decide the applications because:

a) the issues have been fully argued in the written submissions received;

b) the issues are of importance to document disclosure generally and will be of guidance in other appeals; and

c) determining the issues will not unnecessarily or inappropriately use Commission's resources.

[25] In the further alternative, if the Commission declines to decide the application(s), the Respondent seeks an order for costs in relation to that portion of the Appellant's appeal which has been abandoned.

[26] The Respondent says that the Commission may award costs in special circumstances. The Respondent says that the Appellant's decision to amend its appeal at this stage of the appeal resulted in the parties spending resources preparing for an appeal that has now been significantly narrowed in scope.

[27] The Respondent says the Appellant's conduct was reckless and/or irresponsible and it warrants a deterrent cost award.

Forest Practices Board

[28] The Forest Practices Board takes no position on whether the applications for document production of the Appellant and the Respondent should be determined.

[29] The Forest Practices Board says it is not opposed to the Appellant abandoning some of its grounds of appeal.

[30] The Forest Practices Board takes no position on the Respondent's request for a cost award.

ANALYSIS

1) Should some or all of the documents requested by the Respondent be produced?

Test for document production

[31] The Commission can 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*").

[32] The requirements of production under section 34(3)(b) of the *ATA* are that documents be admissible, relevant, and within the possession or control of a "party or another party" in the proceeding.

[33] The test for relevance in relation to document production was recently considered by the Commission in *Cassiar Forest Corp. v. Government of British Columbia, 2024 BCFAC 5 (CanLII)* where it was said*:*

> 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." 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."

[34] The question of relevance in this appeal must be considered in light of the Appellant's decision to narrow its appeal. The documents the Respondent seeks must be relevant to the 4 remaining grounds of appeal. The Commission in *Cassiar* also found that it is the party seeking production that bears the onus, so it is the Respondent who bears the onus to establish the requested documents are relevant to those issues.

[35] I will consider each class of documents requested in the context of the remaining 4 grounds of appeal.

a) Field notes and photos created by Tolko Industries Inc. and Westbank prepared during an inspection of the slide area in 2017 after the slide occurred as well as any emails relating to that inspection.

[36] These documents are not relevant to issue 4, which is a legal issue concerning whether multiple contraventions can arise out of the same unlawful act.

[37] Issue 5 concerns another purely legal issue regarding the interpretation of whether the damage to resources contemplated in section 52(1) of the *FRPA* is direct damage as

opposed to indirect. The requested documents are not relevant to making that determination.

[38] Issues 9 and 10 concern the amount of the administrative penalty. The Respondent originally sought these documents because it said they were relevant to determining the cause of the slide and on the issue of the Appellant's due diligence. However, those issues are no longer ones to be determined in this appeal. The Respondent says those field notes and photos it seeks could be relevant to assessment of penalty. The Respondent says the issue of causation is "interwoven" with the task of penalty assessment.

[39] I am not satisfied that understanding more about the cause of the slide will assist in determining the appropriate penalty. The Respondent's concerns that the Appellant may yet still argue it did not cause the slide or that other factors contributed to the slide are not a well-founded concern. The Appellant is not appealing the finding that it caused the slide, and therefore that issue is not before the Commission.

[40] The Respondent says the post-slide investigation might inform the assessment of the gravity and magnitude of the contravention. It says the post-slide investigation might reveal something about the Appellant's forest practices and the cause of the slide which could be used to determine gravity and magnitude.

[41] I am not satisfied that the post-slide investigation of the roadway could assist in determining the gravity and magnitude of the contravention.

[42] In *North Enderby Timber and Canadian Cedar Oil Technologies v Government of British Columbia, 2022 BCFAC 3 (CanLII),* the Commission found that gravity, for the purposes of determining an administrative penalty, refers to the nature of the contravention, while magnitude requires a consideration of the result of the contravention.

[43] The nature of the contravention here concerns the road construction in 2011, which the District Manager found was constructed without sufficient drainage. The Appellant is no longer challenging that finding. I am not satisfied that an investigation of the roadway in 2017 will assist in understanding the nature of the contravention.

[44] The magnitude of the contravention requires a consideration of the resulting impact of the slide. The Decision Maker notes that there was evidence before him of the area affected by the slide and the volume of merchantable timber destroyed. I am not satisfied that the Appellant's investigation of the cause of the slide is relevant to the assessing the downslope impact.

[45] The Respondent has not met the onus of establishing this class of documents are relevant to the issues that the Commission is to determine in this appeal.

b) Tolko Industries Inc.'s LiDAR data for the area in question

[46] LiDAR, or Light Detection and Ranging data, provides data for mapping a densely forested area that would otherwise not be visible from aerial photographs. The Respondent relied on the affidavit of Gareth Wells, Professional Geoscientist in support of

its application for this data. Mr. Wells says the LiDAR data would be directly related to assessing the cause of the slide because it will reveal topography and drainage patterns.

[47] As noted above, the cause of the slide is no longer in issue. I am not persuaded that the LiDAR data would be relevant to the remaining issues, including the penalty determination, in this appeal.

c) Road deactivation reports, terrain stability reports, drainage assessments, and post harvest or post construction reviews, inspection or maintenance records in relation to road structures above the Rosemond slide

[48] Mr. Wells says this information is directly relevant to determining the cause of the slide. Causation is no longer an issue to be determined in this appeal and for the same reasons as set out above, these documents are not relevant to the issues I am to decide in this appeal.

[49] The Respondent has not established how these records assist in determining the magnitude of the impact of the slide, which necessarily must involve a consideration of what occurred below the road rather than how the road was maintained or deactivated in 2017. Neither do these documents assist in assessing the contravention which arose out of events in 2011 when the road was constructed.

d) Photographic evidence showing snow conditions upslope of Tolko Industries Inc.'s logging road in the days and weeks prior to the landslide

[50] Again, Mr. Wells deposes that this information would be directly relevant to the cause of the slide. For the reasons stated above, evidence of the snow conditions is no longer relevant.

e) Any analysis or assessment of climate conditions that Tolko Industries Inc. alleges to have caused the slide.

[51] For the reasons stated above, the appeal no longer concerns the cause of the slide; these documents are not relevant, and furthermore they do not inform the determination of gravity and magnitude of the contravention.

[52] I find that none of the requested class of documents are relevant to the issues to be determined in this appeal. While the other component of the legal test is whether the documents are in the within the possession or control of a party in the proceeding, as I have found the requested documents are not relevant, I do not need to determine if the documents are in possession or control of the Appellant. Having found that the requested documents are not relevant fully disposes of the Respondent's application for document production.

2) Are the two document production applications moot, and if they are, should the Panel exercise discretion to render a decision in each application?

Respondent's Application for Document Production

[53] The Appellant characterized the Respondent's application as moot, following the narrowing of the grounds of appeal. The Respondent says their document production application is not moot, but if it is, the Panel should exercise its discretion to decide their application.

[54] In my view, the use of the term mootness in this instance is inapplicable. I say so for these reasons.

[55] The entire thrust of the application for document production is seeking a decision on whether the requested documents should be produced. Document production is based on relevancy. I have determined that the requested documents are not relevant. I have made a decision and so, this is not an instance of declining to determine an issue because of mootness. There is nothing moot about the application for document production.

[56] What has become moot in the appeal are the issues of causation, due diligence, mistake of fact, and lapse of the limitation period, because those issues are no longer ones to be determined. However, those issues are not before me in this application and no decision is sought on those "moot' issues. Rather, the Respondent asks me to address the various arguments that have been made, for and against its document request. I have determined that the requested classes of documents are not relevant. It is unnecessary to address any other arguments, for or against, making a production order.

Appellant's Application for Document Production

[57] The Appellant is no longer seeking document production from the Respondent. That application has been withdrawn. As the Respondent concedes, the Appellant was at liberty to decide whether to proceed with its application or not.

[58] The Respondent, however, submits that I should still proceed to decide the merits of the Appellant's application notwithstanding that it is not before me. The Respondent relies on the doctrine of mootness and encourages me to exercise my discretion and proceed to decide that application.

[59] The Appellant's application ceased to be before me once the Appellant decided not to proceed. It would be inappropriate in my view to determine an application that the Appellant is no longer advancing. I decline to decide the Appellant's document production application, including making a determination on whether it has been rendered moot.

3) Is Respondent entitled to a cost award against the Appellant?

Position of the Parties

Respondent

[60] The Respondent submits that it is not seeking the costs of this application *per se,* but rather its costs in relation to that portion of the appeal that Tolko Industries Inc. has abandoned. It says that a costs order can be made now, and before completion of the appeal, because the section 13 of the Commission Manual says "an application for costs may be made at anytime during the appeal", if there are special circumstances.

[61] The Respondent submits that special circumstances exist because Tolko Industries Inc. should have taken steps to abandon portions of its appeal much sooner than April of 2024, and its decision to advance "weak" grounds of appeal was reckless and/or tactical and as a result the Respondent was put to the unnecessary cost of expending resources on issues that were, at a very late stage, abandoned.

[62] The Respondent further submits that the Appellant advanced 11 grounds of appeal seeking to set aside a $75,000 penalty and that this was disproportionate to the penalty amount. The Respondent says it was compelled to make an equally detailed response to those 11 grounds of appeal.

Appellant

[63] The Appellant submits that costs should only be awarded where there is unreasonable and/or abusive conduct, and it says its conduct in this appeal cannot be characterized as such.

[64] The Appellant says that its decision to narrow the grounds of appeal reduces the cost for all parties and is something to be encouraged and should not be penalized.

[65] The Appellant submits that the authorities relied upon by the Respondent are distinguishable from the facts in this appeal and its conduct in this appeal does not support a cost award against the Appellant.

[66] Further, the Appellant says pursuing an appeal is a statutory right, and vigorous or strident pursuit is not conduct that could be characterized as a special circumstance giving rise to a cost award

Analysis

[67] The Commission's power to award costs flows from Section 47(1)(a) of the *ATA*:

> **47**(1) Subject to the regulations, the tribunal may make orders for payment as follows:
>
> > (a) requiring a party to pay all or part of the costs of another party or an intervener in connection with the application;

> (b) requiring an intervener to pay all or part of the costs of a party or another intervener in connection with the application;

[68] Section 47 specifically refers to the costs of the application. However, the definition section of the *Act* defines "application" as follows:

> **"application"** includes an appeal, a review or a complaint but excludes any interim or preliminary matter or an application to the court;

[69] Given the definition of application, the Commission has no power to require Tolko Industries Inc. to pay the Respondent's costs of the document production application because it is a preliminary matter and therefore excluded from the application of section 47 of the *ATA*.

[70] The Commission's test for awarding costs is found in section 13.0 of its Practice and Procedure Manual which says costs will only be awarded in special circumstances, which are described as including:

a) where, having regard to all of the circumstances, an appeal is brought for improper reasons or is frivolous or vexatious in nature; [and]

b) where … the failure of a party/intervener to act in a timely manner, results in prejudice to any of the other parties/interveners ….

[71] While not binding on the Commission, decisions of the Environmental Appeal Board (the "Board") offer some guidance on cost awards, as both bodies draw their power to award costs from section 47 of the *ATA* and the portion of the Commission's Practice and Procedure Manual excerpted above is substantially identical to the same provision in the Board's Practice and Procedure Manual. In *Thomas H. Coape-Arnold v Delegate Director, Environmental Management Act, 2020 BCEAB 11 (CanLII),* the Board identified these principles:

- An award of costs in proceedings before the Board is an extraordinary remedy, to be used at the Board's discretion to punish and dissuade abuses of process or other forms of reprehensible conduct.
- Whether to award costs involves considerable exercise of discretion and will often be a very fact-specific exercise.
- The Board must keep in mind that a range of personality types are permitted to participate in the appeal system, and that cost awards should not dissuade people from participating in an appeal just because they are more strident or persistent than others.
- Finally, costs may only be awarded where there are "special circumstances', meaning conduct amounting to a significant departure from expected standards.

[72] In *Board of Education of School district No. 43 v. Director, EMA, 2023 BCEAB 1 EAB (CanLII) ("Board of Education"),* the Board awarded costs against an appellant who refused to acknowledge that the Board lacked jurisdiction to hear an appeal after pollution prevention orders against the appellant had been withdrawn, thereby making the appeal necessary. The appellant in that case also failed to respond to requests for particulars or produce documents. This conduct was found to be deserving of a costs award.

[73] In *Thomas Hobby v Assistant Regional Water Manager 2017 BCEAB 6 (CanLII) ("Thomas")*, the appellant failed on two separate occasions to notify the Board or the parties that two parcels of land that were the subject of a water license under appeal had been sold. The appellant also failed to attend the hearing. The Board found this conduct amounted to special circumstances and costs were awarded.

[74] In *367079 BC ltd. DBA Pro-link Logging v Government of British Columbia 2023 BCFAC 7 (CanLII)* ("*DBA Prolink*"), the Commission considered an application for an award of costs after the appellant withdrew its appeal on day 2 of a 5-day hearing. This followed a determination by the Panel not to certify one of the appellant's exert witnesses. The respondent argued that the appellant had not adequately prepared its case and had not familiarized itself with the normal practice and procedure before the Board. In the result, the Respondent submitted, it had been put to unnecessary expense in responding to the appeal. The Commission declined to second guess the appellant's decisions on how it prepared its appeal. The Panel found there were no special circumstances that would support an award of costs.

[75] Using the foregoing decisions as guidance, I find that no special circumstances akin to those that were found to exist in *Thomas* or *Board of Education* are present in this appeal.

[76] I further find that there is nothing in the Appellant's conduct of this appeal that can be described as a marked departure from the expected standards of conduct.

[77] In terms of the Respondent's proportionality argument, it is not for this Panel to judge what one party might consider an issue of importance that warrants an appeal, or what is a proportional response. The amount of the penalty should not be used to judge whether or why a party might choose to appeal a decision which they do not agree with or how much effort or resources they should expend in doing so. The Panel ought not to judge a party's own assessment of their case and to weigh those decisions to support a finding of improper conduct except in the most obvious and serious cases. *Board of Education* and *Thomas* are examples of such obvious and serious cases, but as I have said, those circumstances do not present themselves here.

[78] Any number of issues may affect a party's view of its appeal while the case develops and is made ready for hearing. There may be recent judicial or administrative decisions of note that influence a party's assessment. The Panel should be reluctant to judge a party's view of its appeal, except as I have said, in the clearest of cases.

[79] There is insufficient reason to find that the appeal was brought for an improper purpose or that it was frivolous or vexatious. Simply because the Appellant determined during the appeal that it will narrow its grounds does not mean that those grounds were improper or frivolous in the first instance.

[80] I decline to order costs in relation to the grounds of appeal that the Appellant chose to abandon.

4) Should the appeal now proceed by way of written submissions?

[81] The Appellant proposes that the appeal now proceed by way of written submissions rather than as a *viva voce* hearing as had originally been scheduled.

[82] The Respondent says it is unable to fully assess this proposal because it does not understand the type of evidence the Appellant intends to rely upon and offers no submissions for or against written submissions.

[83] The Panel is reluctant to make this determination based on the submissions received. I instead will require the parties to attend at a prehearing conference to fully discuss the need for an in-person hearing. If the parties cannot agree on the format of the appeal, they may bring an application for a specific form of hearing which may involve making further submissions to the Commission.

SUMMARY

[84] The Appellant's application for document production was withdrawn. The Panel will not determine that application.

[85] The Respondent's application for document production is dismissed.

[86] The Respondent request for a costs order is dismissed.

[87] Whether this appeal will proceed as a document only appeal on written submissions will be the subject of further discussion at a pre-hearing conference.

"Jeffrey Hand"

Jeffrey Hand, Panel Chair
Forest Appeals Commission