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IN THE MATTER OF THE *FOREST ACT*, R.S.B.C. 1996,
CHAPTER 157, TIMBER HARVESTING CONTRACT AND
SUB-CONTRACT REGULATION, B.C. REGULATION 259-91
(REVISED 22-96) (together referred to as "the Act") AND
COMMERCIAL ARBITRATION ACT,
R.S.B.C. 1996, CHAPTER 55

AND

IN THE MATTER OF A DISPUTE CONCERNING THE
RATE TO BE PAID BY
CARRIER LUMBER LTD. TO
JOE MARTIN & SONS LTD.
IN RESPECT OF 1999 SUMMER LOGGING ON CP 611 BLOCKS 1-4
IN TAKO CREEK, BLACKWATER REGION OF THE
PRINCE GEORGE TIMBER SUPPLY AREA

DECISION ON APPLICATION TO CROSS EXAMINE BRAD SIX ON HIS AFFIDAVITS SWORN NOVEMBER 23, 2000 AND ON NOVEMBER 21, 2001; AND ON AN APPLICATION TO CONTINUE OR REOPEN THE ARBITRATION HEARING ON THE ISSUE OF COSTS

COUNSEL FOR CARRIER LUMBER LTD.	LORNE A.J. DUNN
COUNSEL FOR JOE MARTIN & SONS LTD.	ROY J. STEWART, Q.C.
ARBITRATOR	PAUL D.K. FRASER, Q.C.

I Background and Submissions of Counsel

1. In an Arbitration Award ("the award") dated July 18, 2000 I determined the base rate for the 1999 summer logging by Joe Martin & Sons Ltd. ("JM&S") of CP611 under a replaceable contract for a timber licence held by Carrier Lumber Ltd. ("Carrier") in the Prince George timber supply area.

2. I retained jurisdiction to deal with any matters that might arise in the implementation of the award and, with counsel's agreement, to deal with the question of costs, if the parties were unable to agree.

3. The procedural background leading up to this decision is somewhat complicated. Four months after the award, the parties raised two issues: the first related to payment for any "additives" which Carrier had previously paid to JM&S in addition to the base rate negotiated between the parties. The second was costs. A hearing was arranged for November 24, 2000. Argument on the additives issue was heard on November 24 and a decision was subsequently given to the parties on that issue.

4. On the day before the hearing, counsel for the Plaintiff delivered an affidavit sworn that day by Brad Six, a Logging/Silviculture contractor of Prince George. Mr. Six was not called as a witness in the proceedings that took place in March, 2000 and which led to the award. However, a letter dated June 14, 1999 from him to Terry Kuzma, Carrier's Woodlands manager, was introduced into evidence (Exhibit 6 – Tab E5) as part of Carrier's case. The letter contained a "tender price for stump to dump logging of CP611..." It was part of the evidence introduced by Carrier as a comparative to the logging rate proposed to it by JM&S.

5. In his affidavit sworn November 23, 2000, Mr. Six swears that Mr. Kuzma specifically told him what per tonne rate to put into his letter for the purposes of these proceedings and that Mr. Kuzma held out to him "the prospect of receiving some...summer logging in exchange for having [the] letter prepared".

6. Mr. Six also deposed, in part, as follows:

> Terry Kuzma informed me...that he disliked the Martins intensely and disliked them so much that he intended to force them out at any cost. (Paragraph 7)
>
> ...
>
> [The] letter...was prepared by me on the instruction of Mr. Kuzma who told me:
>
> a) he needed this letter for the purpose of using it in an arbitration with JM&S; and
>
> b) in the arbitration he wanted to show, through the use of this letter, that the rates proposed by JM&S were out of line or too high compared to other contractors; and
>
> c) he specifically told me what to put in the letter, namely the rate of $16.10/tonne and to describe that rate as the rate NSR would be prepared to receive for the work;
>
> d) Terry Kuzma held out to me the prospect of receiving some of this volume from summer logging in exchange for having this letter prepared; and
>
> e) Mr. Kuzma knew, since I told him, that I did not prepare any analysis of the costs of doing this work and did not prepare anything to support the figure of $16.20/tonne; and
>
> f) Mr. Kuzma indicated that he wanted the letter so that he could deal with JM&S in arbitration. (Paragraph 10)

7. Given the late delivery of Mr. Six's affidavit, I determined that the issue of costs would not be dealt with on November 24th but at a subsequent date to be arranged.

8. Until November 24th, counsel for JM&S had confined the impact of Mr. Six's affidavit to the issue of costs. He indicated in oral submissions that he would be seeking full indemnity for costs. At a hearing on January 26, 2001, he broadened the approach to include a claim for punitive damages and sought the following orders:

1. the *hearing be reopened*, pursuant to Rule 34 of the BCICAC Domestic Commercial Arbitration Rules on the grounds that exceptional circumstances exist and the Arbitrator ought therefore to exercise his discretion to reopen the hearing; or

2. in the alternative, the *hearing be continued*, on the grounds that further evidence should be admitted as to the issues of *costs and punitive damages*;

3. JM&S has a claim against Carrier Lumber Ltd. (Carrier) for full indemnity or reasonable legal fees and disbursements incurred by JM&S in the hearing, and any other proceedings related thereto; and

4. JM&S has a claim against Carrier for *punitive damages*; and

5. at the reopened hearing evidence be admitted in support of the claim of JM&S that Carrier indemnify JM&S in respect of all of its reasonable legal fees and disbursements incurred in respect of the hearing and any other proceedings related thereto; and

6. at the reopened hearing evidence be admitted in support of the claim of JM&S that Carrier pay punitive damages to JM&S. (emphasis added)

9. The material portion of Rule 34 of the *BCICAC Domestic Commercial Arbitration Rules* is as follows:

> (1) Having received the evidence and the final submissions of the parties, the arbitration tribunal shall close the hearing.
> (2) After the hearings have been closed, the arbitration tribunal may, in exceptional circumstances, re-open the hearings at any time before the final award.

10. The order that the hearing be continued or reopened was sought on the grounds that "exceptional circumstances" had been revealed in Mr. Six's affidavit sworn November 23, 2000.

11. In summary, JM&S wanted to call evidence to, first, support the claim it wished to advance for full indemnity of reasonable legal fees and disbursements and, second, to support a claim for punitive damages.

12. At the hearing on January 26, 2001, counsel for Carrier submitted that the application for reopening the hearing with respect to the issues of costs and punitive damages be dismissed. He went on to submit as follows:

> 7. In the alternative, *if* the tribunal is considering reopening the hearing, then Carrier seeks an Order Mr. Six be subjected to cross-examination on his affidavit in order to properly test the veracity of his evidence;
>
> 8. In the further alternative, *if* the hearing is reopened as to the issue of punitive damages and/or costs, then the hearing must be reopened on those issues generally, including an Order that it be allowed:
>
> a. full pre-hearing procedures including a further discovery of an authorized representative JM&S on all matters that effect the issues of costs or punitive damages, including the lack of full production of the contractor bids by JM&S, such as to mistakenly produced "bid" of Mr. Doug Wilson of Forest Hill Contractors, and apparent lack of knowledge of the presence of any other bids;
>
> b. Production from Mr. Six of all relevant documents with respect to the allegations contained in his Affidavit;
>
> c. lead evidence as to the improper and outrageous conduct of JM&S generally with respect to its dealings with Carrier;
>
> d. lead evidence as to Carrier's proper conduct and dealings with JM&S herein, and to contradict each and every point alleged by Mr. Six. (emphasis added)

13. Carrier took the position that before the application to reopen could be heard it was entitled to cross examine Mr. Six on the contents of his November 23, 2000 affidavit. The basis for seeking an order to cross examine rested on the affidavit sworn on January 15, 2001 by Valerie Kordyban, an employee and shareholder of Carrier whose brother, Bill Kordyban, was the president of Carrier at all material times. The substance of her affidavit was that Brad Six indicated to her his interest in obtaining some replaceable volume contractor work and during the summer of 2000 he asked her if JM&S was going to sell replaceable volume to Carrier or to another contractor. In November 2000 she deposes that Mr. Six told her that Mr. Kuzma had not "come through on some logging volume for him". She deposes that neither Mr. Kuzma nor her brother told her that Mr. Six had been promised that he would be sold all or a portion of

replaceable logging. Finally she deposes that the first she heard of Mr. Six's allegation about Mr. Kuzma dictating the bid rate was when she read Mr. Six's affidavit of November 23, 2000.

14. It is fair to say that the primary focus of the submissions made by counsel on January 26, 2001 was the claim JM&S was then advancing for punitive damages. The application to reopen or continue the Board's hearings was made in circumstances where JM&S wanted to lead evidence to support its expanded claim. It was obvious that the threshold question of the jurisdiction of an arbitration board to award punitive damages needed to be determined. The practical reality of the situation was that a determination of the jurisdiction issue would ultimately determine the dimension of JM&S' application to reopen or continue the proceedings. Carrier's desire to cross examine Mr. Six was determined and real, but was overshadowed by the obvious immediacy of the jurisdictional issue.

15. Accordingly, I determined that the threshold question of my jurisdiction to award punitive damages should be heard as a preliminary matter. The issue of cross examination was, in effect, deferred.

16. Counsel for the parties presented full argument on the jurisdiction issue. While I had their submissions under consideration, counsel advised me that there were two conflicting arbitral decisions on whether an arbitrator in proceedings under the Act had jurisdiction to award punitive damages. The conflicting decisions were provided to me. I decided that there was jurisdiction. My decision and the other arbitral decisions were packaged and appealed together by arrangement between counsel to the Supreme Court of British Columbia. The court decided that an arbitrator lacked jurisdiction to award punitive damages in an arbitration conducted pursuant to the Act. No appeal was taken to the British Columbia Court of Appeal.

17. Before the result of the jurisdiction issue was known, counsel for Carrier brought on a formal application in November 2001 that Mr. Six be cross examined on his affidavit sworn November 23, 2000 prior to any decision being made by this Board on JM&S' application to reopen or continue the hearing. Counsel for Carrier relied on an affidavit sworn by Terry Kuzma on October 24, 2001 and submitted as follows:

> At the time the application by JM&S first came on for hearing, Carrier Lumber Ltd. had not prepared a responding affidavit as it had not completed its investigation. Since then Carrier Lumber Ltd. has investigated the allegations made by Mr. Six and has now delivered a responding affidavit specifically denying the allegations in Mr. Six's affidavit.

18. In addition to containing a denial of the allegations in Mr. Six's affidavit of November 23, 2000, Mr. Kuzma deposed that he had commenced proceedings against Mr. Six for defamation based on the remarks contained in the November 23, 2000 affidavit. Mr. Kuzma indicated that:

> Mr. Six has defended the defamation action on the basis that his affidavit was protected by absolute privilege and in the alternative, that the affidavit was true in substance and in fact.

19. In response, counsel for JM&S filed a further affidavit of Mr. Six sworn November 21, 2001. The substance of the affidavit relates to the status of the defamation action and the upset and emotional stress Mr. Six deposes he has experienced as a result of alleged contacts others have had with his friends, business associates and former employees with respect to his character.

20. Counsel for Carrier now seeks to also cross examine Mr. Six on his affidavit of November 21, 2001. He submits that the general right to cross examine on affidavits is recognized, citing Brown v. Garrison (1967) 63 W.W.R. 248 (B.C.C.A.). He also makes the following statutory references and submissions:

> *The Commercial Arbitration Act*, Section 6(2)(c), makes the admission of evidence on arbitrations subject to the rules of natural justice. Failure to observe the rules of natural justice is "arbitral error": *Commercial Arbitration Act*, sec. 1.

> *The Arbitration Rules* Section 25(5)(d) indicate that the usual practice will be that a witness will be cross examined when another party requests it.

21. The material portions of Sections 1 and 6 of the *Commercial Arbitration Act* and Section 26 of the Arbitration Rules are reproduced in the Appendix to this decision.

22. It is submitted that the reliability of Mr. Six's assertions should be subject to the challenge of cross examination, followed by submissions by counsel on its admissibility on the issue of continuing or reopening the hearing. Mr. Dunn relies on the decision of the British Columbia Court of Appeal in *Brown v. Garrison et al*, supra 248 at page 250 where the court held as follows:

> Clearly, and it has been long so held, the judge has a discretion which he must exercise on proper principles as to whether or not cross-examination should be directed on the application of a party. There is no question that in the normal course where the affidavit on which the cross-examination is sought includes facts that are in issue, the deponent will so be ordered to attend if application therefor is sought. But the circumstances may be such that the judge may properly exercise his discretion to refuse such an application, and in this case, I am of the opinion such circumstances existed. (emphasis added)

23. Counsel for JM&S has submitted that his motion in January 2001 to reopen or continue the hearings was completed and that the issue with respect to cross examination of Mr. Six on either, or both, of his affidavits, could not be reincarnated based on new material and without their being an application to reopen the earlier application for a reopening of the hearing.

24. A further dimension to the procedural imbroglio in this arbitration is that while the various motions described herein were extant, Carrier sought and obtained leave to appeal the award of July 18, 2000. The Supreme Court of British Columbia ultimately set aside the award and ordered that the matter be remitted to me. JM&S then appealed. The British Columbia Court of Appeal restored the award in a judgment delivered on January 20, 2004.

25. The costs issue was essentially parked during the course of all of this arbitral, procedural and appellate activity. Now that the award itself has been confirmed and the issue of jurisdiction to award punitive damages in proceedings under the *Act* has been decided, the motion to reopen or continue the hearing on the cost issue and the motion to cross examine Mr. Six on his affidavits can be decided.

II DECISION

26. The first question to be decided is whether the hearing in these proceedings, as it relates to the costs issue, has been "closed" as that term is used in Rule 34(supra).

27. In my view, and given the reservation of jurisdiction in the award, the arbitration hearing has not been closed with respect to the question of costs. There is a clear distinction between the costs issue and, for example, the ability of the parties to raise new claims, such as a claim for punitive damages. In short, the need to *reopen* the hearing in order to deal with the issue of costs doesn't arise. The hearing can simply be *continued* with respect to that issue.

28. In view of this finding, the question of whether Mr. Six can be cross examined on his affidavits doesn't, in my view, arise in the context of the analogous Rules of the Supreme Court of British Columbia and the relevant juris prudence. I should say, however, that if I had found it necessary to decide the issue, I would have exercised my discretion to refuse the application, in the circumstances of these proceedings.

29. Counsel for Carrier has submitted that the provisions of Rule 26(5)(d) of the *Arbitration Rules* require ("subject to the direction of the arbitration tribunal") that a witness attend a hearing for oral examination if requested to do so. As I understand his argument, counsel for Carrier says that this provision in the rules would require Mr. Six's attendance pursuant to the application before me to cross examine him on his affidavit.

30. I don't accept that "stand alone" interpretation of Rule 26. Therefore, I am not prepared to direct Mr. Six to appear for cross examination on the motions before me.

31. The next question that arises by implication is whether the parties can lead evidence at the continued hearing on the issue of costs. Counsel for JM&S has indicated that he intends to lead evidence at the proceedings. Counsel for Carrier argues that the parties do not, as of right, have the ability to call evidence on the costs issue. Put another way, counsel for Carrier agrees that the conduct of the parties during the course of the proceedings is relevant to an assessment of costs, but says that the parties do not, as a right, have the ability to call evidence with respect to that conduct. No specific authority was cited in support of the proposition that is not open to the arbitrator to allow parties to call evidence on the costs issue.

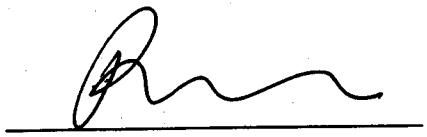
32. In my view, the broad discretion and powers given to me with respect to costs under the provisions of the *Commercial Arbitration Act* certainly include the ability to allow parties to lead relevant evidence at this stage of these proceedings. I will not, of course, pre judge the admissibility of any evidence that may be tendered. That will depend on the rules of evidence and the imperatives of the *Commercial Arbitration Act* and *Rules of Procedure*.

33. JM&S is seeking what in the Rules of the Supreme Court of British Columbia are referred to as "special costs". There are an abundance of cases in this Province providing guidance on when and under what circumstances such costs may be awarded. A consideration of the evidence will have to be made in the context of the claim that is being advanced by JM&S for an extraordinary remedy.

34. The arbitration hearing will, therefore, continue on the issue of costs. I am not prepared to order the pre-hearing disclosure and relief suggested by counsel for Carrier (see paragraph 12 herein) as a pre-condition to the continuation of the hearing. The parties will be left to decide what evidence they wish to tender. Any objections and submissions by counsel will be made in the ordinary way.

35. In the result, the application to continue the hearing with respect to costs is granted. The applications for cross examination of Mr. Six on his affidavits are dismissed, together with the pre-hearing disclosure and relief suggested by counsel for Carrier. The consideration of the costs associated with these motions will form part of my decision on the entire issue of costs.

Dated at Vancouver, British Columbia, this 16th day of February 2005.



Paul D.K. Fraser, Q.C.
Arbitrator

APPENDIX

References to material portions of *Commercial Arbitration Act* referred to by counsel

Section 1

1. In this Act:
"**arbitral error**" means an error that is made by an arbitrator in the course of an arbitration and that consists of one or more of the following:

...

(d) *failure to observe the rules of natural justice*;

Section 6
Examination and production of records and evidence

6 (2) In an arbitration, the arbitrator

...

(c) *may* determine, subject to the rules of natural justice, how evidence is to be admitted.

Reference to material portions of the *Arbitration Rules* referred to by counsel

Costs

11 (1) The costs of an arbitration are in the discretion of the arbitrator who, in making an order for costs, may specify any or all of the following:

(a) the persons entitled to costs;

(b) the persons who must pay the costs;

(c) the amount of the costs or how that amount is to be determined;

(d) how all or part of the costs must be paid.

(2) In specifying the amount of costs under subsection (1)(c), the arbitrator may specify that the costs include

(a) actual reasonable legal fees, and

(b) disbursements, including the arbitrator's fees, expert witness fees and the expenses incurred for holding the hearing.

...

19. Conduct of the Arbitration

(1) Subject to these Rules, the arbitration tribunal may conduct the arbitration in the manner it considers appropriate but each party shall be treated fairly and shall be given full opportunity to present its case.

(2) The arbitration tribunal shall strive to achieve a just, speedy and economical determination of the proceeding on its merits.

...

26. Hearings and Evidence

...

(5) Subject to the direction of the arbitration tribunal,

(a) the evidence of every witness shall be presented in written form;

(b) the written statement of each witness shall be signed by the witness and, if the tribunal so directs, duly sworn or declared;

(c) the parties shall exchange statements of witnesses no less than 5 days before the hearing, if any;

(d) a witness shall attend the hearing for oral examination if requested to do so no less than 2 days before the hearing;

(e) if a witness is requested but fails to attend the hearing, the tribunal may refuse to receive the written statement as evidence or place such weight on the evidence as it considers appropriate; and

(f) subject to sub-rules 4 and 5(e), each statement shall be received as the direct examination of the witness.

(6) The arbitration tribunal, on such terms as are necessary to prevent prejudice, may allow a party to introduce into evidence a document not disclosed under Rule 21(5), or introduce oral evidence of a witness not disclosed under this Rule.

34. Closure of Hearings and Termination of the Proceedings

(1) Having received the evidence and the final submissions of the parties, the arbitration tribunal shall close the hearing.

(2) After the hearings have been closed, the arbitration tribunal may, in the exceptional circumstances, re-open the hearings at any time before the final award.

...

38. Costs

(1) The arbitration tribunal shall determine liability for costs and may apportion costs between the parties.

(2) In awarding costs, the arbitration tribunal shall take into account the principles set out in Rule 19(2), and the failure of any party to comply with these Rules or the orders of the tribunal. The tribunal shall provide reasons in the event it departs from the principle that costs follow the event.

...