

COPY

IN THE MATTER OF THE FOREST ACT, R.S.B.C. 1979, c.140, as amended;

AND

IN THE MATTER OF THE TIMBER HARVESTING CONTRACTS AND
SUBCONTRACTS REGULATION, B.C. REG. 258/91, (the "Regulation");

AND

IN THE MATTER OF THE COMMERCIAL ARBITRATION ACT, S.B.C. 1986,
c.3, AND IN THE MATTER OF A DISPUTE:

BETWEEN:

PAT CARSON BULLDOZING LTD. OF THE FIRST PART
AND:

FALLS CREEK FALLING CONTRACTORS LTD. OF THE SECOND PART

AWARD
JUNE 30, 1997

Arbitrator:	Richard M. Herring, RPF
Counsel for Pat Carson Bulldozing Ltd.:	D. Geoffrey Cowper Tracey M. Cohen
Counsel for Falls Creek Falling Contractors Ltd.:	Eileen Vanderburgh
Dates of Hearing:	March 17, 18, 26, 1997
Places of Hearing:	Nanaimo and Vancouver, British Columbia

I THE ISSUES

In 1994, Pat Carson Bulldozing Ltd. (hereinafter referred to as PCB) was a stump-to-dump contractor on Tree Farm Licence 46 (TFL) held by TimberWest Forest Limited (TWF) under a contract (*Contract*) with Fletcher Challenge Canada Limited, the predecessor to TWF, dated January 9, 1990 (Exhibit 1).

Falls Creek Falling Contractors Ltd. (FCFC) was a falling and bucking contractor for PCB on the TFL under a Subcontract (*Subcontract*) dated January 1, 1994 (Exhibit 2).

In early 1994, a trespass (timber cut outside the authorized area) occurred on Cutblock 1161 of the TFL. TWF took remedial action and charged PCB the costs they attributed to such action, by withholding \$198,348.49 under the indemnity provision in the *Contract* from monies due PCB. PCB charged this amount to FCFC under the indemnity provision in the *Subcontract*. FCFC disputes their full responsibility for the trespass, and the amount of the charges.

On October 18, 1995, both parties agreed to submit the dispute to arbitration under a single arbitrator: R.M. Herring, R.P.F. (Exhibit 11).

On March 7, 1997, both parties agreed in their *Submission to Arbitration* that the *Issues to be Submitted* were (paragraph 4):

- (a) Is Falls Creek liable for the costs charged to Pat Carson by TimberWest or any portion of them, associated with the contraventions?
- (b) What, if any, interest is payable by Falls Creek as a result of the costs arising from the contraventions?
- (c) What, if any, legal fees are recoverable by the parties as a result of this Arbitration?

II BACKGROUND

While PCB, now known as Hayes Forest Services Ltd., is a stump-to-dump contractor, they have traditionally relied on sub-contracting the falling and bucking phase of production. Until PCB acquired Forestland Industries in 1993, they had no fallers on their payroll.

FCFC was the falling and bucking sub-contractor for PCB on Cutblock 1161. Since successor rights under the Labour Relations Code (s. 35 and 36) obligated PCB to offer work to the fallers on the seniority list of Forestland Industries, but having no falling and bucking organization of its own (e.g. tools, vehicles, supervision), PCB asked FCFC to add them to its crew to handle the extra production that came with Forestland's annual cut. This met with agreement by FCFC. In order to comply with the Contractor clause (Art. XXV) of the IWA Coast Master Agreement, PCB had to carry them on its payroll records even if they worked on someone else's crew.

Accordingly, the Forestland fallers worked under the supervision of FCFC but were listed on PCB's bargaining unit with all earnings reported by FCFC, plus PCB payroll costs, billed back to FCFC at cost.

Cutblock 1161 is at the upper end of what is known as the Allan Creek Mainline on Cutting Permit (CP)2 of the TFL. During prelogging planning between the licensee (TWF) and government agencies, the cutblock area in general was identified as environmentally sensitive. Evidence at hearing (Exhibit 18) indicates several (January 24, 1994 and February 10, 1994) joint field inspections were made involving representatives from TWF, PCB, FCFC and government agencies; but most of the trespass areas were outside the coverage of such visits.

Falling started on Cutblock 1161 in March 1994 (Exhibit 3), with a crew made up of men from both FCFC's own payroll and several Forestland fallers carried on PCB's payroll records. A setting map (Exhibit 17) from TWF was provided to FCFC. Sometime between December, 1993 and March 1994, TWF evidently chose to change some of the cutting boundaries of the cutblock, as evidenced by comparison of the "Current Setting Map" (Exhibit 19) and Exhibit 17. In spite of such changes, Exhibit 17 carries the same effective date (93/12/08) as Exhibit 19.

None of the fallers were copied with the setting map, it evidently being kept in the vehicles of the principals of FCFC (Worthing and Wheeldon). Some fallers reported encountering boundary markings (ribbons, blazes) in unexpected locations compared to directions they were given, but they all found boundary markings they could start from.

Ultimately, TWF was asked to send out a representative to clear up the confusion. This was carried out on April 25, 1994, and it was found cutting had taken place outside of approved boundaries, constituting a trespass. Reported to the Ministry of Forests on April 26, 1994, it resulted in a suspension of operations on Cutting Permit 2 of the TFL of which Cutblock 1161 was part (Exhibit 5). After approval of a remediation plan developed between TWF and the Ministry of Forests, creek cleaning and helicopter logging was carried out between June and August, 1994 (Exhibit 6).

On April 28, 1994, PCB notified FCFC that they were considered in default of the *Subcontract* pursuant to s. 12 thereof, due to "...operations on Block 1161", including a description of specifics (Exhibit 14).

Also on April 28, 1994, PCB advised TWF that they acknowledged responsibility for what became known in the *Submission to Arbitration* as Trespass Areas 1 and 3 through the actions of their subcontractor FCFC, who would be held "accountable for costs and penalties". PCB said that they did not consider what became known as Trespass Area 2 was the responsibility of PCB or FCFC due to the fact that the area had "three versions of block boundaries" and the trespass was the "...direct result of TimberWest not removing the two other versions of the falling boundary..." (Exhibit 16).

FCFC replied to PCB on May 5, 1994 expressing disagreement with the " ...characterization of our conduct in respect of the falling on Block 1161" but offering "to undertake the hand-cleaning of the creek" in one of the areas of contention (Exhibit 15).

On May 17, 1994, TWF advised PCB that they would "...seek to recover any extra costs to TimberWest Forest Limited resulting from this trespass" pursuant to the Contract (Exhibit 5).

On May 25, 1994, PCB advised FCFC that TWF was holding PCB liable for "any extra costs" per their above noted letter, and that PCB "...will seek indemnity from you in respect of this claim." FCFC was also asked to acknowledge and confirm that they were obligated to indemnify PCB pursuant to s. 10 (sic) of the *Subcontract* (Exhibit 28).

PCB made demand on July 17, 1994 on FCFC for payment of \$198,348.49 assessed against PCB by TWF for their extra costs incurred due to the trespass (Exhibit 7).

FCFC replied on July 27, 1995 that they did not agree that they were responsible, and disputed PCB's July 17, 1994 demand for payment (Exhibit 8).

By letter dated August 2, 1995, Counsel for PCB advised FCFC that PCB intended "...to submit their dispute with respect to the extra costs incurred due to the trespass adjacent to Cutblock 1191 in the Allen Creek area, to mediation." (Exhibit 9)

On the same date (August 2, 1995), PCB informed the Regional Manager, Vancouver Forest Region (VFR), Ministry of Forests (MOF) of its dispute with FCFC, and requests "a list of registered mediators/arbitrators..." (Exhibit 10)

On October 18, 1995, counsel for PCB informed the Regional Manager, VFR, MOF, that both parties had agreed to proceed directly to arbitration, with Richard M. Herring as single arbitrator (Exhibit 11).

On June 5, 1996, the Arbitrator heard arguments by counsel for each of PCB, FCFC and TWF on whether he had jurisdiction to arbitrate the dispute. In a decision dated June 24, 1996, the Arbitrator concluded "...that the dispute between PCB and FCFC is subject to arbitration under terms of the Forest Act and Timber Harvesting Contracts and Subcontracts Regulation, B.C. Reg. 258/91."

Evidence was taken at Nanaimo, B.C. on March 17 and 18, 1997 with final arguments presented in Vancouver, B.C. on March 26, 1997.

III SUBMISSIONS

PCB submits that FCFC and its principals are obliged to indemnify PCB for remediation costs (\$198,348.49) withheld by TWF, plus interest and costs, due to the trespass that occurred on Cutblock 1161, Cutting Permit 2, TFL 46 prior to its discovery on April 25, 1994. Their submissions may be summarized as follows:

- FCC was in default of the *Subcontract* when it failed to:
"conduct its operations in a good and workmanlike manner in accordance with the best British Columbia logging practices" (s.2.1(d)); and

"honour all boundaries, as ascertained and designated by TimberWest and/or the Contractor, and will take such reasonable steps that are in accordance with the best British Columbia logging practices so as to avoid any trespass outside the said designated areas provided that in the case of a trespass by the subcontractor or its employees caused by the Subcontractor's failure to take said reasonable steps, all penalties imposed against the Contractor by reason of such trespass will be for the Subcontractor's account. (s.2.1(k))"

due to the failure of the principals of Falls Creek to: walk the boundary lines prior to commencement of falling; provide fallers with a map of the block; walk the fallers to the boundary or falling corners; advise the fallers of the falling corner numbers; adequately advise the fallers when they became concerned about the boundaries; and cease falling when it was apparent that the boundary lines were not as indicated on the map.

Pursuant to Paragraph 9 of the *Subcontract*, FCFC has an obligation to indemnify PCB for any damages it may suffer in any way caused by or arising out of any default by FCFC, per:

9. Indemnities

9.1 The Subcontractor and the Covenantor jointly and severally agree to indemnify and save harmless the Contractor from and against any and all claims, demands, actions, causes of action, damage, loss, costs, charges and expenses suffered or incurred by any one or more of the Contractor, its directors, agents and servants;

(a) caused in any way by or arising out of the acts or defaults of the Subcontractor or any of its officers, employees, agents or subcontractors, or by the non-compliance by the Subcontractor or any of the aforesaid with any of the terms and provisions contained or referred to in this Agreement; or

(b) attributable to any other person or persons who the Subcontractor, or its agents, employees or subcontractors have expressly or impliedly authorized to enter onto the Lands;

Provided that nothing herein shall render the Subcontractor or the Covenantor liable for the negligence of the Contractor, its employees, agents or other subcontractors of the Contractor.

- Further, under to the terms of *Subcontract*, the principals of FCFC, Richard Worthing and John Wheeldon, also agreed to indemnify PCB. The Whereas provisions of the *Subcontract* provide at paragraph E:

"E. The covenantor has become a party to this Agreement for the purpose of covenanting with the Contractor to indemnify it with respect to any and all damages it might suffer arising out of any default by the subcontractor in this Agreement...

- The damages suffered by PCB are the costs of remediation withheld by TWF (\$198,348.49) plus interest and legal fees.

FCFC's submissions may be summarized as follows:

- FCFC is not liable for costs caused by or arising out of the negligence of TWF, PCB or PCB employees, per final sentence of Paragraph 9 of the *Subcontract* above noted.
- According to Schedule B(f) of the *Contract*, TWF was responsible for laying out setting boundaries. It erred when it failed to remove old boundary markings when new boundaries were designated sometime between December 1993 and March 1994.

- According to Schedule A(f) of the *Contract*, PCB was responsible for ascertaining the boundaries of areas to be logged.
- Two of the fallers who worked in one of the trespass areas (#2) were PCB employees, and PCB remained responsible for their supervision.
- The TWF claim against PCB was unreasonable because there was no evidence why TWF:
 - had to employ helicopters;
 - helicopter log more volume (5,228.8m³) than had been identified as involved in the trespass (2,172 m³);
 - did not allow offsetting credit for \$27,500 road costs obviated by the helicopter logging.
- PCB has taken no action to challenge the TWF claim, and cannot thus claim to recover the whole amount from FCFC on the basis of the Subcontract's indemnity provisions: *C.E.D. Western (3d), Vol. 16 Guarantee, Indemnity and Standby Letters of Credit para 346/349*.
- FCFC accepted responsibility for cutting in what became known as Trespass Area #3.

IV

CONSIDERATION OF SUBMISSIONS

Both parties agree on the facts that a trespass took place at three locations on Cutblock 1161 of Cutting Permit 2 of Tree Farm Licence 46 between March and April 25, 1994.

While some argument addressed the circumstances of why the strip labelled Trespass Area No. 3 was cut, the evidence indicates that FCFC acknowledged responsibility and incurred the cost of remediation. Since there is no other evidence that Trespass Area No. 3 had any role in the remediation costs incurred by TWF, withheld from PCB, and claimed of FCFC, those circumstances played no part in my considerations.

The role TWF may have played in the event was the cause of some argument. In fact, as noted, it figures prominently in the submission of FCFC. However, both parties objected in their turn to the entry of any direct evidence of such a role due to the fact that TWF was not involved in presenting evidence, nor present for examination thereof. Accordingly I must conclude that whatever part TWF may have played in the trespass, I have no evidence to reach any decision on the matter.

Much argument was devoted to the fact that two fallers involved, Daigle and Nelson, were ex-Forestland fallers and thus PCB employees, making PCB responsible for any negligence on their part. In consideration of the several facts that all the evidence, including that of an FCFC principal (Worthing), indicates that:

- The fallers did nothing wrong—based on the directions they were given; and

- other fallers on FCFC's own payroll worked on Trespass Area #1 and probably #2 (conflicting evidence),

leaves me to conclude that any question of the employment status of those two fallers is unrelated to responsibility for the trespass.

PCB asserts that FCFC's obligation to indemnify them for the amount of their claim derives from the language of the *Subcontract*, because the trespass was caused by the failure of FCFC to meet the conditions described in paragraphs 2.1(d) and 2.1(k) already cited, and that such failure stemmed from flawed supervision on the part of FCFC. In this regard, evidence was introduced that a principal of FCFC (Worthing) sent fallers into Trespass Area #2 with only general directions to pick up the lower boundary and start work, even after they had reported finding a confusion of marking ribbons when they had first been given comparable instructions the day before. Further evidence indicated that Worthing told fallers to ignore confusing ribbons when later encountered.

FCFC participated in pre-logging inspections with representatives of PCB, the Ministry of Forests, and Fisheries and Oceans Canada, although such inspections did not cover the areas later identified as Trespass Areas #1 and #2.

FCFC was given a copy of TWF's setting map for Cutblock 1161 before falling began. Evidence given indicates only one such copy was first provided and its usual location was cited as Worthing's or Wheeldon's pickup trucks, exchanged between them at shift changes.

While there is nothing on the setting map entered as Exhibit 17 (such as a revision date in the title block) to indicate that the cutting boundaries differed from those on the December 8, 1993 version, nor evidently were either PCB and FCFC told of such changes otherwise, the early reports of fallers about confusing ribbons should have alerted FCFC (Worthing) that the boundary marking question deserved closer scrutiny. There was no evidence this was done. Rather, Worthing's evidence that he would have realized something was amiss if he had checked his map, with the marked leave strip he discussed with fallers in Area #2, indicated he did not regard the map as a basic reference source when mixed signals were encountered. Evidence also shows that he did not confirm cutting boundaries with his fallers or by himself, nor advise them what corner markers to use as reference points (another non-use of the map in his possession).

FCFC asserts that PCB erred in not checking the cutting boundaries themselves, nor supervising the two ex-Forestland fallers on their own payroll/seniority list.

I am not persuaded that PCB should be found in error because their logging supervisor (Prenevost) or forester/engineer (Clarke) did not personally check all the setting boundaries on Cutblock 1161. That is not the usual personal duty of a logging supervisor or forester responsible for a number of sides or cutblocks, especially when they have a falling supervisor/bullbuck directly on site. Evidence given by both parties indicates that they were in agreement that the principals of FCFC (Worthing and Wheeldon) were the on-site falling supervisors, at least at the time of the trespass.

FCFC argues that the express language of clause 4.2 of the *Subcontract* obligates PCB to be responsible for supervising the two ex-Forestland fallers (Daigle and Nelson) working for FCFC,

but carried on PCB's payroll and seniority list, thus absolving FCFC of supervisory responsibility for them. In the process, several authorities are cited in support of that line of argument: *Mersey Docks and Harbour Guard v. Coggins*, [1946] 2 All E.R. 345 (H.L.); and *Spalding v. Tarmac Civil Engineering Ltd.* [1971] 1 W.L.R. 1508 (H.L.)

The express language of clause 4.2, read in conjunction with the clause 4.1 appears as:

4.1 The Subcontractor shall employ all persons and provide all things necessary to perform properly the whole of the work required to be done hereunder and without limiting the generality of the foregoing, shall provide and maintain in a safe working order, at its sole expense, all tools, machinery, equipment, supplies, labour and supervision necessary to perform the work hereunder and shall provide and pay all costs of accommodation and board for crews and the transportation of crews, supplies and equipment unless otherwise specified herein.

4.2 The Contractor shall be responsible for all of the obligations under Article 4.1 in respect of all work to be done by employees of the Contractor which are supervised by the Subcontractor at the Contractor's request.

I am not able to find support for FCFC's argument in the words of clause 4.2, because it expressly refers to "...employees of the Contractor which are supervised by the Subcontractor at the Contractor's request." (emphasis added). I cannot conclude how a clause specifically citing the relationship that existed can be interpreted as saying it never did exist. Since as noted in evidence, both parties agreed and worked with the arrangement of FCFC principals supervising fallers that had to be carried on the PCB payroll for legal reasons, at least before the trespass; evidently they did not try to interpret it that way either.

I am not able to interpret more into the language of clause 4.2 than PCB would be responsible for the cost obligations relating to their employees supervised by FCFC. That PCB would accept supervisory responsibility for only two men in a crew of up to a dozen when it had no falling supervisors for its own, and had asked FCFC to do so in return for additional contract volume (a fact of agreement in the evidence of both parties) defies rational understanding.

Regarding the application of the authorities cited by FCFC, I am not able to relate the circumstances described in *Mersey Docks* to those identified in this arbitration, since it involves the question of who was the employer of a crane operator who committed a negligent act. If Daigle and/or Nelson were found to have operated their power saws in a negligent manner, some connection might be adduced, but in this arbitration both parties agree that the fallers were not at fault given the directions they received.

I found the same difficulty in finding direction from *Spalding* insofar as it, too, revolves around the negligence of a worker, an event absent in this arbitration.

FCFC challenges their liability under the indemnity clause in the *Subcontract* (clause 9.1) because:

- as noted under Part III herein, TWF and PCB were responsible for the trespass, and
- PCB made no effort to dispute (reduce) the amount of costs levied against them by TWF.

With regard to the question of TWF's degree of responsibility for the trespass, I have already noted that the terms of reference of this arbitration do not allow me to reach any conclusions bearing on it. Assertions were made in abundance, but both parties insisted in their turn that no evidence could be introduced without TWF witnesses who could be questioned. None were called.

My ability to accept arguments about the amount of money deducted by TWF from receivables due PCB is limited by the same circumstances that apply in the issue of TWF's degree of liability—assertions, but no evidence that could be verified by witnesses subject to questioning.

Regarding the question of PCB's responsibility to confirm the final cutting boundaries, I have already described my opinion based on many years in the industry that such a role is more characteristically handled by the falling supervisor (FCFC principals) than a logging superintendent, or corporate forester/engineer (PCB staff). Accordingly, the acknowledged fact that PCB staff did not physically confirm boundaries on the ground is not at odds with standard industry practice. Rather, delegation of the responsibility to the party contracted to provide falling supervision (FCFC) would be fully consistent with such practice. I note that neither FCFC principal disputed that fact in their evidence. In fact, it was Mr. Wheeldon's action in that regard that ultimately brought out the TWF staff who identified the trespass.

V CONCLUSIONS

On the basis of the information and evidence garnered from the witnesses, exhibits and submissions by counsel, I conclude that the trespass in Areas #1 and #2 would not have happened if the supervision by FCFC had been in accord with clauses 2.1(d) and 2.1(k) of the *Subcontract*. In effect, it constituted a breach of contract.

While the existence of markings for more than one cutting boundary appears in the witnesses' evidence relative to Trespass Area #2, that fact was discovered by fallers on the first day they went to work in the area, and reported to their acknowledged supervisor, a principal of FCFC (Worthing), before the start of work the next day. Had Worthing stopped to compare what the fallers described with the map he admitted he had, the existence of invalid boundary markings would have become apparent. Even some days later, when he was critical of fallers bypassing a streamside leave strip in Area #2, he admitted under questioning that had he consulted his map he would have seen the strip was not even in the revised cutblock, nor any of the rest of Area #2. Had he used the map as the proper reference, fallers would never have been sent into Trespass Area #1. It was completely omitted in the revised plan shown on the map.

It follows that failure to meet the level of performance defined in clause 2.1 as cited, would bring the consequences under the conditions set out in clause 9.1 regarding indemnification. The cause clearly meets the conditions that trigger such indemnification per clause 9.1(a): "*caused in any way by or arising out of the act or defaults of the Subcontractor or any of its officers, employees, agents or subcontractors, or by the non-compliance by the Subcontractor or any of the aforesaid with any of the terms and provisions contained or referred.*" The amount that TWF levied against PCB as a result of the trespass clearly meets the definition of *...any and all claims*,

demands, actions, causes of action, damage, loss costs, charges and expenses suffered or incurred by any one or more of the Contractor..." (emphasis added).

As described under Part IV herein, I have no basis to speak to the sum, or basis for, the amount of TWF's claim against PCB. The indemnity clause (12.01) in their *Contract* essentially uses the same language as the *Subcontract* including such powerful words as "any and all" and "in any way caused by...."

VI SUMMARY

In summary, I have concluded that, irrespective of other possible contributing causes that were outside the process of this arbitration to determine, FCFC had adequate warning that the problem of multiple boundary markings existed—and had been provided the tool (map) to identify it—to have prevented the trespass on Cutblock 1161. The fact that it still occurred demonstrated a level of supervision not up to the standard of "*best British Columbia logging practices*", they accepted under terms of clause 2.1(d) and 2.1(k) the *Subcontract*.

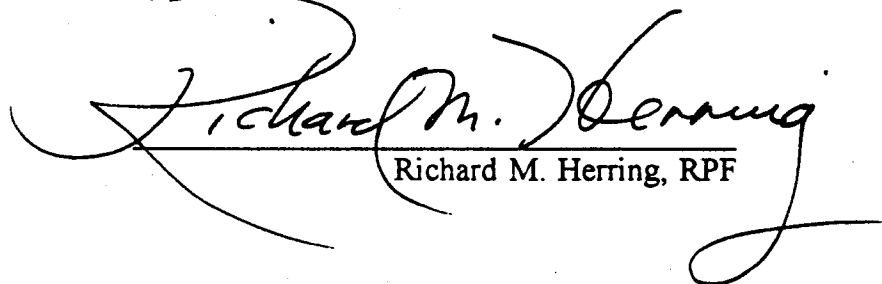
Since such a default falls under the conditions for indemnification defined under clause 9.1(a) of the *Subcontract*, PCB is entitled to be indemnified for its "...costs, charges and expenses..." incurred as a result.

Accordingly, my determination of the appropriate answers to the questions cited in paragraph 4 of the March 7, 1997 joint *Submission to Arbitration* are, (in order of their appearance):

- (a) Falls Creek (FCFC) is liable for the costs charged to Pat Carson (PCB) by TimberWest (TWF); as a "cost" specified in the indemnification clause of the *Subcontract*.
- b) The interest charged to Pat Carson for the sum charged by TimberWest is payable by Falls Creek; as a "charge" specified in the indemnification clause of the *Subcontract*.
- (c) The legal fees incurred by Pat Carson to bring the issue to arbitration are payable by Falls Creek; as an "expense" specified in the indemnification clause of the *Subcontract*.

Dated at Vancouver, British Columbia this 30th day of June, 1997.

ARBITRATOR


Richard M. Herring, RPF