

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Skeena Sawmills Ltd. v. Terrace Timber Ltd.*,
2023 BCSC 550

Date: 20230411
Docket: S21679
Registry: Terrace

Between:

Skeena Sawmills Ltd.

Petitioner

And

Terrace Timber Ltd.

Respondent

Before: The Honourable Justice Chan

Reasons for Judgment

Counsel for the Petitioner:
(via videoconference)

M.S. Oulton

Counsel for the Respondent:
(via videoconference)

C.J. Moore

Place and Date of Trial/Hearing:

Prince George, B.C.
March 8, 2023

Place and Date of Judgment:

Terrace, B.C.
April 11, 2023

Table of Contents

OVERVIEW..... 3

FACTUAL BACKGROUND..... 3

THE RATE DISPUTE 3

 Engaging TimberTrack Inc. 4

 The December 22, 2022 Report of TTI..... 6

 Events of January 2023..... 7

THE SNOW REMOVAL DISPUTE 8

THE LIENS AND CONTRACTOR CHARGES 10

STATUTORY SCHEME FOR REGISTRATIONS OF LIENS AND CONTRACTOR CHARGES..... 11

ISSUES..... 12

ANALYSIS OF THE RATE DISPUTE 12

 Position of Skeena 12

 Position of Terrace 13

 Analysis..... 13

ANALYSIS OF THE SNOW REMOVAL DISPUTE 15

 Position of Skeena 15

 Position of Terrace 15

 Analysis..... 15

CONCLUSION..... 16

Overview

[1] Skeena Sawmills Ltd. (“Skeena”) seeks a declaration under s. 21(a) of the *Forestry Service Providers Protection Act*, S.B.C. 2010, c. 16 [FSPPA] that two contractor charges and two liens registered by Terrace Timber Ltd. (“Terrace”) against Skeena are invalid. Skeena seeks an order discharging the charges and liens, arguing that Skeena is not in default of any payments owed to Terrace.

[2] Terrace seeks a declaration that the charges and liens are valid. Terrace argues the debts underlying the registrations of the charges and liens, associated to timber harvesting and snow removal work performed by Terrace, are in default.

Factual Background

[3] Skeena holds Tree Farm Licence 41 (“TFL 41”), an area-based tenure located to the south of Terrace, in an area near the city of Kitimat on the coast of British Columbia. TFL 41 grants Skeena the right to harvest an allowable annual cut of 128,000 cubic metres of timber from within the area.

[4] In 2015, Skeena and Terrace entered into a replaceable contract to harvest timber in the area (the “Contract”). In the industry, it is known as a “stump to dump” contract, where Terrace agreed to provide timber harvesting services of the allowable annual cut. This Contract was governed by the *Timber Harvesting Contract and Subcontract Regulation*, B.C. Reg. 22/96 [Regulation]. The Contract expired on December 31, 2019. However, under the terms of the *Regulation*, Skeena is obligated to offer to Terrace a replacement contract on substantially the same terms and conditions. The parties have not been able to agree on a new contract, and by operation of the *Regulation*, the Contract remains in force between the parties.

The Rate Dispute

[5] Disputes about logging rates arose under the Contract in the past several years. Part 15 of the Contract contained clauses for resolution of disputes, which included informal negotiations, mediation, and then arbitration. In the spring of 2022, the parties discussed the possibility of engaging a third party to assist in resolving

some rate disputes. These rate disputes involved determining the rate of pay for Terrace in logging 13 specific cutblocks (the “Disputed Blocks”). Rates for timber harvesting work are determined on a block by block basis, depending on the terrain and the type of equipment required to log.

Engaging TimberTrack Inc.

[6] In April 2022, the president of Skeena contacted Greg Main, the president of Terrace, to propose engaging TimberTrack Inc. (“TTI”) as a third party to determine logging rates for the Disputed Blocks. Skeena had previous experience with Aaron Sinclair, the founder of TTI, and trusted his ability. By an email dated June 17, 2022, Greg DeMille, then General Manager of Skeena, advised Mr. Main that TTI would prepare a proposal to resolve the outstanding rates for the Disputed Blocks and develop a framework for rate determination moving forward. In that email, Mr. DeMille advised “Accompanying his proposal will be an agreement that both parties will sign that will make his rate determination binding on both parties”.

[7] A series of emails followed between the parties. As Terrace relies on these emails to argue the agreement was complete between Skeena and Terrace by July 9, 2022, I will set out the contents of the pertinent emails in detail.

[8] On July 4, 2022, Mr. DeMille emailed Mr. Main, advising that Mr. DeMille is “okay with moving ahead with Phase 1, if we agree that the results are binding on both parties”. Phase 1 is a reference to rate determination of the Disputed Blocks.

[9] On July 7, 2022, Mr. Main responded. Mr. Main indicated that he spoke with Mr. Sinclair, who is agreeable to incorporating the following terms of reference in a proposal for Phase 1, as “an alternative to arbitration to resolve log rates for approximately 120,000 m³ of already logged timber”. Other terms of reference that Mr. Main stated he would like to see included are that TTI would follow section 26.01 and section 26.02 of the *Regulation*, which set out the rate test considerations for the industry, and that “Both Skeena and Terrace agree to be bound by TimberTrax determination”.

[10] On July 9, 2022, Mr. DeMille responded with “I am agreeable to what you suggest”.

[11] On July 15, 2022, Mr. Sinclair from TTI emailed both Mr. DeMille and Mr. Main a “Professional Services Proposal for Log Rates”. The agreement (the “TimberTracks Agreement”) is six pages, and includes the following terms:

- “Skeena Sawmills Ltd. (‘Skeena’) and Terrace Timber Ltd. (‘Terrace’) are seeking an alternative to arbitration to resolve log rates for approximately 120,000 m³ of already logged timber performed by Terrace for Skeena”;
- “To the best of its ability, acting reasonably, TTI shall follow the considerations outlined in s. 26.01 and s. 26.02 of the *Regulation* when determining the final rates”;
- “TTI will use methods, as solely determined by TTI, to establish logging rates for work performed by Terrace for Skeena”;
- “It is understood by TTI that this agreement would be an alternative to arbitration and that Skeena and Terrace, by way of an agreement between them, have agreed that TTI’s determination of rates for the historical work is final and binding without recourse”;
- “Reliance on drafts – during the engagement we may provide oral comments, or written reports, letters, schedules or hard or soft copies of electronic work products in draft form. As these represent work in progress and not our final report, we do not assume any responsibility in respect of them. The final results of our work will be contained in our final written report”; and
- “Right to terminate Agreement – either party may terminate this Agreement by giving written notice which will have immediate effect”.

[12] The TimberTracks Agreement was signed by Skeena and Terrace on or about July 29, 2022.

[13] In the meantime, according to section 26(b) of the *Regulation*, if the parties cannot agree on a rate, the forest products owner is to pay a provisional rate to the contractor. Throughout this period, Skeena paid a provisional rate of \$40 per cubic metre for Disputed Blocks requiring the use of cable harvesting methods, and \$28.50 per cubic metre for Disputed Blocks requiring ground-based harvesting methods. The parties agree that this provisional rate has been paid to Terrace for all the Disputed Blocks.

[14] In November 2022, the parties agreed to refer to TTI for its rate determination three additional blocks where Terrace was expected to complete work at about the same time.

The December 22, 2022 Report of TTI

[15] On December 22, 2022, TTI sent the parties the following email:

Gentlemen,

Please see attached preliminary report for the rate determination of blocks in dispute.

The cover letter indicates that this is a preliminary report and we intend to finalize shortly after receiving final details from Terrace Timber on the three final blocks...

[16] Attached to the email is a nine-page report dated December 21, 2022. The first page is a cover letter and reads in part as follows:

Re: Preliminary Log Rate Determination

TimberTracks Inc. is pleased to provide Skeena Sawmills Ltd. and Terrace Timber Ltd. with our preliminary rate determination for 11 blocks in dispute with a total delivered volume of 144,604 cubic metres. This determination is preliminary as we are still waiting for some information from Terrace on three of the blocks just completed. Both Skeena and Terrace have requested that we do not delay production of the report and therefore our rate determination is preliminary until that information is received. We do not anticipate material variances in our preliminary rate determination however, it is prudent to review the information before the rate determination is finalized...

...Our preliminary rate determination is a rate of \$49.20 per cubic metre for the entire package of work...

[17] On page three at the bottom is written “This report is the preliminary report awaiting final information from Terrace on 6-20-3, 6-30-5 and KIT005.” Those numbers represent the three additional blocks referred to TTI in November 2022.

Events of January 2023

[18] Mr. DeMille deposed that due to the holidays, he did not have an opportunity to thoroughly review this report until early January. Upon review, Mr. DeMille had concerns about the methodology used and sent an email to Mr. Sinclair on January 3, 2023, copied to Mr. Main. In the email, Mr. DeMille wrote in part the following:

We respectfully request that you immediately cease any further work on this matter while we complete our review of the preliminary report. If you are unable or unwilling to agree to this request, please consider this email written notice of termination of your retainer in this matter.

[19] Mr. Sinclair responded on the same date. He wrote in part:

I disagree with your assessment that our methodology is inconsistent with the engagement...We will not cease work, and will not accept your email as notice of termination for your convenience, until such time as you can satisfy me that our work is not compliant with the engagement and that we are unable to cure any default...Terrace Timber Ltd. has indicated they expect us to complete our work under the joint engagement.

[20] Mr. DeMille responded by email on January 4, 2023. Mr. DeMille wrote that as TTI has refused to cease work while Skeena reviewed the report, “...we hereby exercise our right to terminate the engagement, effective immediately.”

[21] Mr. Sinclair responded on the same date. Mr. Sinclair stated that this was a termination by Skeena for convenience and not a default by TTI. He further wrote “We will engage with our legal counsel regarding implications for a termination of convenience by Skeena given the joint nature of the agreement and that Terrace has requested we complete the engagement.”

[22] On January 5, 2023, Mr. Sinclair sent an email to Mr. DeMille, which read in part:

To conclude the project, I have attached our report dated December 21, 2022 which was sent to all parties on December 22, 2022. The report indicated our final rate determination subject to a final review of additional information not yet received. As the project is complete, no further information is to be provided or analysis to be done and is no longer preliminary. As per the terms of the engagement, our December 21, 2022 report final rate determination for the stump-to-truck logging services for 144,604 cubic metres is \$49.29 per cubic metre for a total of \$7,127,531.

[23] On January 6, 2023, Mr. Main sent an invoice to Mr. DeMille, representing the difference between the provisional rates already paid by Skeena and the rate determined by TTI. The total invoice was \$1,344,421.05.

[24] On January 9, 2023, Mr. DeMille responded to Mr. Main: “This invoice is not accepted and will not be processed. As noted in previous emails, we do not view the Timber Tracks report as finalized as we terminated this agreement because we had serious concerns regarding the methodology.” Mr. DeMille requested a formal rate proposal from Terrace for eight specific blocks in accordance with the procedure set out in the *Regulation* for determination of rates where there is a dispute.

[25] On January 10, 2023, Terrace registered a lien and a contractor charge against Skeena in relation to this rate dispute.

The Snow Removal Dispute

[26] Terrace performs some snow removal pursuant to a contract with Skeena.

[27] Prior to February 10, 2021, Terrace carried out its road maintenance obligations within TFL 41 through a corporate affiliate, Main Logging Ltd. (“Main Logging”). Main Logging held a road construction and maintenance contract with Skeena dated December 4, 2019 (the “Main Logging Maintenance Contract”), which expired on December 31, 2020.

[28] Under the terms of the Main Logging Maintenance Contract, “Company’s Rules” are defined in Schedule A as including Skeena’s policies as communicated to Terrace. Section 2.10 of Schedule A states that Skeena may establish in the

“Company’s Rules” rights and remedies if Terrace fails to comply with a requirement in the “Company’s Rules”.

[29] In 2018 and 2019, Main Logging held a similar contract with Skeena, a “General Services Contract”, which outlined its road maintenance obligations.

[30] On March 9, 2018, Skeena wrote to all of its road maintenance contractors reminding them of the following policy (“Skeena’s Road Maintenance Policy”) with respect to road maintenance:

- All of Skeena’s road maintenance contractors were required to have a signed General Services Contract and a term sheet;
- Road maintenance work must be authorized by Skeena prior to the work commencing and, if not authorized, will not be paid; and
- All invoices conducted on an hourly basis must include daily time cards and invoices that do not include the required time cards will not be processed.

[31] On September 27, 2018, Skeena sent another notice reminding Main Logging of the contents of Skeena’s Road Maintenance Policy, including the requirement for pre-authorization for any snow plowing work and the requirement for time cards to support hourly wages.

[32] Between January 1, 2021 and February 10, 2021 – after the expiration of the Main Logging Maintenance Contract and before a new contract was signed – Terrace carried out road maintenance on the understanding that the terms of the Main Logging Maintenance Contract would continue to apply.

[33] On February 10, 2021, Skeena and Terrace entered into a new road construction and maintenance contract (the “New Road Maintenance Contract”). This contract expired on December 31, 2021 or on the completion of all work specified in the contract. This New Road Maintenance Contract contains similar terms incorporating the “Company’s Rules”.

[34] This New Road Maintenance Contract was signed after Skeena agreed to amend section 4.2(a) in Schedule B to remove the requirement for Skeena to pre-approve hours of snow removal. However, Schedule A still included the same definition of “Company’s Rules” and Section 2.10 of Schedule A states that Skeena may establish in the “Company’s Rules” rights and remedies if Terrace fails to comply with a requirement in the “Company’s Rules”.

[35] On February 12, 2021, Terrace issued an invoice to Skeena for \$68,469.14 for snow removal work done in January 2021.

[36] On March 3, 2021, Terrace issued an invoice to Skeena for \$49,058.69 for snow removal work done in February 2021.

[37] Between March 8 and 17, 2021, Skeena wrote to Terrace advising of discrepancies between the invoices and Skeena’s Road Maintenance Policy. Specifically, Skeena disputed the invoices on the basis that the work was not pre-authorized and timecards were not provided to support hourly work.

[38] Skeena has issued partial payment in 2021 for the two snow removal invoices. The outstanding balance totals \$23,082.14. Terrace registered a lien and contractor charge against Skeena for this amount on January 9, 2023.

The Liens and Contractor Charges

[39] On January 9, 10, 11, and 26, 2023, Terrace registered five liens and five contractor charges against Skeena’s interests with the Personal Property Security Registry.

[40] Two liens and two contractor charges are at issue in this proceeding:

Date of Registration	Lien	Contractor Charge	Dispute
January 9, 2023	291504P	291525P	Snow Removal Dispute
January 10, 2023	293789P	293803P	Rate Dispute

[41] Skeena seeks a declaration from the Court that these liens and associated contractor charges are invalid, as there was no debt payable or in default by Skeena to Terrace at the time they were registered.

Statutory Scheme for Registrations of Liens and Contractor Charges

[42] The statutory scheme is set out in the *FSPPA*:

2 (1) A contractor who has a contract for the provision of services with a forest products owner has a lien on the forest products owner's forest products, including forest products acquired by the forest products owner after the services are provided, securing an amount due...

(5) A contractor's lien may not be enforced before the forest products owner is in default in paying an amount payable.

...

4 (1) A contractor's lien may not be registered before the forest products owner is in default in paying an amount payable.

(2) Registration of a contractor's lien contrary to subsection (1) is not valid for the purposes of this Act.

...

6 (1) A contractor has a charge on all accounts due to a forest products owner securing an amount due...

(4) A contractors' charge may not be enforced before the forest products owner is in default in paying an amount payable.

...

8 (1) A contractor's charge may not be registered before the forest products owner is in default in paying the amount payable.

(2) Registration of a contractor's charge contrary to subsection (1) is not valid for the purposes of this Act.

...

21 On application to the court by a sheriff, lienholder, chargeholder, forest products owner or person with an interest in forest products affected by a lien or in accounts subject to a charge under this Act, the court may make an order, including a binding declaration of right and injunctive relief, doing one or more of the following:

(a) determining the validity of a claim to a lien of a contractor or a charge of a chargeholder;...

Issues

[43] The following are the issues to be determined in this petition:

1. Is the lien and contractor charge for the rate dispute valid?
 - a. Is there an amount due from Skeena to Terrace for the Disputed Blocks?
 - b. Is Skeena in default in paying Terrace an amount payable for the Disputed Blocks?
2. Is the lien and contractor charge for the snow removal dispute valid?
 - a. Is there an amount due from Skeena to Terrace for the two disputed snow removal invoices?
 - b. Is Skeena in default in paying Terrace an amount payable for the snow removal invoices?

Analysis of the Rate Dispute

[44] With respect to the rate dispute, in order to determine if there was an amount due from Skeena and if Skeena is in default of payment, the issue is whether the rate determination by TTI was binding on the parties.

Position of Skeena

[45] Skeena argues the rate determined by TTI was only a preliminary rate and not binding. Skeena terminated the TimberTracks Agreement before TTI declared the report final. As such, after the TimberTracks Agreement was terminated, Skeena was not bound by a final report issued after termination. As Skeena has paid provisional rates to Terrace for work completed on the Disputed Blocks, there are no further amounts owed by Skeena unless and until a higher rate has been determined. There is no debt payable and in default by Skeena to Terrace and the registrations of the lien and contractor charge are invalid.

Position of Terrace

[46] Terrace argues the TTI rate was a final rate, and binding on the parties when it was released on December 22, 2022. Terrace’s position is the emails exchanged between the parties prior to the signing of the TimberTracks Agreement concluded a binding agreement that both Skeena and Terrace would be bound by the rate determined by TTI. Terrace argues the agreement between Skeena and Terrace is to be found in the email exchanges from June 17 to July 9, 2022. This exchange culminated in Mr. DeMille’s email of July 9, 2022 expressing his agreement to be bound by TTI’s determination. In those emails from June 17 to July 9, 2022, all the essential elements of a contract are found.

[47] Terrace also argues in substance that the report of December 22, 2022 was not a preliminary report but a final report. The further information TTI was awaiting was only in relation to the three additional blocks. The report was final at least in relation to the original eight blocks that TTI had been assessing. As such, Skeena is obliged to pay the extra amount determined by TTI. Terrace argues the liens and contractor charges are valid as Skeena is in default of the extra amount.

Analysis

[48] In my view, the clear language of the December 22, 2022 report cannot be ignored. This report was issued as a preliminary report. There can be no dispute that TTI characterized the December 22, 2022 report as a preliminary report. According to the TimberTracks Agreement, TTI can choose to issue draft written reports representing its work in progress. TTI’s final results would be contained in its final written report. TTI would not assume responsibility for any drafts but only its final report. TTI clearly differentiates between any draft or preliminary reports and its final report.

[49] With respect to Terrace’s argument that the agreement between Skeena, Terrace and TTI is to be found in the emails exchanged up to and including July 9, 2022, in my view, the signed TimberTracks Agreement must also be part of the agreement. While a contract can be found to exist in emails and does not necessarily

have to be a formal written document, in my view, where there is a formal written agreement, that ought to be considered as well. Terrace relies on *Vancouver Canucks Limited Partnership v. Canon Canada Inc.*, 2015 BCCA 144 for the proposition that a binding contract can be found in emails; however, in that decision, unlike this case, there was no signed formal written agreement.

[50] In this case, the TimberTracks Agreement contains the key points exchanged between Skeena and Terrace in the emails. There is no inconsistency between the TimberTracks Agreement and the emails. In my view, the TimberTracks Agreement is the formal written contract containing the intentions of the parties.

[51] In addition to providing for the possibility of draft reports issued at the discretion of TTI, the TimberTracks Agreement contains a wide scope for termination. The right to terminate the agreement is not restricted. A termination is effective immediately. Skeena exercised the right to terminate on January 4, 2023. Skeena was not bound by any report issued by TTI after that date.

[52] With respect to the argument of Terrace that the December 22, 2022 report was in substance a final report, in my view, that assertion cannot be sustained on the basis of the clear language used in the report. With respect to the evidence of Mr. Sinclair, who deposed that he was only awaiting information from Terrace on the three additional blocks, in my view, that evidence is irrelevant. The issue is whether Skeena was bound by TTI's final rate determination when it was released on January 5, 2023. In my view, Skeena was not bound as Skeena had terminated the TimberTracks Agreement.

[53] Skeena argues in the alternative that even if Skeena was bound by TTI's rate determination, the lien and contractor charge for the Disputed Blocks was registered too early, as Skeena was not in default on January 10, 2023. As I have concluded that Skeena was not bound by TTI's rate determination, there is no need to consider this alternative argument.

[54] As such, the lien and contractor charge in relation to the rate dispute that are registered are invalid, pursuant to ss. 4(1) and 8(1) of the *FSPPA*. There was no amount due and owing by Skeena to Terrace, and Skeena was not in default of payment in relation to the rate dispute.

Analysis of the Snow Removal Dispute

Position of Skeena

[55] The outstanding amount due under both snow removal invoices is disputed by Skeena for being in violation of its policy requiring pre-authorization and timecards. Skeena argues that under both the Main Logging Maintenance Contract and the New Road Maintenance Contract, the company's policies are incorporated as part of the contract pursuant to Schedule A. As such, Terrace was required to seek pre-approval for snow removal work and to submit time cards for hourly wages.

[56] Skeena asserts that until there has been a determination that the outstanding balance is valid, no debt is owed to Terrace and Skeena is not in default by not paying. Skeena argues that the registrations of the lien and contractor charge are invalid.

Position of Terrace

[57] Terrace argues that Skeena's policy on road maintenance is not part of either contract for road work that was in place in January and February 2021. Terrace's position is both contracts have terms that state that the contract is the entire agreement, and as such Skeena's Road Maintenance Policy is not part of the contract. Further, Terrace argues Skeena agreed to delete the requirement for pre-approval for hourly work for snow removal in s. 4.2(a) of Schedule B. Thus, Terrace argues there is no longer any requirement for pre-approval of snow removal work. Terrace argues the outstanding balance is in default, and the registrations of the lien and contractor charge are valid.

Analysis

[58] In my view, the road maintenance contracts must be read as a whole. Both of these contracts incorporate Skeena's policies in Schedule A, allowing Skeena access

to any rights and remedies contained in the company's policies. There is nothing inconsistent between Skeena's policy on road maintenance and the terms of the contract. While Terrace argues that Skeena agreed to delete from Schedule B a requirement for pre-approval for hourly work, that does not mean that the same requirement in a different part of the contract has also been deleted.

[59] As such, I find the outstanding balance owed on the snow removal invoices has not been shown to be in default. The outstanding balance continues to be disputed by Skeena, and that dispute needs to be determined to see if the amount is in fact due and owing. The registrations of the lien and contractor charge associated with the snow removal invoices are invalid pursuant to ss. 4(1) and 8(1) of the *FSPPA*.

Conclusion

[60] The Court declares under s. 21(a) of the *FSPPA* that the liens registered by Terrace against Skeena under registration numbers 291504P and 293789P are invalid. The Court orders these liens to be discharged.

[61] The Court declares under s. 21(a) of the *FSPPA* that the contractor charges registered by Terrace against Skeena under registration numbers 291525P and 293803P are invalid. The Court orders these contractor charges to be discharged.

[62] As Skeena has been successful, Skeena is awarded costs at Scale B for this proceeding.

“Chan J.”