Civil Resolution Tribunal

Date Issued: January 8, 2021

File: SC-2020-005204

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Mackenzie v. Udder View Dairy*, 2021 BCCRT 21

B E T W E E N :

GORDON S. MACKENZIE

APPLICANT

A N D :

UDDER VIEW DAIRY

RESPONDENT

A N D :

GORDON S. MACKENZIE

RESPONDENT BY COUNTERCLAIM

REASONS FOR DECISION

Tribunal Member: Chad McCarthy

INTRODUCTION

1. This dispute is about harvesting and transporting timber. The respondent, and applicant by counterclaim, Udder View Dairy (UVD), wanted to harvest trees on its land and transport them to mills who would purchase them. UVD hired the applicant, and respondent by counterclaim, Gordon S. Mackenzie, to do so.

2. Mr. Mackenzie says UVD only paid part of his final invoice, and claims it still owes $2,572.50. UVD says it provided Mr. Mackenzie with rental equipment and an equipment operator for Mr. Mackenzie's logging that totalled $2,572.50. UVD says it withheld that amount from its payment to Mr. Mackenzie, and that UVD owes nothing.

3. UVD also says Mr. Mackenzie worked too slowly, and that he failed to deliver the wood to a nearby mill before the mill's price guarantee expired in October 2019, and before a nearby mill stopped accepting pellet wood. UVD counterclaims against Mr. Mackenzie for lost profits of $2,877.15 on saw logs and $4,184.60 on pellet wood that it sold to the mills after the relevant dates. Mr. Mackenzie says he was not unreasonably slow, and did not agree to complete harvesting by a certain date.

4. UVD also counterclaims for road rebuilding expenses "exceed[ing] $5,000" it says were caused by Mr. Mackenzie's truck ruts on UVD's property. Further, UVD counterclaims an unspecified amount for ruts in fields and a broken barbed wire fence that it says Mr. Mackenzie caused. Mr. Mackenzie says he did not agree to perform any roadbuilding services, and that he owes nothing.

5. UVD says it provided additional, non-invoiced equipment rental, equipment operator, and coordination services for Mr. Mackenzie's UVD logging operations. UVD counterclaims for the value of these services, which it says is $6,665. Mr. Mackenzie says he never agreed to pay for UVD's assistance, and owes nothing.

6. Mr. Mackenzie is represented by his spouse in this dispute. UVD is represented by Jeremy Rouw, its managing partner. UVD says that although its claims total more than $5,000, it abandons amounts exceeding the $5,000 maximum Civil Resolution Tribunal (CRT) small claim amount.

JURISDICTION AND PROCEDURE

7. These are the formal written reasons of the Civil Resolution Tribunal (CRT). The CRT has jurisdiction over small claims brought under section 118 of the *Civil Resolution Tribunal Act* (CRTA). Section 2 of the CRTA states that the CRT's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the CRT must apply principles of law and fairness, and recognize any relationships between the dispute's parties that will likely continue after the CRT process has ended.

8. Section 39 of the CRTA says the CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. Although the parties' submissions each call into question the credibility of the other party in some respects, the credibility of interested witnesses cannot be determined solely by whose personal demeanour in a proceeding appears to be the most truthful. The most likely account depends on its harmony with the rest of the evidence. Further, in the decision *Yas v. Pope*, 2018 BCSC 282, the court recognized that oral hearings are not always needed where credibility is in issue. Keeping in mind that the CRT's mandate includes proportional and speedy dispute resolution, I find I can fairly hear this dispute through written submissions, and that an oral hearing is not necessary in the interests of justice.

9. Section 42 of the CRTA says the CRT may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law. The CRT may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.

10. Where permitted by section 118 of the CRTA, in resolving this dispute the CRT may order a party to do or stop doing something, pay money or make an order that includes any terms or conditions the CRT considers appropriate.

11. UVD seeks an order for a written apology for Mr. Mackenzie's alleged actions, swearing, threats, and property damage. I decline to grant this remedy. First, it is an

order to do something, which in law is known as injunctive relief. Other than specific exceptions that I find do not apply here, CRTA section 118 does not give me the authority to order an apology. In addition, I find a forced apology would be neither productive nor helpful.

12. Both parties provided evidence after the deadline, and after their dispute submissions were complete. This late evidence includes photos of UVD property where trees were harvested, and the parties do not dispute that Mr. Mackenzie's trucks created ruts in the UVD's roads and fields. The balance of the late evidence contains an agreement that was submitted earlier, and 2 emails that I find do not help to prove or disprove a claimed issue. So, I allow the late evidence, but I give it no weight, as it does not assist me in coming to a decision. As a result, there was no need to seek the parties' comments on the late evidence.

13. As noted, the CRT's maximum small claim amount is $5,000 per claim. I find that all of UVD's dispute counterclaims are about Mr. Mackenzie's performance of the same contracted work, so the total of all UVD's counterclaims is limited to $5,000. However, given the outcome of my decision below, nothing turns on this.

ISSUES

14. The issues in this dispute are:

    a. Whether Mr. Mackenzie owes UVD for lost profits on harvested timber, and if so, how much?

    b. Whether UVD was entitled to withhold $2,572.50, or another amount, from Mr. Mackenzie for equipment rental and operator fees.

    c. Whether Mr. Mackenzie owes UVD for additional equipment rental, equipment operator, and coordination services, and if so, how much?

    d. Whether Mr. Mackenzie owes UVD $5,000, or another amount, for road rebuilding, a rutted field, and a broken fence.

EVIDENCE AND ANALYSIS

15. In a civil proceeding like this one, Mr. Mackenzie, as the applicant, must prove his claims on a balance of probabilities. The applicant by counterclaim, UVD, must prove its counterclaims to the same standard. I have read all the submitted evidence, but I refer only to the evidence I find relevant to provide context for my decision.

16. By way of background, the parties agree that UVD contacted Mr. Mackenzie in late August 2019, and they agreed on prices for harvesting and transporting timber to certain mills. UVD says it also had a contract with a mill guaranteeing the price for saw logs delivered to the mill until late October 2019. Mr. Mackenzie denies knowing about any October 2019 price guarantee expiry until September 27, 2019, after he had begun harvesting. UVD says the initial price expiry date was October 31, 2019, and that this was revised to October 18, 2019 on September 27, 2019. The parties disagree about whether Mr. Mackenzie agreed to complete the delivery of the UVD saw logs by a specific date. More on that below.

17. The undisputed evidence is that Mr. Mackenzie began harvesting timber for UVD without a formal, written contract, based on conversations and text message communications. Later, on October 20, 2019, the parties signed a written "Agreement To Log," that specified harvesting and trucking costs for saw logs and pellet wood, based on weight and travel time, with no minimum or maximum amounts. The agreement says the logging was to be completed by approximately December 1, 2019, but that the agreement was "negotiable" depending on weather conditions, equipment breakdowns, and unforeseen circumstances. The agreement is silent about road building and maintenance, and about equipment or services provided by UVD. UVD says it was "forced" to sign the agreement, that it did not receive a copy of the agreement until August 2020, and that it did not read all of the agreement before signing it. I find the evidence fails to show UVD was forced to sign the agreement, or that UVD did not have adequate opportunity to review the contents of the short, 1-page agreement before signing it. I find the written Agreement To Log was binding on the parties beginning October 20, 2019, even if UVD did not have a copy of it.

18. I accept Mr. Mackenzie's undisputed evidence that UVD paid him for all of his timber harvesting and transportation services at prices both parties agreed to, less the disputed $2,572.50 amount. UVD does not deny that Mr. Mackenzie completed this work by early 2020. On balance, I find that Mr. Mackenzie completed all of the agreed work for UVD, so I find UVD owed Mr. Mackenzie for that work. I address below whether Mr. Mackenzie owes UVD anything, as well as the timing and quality of Mr. Mackenzie's work.

Does Mr. Mackenzie owe UVD for lost profits?

19. First, UVD says it lost $2,877.15 in profits on saw logs because Mr. Mackenzie did not deliver them to the mill before the price dropped.

20. I find that from late August 2019 until October 20, 2019, UVD and Mr. Mackenzie had an oral contract to harvest and transport UVD's timber. The terms of oral contracts are often more difficult to prove than written terms. UVD says that it told Mr. Mackenzie in August 2019 that it needed to have all of the saw logs transported to the mill by October 31, 2019 to get a favourable price, and did not want any timber harvested that could not make it to the mill by then. UVD says that it told Mr. Mackenzie on September 27, 2019 that the new mill deadline was October 18, 2019. On the other hand, Mr. Mackenzie says that UVD did not tell him about a deadline for saw log delivery in August 2019, and he was first informed of an October 2019 deadline on September 27, 2019.

21. Apart from UVD's statements, I find the evidence does not support the parties' oral agreement containing any deadline for Mr. Mackenzie to transport saw logs to the mill. I find the agreement did not require Mr. Mackenzie to guarantee UVD's timber profits, or provide any consequences for the saw logs being transported after a price change. I acknowledge that Mr. Mackenzie attempted to transport the wood to the mill by October 18, 2019 at UVD's urging, and that most of the wood arrived by that date. I also find that, were it not for the wet weather, Mr. Mackenzie likely would have been able to deliver the remaining 3 loads of saw logs to the mill by October 31, 2019,

which UVD says was the initial end date of the mill's price guarantee. But on balance, I do not find Mr. Mackenzie was required to meet any deadline.

22. UVD also says that Mr. Mackenzie's work was slow and inefficient, and that the saw logs would have arrived at the mill by October 18, 2019 if he had started earlier and worked quickly, before the weather became wet. I find that whether the quality and timing of Mr. Mackenzie's timber harvesting and transporting work was of reasonable quality is a subject beyond ordinary experience, which requires expert evidence to prove (see *Bergen v. Guliker*, 2015 BCCA 283). I find none of the witness statements or other evidence before me is expert evidence under the CRT's rules. I find the evidence does not sufficiently show the witnesses' qualifications as experts, and in the case of UVD's neighbour, PM, does not sufficiently describe the facts on which his opinion was based. So, on balance, I find the evidence fails to show that Mr. Mackenzie's work operations were unreasonable. Overall, I find that Mr. Mackenzie is not responsible for UVD's alleged lost saw log profits.

23. UVD says it also lost $4,184.60 in profits because the nearby pellet wood mill stopped accepting shipments, and Mr. Mackenzie had to deliver pellet wood to a more distant mill, and charged UVD more for transport. This is consistent with notes later added to the Agreement To Log in December 2019, adjusting the pellet wood harvesting and delivery prices. I find the evidence, including extensive text message communications between Mr. Mackenzie and UVD's principal, Mr. Roux, show that the parties agreed to these price changes after heated negotiations. I find that UVD was not forced to accept those changes, as it alleges. Further, as noted, Mr. Mackenzie did not guarantee UVD's profits, and the evidence fails to show that delays in Mr. Mackenzie's work were unreasonable in the circumstances. I find that Mr. Mackenzie is not responsible for any allegedly lost pellet wood profits.

24. I also find that UVD's evidence and calculations of the loss amounts are insufficient, and the basis for those claimed amounts is unclear. So, I am unable to find that UVD has proved its damages in any case. I dismiss UVD's lost profits claims.

Does UVD owe Mr. Mackenzie $2,572.50 withheld for equipment and operator costs?

25. UVD says it withheld from Mr. Mackenzie $2,000 plus tax for a bulldozer rental, and $450 plus tax for a UVD employee who operated a piece of Mr. Mackenzie's logging equipment. UVD bears the burden or proving that it was owed these amounts, as it is the party alleging this debt.

26. The parties agree that the weather became wet in mid-October 2019, as the mill's October 18, 2019 price guarantee expiry approached. They agree this made it impossible for Mr. Mackenzie's trucks to proceed through UVD's property on their own, which became very muddy. The parties say that UVD provided a bulldozer to tow Mr. Mackenzie's logging trucks through the mud. UVD says that it did so because it appeared not all of the saw logs would make it to the mill before the favourable price expired.

27. UVD also says that it provided one of its employees, AO, to operate Mr. Mackenzie's logging equipment for a brief period. In a written statement, AO said that UVD told him it would charge Mr. Mackenzie for AO's work hours, but that AO would continue his employment with UVD. However, I find the evidence before me fails to show that the parties agreed Mr. Mackenzie would pay for AO's work. Mr. Mackenzie says AO volunteered to help him.

28. On the evidence before me, I find that the parties did not discuss whether UVD would charge Mr. Mackenzie for the bulldozer usage or equipment operator work, or how much. I find there was no agreement about equipment rentals or operator services. I find the first Mr. Mackenzie learned that he might be charged for those services was when UVD provided an invoice for those amounts along with its reduced final payment in March 2019, nearly 5 months it provided the services. As discussed below, I find that UVD provided these services to speed up harvesting and obtain better wood sale profits from the mills, and not as a commercial service to Mr. Mackenzie. I find that Mr. Mackenzie has shown it is more likely than not that those services were gifted to him by UVD.

29. On balance, I find UVD has not proven that Mr. Mackenzie agreed to pay for the bulldozer or AO's operator services. I find Mr. Mackenzie did not owe $2,572.50 for the bulldozer and operator services, and that UVD improperly withheld that amount, which it must reimburse.

Does Mr. Mackenzie owe UVD for additional services provided?

30. UVD also claims $6,665 for additional equipment use fees and labour fees for assisting Mr. Mackenzie in his logging operations, while acknowledging the $5,000 CRT small claim limit. As with the $2,572.50 withheld by UVD for similar fees, I find there was no agreement for Mr. Mackenzie to pay UVD for any of the alleged services it claims. UVD never invoiced Mr. Mackenzie for any of this extra assistance. I note it is unclear how UVD valued the alleged equipment use and labour costs, and it provided no pay statements, time logs, or receipts showing their value.

31. UVD says that much of these additional service costs arose because the weather had turned and UVD needed to assist Mr. Mackenzie's logging trucks through UVD's impassable, muddy roads to meet its October 18, 2019 delivery goal. As described below, Mr. Mackenzie continued working through that time, although he was not required to meet an October 2019 deadline. The parties agree that the saw logs could have been transported later, after the ground froze, for a different price. So, I find Mr. Mackenzie did not require UVD's assistance to complete his work, but that UVD provided it so that the work could finish faster. Overall, I find that Mr. Mackenzie does not owe UVD for additional equipment use and labour, and I dismiss UVD's claim.

Does Mr. Mackenzie owe UVD $5,000, or another amount, for property damage?

32. UVD says Mr. Mackenzie's logging trucks made ruts in its dirt roads that washed out in the spring of 2020 and cost over $5,000 to repair, as well as ruts in UVD's fields. Mr. Mackenzie does not deny making ruts. UVD also says snow plowed by Mr. Mackenzie broke a barbed wire fence, although no one saw this damage occur, and UVD only discovered it in the spring of 2020 when the snow receded. Mr. Mackenzie

says he is not aware of any fence post damage, although such damage is possible because the fence posts were rotten. On balance, I find the evidence fails to prove Mr. Mackenzie damaged the fence.

33. UVD claims no specific amounts for the field ruts and broken fence, and I find there is no evidence of the value of this alleged damage. The only evidence of the road repair costs is a redacted, handwritten note showing prices for certain road work. The note does not sufficiently show its author, or who performed the road work and where, or whether UVD paid any of those prices for road work. So, I give that evidence little weight. I find UVD has not proven the value of the claimed property damage.

34. Even if UVD had proven the value of the alleged road damage, I find that Mr. Mackenzie is not responsible for it, for the following reasons. As noted, there was no agreement about road maintenance. UVD says that its roads were adequate for logging operations in normal conditions, and agrees that it upgraded portions of its roads so that they would be more suitable for logging. Having considered all the evidence, I find it was an implied term of the parties' contract that UVD was responsible for providing adequate road access for Mr. Mackenzie's trucks.

35. Neither party disputes that UVD's roads were muddy and impassable in mid-October 2018, requiring a bulldozer to tow loaded logging trucks through the mud. The evidence shows that UVD authorized and directed Mr. Mackenzie to continue logging during this muddy period, and even provided a bulldozer to enable those operations. Further, UVD admits that it did not inform Mr. Mackenzie about the "unacceptable" ruts because of alleged threats made by Mr. Mackenzie. However, the evidence shows UVD did not cease communicating with Mr. Mackenzie, so I do not find this argument persuasive. I make no further findings about such alleged threats or the parties' other, admittedly difficult, interactions.

36. So, I find the road ruts were made with UVD's knowledge, approval, and assistance, and that Mr. Mackenzie was under no obligation to repair the resulting rut damage. I dismiss UVD's claim for $5,000 in property damage.

CRT FEES, EXPENSES, AND INTEREST

37. Under section 49 of the CRTA and CRT rules, the CRT will generally order an unsuccessful party to reimburse a successful party for CRT fees and reasonable dispute-related expenses. I find Mr. Mackenzie was successful in his claims and in UVD's counterclaims, so he is entitled to reimbursement of the $125 in CRT fees he paid. UVD was unsuccessful, so it is not entitled to any CRT fee reimbursement. Neither party claimed CRT dispute-related expenses, so I order no expense reimbursements.

38. Mr. Mackenzie claims pre-judgement interest under the *Court Order Interest Act,* so I find he is not claiming the $5 per day penalty he applied to UVD's overdue payments without UVD's consent. I find Mr. Mackenzie is entitled to pre-judgement interest on the $2,572.50 owing, from the April 15, 2020 due date of Mr. Mackenzie's March 30, 2020 invoice, until the date of this decision. This equals $16.67.

ORDERS

39. Within 30 days of the date of this order, I order UVD to pay Mr. Mackenzie a total of $2,714.17, broken down as follows:

    a. $2,572.50 in debt,

    b. $16.67 in pre-judgement interest under the *Court Order Interest Act*, and

    c. $125 in CRT fees.

40. Mr. Mackenzie is entitled to post-judgment interest, as applicable.

41. I dismiss UVD's counterclaims.

42. Under section 48 of the CRTA, the CRT will not provide the parties with the Order giving final effect to this decision until the time for making a notice of objection under section 56.1(2) has expired and no notice of objection has been made. The time for filing a notice of objection is 28 days after the party receives notice of the CRT's final

decision. The Province of British Columbia has enacted a provision under the *COVID-19 Related Measures Act* which says that statutory decision makers, like the CRT, may waive, extend or suspend mandatory time periods. This provision is expected to be in effect until 90 days after the state of emergency declared on March 18, 2020 ends, but the Province may shorten or extend the 90-day timeline at any time. A party should contact the CRT as soon as possible if they want to ask the CRT to consider waiving, suspending or extending the mandatory time to file a Notice of Objection to a small claims dispute.

43. Under section 58.1 of the CRTA, a validated copy of the CRT's order can be enforced through the Provincial Court of British Columbia. A CRT order can only be enforced if it is an approved consent resolution order, or, if no objection has been made and the time for filing a notice of objection has passed. Once filed, a CRT order has the same force and effect as an order of the Provincial Court of British Columbia.

Chad McCarthy, Tribunal Member