

No. 10724
Prince George Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

BRINK FOREST PRODUCTS LTD.
PLAINTIFF

AND:

MICHAEL GENE MADRIGGA,
COUNCIL OF FOREST INDUSTRIES,
NORTHWOOD PULP AND TIMBER LTD.,
NORANDA FOREST INC., and
DAVID C. MCELROY
DEFENDANTS

REASONS FOR JUDGMENT

OF THE HONOURABLE

MR. JUSTICE TAYLOR

(No. 2)

D. Byl

S.R. Schachter
and G.B. Gomery

R.W. Lusk, Q.C.
and B.J. Freedman

Counsel for the Plaintiff

Counsel for the Defendant
Noranda Forest Products

Counsel for the Defendant
Council of Forest Industries

By reasons for judgment dated December 28, 1989, I made certain findings of liability against two of the defendants, Noranda Forest Inc. and the Council of Forest Industries, and invited counsel to provide the court with submissions in writing re-addressing the damage issues.

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4 Because it proved impossible for counsel to complete
5 their submissions until the end of the summer recess, the only
6 opportunity offered by the court calendar for the detailed
7 consideration appropriate to cases of such complexity was
8 unfortunately lost. I must apologize that I find myself as a
9 consequence unable in the end to deal with the issues as fully as
10 I had originally hoped. Now that two years have passed since the
11 end of this long and difficult trial, I can fully understand the
12 desire of the parties to conclude this phase of the litigation, if
13 only that the next may begin.
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15 I will accordingly deal only with the two areas in which
16 I find that damages have been proved.
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18 I am able to find only one claim relating to a specific
19 grading practice which falls within the scope of recovery limited
20 by the December 28, 1989, reasons for judgment. This is the claim
21 for material lost to the plaintiff by virtue of the decision of
22 COFI inspectors to allow "wane dips"--that is to say, areas of wane
23 completely across the face of the board--in grades above economy.
24 The significance of this change, which was not authorized by the
25 published rules nor taught to the plaintiff's graders, is
26 highlighted by results of the Jefferson, Texas, reinspection
27 referred to (at pages 25-26) in the December 28, 1989, reasons for
28 judgment. That incident gives at least some indication of the
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4 extent to which boards valuable to the plaintiff having this defect
5 were diverted to purchasers of material in a higher grade, and
6 shows the potential for mischief inherent in the adoption of
7 informal changes in grading practice.
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9 I do not accept that boards re-assigned by reason of this
10 defect during the spring and summer of 1986 would have been both so
11 numerous and of such high quality as the plaintiff claims. But
12 nor, in light of the Jefferson incident, can the resulting loss be
13 dismissed as of trifling importance.
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15 The plaintiff relies on such cases as *Wilson v. Roswell*
16 (1970), 11 D.L.R. (3d) 737 (S.C.C.) and the general principle laid
17 down by Chief Justice Pratt in the old English case *Armory v.*
18 *Delamine*, (1822) 93 E.R. 664, adopted by Lord Cairns in *Hammersmith*
19 *& City Rail Co. v. Brand et al* (1869), [1861-73] All E.R. 60 (H. of
20 L.) and referred to in the Supreme Court of Canada in *Lamb v.*
21 *Kincaid* (1907), S.C.R. 516. The authorities establish the
22 proposition that where a plaintiff has proved damages but cannot
23 with precision demonstrate the quantum of loss the court will
24 assess compensation due as best it can, and will not insist on
25 meticulous proof of the amount, and that it will lean in the
26 plaintiff's favour in making its assessment as against a defendant
27 whose wrong has been the cause of the plaintiff's difficulty of
28 proof. This approach has to some extent been reaffirmed, albeit in
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4 a very different context, in *Huff and Donnelly v. Price et al*
5 (B.C.C.A. December 3, 1990, Vancouver Registry Nos. CA009320,
6 CA009339 and CA009352).

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8 The defendant COFI knew that the plaintiff would suffer
9 loss by diversion of the pieces in question by Northwood to the
10 higher grade, and that unless a tally was kept of the number of
11 pieces so diverted the plaintiff would have no means of proving the
12 amount of its loss. I do not believe either defendant can be heard
13 to complain that the figure adopted by the court is necessarily an
14 estimation. As against the defendant COFI, however, the estimation
15 should properly lean in the plaintiff's favour, since it was COFI
16 which knowingly and wrongfully created the problem.

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18 I assess damages in respect of adoption of the
19 unpublished "wane dip" grading change during the spring and summer
20 of 1986 against the defendant COFI at \$125,000, somewhat under half
21 the plaintiff's claim. Since Noranda was a 'wholesaler' only, and
22 not the manufacturer of the lumber, and since its affiliate's
23 knowledge of the unauthorized diversion cannot in law be ascribed
24 to it, I assess damages against Noranda at \$75,000. These damages
25 reflect the difference in value between wood supplied by Noranda to
26 the plaintiff and that which ought to have been supplied. The
27 damages are awarded in contract against both defendants and as
28 against the defendant COFI also in tort law negligence for breach
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4 of the duty of care which arose as a result of inducement of the
5 plaintiff, as a purchaser, to rely on the COFI grading system. The
6 "market" pricing system applied under the contract between Noranda
7 and the plaintiff would not have resulted in a higher price having
8 been charged to the plaintiff by Noranda had the lumber been graded
9 according to the published rules, because those in the market knew
10 nothing of any change having taken place in applicable grading
11 standards, and must have assumed they were at all times receiving
12 wood graded to the published rule.
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14 I have been unable to come to any firm conclusion from a
15 consideration of the documents concerning wane dips dated November
16 4, 1986, which were prepared by the defendant Northwood for the
17 guidance of its graders. I am unable to say from the evidence
18 referred to that there is a basis for finding that across-the-face
19 wane was accepted at any of the Northwood mills in grades above
20 economy prior to April, 1986. There is evidence that COFI
21 officials advised Northwood two years earlier that it would permit
22 deviation from the published rules in the case of wide-face wane
23 dips, but nothing to which plaintiff's counsel has pointed
24 establishes a date earlier than April, 1986, for the actual
25 adoption of this practice at Northwood mills.
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27 As I have indicated, I have concluded that the other
28 specific claims concerning grading practices advanced for the
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4 plaintiff cannot be allowed under the findings made in December 28,
5 1989, reasons for judgment.
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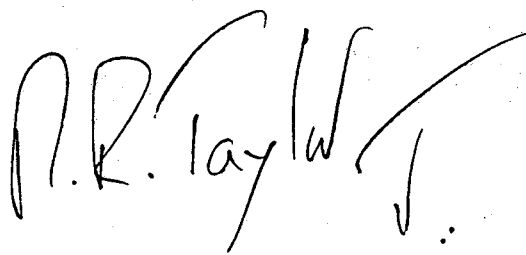
7 There is, however, another ground on which damages should
8 be allowed against the defendant COFI. There is no doubt that COFI
9 was in breach of its contractual duty to the plaintiff in failing
10 to advise the plaintiff with respect to the grading guidelines
11 which it was in fact applying. The plaintiff repeatedly asked COFI
12 to investigate the quality of incoming material and COFI undertook
13 that assignment as part of the services for which the plaintiff
14 paid it. COFI could not discharge the duty which it accepted in
15 this regard towards the plaintiff without informing the plaintiff
16 of the guidelines which it was using in grading Northwood
17 production. The withholding of this information imposed on the
18 plaintiff damages which, while not readily quantifiable, cannot be
19 dismissed on that account. They resulted from the plaintiff's
20 continuing investigation of the quality of the incoming wood and
21 its inquiries of, and altercations with, its supplier, which led in
22 the end to the break-down of their business relationship. I assess
23 general damages under this heading at \$50,000.
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25 There will be judgment against the defendant Noranda for
26 \$75,000 and against the defendant COFI for \$175,000, this judgment
27 being to the extent of \$75,000 jointly and severally against them
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4 both. There will be pre-judgment interest at the registrar's rates
5 from June 1, 1986, to this date.
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7 I am, of course, aware that in the result the plaintiff
8 receives relatively modest compensation in relation to the effort
9 which it has devoted to these difficult proceedings. That it may
10 have established a point of importance to the North American lumber
11 business generally is a factor which may, perhaps, be relevant in
12 dealing with the disposition of costs, one of the remaining matters
13 reserved by agreement for further submission.
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15 If directions are required with respect to the concluding
16 exchange of argument counsel may, of course, apply.
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24 Vancouver, British Columbia
25 February 18, 1991
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