



No. 24191  
Prince George Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN: )  
CARRIER LUMBER LTD. )  
APPELLANT )  
AND: )  
R. L. CAESAR, E. C. CROSSIN, and )  
C.K.B. FORSTER (the Appeal Board) )  
and HER MAJESTY THE QUEEN IN )  
RIGHT OF THE PROVINCE OF BRITISH )  
COLUMBIA AS REPRESENTED BY THE )  
MINISTRY OF FORESTS )

REASONS FOR JUDGMENT  
OF

THE HONOURABLE  
MR. JUSTICE CURTIS

Counsel for Carrier Lumber Ltd.: (Dick Byl, Esq.  
Counsel for Ministry of Forests: Spencer M. Manning, Esq.  
Place and Date of Hearing: Prince George, B.C.  
May 2, 1994

This is an appeal by Carrier Lumber Ltd. under Section 156 of the *Forestry Act* from a decision of a Forestry Appeal board upholding the cancellation of Carrier's Forest Licence A17796 in the Prince George Timber Supply Area. The issue is the proper interpretation of Carrier's contractual obligations under the licence.

In November 1982 Carrier Lumber Ltd. applied to acquire a

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Timber Sale Harvesting Licence from the Receiver Manager of Far West Cedar Fencing Ltd., a timber processing company having a mill in McBride which had gone bankrupt. The licence included an allowable annual cut of 82,130 m<sup>3</sup>, and was later replaced by Forest Licence A17796. The transfer was approved by the Ministry of Forests.

In a letter to Carrier Lumber dated December 8, 1982 the Minister of Forests wrote:

I approve, in principle, the transfer of Timber Sale Harvesting Licence A08556 from the Receiver Manager of Far West Cedar Fencing Ltd. to Carrier Lumber Ltd. subject to the following conditions:

. . .

3. Harvesting the full annual volume will be transferred into high priority beetle infested spruce balsam timber in areas southeast of Prince George for the first year, and, subject to annual review by the Regional Manager, for up to two more years. The areas and the terms of salvage operations will be decided by the Regional manager. After the salvage operations, harvesting will be redirected into cedar stands.
4. Carrier Lumber Ltd. will not close the timber processing facility at McBride without the Licensor's approval. Any relocation of the sawmill must be readily accessible to the McBride work force.

If you are prepared to proceed with your purchase on the basis of the foregoing . . .

At the time the letter was written the Far West Cedar Fencing

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3 Ltd. mill was not operating however the reference in the Minister's  
4 letter to Carrier Lumber not closing the timber processing facility  
5 clearly referred to the timber processing facility that had been  
6 run by Far West Cedar Fencing Ltd.  
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8 Carrier Lumber proceeded with the license transfer as a result  
9 of which Forest Licence A17796 was executed bearing the date  
10 January 15, 1983. The licence was for a term of fifteen years  
11 renewable after 4 years; pursuant to Section 13 of the *Forest Act*.  
12 The licence included these terms:

13 12.01 All timber harvested under this  
14 Licence or its equivalent shall be processed  
through

- 15 (a) a timber processing facility or  
16 facilities owned or operated by the  
Licensee, or any of its affiliates  
17 within the meaning of the Companies  
Act, or . . .

18 12.02 The Licensee will not cause a timber  
19 processing facility or facilities owned or  
operated by the Licensee that processes timber  
20 or wood residue or both, from this Licence

- 21 (a) to be reduced in capacity, or  
22 (b) to be closed for a sustained period  
of time

23 Where such reduction or closure would, in  
24 the opinion of the Licensor reduce the  
Licensee's ability to utilize fully the  
25 allowable annual cut authorized under this  
Licence, unless, and to the extent that, the  
26 Licensor exempts the Licensee from the  
requirements of this paragraph.  
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28 16.06 Application(s) for harvesting will  
be accepted only in timber stands which  
29 contain a minimum of 50 percent of the net  
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3 volume in cedar and hemlock as defined by the  
4 Regional Manager.

5 16.08 The Licensee shall maintain a timber  
6 processing facility capable of utilizing all  
7 cedar and hemlock logs to a ten centimeter top  
8 diameter, inside bark.

9 As mentioned in the Minister's letter of December 1988 the  
10 annual cut under the licence during 1983 and 1984 was transferred  
11 to beetle infested spruce balsam timber, which was milled in Prince  
12 George. The McBride mill remained closed with the Ministry's  
13 agreement.

14  
15 By letter of September 10th, 1985 the Ministry wrote to  
16 Carrier:

17 2. After this winters' operation your cut  
18 from FL A17796 must be directed into cedar  
19 stands. You should therefore discuss your  
20 proposed cedar operations with the District  
21 Manager, Prince George East, so that you can  
22 proceed with a submission of a Cedar  
23 Development Plan.

24 You are also reminded, that one of the  
25 conditions of the assignment was that Carrier  
26 Lumber Ltd. would not close the timber  
27 processing facility at McBride without the  
28 Licensor's approval, and that any proposed  
29 relocation of the milling facilities must be  
30 readily accessible to the McBride work force.

Would you please advise me of your plans  
to reopen the McBride milling facilities.

Carrier Lumber by letter of March 31, 1986 wrote to the  
Ministry:

This letter is further to our discussion on February 28, 1986 regarding the operation of FL 17796. We outlined our proposal that we operate for two years in spruce balsam forest types while undertaking a research program to ensure a reasonable chance of successful operation of a cedar manufacturing plant.

The letter continued to explain that the cedar was not of good quality but Carrier would research the matter and design a manufacturing plant that would convert the Forest Licence cedar to a marketable product.

By letter of July 29th, 1986 the Ministry wrote to Carrier:

. . . .

In consideration of your salvage activities in Spruce Balsam over the past 3 1/2 years, a degree of compromise in regard to cedar operations under A17796 is in order. It should nonetheless be recognized that, over the same period, very little has apparently been done to assess the feasibility of a cedar operation.

The Ministry is prepared to authorize harvesting in Spruce Balsam for two further years, i.e., 1987 and 1988, under normal annual and periodic cut control provisions to allow time for experimental sawing and feasibility studies to be carried out.

Any cedar operations that are contemplated by your company must adhere to point No. 4 of the former Minister's letter to you of December 8, 1983.

The foregoing arrangement is both fair and equitable in consideration of your efforts in Spruce Balsam salvage and in comparison to other licensees in similar situations.

Forest Licence No. A17796 was the subject of another Forest Licence Agreement dated March 20, 1987, including the following terms:

12.01 All timber harvested under this Licence or its equivalent shall be processed through

(a) a timber processing facility or facilities owned or operated by the Licensee, located at Prince George

and

12.02 The Licensee will not cause a timber processing facility or facilities owned or operated by the Licensee that processes timber or wood residue or both, from this Licence

(a) to be reduced in capacity, or

(b) to be closed for a sustained period of time

where such reduction or closure would, in the opinion of the Licensor reduce the Licensee's ability to utilize fully the allowable annual cut authorized under this Licence, unless, and to the extent that, the Licensor exempts the Licensee from the requirements of this paragraph.

16.06 Application(s) for harvesting will be accepted only in timber stands which contain a minimum of 50 percent of the net volume in cedar and hemlock as defined by the Regional Director.

16.07 The Licensee shall maintain a timber processing facility capable of utilizing all cedar and hemlock logs to a ten centimetre top diameter, inside bark.

While neither party can locate a fully executed copy of this document it is conceded it represents the agreement between them except that the Respondent's position is that 12.01(a) should have

read McBride, not Prince George.

In September 1988 a Mr. Lavoie brought equipment to the Far West mill site in McBride and began to produce cedar shakes and bolts. This was the first time the mill had operated since Far West closed. The range of products was less than those produced by Far West prior to its receivership in 1982 and the number of employees significantly fewer. By January or February 1989 twelve people were employed, however the Far West post and rail splitters, scrapmill and sawmill were not being used.

The cedar shake and bolt operation run under Carrier used about three truck loads of logs per day, however only 56 m<sup>3</sup> of the total used came from Forest Licence A17796 although the allowable annual cut on that licence was over 82,000 m<sup>3</sup>. The rest of the logs were purchased by Carrier. A witness for Carrier testified that the reason more cedar from A17796 was not used was an extraordinarily high degree of waste from cedar harvested in the licence area, the cedar being over mature, hollow in the centre, and most not suitable to manufacture merchantable products. According to Carrier's witness within an eight hectare area 6200m<sup>3</sup> of wood was cut down out of which only 56m<sup>3</sup> was usable.

On September 20th 1988 Carrier wrote to the Ministry to advise they were developing their operating plan.

The Ministry by letter of October 20th, 1988 advised Carrier  
in part, as follows:

. . .

I would also remind you that this licence remains under suspension until such time that a Management and Working Plan has been submitted and subsequently approved. . . . if a Management and Working Plan is not received in this office by December 1, 1988, I may have no option but to proceed further on the cancellation of this licence.

A further Forest Licence dated January 1, 1989 was executed between the parties again bearing Licence Number A17796. This licence contained the following clauses:

11.02 The Licensee will not cause a timber processing facility owned or operated by it that processes timber or wood residue, or both, from this Licence to be reduced in capacity, or to be closed for a sustained period of time, unless, and to the extent that, the Minister or his designate, exempts the Licensee from the requirements of this paragraph.

15.06 Application(s) for harvesting will be accepted only in timber stands which contain a minimum of 50 percent of the net volume in cedar and hemlock as defined by the Regional Director.

15.07 The Licensee shall maintain a timber processing facility capable of utilizing all cedar and hemlock logs to a ten centimeter top diameter, inside bark.

15.08 Carrier Lumber Ltd., will not close the timber processing facility at McBride without the Licensor's approval. Any relocation of the sawmill must be readily accessible to the McBride work force.

On the 12th of January 1990 the Minister of Forests wrote to  
Carrier:

Reference is made to point 4 of the Honourable Tom Waterland's December 8, 1982 letter setting the conditions for the assignment of Forest Licence A17796 and also to paragraph 15.08 of the Licence document.

Will you please advise me of your company's plans to operate a mill in McBride to manufacture the volume apportioned to Forest Licence A17796.

Your plans for operating a mill should be submitted to me, for approval, by February 12, 1990. Failure to submit the plans by the required date will result in the suspension of Forest Licence A17796 on February 12, 1990. You should also be aware that once under suspension your licence would then become subject to cancellation.

Should the suspension come into effect, any further operations on the licence area(s) after the suspension date will be considered to be in trespass and will be dealt with accordingly.

William Kordyban Sr., President of Carrier Lumber wrote to the Minister of Forests, by letter of February 13, 1990 in which he stated in part:

This will acknowledge your letter dated January 12, 1990 wherein you point out our failure to perform in accordance with paragraph 15.08 of the Licence document.

We acknowledge that by signing the licence document Carrier Lumber committed itself to the utilization of merchantable cedar and to operate a sawmill at McBride for this purpose. These undertakings have not been realized to date. This letter will set out a concise, constructive proposal that will address this situation and present solutions.

Carrier Lumber remains committed to finding a means to utilize merchantable cedar and realize that such utilization is a key to the company maintaining its cut in the P.G.T.S.A.

. . . .

The Ministry replied by letter of March 6, 1990:

I have been instructed to advise you that the proposal dated February 13, 1990, which you submitted to the Minister of Forests, in reply to his request of January 12, 1990, has been reviewed and it has been deemed unacceptable. This being the case, you are in contravention of paragraphs 11.02, 15.07 and 15.08 of Forest Licence A17796.

In view of the above, I have no alternative but to advise that your Forest Licence A17796 is hereby suspended effective April 6, 1990 in accordance with Section 59 of the Forest Act.

In the event you comply with the requirements of the above referenced paragraphs your rights under this licence shall be reinstated. . . .

This letter was followed by one of May 31, 1990:

Reference is made to our letter of March 6, 1990 advising you of the suspension of F.L. A17796. This licence was suspended because you were in contravention of paragraphs 11.02, 15.07 and 15.08 of Forest Licence A17796 document.

At this time, we see no satisfactory progress to comply with the outstanding obligations contained in these paragraphs of your Forest Licence document. Therefore, I am proceeding with the cancellation of Forest Licence A17796 pursuant to Section 61 of the Forest Act.

Cancellation of Forest Licence A17796 will take place on September 28, 1990 for failure

to comply with conditions set out in paragraphs 11.02, 15.07, and 15.08 of the licence agreement.

Please be advised that pursuant to Section 61(3) of the Forest Act you will be provided with an opportunity to be heard within 30 days of service of this notice.

Carrier made further submissions but without success and the licence was cancelled for the reason given by letter of February 1, 1991 effective December 20, 1990.

Carrier appealed this decision under Section 154(2)(b) of the *Forest Act* to the Chief Forester of the Province of British Columbia who found Carrier to be in breach of clause 11.02 and 15.08 and confirmed the cancellation. Carrier then appealed under clause 154(2)(c) of the *Act* to an Appeal Board which upheld the cancellation in a decision published July 8, 1992, on the basis of finding breaches of 11.02 and 15.08 of the Licence.

The decision of the Appeal Board contains the following passage:

#### 5.4 Compliance by Carrier

The Licence requires that harvesting be restricted to cedar-hemlock stands, and that a mill be operated at McBride. During the period 1983 to December, 1988, harvesting under FL A17796 was carried out as beetle salvage operations in spruce-balsam stands. Logs were taken to Prince George for milling. Such operations, while contrary to the intent and requirements of the Licence, were done with the agreement of the Ministry since there was a crisis to control a beetle epidemic.

During the period 1985 to 1988 letters were sent to Carrier by the Ministry. These letters pointed out in clear terms that, following the salvage operation, Carrier would be required to harvest in cedar-hemlock stands, and operate a mill in the McBride area. The Ministry also requested that plans for such operations be discussed with the Ministry.

Carrier responded to the Ministry with two letters. One letter states an intention to do research on the milling of cedar. The other letter states that Carrier has been developing plans for a cedar operation and has opened a small-scale cedar operation at McBride.

It is the opinion of the board that the directives from the Ministry were clear concerning action required by Carrier to comply with the contract. It is also apparent, from the two letter written by Carrier to the Ministry, that Carrier had a proper understanding of those requirements.

Carrier did not operate the Far West mill and there was no evidence to show that plans had been prepared for harvesting cedar-hemlock stands in accordance with requirements of the Forest Licence. Carrier did, however, start a small cedar operation on the Far West millsite. This operation produced cedar shakes and shake blocks from September 1988 until April, 1990, a period of eight months.

This shake mill was, in the opinion of the Board, a token operation and cannot be considered as fulfilling the requirements of the Licence. During the eight months of operation only some 40 cubic meters of cedar logs from FL A17796 were processed through the mill. This represents only .05 of one percent of the allowable cut of the Licence, which was some 80,000 cubic meters of logs per year.

The Board clearly made an error in stating the period from September 1988 to April 1990 was eight months when in fact it was twenty.

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4 Throughout the proceedings to cancel its licence Carrier has  
5 taken the position that it has complied with the terms of the 1989  
6 Forest Licence. When the Licence was signed January 1, 1989 the  
7 cedar shake and bolt mill was operating and continued to do so  
8 until the licence was suspended.

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10 The issue between Carrier and the Ministry is whether or not  
11 the operation being run by Carrier at the old Far West millsite  
12 complied with its contractual obligations.

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14 Carrier's position is that, as all the equipment ever at the  
15 Far West mill is still there, the mill has not been "reduced in  
16 capacity", and that, as it has run the mill since required to do so  
17 in 1988, the mill has not been "closed" except as exempted by the  
18 Ministry during the beetle kill operation. The mill has never been  
19 relocated and remains readily accessible to the McBride work force  
20 as required.

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22 The Ministry's position is that Carrier's obligations under  
23 the contract are more substantial; that the intent was that the Far  
24 West mill be operated by Carrier in substantially the way it had  
25 been operated by Far West.

26 In deciding this issue the Appeal Board found at page 7:

27 . . . as a fact, that it is not clear whether  
28 the timber processing facility at McBride that  
29 was either not to be closed or was to be  
30 maintained referred to the original Far West

mill, or some other mill. The Far West mill had been closed since it was acquired by Carrier. The Board also found, as a fact, that the intent of the terms not to be closed and maintained are ambiguous, particularly if they refer to a mill that is already closed.

In order to clarify the meaning of the terms intended by the parties the board examined the correspondence between the Ministry and the Licensee prior to the issuance of the Licence in 1989. The Board specifically referred to the Ministry's letter of December 8th, 1982, the Regional Manager's letter of September 10, 1985, the letter from Carrier's Woodlands Manager of March 31, 1986, the letter of the Minister of Forests July 29, 1986 and the letter of Carrier's Woods Manager, September 7th, 1988.

This correspondence clearly establishes that the Timber Processing facilities referred to were those formerly operated by Far West Cedar in McBride.

The correspondence does not clear up the issue of how Carrier could contract not to close a mill that was in fact already closed. None of the letters state that the mill must manufacture the same products or employ the same number of people.

The correspondence clearly indicates that Carrier was to redirect its cut to cedar once the beetle kill operations were concluded, that however was already specifically dealt with in the licence which contractually required in (15.06) "Application(s) for

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3 harvesting will be accepted only in timber stands which contain a  
4 minimum of 50 per cent of the net volume in cedar and hemlock as  
5 defined by the Regional Director. Any cutting permits issued under  
6 the licence were issued by the Ministry. The Licence was not  
7 cancelled for breach of clause 15.06.  
8

9 The Board of Appeal found:

10 From the foregoing correspondence the  
11 Board finds, as facts, that the ambiguous  
12 terms of the Agreements are to be interpreted  
13 as follows:

14 (a) The "timber processing facility at  
15 McBride" refers to the sawmill originally  
16 operated by Far West at McBride and  
17 subsequently closed.

18 (b) The words not to be closed and maintained  
19 mean that it is a requirement of the Licence  
20 that the mill be operated.  
21

22 The licence was cancelled for breach of 11.02 and 15.08.  
23 Neither clause contains the word "maintained".  
24

25 The Boards decision was as follows:

26 Issue 1 - Was Carrier under a legal obligation  
27 to maintain a timber processing facility at  
28 McBride subsequent to 1988?

29 The Board finds that Carrier did  
30 have an obligation to operate a  
sawmill near McBride subsequent to  
1988.

Issue 2 - Did Carrier maintain a timber  
processing facility at McBride in accordance  
with the intent of the obligation?

Carrier did operate a small cedar

shake mill for eight months; however, because of the small production of the mill, and short duration of operation, this facility did not fulfill the requirements of this obligation.

The fact that the closed Far West mill was technically not reduced in capacity does not fulfill the requirement that a mill be operated as that term was understood by both parties.

The Board finds that Carrier did not maintain a timber processing facility at McBride in accordance with the intent of the obligation.

The Board has interpreted Carrier's legal obligation under sections 11.02 and 15.08 of the Forest Licence to maintain the operation of the Far West Cedar Ltd. Mill at McBride.

Was the Board of Appeal in error in considering the correspondence between the parties to interpret the meaning of the words "timber processing facility" in the contract to mean a facility of the nature and extent of the Far West Cedar Fencing Ltd. mill rather than that of the Lavoie shake and bolt mill in existence at the time the January 12, 1989 Forest Licence Agreement was signed? I find that it was not.

While evidence of the parties' negotiations ought not to be used to contract or vary a written agreement subsequently entered into between the parties, written agreements are to be construed in light of the circumstances in which they were made. The term

"timber processing facility" used in the contract was imprecise. In order to understand clearly and fully what the parties meant by it it was proper for the Board to consider their correspondence. The Board properly concluded from that correspondence that neither party understood the term to include a facility of the limited nature of the mill operating between September 1988 and April 1990. Accordingly the Board properly concluded that the contractual obligations had not been met. They reached this conclusion without giving weight to the letter of February 13, 1990 from Mr. Kordyban, on account of the claim of privilege as noted in their reasons. The correspondence and evidence, even without reference to Mr. Kordyban's letter, well supports the conclusion reached by the Board.

Although it is not necessary to the disposition of this appeal to do so I would hold that Mr. Kordyban's letter of February 13th 1993 is not entitled to a claim of privilege, and could properly be considered and given weight in deciding this matter; such evidence adds additional support to the Board's conclusion.

Under the Forest Licence Agreement Carrier had an obligation to submit a Management and Working Plan to the Ministry for approval. It was as part of this process that Mr. Kordyban wrote his letter of February 13th, 1990 to the Ministry in the hope the Ministry would agree to proceed with Carrier's proposal. The letter was written in an attempt to fulfill a contractual

obligation, and in such circumstances admissions made in it ought not to be protected by a claim of privilege.

No error has been demonstrated in the decision of the Appeal Board. The appeal is dismissed.

Dieter Cutes.

Prince George, B.C.  
July 8, 1994