



2 Carrier Lumber Ltd. (Carrier) was required to keep open a timber processing facility as a condition of a forest licence granted by the Ministry of Forests. The Ministry suspended and later cancelled the licence when it determined that Carrier failed to fulfill that condition.

3 Carrier disputed the loss of licence at various levels and maintained that it had complied with the conditions by operating a shake and bolt operation at the site of a sawmill in the village of McBride.

4 The Ministry produced evidence of the circumstances surrounding the original acquisition of the licence (at first the tenure was in the form of two timber sale harvesting licences) in 1982 and of its renewals up to the suspension in 1990 and cancellation in 1991. This evidence, particularly five letters from Ministry representatives to Carrier concerning its obligation to process lumber harvested in the licenced area at the McBride sawmill, was relied upon by the Chief Forester, the Forestry Appeal Board and by Mr. Justice Curtis from whose judgment this appeal is taken, to establish that the phrase "timber processing facility" meant the sawmill at McBride operated as such and not a shake and bolt mill.

5 Carrier's argument proceeds from the assertion that "timber processing facility" is an unambiguous expression in the

context of a forest licence because it is defined in s.1(1) of the *Forest Act*, R.S.B.C. 1979, c.140 which says that it: "means a facility that processes timber or wood residue or both". The shake and bolt operation meets that definition. The Ministry should not have been allowed to resort to parol evidence to support a narrower interpretation of the phrase in question.

6 In 1982 Carrier purchased the assets of Farwest Cedar Fencing Ltd. They consisted of a cedar sawmill in McBride and two harvesting licences. On 8 December 1982, the Minister of Forests consented to the sale on conditions, one of which was that: "Carrier Lumber will not close the timber processing facility at McBride without the licensor's approval".

7 Farwest was in receivership at the time and the mill was not running.

8 The Ministry relieved Carrier from its obligation to cut cedar in the licence area and to mill it at the McBride sawmill because the Ministry needed to re-deploy Carrier's harvesting capacity to stands of spruce and balsam infested by the spruce bark beetle. This was a crisis that continued until 1989. Carrier was allowed to process the spruce and balsam at its Prince George plant.

9           Apart from the shake and bolt operation, which went from September 1988 to April 1990, the McBride sawmill was idle. Very little of the cedar cut from the licence area was used in that operation. It is obvious that the Ministry cancelled the licence because it felt that Carrier was not going to resume sawmilling in McBride.

10           Carrier appealed to the Chief Forester who confirmed the cancellation. This was upheld on appeal to an Appeal Board constituted under s.154(2)(c) of the *Forest Act*.

11           In its decision of 8 July 1992, the Appeal Board said:

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.

12 Curtis, J., in the further appeal taken to the Supreme Court under s.156 of the *Act*, which could only be on a point of law, said at p.16-17 of his reasons:

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 contracted 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.

13           This case was argued here and below on the footing that the rules of interpretation for ordinary contracts apply to a forest license. Assuming that to be the correct approach, I am of the opinion that no impediment stands in the way of considering extrinsic evidence.

14           When the words in question are seen in the context of the facts surrounding the making of the written instrument, a genuine controversy emerges as to their meaning. A latent ambiguity appears and it is, in my view, legitimate to examine those same contextual facts to determine the true intention of the parties. Labour arbitrators in Canada have long been comfortable with this approach in construing collective agreements. Their resort to extrinsic evidence has received judicial approval. In *Noranda Metal Industries v. I.B.E.W., Local 2345* (1983), 1 O.A.C. 187, Dubin J., as he then was, said at 193:

[11] The majority of the Divisional Court concluded that the clause was unambiguous and thus extrinsic evidence could not be resorted to aid in its interpretation. Mr. Justice White was of the contrary view. It is apparent from the reasons of the arbitrator that he felt that both the contention of the company and of the union were plausible interpretations and thus the clause was ambiguous. It is difficult to conclude that he made a jurisdictional error in so concluding in light of the division of opinion of the Divisional Court on this very issue. I agree with Mr. Justice White that the clause was patently ambiguous and the arbitrator was entitled to resort to extrinsic evidence to assist him in ascertaining the true intentions of the parties, but, in any event, he was

entitled to resort to extrinsic evidence to determine whether there was any latent ambiguity, or in applying it to the facts.

[12] That proposition was stated by Gale, C.J.O., in *Leitch Gold Mines Ltd. et al. v. Texas Gulf Sulphur Co. (Incorporated) et al.*, [1969] 1 O.R. 469, at p.524 wherein he stated:

Extrinsic evidence may be admitted to disclose a latent ambiguity, in either the language of the instrument or in its application to the facts, and also to resolve it but it is to be noted that the evidence allowed in to clear up the ambiguity may be more extensive than that which reveals it. Thus, evidence of relevant surrounding circumstances can be accepted to ascertain the meaning of the document and may clarify the meaning by indirectly disclosing the intention of the parties.

15 Further support for this view can be found in a commercial case, *Canadian Atlas Diesel Engines v. McLeod Engines* [1952] 3 D.L.R. 513 (S.C.C.) per Estey J. at 523-24 and Rand J. at 519-20.

16 When the extrinsic evidence is examined in the instant case, the problem of interpretation is quickly resolved in favour of the meaning advanced by the Ministry.

17 There is another and perhaps preferable approach to the construction of the forest licence. That is to recognize its special features as a licence, a grant by a public authority, and while the contractual characteristics must be acknowledged (s.10(a) of the *Forest Act* describes a Forest licence as a form of contract) the interpretation of the license should not be constrained by any

rule of contract interpretation which prevents a full inquiry into formation of the licence and the meaning of its terms.

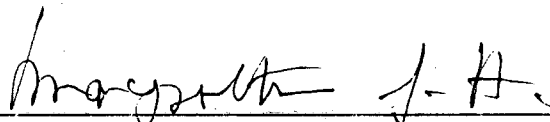
18 Carrier takes one further point in this appeal. The Appeal Board received in evidence a letter written by the principal of Carrier in which he made statements fully supporting the Ministry's position that Carrier was obliged to operate the sawmill. Carrier objected to the reception of this letter on the basis that it was a privileged communication written in the course of negotiations. The Appeal Board said that it gave the letter no weight. The letter was considered by Mr. Justice Curtis but he too did not rest his judgment on the letter. Given the treatment of this evidence by the Appeal Board and by Mr. Justice Curtis, I am unable to find any real issue in this point.

19 There being no error demonstrated in the judgment below, I would dismiss this appeal.

20 SOUTHIN, J.A.: I agree with Mr. Justice Donald's disposition of this appeal because I agree with what he has said on what he has called "another and perhaps more preferable approach". As to the application, in these circumstances, of the ordinary rules concerning extrinsic evidence, I prefer to express no opinion.

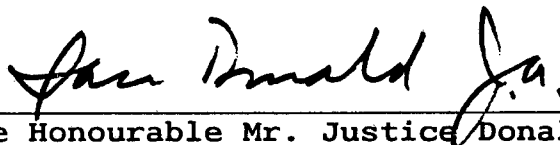
21 CUMMING, J.A.: I agree with the disposition proposed by Mr. Justice Donald and with the additional comments of Madam Justice Southin.

22 SOUTHIN, J.A.: The appeal is dismissed.



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The Honourable Madam Justice Southin



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The Honourable Mr. Justice Donald

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