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5 Adina Timber is a B.C. company owned by David Zielke and his
6 wife who reside in Vanderhoof. Adina owns logging equipment such
7 as D7 and D9 cats, skidders and a feller buncher. It is in the
8 business of contracting to provide "stump to truck" logging
9 services, that is to fell, skid, buck and load timber onto trucks.
10 In the process of doing so Adina also builds the necessary roads
11 and landings to service the cut block it is working on. Adina
12 employs its own crew and equipment and subcontracts portions of the
13 work on occasion.

14
15 Stuart Lake Lumber Ltd. is a saw milling company engaged in
16 the business of manufacturing dimension lumber. It is the holder
17 of a timber licence in the Fort St. James area where it has carried
18 on the business of a relatively small, independent saw mill since
19 the mid 1950's.

20
21 In 1982 Adina Timber was the principal logging contractor for
22 Bond Brothers Sawmills near Vanderhoof. In that year the company,
23 intending to expand its business was looking for more work. Mr.
24 Zielke happened to meet Mr. Gene Larsen, Woods Manager for Stuart
25 Lake Logging while Adina was logging property owned by Mr. Larsen.

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27 In June 1983 Mr. Zielke met with Mr. Larsen and Mr. Drury of
28 Stuart Lake Lumber's forestry department in the Stuart Lake Lumber
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3 office at Fort St. James. They asked Mr. Zielke to submit a
4 written bid to log timber from a proposed road right of way.
5 Adina's bid was accepted and the work was completed in August or
6 September, 1983.
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8 Stuart Lake Lumber had an allowable annual cut of
9 approximately 200,000 cubic meters. Prior to the dealings with
10 Adina the logging services for Stuart Lake had been done by a
11 number of other contractors the two major ones being Bob Ublies
12 Logging and Lynx Creek. Lynx Creek advised Stuart Lake that it
13 wished to discontinue logging and Mr. Zielke asked if his company
14 could do some logging work for Stuart Lake. Mr. Zielke does not
15 recall the particulars of the agreement reached with Stuart Lake
16 under which Adina logged in the winter season of 1983-1984. All
17 agreements between Stuart Lake and Adina were oral except the first
18 work which was done on a written bid.
19

20 In the Fort St. James area logging is conducted during two
21 seasons, the winter which begins about December following freeze up
22 and ends about March with break up, and the summer which begins
23 about July and ends about the beginning of October.
24

25 Under the terms of its licence Stuart Lake Lumber is granted
26 cutting permits by the Ministry of Forests which permit it to
27 harvest timber from specific cut blocks, the location of which is
28 set out in the permits. Stuart Lake Lumber prepares and submits
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a 5 year plan to the Ministry for approval and it is under these plans that the Ministry from time to time issues the cutting permits.

Adina proceeded to log for Stuart Lake in the winter of 83/84 and thereafter for each season until the summer of 1987 following which Stuart Lake Lumber did not request its services. Adina did some logging for Stuart Lake in January 1988, however this was completion work on a particular cut block on which it had been working the previous season.

There were other contractors logging for Stuart Lake between 1983 and 1986 with Ublies remaining the principal contractor.

I have calculated the division of logging work during the relevant time period to have been as follows:

	<u>Ublies</u>	<u>Adina</u>	<u>Karvel</u>	<u>Others</u>
1983	56%	13%	0%	31%
1984	50%	40%	0%	10%
1985	42%	51%	0%	7%
1986	44%	41%	13%	2%
1987	47%	37%	11%	5%
1988	53%	3%	36%	8%
1989	55%	0%	33%	12%
1990	92%	0%	8%	0%

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3 According to Mr. Zielke's recollection the usual procedure was
4 that before the beginning of a season's work he would meet with
5 representatives of Stuart Lake. They would propose logging on a
6 certain cut block at a price they had determined. The mill would
7 give him a map of the proposed area. He would walk over the block
8 and decide whether the price was acceptable. In Mr. Zielke's words
9 he "always made it a point of checking the block before we made a
10 commitment". As it turned out the price was always acceptable,
11 although Mr. Zielke agreed it was his understanding he could refuse
12 the work if it wasn't. The work remained the same "stump to truck
13 logging".
14

15 There was no discussion of how long the relationship would
16 continue; no discussion of termination at all.
17

18 Mr. Zielke said it was quite common to start a cutting block
19 in one season and finish it in another. Payment was by the tonne
20 for timber processed. Because the logging contractor might build
21 roads and landings to remove timber from a cut block but not get
22 all the timber off in one season there would frequently be what is
23 referred to in the industry as "unamortized development work" -
24 meaning the logger hadn't got the value of the development work
25 until all the timber for which it had been done was removed. Thus
26 it was common that the contractor went back to the same block the
27 following season to finish the work.
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3 In the spring of 1987 Mr. Zielke met Mr. Wayne Drury at a
4 landing on a cutting block and had a conversation upon which it is
5 alleged Adina relied in purchasing a \$440,000 feller buncher.
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7 The meeting was entirely by chance. Mr. Zielke was on the
8 block and happened to meet Mr. Drury who was doing an inspection
9 for Stuart Lake Lumber. Mr. Drury was at the time employed in the
10 forestry department of Stuart Lake Lumber where he worked very
11 closely with Mr. Larsen, the Woods Manager. During the meeting Mr.
12 Zielke helped Mr. Drury load his truck with firewood.
13

14 According to Mr. Zielke he asked if Stuart Lake Lumber was
15 happy with Adina's work to which Mr. Drury replied "yes". He said
16 Mr. Drury told him Adina's position with Stuart Lake Lumber was
17 secure so long as the work was properly done. Mr. Zielke said he
18 told Mr. Drury he was considering buying a feller buncher and Mr.
19 Drury told him to go ahead and make the investment. When cross
20 examined on this point Mr. Zielke said he asked Mr. Drury what he
21 thought and Drury indicated it was a good idea. He could not
22 recall the exact reply but felt he could buy the buncher as a
23 result of what was said.
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25 Mr. Zielke did not discuss the matter again with anyone from
26 Stuart Lake and completed the purchase of the machine June 2, 1987.
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28 Mr. Drury who left the employment of Stuart Lake in June, 1987
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4 to take a job as Woods Manager for a saw mill in Salmon Arm
5 recalled talking to Mr. Zielke on a cut block in February 1987. He
6 said "Dave and I were sitting in my pick up. He was inquiring as
7 to what I thought it looked like for work in the future. I
8 couldn't offer him any guarantees. What I tried to do was offer
9 him an opinion on what I knew at the time. I provided an opinion
10 I didn't see much of a problem in working for Stuart Lake Lumber.
11 . . . Never talked about time frame, volume, size of operation or
12 whether it would be every season. . . . He brought up issue he was
13 considering buying a feller buncher. He was trying to collect as
14 much information as possible to help him make his decision."

15
16 Mr. Drury denied telling Mr. Zielke his company could work for
17 Stuart Lake as long as it was doing a good job. He said Stuart
18 Lake Lumber had a very short planning horizon; at the end of one
19 season it often didn't know how much or where it would log in the
20 next. Mr. Drury said he was not in a position to guarantee logging
21 contractors work and never did.

22
23 In June, 1987 Mr. Zielke suffered a severe knee fracture as a
24 result of which he had one of Adina's employees, Larry Knudsen
25 supervise Adina's summer logging in 1987 for Stuart Lake. Mr.
26 Danny Boyd was Adina's logging supervisor for the Bond Brothers
27 work at that time.

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29 In October, 1987 Mr. Zielke went to Fort St. James and spoke
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3 to Mr. Larsen in the Stuart Lake office to inquire if there was any
4 work for Adina in the coming winter season. At that point in time
5 the Canadian softwood industry was in the throes of dealing with a
6 significant lumber tariff imposed by the United States on Canadian
7 imports in January, 1987. Mr. Larsen told Mr. Zielke there was no
8 logging work for Adina that winter because of the increased
9 stumpage cost. (The government having dramatically increased
10 stumpage by up to 10 times in return for the United States dropping
11 its tariff). Mr. Zielke made several similar inquiries for work in
12 the following months by telephone with similar results. In
13 January, 1988 Adina did some further work. Mr. Zielke said "I
14 think we arranged we'd load out timber left decked at the end of
15 the season - fall 87". This was work to complete removal of timber
16 from a cutting block Adina had worked on the previous season.
17

18 Mr. Zielke said in the winter of 87/88 he was waiting, hoping
19 Stuart Lake would start logging again and he didn't look for
20 alternate work for his company, however, Bond Brothers came up with
21 a fairly large contract in December and Adina was able to use most
22 of its machinery there.
23

24 Mr. Zielke met with Mr. Larsen again on April 20th. He asked
25 if there was any plans for work for Adina and was told there was
26 not. The last meeting between Zielke and Larsen occurred August
27 17, 1988. Mr. Larsen told him there was still no work, although
28 there was a possibility of some.
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3 Stuart Lake Lumber never gave any notice of termination, nor
4 did it advise Adina the work was unsatisfactory, it simply did not
5 offer further work. Adina commenced this action July 11, 1989.
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7 Did Adina Timber have a contract with Stuart Lake Lumber which
8 required reasonable notice to terminate?
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10 No such term was ever agreed upon. The subject was never
11 discussed between the parties. Furthermore when Mr. Zielke
12 inquired about work in the fall of 1983 for his company he asked if
13 there was work for the winter season, not if Adina could log for
14 Stuart Lake Lumber indefinitely. I accept Mr. Drury's evidence
15 that Stuart Lake Lumber had a short planning horizon and that it
16 would not guarantee work to a logging contractor. Adina Timber
17 never sought nor contracted for a term of reasonable notice and on
18 the evidence, had it attempted to do so such a term would have been
19 refused.
20

21 Should the law, in the circumstances of this case imply a term
22 that Adina was entitled to work for Stuart Lake until terminated on
23 reasonable notice? There is certainly no evidence that it is
24 customary for saw mills to hire logging contractors on such terms.
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26 Adina logged for Stuart Lake for 4 winter seasons and 4 summer
27 seasons but it was never the exclusive contractor. During that
28 time the percentage of the mill's total logging done by Adina
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3 varied from 13% to 51%. Ublies remained the principal contractor,
4 and there were others as well. Prior to each season Mr. Zielke
5 would obtain a map of the proposed cut block and walk over the site
6 to determine whether the price offered was acceptable. He said he
7 would check the block before making a commitment. There was no
8 mechanism for setting the price if it was unacceptable, it just so
9 happened that it always was.
10

11 The conduct of the parties is consistent with each season or
12 cut block being a new agreement between them. Each time the mill
13 would offer particular work at a particular price and each time Mr.
14 Zielke would check the area and decide whether or not to accept it.
15 The fact that work on a cut block might carry over from season to
16 season is not inconsistent with this, the logging contractors
17 frequently completed work on a block started but not finished in an
18 earlier season. This is what was agreed to when Adina completed
19 some work in January, 1988.
20

21 The fact that Stuart Lake Lumber did not send a notice of
22 termination is consistent with its position that the only contracts
23 it had with Adina were those specifically agreed to by season and
24 cut block.
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26 Mr. Larsen told Mr. Zielke there was no work because of the
27 increased stumpage costs. The fact is that Karvel and Ublies
28 continued to log while work was not offered to Adina. Why this
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3 occurred is not clear, obviously Stuart Lake Lumber decided not to
4 offer Adina work, however, unless Adina had negotiated for and
5 agreed upon mutual obligations giving it job security, or the law
6 now implies such a term, Stuart Lake was entitled to do what it
7 did.
8

9 The law ought to be cautious in reading into contracts terms
10 which were not negotiated. Parties should be entitled to rely upon
11 what they did not contract for as much as what they did.
12

13 In support of the contention that this court ought to imply a
14 term of reasonable notice the following authorities have been
15 cited.
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17 Hillas & Co. Ltd. v. Arcos Ltd., [1932] All E. R. 494 (H.L.).

18 Halsbury's Laws of England, (3d) Vol. 8, Para 267, pp 156, 157
19 "Contracts".

20 Winter Garden Theatre (London) Limited v. Millenium
Productions Limited, [1948] A.C. 173.

21 Robinson v. Galt Chemical Products Ltd., [1933] O.W.N. 502
22 (Ont. C.A.).

23 Gill Brothers v. Mission Sawmills Limited (1944) 3 W.W.R. 311
24 (B.C.S.C.), [1945] 2 W.W.R. 337 (B.C.C.A.), [1945] S.C.R. 766
(S.C.C.).

25 Toronto Type Foundry v. Miehle - Goss Dexter Inc. (1968), 5
26 D.L.R. (3d) 578 (Ont. H.C.).

27 Paper Sales Corporation Ltd. v. Miller Bros. Co. (1962) Ltd.
(1975) 55 D.L.R. (3d) 492 (Ont. C.A.).

28 Hillis Oil & Sales Ltd. v. Wynn's Canada ltd. (1986), 25
29 D.L.R. (4th) 649 (S.C.C.).
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3 Bernard-Norman Specialties Co. Ltd. v. S.C. Time Inc. (1989),
4 31 C.P.R. (3d) 158 (Ont. H.C.J.).

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6 In each of the cases cited the facts are significantly
7 different from the present one.

8
9 The Winter Garden Theatre case concerned an option to renew a
10 licence to use a theatre for a set price per week. The agreement
11 from the outset clearly contemplated an indefinite term of rental,
12 and in deciding that the rental could not be terminated by the
13 landlord without reasonable notice (the licence required one months
14 notice by the licence holders to terminate) the court placed
15 reliance upon the law relating to the rental of land.

16
17 In the Hillas case the court was attempting to interpret and
18 give meaning to a negotiated and agreed upon term of a contract.
19 It held that when the contractual intention of the parties is clear
20 but the contract is silent on some detail the court may supply the
21 detail. That is not the case here, the parties had not discussed
22 nor directed their minds to the question of notice being required
23 to terminate, and in any event were dealing with multiple
24 contracts.

25
26 The Gill Brothers case concerned a contract by the mill to
27 sell and the Gill Brothers to buy all the mill's output of fuel
28 wood, and by the Gill Brothers to keep the mill's wood bunker clear
29 which was necessary for the mill to keep running. The agreement
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3 clearly contemplated continuous mutual obligations for an
4 indefinite period of time from its very outset. Adina did not
5 contract to do all of Stuart Lake Lumber's logging or any
6 particular portion of it, and Mr. Zielke did not consider himself
7 committed to log any site until he had inspected it and agreed to
8 do so.
9

10 The Paper Sales case, and that of Hillis Oil, Toronto Type
11 Foundry and Bernard-Norman specialities were all found to involve
12 permanent, or indefinite, exclusive agency or distributorship
13 agreements, much different than the contractual arrangements in the
14 case at bar.
15

16 It is not claimed that the conversation with Mr. Drury in the
17 spring or winter of 1987 amounted to a modification of the contract
18 between the parties, nor could it in the circumstances amount to
19 that. Mr. Zielke did not state that he was seeking agreement by
20 the mill to employ him for a particular time period, nor were the
21 terms that should be agreed upon, were that the case, such as
22 volume or proportion of the work, availability of work or method of
23 setting price discussed let alone agreed upon. Furthermore Mr.
24 Zielke did not contract on behalf of Adina to any obligations on
25 its part in consideration of such an agreement by the mill. The
26 conversation is sued upon as a misrepresentation; not a contractual
27 term.
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3 Adina Timber's claim to be entitled to reasonable notice upon
4 termination of its relationship with Stuart Lake Lumber fails upon
5 the facts of this case, and the law as it relates to those facts.
6 There was not one contract but a series of contracts in which
7 Stuart Lake Lumber offered work at particular sites and Adina
8 accepted it. The continuation of this relationship over 4 years
9 does not in law give Adina Timber additional contractual rights it
10 did not bargain for.
11

12 In my opinion Adina's claim for damages for misrepresentation
13 must also fail. As Stuart Lake Lumber was not contractually bound
14 to employ Adina Timber beyond the contracts already agreed to, even
15 if it did misrepresent the reason for not offering Adina work, such
16 a misrepresentation is not actionable.
17

18 I find further that Adina Timber Ltd. is not entitled to
19 damages on the basis of Mr. Zielke's conversation with Mr. Drury in
20 the late winter or early spring of 1987. Mr. Zielke quite frankly
21 stated he could not recall exactly what was said at the time. He
22 said the result was he felt he could go ahead and purchase the
23 feller buncher. I accept Mr. Drury's evidence that what he told
24 Mr. Zielke was not that Adina could work for Stuart Lake
25 indefinitely, but that in his opinion Adina's logging work for
26 Stuart Lake Lumber was acceptable, and he did not see a problem in
27 Adina continuing to work for Stuart Lake. In fact after that
28 conversation Adina did work the next season for Stuart Lake.
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3 This was a chance meeting. It did not have the aura of
4 contractual or legally binding discussions and it would not be fair
5 to give that discussion such effect now. Mr. Zielke could have
6 attempted to negotiate job security if he wished. He did not
7 consult Stuart Lake further before buying the feller buncher.
8 There was no discussion of terms which one would expect to be dealt
9 with if job security was being guaranteed such as availability of
10 work, volume, price etc.
11

12 What Mr. Drury represented to Mr. Zielke was not that Adina
13 was guaranteed work for the indefinite future, but that at the time
14 of the conversation matters were going well between the companies
15 and he did not foresee problems. If Mr. Zielke chose to rely on
16 such a discussion to purchase the buncher it is his company which
17 must bear the risk as the circumstances of the contracts with
18 Stuart Lake and the nature of the discussion do not in my opinion
19 warrant shifting any loss incurred to Stuart Lake Lumber.
20

21 The Plaintiff's claim for damages for breach of contract and
22 misrepresentation is dismissed.
23

24 I understand the parties do agree that Adina Timber is
25 entitled to payment for some "unamortized development cost". If
26 this issue cannot be resolved it may be spoken to.
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Subject to any submission counsel may have the Defendant shall recover the costs of this action on scale 3.

Dickie Cutler

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