No. 10724
Prince George Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:	
BRINK FOREST PRODUCTS LTD.	REASONS FOR JUDGMENT
PLAINTIFF	
AND:	OF THE HONOURABLE
MICHAEL GENE MADRIGGA, COUNCIL OF FOREST INDUSTRIES, NORTHWOOD PULP AND TIMBER LTD., NORANDA FOREST INC. and DAVID C. McELROY	MR. JUSTICE TAYLOR
DEFENDANTS	

D. Byl, Esq.	Counsel for the Plaintiff
S. R. Schachter, Esq. and G. B. Gomery, Esq.	Counsel for the Defendants Northwood, Noranda, Madrigga and McElroy
R. W. Lusk, Esq., and B. J. Freedman, Esq.	Counsel for the Defendant Council of Forest Industries
DATES OF TRIAL:	October 31, November 1, 2, 3, 4, 7, 8, 9, 10, 14, 15, 16, 17, 18, 21, 22, 23, 24 & 25, December 5, 6, 7, 8, 9, 12, 13, 14, 15 & 16, 1988; January 3, 4, 5, 6, 9, 10, 11, 12, 13, 16, 17, 19, 20, 23, 24, 25, 26 & 31 and February 1, 2 & 3, 1989. Prince George & Vancouver, B.C.

This action is concerned with the grading of dimension lumber, a complicated yet necessarily inexact process of some importance in British Columbia's forest industry.

The claim is for something more than $5,000,000 in damages alleged to be due to the plaintiff Brink in respect of the supply to it by the defendant Noranda of "economy" grade lumber produced at mills of Noranda's associate company, the defendant Northwood, which the plaintiff says did not in fact meet the prescribed standards for that grade.

The lumber was used by the plaintiff as raw material for "remanufacturing" at its Prince George plant into smaller, higher-grade pieces, by splitting, planing and trimming so as to eliminate defective portions of the wood.

The defendants--Noranda and its officers Messrs. Madrigga and McElroy, its associated company Northwood which produced the wood and the Council of Forest Industries (COFI) which provided grading and other services both to the plaintiff and to Northwood--are alleged to have conspired together to deny the plaintiff during the period November, 1983 to July, 1986 material constituting the "top end" of the economy grade by putting this into the next higher grade, and to supply as economy lumber material which did not qualify as such, but was fit only for "chipping" or burning. The plaintiff says the consequence of these undisclosed changes in grading practice was, on the one hand, that Northwood considerably increased its sales of lumber designated "utility" or "No. 3"--the grades immediately above "economy"--and, on the other hand, that the volume of remanufactured lumber which

the plaintiff was able to produce fell significantly, as did the average quality of the plaintiff's output.

The plaintiff says also that the amount of its "downfall", or waste, as a consequence substantially increased, and it is by this increase in the proportion of wood rejected in the course of remanufacturing that it seeks to prove its loss.

The conspiracy is alleged to have been carried out through the application by Northwood in its grading process of certain confidential "guidelines" adopted by the defendant COFI of which the plaintiff says it had no knowledge itself but which it says were disclosed to, and used by, Northwood. These guidelines incorporated criteria which the plaintiff says are in important respects less demanding than, and essentially in conflict with, those laid down in the published, and generally applied, National Lumber Grades Authority Rules (NLGAR).

The plaintiff also alleges negligence, breach of express and implied warranties, interference in contractual relations, improper termination of the wood-supply agreement, "economic duress" and breaches of fiduciary duty. It claims punitive as well as compensatory damages, and seeks an accounting of the profits which it says Northwood made at its expense.

The issues raised proved to be far greater in scope than the parties had anticipated, and the claim became increasingly complicated as the trial proceeded. The hearing took 50 days, as opposed to the 19 which had been estimated, and more than 30 witnesses were called and 500 pages of argument submitted. Much relevant documentary evidence within the possession of the defendant COFI was disclosed only in the last stage of the trial, and COFI also elected not to call the senior member of its staff involved, whose evidence it knew would be central to the case. Had proper pre-trial discovery been sought and made, the proceedings would undoubtedly have been shorter, and the task of the court less onerous. Had the key COFI witness been called there would have been direct testimony on an important issue which the court is now asked to decide instead by inference.

With agreement of all parties, Martin Linsley, C.A., sat as an Assessor during evidence and argument relating to certain complicated statistical issues which are said to be relevant to both liability and damage questions and I am grateful to Mr. Linsley for the able assistance which he rendered.

I regret that the task of arriving at conclusions on several of the important issues raised has proved so much more time-consuming than the parties could have expected.

(a) The NLGA Rules

The National Lumber Grades Authority Rules (NLGAR), the Canadian grading rules which are accepted by all parties as applicable to lumber supplied under the contract between Brink and Noranda, were first published in 1977 and incorporate the National Grading Rule (NGR), in fact a set of rules, which emerged from a 1970 industry-wide conference at Chicago.

The importance of the NGR is that it was enacted as a result of discussions in which representatives of both producers and consumers of dimension lumber took part, held under the auspices of the United States Department of Commerce, as a mutually-acceptable statement of quality standards for application throughout the North American lumber industry. At the time of trial the conference had never been reconvened. The Rule had never been changed in any way. The subsequent direction of grading practice had been controlled by grading agencies and their governing bodies, organizations almost exclusively employed by the lumber producers and in many cases, as in that of the defendant COFI, actually organized and operated by them.

Representatives of consumers were not, during the period relevant to this action, consulted in any way with respect to the interpretation and application of the grading rules. Nor were the "guidelines" used by the agencies meant to be available to them.

In some cases--as with those used by the defendant COFI--the guidelines were designated "confidential".

So far as COFI was concerned the guidelines were not apparently to be made known to the parties whose interests would be affected by them, either producers or buyers. Yet COFI, as I have mentioned, is an organization of lumber producers, whose purpose is to advance the producers' interests, and there is evidence that a U.S. grading agency was willing to make them available to mills it served. Both the plaintiff and the defendant Northwood were COFI members, and users of its full range of grading, advisory and other services, the plaintiff being one of the smallest while Northwood and its associated companies are among the largest producers in the world.

The interpretation of certain provisions of the NGR is important to the outcome of this litigation.

"Economy" is the lowest grade of lumber. The NGR by defining the minimum qualities of lumber in No. 3 or "utility"--the grades immediately above "economy"--thereby establishes the quality "ceiling" for economy lumber. The "bottom" of the economy grade--the minimum standard to be met by lumber supplied to Brink--is defined, not by the NGR, but by the NLGAR, the Canadian rules. Little importance seems, however, to attach to this minimum standard. The plaintiff's case rests essentially on its claim that

it was denied the "top end" of the economy grade--its assertion that what should have been its best pieces were assigned instead to the No. 3 or utility grades, thereby diluting those grades and impoverishing the economy grade. The plaintiff's case is one of 'non-delivery', rather than 'mis-delivery'.

It is the plaintiff's position that a mill can be said to deliver "economy grade" lumber only if it provides the full range of its production properly falling within that grade.

The NGR and NLGAR, in my view, amply support the plaintiff's contention in this regard--that is to say that a purchaser by grade is entitled to the full 'spectrum' of the mill production in that grade. Such a purchaser cannot be said to receive lumber of the grade contracted for simply because the pieces delivered can be shown to be of a quality at or above the minimum set by the rules for that grade.

This is both implicit, in my view, in the nature of the grading scheme, and also expressly provided by General Provision 8 of the NLGAR, which states:

> A lumber grade is a grouping of pieces, all slightly different within defined limits, with regard to the end use for which the grade is intended. A parcel or shipment of a specified grade will be representative and will not be made up principally of either low or high line pieces.

Any debate over what size of consignment constitutes a 'shipment' for this purpose seems to me largely irrelevant. If a practice is followed at any mill which results in the 'bumping' of lumber from a lower to a higher grade, that is likely to result in every consignment of the lower grade being deficient, whether single parcel or several truckloads. Logic moreover dictates that if loads from a mill are not in this sense properly "representative", a notional or statistical mixing of such loads with loads delivered from another mill cannot, by means of an "averaging" process, somehow render them representative.

If the "top-end" of the lumber properly belonging to one grade is moved into the next higher grade this will almost inevitably result in failure of both to meet the requirements of the rules--the former being no longer representative of production in that grade, and the latter because sub-standard pieces exceed the five per-cent permitted by the rules.

A key question in the present litigation is whether this is what happened in the case of the lumber produced by Northwood and supplied by Noranda to the plaintiff.

(b) <u>The Limits of the Claim</u>

The wood-supply contract between Brink and Noranda, dated 1978 and effective January 1, 1979, appoints Noranda exclusive

agent for the sale of all Brink's production of re-manufactured lumber and offers Brink a long-term supply of economy lumber from the Northwood mills as raw material.

The contract provides that 60 per-cent of Northwood's production of economy-grade lumber--originally estimated at 23 million board feet and later increased to 35 million board feet--is to be made available to Brink "on a weekly basis". Brink is not obliged to take the weekly offering, but should it refuse any such offering Noranda would be entitled "to reduce the agreed-upon supply by this amount". Brink was therefore free to obtain its future wood supply elsewhere to the extent that it pleased, but if it refused any Noranda weekly offering it would to that extent lose its assurance of supply from Northwood.

The wood was to come from any or all of four Northwood mills--Houston, Prince George, Upper Fraser and Shelley.

The contract contains a *'force majeure'* clause on which Brink relies in these proceedings in denying the effectiveness of the termination notice it ultimately received from Noranda. This clause provides that neither party would be obliged to ship lumber if unable to do so because of a strike. It provides that the contract would be "suspended" during any such strike, and that "the terms of this Agreement shall be extended for a period equal to the period of suspension". The contract allowed for termination by

either side on 90-days notice directed to the anniversary date. On September 24, 1986, Noranda gave such notice to cancel, effective January 1, 1987. This was given after Brink indicated it would bring this action, and while a province-wide woodworkers' strike was in progress.

The plaintiff's claim is limited in two particular respects which have obvious potential significance: the claim relates only to lumber which originated at Northwood's Prince George, Upper Fraser and Shelley mills, and only to that supplied from those mills during a 32-month period from November, 1983 to July, 1986, when the strike started. The plaintiff thus accepts that wood supplied from all four mills during the first five years of the contract term, those preceding the start of the claim period, was of contract quality, and also that wood produced at the Houston mill--amounting to half that supplied--continued to be acceptable throughout the claim period.

It is of obvious significance, too, that it was not until July, 1984--eight months into the claim period--that COFI first became Northwood's grading agency.

So the plaintiff maintains that the departure from acceptable grading practice started prior to COFI becoming Northwood's grading agency, and continued thereafter, but that it was reflected in the quality of only half of the volume supplied-

-that produced at three of the four Northwood mills. There is no claim made in these proceedings against the agency employed by Northwood at the time the guidelines are said first to have become known to Northwood, and to have first been used in grading the lumber produced at these three Northwood mills.

The plaintiff's case is complicated also by serious difficulties involved in comparing the quality of raw material which it received during the claim period with that of material it received before and afterwards.

(c) <u>The Grading System</u>

A full description of the operation of the grading system would call for resources far more extensive than those afforded a trial judge in such proceedings as these, and the following is merely an outline, based on less-than-complete evidence led in an action brought by a small participant in the industry.

The separation of finished boards into NLGA-prescribed grades takes place in the sawmill at what is called a grading 'table'--in fact a point on a moving production line close to the end of the process. It is done by employees of the mill. A grader has only a second or two in which to size up the characteristics of a board, probably before its length is finally determined, and to decide whether it qualifies as "No. 1", "No. 2", "No. 3" (or

"utility") or "economy". The grades sometimes bear other names, and may be broken down or combined, such descriptions as "Japan grade" and "standard or better" being used for variations, but I do not think it necessary to discuss grades other than economy and No. 3 or utility, the latter being two essentially similar grades constituting the next step above economy.

The grader is a highly-skilled member of the sawmill workforce. Because of large differences in pricing as between wood in one grade and the next, an efficient mill can generally be expected to look to its graders to make certain that lumber is placed in the highest grade for which it qualifies. The rules provide for a five per-cent margin of error, so that lumber may be declared "on grade" even though one in 20 boards ought properly to have been classified in a lower grade.

This in-house grading process is subject to overall supervision and control by a grading agency such as COFI.

The agency trains the mill-employed graders and does random checks, conducted twice-monthly in the case of Northwood mills, to ensure that the graders are doing their job properly. By demonstrating what defects are and are not acceptable in each grade the inspections assist the graders in maintaining the proper standards. The agency also acts as arbiter between buyer and seller in the event of disputes which can be settled by

"reinspection", a piece-by-piece check by grading agency personnel of the disputed shipment. Reinspection is the only recourse provided for by the rules where a buyer claims that a shipment received is "off-grade". While this process was repeatedly referred by the defendants as an essential course for the plaintiff to have followed in respect of the complaints it makes in this action, the process is not one which could have resolved the plaintiff's principal complaint.

Reinspection shows whether the pieces delivered are above the minimum quality standard for the specified grade, but the plaintiff's principal complaint is not that it received wood below the minimum standard for economy but that the shipments which it received did not include what would have been the "top end" of the grade. Its complaint is concerned with wood which it says it should have received but did not--wood which it says was sold instead to others, mainly as utility or No. 3. Re-inspection is not required by the rules as a pre-requisite to the making of a claim of this sort and, had it taken place, would merely have resulted in application of the guidelines and a finding that the pieces delivered were "on grade".

The instruction of mill graders by the agencies, through published material, grading classes, mill inspections, refresher courses and grading competitions, is intended to ensure that the

grading practices in fact followed at the mills both accord with the grading rules and are uniform.

Since the rules--the NLGAR, incorporating the NGR--are in many respects ambiguous and obviously incomplete, the work of the agencies has much significance in determining the minimum and maximum standards for each grade.

The interpretation of the rules calls for a very large measure of judgment; this judgment is to be exercised, not by an independent enforcement agency, that is to say one set up jointly by buyers and sellers, but by agencies controlled or employed solely by the producers, and by the NLGA, a producer-controlled rules body. The general provisions of NLGAR encourage buyers to rely on these bodies, notwithstanding their less-than-independent position, to ensure that standards prescribed by the rules are fairly and uniformly enforced.

For the purpose of ensuring that the quality of each piece it receives is no lower than the minimum quality allowed in the ordered grade a purchaser is entitled to call for a reinspection by the grading agency. For the purpose of ensuring that wood received is "representative" of production in that grade the purchaser is equally reliant on application of the published rules by the agency, but in this respect the purchaser's reliance is on the agency's inspection of the mill's production of wood

placed in the higher grades. There is no means of re-inspection provided by the rules by which a purchaser can challenge the wood it receives as not being fully "representative" of production properly falling within that grade. The only means of enforcing that equally important requirement seems to be the bringing of such difficult proceedings as these.

Another producer-controlled organization, Canadian Lumber Standards (CLS), certifies and supervises the inspection agencies. Little was said in evidence as to how it operates. There was nothing said to suggest that it involves representatives of lumber consumers in its work, insofar as it plays any part in the interpretation or enforcement of the rules. The Executive Director of CLS is also Manager of the NLGA, and the two organizations appear, therefore, to be closely linked.

General Provision 1 of the NLGAR says that the purpose of the rules is "to maintain a standard or measure of value between mills manufacturing the same or similar woods so that uniform qualities will result". General Provision 2 says that "the interpretation of these rules and decisions on grades is vested in the National Lumber Grades Authority". The preface to the Rules says that the NLGA "consists of all lumber manufacturers' associations in Canada that have approved grading agencies, as well as the independent agencies". The reference to "independent agencies" seems to be to grading agencies which are not actually

operated by lumber manufacturers--I heard no evidence of any agency which is "independent" in the sense of being employed by both producers and buyers. Those agencies which are not actually controlled by producers seem to be solely employed by producers, and compete with each other for their business.

The intention of the rules seems to be that those who order Canadian lumber by grade from NLGA mills will receive wood which meets those requirements laid down by the published rules, no matter from which mill it originates. To determine what the requirements are, however, a buyer must know not only what the rules say, but how they are interpreted. That important information can be found out only from a study of the material published by the grading agencies for the guidance of graders--that is to say the material used in the grading courses.

There is nothing in the rules to suggest that secret directions may be given by the NLGA to the grading agencies authorizing the application by their inspectors of less demanding standards in the inspection and reinspection processes than those officially promulgated and taught.

No claim is made by the plaintiff against the NLGA, nor did COFI criticize the NLGA for approving the NGR guidelines. Insofar as they contained less demanding criteria than the rules themselves COFI was under no obligation to apply them.

(d) The Confidential Guidelines

The defendant COFI concedes that it applied confidential NGR Guidelines in its inspections of production at mills such as Northwood's and also when re-inspections were called for by purchasers who complained of having received wood which did not meet the published standards for the grade.

The NGR Guidelines were drawn up in 1977 and amended in 1981. They were created and amended by the producer-controlled rules organization in the United States and provided to the Canadian agencies by the NLGA for use in inspections and reinspections, with the request that they be treated as confidential. Considered in the context of the purpose of the rules, the provision authorizing the National Lumber Grades Authority to interpret the rules and "make grading decisions" cannot, as I have said, be taken to authorize the establishment in this way of two quality standards, one promulgated and the other kept secret but in fact applied by inspectors.

In the absence of words authorizing such a practice, the rules must be taken to contemplate the establishment of a single set of criteria which the authority is prepared to disclose and openly apply. No coherent explanation was offered by the defendants for maintaining secrecy with respect to the guidelines, a practice obviously quite contrary to the intent of the NLGAR that

there be uniformity of grading practice. It seems inevitable that application of less demanding criteria by inspectors in the supervisory mill inspections, and in the ultimately adjudicative "re-inspections", would gradually come to the attention of some of the mills--that some would "cotton on" sooner than others. The ultimate objective of most graders is necessarily so to grade the lumber that it will pass inspection, and if necessary re-inspection, subject to the five per-cent allowance for error, without "giving anything away"--and be in this sense "on grade". Graders could not normally be expected to continue to place pieces in a lower grade than that into which they know the inspectors would permit them to be graded.

In leaving the interpretation of the rules to the grading agencies and their rules body, the NLGA, purchasers should, I conclude, be taken to have entrusted those organizations with a duty to act openly and fairly, that is to say in an impartial capacity on which buyers and sellers alike would be able to rely. In applying the rules COFI and its employees were not entitled to act as agents of the sellers, or of the NLGA--a producers' organization--or of any other body. Those involved in their creation must have known, and have intended, that the adoption of undisclosed guidelines, in place of the open exercise of the discretion left to the NLGA and the agencies, was inconsistent with the purpose of the grading system, and would result in some wood being placed in a different grade than that to which it would

otherwise have been allocated under the rules as taught. It must have been apparent to COFI that the guidelines would become the standard to which its producer members would in practice gradually come to grade their production.

I do not overlook the difficulties imposed on the agencies in carrying out their task while under the control of the producers, or obliged to offer their services to the producers in a competitive environment. But other professional organizations, such as chartered accounting firms, have imposed on them similar responsibilities of frankness and impartiality in dealing with their clients' affairs, notwithstanding that this may not always serve their clients' best interests. It was not unreasonable to expect similar impartiality of the grading agencies.

The plaintiff is a buyer unlike most, if only because it was well aware of the interpretations given to the rules by COFI in instructing the graders. It applied these interpretations in grading its own production for the purpose of sale. To the extent that COFI inspectors may have applied less demanding criteria than those taught, it is not suggested that the plaintiff changed its grading practices to take advantage of this. It is, in my view, impossible to accept that the plaintiff is entitled to complain that COFI applied interpretations which it knew to be generally taught and applied in the industry, and which it used itself in the grading of its own production. Its valid complaint must

necessarily be limited to the use by Northwood of interpretations which were neither published nor taught, which it did not itself apply and of which it had no knowledge.

I conclude that it is only those NLGA interpretations which were openly disclosed that can be regarded as authorized by the NLGAR--that is to say as defining grade standards for the purpose of dealings based on the rules. It follows that the interpretations contained in the confidential guidelines can have had contractual force only if in fact known to the plaintiff, or if they fairly state the meaning which would in any event be given to the openly-promulgated rules.

I must therefore decide to what extent the confidential guidelines authorized the application of less demanding criteria than those in fact taught, or otherwise known to the plaintiff, to what extent such less demanding criteria were in fact applied by Northwood, and to what extent this affected the quality of the wood supplied by Northwood to the plaintiff.

(e) <u>The Differences</u>

The differences as between the published rules and the informal guidelines, on which the plaintiff bases its claim, have to do with the permissible extent of two defects which can result in wood being classified as "economy" rather than "utility" or "No.

3": (i) "wane", which is the lack of a corner due to the roundness of the tree, something found on boards cut above or below the centre line which "overlap" slightly the outside of the log; and (ii) "unsound wood", that is to say decay.

The plaintiff contends that, by application of the guidelines, boards having these defects in moderation--those from which the plaintiff could most readily have "remanufactured" pieces of higher-grade--were improperly denied to it, and sold instead to others, mainly as utility or No. 3.

The differences which the plaintiff alleges as between requirements of the rules and of the guidelines are, in the cases of both defects, highly technical. Since the grading system includes no provision for the resolution of disputes such as this by an independent qualified arbiter, and since the parties could not agree on an assessor to guide the court in this field, the court must do the best it can to deal with the issues on the basis of the expert evidence but with the exercise of lay judgment, aware that its analysis will inevitably be imperfect. Only someone with considerable training in the field is truly competent to deal with the technical questions raised and it is the failure of the rules to provide for such an arbiter that results in the dispute having to be resolved in the ordinary courts.

NLGA Rule 124(d) describes the extent to which a shipment of lumber graded above "economy" may have boards with the missing corners called wane. It says that an unlimited number of boards in a shipment may have wane extending to half the thickness and half the width so long as it does not exceed a quarter of the length (referred to at trial as "basic wane") and that up to five per-cent of boards in a shipment may have wane "up to" 7/8 of the thickness and 3/4 of the width for up to a quarter of the length (referred to at trial as "additional wane").

The confidential guidelines say that the "five percent" rule need be applied only to wane which extends to the full extent of additional wane, and that boards with wane between "basic" and "additional" can be allowed without restriction "on an equivalent basis", the concept of "equivalence" in this context apparently meaning, for instance, that to exceed basic wane in thickness or width the wane must be restricted to less than one-quarter of the length. This interpretation gives the rule the meaning it would have without the words "up to". The guideline also provides that boards may be accepted in the grade above economy with wane completely across the face up to the width of the maximum size of permitted defects called "scantness" or "holes". This sort of defect, referred to as a "wane dip", is not allowed under the rule, and there is nothing in the rules to justify allowing listed defects beyond their specified permitted extent by reference to listed defects of a different sort.

I am satisfied that the wane rules do not, on 'common sense' interpretation, bear the meaning sought to be given to them by the guidelines. There is evidence which suggests that those involved in adopting the guidelines knew this and were seeking to interpret the rules in a way which, if generally known, might result in another conference such as that at which they were drawn up. This seems, indeed, the only rational explanation for the secrecy attached to the guidelines.

The published rule concerning "unsound wood" in the grades above economy permits "spots or streaks" extending to a third of the cross-section of a board at any point, provided that it does not "destroy the nailing edge".

The guidelines permit an unlimited area of decay on any face but provide that if the decay is on more than one face it may extend only to one-sixth of the length of the board, and must not destroy the nailing edge in the sense of being wider than "maximum wane", nor be more than twice the length of an allowable knothole when completely through the narrow face.

With respect to the principal guideline concerning unsound wood, I am unable to say that on a 'common sense' interpretation it properly applies the published rule. Since the rule itself places no limitation on the length of "spots or streaks", it might seem lax enough to permit rot extending the full

length of the board, because a "streak", like the proverbial "piece of string", is necessarily of indefinite length. But that is not a "common sense" interpretation. Some meaning must, on such an interpretation, be given to the words 'spots or streaks' as words of limitation, yet the guidelines largely ignore them. In this regard it is perhaps notable that prior to the enactment of the NGR spots or streaks of unsound wood were generally required by pre-existing rules to be "widely separated".

To avoid "destruction of the nailing edge" might, however, as the defendants contend, require only that there be sufficient good wood along the narrow surface to hold a nail.

It seems likely that the framers of the guidelines felt that any attempt to clarify the rule itself respecting unsound wood was likely, too, if it became known to buyers, to provoke controversy, to lead to a reconvening of the meeting with consumers representatives at which the rules had been formulated, and perhaps to result in some more restrictive definition ultimately being adopted. It is, perhaps, notable that since this dispute arose COFI has replaced its confidential guidelines with "instructions" which are said now to be published and to be made generally available to buyers and sellers alike. These instructions limit unsound wood to one patch of up to 1½ inches times the width of the piece in every two feet, or one patch one-third the width times 10

per-cent of the length, certainly a more restrictive allowance than that which had been contained in the confidential guidelines.

I have so far been unable from the evidence to determine to what extent the concepts included in the guideline definitions of wane and decay were taught by COFI, that is to say the extent to which they would bind the plaintiff.

(f) The Key COFI Evidence

The existence of the NGR guidelines first came to the plaintiff's attention during a discussion in August, 1986, between its principal, John Brink, and a COFI inspector, Brian Marsh--that is to say after the guidelines had been used by COFI in inspections and re-inspections for nine years, either in the original 1977 form or as revised four years later, in 1981.

Mr. Brink had complained to Mr. Marsh about the quality of his shipments from Northwood. Mr. Brink testified that Mr. Marsh said he had recently conducted a re-examination in Texas of a consignment of No. 3 from Northwood's Upper Fraser mill, produced in the summer of 1986, which had been challenged by the purchaser. Mr. Brink said Mr. Marsh told him the problem had been caused by the use by Northwood of the guidelines. Mr. Brink said Mr. Marsh told him that he had been obliged to approve wood on the Texas reinspection under the guidelines which would not have been graded

No. 3 under the NGR, that is to say wood which would be graded under the rules themselves as economy. Mr. Brink said Mr. Marsh told him that "wrongful use and abuse" of the guidelines by Northwood and others caused this sort of problem, and that this had probably resulted in the plaintiff receiving only "low-line" economy lumber from Northwood mills.

Mr. Marsh denied in evidence that he told Mr. Brink that the quality of the Northwood lumber he reinspected in Texas was low because of use by Northwood of the guidelines.

Mr. Marsh testified that the principal objection made by the purchaser in Texas was that the wood received from Northwood included wane "dips", defects allowed under the guidelines in No. 3 but which would not have been permitted under the rules in any grade above economy. He testified that he had no first-hand knowledge of Northwood using the guidelines but that, as a result of the Texas experience, he thought this was what was happening. He testified that he had seen wood graded at Northwood mills for wane otherwise than as taught at the COFI classes, but that this could have been due to grader error. While Mr. Marsh seemed to agree that wane "dips" *might* be allowed under the NGR as "equivalent" to other specified defects, or on the basis of "good judgment", this does not seem to have been his own view.

Mr. Marsh said that in mentioning the guidelines to Mr. Brink he was influenced also by an experience he had recently had during an inspection at a mill in the Prince George area operated by a company other than Northwood.

He said that on this inspection he found many pieces with wane dips and that the mill manager said he had learned from a grader that COFI was permitting them. Mr. Marsh said that he thought it impossible in the long run to keep knowledge of the guidelines from mill personnel because graders watch the inspectors to learn what will be allowed in each grade.

Mr. Brink was greatly alarmed by what Mr. Marsh told him and called Mr. Marsh's superior, Nils Larsson, COFI's Chief Inspector. Mr. Brink demanded to know more about the guidelines. He demanded a copy in his capacity as a member of a COFI committee. After some delay, and consultation with his superior, Mr. Larsson gave him a copy. Mr. Brink said Mr. Larsson told him the guidelines were being used by Northwood and one other producer, but Mr. Larsson denied this. He said he told Mr. Brink that a couple of mills *could* be using the guidelines but denied he said that Northwood was one of them. Mr. Larsson testified he had never seen anything at the Northwood mills which would cause him to believe Northwood was using the guidelines.

A matter on which some importance was understandably placed by the plaintiff in resolving the conflict of evidence between Mr. Brink and Mr. Larsson and Mr. Marsh is that Mr. Marsh wrote a memorandum to Mr Larsson, at about the time when these conversations took place, in which he expressed concern about the use of the guidelines and their impact on the output of the mills, and this memorandum was not disclosed at trial by COFI.

Mr. Marsh denied in his evidence that he mentioned Northwood in this memorandum. He said he wrote it by hand on a multi-copy form and that Mr. Larsson said he would have it typed. Mr. Larsson testified that he sent it to his superior in COFI, Dan Chapotelle, who was also chairman of the NLGA Rules Committee. COFI maintained at trial that none of the copies of this memorandum, handwritten or typed, can now be found. It declined, however, to call Mr. Chapotelle. No reason was advanced for the failure to call this obviously important witness, someone said to have been present during part of the trial.

The circumstances are such as render the drawing of an adverse inference virtually unavoidable.

Another COFI staff member who did testify was Reginald Stafford, the quality control supervisor responsible for supervision of grading at the plaintiff's plant during the period relevant to this action. He testified that the plaintiff's graders

and Northwood's could attend the same grading classes, and were taught in the same way how to interpret and apply the rules. Mr. Stafford denied, however, that the plaintiff's graders would learn from his own mill inspection that he operated on the basis of less demanding rules than those taught in the classes. Mr. Stafford said the interest of graders lies rather in knowing why pieces are rejected by COFI inspectors than in knowing why pieces are not rejected. He said that if he was questioned by a mill employee as to why he had passed a piece (that is to say under the guidelines) which would have been rejected under the rules as taught, he would say that he made a mistake.

While Mr. Stafford may in this way have satisfied employees in a small operation such as the plaintiff's, as the defendants appear to accept, it is hardly likely that such a ploy would long work in larger mills, such as Northwood's.

So far as the wane guidelines were concerned, an experienced COFI inspector, Joe Chartrand, admitted as much in a conversation with Mr. Brink, the content of which was recorded by Mr. Brink and not contested by COFI. Mr. Chartrand said of wane permitted by the guidelines that quality control people in some mills got to know about it from the COFI inspections, and told their graders. He said this particularly in regard to "wane through the edge" and specifically mentioned Northwood mills as among those where this happened. In this way, said Mr. Chartrand,

the mill graders learned that the inspectors allowed wane beyond the extent allowable as taught in the classes.

I find that while Mr. Marsh and Mr. Larsson may not have known of the extent to which some Northwood mills had, as a result of inspections or otherwise, become aware of, and fallen in with, the practices sanctioned by the guidelines, Mr. Chapotelle knew and that his evidence would not only have conformed Mr. Chartrand's statement, but probably have gone somewhat further.

(g) <u>The 'Statistical Case'</u>

Counsel for the plaintiff emphasized in argument that its case is heavily 'statistical' that is to say that the plaintiff relies on a statistical analysis by which it claims to demonstrate that it experienced an increase in the proportion of wood rejected in its process and a decline in average quality of remanufactured output, during the claim period November, 1983, to July, 1986, as compared with its experience with wood processed at other times, or received from other sources.

The plaintiff says that its figures show that the Northwood product started to deteriorate in late 1983, so that a smaller proportion of the wood received thereafter was capable of remanufacture into higher-grade pieces, and that the pieces which were so produced were of lower average grade.

With respect to the first of the two approaches it is apparent, as the Assessor, Mr. Linsley, has pointed out, that the validity of the plaintiff's statistical case is very much dependent on the correctness of its assumptions. It is based on assumptions that "downfall" (that is to say loss of wood in the remanufacturing process), was: (i) 20 to 24, say 22, per-cent in respect of economy lumber received from sources other than the three impeached Northwood mills (those at Prince George, Upper Fraser and Shelley); (ii) 22 per-cent in respect of "normal" or average quality economy grade lumber produced in the British Columbia northern interior region; and (iii) 10 per-cent in respect of "rough" lumber from the plaintiff's own "bush mill", a movable facility operated by the plaintiff during part of the claim period to produce boards in the forest for later planing and trimming at the plaintiff's remanufacturing plant in Prince George.

I have spent many hours, over many months, trying to decide whether these assumptions are reasonable. I accept that statistical evidence has little value if the assumptions are not shown on the balance of probabilities to be reliable. In the end I find it impossible to say that the plaintiff had met the burden which lies on it in this regard.

The Assessor's calculations show that a one per-cent error in the 22 per-cent assumption with respect to "normal" downfall would make an average difference of about $65,000 in the

amount claimed in respect of each of the three years. The total claim based on this approach is $1,247,000, so that an error of 6.5 per-cent in the assumption made as to "normal" downfall would be enough to defeat the claim entirely. But I must be equally concerned that what is assumed by the plaintiff to be "normal" downfall in respect of lumber supplied from sources other than the three relevant Northwood mills would not have been so regarded by a knowledgeable independent observer at that time. There is evidence that Northwood's production of economy lumber at the three mills whose production is impeached changed for the worse during this period because of such factors as improved production practices--that is to say the use of better production techniques resulting in more higher grade wood being produced from the same quality of input--and some lowering of quality in the logs processed due to an increased proportion of balsam.

In deciding whether the challenges to the plaintiff's statistical case have validity, some assistance might reasonably be gained from examining the plaintiff's experience in 1987 with wood obtained from other sources which it considered to be of acceptable quality--that is to say, wood it purchased after termination of the contract with Noranda. The evidence shows that the comparison would not support the plaintiff's case, and that the plaintiff probably knew this to be so.

Mr. Linsley's analysis points out that any error in the assumption that downfall from the plaintiff's own "rough" lumber was 10 per-cent has a much smaller impact on the ultimate calculation of downfall from the Northwood "suspect" wood during the claim period. But an underestimate of four percentage points is in this assumption would still seem to result in overstating the claim by well over 20 per-cent.

It seems to me that the key assumptions are those relating to the plaintiff's experience of so-called "normal" downfall--that attributed to lumber which properly conforms to the rules, that is to say lumber provided by Northwood mills prior to the claim period, that provided by the Houston mill, and that from other mills whose product was regarded by the plaintiff as acceptable--and its comparability with the plaintiff's experience in processing the lumber of which it complains in this action. The assumptions made by the plaintiff in this regard have not been shown to be supported by actual experience. There is evidence to suggest, indeed, that downfall suffered by the plaintiff in processing what it regards as acceptable material from other sources after the claim period was as high as 27 per-cent. The plaintiff vigorously opposed comparison of its experience during the claim period with its experience afterwards, despite the existence of factors which indicate, in my view, that this might well have been a more helpful comparison.

Combined with other explanations which can reasonably be given for fluctuation in downfall figures--explanations having nothing to do with changes in grading standards--I find it impossible to accept the statistical case based on increased downfall as establishing loss which the plaintiff in fact suffered as a result of application of the guidelines. The most that can be said is that the figures are not inconsistent with some such loss having been experienced by the plaintiff.

As to the suggestion made by the Assessor that downfall from the plaintiff's own 'rough' lumber and from the so-called "top end" of the economy grade might be taken as similar, this was, of course, as Mr. Linsley emphasized, an arbitrary assumption, one which might or might not be supportable by evidence. There was no evidence adduced in support of it.

With respect to the second statistical approach, that based on decline in average quality of output, the evidence as a whole seemed to me to show that it is equally likely there was in fact some improvement in quality mix during the claim period. This may largely have been due to the plaintiff's decision to remove, and use for 'chipping', what would have been the lowest-quality 'studs' it produced. That decision also resulted in increased downfall, a complicating factor in the comparative downfall analysis. The decision to take out the 'bottom' studs was motivated by market resistance which had started prior to the claim

period but may have been accelerated to some degree thereafter by increased 'low-line' production due to a lowering of the average quality of the incoming material.

I find it impossible, on the basis of the evidence as a whole, to draw any relevant conclusion from either of the statistical approaches. The figures are not inconsistent with some loss having been experienced as a result of deterioration in the quality of the Northwood lumber during the period, but that could have resulted from unrelated causes.

(h) The Loss Proved

I have reached the conclusion that as a result of application of the guidelines by COFI on its inspections at Northwood's mills some lowering of grading standards probably occurred causing loss to the plaintiff of some volume of wood which, but for their use, would have been placed in the economy grade, and which as a result of their use was placed instead in higher grades, this being the better material in the grade and that most suitable for the plaintiff's purposes.

This loss is not proved by the statistical evidence based on analysis of mill downfall and production mix, nor does that evidence provide an acceptable basis for determining the quantum of any loss which may have been experienced.

The evidence which I accept as establishing the loss described chiefly emanates from COFI employees. I accept that evidence as showing that some Northwood mills probably graded to some extent to standards accepted by the COFI inspectors for inspection and reinspection purposes, rather than to those officially promulgated by COFI and taught in the grading classes. The Texas reinspection, in my view, shows this probably to have been so, and Mr. Chartrand confirmed it to Mr. Brink. I accept Mr. Mr. Brink's evidence that Mr. Chapotelle told him his problems might be resolved shortly, and that this was said at a time when changes in the guidelines were being discussed.

Mr. Stafford's evidence demonstrates how the guideline standards could have influenced some Northwood personnel while being concealed from the plaintiff's staff. The failure of COFI to call Mr. Chapotelle, the person who knew more than any other COFI employee about these matters, confirms me in that conclusion. So does COFI's failure to produce Mr. Marsh's memorandum, or to explain what has happened to the several copies of that memorandum, and its failure to say whether or not the memorandum led to further discussion or documentation after it reached Mr. Chapotelle, all these being matters about which Mr. Chapotelle would obviously have been the most knowledgeable person.

But, above all, the evidence indicates that the purpose of the guidelines was in subtle ways to influence grading standards--to do so by "interpretation", rather than by amending the rules themselves--and there is evidence that Northwood gave instructions to its graders to conform with the wane dip guidelines informally promulgated by COFI.

I conclude that as a result of COFI's use of the guidelines, the grading standards at some Northwood mills were, not surprisingly, to some extent below the standards which would otherwise have been enforced. The drop was not, of course, a dramatic one because that would inevitably have been noticed by purchasers of the higher grades, and there is evidence from such purchasers who noticed no such change. Having in mind the size and standing in the industry of the Noranda-Northwood organization, the possibility that it was unaware of the standards applied in the producer-controlled grading system for almost a decade throughout the North American lumber industry seems inherently improbable. I say that particularly because of the evidence of a leading expert in the field, Mr. Earl Jones, of the Southern Pine Inspection Bureau, a witness for the defendant COFI, who testified that his agency would give a copy of the guidelines to its subscriber mills if requested, an indication that the guidelines cannot have been unknown among producers in the United States.

There is, as I have said, evidence that Northwood did have some knowledge of COFI wane guidelines, and certainly it was allowing wane 'dips' in grades above economy during the spring and summer of 1986, and perhaps before that. Northwood's quality control people did not have copies of the guidelines, but they were aware of some things which COFI permitted as a result of them, and to some extent reflected this in their grading.

I will invite counsel to make further submissions, initially in writing, to assist the court in quantifying the plaintiff's resulting loss, and to address the matters reserved at trial for later argument.

(i) The Alleged 'Conspiracy'

Much time was spent at trial in exploring various dealings between the plaintiff and personnel of the defendants Northwood and Noranda--evidence concerning such matters as a claim for excessive moisture content in Northwood lumber, negotiations concerning the establishment of a 'market' price for the purposes of the wood-supply contract, evidence of difficulties experienced by Mr. Brink in his relationship with some of the personnel of these defendants and of his supply having been suspended at one point--but I find very little of it useful in resolving the issues as they emerge from the plaintiff's argument.

I assumed, perhaps wrongly, that the purpose of this wide-ranging inquiry into the course of dealings between the plaintiff and those defendants was to establish the existence of the conspiracy to injure of which counsel spoke in opening, or at least some ill-will towards the plaintiff consistent with a desire to do the plaintiff harm. Little was made of this in the plaintiff's closing submission. The existence of an agreement between COFI and Northwood and Noranda, whereby the latter were provided with copies of the guidelines while the plaintiff was not, with a view to harming the plaintiff, was not supported by any evidence. It seems to have been an assumption made by Mr. Brink as a result of his, perhaps understandable, sense of outrage when he discovered the existence of the guidelines and felt that his company had been ill-used by the defendants.

I find the claim based on conspiracy to injure or to induce a breach of contract has not been proved. It has not been shown that the defendants made such an agreement, nor that they had the intent necessary to commit such wrongs.

I do accept that Noranda increased its pricing to the plaintiff in a brusque and insensitive way, without prior discussion of the figures being considered, and that the plaintiff was referred to at a Noranda-Northwood meeting as a "captive". The evidence does not show the prices charged to have been above 'market' level, a necessarily vague and unstable concept in an

industry in which pricing depends on many variables, including specifications as to length, volume purchased and, of course, availability of competitive material at the date of order. The fact that the plaintiff's output was committed to sale on commission through Noranda's marketing organization certainly gave the plaintiff's business special value to Noranda, but that could not affect the market value of the economy raw material which Noranda sold to it. The use of the term "captive" in relation to Brink was not inaccurate in the circumstances, but I do not think it adds anything to the plaintiff's case.

It follows that the claims based on conspiracy must be dismissed as against all defendants.

(j) Other Claims Against Noranda

The claims in contract against Noranda are based on failure to meet the contract quality under the NLGAR, and particularly General Provision 8, breaches of the warranty of fitness implied by Section 18(a) of the *Sale of Goods Act*, R.S.B.C. 1979, Chapter 370, termination of the contract without proper notice, refusal to the plaintiff of the opportunity to decide as between the Northwood mills from which its raw material would be supplied, and breach of fiduciary duty arising from agency.

There is also the claim in tort for conspiracy to injure which I have already dealt with.

I have said that the wood supplied probably failed to meet the requirements of General Provision 8, insofar as the guidelines used by COFI in inspections and re-inspections were contentious, differed from those promulgated and taught and were adopted by Northwood. To that extent the wood supplied could not be said to have been of contract quality, and the plaintiff is entitled to compensation.

The evidence does not, however, establish that the wood supplied was unfit for the plaintiff's purpose.

It is, of course, plain that the lumber was physically capable of being successfully used for that purpose, and that it was so used over the 2½-year period to which the claim relates. The plaintiff's complaint is not that the wood could not be so used in a physical sense but that its use for 'remanufacturing' was unprofitable. That obviously could have resulted from the manner in which the plaintiff chose to carry on its operation. It could also have been due to the 'spread' between market prices of the plaintiff's input and output during the claim period not being sufficient to provide the 'margin' needed for profitable operation of the plaintiff's business.

The warranty of fitness does not, in my view, normally amount to an assurance that the purchaser of raw material will be able to profit from its processing and resale.

No authority was referred to by the plaintiff in support of that proposition and I think it a mis-statement of the statutory warranty to construe it in effect as a guarantee by a supplier of its purchaser's profit. It may be notable that in the leading case of *Cammell Laird & Co. v. The Manganese Bronze & Brass Co.*, [1934] A.C. 402 (H.L.), which involved the supply of a ship's propellers, Lord Wright observed that the warranty did not go beyond an assurance that the propellers would "work" in the intended application, observing (at pages 424-5):

> . . . if the propeller worked efficiently as a propeller, it would not matter to the respondents [the sellers] if owing to something in the design of ship or engines, it could only propel the ship at two miles an hour.

No case was cited in which the statutory warranty of suitability has been interpreted as a warranty of "economic" suitability, and I have difficulty in conceiving of a circumstance in which it would be so construed. I do not believe it could, on the facts of the present case, reasonably be so applied.

Nor, in my view, does the evidence establish that the plaintiff *could not* have made a profit from the wood it received at the prevailing 'spread' in market prices. That would, of

course, depend very much on how the plaintiff chose to carry on its operation--the costs it chose to incur, the extent to which it chose to utilize its facilities for the processing of material from other sources, so as to reduce the share of fixed costs allocated to production from the material in question, and the technology and manufacturing techniques it chose to employ.

But I am in any event doubtful that the warranty of fitness is applicable in the present case, because General Provision 6 of the NLGAR provides that "material supplied in accordance with these rules is not graded with the intent that it be suitable for remanufacturing to smaller sizes". This possibility was not, however, fully explored.

The claim relating to termination of the agreement without due notice is based, firstly, on general allegations of unreasonableness and unconscionable conduct and, secondly, on construction of Clause 15, the termination clause, with Clause 14(a), the *'force majeure'* clause, as the latter relates to interruption due to labour disputes. The notice given by Noranda was dated September 24, 1986, half way through the five-month industry-wide woodworkers' strike, and was directed to January 1, 1987, the contract anniversary date.

The general attack on the termination clause for unreasonableness, and on the ground that its use in the particular

circumstances was unconscionable or oppressive, and the contention that the court should, by analogy to employment cases, substitute a 'reasonable' period of notice, seem to me wholly unfounded. The provision was not wanting in mutuality; it was clearly there for the potential benefit of either party. The period of three months has not been shown to be unreasonably short. Termination of the contract during the strike, rather than while the plants were operating normally, was not shown to have resulted in any extra burden being cast on the plaintiff.

I should add that nothing has been put forward which would support the challenge to effective termination on the ground described by counsel as "undue influence".

I turn, therefore, to Clauses 14(a) and 15.

Clause 14(a) provides that in the event of failure by either party to deliver lumber because of certain *'force majeure'* conditions, including strikes, the agreement "shall be suspended from the date thereof until the cause of such failure is remedied or ceases" and "the terms of this Agreement shall be extended for a period equal to the period of suspension". Clause 15 provides that the agreement continues for one year and thereafter "from year to year unless either party has given 90 days notice in writing to the other to terminate the Agreement on the second or any subsequent anniversary of the Agreement".

I understood counsel to contend that the effect of the *force majeure* clause was to put forward the contract anniversary date for the purposes of termination by a period equal to that of the strike, so that the 90-days notice would run effectively from the end of the strike, say January, 1987 to April, 1987.

The clause appears beside the notation "Failure to Ship". Its purpose, so far as supply of wood by either party is concerned, seems to me to be to ensure that an additional period will be allowed to provide the guaranteed annual minimum quantity which each has contracted to provide. It is notable that the clause goes on to provide that should the inability to deliver continue for six months "either party may by notice in writing to the other terminate this Agreement". The intention is that should an interruption continue for that long there will be a right of termination without notice. That does not seem to me at all consistent with the anniversary date being extended for termination purposes in the event of an interruption of lesser duration. The provision that "the terms (plural) of this Agreement shall be extended for a period equal to the period of suspension" seems to me to refer to *terms* such, as I have said, as that requiring delivery of a particular quantity of wood within a 12-month period, rather than to the *term* of the contract. By "suspension" of the agreement is meant suspension of performance under it and by "extension" is meant extension of time for performance.

The interpretation which the plaintiff urges would seem to result in constant amendment of the anniversary date, as periods of interruption accumulated, and denial of the right to terminate during a strike of less than six months. I do not think either result was intended.

Had I come to a different conclusion, I doubt I would have been able to award more than nominal damages. The evidence shows that the plaintiff obtained its input requirements from other sources after the strike ended, and I recall no evidence that it would have been able to process as well the minimum quantity which would have been made available to it under the agreement with Noranda. To the extent that the plaintiff did not process as much lumber during the three months after the strike ended as it did during the three months before the strike, the evidence does not establish that this was due to the non-availability of economy grade lumber in the open market.

The claim against Noranda for breach of the supply agreement by refusing the plaintiff the opportunity to reject wood from some of the Northwood mills, and accept that from others, was referred to by counsel as Noranda's insistence that the plaintiff take "all or nothing". It involves consideration of Clause 2 of the agreement which, having said that Noranda (there referred to as "Northwood") will supply Brink with 60% of the Northwood

production of economy lumber "provided Brink at all times pays market price", goes on to provide:

> This economy lumber is to be offered to Brink on a weekly basis, and should Brink refuse to accept this weekly quantity, Northwood shall have the right to reduce the yearly agreed upon supply by this amount, and to sell this quantity elsewhere.

The clause contemplates a weekly offering, and that the plaintiff will either accept or reject *"this weekly quantity"*. I think that Noranda correctly interpreted the clause as meaning that the amount offered each week--which would presumably have to represent about 1/52 of the yearly volume contracted for--must be accepted in total or rejected in total, and that the plaintiff would not therefore be able to designate from which of the mills it would come, or otherwise to accept some only of the offering.

The plaintiff was, of course, entitled to reject any shipment on the ground that it failed to meet the requirements of the NLGAR, as the "applicable grading rules" referred to in the agreement. But the plaintiff did not reject any wood on that ground. It said simply that it did not wish to have any wood from a particular mill, and this was not, in my view, open to it under the terms of the agreement.

The final claim against Noranda is that for "breach of fiduciary duty" arising out of agency.

It is based on the contention that Noranda, as Brink's agent, owed the plaintiff a duty of loyalty which it breached in its dealings with its own associate company, Northwood, particularly those concerning the pricing of lumber supplied to the plaintiff. But in my view Noranda's position under the agreement, so far as concerns the supply of economy grade raw material, is clearly that of vendor only, and that it is only with respect to sale of the plaintiff's output that Noranda could be described as its agent and therefore subject to fiduciary obligations.

Plaintiff's counsel asserts that once a party becomes the agent of another a fiduciary duty arises for all purposes. No authority was cited for that proposition.

The present agreement seems to me to be so drawn so as clearly to create different relationships for different purposes. It is, in my view, only with respect to the one of them--the sale of the plaintiff's remanufactured product--that a fiduciary duty could arise from agency. As a result of the sale of economy lumber by Noranda to the plaintiff no fiduciary duty could arise. I do not understand, then, how the existence of the agency relationship in the other connection could change this fact. No basis was suggested for placing such a construction on the agreement and I know of no other basis on which it could arise.

To the extent that the plaintiff can, in the manner which I have described, establish that the lumber failed to correspond to standards established by the NLGAR as officially promulgated and taught, or otherwise known to it, it is entitled to recover from Noranda according to the ordinary rules governing the assessment of damages for breach of warranty in the sale of goods, presumably in a sale of goods by description.

No claim has been established to any other damages against Noranda, including punitive damages. Nor has a right been established to an accounting of profits.

If any damages can be proved, they will in my expectation be modest in relation to those claimed. Should the plaintiff be unable to establish its damages in the sense described, it will be entitled to nominal damages.

(k) The Claims Against Northwood

The claims against Northwood are in tort, essentially for conspiracy and inducing breach of contract. I have already said there is no evidence at all to support the claim that Northwood made an agreement with COFI to injure the plaintiff by applying the guidelines, or in any other respect. Insofar as there may have been breach of the contract under which Noranda was to provide economy grade lumber to the plaintiff there is no evidence that

such breach was induced by Northwood. No case in negligence was effectively articulated so far as Northwood is concerned. The company seems to me to be simply a supplier to the plaintiff's supplier, its duties being in contract to its affiliate, Noranda, which, of course, makes no claim against it.

(1) The Claims Against COFI

The claims against COFI are under its contract with the plaintiff as a member to which it provided its advisory services and also in tort for conspiracy and negligence.

I have already found that COFI acted without authority under the rules in applying the confidential guidelines. It is in my view responsible to the plaintiff, both in contract and in tort, for any loss suffered as a consequence. I have already said there is no evidence to support the plaintiff's claim with respect to a conspiracy between COFI and others to injure it.

The liability in contract arises from the existence of an unwritten agreement whereby, in consideration for a fee based on the plaintiff's production, COFI agreed to provide its full range of membership services--not merely those related to grading of the plaintiff's production. There is evidence that COFI would not permit members to take its grading service alone--there was to be no "cafeteria-style" choice among the available services. It

required them also to take its advisory, promotional and other business services. There is evidence also that COFI agreed to advise the plaintiff on its incoming lumber, and that, in a rather inadequate sense, it set out to do so.

COFI did not, however, tell the plaintiff about the confidential guidelines. It refrained from mentioning them both before and after it became also Northwood's grading agency. It was only in August 1986, nine years after it had first adopted the guidelines, that it told the plaintiff about them. COFI could not, in my view, accept the position of a business advisor to a member such as the plaintiff and respond in the way it did to the plaintiff's enquiries concerning its raw material without disclosing this obviously important fact.

The fact was one which COFI was free to disclose since the 'confidence' was not imposed by any legal duty, and moral duty would certainly have demanded disclosure.

There was also, I find, a tort law duty of care owed by COFI to the plaintiff arising from the reliance which the plaintiff reasonably placed on COFI to grade the Northwood lumber in accordance with openly-authorized interpretations of the NLGAR, a reliance of which COFI was aware, and had, indeed, invited, and this duty was, in the sense I have mentioned, breached. The application of informal guidelines less restrictive than the

openly-taught rules would inevitably result in breach of General Provision 8, one of the rules which the plaintiff would rely on COFI to enforce as Northwood's grading agency.

What, then, would have happened if COFI had disclosed the guidelines to the plaintiff before the start of the claim period and had told the plaintiff that they were being applied throughout the industry, and that they were probably being used by the grading agency then employed by Northwood? What would have happened had COFI observed what plaintiff's counsel calls its "duty to warn"? What loss would have been avoided? These questions were not addressed in argument, and the answers are far from obvious.

But I do not mean to foreclose the possibility that COFI is liable with Noranda for damages due to failure to ensure that the lumber supplied met the proper standards. Both seem to me to have been under that duty to the plaintiff in law. This matter, again, was not fully addressed in argument, nor has there been argument with respect to a right of indemnity in favour of one defendant against the other.

If damages in the sense mentioned cannot be quantified, the plaintiff is entitled as against COFI to recover nominal damages for breach of contract.