CV 06226

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

923087 N.W.T. LTD.

Plaintiff

- and -

ANDERSON MILLS LTD., ALLAN ANDERSON, MACKENZIE WOOD PRODUCTS LTD., TRANS NORTH DEVELOPMENTS LTD., ROY PETERSON, and WAYNE WILKINSON

Defendants

REASONS FOR JUDGMENT

1 The plaintiff and the defendant Anderson Mills Ltd. are companies engaged in the business of cutting of timber and milling of logs. In 1993 Anderson Mills Ltd. obtained a timber cutting licence (Licence 676) from the government authorizing Anderson Mills Ltd. to cut timber in a certain tract of Crown land near Ft. Simpson, Northwest Territories over a 5-year period. In 1994 the two parties entered into an agreement whereby the plaintiff was to cut timber under licence 676 and pay to Anderson Mills Ltd. a fee for each board foot of lumber cut, milled and sold. Subsequently, the parties fell into disagreement as to the interpretation of their 1994 agreement, and the within litigation ensued. On the present application, the plaintiff seeks an interlocutory injunction compelling Anderson Mills Ltd. to adhere to the 1994 agreement for the current timber harvesting season.

2 There are some undisputed facts. The plaintiff operates its business primarily in the Hay River area. Anderson Mills Ltd. operates primarily in the Ft. Simpson area. The plaintiff says that it is active in the business whereas Anderson Mills Ltd. has been inactive for a number of years. The plaintiff says that the two parties agreed to apply for Licence 676 in the name of Anderson Mills for political reasons, due to Anderson Mills' proximity to the sought-after tract of land. The parties drafted the 1994 agreement themselves and it contains but eight paragraphs, as follows:

> "THIS AGREEMENT made the 29 day of August 1994
>
> BETWEEN:
>
> ANDERSON MILLS LTD.
> (hereinafter called the "License Owner")
> OF THE FIRST PART
>
> - and -
>
> 923087 N.W.T. Ltd.
> (hereinafter called the "Contractor-Operator")
> OF THE SECOND PART
>
> **CONTRACT**
>
> 1. The Contractor-Operator agrees to log, saw and market timber under License number 676, (hereinafter called the "License")
>
> 2. The Contractor-Operator agrees to pay all Territorial and Federal Government fees that are necessarily associated with acquiring and maintaining the License.
>
> 3. The Contractor-Operator agrees to pay all expenses directly incurred to log, saw and market the lumber.
>
> 4. The Contractor-Operator will pay to the License Owner a fee of Two Dollars ($2.00) per thousand foot board measure (MFBM) for all lumber sold from the license.
>
> 5. The License Owner, if and when required by the Contractor-

> Operator, agrees to supervise, temporarily oversee or perform work associated with the logging, sawing and marketing of the timber.
>
> 6. The Contractor-Operator agrees to pay the License Owner a fee for services contained in paragraph 5. The fee and terms are to be negotiated between the parties.
>
> 7. The License Owner agrees to provide its existing yard for the use of the Contractor-Operator as a sawmill and log and lumber storage to the extent that the License Owner has available.
>
> 8. The License Owner agrees to provide liaison with the various communities and levels of government as required for the maintenance of the License."

3 An initial reading of this document would indeed indicate that it was clearly contemplated that the plaintiff would be the operating entity and Anderson Mills Ltd. would, for the most part, simply collect a fee for the use of its licensed authority.

4 It is the plaintiff's view that the 1994 agreement grants the plaintiff the exclusive right to harvest timber under Licence 676. Anderson Mills Ltd., in the within litigation and on the present application, asserts that the 1994 agreement does not give the plaintiff the sole and exclusive right to log under Licence 676, and that it is open to Anderson Mills Ltd. to enter into similar agreements with other contractors/operators.

5 In the latter part of 1995 Anderson Mills Ltd. advised the government that it was negotiating a sale or transfer of Licence 676. The shareholders of Anderson Mills Ltd. also made known their intention to sell their shares of Anderson Mills Ltd.; indeed, they say they offered to sell the shares to the plaintiff. In early January 1996 the shares were sold to the defendant MacKenzie Wood Products Ltd. The plaintiff says that MacKenzie is an active business competitor of the plaintiff in the timber harvesting/milling business.

6 The plaintiff commenced the within action by filing a Statement of Claim on January 18, 1996. In that pleading it is alleged by the plaintiff, *inter alia*; that:

(1) The plaintiff wished to exercise its rights under the 1994 agreement for the 1994/95 winter harvesting season.

(2) The defendant, Anderson Mills Ltd., failed to co-operate in obtaining the necessary governmental approvals for (a) the 94/95 harvest plan, and (b) the 94/95 land use permit, thereby breaching the 1994 agreement.

(3) As a result of Anderson Mills' breach, the plaintiff lost the 94/95 harvesting season and suffered damages of $1,500,000.

(4) The plaintiff was able to conduct harvesting operations elsewhere in the Northwest Territories in the 94/95 season, mitigating its 94/95 damages to the extent of $1,000,000.

(5) The defendant, Anderson Mills Ltd., has failed to co-operate with the plaintiff in obtaining the necessary governmental approvals for the 1995/96 harvesting season.

(6) As a result of Anderson Mills' further breach, the plaintiff has suffered damages of $10,000.00 per day in the 95/96 harvesting season, commencing December 1, 1995.

(7) In the fall of 1995, the defendants attempted to force the plaintiff to sell the plaintiff's rights under the 1994 agreement for a "a

minimal sum of money".

7 In the prayer for relief of its statement of claim, the plaintiff seeks $500,000 damages for the 94/95 season, $10,000/day damages for the 95/96 season, and exemplary and punitive damages. In the context of the present application before me, it is noteworthy that the statement of claim does not request either a temporary injunction or a permanent injunction. On its face, the statement of claim merely seeks damages.

8 The defendants filed a statement of defence and added a counterclaim against the plaintiff. In these pleadings the defendants say that the plaintiff has failed to fulfill its obligations under the 1994 agreement and has repudiated it, thus bringing the 1994 agreement to an end. The plaintiff responded by filing a defence to the counterclaim.

9 In the present application, the plaintiff seeks the following interlocutory relief pending the trial of the action:

(a) an injunction restraining the defendant Anderson Mills Ltd. from assigning or otherwise encumbering Licence 676.

(b) an injunction restraining all defendants from entering upon the lands covered by Licence 676.

(c) a mandatory injunction directing the defendant Anderson Mills Ltd. to assist the plaintiff, and do all things necessary, in obtaining all required governmental approvals to allow the plaintiff to conduct

operations pursuant to Licence 676.

10 An interlocutory injunction is by nature an immediate, and drastic, remedy. It should not be used in practice either as a bargaining/negotiating tool or as a device to obtain a quick inexpensive resolution of the merits of the litigation.

11 Before granting such a drastic remedy, the basic premise is that the Court must be satisfied that the rights of the applicant litigant will be nullified before the trial date.

12 In making its determination, the Court has in previous cases made reference to the following factors:

(1) a preliminary assessment of the merits of the case to ensure that there is a serious question to be tried,

(2) whether the applicant litigant will suffer irreparable harm if the injunction is refused, and

(3) an assessment of the balance of convenience between the parties, i.e. which of the parties will suffer the greater harm from the granting or refusal of the injunction.

Ambrose v. *Stewart*, [1991] N.W.T.R. 364,
McLellan v. *Parent*, [1992] N.W.T.R. 226, and
City of Yellowknife v. *Foliot*, S.C.N.W.T. #CV 05904, September 13, 1995, unreported.

13 In the present case, I am satisfied that there is a genuine *lis* between the

parties. The plaintiff's claim is not frivolous or vexatious. The defendant Anderson Mills Ltd. acknowledges the existence of the 1994 agreement. That written agreement appears to say what the plaintiff alleges - that it was the plaintiff who was to have the right to harvest the timber authorized by Licence 676.

14 The plaintiff, though, must not only demonstrate that it has a *prima facie* case, but must also show that it cannot be adequately compensated in damages at trial. Can the injuries to the plaintiff's rights, complained of in the present litigation, be compensated for in damages by the trial judge? As I read the statement of claim, the plaintiff tells me that yes, this can be done.

15 Eugene Patterson, the principal of the plaintiff company, subsequently swore an affidavit which was filed in support of the present application. (I pause here to note that much of what is contained in Mr. Patterson's affidavit, and also in the affidavit of Wayne Wilkinson, filed by the defendants in response, is mere argument. Rule 328 stipulates that affidavits be confined to a statement of facts). In any event, in paragraph 15 of Mr. Patterson's affidavit he asserts that "the plaintiff company is faced with irreparable damages should they not be permitted to enter upon and harvest lands identified in Licence 676" - yet he provides no specifics. That assertion and others in his affidavit are, surprisingly, untested by cross-examination.

16 There is no evidence before me that the defendants will be unable to pay damages awarded by the trial judge. While a defendant's impecuniosity is not a decisive factor in applications of this nature, it is an important consideration.

> If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage.
>
> Lord Diplock, in *American Cyanamid* v. *Ethicon*
> [1975] 1 All E.R. 504 at p.510.

17 Evidence provided by the plaintiff on the present application indicates that Licence 676 authorizes the harvesting of a maximum of 31,250 cubic metres of timber in each of four harvesting seasons commencing in 1994/95. As the plaintiff has framed its case in this litigation, there is nothing to prevent the plaintiff from taking the matter to a timely trial, and assuming full success, recovering damages for the first two harvesting seasons (lost) and then continuing with its contemplated operations during the remaining two harvesting seasons.

18 The meaning of irreparable harm was provided by the Supreme Court of Canada in *R.J.R. MacDonald Inc.* v. *Canada*, [1994] 1 S.C.R. 311 at p.341:

> ""Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other".

19 The plaintiff has not established irreparable harm. The Court must withhold the drastic remedy of an interlocutory injunction when the plaintiff does not show that the ordinary legal remedy in damages would be inappropriate or inadequate.

20 As for the "balance of convenience" between the parties, I am not satisfied that it has been shown on this application that greater harm will necessarily be suffered

by the plaintiff if the injunction is refused than will be suffered by the defendant Anderson Mills Ltd. if the Court grants the injunction, thereby imposing upon the defendants the plaintiff's interpretation of the 1994 agreement.

21 For these reasons, I find that the plaintiff has not met the onus upon an applicant for interlocutory injunctive relief.

22 The application is dismissed, with costs.

J.E. Richard
J.S.C.

Yellowknife, Northwest Territories
March 5, 1996

Counsel for the Plaintiff: G. Boyd

Counsel for the Defendants: G. Weist