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

The defendants, Allan Anderson, Mackenzie Wood Products Ltd., Trans North Developments Ltd., Roy Peterson and Wayne Wilkinson, move for summary judgment, pursuant to Part XII of the Rules of Court, dismissing this action.

SUMMARY OF LITIGATION:

This action arises from an agreement made in 1994 between the plaintiff, a family-owned logging company run by Eugene Patterson, and the defendant, Anderson Mills Ltd., also a logging company owned and operated by the co-defendant Allan Anderson. The

case is scheduled for trial next month and extensive pre-trial proceedings have already taken place.

In 1993, the Government of the Northwest Territories issued a timber cutting licence to Anderson Mills Ltd. The agreement between the two logging companies was reduced to writing thereafter so as to give effect to an arrangement already negotiated by the principals. That arrangement, characterized by the plaintiff as a “joint venture”, essentially involved Anderson Mills Ltd., as the licence holder, to be a “front” for the plaintiff, which would be the company actually carrying out the logging operations. In September, 1996, I presided over a two-day trial to determine, as a preliminary point, the scope of this agreement. In my Reasons for Judgment released on September 9, 1996, I concluded that the agreement provided the plaintiff with an exclusive right to harvest timber under the licence issued to Anderson Mills Ltd.

In this action, the plaintiff alleges that Anderson Mills Ltd. breached the agreement by unilaterally withdrawing the plaintiff’s authority to deal with the regulators about the licence requirements and by refusing to sign off on certain plans necessary for the issuance of the land use permits required to commence logging operations. The defendant Anderson Mills Ltd. alleges that it was the plaintiff that first breached the agreement by failing to fulfil some of its obligations in the process for issuance of the land use permits. There is no dispute that there is a triable issue over which party, if either of

them, breached the agreement and why. There may also be an issue as to whether, even if one party did breach its obligations, any damages incurred by the other party should be considered as being merely "nominal" due to an inability on the part of the innocent party to perform its obligations when expected to do so pursuant to the agreement.

The actions, or inaction, complained of by the plaintiff occurred in October of 1995. On October 26, 1995, Anderson informed the government regulators that he would be acting and signing for all matters relating to the licence (whereas previously Patterson had been given that authority) and that Anderson Mills Ltd. was negotiating with a number of companies for the assignment of the licence. In November, 1995, the plaintiff's solicitors put Anderson and his solicitor on notice that they considered the 1994 agreement as one providing exclusive logging rights to the plaintiff and requiring Anderson's signature to the plans to be submitted for the government's approval prior to commencing harvesting. They conveyed the message that Anderson's refusal or failure to sign off on the plans by November 24, 1995, would be considered as a breach of contract.

A series of events then took place involving the other defendants. The defendant, Mackenzie Wood Products Ltd., is a Northwest Territories company with the defendants Wilkinson and Peterson as its directors. The defendant Trans North Developments Ltd. is a British Columbia company with Peterson and others (not party to this action) as directors. As it eventually turned out, by mid-January of 1996, Anderson sold the shares in Anderson

Mills Ltd. to Mackenzie Wood Products Ltd. From then on Peterson and Wilkinson were the directors of Anderson Mills Ltd.

The plaintiff alleges that Anderson deliberately sold the shares of his company so as to deprive the plaintiff of its exclusive logging rights pursuant to their 1994 agreement. It alleges that all of the defendants conspired to deprive the plaintiff of the benefits of that agreement by, first, inducing or procuring a breach of the contract by Anderson and then, second, by conducting sham negotiations with the plaintiff so as to delay any action on its part until the share transfer can be concluded. At that point, the defendants, it is alleged, had accomplished their one and only aim, that being to garner unto themselves the logging work under Anderson Mills' licence.

The Statement of Claim, in addition to alleging breach of contract on the part of Anderson Mills Ltd., also advances claims alleging breach of fiduciary duty, conspiracy to injure and to defraud the plaintiff, and inducing breach of contract. The pertinent paragraphs relating to the other defendants are:

> 18. The Plaintiff claims that in entering into negotiations for the sale of his shares in Anderson Mills and in negotiating for the transfer of Timber cutting Licence 00676 and the Annual Operating Plan, Defendant, Allan Anderson was in breach of his fiduciary duty to the Defendant corporation, Anderson Mills and while negotiating the sale of his shares in the Defendant company with Mackenzie Wood, Trans North, Roy Peterson, Wayne Wilkinson and all or any combination thereof did wrongfully and maliciously conspire with the other Defendants

to defraud the Plaintiff by attempting to sell his shares in the Defendant company, Anderson Mills and to transfer the rights under Timber Cutting Licence 00676 to the subsequent beneficiary of those shares.

19. The Plaintiff alleges that all of the Defendants named herein were aware of the existence of the Agreement and were aware that the Plaintiff was insistent on exercising its rights to harvest timber under Licence 00676 and notwithstanding such knowledge did combine to defraud and to injure the Plaintiff company by preventing its ability to harvest timber under said Licence.

20. In pursuance of and in furtherance of said conspiracy, the Defendants did the following overt acts, namely:

(a) on or about the 26th day of October, 1995 Allan Anderson unilaterally withdrew his consent to having Plaintiff act on behalf of the Joint Venture thereby preventing the Plaintiff from submitting all applications for licences and permits to cut timber under Licence 00676 contrary to the agreement;

(b) on or about the year 1995 did enter into negotiations with the Defendants, Mackenzie Wood, Trans North, Roy Peterson, Wayne Wilkinson or any combination thereof to negotiate the sale of his shares in Anderson Mills and for the transferring of timber Cutting Licence 00676 and the 1995/1996 Annual Operating Plan from the name Anderson Mills Ltd. into the purchasers name, without the approval of Plaintiff and with the intent to defraud the Plaintiff;

(c) on or about the fall of 1995 the Defendants, with the knowledge and consent of the Defendant, Allan Anderson, did attempt to force Plaintiff into accepting a minimal sum of money in return for Plaintiff's rights under the Joint Venture Agreement thereby acknowledging the existence of the Agreement and attributing some pecuniary value to the Agreement;

> (d) on or about the late summer/early fall of 1995, the Defendants, Allan Anderson, Roy Peterson and Wayne Wilkinson did conspire amongst themselves for their own gain to prevent Plaintiff from exercising its rights under the Agreement by making it impossible for the Plaintiff to go on to the land and harvest the timber allotted under the Licence, examples of which include Defendant, Allan Anderson withdrawing Plaintiff's right to act on behalf of the licensee, while the remaining Defendants attempted to acquire Plaintiff's rights for an amount well below market value;
>
> (e) on or about late summer/early fall of 1995 the Defendants, Allan Anderson, Roy Peterson and Wayne Wilkinson did enter into negotiations with First Nations Development Corporation representatives from Fort Simpson, Northwest Territories offering to joint venture its project utilizing Licence 00676 for their own benefit and at the exclusion of the plaintiff.
>
> . . .
>
> 24. The Plaintiff further claims that the Defendants, Allan Anderson, Mackenzie Wood, Trans North, Roy Peterson and Wayne Wilkinson, while knowing the Plaintiff had certain rights under a Joint Venture Agreement with the Defendant, Anderson Mills, did wrongfully induce the Defendant Anderson Mills to breach its agreements and contracts with the Plaintiff. In consequence of such inducement the Plaintiff has been unable to enter upon the land to commence harvest operations and has thereby been greatly injured in their trade and have suffered loss and damage as a result of the induced breach ...

The defendants, in their collective pleading, deny that the 1994 agreement granted exclusive rights to the plaintiff and allege breach of contract on the plaintiff's part. They plead the *bona fides* of the share sale agreement and that such a sale did not affect the 1994 agreement since that continued as a contractual obligation of Anderson Mills Ltd.

The documentary evidence presented on this application reveals a pattern of interaction between the plaintiff and some of the defendants up to and after the controversial Anderson share sale.

After Patterson learned that Anderson was trying to sell the timber cutting licence, and after the plaintiff's solicitors put Anderson Mills' solicitors on notice of the potential breach, Patterson wrote to the defendant Mackenzie Wood Products Ltd. on November 27, 1995, saying that the plaintiff is "open to negotiations" with respect to the harvesting rights under the licence. On November 28th, Wilkinson wrote to Anderson's solicitor saying that Mackenzie Wood was "anxious" to acquire logging rights under the licence and seeking an offer from Anderson. The same day Patterson wrote again to Mackenzie Wood saying that (a) the plaintiff and Anderson Mills Ltd. have a "joint venture" for the harvesting of timber pursuant to Anderson's licence; and (b) he was willing to "negotiate, if possible, an agreement that will have mutual benefits to your company and ours". Wilkinson, on behalf of Mackenzie Wood Products, replied to Patterson saying that they are "interested" in receiving a proposal and that it was "in both of our interests ... to cooperate and work jointly". Patterson responded in writing to the effect that he was "willing to co-operate with you in this venture" but noting that the plaintiff had "long-term plans" for the licence. On December 15, 1995, Wilkinson informed Patterson that negotiations may not be productive because Anderson had not yet put forward a "written offer". Nevertheless it

appears evident that a meeting took place between Patterson and at least Peterson on or about December 19, 1995.

On December 20th, Peterson, on behalf of Mackenzie Wood Products Ltd., sent to Patterson drafts of an agreement between Mackenzie and the plaintiff and a "harvesting agreement" between Anderson Mills Ltd. and the plaintiff. Peterson's cover note stated in part:

> Attached are agreements as discussed last night. I believe they reflect your desires and will serve the purpose. However please advise of any changes required ASAP or sign and return documents by fax. We will seek to get Allan's signature on our original executed copy to be forwarded to you.

The draft agreement between the plaintiff and Mackenzie Wood contained the following preambles:

> WHEREAS;
>
> Mackenzie Wood Products Ltd. desires to purchase Anderson Mills Ltd. and a Timber Cutting Licence number 00676 (exhibit "A"), currently owned by Anderson Mills Ltd. of Ft. Simpson, NWT.;
>
> AND;
>
> Anderson Mills Ltd. is desirous to sell it's licence # 00676 to Mackenzie complete with the 1994 Paterson (*sic*) Agreement (exhibit "B") in effect, or, a signed, new agreement to replace the 1994 Patterson Agreement that will not result in litigation.
>
> AND;

> Patterson has been unable to benefit from the agreement, for a variety of reasons, and now seeks to reach a new agreement with Mackenzie that would allow Anderson to sell, Mackenzie to purchase, then operate as Anderson Mills Ltd., and Patterson to benefit from Licence 00676 as outlined in the Harvesting Agreement with Anderson Mills Ltd., attached hereto as Exhibit "C".
>
> IT IS HEREBY AGREED;
>
> That Patterson shall, without any reservation or claim whatsoever, allow Mackenzie to purchase all issued shares of Anderson Mills Ltd. from the current shareholders on terms acceptable to them. Furthermore, Patterson shall cease, and desist from, any and all litigation, including claims against Anderson Mills ltd., Mackenzie Wood Products Ltd., and any directors or shareholders of Anderson Mills Ltd. and/or Mackenzie Wood Products Ltd., and Renewable Resources, GNWT.

The proposed "harvesting agreement" between the plaintiff and Anderson Mills contained the following:

> WHEREAS;
>
> Patterson agrees to the sale and transfer of all issued shares of Anderson Mills Ltd. to Mackenzie Wood Products Ltd. (hereinafter reffered (*sic*) to as Mackenzie).
>
> AND;
>
> Anderson Mills Ltd. agrees to the sale and transfer of its shares to Mackenzie and will sign, prior to January 1, 1996 a sale agreement (to be approved by their lawyers) necessary for this agreement to come into effect.

> AND;
>
> Pending the completion of the share transfers as specified above, and for the purposes of this agreement, any and all references to Anderson shall assume the share transfer will be completed pursuant to an agreement between the founders of Anderson Mills Ltd. and Mackenzie Wood Products Ltd.
>
> AGREEMENT
>
> 1. The purpose of this agreement is to allow the sale of Anderson to Mackenzie to proceed without threats of litigation, thereby allowing the new owners of Anderson to enter into this agreement with Patterson. Patterson agrees to allow Anderson to conduct one or more logging operations under this licence ...
>
> This agreement cancels and supersedes any and all other prior agreements with Anderson Mills Ltd.

It appears that, after transmittal of these drafts, Patterson's solicitor and Peterson had further discussions and various revisions were considered. There was then a two-week hiatus in the negotiations over the Christmas and New Year period. On January 9, 1996, Patterson issued an ultimatum demanding an immediate response to his proposals for the agreement (although it is not clear from the evidence if Patterson's solicitors responded to a letter sent by Peterson on December 22, 1995, after their discussions). Finally, on January 11, 1996, Wilkinson wrote to Patterson rejecting his proposals and confirming that "the agreement we had negotiated is as far as we can go".

In the meantime steps were proceeding for Mackenzie Wood Products Ltd. to acquire the shares of Anderson Mills Ltd. That sale closed on January 11, 1996, the same

day that Wilkinson rejected Patterson's proposals. Apparently, as part of the consideration for the share transfer, Mackenzie Wood agreed to indemnify Anderson Mills up to $100,000.00 for any liability that may arise from any litigation. This action was commenced on January 18, 1996.

These are the salient and undisputed facts providing the background to this application. The defendants maintain that there is simply no evidence on which one could argue that these defendants did anything or conspired to do anything which would induce or procure a breach of contract by Anderson Mills Ltd. and, in any event, the breach is not causally connected to any actions on the part of these defendants.

TEST FOR SUMMARY JUDGMENT:

Prior to 1996, the Rules of Court did not provide a mechanism whereby a defendant could apply for summary judgment. The revised Rules enacted that year included a new Part XII, modelled on the Ontario Civil Procedure Rules, whereby a summary judgment motion could be brought by either a plaintiff or a defendant after the close of pleadings. The pertinent provisions are:

> 175. A defendant may, after delivering a statement of defence, apply with supporting affidavit material or other evidence for summary judgment dismissing all or part of the claim in the statement of claim.
>
> 176.(1) In response to the affidavit material or other evidence supporting an application for summary judgment, the

> respondent may not rest on the mere allegations or denials in his or her pleadings, but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue for trial.
>
> (2) Where the Court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the Court shall grant summary judgment accordingly.

The entire focus of an application under these Rules is to determine if there is a genuine triable issue. In commenting on the similar rule in Ontario, Osborne J.A., in 1061590 Ontario Ltd. v. Ontario Jockey Club (1995), 21 O.R. (3d) 547 (C.A.), stated (at page 557):

> The rule is intended to remove from the trial system, through the vehicle of summary judgment proceedings, those matters in which there is no genuine issue for trial ... The motions judge hearing a motion for summary judgment is required to take a hard look at the evidence in determining whether there is, or is not, a genuine issue for trial.

In Alberta the Rules of Court were amended a few years ago to also provide a defendant with the facility to move for summary judgment. The Alberta Court of Appeal stated in Zebroski v. Jehovah's Witnesses (1988), 87 A.R. 299 (at page 232), that:

> ...summary judgment is available to a defendant where the material clearly demonstrates that the action is bound to fail.

The test was more fully described by O'Leary J. (as he then was) in Allied Signal Inc. v. Dome Petroleum Ltd. (1991), 81 Alta. L.R. (2d) 307 (Q.B.), at page 319:

> Summary judgment may be granted to a defendant under (the Alberta Rule) if the court is satisfied that there is no merit to the claim, that is, it does not raise a genuine issue for trial. The court must look at the merits of the claim and the defence and determine whether there is an issue requiring a trial. A defendant must show more than a strong likelihood that he will succeed. To justify deciding the matter without a trial the pleadings and evidence on the motion must show that the claim has no reasonable prospect of success.

Subrule 176(1) contemplates that a complete evidentiary record will be before the judge hearing the motion. The parties must put their "best foot forward" at that time: Pollon v. American Home Assurance Co. (1991), 3 O.R. (3d) 59 (C.A.). The motions judge is entitled to assume that the parties have done so.

The principles to be applied on motions for summary judgment were succinctly summarized, with respect to the Ontario Rules, by Kiteley J. in Steer v. Merklinger (1996), 25 O.R. (3d) 812 (Gen. Div.), appeal dismissed at 30 O.R. (3d) 417 (C.A.). They are equally applicable to motions under our Part XII. Her summary was as follows (at page 821):

> The objective of the rule is to screen out claims that, based on the evidence provided, ought not, in the court's view, proceed to trial because they cannot withstand a "good hard look".
>
> The moving party has the burden of establishing that there is no genuine issue for trial. The responding party also bears an evidentiary burden to put evidence before the court showing the existence of issues requiring a trial ...

> The court must look at the overall credibility of the respondent's pleading and determine whether it has a "ring of truth" about it that justifies consideration by a trier of fact.
>
> Where there are significant facts in dispute, the case should likely be sent to trial. However, this does not follow as a matter of course. If the evidence satisfies the court that there is no issue of fact that requires a trial for its resolution, the ... test has been satisfied. It must, however, be clear that a trial is unnecessary ...
>
> The same principle applies to issues of credibility. In taking a hard look at the merits of the case, the court must decide if "any conflict [in credibility] is more apparent than real, i.e. whether there is really an issue of credibility that must be resolved in order to adjudicate on the merits" ...

The evidence presented by the defendants on this motion consisted primarily of documents (many of which I noted above) and extracts from the evidence at the summary trial held last September and from Patterson's examination for discovery conducted since then. The plaintiff relied on an affidavit of one of its solicitors which also had appended to it numerous documents. The documentary evidence was helpful but the solicitor's affidavit cannot be given weight. It contains by and large statements comprised of hearsay, opinion and conclusions of fact and law. The defendants also submitted one affidavit that was replete with the same problems but defendants' counsel astutely withdrew any reliance on it. I understand that, except for Allan Anderson, the plaintiff did not conduct examinations for discovery of the other defendants. This is significant especially if I am to assume that the plaintiff has put its "best foot forward" in responding to this application.

THE MOTION RESPECTING THE DEFENDANT ANDERSON:

This application does not seek to dismiss the action as against Anderson Mills Ltd. It does, however, seek that relief on behalf of the defendant Allan Anderson. Essentially defendants' counsel submits that the action is between the two companies that were privy to the 1994 agreement. Anderson, as merely a shareholder and director of his company, is shielded by the corporate entity.

The Statement of Claim alleges breach of fiduciary duty and fraud on the part of Anderson. The fraud allegation connotes a breach of trust argument and plaintiff's counsel referred to it as such at the hearing. Defendants' counsel pointed out that breach of trust was not pleaded and referred me to the requirements of Rule 117:

> 117. Where the party pleading relies on a misrepresentation, fraud, a breach of trust, wilful default or undue influence, particulars must be stated in the pleading.

The rule requires that sufficient particulars of the fraud be pleaded so that the circumstances relied on are clear to the defendants. The Statement of Claim, while not referring to breach of trust expressly, pleads sufficient facts so as to arguably make apparent that trust principles will be argued.

In this case, if it can be said that the 1994 agreement created a trust arrangement, i.e., certainty of intent (the joint venture), of subject-matter (the licence), and of object (the

plaintiff), then an argument could be made that Anderson is personally liable as a "constructive trustee". This principle was explained in Air Canada v. M & L Travel Ltd., [1993] 3 S.C.R. 787. A "stranger" (e.g., a company director) to a trust can be held personally liable to the beneficiary as a participant in a breach of trust as one who knowingly assisted in a dishonest and fraudulent design on the part of the "trustee" (e.g., the company).

The evidence shows that in November, 1995, Anderson was actively seeking buyers for the timber cutting licence. His evidence at the September summary trial was that his role *vis-à-vis* the licence was as a "front man or agent" for the plaintiff. Arguably his attempt to traffic in the licence can be viewed as being inconsistent with his self-described role pursuant to the 1994 agreement with the plaintiff. If the beneficial interest in the licence can be said to belong to the plaintiff then such inconsistent actions could also be potentially labelled as part of a scheme to deprive the plaintiff of that interest.

Granted the full legal consequences of the 1994 agreement were still a matter of dispute in late 1995. That there was a genuine dispute is reflected by the fact that the parties requested a summary trial on its interpretation. It was not until September of 1996, well after the sale of the shares of Anderson Mills Ltd., that my ruling as to the agreement's exclusivity aspect was made. I cannot say therefore that Anderson should have known it

was an exclusive arrangement but his attempt to sell the licence itself raises a triable issue as to his intentions.

Similarly, it could be argued, as plaintiff's counsel does here, that the attempt to traffic in the licence is a breach of fiduciary duty on the part of Anderson Mills Ltd. and of Anderson personally. Since the licence was in the name of Anderson Mills, that company was, arguably, able to unilaterally cut off the plaintiff from any independent action in relation to it. It could be said that Anderson's withdrawal of Patterson's authority to deal with the government with respect to licence requirements is an example of such unilateral action taken to the detriment of the plaintiff.

The nature of a fiduciary obligation was described in Canson Enterprises Ltd. v. Boughton & Co. (1991), 85 D.L.R. (4th) 129 (S.C.C.):

> The basis of the fiduciary obligation and the rationale for equitable compensation are distinct from the tort of negligence and contract. In negligence and contract the parties are taken to be independent and equal actors, concerned primarily with their own self-interest. Consequently, the law seeks a balance between enforcing obligations by awarding compensation and preserving optimum freedom for those involved in the relationship in question, communal or otherwise. The essence of a fiduciary relationship, by contrast, is that one party pledges herself to act in the best interest of the other. The fiduciary relationship has trust, not self-interest, at its core, and when breach occurs, the balance favours the person wronged. The freedom of the fiduciary is diminished by the nature of the obligation he or she has undertaken -- an obligation which "betokens loyalty, good faith and avoidance of a conflict of duty

and self-interest": Canadian Aero Service Ltd. v. O'Malley, (1973), 40 D.L.R. (3d) 371 at p. 381, ll C.P.R. (2d) 206, [1974] S.C.R. 592. In short, equity is concerned, not only to compensate the plaintiff, but to enforce the trust which is at its heart.

The trust-like nature of the fiduciary obligation manifests itself in characteristics which distinguish it from the tort of negligence and from breach of contract. Thus, Wilson J. in Frame v. Smith (1987), 42 D.L.R. (4th) 81 at p. 99, [1987] 2 S.C.R. 99, 42 C.C.L.T. 1 (approved by Sopinka and La Forest JJ., in Lac Minerals Ltd. v. International Corona Resources Ltd. (1989), 61 D.L.R. (4th) 14 at pp. 63 and 27, 26 C.P.R. (3d) 97, [1989] 2 S.C.R. 574) attributed the following characteristics to a fiduciary obligation: (1) the fiduciary has scope for the exercise of some discretion or power; (2) the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests; (3) the beneficiary is pecuniarily vulnerable or at the mercy of the fiduciary holding the discretion or power.

Cooter and Freedman, "The Fiduciary Relationship: Its Economic Character and Legal Consequences" (1991), 66 N.Y.U.L. Rev. (forthcoming), offer a similar formulation of the characteristics of a fiduciary obligation: (I) separation of ownership from control or management (i.e., one party has some power or discretion which can be exercised unilaterally so as to affect the other party's legal or practical interest); (ii) open-ended obligations, in that specific conduct or definite results are not stipulated; (iii) asymmetry of information concerning acts and results. The first characteristic in this formulation parallels Wilson J.'s first and second characteristics, and the remaining two can be seen as treating the notion of vulnerability in Wilson J.'s test.

Cooter and Freedman go on to point out that because the fiduciary has superior information concerning his or her acts, it will be difficult to detect and prove breach of these wide obligations; and because the fiduciary has control based on the notion of implicit trust, there is a substantial potential for gain through such wrongdoing.

In this case it could be argued that Anderson Mills Ltd. breached its fiduciary obligations to the plaintiff. The defendant Anderson, as the directing mind of the company, thus could be said to have also breached that duty. At this point it will suffice to say that an argument can be made as to the defendant Anderson's personal liability. Therefore I conclude that this is a genuine issue for trial.

The motion for summary judgment on behalf of the defendant Allan Anderson is dismissed.

THE MOTION RESPECTING THE OTHER DEFENDANTS:

I will address first, and very briefly, the situation with respect to the defendant Trans North Developments Ltd. This company's liability is said to rest on the common involvement of the defendant Roy Peterson as a director of it, of Mackenzie Wood Products Ltd., and now of Anderson Mills Ltd. The corporate records, however, reveal that this company has other directors not associated with the other two companies. Furthermore, I have been unable to find one item of evidence to suggest that Trans North Developments Ltd., as a company, had any involvement whatsoever in this matter. Accordingly, I conclude that there is no case for this party to meet and the action will be dismissed as against it.

The motion with respect to the other defendants is not as easy to resolve. The Statement of Claim alleges both a wrongful inducement to Anderson Mills Ltd. to breach its 1994 agreement with the plaintiff and a conspiracy to injure economically the plaintiff by depriving it of the benefits of that agreement. The two claims have to be analyzed separately.

A concise statement of the tort of inducing breach of contract was provided by Lord Morris in D.C. Thomson & Co. Ltd. v. Deakin et al, [1952] 1 Ch. 646 (C.A.), at page 702:

> The breach of contract must be brought about or procured or induced by some act which a man is not entitled to do, which may take the form of direct persuasion to break the contract or the intentional bringing about of a breach by indirect methods involving wrongdoing.

The essential point is that if the acts done are themselves lawful, the defendant cannot incur liability.

In this case the plaintiff alleges that Anderson breached its contract with the plaintiff by failing to sign off on the plan documents required to commence harvesting. This was done at the same time that Anderson disclosed his desire to sell the licence. The difficulty here, as pointed out by defendants' counsel, is that there is no evidence that these defendants did anything to induce Anderson to take the steps he did. Anderson's correspondence referred to his negotiating with a number of parties for the sale of the

licence. Furthermore the only act which can be attributed to these defendants is a perfectly legal one, that being the purchase of the shares of Anderson Mills Ltd. There is no suggestion that Anderson was prohibited from selling the shares and, without doubt, the 1994 agreement would constitute a continuing legal obligation of the company. But, since the breach occurred prior to the share sale, one cannot conclude that one was caused by the other.

The lack of evidence as to an inducement is evident in the following extract from Patterson's examination for discovery:

> Q Is it the position of the plaintiff that MacKenzie Woods induced a breach of the agreement between the plaintiff and Anderson Mills Ltd.?
>
> A Yes, it is.
>
> Q What breach did MacKenzie Woods procure?
>
> A They simply were a party to the conspiracy and, as such, they would have known about the fact that Anderson Mills refused to submit the layout.
>
> Q What breach of the agreement was procured by the defendant Trans North?
>
> A Trans North are a party of the conspiracy. We believe that they all -- one and all were in favor of this conspiracy.
>
> Q Are you saying that the conspiracy, itself, is the breach?
>
> A There is only two breaches of this contract as far as I know; one of them is a failure to take care of the land

use permit in October 1995, the other is the failure to submit the layout.

Q Which of those breaches was procured by Trans North, if any?

A Which one of them are prepared?

Q Procured?

A Oh procured, I think because of the conspiracy between the three of them to fail to submit the layout.

Q Which three?

A Between all of the defendants.

Q What actions did MacKenzie Wood take to prevent the submission of the layout?

A I don't know that.

Q What actions did Trans North take to prevent the submission of the layout?

A I don't know that either.

Q What actions did Roy Peterson take with respect to the prevention of Anderson Mills Ltd. from submitting the layout?

A I don't know that either.

Q What actions did Wayne Wilkinson take with respect to preventing the submission of the layout?

A I don't know that.

Plaintiff's counsel submits that the breach, being the failure to submit the plan, is a continuing one. That may be a valid point if the plaintiff, by treating that failure in November

as the breach and choosing to sue for damages, had not effectively terminated the agreement.

This allegation, however, is intrinsically bound up with the allegation of a civil conspiracy. The position of the plaintiff is that the entire scenario suggests nothing less than a concerted and combined effort to deprive the plaintiff of the exclusive logging rights provided by the licence and its agreement with Anderson Mills. It is alleged that these defendants knew that such deprivation would cause economic injury to the plaintiff. Furthermore it is alleged that the breach by Anderson was the foreseeable consequence of the attempt to obtain the licence.

A summary of the law relating to claims of civil conspiracy was provided by McLachlin J. (as she then was) in Nicholls v. Richmond et al (1984), 52 B.C.L.R. 302 (S.C.), at pages 311-312:

> There are two categories of civil conspiracy: (1) where the predominant purpose of the defendants' conduct is to injure the plaintiff; and (2) where the defendants effect their agreed end by unlawful means knowing that the plaintiff may be injured. While only the first category is available in the United Kingdom since the decision of the House of Lords in *Lonrho Ltd. v. Shell Petroleum Ltd.*, [1982] A.C. 173, [1981] 3 W.L.R. 33, [1981 2 All E.R. 456, both categories are recognized in Canada: *Can. Cement Laforge Ltd. v. B.C. Lightweight Aggregate Ltd.*, [1983] 6 W.W.R. 385, 21 B.L.R. 254, 24 C.C.L.T. 111, 72 C.P.R. (2d) 1, 145 D.L.R. (3d) 385, 47 N.R. 191 (S.C.C.).

> The requirements of conspiracy to injure the plaintiff are an agreement between two or more persons whose predominant purpose is to injure the plaintiff and which when acted upon results in damage to the plaintiff. It is not a requirement that the conduct of the defendants in effecting their agreement be unlawful.
>
> The requirements of the second type of conspiracy, conspiracy by unlawful means, are an agreement between two or more persons which is effected by unlawful conduct where the defendants should know in the circumstances that damage to the plaintiff is likely to ensue and such damage does in fact ensue. Unlike the first category of conspiracy, it is not a requirement of conspiracy by unlawful means that the predominant purpose of the defendants be to cause injury to the plaintiff. Rather, a constructive intent is derived from the fact that the defendants should have known that damage to the plaintiff would result from their conduct.

McLachlin J. goes on to make two further points. The first relates to the requirement to establish a common design with the predominant purpose of causing damage to the plaintiff. As she notes (at page 313), such a design must be established from the facts so that no other inference can be drawn. The second is with respect to the question of "unlawful means". She points out (at page 314) that there is no authority to support the proposition that a breach of contract provides the unlawful means necessary to support an action for conspiracy.

The liability for the tort of conspiracy requires that the sole or predominant purpose be to injure the plaintiff. If the real purpose is not to injure the plaintiff but to advance the economic interests of those in the alleged conspiracy, then no action will lie even if

damage results to the plaintiff: Crofter Hand Woven Harris Tweed Co. v. Veitch, [1942] A.C. 435 (H.L.). A combination or conspiracy may have more than one object or purpose. If so, then, as stated by Lord Simon in the Crofter case (at page 445):

> ... liability must depend on ascertaining the predominant purpose. If that predominant purpose is to damage another person and damage results that is tortious conspiracy. If the predominant purpose is the lawful protection or promotion of any lawful interests of the combiners (no illegal means being employed) it is not a tortious conspiracy even though it causes damage to another person.

There are a number of impediments to the conspiracy claim in this case.

First, there is no evidence of "unlawful means". The action of these defendants was the purchase of Anderson's shares. There is nothing unlawful about that, indeed, it is a very normal part of advancing one's own economic interests.

Second, the plaintiff offers no evidence as to what acts these defendants took to further the alleged conspiracy. At his examination, Patterson proffered the suspicion that Mackenzie Wood Products Ltd. simply wanted to eliminate competition by acquiring Anderson's licence since Mackenzie could have applied for its own licence. But beyond mere suspicion he could offer no facts. This is illustrated further by the following exchange at Patterson's examination:

> Q What is the source of your knowledge that MacKenzie Wood wanted this license for themselves in lieu of making application for their own license?

A Well that's a big puzzle because they could make an application for themselves and live and let live without any problem and it's a puzzler to me why they would want this license rather than applying for one of their own. And the fact of it is, if they applied for one of their own, which leads me to believe that they're trying to eliminate the competition. They applied for timber in what is called Blackstone, and they harvested timber there last year, and it is my belief that they harvested the timber there this year. However I have no idea who owned those licenses and, as a consequence, I don't have information I can give you. But the fact of it is that they can apply for timber any time they want to and they don't have to have -- don't have to interfere with this at all. So there is a very good possibility that they're trying to eliminate the competition, that's all there is to it.

Q Are you saying that MacKenzie Wood wants this license to achieve its other goal, which you believe it has, which is eliminating the competition?

A That's exactly what I think, but I can't prove it anyway. I guess we'll prove it at trial if you want to go to trial.

Q But the point of this discovery is to canvass what it is you hope to prove at trial. What facts you're going to be relying on to prove these matters at trial. So if you have any other facts that you're relying on with respect to these matters, I would like you to state them now?

A Well, it's just like what I said, is that they can apply for timber just the same as I can. And why they didn't do it I have no idea. And they must have a motive and the only motive that I can think of, and the only possible motive, is to eliminate the competition.

Q What facts are you relying on in support of the allegation that MacKenzie Wood acted in a malicious manner in the share sale involving Anderson Mills Ltd.?

> A MacKenzie Wood participated in the -- in the negotiations which weren't -- they were such one-sided negotiations that you could only believe that it was a malicious effort on their part.
>
> Q Anything else?
>
> A That's the only thing that I can think of that there is a conspiracy. They're (sic) can't be nothing else but a conspiracy.

The evidence presented on this motion convinces me that the conspiracy claim is based on nothing more than conjecture. I recognize that in conspiracy cases, just as in cases alleging breach of fiduciary duty, it is often difficult to unearth the evidence necessary to support the claim. Usually such conduct relies on subterfuge and much of the critical evidence is solely within the alleged conspirators' knowledge. But, in this case, the plaintiff has not made use of the procedure that is available, examinations for discovery, to obtain evidence. The trial is not the place to go on a fishing expedition based on speculative theories.

I am also convinced that the predominant purpose was not to injure the plaintiff but to advance the economic interests of Mackenzie Wood Products Ltd. by obtaining the logging rights provided by Anderson's licence. The defendants were aware that the plaintiff had an interest in that licence (although there was disagreement over the extent of that interest). The defendants attempted to address this issue by negotiating a new agreement with the plaintiff. They also recognized a potential liability by agreeing to

indemnify Anderson. These are not conclusions based on a weighing of the evidence; these are the only conclusions one can draw from the evidence.

Plaintiff's counsel submits that the negotiations between Patterson and the defendants preceding the share sale were a sham designed to drag things out until the share sale was concluded. Yet the plaintiff offers no evidence in support of this submission.

In my opinion those negotiations are a complete answer to the conspiracy claim. Patterson offered to negotiate. The only conclusion to draw is that he was willing to replace his 1994 contract with a new agreement. By then, in any event, he had already indicated his intention to treat that contract as having been breached. Agreements were drafted and, as noted by defendants' counsel, all Patterson had to do was sign them to secure a share of the logging operations. These arrangements may not have been as advantageous to the plaintiff as those he thought he had with the 1994 contract (although there is no specific evidence on this point) but the supposed advantages of that earlier contract were the subject of some controversy.

The most significant point of the evidence is that the defendants recognized the plaintiff's interest and attempted to deal with Patterson about it. I fail to see how one can allege a conspiracy when all acts were done with the aim of avoiding litigation if at all

possible. It seems to me to be a contradiction to say that the defendants' real purpose was to eliminate competition when the defendants were prepared to sign agreements with their competitor, the plaintiff, which could conceivably have also advanced the economic interests of the plaintiff.

The evidence satisfies me that the plaintiff's claims as against the defendants Mackenzie Wood Products Ltd., Roy Peterson and Wayne Wilkinson, cannot withstand that "hard look" called for by the Rules of Court. I find no genuine triable issue. Therefore the action will be dismissed as against these three defendants.

CONCLUSION:

The motion for summary judgment was unsuccessful with respect to one defendant but successful with respect to the four others joining in this application. Under the circumstances, the question of costs shall be deferred until the end of the trial at which time it can be considered within the context of the entire proceedings.

J.Z. Vertes
J.S.C.

DATED this 16th day of June, 1997

Counsel for the Plaintiff: James D. Brydon

Counsel for the Defendants: Tracey M. Foster