

CANADA / JUDGMENT

Billows v. Canarc Forest Products Ltd.

2003 BCSC 1352

COURT

Supreme Court of British Columbia

DECIDED

3 September 2003

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2003BCSC1352

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Billows v. Canarc Forest Products et al,

2003 BCSC 1352

Date: 20030903

Docket: S057916

Registry: New Westmisnter

Between:

Neil Billows

Plaintiff

And

Canarc Forest Products Ltd.

Defendant

Between:

Canarc Forest Products Ltd.

Defendant

(Plaintiff by Counterclaim)

And:

Neil Billows

Plaintiff

(Defendant by Counterclaim)

And:

Millenium Lumber Distribution Ltd.

Defendant by Counterclaim

Before: The Honourable Madam Justice MacKenzie

Reasons for Judgment

Counsel for the Plaintiff (Defendant by Counterclaim), Neil Billows

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Counsel for the Defendant by Counterclaim, Millenium Lumber Distribution Ltd.

W.A. Campbell

Dates and Place of Trial:

June 9-13, 16-20, 2003

July 14-18, 2003

New Westminster, B.C.

- [1] The plaintiff, Neil Billows, is a 46 year old lumber trader who claims damages for wrongful dismissal from Canarc Forest Products Ltd. ("Canarc"), a lumber wholesaler and manufacturer. Canarc alleges that Mr. Billows resigned, was dismissed for just cause, or, if dismissed without just cause, suffered no damages.
- [2] Canarc makes a counterclaim for damages arising from Mr. Billows' breaches of his employment contract and from breaches of his duty of fidelity or confidentiality to Canarc.
- [3] Mr. Billows worked for Canarc as a lumber trader and office manager of Canarc's Surrey office from September 16, 1997, to December 13, 1999. He was paid by commissions on his lumber sales.
- [4] Mr. Billows had worked for the previous five and a half years as a lumber trader for Tolco Industries, ("Tolco"), a forest products company. He was a car salesman before that and was earlier involved in lumber sales. Mr. Billows has a Grade 11 education.

- [5] When he left Canarc, Mr. Billows and a partner, through their holding companies, each became fifty per cent owners of Millenium Lumber Distribution Ltd., ("Millenium"), also a lumber wholesaler. Mr. Billows is an officer and director of Millenium. In Millenium's lucrative first year of operation, Mr. Billows earned almost as much as he had at Canarc during his unusually profitable last year there.
- [6] The issues in this case are:
1. Did Mr. Billows resign from his employment with Canarc?
 2. If not, did Canarc have just cause to dismiss Mr. Billows?
 3. If there was no just cause for dismissal, what would have been a reasonable period of notice and what are Mr. Billows' damages?
 4. What are Mr. Billows' mitigation earnings?
 5. Does Canarc owe Mr. Billows any commission?
 6. On the counterclaim, did Mr. Billows breach his contract of employment with Canarc or breach his duty of fidelity or confidentiality to Canarc?
 7. What damages did Canarc suffer from Mr. Billows' breaches?
- [7] The parties agree that Canarc is vicariously liable for the actions of Sam Morgan, and Millenium is vicariously liable for the actions of Neil Billows.
- [8] The credibility and reliability of Mr. Billows and Mr. Morgan was critical to this case. My findings of fact were largely determined by resolution of this issue.
- [9] Mr. Billows was a chronically evasive and unresponsive witness who gave inaccurate, often untruthful evidence. Mr. Billows repeatedly hid behind the words, "I don't recall," when he was cross-examined on matters for which the answers were either obvious, or clearly within his knowledge. Mr. Billows resisted making even the most reasonable of admissions. For example, he was reluctant to admit that the reason he left Tolco, his previous employer, was because of a dispute over commissions he felt Tolco owed him.
- [10] In a most effective cross-examination, counsel for Canarc repeatedly confronted Mr. Billows with evidence from his examination for discovery that was inconsistent with the answer he had just given at trial. Mr. Billows invariably adopted the evidence he gave at his examination for discovery.
- [11] The record is replete with examples of Mr. Billows' evasiveness and lack of candour. Ultimately, I could not rely on his evidence. Where it was inconsistent with the evidence of Mr. Morgan, I had no hesitation in preferring the evidence of Mr. Morgan.
- [12] Mr. Morgan impressed me as a forthright, honest and sincere witness. He was careful to give detailed and fair evidence. His evidence was also well-supported by documentary evidence.

- [13] Vince Bulic testified on behalf of Mr. Billows, but he was not an objective witness, nor was he aware of all the circumstances. Mr. Bulic's views were strongly influenced by Mr. Billows for whom he now works. I could not rely on Mr. Bulic's evidence. I prefer the evidence of Mr. Morgan in areas of conflict.

Background

- [14] Canarc was formed in 1993. Wayne McKinnon is president and a director. His brothers also owned part of the company. Mr. McKinnon worked in the Calgary office. Sam Morgan was hired to work in the Surrey office, but moved to the Calgary office when other traders were hired for Surrey. By 1995, Mr. Morgan and his wife had become owners of fifty percent of Canarc. Mr. McKinnon and his brothers owned the other fifty percent. As the operating and managing partner, Mr. Morgan made the employment decisions. He was also the sales manager, and he ran Canarc's day-to-day business. Mr. Morgan is now an employee of Canarc because the McKinnons bought out his shares in the spring of 2002. The company closed its Surrey office in the chaotic aftermath of Mr. Billows' departure. Only Canarc's Calgary office remains.
- [15] Mr. Morgan worked in Canarc's small office in Langley, British Columbia, from 1993 until 1997 when he moved to Canarc's Calgary office.
- [16] Vince Bulic worked as a lumber trader for Canarc from 1994 to 1997. He returned to Canarc in 1999 but left to work for Mr. Billows' new company in 2000.
- [17] Mr. Morgan hired Mr. Billows in September 1997. Mr. Billows then worked alone in Canarc's Surrey office.

The hiring of Mr. Billows

- [18] Mr. Morgan knew Mr. Billows through industry events. The two men had lunch in 1996 and 1997 and discussed business. In the fall of 1997, Mr. Morgan and Mr. Billows discussed the possibility of Mr. Billows working for Canarc. Mr. Morgan explained Canarc's commission structure, its medical and dental benefits, and other details. Mr. Billows was very interested as he was unhappy with Tolco which he felt owed him commissions.
- [19] Mr. Morgan explained to Mr. Billows that Canarc was a small wholesale lumber group that was not in the distribution business. They had only two people in the Calgary office and would have one in Surrey. Mr. Billows understood. He asked Mr. Morgan to "put something in writing".
- [20] Mr. Morgan sent Mr. Billows an initial faxed letter outlining certain terms, and a second one to correct certain details. Mr. Billows signed and returned the second faxed offer on the day he received it.

[21] Canarc's lumber traders were paid by commission with a draw against commission on the 15th and 30th of each month. They were also provided a \$400 per month car allowance. Mr. Billows was allowed initially to accumulate that money to purchase a home computer. He later received it as a car allowance.

[22] Canarc's traders were paid a percentage of the gross profit on lumber sales. The letter or offer that Mr. Billows accepted provided as follows:

September 16, 1997

Neil Billows

Dear Neil

This is to confirm our conversation of Sept. 16, 1997.

I am pleased to be able to offer you the following Compensation and Benefit package.

Our Compensation package

The following is based on 100% commission.

We will pay you a \$2500.00 draw against your gross commission on the 15th and the end of each month.

The balance of commission will be paid after every quarter.

If you are at a deficit amount at the end of a quarter that amount will be carried over to the next quarter.

You will be given three weeks vacation or 6% holiday pay based on your gross profit.

We will supply you with a cell phone.

All commission paid is based on gross profit.

35% on gross profit from \$0.00 to \$200,000

40% on gross profit from \$200,000 to \$250,000

45% on gross profit from \$250,000 to \$300,000

50% on gross profit from \$300,000 and over

Our Benefit Package.

- Medical
- Dental
- Vision
- Long-term Disability

- Life Insurance
- Pension (Begins in the second year.)

Please give me [a] call if you have any questions or concerns.

Sincerely,

"Sam Morgan"

Sam Morgan

- [23] Mr. Billows was the office manager for Canarc's Surrey office. He was responsible for supervising the support staff, ensuring the other traders arrived on time, and for the general order of the office. He had no authority to hire or dismiss employees. Mr. Billows could not make rules, but was responsible for ensuring compliance by the traders, including himself, with the rules set down by Mr. Morgan. Mr. Billows was Mr. Morgan's "eyes and ears" in the Surrey office and he reported to Mr. Morgan.
- [24] Canarc used a bank line of credit to make lumber purchases from sawmills. The company therefore incurred interest costs on lumber kept as inventory, and on trucking expenses. The limit on their line of credit was \$3 million.
- [25] Canarc had well-established rules that it expected all traders to respect. These included staying within a maximum level of \$500,000 worth of total inventory for all traders, respecting the terms of payment Canarc placed on its customers, and respecting Canarc's own credit limits with the sawmills. Mr. Morgan explained these rules to Mr. Billows when he joined Canarc. He told Mr. Billows that exceeding the \$500,000 inventory level would affect Canarc's line of credit and its day-to-day business.
- [26] When Mr. Morgan told Mr. Billows that Canarc was not in the "distribution" business, he meant that Canarc did not keep a large inventory with a variety of wood that it could ship in assortment to its customers. Instead, Canarc's wholesale business consisted of buying whole truckloads from a mill to sell to the customer.
- [27] Mr. Morgan had never experienced problems with traders exceeding the maximum inventory level. However, this changed in 1999 when Mr. Billows refused to respect what he perceived to be restrictions on his ability to trade large amounts of lumber and to hold inventory that exceeded Canarc's limits.

The breakdown of the employment relationship

- [28] In early 1999, Canarc became aware of an hiatus, or "loophole", in the tariff or duty provisions of U.S. Customs made pursuant to the Softwood Lumber Treaty. This hiatus meant that Canarc could sell wood that had been pre-cut into angle-cut truss components ("angle-cut") to customers in the U.S. without the usual quota restrictions. The classification which applied to this angle-cut was not subject to tariff or duty.

- [29] In 1997 and 1998, Mr. Billows traded in regular dimension lumber for mainly local (Canadian) customers. He quickly took advantage of the opportunity presented by the Customs loophole and in 1999, eighty percent to ninety percent of his lumber trading was in angle-cut. These sales gave Mr. Billows a windfall and he made huge commissions that year. Mr. Billows had been earning approximately \$100,000 per year at Tolco. He earned about \$130,000 in 1998 at Canarc, but to only the end of September 1999, he earned over \$512,000 in commissions at Canarc.
- [30] Canarc's practice was not to keep angle-cut wood in inventory unless there was a purchaser for it. It was extremely risky to keep angle-cut in inventory because U.S. Customs could, and did, change their rules with respect to the classifications of wood that required quota, and would enforce them retroactively. Customs could decide to make angle-cut "quota" wood, thus restricting Canarc's sales to the U.S. Mr. Morgan expressed these concerns to Mr. Billows who was by far the greatest trader in angle-cut. Mr. Morgan told Mr. Billows he did not want to keep angle-cut in inventory in view of the risks it presented with Customs. He instructed Mr. Billows not to keep unsold angle-cut in inventory. Mr. Billows did not follow this instruction.
- [31] Mr. Morgan's concerns about keeping unsold angle-cut in inventory were realized. On August 27, 1999, Canarc's customs brokers, Norman G. Jensen, Inc. ("Jensens"), sent a fax advising Canarc that an additional document was required to support the angle-cut invoices. Initially, a blueprint identifying the imported component's use as a truss was accepted as sufficient. It was optional then to provide a statement from the truss manufacturer verifying the component's end-use in its imported condition (an "end-user statement"). However, by November, 1999, U.S. Customs was taking an increased interest in angle-cut and would routinely issue requests for end-user statements. In early December, such a request was made of Canarc; it was clear that the information Canarc provided could affect a U.S. Customs determination to reclassify the merchandise under a tariff classification that required application for a Softwood Lumber Permit.
- [32] Mr. Morgan sent the traders, including Mr. Billows, two memoranda on December 6, 1999. He firmly reminded them of the existing rules -- that Canarc was not in the distribution business, that it had always had a maximum inventory amount of \$500,000 for the entire company, and, to prevent any trader from monopolizing Canarc's total inventory position, no trader would be allowed to purchase or own any inventory over \$100,000 CDN without the approval of Mr. Morgan or another partner.
- [33] One memorandum also instructed that no "reman" (referring to angle-cut) or cut stock of any kind could be in Canarc's inventory. Reman or cut stock must be done on a "back-to-back" basis only and must be processed and invoiced to the customer within seven working days after Canarc had been invoiced for the raw material. All reman and cut stock must have a minimum of six percent profit. In addition, inventory must not be owned for more than twenty days after Canarc had been invoiced. Otherwise, Mr. Morgan would decide whether it would be sold at market price with any loss taken by the purchasing trader.

- [34] Mr. Morgan sent this memorandum because he wanted to reinforce previous conversations with the traders and to emphasize that the rules at Canarc had not changed. The inventory limit remained the same, the company was not in the distribution business, reman or angle-cut stock in inventory exposed the company to risk, so it required a higher profit. Canarc had a small line of credit and a small licence.
- [35] Mr. Morgan wanted to enforce a limit of twenty days after Canarc was invoiced for lumber before it had to be sold at market price. This would protect Canarc from holding, for example, green fir which quickly turned mouldy. It would protect against loss of money on wood that had to be sold for less than it had been purchased, and against excess interest on Canarc's line of credit. He reinforced the existing inventory limit of \$500,000 total for all traders. Mr. Morgan also did not want Mr. Billows to monopolize the line of credit so as to prejudice the other traders. The memorandum did not prevent a trader from purchasing and selling lumber as Mr. Billows claimed it did. It simply required any trader to obtain Mr. Morgan's approval before purchasing or owning more than \$100,000 in inventory. It is noteworthy that Mr. Billows was the only trader of the three in the Surrey office to have inventory over \$100,000.
- [36] The second memorandum of December 6 changed the commission structure. It was to take effect on January 1, 2000.
- [37] Mr. Morgan had sent copies of the memoranda to Wayne McKinnon, who agreed with their contents. Mr. Billows was the only trader who complained directly to Mr. Morgan about the December 6 memoranda.
- [38] Mr. Morgan also told Mr. Billows not to sell or ship any more orders for angle-cut until Mr. Billows had obtained the required signed U.S. end-user statements on each entry. He made it clear to Mr. Billows that no further sales or shipments were to occur until Customs had accepted the statements and the whole issue had been cleared up. Mr. Morgan did not want Canarc exposed to any further risk of penalties.
- [39] Mr. Billows was angry. He had heated conversations with Mr. Morgan about the December memoranda. Mr. Morgan was unable to persuade Mr. Billows to accept the instructions in the memoranda. Mr. Morgan explained that the existing commission structure worked to the traders' advantage but not to the company's and that someone had to watch the line of credit. Mr. Billows repeatedly complained that Mr. Morgan was trying to restrict his ability to make money and that he was going to work elsewhere in such a situation. He told Mr. Morgan that he had made money before he came to Canarc and would make money after he left.
- [40] On December 9, Mr. Billows e-mailed Mr. Morgan and copied it to Wayne McKinnon. He wrote:

AS DISCUSSED BETWEEN SAM AND MYSELF WE HAVE AGREED THAT I WILL BE ON VACATION FOR 3 WEEKS EFFECTIVE CLOSE OF BUSINESS TODAY.

AS DISCUSSED I WILL TAKE CARE OF CURRENT BUSINESS BEFORE I LEAVE TODAY

ANY UNFINISHED BUSINESS WILL BE LEFT IN VINCE BULIC'S CARE AND I WILL COORDINATE WITH HIM

[41] Mr. Morgan was alarmed and incredulous when he read Mr. Billows' memorandum about his intended and immediate holiday plans. He could not believe Mr. Billows was going to be absent the rest of the year when the company had just received the information from Jensens that Customs now required signed end-user statements on about 67 orders that Mr. Billows had taken on angle-cut sold in the U.S. It appeared that Mr. Billows was leaving Vince Bulic, another trader, with the responsibility of obtaining them. Mr. Billows also had inventory to sell.

[42] Mr. Morgan responded to Mr. Billows' news about his intended vacation as follows:

Neil I have not agreed with anything. You have too many inventory problems and we must have all of the statements from your customers for U.S. Customs before December 27, 1999. All of these problems must be taken care of before you can consider taking any time off. If you think giving me less than a days notice that you will be taking the rest of the year off is acceptable you are wrong. If you take the vacation time you have indicated I will consider that you have tendered your resignation.

[43] The critical conversation between Mr. Billows and Mr. Morgan on the issue of whether Mr. Billows resigned or was dismissed occurred on Friday, December 10, 1999. Mr. Morgan spoke to Mr. Billows by telephone from Calgary to ask how he was making out with the obtaining of the end-user statements from the U.S. truss manufacturers. Mr. Billows told Mr. Morgan there was "nothing to worry about". He said he had taken care of the situation and that Canarc would be receiving all the signed statements. Regarding the December 6 memoranda, Mr. Billows told Mr. Morgan there was nothing to discuss. Mr. Billows said he had a contract and that Mr. Morgan could send out all the memoranda he wanted, but they had no impact on him. Mr. Morgan responded that not only was he, Morgan, Mr. Billows' manager, but was also owner of the company. Mr. Billows answered, "If you don't like the way I do business, I will quit".

[44] After that conversation, Mr. Morgan told his partner, Wayne McKinnon, that he was going to Surrey on Monday, December 13 and would accept Mr. Billows' resignation. (There is a minor discrepancy between the evidence of Mr. Morgan and that of Mr. McKinnon in that Mr. McKinnon testified that Mr. Morgan told him after he returned from the Surrey office that he had accepted Mr. Billows' resignation. This peripheral inconsistency reflects a memory failure of one of the two men. It does not affect my findings of fact).

- [45] Mr. Billows and the other two traders in the Surrey office individually complained to Mr. McKinnon about Mr. Morgan's December memoranda. Mr. McKinnon told them Mr. Morgan would be there on December 13 to "straighten things out". Mr. McKinnon never told the traders that the instructions in the memoranda would be withdrawn. On the contrary, he supported Mr. Morgan's instructions.
- [46] On December 13, Mr. Morgan was in Canarc's Surrey office. Mr. Billows told him that he had sent out his draft end-user statements as required by Customs. He confirmed that they would be signed and returned to Canarc. (Mr. Morgan learned later that Mr. Billows sent out his form of the required statement to the U.S. customers late that day by courier).
- [47] Mr. Morgan waited until the end of the day to speak to Mr. Billows so that he would not disrupt the other employees. He sat across from Mr. Billows at Mr. Billows' desk and said, "Neil, I am going to accept your resignation. You can clean up your desk today". Mr. Billows responded, "I am not going to quit. You will have to fire me". Mr. Morgan responded, "You can call it whatever you like. I am accepting your resignation and that is what it will say on your final information from the company". Mr. Morgan testified that the conversation took about twenty minutes as the two were arguing back and forth. Mr. Morgan ended it by saying he was not going to talk to Mr. Billows any more. He gave Mr. Billows a box and told him to clean out his desk.
- [48] Mr. Morgan handed Mr. Billows a letter that stated the following:
- I have no choice but to accept your resignation as you feel that you cannot and will not be able to work within the company guidelines.
- [49] Mr. Billows' version of the December 13 meeting with Mr. Morgan and receipt of the letter above is that he told Mr. Morgan they needed to "sort out some things". He said that things could not go on the way they were. According to Mr. Billows, Mr. Morgan replied, " You are right," and handed him the resignation letter described above. Mr. Billows denied telling Mr. Morgan that he would not work within the guidelines set out in the December memoranda. He denied having resigned and he testified that the closest he had come to resigning was the week before (December 10) when the two men were discussing Mr. Morgan's December 6 memoranda. Mr. Billows testified that Mr. Morgan told him the company had lost money on Mr. Billows' transactions. Mr. Billows testified he told Mr. Morgan he should appoint an outside accountant to review Mr. Billows' business. If that accountant determined that he had not made money for the company, Mr. Billows said he would "fall on his sword." Mr. Billows testified that he asked Mr. Morgan what the letter meant, and Mr. Morgan replied that it spoke for itself.
- [50] However, Mr. Billows also testified on cross-examination that he was "disputing" the December 6 memorandum that prohibited the traders from keeping any reman or cut stock of any kind in Canarc's inventory. He testified that he was not prepared to accept that directive because, in his view, it had the effect of reducing his earnings to "near zero". Mr. Billows testified that when he told Mr. McKinnon about his "dispute", Mr. McKinnon said Mr.

Morgan would come out to Surrey to discuss it. Of course, Mr. McKinnon never told Mr. Billows or anyone that the instructions in Mr. Morgan's December memoranda would be retracted, or that they were on hold or suspended until further notice.

[51] Canarc issued Mr. Billows a Record of Employment that said he had "Quit."

Did Mr. Billows resign from his employment with Canarc or was he dismissed?

[52] Mr. Billows argues that Mr. Morgan fired him without cause. Canarc says that Mr. Billows' conduct and statements toward the end of his employment amounted to an ultimatum that, in the circumstances, constituted a resignation.

[53] The issue can be reduced to whether Mr. Billows' refusal to follow Mr. Morgan's directions in the December, 1999, memoranda amounted to an ultimatum that constituted a resignation.

[54] The test for deciding whether an employee has resigned their position is an objective one: *Larsen v. Airarms Fasteners & Industrial Ltd.*, [1999] B.C.J. No. 883. A resignation does not require the use of that very word: *Kieran v. Ingram Micro Inc.*, [2001] O.J. No. 4318.

[55] I accept Mr. Morgan's version of Mr. Billows' statements to him on December 10 and 13, 1999. Indeed, Mr. Morgan's evidence is supported by Mr. Billows' own evidence that he would not accept the directions in the December memoranda. I find Mr. Billows told Mr. Morgan he would leave if Mr. Morgan did not like the way he, Billows, "did business". The way Mr. Billows "did business" was incompatible with Canarc's rules in the memoranda. Nothing Mr. Morgan said could persuade Mr. Billows of the reasonableness of Canarc's position. Indeed, as Mr. Morgan later learned, Mr. Billows showed his contempt for Mr. Morgan's instructions by continuing to order and sell angle-cut even after December 6, 1999. He remained firm in his resolve not to accept any restrictions on his ability to trade an unlimited amount of lumber. He had no respect for Canarc's line of credit or its financial situation. He testified that issue was not his "domain".

[56] Mr. McKinnon testified that Mr. Billows told him he disagreed with the contents of the memoranda and would not abide by them. Mr. Billows refused to follow the directions, and, as supervisor of the Surrey office, failed to encourage the other traders to follow them. Each complained to Mr. McKinnon.

[57] Mr. Morgan's letter accepting Mr. Billows' resignation supports Mr. Morgan's version of Mr. Billows' departure, including his evidence about Mr. Billows' angry reaction to the directives emphasized in Mr. Morgan's December memoranda. Mr. McKinnon's evidence provides further support.

[58] On the totality of the circumstances, I find that Mr. Billows' statements to Mr. Morgan on December 10 were an ultimatum amounting to a resignation: either Canarc had to remove the restrictions on Mr. Billows' ability to trade, or he would leave. Mr. Morgan refused to retract those restrictions and he expected Mr. Billows to comply with the rules. He refused to accept Mr. Billows' ultimatum. Mr. Morgan therefore accepted Mr. Billows' resignation.

His letter to Mr. Billows simply reflected his acceptance of the resignation Mr. Billows made on December 10. In the circumstances, Mr. Morgan's view that Mr. Billows had resigned his employment is objectively justified.

- [59] Mr. Billows' unauthorized and abrupt decision on December 9 to leave on three weeks holiday that very day further supports the finding of an ultimatum. Mr. Billows was dishonest in his e-mail; Mr. Morgan had not agreed he could immediately leave on vacation. Mr. Morgan made that clear when he pointed out to Mr. Billows that he must first obtain the signed end-user statements from U.S. customers and take care of all his inventory problems.
- [60] The evidence shows that Mr. Billows may have been in the process prior to December 13 of establishing his own company as an alternative to employment at Canarc. Mr. Billows claimed he did not purchase the numbered company obtained to hold his shares in Millenium until January 2000. However, it is reasonable to infer that when he left Canarc on December 13, he was already planning to establish his own competing lumber wholesale business.
- [61] Counsel for Canarc received only a partial file regarding the services provided by the lawyer retained by Mr. Billows to incorporate the holding company for Mr. Billows' shares in Millenium. Counsel for Canarc did not receive any pre-bill notes or notes of conversation which might show the specific dates of the services provided. Counsel only received an account for those services which confirmed the fees for the twelve month period ending December 13, 1999.
- [62] According to the evidence, Mr. Billows and his wife, Karin Billows, signed corporate documents on December 14, 1999, so there is a discrepancy in the evidence about when the numbered holding company was incorporated. Mr. Billows testified it occurred later than December 14, 1999.
- [63] Canarc requested disclosure of the solicitor's file. Mr. Billows was unable, for various reasons, to disclose its entire contents. There is nothing to show when the solicitor was first retained, when funds were paid into trust, or when Mr. Billows took steps to incorporate the numbered company. The circumstantial evidence indicates that contrary to Mr. Billows' testimony, his plan to form a competing business occurred before his resignation. At the very least, it was his alternative to staying at Canarc should Mr. Morgan not accept his refusal to abide by Canarc's rules. When Mr. Morgan did not do so, Mr. Billows resigned.

Did Canarc have just cause to dismiss Mr. Billows?

- [64] Had I not found that Mr. Billows resigned from Canarc, I would have concluded that Canarc had just cause to dismiss him. During Mr. Billows' employment, Mr. Morgan was aware of some of his misconduct, and learned afterward of additional grounds to dismiss him. Dismissal can be justified by "after-acquired" knowledge of misconduct: *Lake Ontario Portland Cement Co. v. Groner* (1961), 28 D.L.R. (2d) 589 (S.C.C.) at p.598, [1961] S.C.R. 553; *Blomgren v. Jingle Pot Pub Ltd.*, 1999 B.C.C.A. 9 at para. 8. Both categories of misconduct

constituted breaches by Mr. Billows of his employment contract with Canarc and provided ample cause for dismissal without notice.

- [65] It is worth observing that in his Statement of Claim, Mr. Billows recognized that his employment responsibilities included supervising and directing the other lumber traders in Canarc's Surrey office. Insubordination of Mr. Billows was therefore more serious as he had an elevated duty to accept direction and supervision from Mr. Morgan to set an example to the other traders.
- [66] Mr. Billows agreed that his employment meant that he was required to act in furtherance of Canarc's interests, and was not permitted to engage in activities that were inconsistent with his duties to Canarc, or that would put him in a conflict of interest. He understood he was required to comply with the rules, policies and procedures that were established by Canarc from time to time.
- [67] As the operating manager of Canarc, Mr. Morgan released a number of important policies and rules that limited the amounts of inventory held by the traders, the level of credit they could extend to customers and the time over which it could be extended. But instead of accepting these directions, Mr. Billows "protested" them and failed to ensure the other traders complied with them.
- [68] Mr. Billows testified that the directives in the December 1999, memoranda were "an ongoing source of debate". But they were never open to debate, and were never retracted. Mr. Morgan and the McKinnon brothers owned the business and were entitled to set reasonable directions and to expect their employees to follow them. As Southin J.A. stated in *Stein v. British Columbia (Housing Management Commission)*(1992), 65 B.C.L.R. (2d) 181, the starting proposition is:
- [A]n employer has a right to determine how his business shall be conducted. He may lay down any procedures he thinks advisable so long as they are neither contrary to law nor dishonest nor dangerous to the health of the employees and are within the ambit of the job for which any particular employee was hired. It is not for the employee nor for the court to consider the wisdom of the procedures. The employer is the boss and it is an essential implied term of every employment contract that, subject to the limitations I have expressed, the employee must obey the orders given to him.
- [69] Before Mr. Billows left Canarc, Mr. Morgan was aware that he had not followed directions about limits on customers' lines of credit with Canarc or their terms of payment. Mr. Billows did not obtain Mr. Morgan's approval for "major buys" of wood or for exceeding inventory limits.

- [70] I accept Mr. Morgan's evidence that information about customers' credit limits, or "credit reports" were given weekly to the traders. Mr. Billows admitted that some customers had credit limits, and I do not accept that he could not recall receiving or having access to regular credit reports. Mr. Billows consistently denied any knowledge of matters such as this where it could harm his position at trial.
- [71] Mr. Morgan had directed all traders, including Mr. Billows, not to make a "major buy" without Mr. Morgan's prior authorization in order not to consume Canarc's credit line and cause cash flow problems. The traders knew they had to stay within the credit limits provided by each lumber mill to Canarc. Mr. Morgan had given this direction to Mr. Billows several times.
- [72] Mr. Morgan had become aware during Mr. Billows' employment that he was not complying with directives. By December 1999, Mr. Morgan was increasingly concerned about Canarc's potential liability to U.S. Customs and cash flow problems caused by the banking of quota by the traders, the stockpiling of inventory and the high commissions which had arisen in angle-cut trading. Thus he issued his December memorandum.
- [73] After Mr. Billows left Canarc, Mr. Morgan learned that he had breached the directions in the December memorandum and other obligations under his contract of employment. Mr. Billows had in fact, continued to purchase more lumber, including angle-cut, and put it into inventory without Mr. Morgan's authorization. He also exceeded the limit on inventory.
- [74] Mr. Billows exceeded customer's credit limits and extended their payment periods. For example, on October 15, 1999, Mr. Billows sold approximately \$195,000 worth of lumber to B & B Truss. This was over three times their credit limit of \$50,000. Mr. Morgan had to remind Mr. Billows on December 8, 1999 not to sell any more lumber to Precision Truss, another client, until they had paid their outstanding account of \$83,861.
- [75] Another example of many breaches of his employment contract occurred when Mr. Billows, in March and May, 1999, shipped lumber to Maple Ridge Truss (a company owned by Mr. Billows' current business partner, Mark Monkman), but did not invoice Maple Ridge Truss for this lumber until July 12, 1999. While Mr. Billows testified that this was an "oversight", he agreed that the traders did not have authority to provide terms more favourable to customers than Canarc's standard terms of payment which he exceeded with Maple Ridge Truss.
- [76] On yet another occasion Mr. Billows placed a purchase order with Carrier Lumber for approximately \$299,000. This was well over the credit limit Carrier Lumber would extend to Canarc. It was a major buy which had not been authorized.
- [77] Mr. Billows also increased his inventory in proportion to increasing sales of angle-cut. He misled Mr. Morgan into thinking that he had less in inventory than he actually had. His inventories had increased substantially by November or December, 1999. This caused significantly higher expenses for Canarc.

- [78] There was also, of course, a high risk in stockpiling angle-cut because if U.S. Customs did not accept the form of end-user statements, Canarc would have to use quota to ship the angle-cut or sell it at a loss. Mr. Billows refused to change his patterns; he continued to increase his inventory levels at Canarc's expense.
- [79] I also find that Mr. Billows' negligent drafting of end-user statements exposed Canarc to substantial risk of liability as U.S. Customs increasingly tightened its requirements for sale to the U.S. of angle-cut. On November 9, 1999, Jensens sent Canarc a bulletin advising, "U.S. Customs has taken an increased interest in truss components imported from Canada ... Customs at the port of Blaine, Washington has advised our lumber specialist that Customs will routinely issue a 'Request for Information, Customs Form 28', on entries of truss components to verify the use of the goods".
- [80] The request contains the following message:
- A statement is required from a knowledgeable person employed by the truss manufacturer in the U.S. that the angle on the boards when they are imported is actually used in the finished trusses.
- Customs has verbally advised that they consider a knowledgeable person to be the Plant Manager or Production Manager - not a buyer or seller If the document requested is not furnished Customs could reclassify the goods as lumber and require a Softwood Lumber Permit..."
- [81] Mr. Morgan was concerned about the new requirements in the above Trade Update. In particular, he discussed it with Mr. Billows.
- [82] On December 3, 1999, Jensens sent Mr. Morgan a very important letter. They attached a "U.S. Customs CF-28 Request for Information". Jensens advised that by issuing that document, Customs was reviewing Canarc's importation to determine whether the tariff classification was correct. Jensens stated that the information Canarc provided was extremely important because it may affect a U.S. Customs' determination to reclassify the merchandise under a tariff classification that required application for a Softwood Lumber Permit. Jensens instructed Canarc to review the document carefully in order to respond as completely and accurately as possible. Jensens also recommended that every effort be made to provide the information requested no later than December 27, 1999, or 25 days after the Request was issued as U.S. Customs maintained strict deadlines for responses to CF-28 Requests for Information.
- [83] The above advice had to be taken very seriously. Customs required many signed end-user statements and the requirement applied retroactively. Again, Mr. Morgan discussed this requirement with Mr. Billows.
- [84] Mr. Billows needed to obtain signed statements from the manufacturers, or end-users, in the U.S. as required by Customs to avoid penalties from Customs. Jensens advised there were 67 entries which required the statements. (It became apparent on January 7, 2000, after Mr. Billows had left Canarc, that statements for many more orders were required).

- [85] On December 2, 1999, Mr. Morgan had sent a firm memorandum to all of Canarc's traders, instructing them that all sales or purchases that involved a loss or a "break even" in order to acquire quota must be done in a "back-to-back" fashion, and that quota could not be banked and used later. He told them that if quota were not used immediately, there would be an interest charge applied, smaller commission paid, and/or a loss of this quota. He said that Canarc could not, and would not, carry those losses for any time. Mr. Morgan was trying to stop a practice by the traders that amounted to a form of speculation and could result in a loss carried by the company. The traders, particularly Mr. Billows who was increasing this speculation, were benefiting from losses for which the company paid. Mr. Billows was carrying excess inventory for which Canarc had to pay interest on its line of credit. Excess inventory also posed significant risk in terms of the volatile lumber prices and the vicissitudes of the Customs rules.
- [86] Mr. Billows brazenly continued to take unauthorized orders for angle-cut during the last week of his employment, even after Canarc received the alarming CF-28 Request for Information on December 3, 1999.
- [87] After Mr. Billows left Canarc, Mr. Morgan learned that when Mr. Billows requested vacation on December 9, he had not even finished sending out the form of end-user statements for signature. He sent further such letters out on December 13, 1999, the last day of his employment.
- [88] The crisis created by Mr. Billows was underscored when Canarc received the Notices of Action from U.S. Customs on January 7, 2000. By then, in addition to the 67 shipments of lumber that required statements in accordance with the December 3, 1999, "Request for Information" from U.S. Customs, there were 146 more shipments which required signed statements.
- [89] Furthermore, the wording of the statements Mr. Billows sent for signature to the end-users of angle-cut did not comply with the wording provided in the clear advice from Jensens. Mr. Morgan became aware that U.S. Customs had rejected Mr. Billows' statements when Canarc received the Notices of Action on January 7, 2000.
- [90] Customs issued two Notices of Action on January 3 and 4, 2000, which meant that Customs had reclassified the angle-cut truss components. They now required the submission of a Softwood Lumber Export Permit from the Canadian government. Those permit numbers had to be supplied no later than January 24, 2000. However, if Canarc could secure acceptable statements from the U.S. end-users of angle-cut before January 24, 2000, Jensens would forward them to Customs and the Notices of Action might be cancelled -- failing that, if valid permit numbers were not furnished to U.S. Customs by January 24, 2000, the offending entries would likely be forwarded to the Customs Fines, Penalties and Forfeitures Branch for issuance of liquidated damages claims against Canarc's entry bond. The damages claims would be, at a minimum, \$100 per 1,000 board feet. When all the entries to the U.S. were totalled, Canarc's potential liability in fines and penalties exceeded \$2 million. This

was the degree of financial liability to which Mr. Billows had exposed Canarc by his careless drafting of the required end-user statements.

- [91] At trial, Mr. Billows admitted that he understood that U.S. Customs required him to ensure that signed statements were obtained from end-users. However, he attempted to minimize the rules of U.S. Customs as "irritants". While he knew that obtaining the signed statements from the end-users of the angle-cut was important, Mr. Billows initially said he was "not certain" whether the financial liability to Canarc could be high. Yet shortly afterward he agreed that if the statements he supplied were not accepted, Customs would reclassify the lumber at significant cost to Canarc.
- [92] Despite being confronted with the difference between the wording on his own end-user statements and that specified in the Jensen memorandum, Mr. Billows continued to insist he had followed the instructions.

Discussion

- [93] The lumber business is not for the financially faint of heart. It requires vigilance to anticipate and react to the vicissitudes of the lumber market and changes in the Customs classifications and requirements. It was critical for Canarc's traders to cooperate with the reasonable directives issued by their supervisor, Mr. Morgan. Mr. Billows failed to do this.
- [94] In *Candy v. C.H.E. Pharmacy Inc.*, [1997] B.C.J. No. 684 (C.A.), Southin J.A. said, at para. 6, that "insubordination, like dishonesty, is grounds for termination of a contract of employment without notice, for both are inconsistent with the continuation of the employer/employee relationship". In both *Stein* (supra) and *Candy*, Southin J.A. adopted the following statement from *Laws v. London Chronicle (Indicator Newspapers) Ltd.*, [1959] 2 All E.R. 285 at 287-88:

To my mind, the proper conclusion to be drawn from the passages which I have cited and the cases to which we were referred is that, since a contract of service is but an example of contracts in general, so that the general law of contract will be applicable, it follows that, if summary dismissal is claimed to be justifiable, the question must be whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service. It is no doubt, therefore, generally true that wilful disobedience of an order will justify summary dismissal, since wilful disobedience of a lawful and reasonable order shows a disregard -- a complete disregard -- of a condition essential to the contract of service, namely, the condition that the servant must obey the proper orders of the master and that, unless he does so, the relationship is, so to speak, struck at fundamentally.

Similarly, in his text, *The Law of Dismissal in Canada*, 2nd ed. (Aurora, Ontario: Canada Law Book Inc., 1992), at p. 142 (cited in *Neudorf v. Sun Valley Co-op Ltd.*, [1994] M.J. No. 768 (Q.B.)), Howard A. Levitt wrote:

Wilful disobedience by an employee to a lawful and reasonable order is cause for dismissal since it repudiates the essential condition of the employment contract that employees must obey their employers' instructions.

In *Ahmed v. RBC Dominion Securities Inc.*, [1998] B.C.J. No. 1729 (Q.L.), the plaintiff was an investment advisor who was dismissed after she bought stock in a client's account without the client's knowledge or permission. The plaintiff was aware that such discretionary trading was prohibited by the applicable rules and regulations. As in the case before me, the plaintiff worked in a highly regulated business. Hood, J. concluded, at paras. 132-133:

In my opinion the plaintiff's misconduct was indeed grave or serious, given the nature of the defendant's business, the trust position in which she stood in conducting that business, and the possible consequences of it. The latter would include exposure to vicarious liabilities, and a loss of reputation in a business where a reputation for professionalism, integrity and trustworthiness is fundamental to success, and to leadership in the industry.

The plaintiff's conduct disclosed a complete disregard for fundamental conditions essential to her employment. I have no doubt that it would have undermined the essential trust and confidence that the defendant was entitled to place in the plaintiff given their relationship, and would have caused loss of all confidence in the plaintiff's ability to faithfully represent them in any business dealings. Finally, in the concluding words of Finch, J., in *Ennis*, her conduct revealed a character incompatible with the faithful discharge of her duties to the defendant, and prejudicial to the safe and proper conduct of the defendant's business.

[95] It is plain that Mr. Billows' conduct during his employment constituted wilful disobedience, insubordination, dishonesty, and a breach of the bond of trust essential to the employment relationship. In all the circumstances, he fundamentally breached or repudiated his contract of employment with Canarc. Canarc, through Mr. Morgan, was entirely justified in terminating Mr. Billows' contract of employment without notice because his conduct was inconsistent with the continuation of the employment relationship.

[96] The potential risks to Canarc as a result of Mr. Billows' conduct were serious and justified summary dismissal for cause. Mr. Billows' reckless drafting of the end-user statements, which U.S. Customs rejected, created potential financial liability of Canarc to U.S. Customs of over \$2 million. Mr. Morgan's loss of confidence and trust in Mr. Billows was justified and easily provided just cause for dismissal without notice.

Reasonable Notice

[97] It is unnecessary to address the issue of reasonable notice in view of my previous findings. However, it is apparent that on application of the factors established in *Bardal v. Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (Ont. H.C.) and approved in *Wallace v. United Grain Growers Ltd.*, [1997] S.C.J. No. 94 (Q.L.) at para. 81 that the period of reasonable notice would be short, and Mr. Billows amply mitigated any loss through his new company. Millenium had an extraordinarily profitable first year of operation. On any view of what constitutes a

reasonable notice period, Mr. Billows' mitigation earnings substantially exceeded what he would have earned at Canarc during a period of reasonable notice because Canarc ceased its angle-cut business. In addition, Millenium had substantial retained earnings.

The claims for aggravated damages and an extended notice period

[98] Mr. Billows' claims for aggravated damages and an extended notice period need not be addressed because he resigned. In any event, there is utterly no evidence to support such claims. His pleadings do not even claim an extended notice period based on bad faith conduct by Canarc. The issue was raised for the first time during closing argument. Mr. Billows abandoned his claim for damages for mental distress.

Does Canarc owe any commission to Mr. Billows?

[99] Mr. Billows argues that Canarc owes him \$200,532.68 in unpaid commission for the last quarter of 1999 (October 1 to December 13). It is common ground that he had been paid \$512,025.29 in commission for that year. His T4 supports that figure. Mr. Billows also claims additional commission for the period before September, 1999.

[100] Canarc contends, based on the evidence of Mr. Morgan and the cross-examination of Mr. Billows, that it owes Mr. Billows only \$1,649.27 in commission.

[101] I accept Canarc's calculation of outstanding commission. It is solidly supported by the evidence. Canarc owes Mr. Billows \$1,649.57 in commissions from October 1 to December 13, 1999. This figure is based on the \$256.04 that Mr. Morgan calculated from the profit and loss margin fairly attributed to Mr. Billows, and an adjustment for a loss incorrectly attributed to him.

[102] Mr. Morgan's calculation was based on the profit and loss obtained from the liquidation of Mr. Billows' inventory. It was carefully based upon the processing of transactions up to March 2000. Mr. Morgan's detailed evidence described an appropriate and fair method upon which to calculate the commissions owed to Mr. Billows.

[103] Indeed, Mr. Billows himself conceded in cross-examination that he would be "comfortable" with the final commission being calculated on a liquidation of his inventory, providing both the profits and the losses were factored into it. Mr. Morgan did perform that exercise.

[104] When Mr. Billows left, Mr. Morgan discovered many problems with his orders and inventory. As Mr. Billows conceded, there were outstanding orders for angle-cut for which Mr. Morgan had to purchase more lumber. But to accomplish this, Mr. Morgan had to buy a number of blocks of lumber and sell the leftover after the outstanding orders were filled.

[105] Mr. Morgan also had to liquidate Mr. Billows' inventory of lumber which included unpopular odd-length and short lumber. There was green fir in Mr. Billows' inventory that went mouldy after about two months. These trades were factored into Mr. Morgan's calculation of Mr. Billows' outstanding commission.

- [106] Mr. Morgan based his calculation of the outstanding commission owed to Mr. Billows on the documents at Exhibit 6.4, Tab 88. They are different from those (Exhibit 6.4, Tab 87) upon which Mr. Morgan based the losses suffered by Canarc as a result of Mr. Billows' breaches of his employment contract, including the problems Mr. Billows created for Canarc with U.S. Customs. The material at Tab 87, therefore, includes various losses suffered by Canarc which Mr. Morgan did not consider in the calculation at Tab 88 of the commission owed.
- [107] The calculation of the commission owed Mr. Billows is accurate because Mr. Morgan produced it the same way he calculated Mr. Billows' Quarterly Incentive Reports but with additional factors which accounted for the circumstances of Mr. Billows' departure.
- [108] In accordance with industry practice, Mr. Morgan took into account the sale of inventory left by Mr. Billows. He gave him credit for orders he took but which were shipped, invoiced and paid after Mr. Billows left.
- [109] Mr. Morgan did not give credit to Mr. Billows for sales where Canarc's "quota" had to be used to fill the order. That is, Mr. Billows had committed to a number of orders for which he did not have enough "banked" quota. Mr. Morgan decided to use Canarc's own banked quota to fill the order rather than incur further losses by purchasing more lumber with "quota in".
- [110] Mr. Morgan's commission calculation for Mr. Billows does not include credit for orders taken by Mr. Billows, but which were later cancelled. On the other hand, Mr. Morgan did not attribute to Mr. Billows the losses incurred by Canarc when Mr. Billows' inventory had to be written off. For example, Canarc had to write off about seven packages of green fir purchased by Mr. Billows because they went mouldy.
- [111] Mr. Morgan made a tally of all the profits and losses he attributed to Mr. Billows (Exhibit 6.4, Tab 88, p.1) and determined that a commission of 50% yielded a total commission of \$18,156.04. Since Canarc had already advanced \$17,900 in commission to Mr. Billows for that period, only \$256.04 remained.
- [112] On reviewing his calculation, Mr. Morgan adjusted the commission total to add a credit for an order of B & B Truss (Exhibit 6.4, Tab 88, p.7, order 6281 and Tab 88, p.5, order 6281) which resulted in an additional \$1,393.53 in commission. This brings the total commission owing to \$1,649.57.
- [113] Mr. Billows admitted that he could not question the accuracy of the final total as based on Mr. Morgan's assumptions.

- [114] Mr. Billows' position that Canarc owes him \$200,532.68 in outstanding commissions is not supported by the evidence. He based this figure on calculations set out in three binders of documents (Exhibits 3, 4, and 5). However, Mr. Morgan's evidence and the cross-examination of Mr. Billows clearly showed his calculation was unreliable and based on false assumptions.
- [115] Mr. Billows was cross-examined on various entries in his binders of documents and it became obvious his evidence about "problems" with Mr. Morgan's calculation of his outstanding commission was fraught with errors. For example, Mr. Billows believed certain losses were deducted from the commission he was owed, but in fact, Mr. Morgan did not take them into account.
- [116] With respect to Mr. Billows' claim for additional commission for the period before September 1999, he could not verify these exact amounts without looking at further documents. He admitted having had access, while employed by Canarc, to all the gross margin reports required to verify his commissions. Mr. Billows, therefore, failed to prove a claim for any additional commission for the period before September 1999. In short, his assertion that he was owed over \$200,000 in commission was unsupported by the evidence.
- [117] I find that Mr. Morgan reasonably and fairly calculated the commission owed to Mr. Billows by Canarc at \$1,649.57.

Canarc's Counterclaim

- [118] In its counterclaim, Canarc seeks damages for Mr. Billows' breach of his employment contract and breach of his duty of fidelity or confidentiality.
- [119] Mr. Billows practices were costly for Canarc. In 1999, Mr. Billows began to purchase large blocks of lumber for resale without first discussing it with Mr. Morgan. A block consisted of five to ten truckloads of lumber. The value of five truckloads was \$150,000, yet Canarc's credit line with individual mills was much less. In order to purchase a whole block of lumber, Canarc would have to pay the mill in advance. Mr. Morgan needed to know in advance of such a purchase by a trader so that he could monitor Canarc's bank line of credit.
- [120] As discussed earlier in these reasons, Mr. Billows also created serious problems by exceeding the credit limits Canarc had established for its customers.
- [121] Mr. Billows' increasing sale of angle-cut in November and December, 1999, while profitable, was expensive for Canarc not only because it required Canarc to buy blocks of lumber for which it had to pay in advance, but also because Canarc had to pay Maple Ridge Truss to cut angle on it at the rate of \$1,200 per truckload. Canarc had to pay Maple Ridge Truss within ten days. Overall, the cost of Canarc's inventory continued to climb because of Mr. Billows' practices.

[122] In addition, Canarc argues it should be compensated for losses incurred as a result of Mr. Billows having set up a competing wholesale lumber company almost immediately upon leaving Canarc by using client information obtained at Canarc. Canarc further argues that it was forced to give up trading angle-cut because of Mr. Billows trading practices and failure to properly draft the end-user statements.

Breach of Contract of Employment

[123] Amongst the other breaches of his contract discussed above, Mr. Billows breached his employment contract by his negligent choice of wording for the end-user statements required by U.S. Customs. The facts which found this claim are those which provided Canarc with just cause to dismiss Mr. Billows as discussed earlier. Mr. Billows' failure to exercise care resulted in the threat to Canarc of a huge financial liability to U.S. Customs in penalties and fines. This exposure led directly to Canarc's decision to leave the angle-cut business and to close the Surrey office.

[124] The real issue is whether Mr. Billows' breach of his duty of care caused Canarc's loss of the angle-cut business. The issue can be framed by asking, "But for Mr. Billows' negligence (which was a breach of his employment contract), would Canarc have kept the angle-cut business that Mr. Billows later acquired?"

Breach of duty of fidelity or confidentiality

[125] It is common ground that Mr. Billows did not owe a fiduciary duty to Canarc. Nor was he bound by a restrictive covenant. Canarc concedes that a departing employee has the right to compete with the former employer, but correctly says the right is not unfettered.

[126] The issue on the claim for breach of fidelity or confidentiality is whether Mr. Billows breached his duty not to use confidential information belonging to Canarc to solicit customers. The duty of non-disclosure is part of the general duty of fidelity that employees carry with them post-resignation or termination. The duty is not to use confidential information in a manner adverse to the interests of the former employer and not to make unfair use of any information acquired during employment. The limited nature of this duty was described by Hood J. in *Alnor Services Ltd. v. Sawyer et al* (1990), 31 C.C.E.L. 34 at p. 61 (adopted by Burnyeat J. in *Clayburn Industries Ltd. v. Piper*, [1998] B.C.J. No. 2831):

...[T]he duty owed by the employee, after his employment has been terminated, is far more restricted and consists mainly of respect for trade secrets and for confidentiality of customers' lists. These are common law duties and do not appear to be based on a fiduciary relationship. The more modern definition of that duty is a duty not to use confidential information belonging to the former employer and not to make unfair use of any information acquired during his employment. I am here, of course, speaking of the duty owed after employment has been terminated.

[127] Although the Courts have been reticent about imposing restrictive duties on former employees, manifest unfairness cannot be condoned. As Hall J.A., for the Court cautioned in *Barton Insurance Brokers Ltd. v. Irwin*, 1999 B.C.C.A. 73 at paras. 39-40:

Absent an enforceable agreement to refrain from soliciting former customers, I am not of the view that any duty, fiduciary or otherwise, should have been found to prevent Ms. Irwin from canvassing former clients. In cases involving activity by key or senior former employees, or by directors in situations disclosing manifest unfairness...a court may be persuaded to grant injunctive relief or to award damages against former employees. However, the general interest of the public in free competition and the consideration that in general citizens should be free to pursue new opportunities, in my opinion, requires courts to exercise caution in imposing restrictive duties on former employees in less than clear circumstances. Generally speaking, as I noted from the earlier authorities referred to, the law favours the granting of freedom to individuals to pursue economic advantage through mobility in employment...

In certain circumstances, which I think would be relatively rare, a former employee of less than senior management or directorial status might be found subject to a fiduciary duty for instance a "key employee" finding might serve to found such a duty. But I do not believe that courts should be easily persuaded to find that ordinary employees would be subject to such continuing duties. Of course, as *Smith Paper Ltd.* points out, courts will always be prepared to act to prevent manifest unfairness.

[128] As stated above, on leaving Canarc, Mr. Billows immediately began, or had already begun, his preparations for establishing his own company. Mark Monkman became his partner. Mr. Monkman owns Maple Ridge Truss Ltd. which had been doing all the angle cutting on the components Canarc sold to American companies before Mr. Billows left Canarc.

[129] Mr. Billows discussed going into business with Mr. Monkman by at least December 14, 1999. Mr. Billows and Mr. Monkman each became 50% owners, through their holding companies, of Millenium Lumber Distribution Ltd. The numbered company which became Millenium was incorporated, as referred to above, around December 14, 1999.

[130] In early January, Mr. Billows and Mr. Monkman had obtained financing for the new company and had completed their "due diligence". On January 22, 2000, Mr. Billows signed the lease for the office premises for Millenium.

[131] Vince Bulic left Canarc and joined Millenium about January 25, 2000. He had discussed Mr. Billows' new business with him soon after Mr. Billows left Canarc.

[132] Mr. Billows prepared a business plan to obtain a line of credit for Millenium from Scotia Bank. He testified he prepared it on December 31, 1999. It included some cash flow projections. In the business plan's "Marketing Strategy", Mr. Billows wrote:

The company will target markets in the US Southwest primarily to engineered wood truss and component manufacturers. The company already has established distribution agreements with two major distributors. Tolko Industries, Vernon BC., a major producer and distributor of forest

products has indicated that they want to continue the relationship established with the company principles prior to the creation of Millenium Lumber Co Inc. This opportunity will provide sales in the area of 11 million dollars. Seemac Inc. a national US distributor of forest products has indicated they also intend to support the company with annual purchases in the 5-8 million dollar range. Both of these companies are exceptionally strong financially and pay very promptly.

- [133] Mr. Billows testified that he had not yet started up Millenium when he created this business plan, yet by December 31, 1999, he had distribution agreements with Tolco and Seemac. He was asked in cross-examination whether Seemac had ever given him a dollar commitment. Mr. Billows replied that he did not know whether Seemac had given him a dollar commitment or a volume, or whether the figure he used in the business plan was based on past sales. However, Mr. Billows then adopted his evidence from his examination for discovery where he testified that Seemac had said they would like to do business with him; Seemac had not used a number, and Mr. Billows himself came up with those numbers as a forecast. He acquired that information while at Canarc and used it afterward to his own benefit.
- [134] Mark Monkman testified that Mr. Billows had told him Seemac and Tolco would create a lot of business for their new company, Millenium.
- [135] Mr. Billows was evasive in cross-examination regarding the "Staffing" section of his business plan where he referred to "another staff member". He said he did not remember whether that other staff member was going to be Mr. Bulic whom he hired in January, 2000. That answer was untrue; he knew it was Mr. Bulic. The business plan was written December 31, 1999.
- [136] Mr. Billows was asked whether he was "moving quickly" to establish Millenium in order to keep Tolco and Seemac "happy". He replied, "Not necessarily. I was moving quickly to keep business going. The longer you are out, the harder it is to get up to speed."
- [137] Mr. Billows testified in direct examination that he "got the word out" about the opening of his new business by contacting his "regular" suppliers and customers from information kept in his "black book." Mr. Billows had recorded in his black book information about "his" customers. He started maintaining that book earlier when he worked at Tolco. Mr. Billows substantially expanded upon it at Canarc.
- [138] Mr. Billows testified that Vince Bulic advertised the opening of Millenium by contacting suppliers and customers and faxing out a memorandum detailing Millenium's business. Mr. Billows referred to this as a "faxed solicitation". Although the faxed solicitation was sent by Mr. Bulic, the list was reviewed and signed by Mr. Billows. In direct examination, Mr. Billows said Mr. Bulic got the information about whom to send it to from his own records and from business directories. He said most came from the internet.

- [139] In cross-examination, Mr. Billows agreed that he sold both angle-cut and non angle-cut lumber to Seemac soon after he left Canarc. Seemac had been one of Canarc's largest customers. Mr. Billows also sold to Tolco after leaving Canarc. After he left, he filled orders he took while at Canarc for both Seemac and Tolco. Of course, Mr. Morgan had either cancelled orders on angle-cut for those two companies, or refused to ship them until he had, if possible, sorted out the crisis with U.S. Customs.
- [140] Many of Millenium's customers were formerly customers of Canarc. Mr. Billows' business card at Millenium is very similar to the one he had at Canarc. Indeed, Millenium is a competing company, except Canarc no longer sells angle-cut. Millenium offered the same broker services and used the same suppliers to service the same customers. When Millenium developed its own problems with Customs, Mr. Billows incorporated a new company called "Millco".
- [141] Mr. Billows was cross-examined on an affidavit he swore on December 1, 2000. In it, he denied having solicited a company called Valley Truss (Idaho). He said he never contacted that company at any time before or after his employment with Canarc, though he "believed another trader may have done so". Counsel for Canarc then produced a copy on Millenium's letterhead of the fax Mr. Billows referred to as a "solicitation" that was sent to potential customers of Millenium. It was sent to hundreds of potential customers, including Valley Truss (Idaho). Despite this cross-examination and his admission that he signed the letter of solicitation, Mr. Billows denied having solicited Valley Truss (Idaho).
- [142] In addition to the faxed solicitation, Mr. Billows telephoned customers with whom he had dealt at Canarc. He told them about his new business and expressed his wish to establish a "new relationship" with them. Mr. Billows relied upon the information contained in his black book to contact these customers. As admitted in his examination for discovery, he also used accounting information, including receivables. It is very clear that Mr. Billows did not restrict himself to publicly accessible information about his future customers when he solicited them. He used information he acquired at Canarc and recorded in his black book to solicit and acquire former customers of Canarc.
- [143] Mr. Billows admitted that he did not know one of Canarc's major customers, Seemac, before he worked at Canarc. In cross-examination, Mr. Billows admitted to using his black book to formulate the Millenium customer list. However, he denied that it was Canarc's list of customers. He said, incomprehensibly, he had prepared it while at Millenium from the "current" Millenium list. Mr. Billows said he wanted to be certain to include customers of other traders in his office. He agreed that he considered the customers he dealt with at Canarc to be his own, yet he knew while working there that he was doing business on behalf of Canarc.

- [144] Mr. Billows denied recalling whether numerous telephone calls he made to contacts at Tolco, Seemac and other customers of Canarc in December, 1999, and early 2000 were for the purpose of establishing his own business. Yet he agreed that on December 14, 1999, the day after he resigned from Canarc, he was actively soliciting work and both Tolco and Seemac were interested in his services.
- [145] The list of Millenium's customers which Mr. Billows produced at Canarc's request before the examination for discovery contained approximately 25 names of customers (from a total of about 40) with whom Mr. Billows had dealt while at Canarc; Mr. Billows testified that list was now out of date and had been "expanded upon." He was most evasive when it was suggested to him that even if he had not personally, at Canarc, dealt with some of the remaining 15 customers on the list, that other traders at Canarc had done so. He only admitted it was "possible" that Mr. Bulic had done so.
- [146] Mr. Billows admitted that after he left Canarc, he was selling both angle-cut and non angle-cut lumber to the former customers of Canarc. He admitted that except for the angle-cut business, both Canarc and Millenium were doing the same type of business.
- [147] Mr. Billows refused to disclose his black book to Canarc when disclosure was requested.
- [148] Mr. Billows' actions created significant management confusion at Canarc. Mr. Morgan and his partner, Wayne McKinnon, hardly communicated from the time Mr. Billows left Canarc until late January, 2000. Their relationship was seriously strained by the problems that had erupted with Customs from Mr. Billows' careless drafting of the required "end-user" statements. Mr. Morgan was frantically trying to repair the damage Mr. Billows had left in his wake. Mr. Morgan was composing and sending out revised end-user statements and looking up all the orders for which U.S. Customs retroactively required the statements. He was trying to liquidate Mr. Billows' inventory, absorb Mr. Billows' losses, fill orders Mr. Billows had taken, and cancel others.
- [149] Mr. McKinnon, upset by Canarc's troubles with U.S. Customs and unaware of the circumstances, believed erroneously that only Mr. Billows could correct the situation. Thus, between December 13, 1999, and January 25, 2000, Mr. McKinnon tried to persuade Mr. Billows to return to Canarc. Mr. Billows dishonestly "strung" him along. He did not tell Mr. McKinnon that in early January, 2000, he was preparing for litigation, and that by January 20, 2000, he had filed this action for wrongful dismissal.
- [150] Fortunately, Mr. Morgan and Mr. McKinnon repaired their relationship. Mr. McKinnon bought out Mr. Morgan. Mr. Morgan is now an employee of Canarc, but still administers his own expense account.
- [151] The consequence of the damage Mr. Billows caused was Canarc's decision on January 7, 2000, to stop the angle-cut trading. They "did not have the heart for it." It was too risky. Mr. Billows' actions had exposed Canarc to serious financial penalties. Customs accepted the end-user statements drafted by Mr. Morgan just before the deadline expired.

Discussion

[152] As conceded by Canarc, a departing employee has the right to compete with the former employer. But that right is not unrestricted, and I find that Canarc has proved that Mr. Billows used confidential information belonging to Canarc. This information was not publicly accessible. Mr. Billows also made unfair use of information acquired during his employment with Canarc. I conclude that Mr. Billows breached his duty of fidelity to Canarc following his departure.

[153] Mr. Billows left Canarc in a disadvantageous and vulnerable position with potential liabilities of over \$2 million dollars to U.S. Customs and a deadline for obtaining acceptable signed end-user statements. Mr. Billows then used that vulnerability to his advantage by soliciting Canarc's customers, using information he acquired at Canarc and obtaining their business. The decision of Mr. Morgan to cancel certain angle-cut orders or shipments was entirely reasonable in the circumstances, but it upset Canarc's customers.

[154] Mr. Billows began accumulating information in his black book at his previous employer, Tolco. He significantly expanded upon it at Canarc. He took it with him when he left Canarc, and refused to disclose it.

[155] Mr. Billows could not have made the projections in his business plan without confidential information he had recorded in the black book while at Canarc. His projections about huge business revenue from Tolco and Seemac came from knowing the volume of lumber those companies bought over a given period. He used information obtained from Canarc and its goodwill with these customers to persuade the bank to grant Millenium a line of credit.

[156] Mr. Billows' counsel tried to justify the refusal to disclose Mr. Billows' black book on the basis it contained confidential, private, and sensitive information about Millenium's customers. This is, of course, precisely its relevance to Canarc's counterclaim.

[157] Canarc asked me to draw an adverse inference from Mr. Billows' failure to produce his black book and to infer that it contained confidential information about Canarc's customers which Mr. Billows used to compete against Canarc. I draw such an inference.

[158] I adopt the following passage from Wigmore on Evidence, 3rd ed., Vol. II, p. 162 (cited in *McTavish v. MacGillivry*, [1997] B.C.J. No. 1719 (S.C.)):

... The failure to bring before the tribunal some circumstances, document, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavourable to the party. These inferences, to be sure, cannot fairly be made except upon certain conditions; and they are also open always to explanation by circumstances which make some other hypothesis a more natural one than the party's fear of exposure. But the propriety of such an inference in general is not doubted.

- [159] It is fair to infer from Mr. Billows' refusal to disclose his black book that its contents would reflect unfavourably upon him. Indeed, the explanation given by his counsel for the non-disclosure reinforces that conclusion. His counsel said it contained confidential, private information about Millenium's customers. It is fair to infer in all the circumstances that it contains a variety of confidential information about Canarc's former customers that Mr. Billows used to compete with Canarc.
- [160] Other documents were not disclosed to Canarc, even though this Court ordered them disclosed. The reasons they were not disclosed appear to be similar to those for which the black book was not disclosed. On April 11, 2003, Master Tokarek ordered Mr. Billows to provide Canarc with, amongst other documents, "a calculation of the billings and the profit Millenium received in the year 2000 from business it conducted with customers who previously dealt with Canarc". Mr. Billows did not comply with that order.
- [161] In addition, Mr. Billows did not disclose to Canarc the monthly financial statements for Millenium. Master Tokarek had also ordered those be disclosed. Again, counsel for Mr. Billows said these financial statements would disclose private, confidential information about the names of Millenium's customers and the revenue they produced.
- [162] I conclude on the totality of the evidence that Mr. Billows used confidential information acquired at Canarc for his own benefit. Not only did he use the names of customers and their contact people, but also the volume of lumber purchased (as reflected by his business plan), and, I infer, the needs and preferences of customers. This gave Mr. Billows an unfair advantage over Canarc. His activity went much further than mere use of the skills he had acquired at Canarc; he made unfair use of information acquired during his employment with Canarc.

Losses from Mr. Billows' breaches of his employment contract

- [163] The effects of Mr. Billows' negligent drafting of the end-user statements and his continuation of angle-cut business without first obtaining statements acceptable to Customs forced Canarc's decision to cease trading in angle-cut. Mr. Billows put Canarc in the financially vulnerable position of huge potential liability to Customs. Canarc had little choice but to mitigate its potential loss by not trading in angle-cut until the crisis with Customs had been resolved. Canarc made this decision around January 7, 2000. Mr. Morgan and Mr. McKinnon could not predict whether the "Notices of Action" issued by U.S. Customs against Canarc would be cancelled. They had a duty to avoid exposing Canarc to further risk.
- [164] I agree with Canarc that, in the circumstances, the decision to stop doing angle-cut business was not an intervening event that broke the chain of causation between Mr. Billows' breach of his employment contract and Canarc's loss of angle-cut sales. The business was heavily regulated. Confronted with the Notices of Attachment and Customs' deadline of January 24, 2000, for cancellation of the Notices, Canarc made the only

reasonable decision it could by deciding in early January not to do any more angle-cut business.

- [165] While Canarc narrowly managed to avoid penalties of over \$2 million dollars, the company incurred expenses and lost time in the obtaining of acceptable end-user statements. It lost substantial profit from ceasing to trade in angle-cut.
- [166] Mr. Billows created further financial problems for Canarc because he left a great deal of inventory and had made additional unauthorized major purchases of lumber. He had committed Canarc to filling numerous additional orders for which Canarc had to purchase wood. Mr. Morgan had to address the cash flow problems Mr. Billows' activities created. He had to sell much of Mr. Billows' inventory such as short and odd-length stock, and green fir at a loss.
- [167] Canarc's reputation and relations with its customers suffered as a result of Mr. Billows' activities. After U.S. Customs rejected the end-user statements obtained by Mr. Billows, Mr. Morgan refused to ship Tolko's outstanding orders for angle-cut. He decided to wait until he had obtained acceptable statements. Tolko responded by withholding payment on previous shipments from Canarc. This increased Canarc's financial crisis.
- [168] Rumours spread about Canarc's huge potential liability to U.S. Customs. In early 2000, sawmills that supplied wood to Canarc became nervous and reduced Canarc's credit limits. Canarc therefore had to pay cash in advance to receive shipments of the lumber it required to fill orders.

Losses from Mr. Billows' breach of his duty of fidelity or confidentiality

- [169] Canarc is entitled to be compensated for the further loss of business it suffered from Mr. Billows' breach of his duty of fidelity. This is connected to the loss from Mr. Billows' breach of employment contract because of the disadvantaged position in which Mr. Billows left Canarc on his departure.
- [170] The decision forced upon Canarc to cease trading in angle-cut left that market particularly vulnerable to Mr. Billows' solicitation of Canarc's former customers through use of confidential information acquired at Canarc, and unfair use of other information. The unfairness was aggravated by the synergistic effect of both types of breaches, so the related losses were increased. Canarc not only lost the angle-cut business when it decided to stop it, but also the non angle-cut sales.
- [171] When Canarc finally resolved its problem with U.S. Customs, it could not resume the angle-cut trading. Only Maple Ridge Truss was large enough to handle the angle-cut business, but it refused to provide this service to Canarc. The owner of Maple Ridge Truss had become Mr. Billows' partner. In any event, Millenium had taken Canarc's former angle-cut business. Not only did the Canarc customers solicited by Mr. Billows take their angle-cut business to Millenium, they also took their non angle-cut work.

- [172] Canarc suggested that the damages flowing from the breach of fidelity or confidentiality consist of the loss of the non angle-cut business, whereas the damages from the breach of the duty of care in his employment contract is the loss of the angle-cut business. I find the two are linked for the reasons described above.
- [173] Canarc lost \$553 for additional work by Canarc's customs broker, Jensens, when U.S. Customs rejected Mr. Billows' end-user statements. Canarc is entitled to recover that expense.
- [174] The damages from Mr. Billows' breaches of his employment contract, and duty of fidelity after he left Canarc are difficult to quantify. This is partly because of his failure to provide both the accounting and the monthly financial statements of Millenium as ordered by Master Tokarek.
- [175] Canarc concedes that the damages from the breach of Mr. Billows' post-employment duty of fidelity and confidentiality have a temporal limit. Canarc also concedes that even had Mr. Billows competed fairly with Canarc, as he was entitled to do, he may well have succeeded anyway in obtaining part of Canarc's business. I accept Canarc's submission that four months is a reasonable period for which to award damages to Canarc.
- [176] Canarc submits that its damages can be calculated in one of two ways. The first is to base the damages on an accounting of Millenium's profit after it took the business from Canarc. Although Mr. Billows did not provide the accounting ordered by Master Tokarek, Millenium's total revenue for January to April 30, 2000 is found in its "Unaudited Statement of Income". Mr. Billows admitted that the gross profit on Millenium's total revenue for the four months of its fiscal year 2000 (January to April 30, 2000) was 3.9%, and the net profit was 2.6% as reflected in that statement. This works out to \$172,669.07 (rather than the \$173,624 shown on the "Unaudited Statement of Income").
- [177] The second method of calculating Canarc's damages is to base it on the difference between Canarc's profit in 1999 and its profit in 2000. The evidence discloses that the total decline in business for Canarc from 1999 to 2000 was represented by a gross margin of \$1,691,275.63. This figure is the difference between the gross margin in 1999 of \$2,452,987.60 and that in 2000 of \$851,711.97. Mr. Morgan testified that a fair estimate of net profit on the gross margin after deduction of other expenses such as commissions and overhead was 2%. On a reduction in gross margin of \$1,691,275.63, the loss of net profit in 2000 from 1999 was therefore \$33,825.51.
- [178] On this second method, Canarc's approximate loss for the whole of 2000 is \$33,825.51, but the period for which to calculate Canarc's damages is only four months. I agree it is reasonable to infer that Canarc would have incurred most of its loss in the first four months of 2000. It was during this period that Canarc suffered the harm to its reputation, the loss of major customers to Mr. Billows, the time-consuming liquidation of Mr. Billows' inventory, and the obtaining of acceptable end-user statements. This was the period of intense damage control. Canarc had also to close its Surrey office. After about four months, Canarc

would have assumed new business and begun to recover its lost ground. On this second method of assessing Canarc's damages then, a reasonable award is \$30,000.

[179] Canarc says that it would be preferable to base the assessment of Canarc's damages on the first method. That is, on Millenium's net profit for the first four months of 2000. Canarc argues that it is more certain because the business went to Millenium (as did Mr. Bulic). Millenium and Canarc each had one office (Canarc closed its Surrey office). Millenium was doing both the angle and non angle-cut business of former customers of Canarc. In addition, Canarc points out that Mr. Billows' income for 2000 was close to his income for 1999 with Canarc.

[180] I have concluded that the second, more conservative method, based on the difference in Canarc's net profit between 1999 and 2000, is the more equitable way to assess Canarc's damages. The alternative of basing the damages on Millenium's net profit for the first four months of 2000 is troubling; it does not account for the reasonable possibility that even had Mr. Billows not left Canarc in a disadvantageous position by breaching his employment contract, and even had he not breached his duty of fidelity, some of Canarc's clients would have followed him to Millenium in any event. There is also the real possibility they would have given Mr. Billows both the angle-cut and non angle-cut business for the convenience of using only one trader whom they already knew.

Conclusion

[181] In conclusion, I dismiss Mr. Billows' claim for wrongful dismissal. I find Canarc owes him \$1,649.57 in unpaid commission.

[182] I allow Canarc's counterclaim against Mr. Billows and Millenium and award Canarc damages of \$30,553 (\$30,000 and the \$553 for the extra work by Jensen). The commission Canarc owes to Mr. Billows will be deducted from the award of damages.

[183] Counsel may arrange to address Canarc's application for special costs.

"A.W. MacKenzie, J."

The Honourable Madam Justice A.W. MacKenzie

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