SUPREME COURT OF NOVA SCOTIA
Citation: MacDonald v. Earle, 2010 NSSC 151

Date: 20100528
Docket: S.SN. No. 207083
Registry: Sydney

Between:

Frank MacDonald

Plaintiff

-and-

Andrew Joseph Earle, Shirley Irene Earle, Ann Reginato, John Reginato and John L. Reginato Pulp Company Limited, a body corporate

Defendants

Judge: The Honourable Associate Chief Justice Deborah K. Smith

Heard: October 20, 21 and 22, 2009 in Sydney, Nova Scotia

Counsel: Brian P. Casey, Esq. for the Plaintiff
Duncan H. MacEachern, Esq. for the Reginato Defendants
Andrew Earle and Shirley Earle - Self-Represented

By the Court:

[1] This is an action for trespass and conversion brought by the Plaintiff, Frank MacDonald, against Andrew Joseph Earle, Shirley Irene Earle, Ann Reginato, John Reginato and the John L. Reginato Pulp Company Limited.

[2] The Plaintiff is the owner of approximately 110 acres of woodland which is located in what is known as the Kytes Hill Road area near Sydney, Nova Scotia. The property consists of two parcels of land which are identified by PID #15226509 and PID # 15226517 (hereinafter referred to collectively as "the property".) The property had been owned by the Plaintiff's aunt, Mary Catherine MacKinnon, who died in 1993 or 1994. The land was devised by way of Ms. MacKinnon's will to the Plaintiff and four of his siblings. Over time, the Plaintiff became the sole owner of the property.

[3] Earlier in the proceeding questions were raised by the Reginato Defendants as to whether the Plaintiff held sole title to the property when the conduct complained of occurred and whether the Plaintiff's siblings had an interest in any damages that may be awarded. They took the position that if the Defendants are liable to pay damages, the Plaintiff is only entitled to a portion of those damages as he was only a part owner of the property at the time in question. As a result, I required that the siblings named in Ms. MacKinnon's will be given notice of this action and an opportunity to participate. This notice was given and each sibling or their representative signed a waiver of their right to participate in the trial of this action and transferred to the Plaintiff any rights that they may have had to make a claim in this proceeding.

[4] At the commencement of the trial, the Defendants confirmed that ownership of the property was no longer in issue and they admitted that the Plaintiff owned the property at the time the alleged trespass and conversion took place. In addition, counsel for the Reginato Defendants confirmed that he was no longer taking the position that the Plaintiff would only be entitled to a portion of any damages that may be awarded.

[5] The Plaintiff is a lawyer who practices in Cole Harbour, Nova Scotia. As indicated above, he is the owner of the woodlots in question. In October of 2000, the Plaintiff contacted a forest management company known as InterForest Inc. with a request that they do an assessment of the property to determine its value in terms of harvesting the wood off of the property. The Plaintiff had plans to call tenders for the cutting of the wood and wanted to know its value.

[6] Michael Anthony Brown is the president of InterForest Inc. and is a forester. In the fall of 2000, Mr. Brown viewed aerial photographs of the property taken in 1993 and gave the Plaintiff a preliminary estimate of $53,246.00 for the stumpage value of all of the wood on the property (110 acres). The stumpage value of wood is the value that a landowner can reasonably expect to receive for his timber "on the stump". Mr. Brown recommended that someone from his company make a ground visit to the site in order to give a better opinion on the value of the wood. Upon doing so, it was determined that substantial harvesting had recently taken place on the property. The Plaintiff was advised of the situation and on January 11th, 2001, Mr. MacDonald attended at the property. While there he encountered two people with chainsaws who were cutting trees on the property. He followed these two people out

of the woods and met up with the Defendant, John Reginato. The Plaintiff explained that he owned the property that the wood was being cut off of and indicated that he would be looking for compensation in relation to the cutting and the removal of the wood. Mr. Reginato indicated that the Defendant, Andrew Earle, had told him that he had permission to cut the wood off of the property. Mr. Reginato further indicated that he had taken softwood pulp from the property and sold it but that the other type of wood on the property (the hardwood and the log wood) were sold by Mr. Earle. Further, Mr. Reginato indicated during this conversation that Mr. Earle had not entered the property until June or July of 2000.

[7] Following this meeting, the Plaintiff laid a complaint with the Cape Breton Regional Police Service. Mr. Earle was charged with stealing standing timber, the property of the Plaintiff, of a value exceeding five thousand dollars contrary to s. 334(a) of the *Criminal Code* of Canada. He was further charged with mischief by wilfully damaging property – to wit standing timber the property of the Plaintiff – the value of which exceeded five thousand dollars contrary to s. 430(3)(a) of the *Criminal Code*.

[8] None of the Reginato Defendants were charged criminally as a result of this matter.

[9] On September 25th, 2002, Mr. Earle entered a plea of guilty to the charge under s. 334(a) of the *Criminal Code*. The second count under s. 430(3)(a) was dismissed.

[10] Mr. Earle was sentenced in Provincial Court in Sydney, Nova Scotia, on November 5th, 2002. He was given a suspended sentence with three years probation. One of the conditions of his probation was that he pay restitution to Mr. MacDonald in the amount of $18,000.00 over three years. In addition, he was ordered to pay compensation to Mr. MacDonald in the amount of $50,000.00. The total amount to be paid by Mr. Earle to Mr. MacDonald ($68,000.00) was reflected in a Restitution Order which was issued by the Provincial Court on November 5th, 2002.

[11] On April 2nd, 2003, the Plaintiff brought the within action against the Defendants. Mr. and Ms. Earle did not file a defence to the action and on April 14th, 2004, default judgment was taken out against them with damages to be assessed.

[12] Michael Brown was called by the Plaintiff to testify at the time of trial and was qualified to give expert opinion evidence as a forest appraiser. Mr. Brown and his senior forest technician, Ross Rankine, prepared an expert's report which was tendered into evidence. Mr. Brown and Mr. Rankine had cruised the cutover area (which they calculated to be 50.80 acres in size) and interpreted aerial photographs of the property taken in 1999. They estimated that a total of 1262.16 cords of wood had been removed from the property. This estimate was further broken down into 408.26 cords of softwood pulpwood, 612.39 cords of softwood saw material and 241.51 cords of hardwood pulpwood. Mr. Brown estimated the stumpage value of the softwood pulpwood at $25.00 a cord, the softwood saw material at $50.00 per cord and the hardwood pulpwood at $14.00 a cord. Using these figures, he gave an estimated stumpage value for all wood removed from the cutover area at $44,365.87 which was broken down as follows:

Softwood Pulpwood:	$ 9,915.73	
Softwood Saw Material:	$31,099.45	
Hardwood Pulpwood:	$ 3,359.69	
Total:	$44,365.87	[$44,374.87]

[13] At the time that Mr. Brown prepared his report in July of 2002, he recommended reforestation of the cutover area at a cost of $23,685.04. By the time of trial he was satisfied that adequate natural regeneration had occurred and he was of the view that reforestation was no longer necessary. However, he did recommend weeding or thinning of the new trees in order to reduce the growing time necessary before a new stand of trees would be commercially marketable and to improve the quality of the wood. The Plaintiff is seeking $7,000.00 for the cost of this weeding or thinning.

[14] As indicated previously, the stumpage value of wood is the value that a landowner can reasonably expect to receive for his timber “on the stump”. Mr. Brown estimated that with the Plaintiff’s property it would cost an additional $50.00 per cord to get the wood “roadside”. This additional figure would include the cost of cutting, limbing, piling and transporting the wood to the roadside. Mr. Brown agreed that this figure of $50.00 per cord was only an approximation and that wood contractors would have more definitive figures about what is paid for these types of expenses.

[15] Andrew Earle also gave evidence at trial. He testified that in the late 1980's he contacted the Plaintiff’s aunt, Mary MacKinnon, and asked her whether she would be

interested in selling him the wood that was on the property. According to Mr. Earle, Ms. MacKinnon indicated that she wasn't really interested in getting money for the wood as she was "financially situated" and if there was any wood on the property that was of value to him – he could cut it.

[16] Over a decade later (in 2000), Mr. Earle and his employees went to the property and cut numerous cords of wood. By this time, Mr. MacDonald was the owner of the property. Mr. Earle acknowledged that he did not try to contact Ms. MacKinnon again to see if he still had permission to cut the wood on the property nor did he check to see whether Ms. MacKinnon was still the owner of the property. Mr. Earle acknowledged at trial that he did the "wrong thing" and that he shouldn't have cut the wood on the property.

[17] The trial of this matter was heard approximately nine years after the events took place. Understandably, witnesses' memories were vague on some of the details. During Mr. Earle's testimony he gave a number of different estimates for the amount of wood that he removed from Mr. MacDonald's property. These estimates ranged from 400 cords to 600 or 700 cords to 800 cords of wood.

[18] Mr. Earle arranged for the Defendant, John Reginato, to haul the wood to the roadside after it was cut, limbed and stacked. In addition, Mr. Earle testified that he sold Mr. Reginato the [softwood] pulpwood from the property. He further testified that he sold the log or [softwood] saw material to a company called MacTara and that he privately sold any hardwood that he got from the property.

[19] Mr. Reginato paid Mr. Earle for the wood that he bought with a series of cheques which totalled $57,800.00. At the time, Mr. Earle was having difficulty with Revenue Canada seizing funds from his personal bank account. As a result, he deposited these cheques into his wife's bank account. Ms. Earle's signature is on $35,850.00 worth of the cheques deposited into this account.

[20] Mr. Earle acknowledged at trial that Mr. Reginato had asked him whether he had permission to cut wood on the property and he "lied" and told him that he did.

[21] Mr. Earle gave evidence concerning the costs that he incurred in cutting the wood and getting it "roadside". He testified that he paid approximately $40.00 per cord on account of the men that actually cut, limbed and stacked the wood. The workers themselves received $35.00 per cord and approximately $5 per cord was paid by Mr. Earle for statutory deductions such as Canada Pension and Unemployment Insurance. In addition, Mr. Earle was charged $25.00 per cord by Mr. Reginato to haul the wood "roadside". Mr. Earle acknowledged that he did not pay the Plaintiff stumpage for the wood but said that if he had – stumpage at the time would have been approximately $15.00 a cord for the softwood pulpwood and no more than $25.00 a cord for the [softwood] saw logs.

[22] John Reginato also gave evidence at trial. He testified that he and his company were not involved in the cutting, limbing or piling of the wood from Mr. MacDonald's property. He acknowledged, however, that he and his workers hauled wood from the property to the roadside for Mr. Earle and, in addition, purchased softwood pulpwood

that had been cut from the property. Mr. Reginato testified that he first placed his equipment on the property for the hauling of the wood on July 8th, 2000.

[23] In January of 2001 (within weeks of learning that Mr. MacDonald owned the property in question and that Mr. MacDonald had not given Mr. Earle consent to cut wood from the property), Mr. Reginato met with a Sgt. Doyle who, at the time, was with the Cape Breton Regional Police Service. Mr. Reginato advised Sgt. Doyle that he had bought a little more than 800 cords of wood from Mr. Earle and provided Sgt. Doyle with the cheques that he had written to Mr. Earle in payment for the wood. As indicated previously, these cheques total $57,800.00. At the time that Mr. Reginato met with Sgt. Doyle in January of 2001 he assumed that all of the cheques related to wood that was purchased from the Plaintiff's property. As a result of a more recent suggestion made by Mr. Earle that some of these cheques may have related to wood purchased from other properties, Mr. Reginato now questions whether he may "possibly" have been mistaken when he estimated that he had purchased 800 plus cords of wood from Mr. MacDonald's property. He testified at trial that he now thinks that he bought 500 to 600 cords of wood from Mr. MacDonald's land.

[24] Mr. Reginato testified that the softwood pulpwood that he purchased from Mr. Earle was broken down into two grades (Grade 1 and Grade 2) and that he paid $65.00 a cord for the Grade 2 wood and between $80.00 and $90.00 a cord for the Grade 1 wood. He suggested that approximately 20% of the Grade 1 wood would have been saw material (which is a higher quality of wood.) Mr. Reginato testified that on average he paid Mr. Earle approximately $75.00 a cord for the wood that he bought. This figure of $75.00 per cord represented the price paid for the wood minus the sum

of $25.00 per cord which is the amount that Mr. Earle paid to the Reginato Defendants to have the wood hauled roadside.

[25] Mr. Reginato confirmed that workers in this area of Cape Breton were paid an average of $35.00 a cord for cutting wood and, in addition, benefits would be paid on behalf of the workers for CPP, Unemployment Insurance and Workers' Compensation. He testified that in total it cost approximately $40.00 per cord for the cutters and their benefits.

[26] Mr. Reginato also testified that in the year 2000 he was paying an average of $15.00 per cord for stumpage. He acknowledged that some of the smaller contractors could have been paying $20.00 per cord and, during his testimony, indicated that if Mr. Earle had paid stumpage to Mr. MacDonald (as he should have) he would have been paying $20.00 per cord. While it was not clear from Mr. Reginato's testimony, I assume that he was talking about stumpage for softwood pulpwood since that is the type of wood that Mr. Reginato deals with in his business.

[27] A forestry worker by the name of Christopher MacDonald also testified at trial. He said that he attended at the Kytes Hill property around the middle to the end of June, 2000 and at that time preparations were being made to start work on the property.

[28] At the conclusion of the trial a number of reasonable concessions were made by the various parties. Counsel for the Plaintiff advised that he is not longer seeking an Order against Mr. Earle in this proceeding as his client is content with the

$68,000.00 Restitution Order that was issued against Mr. Earle by the Provincial Court on November 5th, 2002. I should indicate that on March 12th, 2004, Mr. Earle made an assignment in bankruptcy. As part of the bankruptcy proceeding, Mr. Earle was issued an Absolute Order of Discharge as of January 6th, 2006. The Plaintiff takes the position (with which I agree) that the Restitution Order survived the bankruptcy in light of s. 178(1)(a) of the *Bankruptcy and Insolvency Act* and accordingly, the Restitution Order remains in full force and effect.

[29] As the Plaintiff is no longer seeking relief against Mr. Earle an Order will issue dismissing the action against him.

[30] In addition, during summation, counsel for the Plaintiff advised that while it appears that a total of $57,800.00 was deposited into Ms. Earle's bank account (which represented funds paid by Mr. Reginato for wood purchased from Mr. Earle) the Plaintiff is only seeking an Order against Ms. Earle in the amount of the cheques actually endorsed by her. According to my calculations these cheques total $35,850.00.

[31] Further, on the last day of the trial a Consent Order was filed dismissing the action against Ann Reginato without costs. In addition, counsel for the Plaintiff confirmed that the Plaintiff is no longer seeking aggravated damages or general damages for loss of enjoyment (as set out in the Statement of Claim).

[32] Counsel for the Plaintiff also advised that while, in his view, there is an argument to be made that the Reginato Defendants could be held liable in trespass and

conversion for the wood that they hauled to the roadside for Mr. Earle – but did not buy – the Plaintiff is not seeking damages in this regard. Rather, the Plaintiff's claim against the Reginato Defendants is for the sum of $57,800.00 which is the amount that Mr. Reginato paid for the wood that he purchased from Mr. Earle. In addition, the Plaintiff is seeking pre-judgement interest on that amount as well as $7,000.00 for the cost of weeding or thinning the new trees that have grown since Mr. Earle harvested the wood from Mr. MacDonald's property.

[33] Further, at the conclusion of the trial, counsel for Mr. Reginato acknowledged that his client is liable to the Plaintiff but submitted that the extent of his liability should not exceed $10,000.00.

[34] Finally, Mr. Earle apologized to all parties involved in this matter.

SHIRLEY IRENE EARLE

[35] As indicated previously, default judgement has already been rendered against Ms. Earle with damages to be assessed. Ms. Earle endorsed $35,850.00 worth of the cheques that Mr. Reginato gave to Mr. Earle for the wood in question. I find that she is liable to the Plaintiff for conversion in the amount of $35,850.00 plus pre-judgement interest.

THE REGINATO DEFENDANTS

[36] That takes me to Mr. Reginato and the John L. Reginato Pulp Company Limited. As indicated previously, the Plaintiff seeks damages against these Defendants in the amount of $57,800.00 which represents the amount that Mr.

Reginato paid to Mr. Earle for the wood that he purchased after deducting $25.00 per cord for the cost of hauling the wood roadside.

[37] I must begin my analysis by determining the amount of wood that Mr. Reginato actually purchased from Mr. Earle and whether all of this wood came from the Plaintiff's property.

[38] The evidence provided to the Court on these two issues was inconsistent and far from satisfactory. I suspect that this was due, in large part, to the fact that the trial was held more than nine years after the cutting occurred and so witnesses were unclear in their recollections.

[39] As indicated previously, during Mr. Earle's testimony he gave a number of different estimates for the amount of wood that he removed from Mr. MacDonald's property (ranging from 400 cords to 800 cords of wood). He also gave conflicting evidence on whether the money that he received from Mr. Reginato was for wood taken solely from the Plaintiff's property or whether it included wood harvested from other properties. In Mr. Earle's cross examination by Mr. Casey, he confirmed that the money that Mr. Reginato gave him was for the wood that he took from the MacDonald property. When questioned by Mr. MacEachern, he testified that some of the $57,800.00 was for wood product removed from other properties. He noted that Mr. Reginato began giving him cheques in April of 2000 and said that his men did not start cutting on the MacDonald property until June of that year. He acknowledged that he could have been given an advance by Mr. Reginato but suggested that an advance

would not be given that far in advance of the cutting of the wood. He therefore concluded that some of the money was for wood from other properties.

[40] Mr. Reginato also gave evidence on this issue. He testified that when he spoke with Sgt. Doyle in January of 2001 he assumed that all of the cheques that he wrote to Mr. Earle were for wood purchased from the Plaintiff's property. However, in a statement prepared by Sgt. Doyle in February of 2001 (based on information given to him by Mr. Reginato) it is suggested that Mr. Reginato hauled 1,382 cords of wood for Mr. Earle from the site off Kytes Hill Drive but that Mr. Reginato did not know how much of this wood came from the Plaintiff's property.

[41] While there appears to have been some question in Mr. Reginato's mind in 2001 as to whether all of the wood that he hauled for Mr. Earle actually came from Mr. MacDonald's property, there does not appear to have been any question in his mind at that time that he had purchased approximately 800 cords of wood from Mr. Earle.

[42] Mr. Earle acknowledges cutting wood off of the Plaintiff's property in 2000. In the spring of 2001 (close to the time that the cutting actually occurred) Mr. Reginato advised the police that he had purchased approximately 800 cords of wood from Mr. Earle. Until just prior to the trial, Mr. Reginato assumed that this wood came from Mr. MacDonald's property. Neither Mr. Earle nor Mr. Reginato provided the Court with any documentation which would confirm that Mr. Earle was cutting wood on properties other than the Plaintiff's property in the spring of 2000 or that Mr. Reginato was purchasing wood from Mr. Earle from other properties at that time. I

am satisfied, and I find on a balance of probabilities, that Mr. Reginato purchased 800 cords of wood from Mr. Earle which wood was taken from the Plaintiff's property.

[43] In a Statement of Admissions filed with the Court it is admitted that the John L. Reginato Pulp Company Limited entered upon the lands in question and removed softwood and hardwood previously cut by Mr. Earle. In the same document the company also admits to selling softwood pulpwood removed from the property to Stora Enso.

[44] In Mr. Reginato's testimony he confirmed that he was on the Plaintiff's property. In addition, the evidence establishes that Mr. Reginato paid Mr. Earle for the wood in question with cheques written on Mr. Reginato's personal bank account.

[45] I am satisfied, and I find, that Mr. Reginato and the John L. Reginato Pulp Company Limited trespassed on the Plaintiff's property. Further, I find that Mr. Reginato bought wood which was improperly harvested from the Plaintiff's property and that the John L. Reginato Pulp Company Limited sold the said wood to Stora Enso. Based on these findings, I am satisfied that the Reginato Defendants (John Reginato and the John L. Reginato Pulp Company Limited) are liable to the Plaintiff for both trespass and conversion.

[46] That takes me to the issue of damages.

[47] The Plaintiff seeks, *inter alia*, the sum of $57,800.00 from the Reginato Defendants, representing the amount that Mr. Reginato paid to Mr. Earle for the wood

in question. The Reginato Defendants dispute that this is the appropriate measure of damages and submit that damages should be assessed based on the stumpage value of the timber. They further submit that the Court should set the stumpage value at $17.50 per cord.

[48] Conversion is a tort of strict liability. It is no defence that the wrongful act was done in good faith or innocence (see *Boma Manufacturing Ltd. v. Canadian Imperial Bank of Commerce*, [1996] 3 S.C.R. 727 at ¶ 31). However, the nature of the Defendant's actions can have a significant affect on the assessment of damages. In *Canadian Pacific Forest Products Ltd.* v. *Pacific Forests Industries Ltd.*, [1991] B.C.J. No. 2142 (S.C.) Cooper, J. stated at p. 3 (using the quicklaw version of the case that counsel provided):

> In the recent decision of our Court of Appeal in Shewish et al v. MacMillan Bloedel Ltd. (1990) 48 B.C.L.R. (2d) 290 it was held that in cases of trespass and a taking there are two rules for determining the measure of damages. Under the "mild rule", the defendant will be allowed the cost of severing the things taken from the realty and bringing it to market. Under the "severe rule", only the cost of bringing the thing to market will be allowed. In assessing damages the law looks to the degree of culpability or want of bona fides in the trespasser. Negligent trespass does not necessarily attract the severe rule. It is the degree of negligence which must be looked at in determining the rule to be applied.

[49] In the case at bar, the Plaintiff has acknowledged (quite properly in my view) that the mild rule should be applied to the assessment of damages relating to the Reginato Defendants. What then is the amount of damages that should be awarded in relation to these Defendants?

[50] Counsel for the Plaintiff has referred the Court to the decision of Nathanson, J. in *Saulnier v. Bain*, 2006 NSSC 27 where it is stated at ¶ 54 – ¶ 55:

> [54] These authorities reveal that the measure of damages depends upon the nature of the trespass.
>
> [55] There appear to be two rules for determining the measure of damages: a mild rule, where the trespass has been inadvertent or under a *bona fide* belief in title or by mere mistake; and a severe rule, to be applied where the trespass has been willful or fraudulent. Under the mild rule, the measure of damages is the value of the trees less the amount which the defendants by their labour have added to that value.....

[51] It is the Plaintiff's position that he is entitled to the value of the wood that Mr. Reginato purchased from Mr. Earle minus the amount by which the Reginato Defendants (solely) have, by their labour, added to that value. Mr. Reginato paid Mr. Earle $57,800.00 for the wood in question. Mr. Reginato's costs for hauling the wood ($25.00 per cord) had already been deducted from the money that Mr. Reginato paid to Mr. Earle. The Plaintiff therefore submits that the value of the wood in question is $57,800.00 and that this is the appropriate amount of damages.

[52] The Plaintiff further submits that the Reginato Defendants are not entitled to deduct the costs that Mr. Earle incurred in severing the wood in question. He suggests that if an award of damages was made against Mr. Earle such an award would be based on the severe rule. Under the severe rule, Mr. Earle would not be permitted to deduct the cost of severing the wood from Mr. MacDonald's land. Mr. Casey argues that since Mr. Earle would not be entitled to this deduction – Mr. Reginato cannot receive the benefit of this deduction either.

[53] The Reginato Defendants submit that it would be improper, in the circumstances of this case, not to deduct the cost of severing the wood in question. They have referred the Court to *McGregor on Damages* in this regard. In the 16th edition of this text (London: Sweet & Maxwell, 1997) the authors deal with the issue of damages in cases of unauthorized mining and state at p. 923:

> Where mineral in the earth is wrongfully severed and raised by the defendant, its value at the pit's mouth is greater by virtue of the severance and raising than its value in the earth, since it is of no use to anyone until severed and raised. Therefore the exact loss to the plaintiff, whether in an action of trover for wrongfully converting his minerals or in an action of trespass to goods for wrongfully taking them away, is measured by the price at the pit's mouth less both the cost of severing and the cost of raising. If the defendant is not allowed to deduct these costs, the plaintiff is paid for expenditure which he has never incurred. On the other hand, if the defendant is allowed to deduct this outlay, it may be said that he is being paid for his own unlawful act.

[54] The Reginato Defendants say that in the case at bar, they acted at all times in a *bona fide* manner and that their conduct was not willful. They suggest that it would be improper to value the wood based on what Mr. Reginato paid for it without taking into account the cost of severance. Finally, they submit that damages should be assessed based on the stumpage value of the timber.

[55] The Reginato Defendants note that when Mr. Reginato paid Mr. Earle for the wood in question, Mr. Earle was paid a stumpage fee - although he did not forward this fee on to the Plaintiff as he should have. They also point out that if the Court now orders the payment of a stumpage fee to the Plaintiff (as they suggest should occur) the result will be that the Reginatos will have paid this stumpage fee twice – once to Mr. Earle and once to the Plaintiff. They submit that an award based on the stumpage

fee is appropriate and that an amount greater than the stumpage fee would be excessive and unwarranted in the circumstances of this case.

[56] The primary goal, when assessing damages, is to put the injured party in the position that he would have been in had the tortious conduct not occurred (see *Livingstone v. Rawyards Coal Company* (1880), 5 App. Cas. 25 (H.L.)). Prior to learning of the trespass in question, the Plaintiff had plans to call tenders for the cutting of the wood on the property. If this had occurred as planned, the Plaintiff would have been paid the stumpage value of the wood. There is no evidence to suggest that the Plaintiff intended to cut the wood himself and sell it. In these circumstances, I am satisfied that it is appropriate to assess damages against the Reginato Defendants based on the stumpage value of the wood in question. Interestingly, that is what Nathanson, J. did in *Saulnier v. Bain*, *supra*, (see ¶ 64). The stumpage value of the timber was also used to assess damages in the case of *Phillips Estate v. Noble*, [1995] N.B.J. No. 518 (Q.B.).

[57] While in cases of willful trespass and conversion the Plaintiff can receive the benefit of the cost of severing the wood, the situation, in my view, is different when (as occurred here) the Defendants' conduct is not willful and is done in a *bona fide* manner (I refer here to the conduct of the Reginato Defendants.) As indicated, when assessing damages against the Reginato Defendants, I am satisfied that it is appropriate to award the Plaintiff the stumpage value of the wood.

[58] What then is the stumpage value of the wood in question?

[59] The various types of wood taken from the subject property have different stumpage values. For example, softwood saw material is more valuable than softwood pulpwood.

[60] I have found that Mr. Reginato purchased 800 cords of wood from Mr. Earle. This wood was sold to Stora Enso as softwood pulpwood. I am satisfied from the evidence, however, that some of this wood could be classified as softwood saw material even though it was sold by the Reginato Defendants as softwood pulpwood.

[61] Mr. Reginato testified that the wood that he bought was broken down into two grades (Grade 1 and Grade 2). He gave a number of different estimates for the amount of Grade 1 wood that he purchased but concluded by estimating that approximately 45% of the wood that he purchased was Grade 1 and that 20% of this Grade 1 wood was saw material.

[62] Mr. Reginato testified that he paid different prices to Mr. Earle based on these grades (the Grade 1 wood cost more than the Grade 2 wood). I was uncertain from his evidence whether the landowner would receive a different stumpage rate between the two grades.

[63] Mr. Brown based his stumpage valuation on the “highest and best” use of the wood in question. In other words, if a tree could properly be classified as saw material – he used that classification even though the tree could also be sold as softwood pulpwood. Using this method, Mr. Brown estimated that 408.26 cords of

wood removed from the Plaintiff's property was softwood pulpwood and 612.39 cords were softwood saw material.

[64] I am satisfied that for the purpose of assessing damages in this case it is appropriate to use the "highest and best" use of the wood when calculating the stumpage values regardless of how the wood was actually sold by Mr. Reginato. In other words, if the wood was capable of being classified as saw material, stumpage should be based on that classification even if Mr. Reginato sold it as softwood pulpwood.

[65] In Mr. Brown's report of July 15th, 2002, he estimates that 1,020.65 cords of softwood pulpwood and softwood saw material were removed from the Plaintiff's land. Using the "highest and best" use method he estimated that 40% (408.26 cords) was softwood pulpwood and 60% (612.39 cords) was softwood saw material. I am satisfied that it is appropriate to use the same percentage breakdown in relation to the 800 cords of wood purchased by Mr. Reginato. I find that 40% of the wood purchased by Mr. Reginato (320 cords) should be classified as softwood pulpwood for stumpage valuation and 60% (480 cords) should be classified as softwood saw material. I make this finding despite the fact that Mr. Reginato sold the wood as softwood pulpwood.

[66] What then is the difference in value between the softwood pulpwood and the softwood saw material?

[67] In Mr. Brown's report filed with the Court he indicated that typical negotiated stumpage value ranges for softwood pulpwood in Cape Breton in 2000 were between

$20.00 and $25.00 per cord. He went on to say that, in his opinion, the softwood in question was above average in value and he therefore concluded that the softwood pulpwood had a stumpage value of $25.00 per cord.

[68] Mr. Earle testified that at the time the softwood pulpwood was taken it had a stumpage value of approximately $15.00 per cord.

[69] Mr. Reginato indicated that in the year 2000 he was paying an average of $15.00 per cord for stumpage although he acknowledged that some of the smaller contractors could have been paying $20.00 per cord. During his testimony he also indicated that if Mr. Earle had paid stumpage to the Plaintiff he would have been paying $20.00 per cord.

[70] Finally, a forester by the name of Gordon MacDonald (who was called to testify on behalf of the Reginato Defendants) testified that in 2000 stumpage for [softwood] pulpwood would have been "around" $25.00 per cord.

[71] I found Mr. Reginato's evidence on this issue to be the most persuasive. He has been involved in the forestry industry in Cape Breton county for decades. While I appreciate that he has a vested interest in the outcome of this proceeding, nevertheless, I found him to be a creditable witness. He testified that if Mr. Earle had paid stumpage to the Plaintiff [as he should have] he would have been paying $20.00 per cord. I find that this is the stumpage value for the softwood pulpwood purchased by Mr. Reginato from Mr. Earle.

[72] In Mr. Brown's report he estimated the stumpage value of the softwood saw material to be between $40.00 and $50.00 per cord. He used a figure of $50.00 per cord when doing his overall calculations.

[73] Mr. Reginato testified that a harvesting contractor would lose money if he paid a landowner stumpage of $40.00 to $50.00 per cord for saw material. He pointed out that in the case at bar, Mr. Earle sold saw material to MacTara and was paid approximately $100.00 per cord for that wood. I find that it cost approximately $40.00 per cord to have the wood cut, limbed and stacked and another $25.00 per cord to have the wood hauled to the roadside. If Mr. Earle had paid stumpage of $50.00 per cord for this wood (which is the figure suggested by Mr. Brown) he would not have earned any profit and, in fact, would have lost $15.00 on every cord of saw material that he sold.

[74] In Mr. Reginato's testimony he indicated that a figure of $30.00 per cord for the stumpage value of saw logs would be more "realistic" although he went on to say that he does not know of anyone that has actually been paid that amount for saw material. He testified that in his experience a land owner is typically paid stumpage of $25.00 per cord for saw material.

[75] Mr. Earle testified that the stumpage value of saw logs was no more than $25.00 per cord.

[76] I find that the stumpage value of the softwood saw material in question was $25.00 per cord.

[77] I therefore conclude that the stumpage value of the wood that Mr. Reginato purchased from Mr. Earle is $18,400.00 which is broken down as follows:

320 cords of pulpwood softwood @ $20 per cord	$ 6,400.00
480 cords of softwood saw material @ $25 per cord	$12,000.00
Total stumpage value of the wood purchased by Mr. Reginato from Mr. Earle:	$18,400.00

[78] The Reginato Defendants (John Reginato and the John L. Reginato Pulp Company Limited) are liable to the Plaintiff for this amount.

[79] In the pretrial memorandum filed on behalf of the Reginato Defendants it is submitted that any damage award should reflect "the valuation of the property and of comparable properties". It was further submitted that the cutting of the wood would result in only a minor variation in the properties' actual value on the open market.

[80] At the time of trial the Reginato Defendants submitted an appraisal of the Plaintiff's property prepared by William R. Martheleur (a designated commercial appraiser). According to Mr. Martheleur's report the assessed value of the property in question in 2008 was $2,000.00. Mr. Martheleur gave a market value of the entire property as of December 15th, 2008 in the amount of $15,000.00. He did not give a value for the property before and after the harvesting in question occurred.

[81] The Reginato Defendants argue that since only half of the property was harvested, the value of the land affected by the trespass and conversion is less than $15,000.00.

[82] Very little reference was made to Mr. Martheleur's report by the Reginato Defendants at the time of trial. This is understandable. When preparing his opinion, Mr. Martheleur did not take into account the potential value of the wood located on the property. He did state in his report, however, that the most probable use of the land was as a woodlot or for forestry operations if viable (see page 5 of his report).

[83] As indicated previously, Mr. MacDonald had plans to call tenders for the harvesting of the wood on the property. The wood clearly had a value much greater than the estimate given by Mr. Martheleur. I have not taken Mr. Martheleur's opinion on the value of the property into account when assessing damages.

WEEDING/THINNING

[84] As indicated previously, the Plaintiff is also claiming the sum of $7,000.00 for the cost of weeding or thinning the new trees that have grown on the property since Mr. Earle improperly harvested the wood. Mr. Brown testified that weeding and thinning will improve the quality of the wood on the property and will reduce the growing time necessary before a new stand of trees will become commercially marketable.

[85] The evidence established that there are companies in the Cape Breton area that offer a variety of forest management programs through which the Plaintiff can have the property in question weeded or thinned at no cost. However, there is a condition with such programs that the forest be allowed to develop and stay in forestry use for at least ten years failing which the company involved may seek reimbursement for

their costs involved in conducting the weeding or thinning. The Plaintiff argues that it is not appropriate to place this ten year stipulation upon him and suggests that if the trespass and conversion had not occurred he would be free of this condition.

[86] The Plaintiff has not satisfied me that he is entitled to this portion of his claim.

[87] If the Plaintiff no longer wishes to hold the property for the harvesting of wood then there should be no need to conduct the weeding or thinning in question. If, on the other hand, the Plaintiff wishes to maintain the property for future harvesting then, in my view, it is not unreasonable to expect him to take advantage of the opportunity to have the weeding and thinning done for free even though there is a stipulation that the property must be allowed to develop for at least ten years.

[88] It must be remembered that prior to the trespass and conversion occurring the Plaintiff had planned to call for tenders for the harvesting of the wood on his property. Once this harvesting occurred and re-growth took place, he would have been looking at weeding and thinning the property in any event. In my view, the Plaintiff is in no worse position in relation to the weeding and thinning as a result of the Defendants' actions. This portion of his claim is therefore dismissed.

CONCLUSION

[89] I have found that Shirley Irene Earle is liable to the Plaintiff for $35,850.00. The Reginato Defendants (John Reginato and the John L. Reginato Pulp Company Limited) are liable to the Plaintiff for $18,400.00.

[90] Counsel have not made representations on the issue of joint/several liability. The Plaintiff filed proposed wording for an Order prior to the trial in which it is suggested that some of the liability is joint and some is several. I reserve the right to deal with this issue if necessary.

PREJUDGMENT INTEREST

[91] The parties have reached agreement on prejudgment interest rates, but do not agree on the period of time for which prejudgment interest is payable. All parties agree that prejudgment interest shall be 5% simple interest up to December 31st, 2008 and 3.5% from January 1st, 2009 onward. As indicated, the issue is the period of time for which prejudgment interest is payable.

[92] The conduct complained of took place, for the most part, in 2000. This action was commenced in April of 2003 after the criminal proceeding concluded. While I have some concern with the length of time that it took to bring the matter to trial, after hearing the representations of counsel, I am satisfied that prejudgment interest should be payable for the full period from January 1st, 2001 onward. I note that during this time natural regeneration of the forest in question has occurred and, as a result, reforestation is no longer required. In other words, the delay has actually benefited the various parties in relation to damages.

COSTS

[93] I will receive written submissions on costs in the event that the parties are unable to reach agreement in this regard.

Deborah K. Smith
Associate Chief Justice