

**CASE:**

**VOLUME NO:**

**PAGE NO:**

(Cite as: Cape Breton Development Services Ltd. v. D. Roper Services Ltd., 2001 NSSC 179)

**CAPE BRETON DEVELOPMENT SERVICES LIMITED**

**Plaintiff/Defendant by Counterclaim**

**v.**

**D. ROPER SERVICES LIMITED**

**Defendant/Plaintiff by Counterclaim**

**Justice A. David MacAdam**

**Halifax, NS**

**SN. No. 04087**

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**HEARD:** Before the Honourable Justice A. David MacAdam

**WRITTEN RELEASE**

**OF DECISION:** December 14, 2001

**SUBJECT:** Contract - Breach of Contract - Tort - Negligent Misrepresentation - Damages

**SUMMARY:** Defendant, and plaintiff by counterclaim, was successful in obtaining tender to bank, blend and load coal at the plaintiff's coal preparation plant. In performing the contract, defendant experienced equipment problems resulting in plaintiff having to rent equipment from defendant's predecessor. Plaintiff terminated the contract without any prior warning or notice to the defendant.

**HELD:** The defendant was in breach of the contract because of its inability to perform the contracted services in accordance with the contract terms, and in particular, because of repeated equipment breakdowns was not supplying sufficient operable equipment. The plaintiff was entitled to the cost of renting equipment required to carry out defendant's obligation under the contract, and to reimbursement of advances made to the defendant in excess of the work and services performed by the defendant.

The plaintiff was in breach of the contract because the volumes of coal supplied for banking,

blending and lifting did not “approximate” the tonnages represented in the contractual documents as the volumes anticipated to be required to be handled over the term of the contract. The clause excluding liability for errors in the forecast did not excuse the plaintiff because the actual volumes were not even “approximate” to the forecasted tonnages, and the rates bid by the defendant were directly related to the anticipated tonnages.

The plaintiff was not liable under the tort of negligent misrepresentation since there was no evidence as to how the plaintiff arrived at the information used in the calculation of the forecasted tonnages. Absent evidence this information was negligently obtained, there could not be the tort of negligent misrepresentation.

The defendant was not successful in claiming any loss of profits for the unexpired term of the contract because, on the evidence, it appeared it was operating at a loss, and even with tonnages approximating the forecasted tonnages, on the balance of probabilities, it would have continued to operate at a loss.

In respect to claims where on the evidence there was a loss, but it was difficult, if not impossible to quantify, applied *Penvidic Contract Co. v. International Nickel Co. of Canada Ltd.*, 1975 CarswellOnt 299, [1976] 1 S.C.R. 267 and awarded damages, even in circumstances where it could be said, “the amount...is a matter of guesswork.”