1986 **SN. No. 04087**

IN THE SUPREME COURT OF NOVA SCOTIA
(Cite as: Cape Breton Development Corporation v. D. Roper Services Ltd., 2001 NSSC 179)

Between:

CAPE BRETON DEVELOPMENT CORPORATION

Plaintiff/Defendant by Counterclaim

v.

D. ROPER SERVICES LIMITED

Defendant/Plaintiff by Counterclaim

DECISION

HEARD: Before the Honourable Justice A. David MacAdam, at Sydney, Baddeck and Halifax, Nova Scotia

DATES: May 2, 3, 7, 8, 9, 22, 23, 24, 28, 29, 30, 31, June 4, 5, 6, 7, 11, 12, 13, 14, 18, 19, 20, 21, 27, 28, 2001, in Sydney, Nova Scotia
Oral Argument: October 3 & 5, 2001
Final Written Submissions: October 25, 2001

WRITTEN RELEASE OF DECISION: December 14, 2001

COUNSEL: George W. MacDonald, Q. C. & Aidan J. Meade, counsel for the plaintiff/defendant by counterclaim
Gary J. Corsano & Nicole E. LeBlanc, counsel for the defendant/plaintiff by counterclaim

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PARAGRAPH

MacADAM, J.:

[1] In early May 1985, Cape Breton Development Corporation, (herein "Devco"), issued an invitation for tenders for the banking, blending and lifting of coal products at its Victoria Junction Coal Preparation Plant, (herein " VJCPP "). The invitation for tenders suggested bidders inform themselves about Devco's operations at the VJCPP, including at the newly constructed lifting and banking centre (herein "LBC"). D. Roper Services Limited, (herein "Roper Ltd."), was one of a number of contractors who responded to the invitation for tenders by submitting a bid to carry out the required work. Among the other contractors submitting bids was Doug Burns Contracting Limited, (herein "Burns"), whose existing contract to provide these services to Devco was about to expire. Roper Ltd. was the *"low bidder"* and Burns the second *"low bidder"*. Roper Ltd., having been awarded the contract, it commenced operations in late July 1985 and continued until terminated, without prior notice, by Devco on March 11, 1986.

[2] Devco brings this action, claiming reimbursement of monies advanced to Roper Ltd. under the contract, and for expenses it incurred for equipment rentals and other activities it says were required because of the failure of Roper Ltd. to perform under the contract. Roper Ltd. counterclaims for damages arising out of losses, it says it suffered, by Devco's unjustified termination of the contract and for services it performed under the contract, and as extras, and for which it has never been paid.

A. BACKGROUND

[3] Devco processed coal received from various sources and of different grades or qualities. Prior to the construction of the LBC, the coal, depending on its grade or quality, would be stock piled in banks at centres known as "H" track and "C" track. By 1985 Devco had decided to construct a more modern centre for the banking, blending and loading of coal, resulting in the construction of the LBC.

[4] The primary sources of coal in 1985 were two operating collieries, known as the Lingan Mine (herein "Lingan"), and the Prince Mine, (herein "Prince"). Coal from the Lingan mine was delivered by rail to the VJCPP, where it was conveyed to the wash plant to be washed, graded and depending on whether it was of metallurgical quality or thermal quality to be conveyed to one of two loadouts, a metallurgical silo with a capacity of approximately 3,000 tons or a thermal chute with a capacity of approximately 250 - 300 tons.

[5] By 1985 Devco had also decided to transport coal by its own trucks, together with some independent third party trucks, from the Prince mine to the VJCPP. In addition to the Lingan and Prince mine coal, Devco also purchased coal from other producers, which coal was transported to the LBC.

[6] At each of the tracks, including the LBC, there were rail lines for handling railcars that were used, in addition to trucks, in delivering the coal to Devco's customers. Devco had its own railway cars for delivery to some of its customers, as for example, Nova Scotia Power Corporation and the international pier at Sydney where coal would be loaded onto ships for delivery to international customers. In addition, Canadian National Railways

supplied railcars that were loaded for delivery to other customers in North America. Once the railcars were loaded, they would be moved or shunted to a weight scale where they would be weighed prior to delivery to the customer or the international pier.

[7] The work of banking, blending and lifting coal was carried out by the use of coal haulers, graders, bulldozers and loaders, as well as other miscellaneous support equipment and vehicles.

[8] The advent of the LBC also coincided with Devco restructuring the personnel involved in overseeing the banking, blending and lifting of coal at the VJCPP. Barry Martin, (herein "Martin"), became the coal handling manager of the VJCPP and the international pier and Keith MacVicar, (herein "MacVicar"), was appointed coal handling coordinator. In addition, three shift managers were hired to oversee the activities during each of the three shifts. John Maxner, (herein "Maxner"), James Hirtle, (herein "Hirtle"), and the late Myron Gouthro, (herein "Gouthro"), had little prior experience, and in some cases, none at all, in the banking, blending and lifting of coal.

B. THE TENDER and THE CONTRACT

[9] The invitation for tenders described the nature of the work to be carried out, certain terms and conditions that would apply to the performance of the work and the procedure for bidding for the contract.

[10] Following receipt of the invitation, Don Roper, (herein "Roper"), President of Roper Ltd., with the assistance of a civil engineer business associate, reviewed the terms of the tender. Together they attended at the LBC and met with MacVicar who provided a tour of the VJCPP operations and generally explained the services that were required. Roper testified during this attendance he was led to believe that once the coal at "C" and "H" tracks had been depleted, these areas would no longer be used. The intention was eventually to only bank, blend and load coal at the LBC. Martin and MacVicar, as well as the general manager of transportation, W. MacLellan, (herein " MacLellan "), all agreed Devco's long range plan was in due course to focus operations at the LBC. They, however, also testified that no time limit had been set for the cessation of operations at "C" and "H" tracks.

[11] Prior to being awarded the contract a meeting was held between Devco and Roper Ltd., during which Roper advised he did not then own the equipment listed in the tender, but had made arrangements to obtain it in the event he was the successful bidder. Following this meeting Devco decided to award Roper Ltd. the contract and did so by the issuance of a purchase order incorporating the terms and conditions in the invitation to tender, the prices bid by Roper Ltd. in the response to the invitation and additional terms and conditions relating to the performance of the contract. A summary of some of the terms and conditions of the contract are outlined in the pre-hearing submission filed by counsel for Devco:

Item I - Banking and blending approximately 3,387,500 tonnes of wash plant product at 35¢/tonne.

Item 2 - Banking of approximately 875,000 tonnes of thermal product from

the wash plant at 35¢/tonne.

Item 3 - The banking of approximately 980,000 tonnes of metallurgical product from the wash plant at 35¢/tonne.

Item 4 - The blending and banking of approximately 3,906,228 tonnes of Prince Mine and third party of coal at 20¢/tonne.

Item 5 - The banking of approximately 170,000 tonnes of domestic screened and pea product coal using a radial stacker at 55¢/tonne.

Item 6 - The lifting from various stock piles of approximately 9,438,000 tonnes at 18¢/tonne.

In addition to the unit prices on a per tonne basis, the Purchase Order allowed Roper $22.00 per hour for standby time and set out equipment rental rates that would be charged for any extra work that Devco awarded to Roper.

The Purchase Order also incorporated by reference the general conditions and specifications set out in the tender. The following clauses from the specifications and general conditions are relevant to this action.

Clause 1 "Contract Term" - Contract was to run from June 17, 1985 [sic] to March 31, 1988 "subject to cancellation - Clause 14".

Clause 2 "Work Schedule" - The work was to be carried out twenty-four hours per day on a three-shift basis as needed. The banking and blending work was to be a five-day week on an "as required basis". The lifting was to be a seven-day week, again "as required". As well the contractor was to arrange his operations to coincide with the schedule of the Coal Preparation Plant and delivery of coal from other sources, as well as the lifting schedule as determined by the Superintendent of Coal Handling".

Clause 5 "Contractor's Equipment" - The contractor was required "to supply and maintain" sufficient equipment. In particular, this clause listed trucks, regular dumps and/or bottom dump trailers, graders, rubber-tired dozer and loaders. This clause expressly stated that "delays in operations due to breakdown of equipment will not be tolerated. The contractor shall maintain sufficient standby equipment to prevent delays due to equipment failure". Devco reserved its right to reject equipment not in proper repair and to substitute from other sources at the contractor's expense if Devco deemed it necessary to maintain a continuous and consistent

operation.

Clause 6 "Banking - CPP" - This clause also emphasized the need to have sufficient equipment available. In particular the contractor was to have enough equipment to truck coal from the wash plant and take it to the banking areas. Banking was to be carried out on an "as required" basis. It also called for the contractor to maintain banking areas in general.

Clause 7 "Banking & Blending Prince Coal & Other Production" - This clause once again emphasized the requirement to have sufficient equipment on hand to handle the banking and blending of coal from the Prince Mine as well as other sources. Prince Coal was to be blended with product from the wash plant.

Clause 8 "Lifting" - This clause set out in detail the many obligations of the contractor relating to lifting off banked and blended coal. There was emphasis placed on avoiding "unnecessary delays". Once again the contractor was obligated to "maintain sufficient loading equipment on the site". With regard to the CN railcars, the contractor was obliged to load to the proper weight.

Clause 10 "Coal Tonnages" - This clause is short but important in the context of this action and is therefore set out in full:

> "The tonnages of coal indicated in this Contract are approximate and are based on the latest information available. The Corporation assumes no responsibility for quantities above or below the tonnages indicated".

Clause 12 "Inspection" - This clause required the contractor to "thoroughly familiarize himself" with operations at the wash plant and LBC before submitting a bid.

Clause 14 "Contract Cancellation" - Again this is a short but important clause and is out in full:

> "This contract may be cancelled by either party following written notice thirty (30) days in advance of such intention or by mutual agreement by both parties."

[12] With the exception of *"Item 4"*, being, "*the blending and banking of approximately*

3,906,228 tonnes of Prince Mine . . . ", the estimated volumes of coal to be handled during the term of the contract inserted in the purchase order were the same estimates as appeared in the original invitation for tender. *"Item 4"*, however, differed from the estimate in the invitation for tender where the amount was shown as *"approximately 4,503,300 tonnes of Prince Mine Selminco and Gillcraft products"*.

[13] Following issuance of the purchase order, Roper met with representatives from Devco during which there was discussion about Roper Ltd's inability to commence the contract on June 17, 1985, since it would not be able to have equipment on site by that time. Devco agreed to delay commencement of the contract until July 24, 1985, on Roper's assurance he would, by then, be able to have the necessary equipment on site. Devco arranged for the previous contractor, Burns, to carry out necessary operations at the LBC until Roper Ltd. was in a position to have its' equipment on site.

[14] Although the equipment eventually purchased by Roper Ltd. was not the same type and model of equipment as it listed in the response to the tender, no objection appears to have been taken with the equipment delivered to the site. The witnesses on behalf of Devco acknowledged they saw nothing wrong or inappropriate in the equipment Roper Ltd. brought on site.

[15] Roper Ltd. commenced work at the LBC in late July, during the period known as the *"Miner's Vacation"*, when traditionally the VJCPP was closed down, apart from some occasional lifting or loading of coal. This was viewed by witnesses on behalf of Devco as useful in enabling Roper Ltd. to further familiarize itself with operations at the VJCPP at a time when there were limited activities required to be carried out.

[16] In view of Devco's agreement to delay commencement of the contract with Roper Ltd. and the acknowledgement by a number of the witnesses called on behalf of Devco, that the equipment supplied by Roper Ltd., although not as described in the response to the invitation for tenders, appeared to be satisfactory for the performance of the contract, nothing herein turns on the delay in commencement of the work nor in respect to the type of equipment brought on site by Roper Ltd..

[17] Counsel for Roper Ltd. suggests, in considering the volumes to be handled pursuant to the contract, the court should regard the estimate in respect to banking and blending under *"Item 4"* as the amount shown in the invitation for tenders rather than the lesser amount shown in the purchase order. During the course of trial, counsel appeared to suggest the provision in the purchase order incorporating the terms and conditions contained in the specifications made this the relevant figure for purposes of the contract, rather than the figure set out in the purchase order. With counsel's suggestion, I cannot agree. Roper Ltd. acted in response to the purchase order and the contract between the parties is the purchase order, including, as provided in the purchase order, the incorporation of terms and conditions in the invitation for tenders. Clearly, this would require incorporation of such terms and conditions as were not inconsistent with the specific terms and conditions in the purchase order itself.

[18] If, on receipt of the purchase order, exception was to be taken, it should have been taken immediately and not at the time of this litigation. The fact the discrepancy was apparently not noticed, at least by the witnesses at trial on behalf of both Devco and Roper Ltd., is of no consequence since it was to the purchase order Roper Ltd. responded.

Roper Ltd. accepted its terms and conditions by proceeding to deliver the equipment and perform the services called for under the purchase order. By way of example only, if Devco had decided to delete one of the intended operations and had issued a purchase order accordingly, then it would be up to Roper Ltd. to decide whether to accept the scope of operations then contained in the purchase order or to indicate that since they varied with the invitation for tender it was no longer bound by its response. Roper Ltd.'s option was to reject the purchase order as not being in conformity with the terms and specifications in the invitation for tender. It chose not to follow this option. Even if Roper, as he testified, failed to notice the change in the estimates, it is not now open to him to select a figure which he considers more beneficial to his position. Roper Ltd. accepted the purchase order by acting under it. In fact, Roper, by written acknowledgement dated June 15, 1985, confirmed an amendment to the purchase order extending the time to have equipment on site to July 24, 1985. As such, counsel for Devco says, Roper Ltd. has confirmed in writing the purchase order, as amended, as being the contract between the parties. In any event, the relevant figures for purposes of considering the estimates made by Devco, and relied upon by Roper Ltd., are those in the purchase order.

(1) **The Nature of the Work**

[19] The work performed by Roper Ltd. essentially fell into four categories;

(a) Banking of Coal

[20] Banking involved transporting coal, by the use of coal haulers, from the metallurgical silo and the thermal chute to the banks, either at the LBC, "C" or "H" track. As the coal haulers transported the coal they were first required to proceed to the weight scale to be weighed. These weights were used in calculating the amounts owed Roper Ltd..

(b) Blending of Coal

[21] Blending involved combining the Lingan coal from the wash plant with the lower quality coal transported to the banks from Prince Mine. The coal was blended in order to produce the quality or grades of coal required by different customers. For this service Roper Ltd. was again to be paid on the weights determined at the weight scale.

(c) Lifting of Coal

[22] Roper Ltd. was required to lift coal from the banks into either railcars or other trucks for shipment to Devco's customers. Payment for this operation was again to be based on the tonnages lifted which were determined when the railcars or vehicles proceeded to appropriate weight scales.

(d) Rental and Standby

[23] Roper Ltd., as requested by Devco, provided hourly rates for the rental of the equipment it was supplying. Rental rates were to be paid when equipment was used for work other than services called for under the contract. There was also a standby rate that applied when equipment was required to be on site, and subject to certain minimum time

requirements, was not being used for reasons other than the breakdown of the equipment itself. These reasons could include, by way of example, lack of product, breakdowns in Devco's equipment or a lack of railcars or trucks into which to load product.

(2) The Scheduling of the Work

[24] Among MacVicar's responsibilities was setting, and providing to the shift managers, the schedule of work to be performed during each shift. In addition to the shift managers employed by Devco, Roper Ltd. employed shift managers to oversee performance by its employees in the carrying out the work required under the contract. The work schedules were made available to the Devco and the Roper Ltd. duty shift managers who then had responsibility to ensure the scheduled operations for their particular shift were carried out. Although there was some evidence suggesting the timeliness of delivery of the work schedules was less than ideal, it appears generally the shift managers involved received the schedules in advance of their shifts.

[25] MacVicar testified the expectation was the work scheduled for a particular shift would be completed during the shift and would not have to be carried over onto the next ensuing shift. He also testified, as did Martin and others, that customers of Devco required timely delivery of coal. In addition, it is clear that when ships arrived at the international pier in Sydney, of particular importance was the timely delivery of coal for loading on ships, since delays in loading could lead to demurrage charges being made against Devco.

[26] Also of importance was a need to continually empty the metallurgical silo and thermal chute and to transport the coal to the banks so that neither the silo, nor the chute, would become full. When the silo or chute was full of a particular type of coal, the plant would have to be shut down until space was made available by the emptying of the silo or chute. Also, on occasion, the metallurgical silo was used to hold thermal coal and in preparation for loading the thermal coal it was necessary to first unload or empty the metallurgical coal so there was not a mixture of the two grades of coal. It was testified that when there was such a mixture, either as a result of thermal coal being placed in the metallurgical silo or the thermal coal being accidentally loaded onto a bank containing metallurgical coal, the grade of that coal was reduced to the lower of the two grades resulting in financial loss to Devco.

(3) Contractor's Other Responsibilities

(a) Maintenance of the banks, ditches, railway tracks and roadways

[27] Clause 6, of the tender specifications, provided the contractor was responsible for " . . . *any part of the stockpile which is effected* [sic] *by adverse weather"*. Clause 8, which dealt with lifting, stated the successful contractor was to maintain *" . . . all access roads to and from the banking station that is to include snow removal when necessary and also the grading and general upkeep of roadways."* The contractor was also required, in respect to stockpiles from which coal had been lifted, to immediately service and recompact the banks in order to prevent spontaneous combustion or run off due to adverse weather that could cause deterioration in the quality of the product.

[28] In his post hearing submission, counsel for Roper Ltd. suggested it is significant that in

an earlier invitation for tender issued in 1984 there was different wording in respect to these obligations, submitting, as a consequence, Roper Ltd.'s responsibilities under the contract were not as extensive as they would have been if the wording in the 1984 invitation for tenders had been used. The contractual obligation to *"maintain the banks"*, is to be construed by the wording in the contract, and any variation in wording between the 1984 invitation for tenders and the 1985 invitation for tenders is inconsequential. Roper Ltd., under its contract, was required to maintain and service the banks and in order to do this it was necessary to remove snow from the areas in which coal was being banked and areas from which coal was being lifted.

[29] A further concern, with respect to the work, was the need to keep the banks compacted and thereby to reduce the build up of methane gas and the risk of fire within the banks. When a fire occurred in a bank, it was necessary to concentrate efforts on removing the area of the bank subject to the fire, so as to avoid it spreading to the remainder of the bank and thereby increasing the loss to Devco. Fire was avoided by compacting the banks as tightly as possible and this was particularly of significance in respect to the banking of the lower grade of coal received from the Prince Mine.

C. CONTRACT PERFORMANCE and PAYMENT

(1) Operational, Payment and Performance Issues

(a) Misrepresentation by Devco

[30] In his post-hearing written submissions, counsel for Roper Ltd. says the phrase at clause 8 of the tender specifications, requiring the contractor to provide or maintain sufficient equipment and personnel . . . to load railcars and/or trucks with coal from the *"various stockpiles at the banking station and other stockpiles at the Coal Preparation Plant until their depletion."*, is ambiguous in that, *"until their depletion"* can refer to either both the *"banking station"* and *"other stockpiles"*, or only to *"other stockpiles"*. Quite frankly, in the circumstance of this contract, there is no ambiguity and it is clear the reference to *" . . . until their depletion"*, obviously refers to *"other stockpiles at the Coal Preparation Plant"*, and not to the *"stockpiles"* at the *"banking station"*.

[31] Nevertheless, counsel refers to the parol evidence rule, citing Fridman, **The Law of Contract (Third Edition)**, at pp. 456 - 58:

> Parol extrinsic evidence may not be admitted where the effect of such evidence would be to contradict the written contract. It is otherwise where the purpose and result of allowing such evidence to be given would be to explain or interpret the true intentions of the parties, where such are not clear from the document.
>
> . . .
>
> Where the contract as written is ambiguous, extrinsic evidence can be admitted to resolve such ambiguity. But it must be ambiguity that exists in the language as it

stands, not one that is itself created by the evidence that is sought to be adduced.

[32] Counsel says, having regard to the extrinsic evidence, there was a collateral warranty or implied term, namely, that it was Devco's intention to deplete the stockpiles at "C" track and "H" track and to concentrate operations at the LBC. Counsel suggests this was a misrepresentation, citing ***BG Checo International Ltd. v. British Columbia Hydro & Power Authority*** 1993 CarswellBC 10 [1993] 1 S.C.R.12.

[33] There was no misrepresentation, but simply a subsequent decision by Devco to continue using "C" track and "H" track, notwithstanding its original intention had been to deplete the coal at these tracks and to concentrate activities at the LBC. Although several of the Devco witnesses testified they were not aware of any time frame for depletion of the tracks, I am satisfied the clear understanding at the time, at least as communicated to Roper Ltd., was that its activities would be limited to depletion of the tracks and it was not to be involved in the further banking and lifting of coal at "C" and "H" tracks. To the extent this decision by Devco caused additional expense to Roper Ltd., it is entitled to be reimbursed. There was, however, no misrepresentation that would entitle Roper Ltd. to any award other than for any increased costs caused by the apparent change of mind on the part of Devco.

(b) Bad Faith by Devco

(i) Unfairly Interpreting the Contract

[34] Roper suggests, in how he was treated, Devco showed bad faith, including attempting to *"get rid of him"*. In claiming an extra for bank maintenance, particularly in respect to snow removal and dust control, Roper, in addition to alleging this was not specifically provided for in the contract, says when Roper Ltd. was replaced by Burns the latter received additional payment for these services. The allegation Burns was paid additional monies for work, that under Roper Ltd.'s contract was interpreted by Devco to be included within the contract and not as additional work, appears in respect to a number of issues and a number of claims for additional payment by Roper Ltd.. What was or was not in Burns' contract, whether the contract preceding the period Roper Ltd. carried out operations at the LBC or following dismissal of Roper Ltd., is irrelevant. Each contract must be judged on its own and interpreted in the context of conditions and circumstances at the time of awarding the contract and the time for performance by each party of its obligations under the contract. In respect to this as well as other issues, Roper Ltd.'s contract must be interpreted in the context of its provisions as to whether work performed by Roper Ltd. was part of the contract for which Roper Ltd. was paid in accordance with its terms or constituted additional work for which Roper Ltd. was entitled to additional payment.

[35] Martin, during the course of his evidence, acknowledged that following his leaving Devco he became employed with Burns and for some time had received overtures from Burns, including during the period relevant to this proceeding. This fact does not support the apparent suggestion of counsel for Roper Ltd. that some how Devco interpreted its

contract with Roper Ltd. in bad faith by applying standards, terms or conditions differently to Roper Ltd. than to Burns. Burns' contract may have been worded differently and its terms may have been negotiated differently. Burns was hired to come on stream at a time when Devco had little alternative, since it had summarily dismissed Roper Ltd.. Whether that provided Burns with additional negotiating leverage, is both unclear and irrelevant. The fact is, Roper Ltd.'s contract must stand on its own and must be interpreted in that context.

(ii) Lack of Cooperation by Devco

[36] In his post-hearing submission, counsel for Roper Ltd. also suggests that from the moment Roper Ltd. arrived on the scene it was given a hard time. Everywhere the company turned it was *"up against a wall"*. Counsel refers to the evidence of Lawrence Digou, (herein "Digou"), the maintenance employee of Roper Ltd., saying to him it was obvious from the first day they were not welcome by the Devco staff and were not well treated, specifically by Martin and MacVicar, who he described as *"terrible people to deal with"*. The summary of Digou's evidence is not inaccurate. However, there is nothing in the facts to substantiate the allegation that Devco employees acted so as to place Roper Ltd. *"up against a wall"*. It is clear there were difficulties, including personality clashes, between some of the Devco employees and some of the Roper Ltd. employees. There were occasions of difficulties between senior Devco personnel and Roper himself. Nevertheless, these same senior employees had reviewed and accepted Roper Ltd.'s tender proposal and in the fall of 1985 accepted Roper's suggested amendment to the terms of payment to provide for a weekly draw to be set off against subsequent earnings.

[37] There was also reference to the area or location provided by Devco for Roper Ltd. to use in servicing its equipment and criticism by witnesses called on behalf of Roper Ltd. of the terrain and a lack of cooperation by Devco. On the evidence it appears the area Roper Ltd. was provided was the same location allocated to Burns for it to service its' equipment. In this regard, counsel for Devco also comments that under the contractual documents Devco had no obligation to provide Roper Ltd. with any area to service its' equipment.

[38] Considering the evidence, it is clear there was tension and personality conflicts between employees of the two parties. Nevertheless, I am not satisfied Roper Ltd. has established some basis for a claim against Devco based on these tensions and conflicts. Perhaps Devco may have done more; perhaps Roper Ltd. may have been more amenable and receptive to the problems its lack of performance was causing Devco in its operations, both in production and in marketing its products to its' customers. However, no claim has been advanced in respect to the latter, nor has a basis for a claim been sustained in respect to the former.

(iii) Improper Payments by Devco to Burns

[39] Counsel for Roper Ltd., queried the use by Devco of an existing unused purchase order as the means by which rental invoices submitted by Burns were authorized to be paid by Devco. Notwithstanding the substantial effort by counsel to paint this mechanism as

something untoward and ominous, there was in fact nothing to substantiate how Roper Ltd. was adversely affected by the methodology used by Martin and MacVicar, internally to Devco, to obtain approval for payment of equipment rented from Burns. How Devco internally supported the payment of invoices rendered by Burns is irrelevant to any claim by Roper Ltd. or defence by Roper Ltd. to any claim made by Devco. It is in fact irrelevant to this proceeding.

[40] Also raised by counsel for Roper Ltd., is the extent to which individual rental invoices are supported by documentation produced by Devco. Having in mind that these events occurred in excess of 15 years ago and that none of the shift managers were seriously challenged by counsel for Roper Ltd. as to their entries concerning the breakdown of the Roper Ltd. equipment, the rental of the Burns' equipment and in what functions and at what locations the rental equipment was used, I am satisfied that in general, rental charges were substantiated, subject, however, that the only rental for which indemnity may be claimed is for the rental of equipment used to perform a function contracted to be performed by Roper Ltd. or for which Roper Ltd. received credit for the tonnages banked, blended and/or lifted.

(c) <u>Rental of Equipment</u>

[41] When equipment breakdowns occurred, and there was need for additional equipment, in many cases MacVicar or the shift manager would speak to either Roper or the Roper Ltd. shift manager about the need for additional equipment and whether Roper Ltd. was able to provide it. Although in some instances Roper Ltd. was able to secure equipment from other sources, it is clear that in the vast majority of occasions Roper Ltd. was simply unable to provide substitute equipment as required. Devco then would contact Burns for the rental of equipment to continue operations while the Roper Ltd. equipment was down. On the evidence, it appeared Burns had decided it would not rent equipment directly to Roper Ltd., who had supplemented it as the contractor performing the banking, blending and lifting operations at the VJCPP. At the same time, Burns was employed on the site in performing other contracts and therefore, presumably, found it to be in its interests to rent equipment to Devco, notwithstanding the equipment would be used to carry out work that had been contracted to Roper Ltd.. Even to the extent there were occasions when representatives from Devco may not have directly communicated, in advance, with either Roper or the Roper Ltd. shift manager, I am satisfied, having considered the evidence and the shift manger's reports, that there were compelling needs for the rental of this equipment. Apart from a limited number of occasions when Roper Ltd. was able to secure equipment from third parties, it was generally unable to provide substitute equipment.

[42] During the course of reviewing some of the Devco shift manager's reports, counsel for Roper Ltd. noted apparent inconsistencies between the times stated on the rental invoice and the times reported in the shift manager's reports for the equipment being on site. To the extent there were such discrepancies, I find them insignificant and accept the invoices as reflecting the times charged to Devco by Burns for the rental of this equipment. Whether the discrepancy could be accounted by delays between the equipment arriving and being observed on site by the Devco shift manager, or for delays between when the rental was completed and Burns was able to remove the equipment from the site, is

irrelevant. Having regard to the circumstances under which the shift manager reports were prepared, namely, customarily at the conclusion of the shift, although not necessarily in respect to all the recorded information, and that the focus of the rental was to get the work done, I am satisfied, on the evidence and the balance of probabilities, that for the most part the rental times sufficiently approximate the period for which the rental equipment was provided. In fact, there was no evidence suggesting the amounts invoiced by Burns to Devco were not paid by Devco for rental. To the extent the rental was of equipment to carry out work contracted to be performed by Roper Ltd., or for which Roper Ltd. received payment for the tonnages handled, Devco is entitled to reimbursement for the expense.

[43] Devco's rental claim, in the amount of $135, 179.00 is allowed, subject to a reduction of $5,000.00 to account for any use of this equipment to perform services not included under the contract or for which Roper Ltd. did not receive compensation for any tonnages banked, blended or loaded.

(d) <u>Loading of C.N. Railcars</u>

[44] The C.N. railcars were required to be loaded within certain weight tolerances and when overloaded were returned from the weight station to have coal removed in order to ensure they were not overweight. Similarly, when cars were under loaded by weight, they would often be returned from the weight scale, because under the transportation contract between Devco and Canadian National Railways, the railway would charge for a full load of coal even though the railway car was not fully loaded. It was therefore important to properly load the cars, since there would be delays when the railcars were returned to either have more coal loaded or to have some coal removed in order to meet the tolerances for the particular railcar. On the evidence, this would disrupt other loading activities since the loading of the C.N. railcar was regarded as a priority, to ensure the coal reached the customer within the contract scheduled time periods. The Devco shift manager's shift reports document a series of loading adjustments caused by either overloading or under loading of railway cars. It appears suggestions were made to Roper Ltd. to have its operators weigh their loaders empty and then loaded and from this determine how many bucket loads would be required in order to load a railway car within its allotted tolerances. Roper testified this was done and yet the operators on occasion continued to have difficulty in loading the railway cars within the specified tolerances. He suggested, from an experience he had, that the weight of the coal would sometimes vary when it was taken from different banks, surmising this was on account of a varying water content of the coal within different banks. Admittedly, on the evidence, Burns' loaders, apparently both in the pre-Roper Ltd. contract as well as the post-Roper Ltd. contract period, also had difficulty in loading C. N. cars. However, what is relevant in the context of this proceeding is the marked increase in the frequency of loading failures by Roper Ltd., as compared to Burns.

(**e) <u>Use of Back End Trucks</u>**

[45] In his post-hearing submission, counsel for Roper Ltd. notes Burns, who was involved in the trucking of coal from Prince Mine to the LBC, was permitted to use *"back end*

dumping trucks", rather than being required to use *"bottom dump trucks"*, in dumping coal on the LBC banks. There was some evidence the graders used to level or blend the coal on the banks had more difficulty when the coal was left in a single large pile, rather than being spread into rows as would occur when *"bottom dump trucks"* were used. However, there is no evidence substantiating what additional cost, either in terms of time or wear and tear on the grader equipment, was caused by any *" apparent"* concession to Burns to permit it to use *"back end dumping trucks"*.

[46] Also, recognizing clause 5 permitted Roper Ltd. to use *"regular dumps and/or bottom dump trailers"*, there is no basis for the suggestion by Roper Ltd. that Devco, by permitting Burns to use *"end dump trucks"* unfairly or improperly added to its cost or expense. If Roper Ltd. could use such trucks, there was no reason why other contractors were not equally entitled to use such trucks. The use of *"bottom dumps"* may have made the work of grading or blending easier, but Roper Ltd. knew, by its own contract, that regular dumps were permitted.

(f) Use of Track Dozers

[47] The LBC was constructed with an asphalt pad, whereas the older "C" and "H" tracks had the coal banked on a ground base. As a result of the use of an asphalt pad, Devco had decided it would only permit rubber tired dozers so as to avoid damage to the asphalt pad, while track dozers had been used in working on "C" and "H" tracks. With this in mind, the invitation for tenders specifically provided that the successful bidder would have to use rubber tired dozers. During the course of the contract and in renting equipment from Burns, on occasion track dozers were brought on site and used on the LBC. When examined in respect to this apparent inconsistency, the Devco witnesses stated the urgency of the situation required the use of track dozers when rubber tired dozers were not available. In order to avoid damage to the pad, they were transported onto the banks on the LBC before being unloaded, rather than being driven over the asphalt pad onto the LBC banks. Apart from the obvious intention to suggest some form of discrimination in treatment, there is nothing in the use, in the circumstances as described by the Devco witnesses, of track dozers that would create a right of action or a claim to indemnity by Roper Ltd. from Devco.

(g) Emptying Silos

[48] In his post-hearing submission, counsel for Roper Ltd. states Devco would often require Roper Ltd. to empty the metallurgical or the thermal load outs *"in very short periods of time, rather than providing him with a full eight hour shift in which to do this and thereby placing excessive demands not otherwise required by the contract."* The submission is without any merit whatsoever. The submission would permit Roper Ltd. to leave the silo full, resulting in the wash plant closing down and with no responsibility on the part of Roper Ltd., until the expiration of the eight-hour shift. As already observed, in respect to the provisions dealing with work scheduling, Roper Ltd. was to arrange its operations to coincide with the schedule of the VJCPP. The contractual documents clearly stipulate the schedule was to be set by Devco, not by Roper Ltd., and even during the course of his evidence, Roper never suggested it was Roper Ltd., rather than Devco, that determined

when work was to be performed. The suggestion also belies common sense having regard to the acknowledged effects of a full silo or chute on the operations of the wash plant, namely causing it to shut down until there was a silo or chute available to receive processed coal product.

(h) Continued Use of "C" Track and "H" Track

[49] As noted, the contract provided that the contractor was to maintain sufficient loading equipment and personnel on each shift to load railcars and/or trucks with coal from the various stock piles at the banking station and other stockpiles at the VJCPP until their depletion. As commented on by counsel for Devco in his post-hearing submission, both Martin and MacVicar testified it had always been Devco's intention that lifting may have to be carried out on a number of different banks at the same time. However, they also testified, as previously noted, on their understanding Devco intended, at some point, to concentrate operations at the LBC, although adding they were not aware any time period for such concentration had ever been set. Roper testified he had assumed from his discussions, apparently with MacVicar and perhaps others, that work would be concentrated at the LBC and he would only be involved in "C" and "H" tracks until they were depleted.

[50] Clearly, Roper Ltd. was entitled to assume its activities on "C" and "H" tracks would be limited to depletion and there was nothing in the contractual documents, nor the evidence, to support any suggestion or requirement it would have to continue banking at either of these tracks. The reference to *"other stockpiles at the Coal Preparation Plant"*, clearly refers to "C" and "H" tracks and the reference to depletion clearly implies activities would be limited to lifting coal rather than to banking additional new loads of coal.

[51] I am satisfied, to the extent Roper Ltd. was required to lift from "C" and "H" tracks, this was consistent with its obligations under the contract, providing the coal lifted had existed on the tracks at the time Roper Ltd. came on site. To the extent there was any banking or other lifting at either "C" or "H" track, this was additional to the contract. Although these were not, as suggested by Roper Ltd.'s counsel, some kind of justification for the equipment failures, I am satisfied there was additional time, effort and expense incurred in such activities.

[52] In a letter written to Martin on January 27, 1986, Roper voiced a number of concerns with the operation of the contract. In respect to the continued use of "H" track, he wrote:

> We also wish to bring your attention to the change in operations related to the banking/blending and lifting operations at the Victoria Junction Coal Preparation Plant. Currently only one pad is being fully utilized at the LBC while the other pad is substantially (over 75%) under utilized. We have been directed to build several new banks on H-track which we understood was to be eliminated after the stockpile on hand at commencement of the contract had been depleted.

[53] The concerns expressed by Roper were never contradicted nor responded to by Martin, nor apparently by anyone else at Devco.

[54] The issue, however, is not so simple since Roper Ltd. apparently was paid the tonnages

that were banked and lifted and any claim for compensation would therefore only relate to any additional cost incurred in carrying out this banking or additional lifting at other than the LBC. Similarly, Roper Ltd. would not be responsible for the rental of any equipment from Burns, or any other contractor, that was used in banking coal at either "C" or "H" track or in lifting any such additional banked coal except only to the extent it received credit for the volumes handled.

[55] By stating in the contract Roper Ltd. was required to lift from these other stockpiles until their depletion, Devco clearly suggested, and Roper Ltd. was entitled to assume, that no additional coal would be added while the two tracks were being depleted. As noted, however, there has to be an adjustment to recognize Roper Ltd. received compensation for coal banked and lifted at "C' and "H" tracks, since this coal would have been weighed and credited to Roper Ltd.'s account. As a consequence, Roper Ltd. would have suffered some, albeit apparently only a small loss, by the ongoing use of "C" and "H" tracks.

(i) <u>Restoring Conditions of Banks After Termination</u>

[56] Hirtle testified that at the time Roper Ltd. was terminated, the banks at the LBC were in a *"God damn mess"*. Replete in the documentary evidence introduced at trial, are references to complaints by the Devco shift managers, as well as others, about the lack of maintenance of the banks and the condition to which they had deteriorated. It is therefore not surprising that in March 1986, when Roper Ltd. was terminated, there were again concerns as to the condition of the banks and the need for maintenance.

[57] MacLellan prepared a memo to Walter MacKenzie, Vice President of Surface Operations, in which he outlined a summary of the work he believed had to be carried out at the LBC to restore the banks. Counsel notes that in the contract entered into with Roper Ltd., clause 12 stated that the contractor was to familiarize themselves with the operation of the VJCPP and to inspect the banking and lifting areas. The clause then continues:

> He should point out areas in the banks where he feels hot spots or similar problems may arise. These areas, where necessary, will be immediately fixed by the Corporation. Thereafter, the Contractor shall be responsible for all Coal in banks at the Victoria Junction Coal Preparation Plant whether actually placed there by him or not.

[58] The evidence of Maxner, Hirtle and MacLellan was to the effect it took some time to restore the banks. Counsel for Roper Ltd. notes the estimate prepared of maintenance costs appears to postdate the bill that was forwarded to Roper Ltd. for these extra costs and therefore, presumably, notwithstanding the submission of the invoice to Roper Ltd., the work had not by that time actually been completed. Devco acknowledges it does not have the precise costs associated with the work carried out to restore the banks and the claim presented is based on the cost estimates that were developed by the contractor in consultation with MacLellan.

[59] Counsel for Roper Ltd. also suggests that some of the work, namely, *"snow removal from bank faces"* was not included in the Roper Ltd. contract as Roper Ltd. was responsible only for snow removal from access roads. As noted earlier, this suggestion is without merit and clearly Roper Ltd. was responsible for the restoration of the banks, including

removal of snow. Nevertheless, it is also clear there is no evidence that all the work contained in the estimate was necessarily done or carried out, or in fact had to be carried out in view of other activities carried out in banking, blending and lifting by Burns following termination of Roper Ltd.. Devco is entitled to some compensation. At issue is whether it is entitled to the full amount claimed, $66,582.00, or some lesser amount. Having regard to the evidence relating to the circumstances of this claim, I would reduce the amount by $20,000.00, leaving a net claim of $46,582.00.

(j) Additional Devco Crew Costs to Adjust C.N. Cars

[60] Devco claims the sum of $3,062.00 as compensation for costs to adjust C. N. cars. Devco submits the basis of this claim is the testimony of Devco witnesses in noting failure to properly fill C.N. cars would result in extra costs to Devco. Reference was made to a letter of November 5, 1985, by MacLellan, that cars being returned for adjustment resulted in costs to Devco, as well as disruption of operating schedules and a letter of February 19, 1986, by Martin writing about the internal costs to Devco. Although there was substantial evidence, both oral and documentary, supporting the fact railway cars were returned for adjustment and sometimes the same cars were returned for adjustment on a number of occasions and this clearly would have cost implications to Devco, I am not satisfied there was, in the evidence, substantiation for this particular charge and therefore this claim for reimbursement is not allowed.

(k) Dead Freight - C.N. Cars

[61] As noted by counsel for Devco, Martin, MacVicar and MacLellan testified about problems arising from the improper weighing of cars and that when underweight Devco would be liable for dead freight. Dead freight referred to the under loading of the railway cars for which the C.N. levied *"full car"* charges to Devco. Roper Ltd. was advised of these charges on March 10, 1986, in other words, one day preceding its termination. Notwithstanding the lack of merits in counsel for Roper Ltd.'s argument, that the requirement for properly loading the C.N. cars was unreasonable on Devco's part, I am nevertheless satisfied there is a lack of documentary and evidentiary support for the particular charges sought to be claimed by Devco against Roper Ltd. in respect to this item.

(l) Damage to Devco Railcars

[62] On the evidence of Devco witnesses, it appears there was damage caused to certain railway cars by Roper Ltd.'s employees, presumably while carrying out the loading of the cars themselves. There was evidence of a letter dated November 21, 1985, particularizing a claim for reimbursement of damages in the amount of $735.00 and notwithstanding Roper Ltd.'s denial of responsibility, I am satisfied sufficient evidence has been brought forward to substantiate this claim

(m) Cost of a Steel Cable and Sling

[63] MacLellan testified about an incident when Roper Ltd. damaged a steel cable it borrowed from Devco. MacLellan testified Devco had to purchase a new cable, for

which it now claims the sum of $697.00. Counsel for Roper Ltd. submits no invoice has been produced substantiating the purchase of a steel cable and sling to replace the damaged cable. Nevertheless, I am satisfied on the evidence that the cable was damaged and Devco is entitled to be compensated, whether or not a replacement cable and sling were in fact purchased. In the absence of evidence contradicting the amount of $697.00 as the cost that would be required to replace the cable and sling, the amount is allowed.

(n) Overpayment

[64] In the fall of 1985, Roper, at a meeting with Devco, indicated he was having financial difficulties and requested a weekly draw to be credited against the amounts owed by Devco to Roper Ltd. for work it performed under the contract. In his post-hearing submission, adjusted during oral submissions, counsel for Devco calculated the overpayment of these weekly draws as follows:

Amount advanced by Devco to Roper under P.O. 44851:**$1,047,730.73**

Contractual entitlement

Banking 612,540 tonnes @ 35¢	$ 214,389.00
Blending 589,572 tonnes @ 20¢	$ 117,914.00
Stacker 14,982 tonnes @ 55¢	$ 8,240.00
Lifting 1,447,599 tonnes @ 18¢	**$ 260,567.82**
Subtotal	**$ 601,110.82**

Extras:

Standby	$ 35,413.00
Rentals	$ 191,886.00
Trucking to Pioneer	$ 56,354.00
Subtotal	**$ 283,653.00**

OVERPAYMENT $ 162,966.91

[65] Counsel have agreed on the amount paid by Devco to Roper Ltd. that is relevant in calculating the Devco *"overpayment claim"*. Although not disputing there was an overpayment which is now due by Roper Ltd. to Devco, counsel for Roper Ltd. suggests there are errors in the calculation that would have the effect of reducing the amount of the overpayment.

[66] The calculations of the actual tonnages handled by Roper Ltd. were apparently made by reference to a database created by counsel for Roper Ltd.'s law firm (herein "Sampson McDougall Database"). On the evidence it appears a number of services performed by Roper Ltd. were not included as part of the general banking, blending and lifting figures included under the "contractual entitlement" calculations. These services, not being part of the specific obligations under the contract were apparently treated in the Sampson McDougall Database as additional services or extras. These additional services, counsel for Roper Ltd. asserts, should be added to the agreed services in determining the offset or contra against the amounts paid by Devco. Although not expressly agreeing, counsel for

Devco has not seriously contested the suggested composition of the Sampson McDougall Database.

(i) Trucking to Pioneer Coal Company

[67] It appears Roper Ltd. trucked coal, apparently amounting to 212,754.4 tonnes, from the wash plant to the Pioneer Coal Company, "(herein "Pioneer"), operation and these services, although provided for in an amendment to the contract, were treated separately in the Sampson McDougall Database. Although Roper Ltd. invoiced the majority of the trucking at the contract rate of thirty (30¢) cents per tonne, it billed some of the trucked coal to Pioneer at sixty (60) cents per tonne and other trucking at an hourly rate of seven-five ($75.00) dollars per hour. Roper, having apparently been advised to expect to truck approximately 3,000 tonnes per shift, had unilaterally made adjustments in the rate Roper Ltd. was charging because of the approximately two-thirds reduction in the volumes it was handling. There was no justification or basis for changing the agreed rate of compensation, and it is on the agreed rate of thirty (30) cents per tonne the value of these services are to be calculated. The contra or offset is therefore 63,826.32.

(ii) Banking Pioneer Fines

[68] It also appears that banking of the Pioneer coal was another service performed by Roper Ltd., to be charged to Devco, that was not included in the general banking, blending and lifting calculations in the Sampson McDougall Database. On the evidence it appears Roper Ltd. banked approximately 117,032.2 tonnes at an agreed rate of twenty (20) cents per tonne for a total value of 23,406.44.

(iii) Rejected Roper Charges

[69] Other suggested discrepancies in the overpayment calculation relate to a number of charges made by Roper Ltd. which were rejected, in whole or in part, by Devco. To the extent Roper Ltd. is entitled to claim for any of them, then the amount or value of such will serve to reduce the amount of the overpayment.

(a) Lifting for Sysco Trucks

[70] Counsel for Roper Ltd. suggests that omitted from the Devco analysis of the overpayment are some invoices issued by Roper Ltd. for the lifting of coal into Sysco trucks, including some loading services which were calculated at double the rate provided in the contract and others at an hourly rate of $65.00 per hour. Counsel asserts Roper Ltd. is entitled to compensation for lifting onto Sysco trucks at an hourly rate, adding his understanding, that when Roper Ltd. was replaced by Burns it was paid an hourly rental for lifting to Sysco truck. For reasons already reviewed, how Burns was paid is irrelevant in determining Roper Ltd.'s entitlement to compensation. There is nothing in the contract entitling Roper Ltd. to an hourly rate, and as suggested by Devco's counsel, the compensation for lifting into trucks or railcars is to be calculated by applying the lifting rate to the quantities loaded. Roper Ltd.'s counsel concludes his submission on this question:

In the event this Honourable Court finds that Roper was not entitled to bill this work at an hourly rate, Roper claims payment for the work at a per tonnage rate as confirmed by the tonnages moved in the coal handling statements.

[71] Counsel in saying the tonnages were part of the services performed by Roper Ltd., but not incorporated in the Devco calculations, submits Roper Ltd., at least in the alternative, should be entitled to credit for the tonnages lifted at the rate per tonne provided in the contract. In their submission, Devco disputes any entitlement to an hourly rate, but make no comment on whether their calculation of the credits, either by way of contractual entitlement or extra, included loading of all the coal into the Sysco trucks.

[72] Roper Ltd.'s Counsel does not identify the coal handling statements to which he is referring. Devco's counsel, in his written submission suggests Roper Ltd., until March 1986, charged for lifting into Sysco trucks on the basis of the tonnages lifted. It was only in March 1986, counsel suggests, Roper Ltd. unilaterally commenced charging an hourly rate for lifting coal into trucks for delivery to Sysco, and only these changes were rejected.

[73] Roper, on being cross-examined in respect to records from his office containing reference to lifting into Sysco trucks off "C" track and "H" track, indicated that although it looked like he was advancing a claim he did not have any "backup documentation" to support the claim. He did not appear to take issue with counsel's suggestion Roper Ltd. had been paid the earlier times it loaded coal into Sysco trucks. As such, I am satisfied, the claims rejected by MacVicar, on the basis they were advanced as hourly charges are represented by three invoices dated in March 1986 totalling 110 hours at $65.00 per hour. The coal handling statements for the coal lifted into the Sysco trucks show a total of 7,688.2 tonnes lifted into Sysco trucks between February 15, 1986 and March 11, 1986. At the contract rate for lifting of eighteen (18) cents per tonne, the total to which Roper Ltd. is entitled is $1,383.88. Admittedly, the Roper Ltd. records appear to suggest substantially greater tonnages. However, in light of Roper's uncertainty as to the nature and quantification of this portion of the claim, and recognizing the quantities recorded in the Coal Handling Statements introduced in evidence in support of the tonnages lifted by Roper Ltd. into Sysco trucks during this period and absent any calculation by counsel for Roper Ltd. suggesting any higher figure, I am only prepared to allow the sum of $1,383.88 as a credit or contra for these services.

(b) Hourly Rental and Standby

[74] Counsel for Roper Ltd. originally submitted the calculation of the overpayment in respect to the offset for standby and rentals did not take into account certain errors acknowledged by MacVicar during his testimony. The parties, in their post-trial written submissions, appear to agree on a credit of $191,886.00 in respect to rentals and $35,413.00 in respect to standby, and these amounts are allowed.

(c) Fuel Tax Increases

[75] The contract indicated Roper Ltd. was entitled to an adjustment in the event of an

increase in the cost of fuel or wages. On November 12, 1985, Roper Ltd. was reimbursed in the amount of $1,812.00 for an invoice issued in respect to increases in the cost of fuel. However, subsequent invoices issued by Roper Ltd. with respect to additional fuel increases, totalling $6,402.16, were not approved, nor included in the calculation of credits to be applied against the payments made to Roper Ltd.. MacVicar testified he was not aware why these invoices were not approved. In the absence of evidence to substantiate the non-approval of these invoices, Roper Ltd. is entitled to have these fuel increases included as an additional credit

(d) Lifting for Brookfield

[76] Again it appears the coal lifted for delivery to Brookfield was included in the Sampson McDougall Database as an extra and, as such, Roper Ltd. is entitled to a credit. The value of this credit is $2,016.13.

(e) Snow Removal

[77] Roper Ltd. received an order under purchase order no. 449952 with respect to providing additional snow removal services. It appears these services, apparently in the amount of $15,750.00, have not otherwise been included in the contra calculations. Roper Ltd. is entitled to the further adjustment.

(f) Carbogel

[78] Again, counsel for Roper Ltd. suggests services provided in respect to snow removal and material handling at the Carbogel Plant pursuant to purchase order 44681, in the amount of $3,505.93, are not shown as a credit in the calculation of the overpayment. Roper Ltd. is entitled to this further credit.

(g) Invoice 023

[79] Evidence was introduced of an invoice, being invoice 023, issued to Devco on September 24, 1985, with respect to banking and blending, in the total amount of $4,916.00. MacVicar testified this invoice had not been paid, nor included in the calculation of the credits against the payments made to Roper Ltd., but he was unable to provide any reason as to why this invoice should not be incorporated in the offsetting credits. As suggested by counsel for Roper Ltd., in the absence of any explanation as to why this invoice was not included as part of the services performed by Roper Ltd. and for which it was entitled to a credit, the reduction in the overpayment will be increased by the amount of this invoice.

(h) Overtime Charge

[80] Included among the invoices issued by Roper Ltd. was an invoice dated December 17, 1985, in the amount of $14,826.00 purporting to be for overtime charges. There was no credible evidence in support of this invoice. Therefore it is not allowed and is not to be included as part of the offset to the amounts paid to Roper Ltd. in calculating the overpayment.

(i) Radial Bin Stacker

[81] One of the services to be performed by Roper Ltd., pursuant to the contract, was the banking of domestic screened coal produced by the wash plant. In order to bank this product Roper Ltd. was required to purchase a radial bin stacker. Roper Ltd. had used it for some time, when Devco decided it no longer wished to continue marketing this product. In the fall of 1985 Devco entered into an arrangement with Pioneer in respect to the domestic screening operation. At the time Devco advised Roper Ltd. the radial bin stacker would no longer be necessary. Roper responded that in the circumstances Roper Ltd. was entitled to compensation since the radial bin stacker had been acquired for purposes of the contract with Devco and continued to incur financing and other charges in respect to its acquisition.

[82] Roper Ltd., beginning in October, to and including early November 1985, used the radial bin stacker on behalf of Pioneer and for this charged an hourly rate. In early November, the stacker was removed from this operation and Roper, by correspondence of January 27, 1986 to Martin, again raised the issue of compensation with respect to having acquired the stacker for purposes of the contract with Devco. He requested a fee of $1,500.00 per month for the months of December 1985 to an including March 1986.

[83] Counsel for Devco, in response, notes that following the meeting in November between representatives of Devco and Roper Ltd., at which time the issue of compensation for the stacker was raised by Roper, an invoice was presented to Devco, dated December 9, 1985, in the amount of $24,181.36. MacVicar testified to having some recollection this represented a settlement of the issue of the stacker and MacLellan testified to a similar effect. Although both MacVicar and MacLellan testified to some understanding the invoice represented a settlement, their evidence was far from clear and there was no indication they had any direct involvement, from the perspective of Devco, in settling the claim by Roper Ltd. for compensation for Devco's decision to discontinue the marketing of a domestic screened product and thereby the need for the use of a radial bin stacker. Roper Ltd. denied this was a settlement, indicating the invoice represented the hourly rate for the use of the stacker by Pioneer following October 1, 1985. Roper said he was advised the charge for the use of the stacker was to be made to Devco and therefore, although the services were performed for Pioneer, the invoice was issued to Devco for these services. The invoice, he stated, did not represent a settlement of the claim for compensation from Devco.

[84] The evidence this invoice constituted a settlement is unsatisfactory and in the circumstances, I am not prepared to recognize it as such. I accept the evidence of Roper it reflected charges for the use of the stacker by Pioneer and as such, Roper Ltd. is entitled to some form of compensation for the discontinued need for the use of the stacker, as a result of the decision by Devco to withdraw from the marketing of a domestic screened product. On the evidence, the stacker was not used during the months of December 1985, nor January, February and March of 1986 and the standby rental of $1,500.00 per month is allowed and is to be included as part of the offsetting credit against the amounts paid by Devco to Roper Ltd..

(2) OVERALL CONTRACT PERFORMANCE

(a) By Roper Ltd.

[85] As part of their duties both Devco's shift managers and Roper Ltd.'s shift managers prepared shift reports that summarily reviewed the activities of the shift, including the work carried on during the shift and the status of the equipment, including occasions when equipment was supplied by third party contractors, particularly Burns. During the period Roper Ltd. performed under the contract, namely from the end of July 1985, until terminated by Devco on March 11, 1986, the shift reports record an increasing series of minor and major breakdowns of Roper Ltd.'s equipment. Roper Ltd. only being modestly successful in obtaining substitute or third party rental equipment, it was necessary for Devco, largely from Burns, to bring additional equipment on site to have the work carried out and completed.

[86] Ted Sobek, (herein "Sobek"), a Senior Mining Engineer, employed by John T. Boyd Company testified, on behalf of Devco, in respect to an assessment and review rendered on Roper Ltd.'s performance. In the report, (herein the "Boyd Report"), and repeated during his evidence, he reviewed the equipment provided by Roper Ltd. and concluded " *. . . the equipment selected could have performed within the parameters as defined by the Tender, provided the equipment was in good condition and operated within industry standards."*

[87] The Boyd Report provides a summary of the apparent availability of the major pieces of equipment used by Roper Ltd. in the performance of the contract.

Equipment Availability

Period: August 3, 1985 through March 8, 1986

	Availability (%)	
Units	Weekly Range	Weekly Average
Front-end Loaders	39 to 100	66
Dozers	24 to 100	81
Coal Haulers	0 to 100	65
Graders	91 to 100	96

[88] Sobek testified the shift reports' documentation of equipment breakdowns and failures were the basis for his calculations. He assumed if there was no reference to equipment failure or breakdown, the equipment would then have been in use. Therefore, he suggests, the figures may be weighed in favour Roper Ltd. since they assume the equipment was operational and working unless noted otherwise. The Boyd Report, in

respect to equipment availability, then concludes:

> Conclusion
>
> Acceptable industry standards for a range of mechanical availability would be 80 to 90 percent. Many manufacturers warrant (when utilizing their maintenance services) in excess of 90 percent. We consider availabilities less than 80 percent below industry standard and less than 70 percent as unacceptable. Typically, less than 70 percent over long durations indicate fundamental flaws in the equipment and/or maintenance practices.

[89] Harry W. Rider, P. Eng., (herein "Rider"), Senior Consultant with Acres International, testified to a report he prepared on behalf of Roper Ltd., in which he reviewed, among other things, his opinion as to the capability of the equipment provided by Roper Ltd. to perform the contract. Rider had occasion to review the discovery evidence of Gordon Keddy, a heavy equipment mechanic, now deceased, who at the relevant time was employed by Atlas Equipment and had occasion to work on the equipment purchased by Roper Ltd.. In respect to Mr. Keddy, Rider noted having known him for twenty years, describing him as " . . . *one of the most capable heavy equipment mechanics in this area, very knowledgeable around most types of construction and forestry equipment."* Rider, referring to Mr. Keddy, then continues:

> In his opinion, when this equipment arrived at the Victoria Junction Plant in 1985 it was very reasonable equipment, capable of carrying out the job intended. He does mention that as time went on the condition of the equipment did deteriorate.

[90] In his discovery, Mr. Keddy, on being examined by the then counsel for Devco, testified Roper Ltd. had his own mechanic, Digou, and that he was called out when there were major problems or too much work for the on site mechanic to complete. During the course of his examination, he testified:

> Q. Do you remember from your recollection of the equipment out there, are you able to say whether some of the equipment out there was in better shape than others?
>
> A. It was basically all the same, I think. I don't know if one is any better than the other in the beginning.
>
> Q. You say in the beginning? Did that change over a period of time?
>
> A. Drastically. It seemed like now, like I say, when he started the job, all the equipment landed there, basically all the same. One didn't seem much better than the other. But then they started breaking down all over the place, but I mean, I guess the ones that were used the most would probably be the one that was broke the most, you

know. The same with anything else. If anything is used more, that's bound to break.

[91] Later, on being asked to compare the work he carried out on Burns' older equipment, after Burns returned to the site following the termination of Roper Ltd., with Roper Ltd.'s equipment, he testified:

Q. Are you able to compare his older equipment with Mr. Roper's older equipment?

A. There wasn't a whole lot in the difference. They were all used and whatever, you know.

Q. Was it any better?

A. I wouldn't say in the beginning, no. It was no better.

Q. As time went on?

A. As time went on, Roper's equipment seemed to fall apart awful quick. Whether that was through maintenance or I don't know.

[92] The record of breakdowns by Roper Ltd.'s equipment is apparent on reviewing the shift manager's reports. Although noted in more detail in the Devco shift manager's reports, the reports prepared by the shift managers for Roper Ltd. also list a series of breakdowns in equipment resulting in the need to bring substitute equipment on site to carry out the work of banking, blending and lifting coal at the LBC. Commenting on a report prepared by Grant Thornton LLP, Sobek, in respect to the condition and breakdowns of equipment, noted:

It is our opinion that excessive wear and tear and breakdowns are the result of purchasing used equipment which we consider to be beyond their normal (industry standard) useful and productive lives.

[93] The inability of the equipment to perform as required is evident from the tabulation of breakdowns noted in the various shift reports. As noted by counsel for Devco in his pre-hearing submission, the breakdowns began in early August and although relatively minor at this point, increased in frequency and severity until the contract was terminated in March 1986.

[94] Clearly Roper Ltd. was unable to perform its obligations under and pursuant to the contract.

(b) <u>By Devco</u>

[95] In addition to raising issues concerning the nature and scope of maintenance of the banks

required to be performed by Roper Ltd. pursuant to the terms of the contract, the area designated by Devco for Roper Ltd. to carry out maintenance on his equipment, the suggestion that somehow, in comparison to Burns, Roper Ltd. was poorly treated by Devco, and issues of bad faith, unfair treatment, and misrepresentation by Devco, counsel also raises a breach of contract and/or negligent misrepresentation on the part of Devco. The suggested breach of contract arises from the stated banking, blending and lifting requirements set out in the original invitation for tenders and repeated in the purchase order, with the one modification noted earlier, as compared to the actual tonnages. Roper Ltd. says the represented tonnages amount to negligent misrepresentation and/or breach of contract on the part of Devco.

[96] During the period Roper Ltd. performed under the contract, there was undeniably a very substantial shortfall in the tonnages generated by Devco as compared to the tonnages set out in the purchase order. In his submission, counsel for Roper Ltd. suggests that during the intended life of the contract, namely, June 1985 to March 31, 1988, the volume of product handled by Roper Ltd. and its replacement, Burns, only reached 70% of the numbers provided for in the invitation for tenders and that during the time Roper Ltd. was on site, the tonnages handled only approximated 60% of the tonnages to be expected, if the total forecasted tonnages were averaged over the period Roper Ltd. performed. Roper testified that in composing his rate calculations, he assumed the represented approximate tonnages were relatively accurate, having incorporated an allowance of 10% to 15% in finalizing his calculations. On the other hand, Devco says the estimates were approximate only and refers to clause 10 of the General Conditions and Specifications.

[97] The source of the estimates used in calculating the amounts shown in the invitation for tenders and purchase order could not be identified by any of the witnesses. MacVicar, who did the calculations that were eventually used, testified they were based on information he received from the production and marketing, as well as the wash plant, divisions of Devco and he simply took their figures and calculated the amounts shown in the contract as well as the invitation for tenders. He testified, despite efforts to obtain the documents on which he relied, they have not been located and he was unable to provide the written material, if there was any, on which he relied in preparing his figures.

[98] The issue of tonnages was raised by Roper shortly after commencing work and appears to have continued to be an issue up to the time of termination of the contract. The notes of a meeting held on September 6, 1985, between representatives of Devco and Roper Ltd., including Roper, record his accountant, Mr. Schibler, stating “banking is far below estimate” and “causing cash flow problems”. He apparently suggested “a draw system be set up to be adjusted every six months”.

[99] It appears the shortfall in tonnages may have formed some of the justification for Devco agreeing to the draw in the fall of 1985. Certainly Roper and his accountant were concerned with the lower tonnages and their effect on Roper Ltd.’s cash flow during the period.

[100] Counsel also suggests the statement in the contract that the tonnages of coal represented the “*latest information available*” was untrue and amounted to a negligent misrepresentation.

[101] Counsel for Roper Ltd., in cross examining Devco witnesses, introduced the Devco

Annual Corporate Plan in which there were estimated volumes, somewhat less than those used by MacVicar in his calculations. Counsel in his post hearing submission suggests the numbers appearing in the corporate plan were therefore more realistic and would have been the *"latest information available as to the anticipated production and marketing by Devco for the intended life of the contract."* As noted, there is no supporting documents or other evidence as to the source of the numbers used by MacVicar other than his testimony they were compiled from information provided by unidentified others at Devco. Nevertheless, there is no basis for counsel's suggestion that because the figures in the corporate plan may have turned out to be more accurate in relation to the actual tonnage handled during the intended life of the contract, that they were, therefore, the *"latest information available"*. It has not been established that the representation in the invitation that the amounts were the *"latest information available"*, was untrue.

D. CONTRACT TERMINATION

[102] On March 11, 1986, Roper was asked to attend at the offices of Devco where he was presented with a letter advising his services were immediately terminated and Roper Ltd. was to have its equipment removed from the site. Clause 14 of the specifications stipulated the contract *"may be cancelled by either party following written notice thirty (30) days in advance of such intention or by mutual agreement by both parties."* Devco says the 30 days notice was not required because of Roper Ltd.'s breach of the contract, which breach was reflected in its failure to perform in accordance with the contract terms, and in particular, *"failing to have sufficient operable equipment"*. Counsel refers to Fridman, **The Law of Contract**, ***supra***, at p. 597, in support of the proposition that *"breach of condition discharges the innocent party from further performance, essentially terminating the contract while leaving alive matters of liability and exclusion clauses"*. Since the contract was terminated because of Roper Ltd.'s breach there was no requirement to provide the 30 days notice.

[103] Roper Ltd., on the other hand, says the termination was without justification and amounts to a breach by Devco of its obligations under the contract.

[104] As to whether there is any obligation on a party terminating a contract for breach to give any kind of warning to the other party, Jewers, J., in ***Montgomery Kone Elevators Co. v. Great West Life Assurance Co.*** (1992), Carswell Man. 297 at para. 25, cites from Waddams, **The Law of Contract** (2nd ed) 448:

> Another question is whether the party not in breach is required to warn the other before terminating. As a general rule performance is due without request. The debtor must seek out his creditor. Consequently, if performance is substantially defective, the other party may terminate, even if ignorant of the deficiency at the time of termination. It may, however, be a harsh result for a party in breach to lose the whole benefit of his contract, and in some cases a duty to warn has evolved. A buyer of goods is obliged, if no delivery date is fixed, to take delivery within a reasonable time, but a seller is not allowed quietly to let a reasonable

time elapse and then terminate without warning. The seller must give notice requiring the buyer to take delivery before he can terminate. Where, under a land sale agreement, no closing date is fixed, or the original date waived, the party waiving it may resume his strict rights, but only on reasonable notice. Similarly, where an employee might not realize that his work is seriously deficient, an employer must give a warning before summary dismissal. These cases appear to be instances of a limited right to 'cure' defective performance, a right more widely recognized in American jurisdictions.

[105] One of the issues considered by Jewers, J., was the fact there was no prior intimation that matters had reached the state where the defendant was even contemplating taking the drastic step of cancelling the contract with the plaintiff. He was satisfied the cancellation came as a complete shock to the plaintiff's manager. Nevertheless, he found for the defendant and upheld the termination.

[106] Devco says if it was not entitled to immediate termination, pursuant to clause 14 it was entitled, on its own, to terminate the contract on 30 days written notice. It suggests, therefore, its only failure would have been the omission to give the 30 days notice, rather than the fact of termination itself. Counsel cites from the decision of the British Columbia Court of Appeal in ***Reeves v. Dawson Creek (City)***, [1988] B.C.J. No. 2256, upholding a decision of Justice MacKinnon at [1987] B.C.J. No. 2665. At trial, Justice MacKinnon found a binding contract for a five-year term which included a provision for termination on 30 days notice. He awarded the plaintiff damages for 30 days loss of income because of the failure of the City to provide any notice.

[107] Counsel for Roper Ltd. says Devco not having invoked the 30-day contract cancellation provision, clause 14 cannot apply to limit the damages payable. Counsel's written post-trial submission continues:

> The current situation involves a commercial contract between two parties which is not akin to an employment contract, and to which precedent cases involving employment contracts should not be seen to apply. In a wrongful termination of an employment contract, principles of law surrounding payment in lieu of notice are crucial. In this case, damages payable for wrongful termination of a commercial contract are measured by determining what benefits the wronged party would have received had the contract been completed as per its terms, and are not limited by any notation of a reasonable notice. To allow Devco to now rely on the Contract Cancellation clause as essentially a reasonable notice, would be to import principles of law relating to employment contracts into a commercial contract context, and would be inappropriate.

[108] In support of its position for Roper Ltd., counsel refers to the decision of the British Columbia Supreme Court in ***Northland Kaska Corp. v. Yukon Territory*** 2001 Carswell BC 1477, 2001 BCSC 929, where the plaintiff had failed to comply with the notice requirements in the contract and its action was dismissed. The contract apparently was for the construction of a highway and contained a clause whereby the plaintiff was to give *"within ten days of the date the actual soil conditions described . . . were encountered . . . the Engineer written notice of his intention to claim for that extra expense or that loss or*

damage". Justice Bennett, in dismissing the claim at para. 109, stated:

> I conclude that the defendant had neither actual or constructive notice pursuant to the provisions of the contract. This finding is sufficient to dispose of the case, as this conclusion results in the dismissal of the plaintiff's claim.

[109] Counsel for Roper Ltd., in his submission, says the Notice clause is clear and unambiguous and by not providing the notice required under the clause, Devco cannot now invoke the notice provision. With counsel's submission I cannot agree. The issue here, in view of the termination by Devco, is whether any claim for damages is limited by clause 14 of the contract. Clause 14 provided both parties with the right to terminate the contract on 30 days written notice. As suggested by counsel for Roper Ltd., the clause is clear and unambiguous. In ***Northland Kaska Corp., supra***, the issue involved the *"right"* to make a claim when the time period for making the claim had expired. The issue here is not the termination, but whether the damages, as the result of a termination not given in accordance with the contract terms, may be limited by other provisions in the contract. In this regard, the decision and reasons of the trial judge, upheld by the British Columbia Court of Appeal, in ***Reeves v. Dawson Creek (City), supra***, are more relevant to the present circumstance and consequently more persuasive.

[110] If Devco was not entitled to terminate the contract, without any prior advice or warning, then, in view of clause 14, any damages arising from the improper termination are limited to 30 days.

E. LAW AND ARGUMENT

(1) Negligent Misrepresentation

[111] Roper Ltd. says the statements by Devco, as to the approximate tonnages, amount, in the circumstances, to negligent misrepresentation. Counsel for Roper Ltd., refers to the five required elements for a successful ***Hedley Byrne*** claim as outlined by Justice Iacobucci in ***Queen v. Cognos Inc.***, [1993] 1 S.C.R. 87 at pp. 110:

> (1) there must be a duty of care based on a " special relationship" between the representor and the representee; (2) the representation in question must be untrue, inaccurate, or misleading; (3) the representor must have acted negligently in making said representations; (4) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and (5) the reliance must have been detrimental to the representee in the sense that damages resulted.

[112] The five issues, therefore, are whether the relationship created between the parties, by virtue of the invitation for tenders and the subsequent contract, was such a special relationship as to meet the initial element of the tort of negligent misrepresentation, whether the representations of anticipated tonnages or in asserting they were "the latest information available", were untrue, inaccurate or misleading, whether in making the representations Devco was negligent, whether Roper Ltd. relied on the representation in preparing the calculations of the rates it submitted in its response to the invitation for tenders, and whether Roper Ltd. suffered damage in the sense it may have submitted

higher rates had it known the representations, even approximately, would not be borne out during the term of the contract.

[113] On the question of whether there was a special relationship, Justice Iacobucci in ***Queen v. Cognos Inc.,*** ***supra***, at p. 116, made the following comment:

> There is some debate in academic circles, fuelled by various judicial pronouncements, about the proper test that should be applied to determine when a "special relationship" exists between representor and representee which will give rise to a duty of care. Some have suggested that "foreseeable and reasonable reliance" on the representations is the key element to the analysis, while others speak of "voluntary assumption of responsibility" on the part of the representor. Recently, in *Caparo Industries plc v. Dickman*, [1990] 1 All E.R. 568 (H.L.), a case unlike the present one in that there the whole issue revolved around the existence of a duty of care, the House of Lords suggested that three criteria determine the imposition of a duty of care: foreseeability of damage, proximity of relationship, and the reasonableness or otherwise of imposing a duty.
>
> For my part, I find it unnecessary - and unwise in view of the respondent's concession - to take part in this debate. Regardless of the test applied, the result which the circumstances of this case dictate would be the same.

[114] As was noted by Justice Iacobucci, and in the present circumstance, I am satisfied whatever approach is adopted, clearly the relationship between Devco and Roper Ltd. was such a special relationship.

[115] At pp. 124-125, Justice Iacobucci, in reviewing the nature of the duty of care, stated:

> However, the duty of care owed by a representor to a representee, <u>when there exists a "special relationship" within the meaning of *Hedley Byrne*, *supra*</u>, is distinct in nature and scope from a duty to be honest and truthful. As was stated in *Hedley Byrne* by Lord Morris (at pp. 502-3):
>
> > Independently of contract, there may be circumstances where information is given or where advice is given which establishes a relationship which creates a duty not only to be honest but also to be careful.
> >
> > . . .
> >
> > In these circumstances, I think some duty towards the unnamed person, whoever it was, was owed by the bank. There was a duty of honesty. The great question, however, is whether there was a duty of care.
>
> and by Lord Pearce (at p. 539):

> There is also, in my opinion, a duty of care created by special relationships which, though not fiduciary, give rise to an assumption that care as well as honesty is demanded.

See also *Hayward v. Mellick* (1984), 45 O.R. (2d) 110 (C.A.), and *Carman Construction, supra,* at p. 973.

> A duty of care with respect to representations made during pre-contractual negotiations is over and above a duty to be honest in making those representations. It requires not just that the representor be truthful and honest in his or her representations. It also requires that the representor exercise such reasonable care as the circumstances require to ensure that the representations made are accurate and not misleading.

[116] As noted by Justice Iacobucci, it is not sufficient that the representor has a subjective belief in the accuracy of the representation, he also must have exercised reasonable care in the circumstances as to ensure the accuracy of the representation.

[117] For reasons already noted, the element of reliance is supported by the evidence of Roper, that in preparing the response to the invitation for tenders he relied on the figures contained in the invitation. With respect to damages, it is reasonable to assume if the figures used by Devco had been more accurate as estimates of future coal handling requirements, Roper Ltd. would either not have submitted a response to the invitation for tenders or in preparing its response would have included higher rates that may, or may not, have resulted in Roper Ltd. being awarded the contract. For reasons arising out of the element of negligence, it is unnecessary to decide how damages for negligent misrepresentation would be calculated in the present circumstances.

[118] The remaining two elements are that the representation must be untrue, inaccurate or misleading, and the representor must have acted negligently in making the representation.

[119] In respect to the second element, namely, that the representation must be untrue, inaccurate or misleading, there is apparently some judicial debate as to whether the statement in question must be of an existing fact or past event rather than a statement of an intention or expectation of something in the future. Justice Chipman, in ***Arrow Construction Projects v. Nova Scotia (Attorney General)*** (1996), 150 N.S.R. (2d) 241 at p. 252, distinguishes between a representation, being a statement of some existing fact or past event, and a promise, being a statement of an intention to do something in the future:

> My view of the addendum in the context of all the evidence is not that D.S.S. made any representation of fact, but rather a statement that it <u>would</u> give consideration to the alternatives and the bid price adjustments. The Hedley Byrne Principle deals with representations, not promises. It is important to distinguish between a representation and a promise. A representation is a statement relating

to some existing fact or past event. A promise is a statement of intention to do something in the future. The distinction was referred to by this court in **Electrical Distributors Ltd. v. WCI Canada Inc**. (1992), 112 N.S.R. (2d) 300; 307 A.P.R. 300 (C.A.), at pp. 307 to 309. In **Queen v. Cognos Inc**., supra, Iacobucci, J., at p. 657 referred to a number of authorities that supported the view that only representations of existing facts and not those relating to future occurrences can give rise to actionable negligence. Assuming without deciding that this view of the law was correct, Iacobucci, J., considered the representations in the case before him as not relating to future matters, but a matter of existing fact. See also **BC Checo International Ltd. v. British Columbia Hydro and Power Authority**, [1993] 1 S.C.R. 12; 147 N.R. 81; 20 B.C.A.C. 241; 35 W.A.C. 241, per Iacobucci, J., (dissenting in part) at pp. 46, 73 and 81 [S.C.R.].

[120] In respect to the representations as to tonnages, they were clearly as to the future anticipated requirements of Devco for banking, blending and lifting of coal at the LBC, and not, in any way, statements as to past tonnages. In this respect, the issue is whether negligent misrepresentation may be founded on representations of future expectations as opposed to statements of existing fact.

[121] In **Electrical Distributors Ltd. v. WCI Canada Inc**. (1992), 112 N.S.R. (2d) 300; 2007 A.P.R. 300 (C.A.), at pp. 308-309, in respect to representations relied on to found liability based on negligence, as opposed to breach of contract, Justice Chipman stated:

> The **Hedley Byrne** principle so-called is based on advice or information given by one who knows actually or inferentially that the receiver thereof will rely upon it, which advice or information is inaccurate at the time it was made.

[122] On the other hand, Lord Denning, M.R., in ***Esso Petroleum Co. Ltd. v. Mardon***, [1976] 1 Q.B. 801, upheld a claim for negligent misrepresentation where the plaintiff oil company had represented to the defendant the likely volume of sales to be achieved at the service station outlet being leased. The defendant went into arrears when the actual volumes fell far short and the plaintiff cut off his supplies and issued a claim for possession of the premises and monies owed. The defendant counter-claimed for both breach of warranty as to the represented volume of sales and alternatively on the basis of a negligent misrepresentation, by virtue of which he had been induced to enter into the contract. Lord Denning held the statement of anticipated volumes to be a contractual warranty and as a result held the oil company liable. In the alternative, he found the statement was a negligent misrepresentation by a party holding itself out as having special expertise in the circumstances, which gave rise to a duty to take reasonable care to see that the representation was correct, and the pre-contractual representation surviving the contract, the plaintiffs were liable in damages on the basis of the tort of negligence. Lord Denning, applying the doctrine of ***Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.***, ***supra,*** found the plaintiff liable for the misrepresentation as to the forecasted volume for the service station in question.

[123] In ***Rainbow Industrial Caterers Ltd. et al. V. Canadian National Railway Co. et al*** (1988), 54 D.L.R. (4th) 43, on the appeal the defendant did not dispute the finding of

negligence in respect to an overestimate it made as to the number of meals it required the plaintiff to supply. At issue, were the proper measure of damage and the finding of fraudulent non-disclosure. Justice Craig, dissenting, would have upheld the trial judge's finding the plaintiff was entitled to relief based on fraud and negligent misrepresentation, where the defendant, having become aware of the errors in the forecast, then remained silent. The majority decision, in the British Columbia Court of Appeal, was rendered by Justice Esson in allowing the appeal in part. He noted the trial judge *"based his conclusion solely on the negligent underestimate and what he found to be the fraudulent failure to disclose"*. In his reasons, he found the evidence did not show the defendant was personally responsible for the error nor had he deceived the plaintiff's on any matter of fact of which he had knowledge. He held damages should be restricted to the loss occasioned by the erroneous estimate, since, if the error had not occurred, the plaintiff's, he found, would still have entered into the contract, though at a higher price. Justice Esson, at pp. 61-62, continues by referencing Lord Denning in ***Esso Petroleum, supra***:

> It seems to me that *Hedley Byrne,* [1963] 2 All E.R. 575, [1964] A.C. 465, properly understood, covers this particular proposition: if a man, who has or professes to have special knowledge or skill, makes a representation by virtue thereof to another - be it advice, information or opinion - with the intention of inducing him to enter into a contract with him, he is under a duty to use reasonable care to see that the representation is correct, and that the advice, information or opinion is reliable. If he negligently gives unsound advice or misleading information of expresses an erroneous opinion, and thereby induces the other side into a contract with him, he is liable in damages.

[124] Justice Esson then continues:

In applying that basis of liability to the facts of this case, the trial judge said:

> On the evidence, this case falls squarely with Lord Denning's previously quoted statement in *Esso Petroleum Co. v. Mardon*, and indeed it is close to being a counterpart of that case. As between C.N. and the plaintiff, C.N. had the special knowledge or skill required to calculate the work gang meal requirements; it made its calculations intending to induce interested parties, including the plaintiff, to contract on the basis of its forecast of requirements; it was under a duty to use reasonable care to see that the estimates were reliable; and it negligently gave incorrect information which induced the plaintiff to contract with it in reliance upon that information.

[125] He then notes:

C.N. takes no issue with that conclusion.

[126] The decision of the British Columbia Court of Appeal was appealed to the Supreme Court of Canada on the issue of the assessment of damages, but not on the finding of negligent misrepresentation.

[127] In ***Northern Petroleum v. Sydney Steel Corp***., [2000] N.S.J. No. 287, the Court of Appeal considered an appeal involving the tort of negligent misrepresentation. The Appellant had claimed that under the terms of the contract entered into with the respondent, the latter had agreed to purchase a minimum quantity of oil per year over the five-year term of the contract. The quantity of oil purchased being considerably less, it claimed in contract and in tort. Flinn, J.A., in the reasons for the court, at para. 6 dismissed the claim for negligent misrepresentation on the basis there was no evidence before the trial judge of negligence on the part of the respondent, *" . . . in respect of any representations which the respondent made prior to the date of the contract. . . . Therefore, there can be no claim against the respondent for negligent misrepresentation."*

[128] The court, however, did not comment on whether the tort of negligent misrepresentation required that the misrepresentation, must, at least in part, refer to a statement of a present fact or past event as opposed to only future expectations or intentions.

[129] In his post oral written submission, counsel for Roper Ltd., unlike counsel for Devco, appears to agree with Justice Chipman's analysis as to the legal requirements for a representation, namely, it must be of a past fact or present event, in order to satisfy the second element of the tort. Counsel's brief continues:

> With respect to the issue of misrepresentation, Roper is not in disagreement with Justice Chipman's analysis. The point to be made is this: regardless of what tonnages Devco would be able to provide in the future to Roper (i.e., once the contract began to be performed), the "representation of fact" by Devco in May of 1985 is that the tonnages it did place in the tender document were based on the "latest information available" to Devco.

[130] Counsel for Roper Ltd. in his final written submission, says the negligent representation, relates, not to the statement as to expected tonnages, but to the statement they were the "latest information available". Counsel's brief continues:

> Devco states in the tender document that the tonnages are based on the "latest information available", it is providing the would-be bidder with some level of assurance that Devco has prepared the documents in a careful and reasonable manner and with the knowledge that bidders would be preparing their bids having regard to what Devco reasonably understood (at the point in time the tender document was let) to be the anticipated production during the term of the contract. Obviously any bidder would take into consideration the "latest information available" being provided by Devco in the preparation of its bid. Moreover, if the "latest information available" suggested that the tonnages would be significantly lower than that contained in the May 2, 1985, tender, it is reasonable to conclude that it would affect the amount being bid per tonne or may result in the would-be bidder not tendering at all. Clearly, it is foreseeable that this is the type of information a bidder relies on in deciding whether or not to bid on such a contract.

I would refer Your Lordship to the Post-Trial Submissions on behalf of the Defendant/Plaintiff by Counterclaim at page 66 wherein Justice Feehan of the Alberta Queens Bench in ***Opron Construction Co. v. Alberta*** (1994), 1994 CarswellAlta 470 at pp 700 is quoting from the ***Cardinal Construction*** case:

> The tender documents must be prepared having in mind the average tenderer, not one who is usually cautious, conservative or has special knowledge or experience: ***Cardinal Construction,*** supra:
>
> A bidder is entitled and expected to rely on the tender document as conveying the best information the owner can give. It is not good enough to provide information that is misleading, incomplete or inaccurate with the intention that the more experienced or knowledge bidders will ferret out the problems from clues: ***Cardinal Construction***, supra.

While the contract documents clearly state the quantities are based on the latest information available, Devco has offered little evidence that this is in fact so. In fact, MacVicar and Martin, who were responsible for drawing up the tender document, were vague as to what information they received, from whom and how, if indeed, they performed calculations.

[131] On the issue of whether the burden is on Devco to establish they used the *"latest information available"* , or on Roper Ltd. to show they did not, counsel's final brief continues:

Your Lordship has questioned upon whom the burden lies to prove misrepresentation on the part of Devco; reference is made to ***Brown v. Cockburn (1876), 37 U.C.Q.B. 592*** wherein Harrison, CJ. stated:

> It is a general rule of evidence that in every case the onus probandi lies on the person who wishes to support his case by a particular fact, and of which he is supposed to be cognizant….**If a negative averment be made by one party which is peculiarly within the knowledge of the other, the party within whose knowledge it lies, and who asserts the affirmative, is to prove it, and not he who avers the negative… [with emphasis]**

It is Roper's position, then, that the burden of proof lies upon Devco, being the party having knowledge of the calculation of tender figures, to prove that the tonnage figures contained in the tender document were based on the latest information available.

> It is Roper's position that Devco has not satisfied this burden as it has not discounted evidence tendered by Roper that the estimates were not based on the latest information available and have offered no proof that the estimates were, in fact, based on the latest information available.

[132] It is Roper Ltd. that is alleging negligence on the part of Devco, and if necessary to decide, I would find it is on Roper Ltd. the burden lies to establish the elements of the tort, not on Devco to disprove the existence of one of more of the elements. As noted earlier, it has not been established the representation in the invitation that the amounts were the *"latest information available"*, was untrue.

[133] It is, however, unnecessary, in view of my finding on the third element of the tort to resolve the question whether, in Nova Scotia, the tort of negligent misrepresentation must relate to a statement of present fact or past event as opposed to future intentions or expectations or whether on the basis of ***Brown v. Cockburn***, ***supra***, the onus is on Devco to establish the figures used were indeed the *"latest information available"*, rather than on Roper Ltd. to show the statement was untrue, inaccurate or misleading.

[134] The third element or requirement is that the representor must have acted negligently in making the representation. Here there is no evidence as to the specific source of the information used by MacVicar in preparing the tonnage calculations that were incorporated into both the invitation for tenders and subsequently the purchase order. As to the applicable standard of care, Justice Iacobucci, in ***Queen v. Cognos Inc., (supra)***, at p. 121, noted this determination required the application of well-established principles of the law of negligence. At p. 121, he continued:

> The applicable standard of care should be the one used in every negligence case, namely the universally accepted, albeit hypothetical, "reasonable person". The standard of care required by a person making representations is an objective one. It is a duty to exercise such reasonable care as the circumstances require to ensure that representations made are accurate and not misleading:...

[135] Here, the reality is the tonnages eventually handled during the term of the intended life of the contract were substantially less than the volumes inserted in both the invitation for tenders and the purchase order. There is, however, virtually no evidence as to the source of the figures used, how they were prepared, what information was gathered in arriving at the numbers, what expectations may have reasonably been relied upon that over the period of the contract turned out to be untrue, or any of the other sources of information that may have been available to those who provided to MacVicar the information from which he calculated the volumes he inserted in the invitation for tenders and which later, with one amendment, were incorporated in the purchase order itself.

[136] The mere fact a statement of future expectations turns out to be inaccurate, even materially inaccurate, does not mean the statement was negligently made, nor does it necessarily raise any presumption of negligence on the part of either the person making the statement or the person who prepared the calculations from which the statement was made. MacVicar testified he used the latest figures he received from the production and marketing divisions. In the recorded notes from the meeting of October 1, 1985, Martin also says as much in responding to Roper that the forecast was *"based on projections*

from mining and processing people." There is no evidence, apart from any inference to be drawn from the extent of the discrepancy in the volumes, of any negligence in the preparation or calculation of the estimates.

[137] As noted earlier, Justice Flinn, in ***Northern Petroleum v. Sydney Steel Corp., supra***, held that in the absence of evidence of negligence on the part of the representor, there can be no claim for negligent misrepresentation. Similarly, in the present circumstances, there is no evidence of negligence on the part of the representor, Devco, and therefore, the element of negligence necessary for the tort has not been established.

(2) Breach of Contract

[138] Roper Ltd. submits by failing to provide *"approximately"* the tonnages set out in the invitation for tenders and purchase order, Devco has breached the contract. In respect to the exclusion of liability contained in clause 10, counsel's submission continues:

> ...it is respectfully submitted that the misrepresentations made by Devco were such a blatant error or "fatal error", they constitute a fundamental breach of contract by Devco. Case law has held that in circumstances where an essential basic element of a contract has not been satisfied and the required standard of care and diligence in so doing is not met, there has been a fundamental breach of the contract and the breaching party cannot rely on an exemption clause. ***(Rose v. Barisco Brothers Limited*** (1983) 147 D.L.R. (3rd) 191). In ***Cathcart Inspection Services Limited v. Purolator Courier Limited*** (1982) 139 D.L.R. (3rd) 371, the Ontario Court of Appeal stated that the question of whether an exclusion clause covered a particular element of the contract depends on the "true construction of the contract" and "the proper test" is whether it was fair and reasonable to attribute to the parties the intention that the exclusionary clause should survive and cover the breach of a fundamental term. Courts have refused to enforce even the clearest of exemption clauses if the affect thereof would be **entirely unreasonable** (see ***Gillespie Brothers v. Roy Bowles Transport Limited*** (1973), 1 al et. R.P. (C.P.A.)).
>
> In the case at bar, it is Roper's position that quantities to be moved were an essential basic element of the contract and were essential to Roper's determination of a Contract price. It is only by relying on the tonnages put forth by Devco in its request for proposals that Roper was able to arrive at a Contract Price. Furthermore, in reliance on those tonnages, Roper incurred significant expenses, including significant capital costs in purchasing the necessary equipment. It is therefore entirely unreasonable to attribute an intention to the parties that Devco was exempt from any obligation to deliver to Roper quantities at least within a reasonable range of those set out in the Purchase Order.

[139] Devco, in response, acknowledges the concept of fundamental breach arose as a means by which to avoid the consequences of an exclusion or limitation clause. Counsel cites from Fridman, **The Law of Contract**, ***supra***, at pp. 601-602, as to the nature of fundamental breach:

> It has been referred to as a breach in consequence of which the performance of the contract becomes something totally different from that which the contract contemplates. It has been called a "breach which goes to the root of the contract." It has been said to involve "such a congeries of defects as to destroy the workable character of the machine"(that is, the machine which was the subject-matter of the contract). A fundamental breach has been defined as one which destroys "the whole contractual substratum" as undermining the whole contract as involving an event which deprives the innocent party of substantially the whole benefit which that party was to obtain under the contract. It has been described as a breach which entitles the innocent party to treat the contract as repudiated or which would make it unacceptable to hold the innocent party to the agreement.

[140] Counsel then notes, where at p. 603, the author says fundamental breach is a question of fact that turns on the *"terms of the contract, the intended benefits, the purposes of the contract and material consequences of the breach,"* and continues:

> There was a debate as to whether fundamental breach was a rule of law or simply a rule of construction. In *Hunter Engineering Co. v. Syncrude Can. Ltd., supra*, Wilson, J. and Dickson C.J.C. both adopted the construction approach. Wilson, J. considered whether it was "fair and reasonable" to enforce the clause in favour of the party who had commented the breach (at pages 375-381). Dickson, C.J.C. was of the view that the parties should be bound by the terms of their agreement, including exclusion clauses, "provided the agreement is not unconscionable" (at page 337). More recently, the Supreme Court in *Guarantee Company of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423, in its review of the decision in *Hunter Engineering* stated at page 477:
>
> > "The [construction approach] addressed the consequences of fundamental breach as a matter of construction of the terms of the contract rather than a categorical rule of law. Courts are required to determine whether the contract, properly interpreted, provides that exclusion clauses shall be enforceable in the event of fundamental breach. If, as a matter of contractual interpretation, the parties clearly intended an exclusion clause to continue to apply in the event of fundamental breach, courts were required to enforce the bargain agreed to by the parties, rather than apply a rule of law to rewrite the terms of the contract."
>
> In order to show that a fundamental breach occurred Roper must prove that there was a totally different performance from that contemplated by the parties. Even if there is a fundamental breach, that does not end the matter. Your Lordship must then consider if on a proper interpretation of the contract the parties intended the exclusion to be enforceable.

[141] Counsel for Roper Ltd. cites the review by Chief Justice MacKeigan, in ***Canso Chemicals Ltd. v. Canadian Westinghouse Co. Ltd.*** (1974), 10 N.S.R. (2d) 306, at pp. 344-345, of a number of definitions or descriptions that have been attached to the phrase

"fundamental breach" where it has been used in the context of whether or not to apply an *"exclusion"* clause, whether it be an exclusion of liability or an exclusion limiting damages. Chief Justice MacKeigan, then continues by referencing a number of authorities where the failure was held to be fundamental breach and on the other hand, authorities where the deficiency was not so found.

[142] Devco says there was no fundamental breach since the contract called for the banking, blending and lifting of coal at the LBC and this is the work Roper Ltd. performed and for which it received compensation for each tonne of coal handled. Counsel refers to the decision of the Alberta Court of Appeal in ***Catre Industries Ltd. v. Alberta*** (1989), D.L.R. (4th), at p. 94, involving an appeal on a unit price contract where the plaintiff had claimed conditions were fundamentally different from those shown in the document on which it had tendered, including in respect to the nature of the materials and the haulage distances. The Province of Alberta had apparently relied on a number of disclaimers that suggested the quantities were *"estimates"* and to be considered *"as approximate only"* and that *"no responsibility will be assumed by the Department for the correctness or completeness of the data shown and should any such data be found incorrect or incomplete, the contractor shall have no claim on that account"*. In performing the contract the contractor was unable to complete on time and brought action alleging the results of soil tests made by the government before the contract were misleading and the contract could not reasonably have been completed in the time agreed. In holding there was no fundamental breach, Justice Stratton, in the reasons of the court, at pp. 94 - 95, made the following comments:

> With respect to the conditions existing at or about the time of tendering it is clear that Cartre was anxious to enter into the road-building market in Alberta and had available to it resources which it undoubtedly considered fully able to compete successfully for this particular job and complete it. As a company it was experienced with dealing with invitations to tender and contract documents. It is not reasonable to conclude that its people did not fully comprehend and accept the stringent terms of the contract including the shortness of the time given to respond to the invitation. If this court should interfere in the circumstances of this case and find the said exculpatory clauses to be unenforceable and thus restructure the contract, the resulting impact on contract law would, in my view, be chaotic and in any event, not justified in law.
>
> It is clear from the *Syncrude* decision that, even in the face of fundamental breach, the courts should not rule that exclusion clauses, by reason of that breach, automatically lose their validity. This applies with even more force in situations of lesser breaches.

[143] Counsel for Devco notes that when Roper Ltd. became aware the tonnages were not being made available as originally anticipated, it took no steps to repudiate the contract and in fact, sought and obtained concessions from Devco in the form of the weekly draw. In respect to the obligation on the innocent party, Lord Upjohn in ***Suisse Atlantique Societe D'Armement Martime S.A. v. N.V. Rotterdamsche Kolen Centrale,*** [1967] 1 A.C. 361,

at pp. 421-2, made the following observations:

> I believe that all of your Lordships are agreed, and, indeed, it has not seriously been disputed before us that there is no magic in the word "fundamental breach"; this expression is no more than a convenient shorthand expression for saying that a particular breach or breaches of contract by one party is or are such as to go to the root of the contract which entitles the other party to treat such breach or breaches as a repudiation of the whole contract.. Whether such breach or breaches do constitute a fundamental breach depends on the construction of the contract and on all the facts and circumstances of the case. The innocent party may accept that breach or those breaches as a repudiation and treat the whole contract at an end and sue for damages generally or he may at his option prefer to affirm the contract and treat is as continuing on foot in which case he can sue only for damages for breach or breaches of the particular stipulation or stipulations in the contract which has or have been broken.

[144] Clearly, Roper Ltd. did not seek to repudiate the contract on the basis of fundamental breach, although there was evidence that early in the fall of 1985, during a meeting held with MacLellan and Martin, together with other representatives of Devco, Roper did threaten to terminate the contract. The notes of the meeting record the following:

Bill Reid	Opened meeting. Don Roper had contacted P. Richardson stating that he has a major problem with banking & lifting contract (can't continue).
Don Roper	Wants to get out of contract, but his major problem is what to do with equipment. He is losing money. Equipment operators are not getting full weeks. Shift supervisors will not sign for down time.
Bill MacLellan	Work load this year doesn't seem to be any different this year than last year. We don't want to see Roper leave but if he must leave, we need to know what to do in the interim.
Don Roper	Want's [sic] to sell his equipment. Feels the production is not there - too variable.

[145] However, Roper Ltd. took no steps to effect a termination or repudiation and instead continued to perform under the contract, later seeking and obtaining concessions in respect to obtaining payment by way of a weekly draw with proviso for an adjustment to

be made at a subsequent date.

[146] A number of problems that ensued during the course of performance of the work are suggested by counsel for Roper Ltd. as constituting *" such a congeries of defects"* as to destroy the workable nature of the contract. Counsel notes the additional work required on the banks, the fact Roper Ltd. was not paid for all the work it suggests were additional to the contract, or were paid to other contractors, the need for extensive work in maintaining and cleaning up "C" track and "H" track and the requirement to disburse equipment to the different tracks as opposed to operating centrally at the LBC following depletion of these other tracks. Counsel suggests Devco knew or ought to have known the conditions in respect to the loading of C.N. cars would be impossible to meet. He does not answer the response that Burns was able, with apparently substantially less need for adjustments, to accomplish the same task. He also says the fact of excessive down time was a factor to be taken into account in determining whether there was fundamental breach. None of these, singularly or together, constitute a fundamental breach even on the most favourable reading of any of the pronouncements relating to what is required for fundamental breach of a contract, and even to the extent the problems were caused or contributed to by failures on the part of Devco.

[147] The submission of fundamental breach rests on whether the substantial discrepancy between the estimates of the anticipated tonnages as compared to the actual tonnages made available to Roper Ltd., during the period he operated under the contract, were such as to make *"performance of the contract something totally different from that which the parties contemplated"*. The situation must be fundamentally different from anything which the parties, as reasonable parties, could have contemplated.

[148] Devco must have known that in inviting tenders and in putting forward estimates, albeit as *"approximations"* of the quantities of coal to be handled, these figures would be used by any prospective tenderer in calculating the rates they would be prepared to charge in performing the requested work. The whole rate structure of the contract was to a large extent dependent on the volumes to be handled over its life. The use of the modifier *"approximate"* put the prospective tenderer on notice the figures were not warranted, nor guaranteed, but certainly could not put the tenderer on notice that in setting its rates the volumes could vary by as much as 30-40%; if otherwise, then what difference if the variance was 50 or 60%. Yet, could the parties reasonably contemplate that a party's commitment to rates it calculated on the basis of certain tonnages, would still be applicable when the actual tonnages bore no resemblance to the relied upon estimates. The mere fact Roper Ltd. was still *"banking, blending and lifting coal"* at the LBC is not the only substratum of the contract. In this circumstance, the anticipated tonnage directly impacted on both the rate to be charged per tonne and on the amount of equipment the tenderer was required to have on site to service the anticipated tonnage. There was a fundamental breach and the fundamental breach was the failure to provide tonnages *"approximating"* the estimates contained in the invitation for tenders and purchase order.

[149] Counsel for Devco says, in the alternative, notwithstanding a determination there was a fundamental breach, it is necessary for the court to then decide whether the exclusion clause should apply to the particular breach. He notes Roper would have been aware tonnages were not guaranteed and that he took into account the possibility of lower

tonnages when he calculated his tender prices. Roper would also have known or ought to have known that coal production was subject to a number of vagaries, including operational difficulties at the mines and that sales could be affected by market conditions. Counsel's submission then continues:

> If Devco could not be certain about the quantity of coal available for handling, it was reasonable for Devco to exclude liability. Devco advised bidders so that bidders could take that into account when determining their prices. It is really a matter of risk and who bears that risk under the terms of this contract. Devco says that the contract places the risk on the contractor. Further, the risk is properly on the contractor because the contractor knows its costs and is the one that sets its prices. Under the circumstances, Devco should be able to rely on the exclusion in the event of a fundamental breach.

[150] Counsel for Roper Ltd. refers to a number of authorities where negligence by the party responsible for drawing the contract precluded the application of the exception or exclusion clause so as to avoid responsibility. It is noted in these reasons I have not found negligent misrepresentation and therefore to the extent the authorities cited by counsel reflect an exemption from the application of *"exemption"* or *"exclusionary"* clauses in the circumstance of a finding of negligence, they have no application here.

[151] Clause 10, in stating the indicated tonnages were approximate, as well as based on the latest available information, specifically provided Devco assumed no responsibility for quantities above or below the estimated tonnages. Clearly, had the estimations been *"approximately"* accurate, there would be no liability. However, to the extent the variation took them out of the *"approximate"* range they could no longer be said to be *"approximate"* and, in view of the role of a unit rate or price as an essential element or substratum of the contract, this purported exclusion of liability could not reasonably have been within the anticipation of the parties. This contract anticipated the use of the information provided by Devco and this information was known to be virtually unavailable to any of the prospective tenderers, perhaps only with the exception of the prior contractor. It also contemplated a major investment in equipment and resources by the successful party who would necessarily be setting their rates based on the information provided by Devco. To permit Devco to avoid responsibility, absent a clear statement that regardless of the tonnages realized the contractor would be required to provide services at the rate tendered, would be unconscionable. Of assistance in interpreting the terms of the contract in this circumstance, are the comments by Chief Justice Dickson, in ***Hunter Engineering Co. v. Syncrude Canada Ltd.***(1989), 57 D.L.R. (4th) 321, where at pp. 341-342, he stated:

> It is preferable to interpret the terms of the contract, in an attempt to determine exactly what the parties agreed. If on its true construction the contract excludes liability for the kind of breach that occurred, the party in breach will generally be saved from liability. Only where the contract is unconscionable, as might arise from situations of unequal bargaining power between the parties, should the courts interfere with agreements the parties have freely concluded. The courts do not

blindly enforce harsh or unconscionable bargains and, as Professor Waddams has argued, the doctrine of "fundamental breach" may be understood as but one manifestation of general underlying principle which explains judicial intervention in a variety of contractual settings. Explicitly addressing concerns of unconscionably and inequality of bargaining power allows the courts to focus expressly on the real grounds for refusing to give force to a contractual term said to have been agreed to by the parties.

I wish to add that, in my view, directly considering the issues of contract construction and unconscionably will often lead to the same result as would have been reached using the doctrine of fundamental breach, but with the advantage of clearly addressing the real issues at stake.

In rejecting the doctrine of fundamental breach and adopting an approach that binds the parties to the bargains they make, subject to unconscionably, I do not wish to be taken as expressing an opinion on the substantial failure of the contract performance, sometimes described as fundamental breach, that will relieve a party from future obligations under the contract.

[152] The Chief Justice went on to note the distinction in the two uses of the term *"fundamental breach"*, namely where it relates to a performance totally different from that which the contract had contemplated and secondly, when there is a breach of contract which is more serious than one which would entitle the other party merely to damages and would entitle the innocent party to refuse performance or further performance.

[153] In the present instance, the question is the interpretation of the *"exclusion clause"* in the context of the *"fundamental breach"* and whether the exclusion clause would be anticipated by the parties to have applied to the circumstances that ensued in the present instance, namely, the failure of Devco to have provided anywhere near *"approximating"* the tonnages that were represented in both the tender documents and the eventual contract. The concept of fundamental breach is only relevant, in the present case, as a descriptive phrase for the nature of the failing by Devco, and it is in the construction of the exclusion clause that I have denied Devco exemption or exclusion from the breach.

(3) <u>Contra Proferentum Rule</u>

[154] Absent ambiguity in language, courts have held there are no grounds to invoke the *Contra Proferentum Rule*. The doctrine, as recently affirmed by the Supreme Court of Canada in ***Eli Lilly & Co. v. Novapharm*** ,[1998] 2 S.C.R. 129, operates to prevent a party who has drafted confusing or *"deviously ambiguous"* language in a contract, from benefiting from the ambiguity, by interpreting any ambiguity in the language against the drafting party.

[155] Counsel for Roper Ltd. suggests any ambiguity in the contract, and particularly clause 14, should be resolved in favour of Roper Ltd.. Counsel refers to ***Hillis Oil and Sales Limited v. Wynns Canada Limited*** (1986), CarswellNS 145, [1986] 1 S.C.R. 57, where it had been found there was ambiguity in respect to how a distributor's agreement could be terminated. Justice Ladane said the rule applies where there is ambiguity in the meaning of a contract of which one of the parties is the author and where the other party has no

opportunity to modify the wording. He then cites from **Anson's Law of Contract** (25th ED. 1979), at p. 151, to the effect that words in a written document are construed more forcibly against the party using them. He then references the reasons of Justice Estey in ***McClelland and Stewart Ltd. v. Mutual Life Assurance Co. of Canada,*** [1981] 2 S.C.R. 6 at p. 15:

> That principle of interpretation applies to contracts and other documents on the simple theory that any ambiguity in a term of a contract must be resolved against the author if the choice is between him and the other party to the contract who did not participate in its drafting.

[156] The requirement for an initial ambiguity was noted by the Court of Appeal in ***Arthur Anderson Incorporated v. Toronto Dominion Bank*** (1994), Carswell Ont 233, where at para. 17, Grange and McKinlay, J.A., for the majority, said:

> ...one must find an ambiguity in the contract before applying the rule, rather than after, as done by the trial judge;

[157] As counsel for Roper Ltd. suggests in his post-trial submission, and with which I agree, clause 14 is clear and unambiguous. It provides that either party may terminate the contract upon giving to the other 30 days written notice. There is no ambiguity and no need to interpret the provision having regard to any application of the *Contra Proferentum Rule* of construction.

F. DAMAGES

(1) Damages for Breach of Contract

[158] Justice Robert Sharpe, in his paper, *"Commercial Law Damages: Market Efficiency on Regulation of Behaviour"* (Atlantic Education Seminar, November 7, 2001), states:

> The first principle of the law of contract damages insists that the innocent party be put in the position he or she would have been in but for the breach:

[159] He then cites ***Wertheim v. Chicoutimi Pulp Company***, [1911] A.C. 301(J.C.P.C.), at p. 307:

> > [I]t is the general intention of the law that, in giving damages for breach of contract, the party complaining should, so far as can be done by money, be placed in the same position as he would have been in if the contract had been performed.

[160] Justice Sharpe citing Waddams, **The Law of Damages**, **(3rd** ed; Canada Law Book, 1997) at 5.10-5.140, continues:

> The innocent party's loss is measured by what is usually called the 'expectation interest', that is, the economic value to the innocent party of the promised

performance.

[161] Later, Justice Sharpe comments:

> The price of breach is to pay the plaintiff the value of the plaintiff's expectation loss. If the defaulting party is willing to pay the plaintiff the value of the lost bargain, the law effectively allows the breach and facilitates the defaulting party's avoidance of loss or pursuit of a more profitable opportunity.

[162] Counsel for Roper Ltd., in suggesting a *"lack of cooperation"* by Devco, referred to ***D'Arcy v. Canada (Minister of Supply & Services)*** 1992 CarswellNat 1166, as supporting *"an implied obligation to act in good faith in matters related to contract."* He also cites ***AlliedSignal Canada Inc. v. Atlantic Electronics Ltd.*** 1998 CarswellNS 413, on the need, in looking for bad faith, to examine, not the effect of the plaintiff's actions but rather the plaintiff's motives.

[163] Clearly, claims founded in breach of contract, can now result in damage awards for losses historically and traditionally more commonly associated with actions advanced in tort. In noting a current trend, or at least instances in commercial law settings, of damages for breach of fiduciary duty, (***Lac Minerals Ltd. v. International Corona Resources Ltd.***, [1989] S.C.R. 574 and ***Canson Enterprises Ltd. v. Boughton*** [1991] 35 S.C.R. 534), for morally reprehensible conduct, (***Wallace v. United Grain Growers Ltd.***, [1997] 3 S.C.R. 701), as restitutionary damages, (***Attorney General v. Blake*** [2001], 1 A.C. 268) as punitive damages, (***Whiten v. Pilot Insurance Co.***, 1999, 42 O.R. (3d) 641 (C.A.), (now under appeal to the Supreme Court of Canada) and ***Royal Bank of Canada v. W. Got & Associates Electric Ltd.***, (1999), 35 C.R. 408), and even for class actions with the goal of behaviour modification,(***Western Canada Shopping Centres Inc. v. Bennett Jones Verchere,*** (2000), 201 D.L.R. (4th) 385 (S.C.C.), Justice Sharpe suggests this is evidence of a departure from the traditional or classical model to achieve justice. However, none of these *"current trends"* are here applicable.

[164] In considering the issue of damages, both as claimed by Devco and by Roper Ltd., I recognize that in many instances there is little specific evidence quantifying the alleged loss. This lack of evidence arises either or both because of the long delay in bringing this matter to trial and, in some cases, the nature of the damages being claimed. In this regard, I have considered the reasons and decision of Justice Spence, for the Court, in ***Penvidic Contracting Co. v. International Nickel Co. of Canada, Ltd.***, 1975 CarswellOnt 299, [1976] 1 S.C.R. 267, where in agreeing with the comment by Wilson, J., at trial, that, *" . . . the evidence was not as helpful as one would have expected and more records giving more particulars of when and where different types of work were being done would have been very useful.",* at paras. 21-23, he observes:

> Viscount Haldane L.C., in *British Westinghouse Electric and Manufacturing Company Limited v. Underground Electric Railways Company of London, Limited*, said at pp. 688-9.

> The quantum of damage is a question of fact, and the only guidance the law can give is to lay down general principles which afford at times but scanty assistance in dealing with particular cases. The judges who give guidance to juries in these cases have necessarily to look at their special character, and to mould, for the purposes of different kinds of claim, the expression of the general principles which apply to them, and this is apt to give rise to an appearance of ambiguity.
>
> Subject to these observations, I think that there are certain broad principles which are quite well settled. The first is that, as far as possible, he who has proved a breach of a bargain to supply what he contracted to get is to be placed, as far as money can do, in as good a situation as if the contract had been performed.

The difficulty in fixing an amount of damages was dealt with in the well known English case of *Chaplin v. Hicks*, which had been adopted in the Appellate Division of the Supreme Court of Ontario in *Wood v. Grand Valley Railway Company*, where at pp. 49-50, Meredith C.J.O. said:

> There are, no doubt, cases in which it is impossible to say that there is any loss assessable as damages resulting from the breach of a contract, but the Courts have gone a long way in holding that difficulty in ascertaining the amount of the loss is no reason for not giving substantial damages, and perhaps the furthest they have gone in that direction is *Chaplain v. Hicks*, [1911] 2 K.B. 786. In that case the plaintiff, owing, as was found by the jury, to a breach by the defendant of his contract, had lost the chance of being selected by him out of fifty young ladies as one of twelve to whom, if selected, he had promised to give engagements as actresses for a stated period and at stated wages, and the action was brought to recover damages for the breach of the contract, and the damages were assessed by the jury at Ł100. The defendant contended that the damages were too remote and that they were unassessable. The first contention was rejected by the Court as not arguable, and with regard to the second it was held that "where it is clear that there has been actual loss resulting from the breach of contract, which it is difficult to estimate in money, it is for the jury to do their best to estimate; it is not necessary that there should be an absolute measure of damages in each case": per Fletcher Moulton, L.J. at p. 795.

When *Wood v. Grand Valley Railway Company, supra*, reached the Supreme Court of Canada, judgment was given by Davies, J. and was reported in 51 S.C.R.

283, where the learned justice said at p. 289:

> It was clearly impossible under the facts of that case to estimate with anything approaching to mathematical accuracy the damages sustained by the plaintiffs, but it seems to me to be clearly laid down there by the learned judges that such an impossibility cannot "relieve the wrongdoer of the necessity of paying damages for his breach of contract" and that on the other hand the tribunal to estimate them whether jury or judge must under such circumstances do "the best it can" and its conclusion will not be set aside even if *the amount of the verdict is a matter of guess work.*

[165] Clearly, where there are no losses sustained, there is no entitlement to damages. The issue addressed by Justice Spence, particularly in the excerpts noted, is in assessing damages where there are losses but they are difficult if not impossible to quantify *"with anything approaching to mathematical accuracy"*. In respect to those claims where I have been satisfied the evidence demonstrates some loss, I have considered and quantified the loss, even in circumstances where the evidence has been less than "satisfactory" as to the quantification of the loss and even where it could be said *"the amount . . . is a matter of guess work"*. I have not quantified, nor awarded damages, where, on the evidence I am not satisfied the claimant has suffered *"some form of loss."*

(a) Devco Damage Claim

[166] Devco claims, as damages, the cost incurred to rent equipment, primarily from Burns, for the purpose of performing work under the contract, the additional costs previously reviewed and reimbursement for the overpayment as represented by the difference between the total amount of the weekly draws paid to Roper Ltd. and the work and services provided by Roper Ltd. to Devco during the same period.

(b) Roper Ltd. Damage Claim

[167] Roper Ltd. claims the following damages:

(i) Lost Profits for Failure to Complete Contract

[168] John E. Carruthers, C.A., CBB, (herein "Carruthers"), a partner with Grant Thornton, LLP, in his report filed on behalf of Roper Ltd., adopted, as did W. Grant Thompson, FCA, (herein "Thompson"), of Revenue Management Limited, on behalf of Devco, the approach of estimating services that would have been performed by Roper Ltd., if not for the termination, by adopting the services performed by Burns, during the period up to and including the date the original contract with Roper Ltd. was scheduled to expire. In doing so, the two reports reach radically contradictory conclusions. Carruthers created four scenarios, all of which would indicate foregone profit to Roper Ltd. by his not being permitted to complete the contract. On the other hand, Thompson says there would have been no profits, and that on all the scenarios advanced by Carruthers, Roper Ltd. would have lost money.

[169] In his post-hearing submission, counsel for Devco suggested a number of flaws in

Carruthers' calculations, including using Burns' unit prices, ignoring Roper Ltd.'s actual productivity per man hour, assuming Roper Ltd. would receive the tonnages set out in estimates, notwithstanding even Roper Ltd. included a 10% to15% allowance in preparing his calculations, ignoring Roper Ltd.'s actual labour costs, failing to include Roper Ltd.'s costs for rental of equipment as part of Roper Ltd.'s costs, including as extras work Roper Ltd. had not performed as extras under its contract but which would have been extras under Burns' contract. The submission adds that Carruthers assumed Roper Ltd. had a contractual right to extras and would have received the identical extras that Burns received, notwithstanding Roper Ltd. and Burns were operating under different contracts.

[170] In respect to the reference to Carruthers using Burns' rates in calculating Roper Ltd.'s loss, counsel's comments are with merit. There was no basis, whatsoever, for calculating any loss by the use of unit prices other than those contained in the contract between Devco and Roper Ltd.. As noted earlier, the rights and obligations of the parties, including any loss or damage, are to be determined having regard to the contract between the parties and not with reference to any contract between Devco and any other person, including Burns.

[171] Thompson, in using the actual productivity and labour costs incurred by Roper Ltd. up to the date of termination, suggests Roper Ltd. would have incurred a loss rather than a profit had it continued to the date set for the original expiration of the contract. Adding in the costs of equipment rented to assist Roper Ltd. in performing its contract, and for the productivity of which it received compensation in accordance with the rates provided for in the contract, a cost apparently not even included by Thompson, the extent of the loss is increased and the possibility of a profit over the original term of the contract made even less likely.

[172] Roper Ltd.'s financial statements for the 10 month period ending May 31, 1986, shows an operating loss and there is nothing in the evidence to indicate, had it completed the contract, it would have turned the loss into a profit. There is, in addition, in respect to the equipment used in the operation, the likelihood of continued deterioration. Ryder referred to discovery evidence of the late Mr. Keddy, stating the "*condition of the equipment did deteriorate*". There is nothing to suggest this deterioration would not have continued. As such, there was the very considerable likelihood of increased maintenance and repair expenses, or the need to replace equipment before expiration of the contract term. However calculated, there is nothing in the evidence to suggest Roper Ltd. would have ever achieved a profit, even if the tonnages suggested in the purchase order had been provided. Thompson in his analysis of the scenarios created by Carruthers, using the tonnages provided for in the purchase order, demonstrated that even then, having regard to Roper Ltd.'s rates, it would have incurred a loss over the term of the contract. The expenses were outstripping income, including any income it would have generated had it received the tonnages forecasted by MacVicar.

(ii) <u>Forced Liquidation of Capital Assets</u>

[173] In his report, confirmed in his testimony, Sobek concludes:

> It is BOYD's opinion that the value reportedly paid for capital assets purchased by Roper to fulfill Tender requirements was substantially in excess of market value. Our independent review indicates that Roper's reported purchase prices are 1 to 3 times higher than published market prices on those units for which valid serial numbers were provided. We realize Roper may have incurred additional costs for shipping and transportation, but not to the magnitude of the prices reportedly paid.

[174] Ryder suggests, having reviewed *"1984/85 Equipment Auction Sales"* and from speaking with a representative from an appraisal service, the prices paid did not appear to be out of line when compared to auction prices in late 1984. Notwithstanding the evidence and report of Ryder, it is clear the prices paid by Roper Ltd. for the equipment were, if not excessive, at least at the top of any range for the purchase of equipment of this vintage. Having regard to its rapid deterioration when on site, including, performance by the loaders and coal haulers to less than industry standards, the prices paid, in hindsight, were undoubtedly excessive for equipment that was approaching the end of their *"useful operable life"*. Perhaps most dramatic in substantiating the likelihood Roper Ltd. paid excessive amounts for the equipment it purchased is the evidence that one of the loaders purchased, for which it apparently paid $90,000 Canadian, was sold one year previously for $18,000 U.S.. As advanced by counsel, even taking into account customs and transportation, the apparent fair market value of this loader one year prior to its purchase by Roper Ltd., was well below what it paid. It was suggested that perhaps the loader may have, in the meantime, been refurbished. However, no evidence was introduced to substantiate any substantial work having been carried out on this loader and even if work had been performed, there is nothing to suggest it would justify the marked increase in the price paid by Roper Ltd. over that paid the year previously. The evidence the loaders were frequently broken down, with at times none of the loaders available for work at the VJCPP, would appear to indicate any refurbishment would have been minimal, at best.

[175] In respect to the claim for loss occasioned by a *"forced liquidation"*, there was evidence the actual liquidation of the equipment occurred some period of time following termination of the contract. There was insufficient evidence as to any earlier efforts that were made to realize on this equipment, or that the method chosen with respect to each piece of equipment was inappropriate or that the amounts achieved were anything but the result of the state of the equipment at the time.

[176] On the evidence, it appears Roper Ltd. paid at least *"premium"* prices for this equipment; it was old at the time it was first placed on the site and it suffered a series of repeated breakdowns. It is therefore not surprising the amounts realized were substantially less than the apparent amounts paid by Roper Ltd. for the equipment, particularly the amounts as summarized in the Ryder report. Thompson, in his report, notes if the equipment had been depreciated over the term of the contract, the additional depreciation would have eliminated the suggested loss on disposal.

[177] There was no satisfactory evidence the liquidation of the equipment purchased by Roper Ltd., as a result of the termination of the contract, resulted in any loss that is otherwise claimable against Devco. In the circumstance, I am satisfied there was no loss from any forced liquidation arising from the termination of the contract.

(iii) Specific Cost Recoveries

[178] Counsel for Roper Ltd. suggests the particulars of this claim are contained in the report prepared by Carruthers, and include the cost of restoring "H" track in the amount of $29,338.00, banking and blending at "C" and "H" tracks in the amount of $46,80.00 and investment income in the amount of $15,000.00 lost to Roper as a result of Roper's bank having cashed in Government of Canada Bonds personally owned by him. Having regard to the evidence, none of these items are recoverable, even in the circumstances of a breach of contract by Devco.

[179] The evidence with respect to the restoration of "H" track is confusing, at best. There is evidence the invoice charged to Roper Ltd. for this work referred to services performed in late October and early November 1985. Roper also acknowledged and introduced records showing lifting continued on "H" track until 1986. On the other hand, the minutes of a meeting held on December 5, 1985 and attended by Roper, Martin, MacVicar and Gouthro record:

> B. Martin stated operations on H Track progressing very well and that a grader could grade the floor to complete the recovery.

[180] If, in fact, the invoice paid by Roper Ltd. reflected services in depleting or recovering "H" track, this was work for which it was paid at a unit rate and for which it therefore received remuneration as the coal was lifted from the banks. There is nothing to suggest the restoration of "H" track involved anything but the depletion of the coal there banked. Admittedly, the fact it continued to lift from "H" track could reflect additional banking at "H" track during or following the depletion or recovery. Nevertheless, the invoice was for the restoration of "H" track, which apparently involved nothing more than the depletion of the track and therefore was part of the contractual obligation of Roper Ltd..

[181] With respect to the additional invoice for banking and blending at "C" and "H" tracks, as noted earlier, Roper Ltd. was paid for the coal banked and blended on "C' and "H" tracks, as well as at the LBC. The only issue is whether the continued activities at these tracks during and/or following the apparent depletion, would entitle it to some reimbursement for any additional cost or expenses incurred by the continued use of these tracks contrary to the original understanding at the time the contract was entered into.

[182] The third item, involving *"lost income"*, is a claim by Roper personally and therefore not part of this claim. In any event, there is nothing in the circumstances of this case that would entitle Roper, even had he been a plaintiff, to claim this amount and no authority was cited in support of such a claim.

(iv) Lost Opportunity

[183] The basis for the claim for lost opportunity appears to be that had Devco not breached the contract, Roper Ltd. would likely have had an opportunity to continue as the LBC contractor and the fact Burns received a contract in the amount of $14,500,000. Unclear is how this translates into a lost opportunity claim on behalf of Roper Ltd..

[184] On the other hand, in Appendix "A" to the report of Grant Thornton LLP, a calculation is made of opportunity costs based on a percentage, per annum, of the various loss calculations made by Carruthers. Counsel for Devco interprets the *"lost opportunity"*

claim as, in effect, a claim in lieu of interest.

[185] Devco, as a Crown corporation, was not required to pay pre-judgment interest prior to an amendment to the ***Crown Liability and Proceedings Act***, R.S.C. 1985 c. C-50. The Act was amended, effective as of February 1, 1992 to permit interest to be awarded against Crown corporations. Counsel for Devco refers to the decision of the Nova Scotia Court of Appeal in ***D.J. Lowe v. Foundation Maritime et al*** (1982), 54 N.S.R. (2d) 135, where at pp. 148-149, Hart, J.A. said:

> The basic premise is that interest may not be allowed against the crown unless there is a statute or a contract providing for it. See *The King v. Carroll*, [1948] S.C.R. 126
>
> . . .
>
> The Queen simply functions through the agency of a Crown corporation and she may sue or be sued in the name of that company in any court having jurisdiction over corporations that are not Crown corporations in relation to obligations incurred by the corporation. If the contract had been entered into by the Queen or by the Minister interest would not have been recoverable had either of them been sued, and, in my opinion, the convenience of handling these affairs through a Crown corporation has not changed that situation.

[186] To the extent the claim for *"lost opportunity"* is, in reality, a claim based on the fact interest could not, prior to February 1, 1992, be awarded against a Crown corporation, then similarly, it cannot be awarded under the guise of *"lost opportunity"*. In the circumstances there is no *"lost opportunity claim"*. As suggested by counsel for Devco, *"Roper cannot re-characterize prejudgment interest simply by calling it "lost opportunity costs""*.

(v) <u>Exemplary Damages</u>

[187] The only basis for exemplary damages advanced by counsel for Roper Ltd., is the suggestion of *"bad faith"* and *"misconduct"* arising out of the manner in which Roper Ltd. was treated by Devco.

[188] The Supreme Court of Canada in ***Royal Bank of Canada v. W. Got & Associates Electric Ltd., supra,*** confirms, in appropriate circumstances, exemplary damages are available for breach of contract. Although an extraordinary remedy in commercial disputes, the court in upholding the award of exemplary damages for breach of contract found it to be appropriate. In the present circumstances, even if the various allegations suggested by Roper Ltd., of *"bad faith"* and *"misconduct"* by Devco, were established in the evidence, which clearly is not the case, they would not constitute *"circumstances sufficient to justify such an extraordinary remedy"* for the breach of contract.

(vi) <u>Loss of Profit</u>

[189] Counsel for Roper Ltd., in his post-hearing submission, references the decision of Justice Roenigsberg, of the British Columbia Supreme Court in ***Seaboard Life Insurance Co. v.***

Bank of Montreal (1999) CarswellBC 1551, at paras. 208 and 209 as follows:

One of the leading cases on damages for breach of contract is *Baud Corp., N.V. v. Brook* (1978), [1979] 1 S.C.R. 633 (S.C.C.). At page 645 Estey J cited the leading case of *Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd.*, [1949] 2 K.B. 528 (Eng. C.A.):

> (1) It is well settled that the governing purpose of damages is to put the party whose rights have been violated in the same position, so far as money can do so, as if his rights have been observed: *(Sally Wertheim v. Chicoutimi Pulp Company*). This purpose, if relentlessly pursued, would provide him with a complete indemnity for all loss de facto resulting from a particular breach, however improbable, however unpredictable. This in contract at least is recognized as too harsh a rule. Hence,
>
> (2) In cases of breach of contract the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonably foreseeable as liable to result from the breach.
>
> (3) What was at that time reasonably so foreseeable depends on the knowledge then possessed by the parties or, at all events, by the party who later commits the breach.

Recovery for loss of profit or loss of opportunity to earn a profit was contemplated n *Baud Corp*., however a more relevant authority on those principles is the decision of McLachlin J.A. (as she then was) in *Houweling Nurseries Ltd. v. Fisons Western Corp*. (1988), 27 B.C.L.R. (2d) 2 (B.C.C.A.), at page 8:

> In my view, the law may be summarized as follows. The basic rule is that damages for lost profits, like all damages for breach of contract, must be proven on a balance of probabilities. Where it is shown with some degree of certainty that a specific contract was lost as a result of the breach, with a consequent loss of profit, some should be awarded. However, damages may also be awarded for loss of more conjectural profits, where the evidence demonstrates the possibility that contracts have been lost because of the breach, and also establishes that it is probable that some of these possible contracts would have materialized, had the breach not occurred. In such a case, the court should make a moderate award, recognizing that some of the contracts may not have materialized had there been no breach.

> The matter may be put another way. Even though the plaintiff may not be able to prove with certainty that it would have obtained specific contracts but for the breach, it may be able to establish that the defendant's breach of contract deprived it of the opportunity to obtain such business. The plaintiff is entitled to compensation for the loss of that opportunity. But it would be wrong to assess the damages for that lost opportunity as though it were a certainty.

[190] Although cited by counsel in the context of Roper Ltd.'s claim for damages, including lost opportunity, the authority clearly states damages require loss and in the circumstances of this case there is no evidence, with the few exceptions noted, that Roper Ltd. suffered any loss of profit or any loss of opportunity to earn a profit. The reality is Roper Ltd. was losing money under the contract and on the balance of probabilities there was every prospect it would continue to lose money had it continued with the contract. There was no loss of profit, nor any loss of the opportunity to earn a profit.

G. CONCLUSION

[191] The contract between the parties was breached, and fundamentally breached, by both Roper Ltd. and Devco. Roper Ltd. breached the contract by failing to perform, evidenced by the increasing number and severity of breakdowns of its equipment. Devco breached the contract by failing to provide anywhere *"approximating"* the tonnages it represented in the invitation for tenders and incorporated in the contract.

[192] On the evidence, Roper Ltd. operated at a loss during the period preceding the termination and it was entirely likely and, certainly beyond the balance of probability, it would have continued to operate at a loss until the conclusion of the contract. There was therefore no loss of profit arising as a result of the termination by Devco. In the event there was any loss, clause 14 of the contract permitted Devco to terminate the contract on 30 days written notice. In the circumstances, any loss occasioned to Roper Ltd. would have to be calculated, recognizing both parties could terminate on 30 days written notice to the other. As such, any calculation of loss, if there had been a loss, would be limited to this period of 30 days.

[193] Devco is entitled to claim reimbursement for the overpayment arising from the weekly draws, as well as certain of the equipment rentals and extra costs it incurred. In respect to the rental claim by Devco against Roper Ltd., it is recognized that some of the rental charges were for services performed on "C" and "H" tracks, other than in respect to depletion of these tracks, and therefore are not properly the subject of the contract between the parties. Roper Ltd. is entitled to claim damages for the premature termination of the use of the radial bin stacker. Additionally, Roper Ltd. received compensation for coal banked on "C" and "H" tracks and as well as for coal lifted on "C" and "H" tracks over and above the coal that existed at the time of commencement of the contract. In the absence of evidence as to the actual extra costs incurred, and recognizing the virtual impossibility, in the circumstances, to establish such costs, Roper Ltd. is entitled to a "fair and reasonable" compensation. In the circumstances, a fair and reasonable compensation for such additional effort, costs and expenses would be the sum of $10,000.00 which is hereby allowed to Roper Ltd..

DEVCO DAMAGES			
Rental of Equipment *Less allowance for non-Roper Services* **Net Rental of Equipment Claim**	$ 135,179.00	5,000.00	130,179.00
Improper Loading of CN Cars	no claim made		0
Restoring Conditions of Bank after termination *Less allowance* **Net claim for restoring condition of banks**	66,582.00	20,000.00	46,582.00
Additional Crew Costs to Adjust CN Cars			0
Dead Freight - CN Cars			0
Damage to Devco Railcars			735.00
Damage to Steel Cable & Sling			697.00
Overpayment Amount Advanced by Devco to Roper	1,047,730.73		
Banking, blending and lifting services		601,110.82	
Banking Pioneer Fines		23,406.44	
Trucking to Pioneer		63,826.32	
Lifting to Brookfield		2,016.13	
Hourly Rentals		191,886.00	
Stand-By		35,413.00	
Lifting to Sysco Trucks (not previously included)		1,383.88	
Fuel Tax Increase (Invoices # 156 & # 334)		6,402.16	
Snow Removal (P.O. # 44952)		15,750.00	
Carbogel (P.O. # 44681)		3,505.93	
Invoice # 023		4,916.00	
Radial Bin Stackers Stand-By Fee		6,000.00	
Amount Owing by Roper			**92,114.05**
TOTAL DEVCO DAMAGES			**$ 270,307.05**
Roper Limited's DAMAGES			

Misrepresentation by Devco			0
Bad Faith by Devco			0
Permitted Use of Back End Trucks			0
Use of Truck Dozers			0
Emptying Silos			0
Continued Loading, Banking & Blending at “C” and “H” Tracks			10,000.00
Loss of Profit			0
Loss on Forced Liquidation			0
Cost of Restoring “C” and “H” Tracks			0
Lost Opportunity			0
Exemplary Damages			0
Loss of Opportunity for Profit on Future Contract			0
TOTAL			**$10,000.00**