Federal Court of Appeal | Cour d'appel fédérale

Date: 20120531

Docket: A-307-10

Citation: 2012 FCA 165

CORAM: **EVANS J.A.**
SHARLOW J.A.
STRATAS J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

SOUTH YUKON FOREST CORPORATION
and LIARD PLYWOOD AND LUMBER MANUFACTURING INC.

Respondents

Heard at Halifax, Nova Scotia, on October 31, 2011.

Judgment delivered at Ottawa, Ontario, on May 31, 2012.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: EVANS J.A.
SHARLOW J.A.

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REASONS FOR JUDGMENT

STRATAS J.A.

[1] This is an appeal from the judgment dated June 7, 2010 of the Federal Court (*per* Justice Heneghan): 2010 FC 495.

[2] The Federal Court found that certain Crown officials in the Department of Indian Affairs and Northern Development (the "Department") promised and represented to the respondents South

Yukon Forest Corporation ("South Yukon") and Liard Plywood and Lumber Manufacturing Inc. ("Liard Plywood") that if they built a lumber mill in Yukon, the Crown would ensure that there would be an adequate, long term supply of timber for the mill. South Yukon and Liard Plywood relied on the promises and representations, and built the mill in Watson Lake, Yukon (the "Watson Lake Mill").

[3] The supply of timber was inadequate. First, the Watson Lake Mill closed briefly. Later, starved for timber, and with no long term permit to harvest timber in the offing, it shut down for good.

[4] Based mainly on these factual findings, the Federal Court found the Crown liable for breach of contract, negligence and negligent misrepresentation. It awarded South Yukon and Liard Plywood $67 million in compensatory damages, $50,000 in punitive damages, prejudgment interest and costs.

[5] The Crown has appealed. I would allow the Crown's appeal with costs. In my view, there was no legal basis for liability on the part of the Crown in these circumstances.

A. The essential facts

[6] This is a complicated, factually intricate case. A clear and comprehensive summary of the facts can be found in the reasons of the Federal Court.

[7] For a long time before the events that gave rise to this case, the Department wished to develop a forestry industry in Yukon. However, that wish was hobbled by the absence of a willing, viable private industry participant.

[8] Regulatory changes were introduced to attract development of the forestry industry and, in particular, the processing of timber in Yukon. One change was the adoption of the "60/40 rule." Another was the establishment of a two-tiered stumpage fee. Under the 60/40 rule, for a timber permit to be issued to an applicant, the applicant had to process 60% of its timber in Yukon. Under the two-tiered stumpage fee system, the stumpage fee charged on logs processed in Yukon was less than for timber exported from Yukon.

[9] These regulatory changes and the Department's enthusiasm for developing a Yukon forestry industry formed a backdrop for the events that followed.

[10] In 1995, discussions started between the Department and individuals who were or would later become associated with South Yukon and Liard Plywood. These discussions concerned the feasibility of building a lumber mill in Yukon.

[11] A major part of those discussions concerned whether sufficient timber would be available to make a mill feasible. In fact, the topic of a long term, assured timber supply arose constantly in meetings for the next few years. It was a significant concern for South Yukon and Liard Plywood.

[12] The regulatory framework for harvesting timber in Yukon, as it existed at that time, greatly affected the supply of timber and thus the viability of a lumber mill.

[13] The Department was responsible for ensuring that timber resources in Yukon were harvested in accordance with applicable legislation and its policies. While the Department was keen to develop a forestry industry, it was also responsible for ensuring long term sustainability of the forests.

[14] Most of the forests in Yukon are on Crown land and cannot be cut without authorization. Authorization could be obtained in three ways:

- A permit for less than 1,000 cubic meters of timber;

- A Commercial Timber Permit, often referred to as a "CTP," for a maximum of 15,000 cubic meters for one year: *Yukon Timber Regulations*, C.R.C. 1978, c. 1528, subsection 4(1). These permits were the principal means for harvesting timber in Yukon, were issued by local Department officials to individual loggers, and could be sold to third parties.

- A Timber Harvest Agreement, known as a "THA," with the Government of Canada, which granted the holder long term tenure: *Territorial Lands Act*, R.S.C. 1985, c. T-7, section 8. Such an agreement required the approval of the Governor in Council by

> order in council. Further, as an administrative matter, approval for a Timber Harvest Agreement was granted only upon submission of a business plan and a forest management plan. A forest management plan is a "high level policy document…designed to balance, and implement controls over, the various social, environmental, economic and political factors that must be considered with respect to forest use": Federal Court reasons, at paragraph 168.

[15] To be viable, the sort of lumber mill envisaged by South Yukon and Liard Plywood would require a long term, assured supply of 200,000 to 215,000 cubic meters of timber per year. Only a Timber Harvest Agreement would suffice.

[16] With a view to obtaining such a supply, Mr. Bourgh of Liard Plywood briefly met with Minister Irwin and his Executive Assistant in Dawson City in May 1996. At trial, Mr. Bourgh testified that after the Minister left the meeting, the Executive Assistant said to him, "If you build a mill that will employ 100 people, why wouldn't we give you the timber?"

[17] In June 1996, Mr. Ivanski, the senior regional official with the Department in Yukon, wrote a letter to Mr. Bourgh. The Federal Court described the letter as follows (at paragraph 683):

> In his letter, Mr. Ivanski advised Mr. Bourgh on behalf of [Liard Plywood], of the necessary steps to receive a [Timber Harvesting Agreement]. He also stated that fulfilling all the relevant requirements did not guarantee the grant of tenure.

"Tenure" in this context means the long term tenure that would be granted under a Timber Harvesting Agreement.

[18] The Ivanski letter also said that a Timber Harvesting Agreement would be a "fundamental tenet" in the overall concept of an operating lumber mill. Mr. Ivanski invited Mr. Bourgh to make an "actual proposal which provides more details."

[19] A plan for the mill began to be formulated. Plans progressed to the point where a site for the mill was acquired at Watson Lake and a commercial building was constructed on it.

[20] In November 1996, Mr. Bourgh wrote the Minister, requesting that he provide a "commitment for a long term timber supply." In March 1997, the Minister responded. The Minister stated that only short term Commercial Timber Permits would be available until consideration of a long term comprehensive forestry policy was completed. Once that policy was worked out, a long term Timber Harvest Agreement could be entered into.

[21] The relevant portions of the Minister's letter to Mr. Bourgh, found in paragraph 318 of the Federal Court's reasons, are as follows:

> Under DIAND's current interim allocation policy, over 350,000 m^3 of wood are available under commercial timber permits in the Watson Lake area. I understand this harvest level should remain the same until new levels are decided through the consultative process of developing sustainable forest management plans for the forest management units most affected by your mill location. These plans will be completed in two to three years. Meanwhile, your plant will be able to secure timber supplies from local permitters for the next few years.

> The development of a comprehensive forestry policy began in December 1996. The policy will address key issues around stumpage, allocation, tenure, and other key elements of forest management. Your company requires long term tenure between you and the Crown. There is a need for Yukoners to define what forms of long term tenure they want. Pending the completion of consultations on long term tenure, existing allocations will be followed until the new strategy and policies are developed. With the exception of commercial timber permits and salvage area wood, no new allocation will be given until the allocation strategy is finalized after due consultation with First Nations, the Government of Yukon, industry, stakeholders, and the public.
>
> I wish you success with your project, as I believe that projects such as yours are ideally suited for the Yukon. I hope your company will be an active participant in helping Yukoners forge a new comprehensive forestry policy.
>
> [emphasis added in the Federal Court's reasons]

[22] The first emphasized portion of the Minister's letter, above, refers to obtaining timber under Commercial Timber Permits. As mentioned above, individual harvesters of timber could apply for Commercial Timber Permits and the amount of timber that could be harvested annually under each Commercial Timber Permit was strictly limited. But the viability of any lumber mill was dependent upon the ultimate granting of a long term Timber Harvesting Agreement. The Minister's letter evidences an understanding that all parties were aware that if the lumber mill were to survive, the provision of short term Commercial Timber Permits would be, at best, a temporary measure, and that a Timber Harvest Agreement would be essential.

[23] The second paragraph of the above passage from the Minister's letter is also significant. It shows that the Department began to develop a "comprehensive forestry policy" in December 1996, and that no long term tenure under a Timber Harvesting Agreement would be granted until that policy was settled. This policy re-think was prompted by a dramatic increase in the demand for

timber in Yukon in 1995. The number of Commercial Timber Permits granted went from a historical level of 175 to 1,300 in 1995.

[24] In July 1997, a meeting took place, described by the Federal Court as "critical" (at paragraph 942). That meeting involved representatives of Liard Plywood and the Department's officials. The Federal Court found that during the meeting, one Department official stated words to the effect that "if a mill was built [Liard Plywood] would receive the timber to operate it" or "if you build a mill, we will give you timber" (at paragraphs 966 and 998).

[25] In the Federal Court, South Yukon and Liard Plywood presented evidence about the historical context of these comments. Earlier in the 1990s, the Department gave long term tenure to another company in return for that company constructing and operating a lumber mill. The company defaulted. South Yukon and Liard Plywood alleged that this adverse experience made the Department keen to have them build a mill first, and only then grant them long term tenure under a Timber Harvesting Agreement.

[26] Other evidence suggested that it was a "risky business decision" to proceed with the lumber mill in these circumstances (see Appeal Book at pages 1495, 1688-1689). Nevertheless South Yukon and Liard Plywood pressed on. Having received the assurances in the July 1997 meeting from the Department official, and in light of other positive signals, such as the meeting in Dawson City and the Department's keenness to start a forestry industry, South Yukon and Liard Plywood decided to proceed with building their lumber mill at Watson Lake.

[27] As will be seen, the Federal Court judge held that the assurances in the July 1997 meeting were representations and promises that South Yukon and Liard Plywood were entitled to rely upon.

[28] The Watson Lake Mill was completed and started operating in October 1998. When it opened, most of the timber it received came from local loggers holding short term Commercial Timber Permits.

[29] However, problems soon developed. The supply of timber was never sufficient. There were delays in issuing Commercial Timber Permits. Some of the permits issued were for areas where the characteristics or "profile" of the logs harvested was inadequate.

[30] Because of problems with the supply of timber, the Watson Lake Mill shut down briefly in December 1998. It re-opened in April 1999. However, with no Timber Harvesting Agreement in sight and, thus, no long term assured supply of timber, it shut down for good in August 2000.

[31] South Yukon and Liard Plywood never received a Timber Harvest Agreement.

[32] Shortly after the Watson Lake Mill shut down, the Department completed its review of policies concerning timber harvesting in Yukon. As a result of that review, in 2001 the Department issued a request for proposals for the granting of two long term Timber Harvest Agreements. Those Timber Harvest Agreements would authorize the holder to harvest 30,000 cubic meters of timber per year over a five-year period. It is evident that even if the Watson Lake Mill had continued to

operate, a Timber Harvesting Agreement permitting such a low harvest would not have allowed it to survive – as the Federal Court found, the Watson Lake Mill needed at least 200,000 cubic meters of timber per year.

B. The decision of the Federal Court

[33] In lengthy reasons for judgment, the Federal Court found the Crown liable for negligence, negligent misrepresentation and breach of contract.

(1) Negligence

[34] The Federal Court concluded that the Crown owed a duty of care in law to South Yukon and Liard Plywood, that harm to them was a foreseeable consequence of disruptions in the supply of wood to the Watson Lake Mill and that the Crown breached the standard of care. The breach of the standard of care occurred when the Crown failed to issue in a timely way Commercial Timber Permits to persons seeking to cut timber, and when the Crown failed to develop in a timely way a policy to govern the long term access of South Yukon and Liard Plywood to timber under a Timber Harvesting Agreement.

[35] The Federal Court found that, in breaching the standard of care, certain officials in the Department acted in bad faith. In its view, the officials' bad faith precluded the Crown from

maintaining that because the officials were developing and applying policy, their conduct was excusable.

(2) Negligent misrepresentation

[36] The Federal Court found the Crown liable for negligent misrepresentation. The Federal Court found that Liard Plywood relied on the representation, described above, to the effect that "if a mill was built [Liard Plywood] would receive the timber to operate it" or "if you build a mill, we will give you timber." Further, reliance on the representation was reasonable, and South Yukon and Liard Plywood would not have built the Watson Lake Mill had the statement not been made. The representation was a continuing one which induced South Yukon and Liard Plywood to build the Watson Lake Mill in the first place, and later to reopen it after the initial shut down in December 1998.

(3) Contract

[37] The Federal Court also found the Crown liable for breach of contract. The representation that timber would be available to a mill built by Liard Plywood and South Yukon was a unilateral promise. When the Watson Lake Mill was built, the unilateral promise was accepted and a unilateral contract was formed. The fact that South Yukon did not exist at the time the promise was made did not matter to the Federal Court, as the unilateral promise was made to the world at large.

[38] The Federal Court found that it was an implied term of the unilateral contract that the annual volume of timber guaranteed to be supplied was 200,000 cubic meters annually over twenty years.

[39] Such a long term supply of timber could only be obtained under a Timber Harvesting Agreement granted by way of order in council. However, in the view of the Federal Court, this was not an obstacle to liability in contract because "[i]t lay within the power of the [Crown] to change the process or seek the necessary authorization in accordance with her contractual obligations" (at paragraph 1097).

(4) Damages

[40] The Federal Court awarded South Yukon and Liard Plywood the loss of profits that they would have made had the Watson Lake Mill remained open. Accepting that they would have received a twenty-year permit to harvest 200,000 cubic meters annually, the Federal Court awarded them compensatory damages of $67 million, punitive damages of $50,000, pre-judgment interest and costs. It awarded punitive damages because of the "misconduct" of the Crown and the "harsh, vindictive, reprehensible and malicious" actions of certain Department officials (at paragraph 1333).

C. The Crown's attacks on certain fact-based findings

[41] In this Court, the Crown attempted to challenge a number of findings of fact on the basis of palpable and overriding error.

[42] The parties devoted a considerable portion of their argument to the issue of whether the Federal Court's judgment must be set aside because it rested upon faulty findings of fact.

[43] The parties agreed that in order to succeed on this, the Crown must show the presence of palpable and overriding error. However, during oral argument, it became evident that the parties had a fundamentally different understanding of the meaning of palpable and overriding error, particularly in a long and complex case such as this. For this reason, I consider that some broader observations on this issue are warranted.

[44] In defining palpable and overriding error, South Yukon and Liard Plywood relied heavily upon the guidance given by the Court of Appeal for Ontario concerning palpable and overriding error in *Waxman v. Waxman* (2004), 186 O.A.C. 201 at paragraphs 278-84. They forcefully submitted that palpable and overriding error is a highly deferential standard of review and that the Federal Court judge's factual findings in this case cannot be disturbed.

[45] On this, I agree with the respondents.

[46] Palpable and overriding error is a highly deferential standard of review: *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401; *Peart v. Peel Regional Police Services* (2006) 217 O.A.C. 269 (C.A.) at paragraphs 158-59; *Waxman*, *supra*. "Palpable" means an error that is obvious. "Overriding" means an error that goes to the very core of the outcome of the case.

When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall.

[47] In applying the concept of palpable and overriding error, it is useful to keep front of mind the reasons why it is an appropriate standard in a complex case such as this.

[48] In this case, there were 40 days of trial stretched out over 6 months, with 19 witnesses and over 1,000 documents, many of which were intricate and technical. In clear and thorough reasons showing considerable synthesis and assessment of the complex evidence before her, the Federal Court judge made key findings of fact. Some of these were founded upon her assessment, clearly expressed, of the credibility of the witnesses before her. Her credibility findings concerning most of the Department's officials who testified are quite negative.

[49] Immersed from day-to-day and week-to-week in a long and complex trial such as this, trial judges occupy a privileged and unique position. Armed with the tools of logic and reason, they study and observe all of the witnesses and the exhibits. Over time, factual assessments develop, evolve, and ultimately solidify into a factual narrative, full of complex interconnections, nuances and flavour.

[50] When it comes time to draft reasons in a complex case, trial judges are not trying to draft an encyclopedia memorializing every last morsel of factual minutiae, nor can they. They distill and

synthesize masses of information, separating the wheat from the chaff and, in the end, expressing only the most important factual findings and justifications for them.

[51] Sometimes appellants attack as palpable and overriding error the non-mention or scanty mention of matters they consider to be important. In assessing this, care must be taken to distinguish true palpable and overriding error on the one hand, from the legitimate by-product of distillation and synthesis or innocent inadequacies of expression on the other.

[52] In this Court, the Crown submitted that a number of the Federal Court's findings of fact should be set aside on the basis of palpable and overriding error.

[53] In my view, the Crown failed to establish palpable and overriding error as it has been articulated above. The Federal Court judge had a basis in the record for her key factual findings. The Crown views the basis for some of them expressed in the reasons as being rather thin. In some regards that may be so but, as I have explained, thinness alone is not palpable and overriding error.

[54] Therefore, in this appeal, I shall proceed on the basis that every one of the Federal Court's findings of fact must stand.

[55] I turn now to some of the fundamental grounds upon which the action of South Yukon and Liard Plywood founders.

D. The reasonableness of South Yukon and Liard Plywood's reliance on representations made by the Department's officials

[56] In essence, South Yukon and Liard Plywood allege that the Crown represented to them that if they built a mill, the Crown would ensure an adequate supply of timber. The Crown would ensure that supply by granting permits to harvest lumber, and by granting them in a timely fashion. South Yukon and Liard Plywood say that their reliance on those representations was reasonable. The Federal Court agreed.

[57] The reasonableness of South Yukon and Liard Plywood's reliance is central to the cause of action of negligent misrepresentation. If, as a matter of law, they relied unreasonably on the Crown's representations, the Crown cannot be held liable: *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 at page 110. In my view, their reliance was unreasonable.

[58] First, as mentioned above, if the Watson Lake Mill were to survive, it would need to receive a Timber Harvesting Agreement for the long term supply of timber. But whatever assurances the Department's officials gave South Yukon and Liard Plywood about getting a Timber Harvesting Agreement, those assurances were not capable of being relied upon. In the end, a Timber Harvesting Agreement could only be made under the authorization of an order in council passed by the Governor in Council under section 8 of the *Territorial Lands Act*. Under that section, the Governor in Council could disagree with the Department's officials if it wished. Therefore, whatever assurances the Department's officials gave could not have been relied upon reasonably by South Yukon and Liard Plywood as the basis for building the Watson Lake Mill.

[59] Section 8 of the *Territorial Lands Act* provides as follows:

8. Subject to this Act, the Governor in Council may authorize the sale, lease or other disposition of territorial lands and may make regulations authorizing the Minister to sell, lease or otherwise dispose of territorial lands subject to such limitations and conditions as the Governor in Council may authorize.	**8.** Sous réserve des autres dispositions de la présente loi, le gouverneur en conseil peut autoriser la cession, notamment par vente ou location, de terres territoriales; il peut également, par règlement, déléguer au ministre ce pouvoir et l'assortir éventuellement de restrictions ou conditions.

The Governor in Council did not make an order in council in this case concerning the Watson Lake Mill.

[60] The Governor in Council's discretion under section 8 of the *Territorial Lands Act* is very broad. The words of the section do not constrain that discretion.

[61] The fact that the authority to decide whether or not to grant a Timber Harvesting Agreement is vested in the Governor in Council sheds some light on the breadth of the discretion. The Governor in Council is "a body of diverse policy perspectives representing all constituencies within government": *League for Human Rights of B'Nai Brith Canada v. Odynsky*, 2010 FCA 307 at paragraph 78. Undoubtedly, in deciding whether to grant a Timber Harvesting Agreement, the Governor in Council is to take into account an array of policy considerations, in this case, the very sort of policy considerations that the Department was investigating in the 1999-2001 period.

[62] In the end, in 2001, the Department issued a request for proposals for the granting of a Timber Harvesting Agreement, ultimately for approval by the Governor in Council. That request for proposals was based upon a forest management plan that the Federal Court described as a "high level policy document…designed to balance, and implement controls over, the various social, environmental, economic and political factors that must be considered with respect to forest use" (at paragraph 168). South Yukon and Liard Plywood could not reasonably rely on any representations made by the Department's officials – the issuance of a Timber Harvesting Agreement was ultimately a decision for the Governor in Council, not the Department's officials, to make on the basis of broad policy considerations.

[63] South Yukon and Liard Plywood submitted that section 8 of the *Territorial Lands Act* was only a directory requirement, not mandatory. I disagree. Whether a provision is mandatory or directory is determined by examining the object of the statute and the effects of ruling one way or the other: *M & D Farm Ltd. v. Manitoba Agricultural Credit Corp.*, [1999] 2 S.C.R. 961 at paragraph 44; *British Columbia (Attorney General) v. Canada (Attorney General)*; *An Act respecting the Vancouver Island Railway (Re)*, [1994] 2 S.C.R. 41 at pages 123-24. The *Territorial Lands Act* is aimed at ensuring that territorial lands are managed in a sound manner for the benefit of the territory and its people. By ensuring that territorial land is only sold, leased or otherwise disposed of in accordance with the policy-based approval of the Governor in Council, section 8 is essential to the objects of the Act. If section 8 were only directory, an important restriction on the sale, lease or disposal of territorial lands would disappear, with the potential for lands to be used contrary to the best interests of Yukon.

[64] South Yukon and Liard Plywood did not argue that they were unaware of section 8 of the *Territorial Lands Act*. I would point out that even if they were unaware of it, that would be of no consequence. Ignorance of the law is no excuse. South Yukon and Liard Playwood must be taken to know that the Department's officials had no power to bind the Governor in Council and that the Governor in Council could disagree with any recommendation of the officials or the responsible Minister and refuse South Yukon and Liard Plywood a Timber Harvesting Agreement. See generally *Wind Power Inc. v. Saskatchewan Power Corp.*, 2002 SKCA 61, leave dismissed [2002] S.C.C.A. No. 283, discussed below.

[65] In the alternative, as a matter of law, the Federal Court could not have found reasonable reliance on the part of South Yukon and Liard Plywood given the totality of the representations made to them. As is evident from Ivanski letter and the Minister's letter, described above, South Yukon and Liard Plywood were on notice that it was far from certain that they would receive a long term Timber Harvesting Agreement that would authorize the harvesting of timber in the quantities needed.

E. No contract could arise from the unilateral promises made by the Department's officials

[66] The Federal Court found that the Department's officials unilaterally promised that if South Yukon and Liard Plywood built their lumber mill, they would receive an assured and adequate supply of timber. When Liard Plywood and South Yukon built the Watson Lake Mill, the unilateral promise was accepted, and a unilateral contract came into being.

[67] As a matter of law, a unilateral contract could not come into being in these circumstances.

[68] Any promises or representations by the officials of the Department to the effect that a Timber Harvesting Agreement would be granted were outside their authority to make because a Timber Harvesting Agreement could only be granted by order in council. The officials had no authority to bind the Governor in Council.

[69] Where a statute regulates the power to make contracts, as section 8 of the *Territorial Lands Act* does in this case, a contract binding on the Crown does not come into existence until the requirements of the statute are fulfilled: *Jacques-Cartier Bank v. The Queen* (1895), 25 S.C.R. 84; *The King v. Vancouver Lumber Co.* (1914), 41 D.L.R. 617 (Ex. Ct.) (ultimately affirmed by the Privy Council (1919), 50 D.L.R. 6); *The Queen v. CAE Industries Ltd.*, [1986] 1 F.C. 129 (C.A.). Where there are statutory restrictions on the authority of servants or agents to bind the Crown, those restrictions must be complied with, and no actual, ostensible or usual authority can override a statutory prohibition: Peter W. Hogg and Patrick J. Monahan, *Liability of the Crown*, 3d ed. (Toronto: Carswell, 2000) at page 225-226.

[70] Very instructive on these points is the decision of the Saskatchewan Court of Appeal in *Wind Power Inc. v. Saskatchewan Power Corp.*, *supra*. The facts of *Wind Power* bear some resemblance to those in this case.

[71] The Saskatchewan Power Corporation tendered for a wind power project. Wind Power Inc. submitted a bid, which the Saskatchewan Power Corporation accepted. The relevant statute prevented the Saskatchewan Power Corporation from entering into a contract without the approval of the Lieutenant Governor in Council. The Lieutenant Governor in Council refused approval. Wind Power nevertheless argued that there was an implied term of the contract that required Saskatchewan Power Corporation to enter into a contract with it. The Court of Appeal rejected this argument, finding that no such implied term could exist in the face of the statutory requirement for approval by the Lieutenant Governor in Council. It also added that a contractor dealing with government is on notice of all statutory limitations placed on public officers (at paragraph 76, citing Hogg and Monahan, *supra* at page 226 and *The Queen v. Woodburn* (1899), 29 S.C.R. 112).

[72] Also instructive is *Donald Frederick Angevine v. Her Majesty the Queen, in Right of Ontario*, 2011 ONSC 4523. The plaintiff, a lawyer, alleged that he was promised by the Attorney General that he would receive a judicial appointment to the Ontario Court of Justice. He was never appointed. He sued for breach of contract. The Ontario Superior Court of Justice, noting that a judicial appointment is "a discretionary, executive function of Cabinet," concluded that a contract could not come into existence (at paragraph 8). It held that "the Attorney General could not bind Cabinet to accept his recommendation" and "if one party to negotiations knows, or ought to know, that the other party lacks the capacity or authority to enter into the contract being discussed, no such contract can be formed" (at paragraphs 19 and 20). In the case at bar, the same can be said for the unilateral promises made by the Department's officials.

F. Causation of damage

[73] In the case of negligence and negligent misrepresentation, causation of damage is an essential element that South Yukon and Liard Plywood had to establish in order to succeed. Specifically, they had to show that the Governor in Council would have granted them a Timber Harvesting Agreement allowing them to harvest timber in amounts required to keep the Watson Lake Mill viable – as the Federal Court found, 200,000 cubic meters of timber per year. Alternatively, they had to show that the prompt issuance of Commercial Timber Permits would have caused a reliable and adequate supply of those same amounts of timber.

[74] They did not show this. Indeed, the evidence suggests the contrary. In 2001, the various relevant policy factors led the Department to issue requests for proposal for Timber Harvesting Agreements allowing the harvest of only 30,000 cubic meters of timber per year.

[75] That decision by the Department has not been challenged by way of judicial review. Therefore, this Court must take it as fact that the policy considerations, when finally analyzed and considered, supported a timber harvest far below what the mill needed to survive.

[76] The Minister's letter, quoted in paragraph 21 above, shows that South Yukon and Liard Plywood were advised and, thus, were well aware of the fact that the Department was engaged in an assessment of the policy considerations and that a moratorium on granting Timber Harvesting Agreements was in force pending the completion of that assessment. In building the Watson lake

Mill in those circumstances, South Yukon and Liard Plywood took the risk that they would not have a Timber Harvesting Agreement of the sort they needed. That risk eventuated. As a matter of law, fault for that cannot be laid at the feet of the Crown.

[77] As for Commercial Timber Permits, whether sufficient timber would be available for the Watson Lake Mill depended upon whether there were sufficient applicants for the permits, a matter beyond the control of the Department. The Federal Court did find that the Department issued Commercial Timber Permits for areas where the timber possessed the wrong wood profile for the mill, but this was not due to the Department's conduct. Those applying for the Commercial Timber Permits nominated the areas where they wanted to harvest timber. In any event, in the end, South Yukon and Liard Plywood shut the mill down once and for all due to the lack of an assured, long term supply of timber, *i.e.*, the lack of a Timber Harvest Agreement. The acquisition of timber through Commercial Timber Permits was always intended by Liard Plywood and South Yukon to be a short term fix until such time as a Timber Harvest Agreement came into place. See the Federal Court's reasons at paragraph 1243 and Appeal Book at page 1395.

G. Legitimate expectations as to substantive matters are not enforceable

[78] The Federal Court's decision essentially enforces South Yukon and Liard Plywood's substantive expectations, said to be encouraged by the Department's officials, that they would receive a long term Timber Harvesting Agreement allowing for the harvesting of timber in the quantities necessary to keep the Watson Lake Mill alive.

[79] It is well-established that an action does not lie to enforce substantive expectations encouraged by officials: *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170 at page 1204; *Reference Re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525 at page 557; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paragraph 26.

H. Negligence arising from delays

[80] The Federal Court found that the Crown was negligent in not granting Commercial Timber Permits on a timely basis. In the end, however, this did not factor into the Federal Court's assessment of damages. As mentioned above, the Federal Court granted South Yukon and Liard Plywood damages on the footing that they had a twenty-year Timber Harvesting Agreement from 2001 to 2020. Further, in the view of the Federal Court (at paragraph 388), "these permits were too small to have any value to a commercial operation." It noted (at paragraph 468) that the Minister himself, perhaps with a bit of exaggeration, referred to the quantity of timber available under a short term Commercial Timber Permit as "firewood."

[81] The Federal Court found that the reason for the final mill shutdown was the inability of South Yukon and Liard Plywood to secure long term tenure through the issuance of a Timber Harvesting Agreement, not any problem with the granting of Commercial Timber Permits (at paragraph 1243).

[82] The Federal Court also found that the Crown was negligent in proceeding too slowly with the process of considering whether a Timber Harvesting Agreement should issue. In its words, "the failure of the Department to develop a process for accessing long term supplies of timber was due to inordinate delay" and "this inordinate delay constitutes negligence" (at paragraphs 845 and 848).

[83] On the evidence, the Crown did fall behind the schedule it originally envisaged for its development of policies concerning the harvesting of timber in Yukon. That is frequently the case when the policy considerations are multiple and complex. But in any event, as mentioned above, given the fact that the Governor in Council had the ultimate say, South Yukon and Liard Plywood had no reasonable assurance that a Timber Harvesting Agreement would ever issue.

[84] In the face of delay in the Timber Harvesting Agreement process, South Yukon and Liard Plywood had two options:

- They could bring an application for *mandamus* or *procedendo* in order to require the Department and the Governor in Council to complete their policy considerations and decide upon a Timber Harvesting Agreement within a particular period of time. They did not do so. In any event, South Yukon and Liard Plywood would have faced the objection that such policy matters and the timing when they are made are not the subject of a duty susceptible to enforcement by *mandamus*: ***Apotex Inc. v. Canada (Attorney General)***, [1994] 3 S.C.R. 1100, adopting the reasoning in [1994] 1 F.C. 742 (C.A.).

- They could delay the building of the Watson Lake Mill until a Timber Harvesting Agreement was in hand or until the Department's policy review was completed and the prospects of a satisfactory Timber Harvesting Agreement was more certain. They did not do so. Instead, they went ahead, knowing of the risks, and accepting them.

In these circumstances, in law, South Yukon and Liard Plywood's alleged loss cannot be attributed to the delay of the Crown.

I. Other issues

[85] The Crown raised several other issues that, if decided in its favour, would result in a finding that it was not liable. These included whether a duty of care arises in this case when the Crown decided for policy reasons in 2001 – in a decision not challenged by way of judicial review – that long term Timber Harvesting Agreements should be limited to only 30,000 cubic meters of timber each year: see *Just v. British Columbia*, [1989] 2 S.C.R. 1228; *Brown v. British Columbia (Minister of Transportation and Highways)*, [1994] 1 S.C.R. 420; *Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)*, [1997] 1 S.C.R. 12. It is unnecessary for us to consider this and other issues raised by the Crown, as the action of South Yukon and Liard Plywood for damages against the Crown must fail for the reasons set out above.

J. Proposed disposition

[86] Therefore, for the foregoing reasons, I would allow the appeal, set aside the judgment of the Federal Court, and dismiss the action of South Yukon and Liard Plywood, with costs throughout.

"David Stratas"

J.A.

“I agree.
John M. Evans J.A.”

“I agree.
K. Sharlow J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-307-10
APPEAL FROM AN ORDER OF THE HONOURABLE JUSTICE E. HENEGHAN DATED JUNE 7, 2010, NO. T-2012-01	
STYLE OF CAUSE:	Her Majesty the Queen v. South Yukon Forest Corporation and Liard Plywood and Lumber Manufacturing Inc.
PLACE OF HEARING:	Halifax, Nova Scotia
DATE OF HEARING:	October 31, 2011
REASONS FOR JUDGMENT BY:	Stratas J.A.
CONCURRED IN BY:	Evans and Sharlow JJ.A
DATED:	May 31, 2012

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