Federal Court  Cour fédérale

Date: 20100505

Docket: T-2012-01

Citation: 2010 FC 495

BETWEEN:

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

Plaintiffs

and

HER MAJESTY THE QUEEN

Defendant

REASONS FOR JUDGMENT

HENEGHAN J.

I. PREAMBLE

[1] This action is about a mill that was built in Watson Lake, located in the Yukon Territory. The following Reasons address three questions: Why was the mill built, why did it close and what are the consequences at law?

[2] In this proceeding, South Yukon Forest Corporation ("SYFC") and Liard Plywood and Lumber Manufacturing Inc. ("LPL"), collectively the "Plaintiffs", seek recovery of damages from

Her Majesty the Queen (the "Defendant") representing the Minister of Indian Affairs and Northern Development (the "Minister"). The claim relates to the construction, operation and ultimate closure of a sawmill near the town of Watson Lake in the Yukon Territory.

[3] LPL is a body corporate, organized and incorporated under the laws of Yukon, on January 26, 1996. Initially, the corporation was called Liard Pulp and Lumber but changed its name on September 3, 1996.

[4] SYFC is a body corporate, organized and existing under the laws of Yukon. It was incorporated on November 5, 1997. It is the operating entity for the joint venture which built and operated the mill in Watson Lake.

[5] The Minister is responsible for the Department of Indian and Northern Affairs ("DIAND" or the "Department"), pursuant to the *Department of Indian Affairs and Northern Development Act*, R.S.C. 1985, c. I-6 (the "Act" or the "DIAND Act").

[6] It is not disputed that the Plaintiffs opened a sawmill in October 1998, that it closed temporarily in December 1998, that it reopened on April 30, 1999, and that it closed permanently on August 4, 2000.

II. PROCEDURAL HISTORY

[7] This action was commenced by the filing of a Statement of Claim by SYFC on November 9, 2001. SYFC sought an order of *mandamus* to compel the Governor in Council to be ordered to designate certain Yukon territorial lands as land management zones and to make 200,000 m^3 of timber per annum available by way of a Timber Harvesting Agreement ("THA"). In the alternative, SYFC sought damages for negligence, negligent misrepresentation, breach of fiduciary duty and misfeasance in public office.

[8] By Notice of Motion filed on May 29, 2002, the Defendant sought an Order to strike certain paragraphs of the Statement of Claim and for further and better particulars of SYFC's Statement of Claim.

[9] The motion was argued on August 16, 2002. By Order dated August 20, 2002, the late Prothonotary Hargrave granted the motion in part, ordering that paras. 1.(a) and 1.(b) be struck, that the Plaintiff SYFC have leave to file an Amended Statement of Claim and that the Plaintiff SYFC provide further and better particulars. Specifically, Prothonotary Hargave struck SYFC's request for an order of *mandamus* because that remedy must be sought pursuant to s. 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7.

[10] SYFC filed an Amended Statement of Claim on August 27, 2002. The Defendant filed an Amended Statement of Defence on October 30, 2002.

[11] On January 2, 2003, the Defendant filed a Notice of Motion seeking leave to file a counterclaim. Leave was granted in that regard by Order dated February 25, 2003 and an Amended Statement of Defence and Counterclaim was filed on February 26, 2003. The Counterclaim raises claims in trespass and nuisance relative to the Plaintiffs' continued occupation of certain lands, as well as a claim for unpaid rent in the amount of $4,060 together with Goods and Services Tax and interest.

[12] On October 30, 2003, SYFC filed a Statement of Defence to the Counterclaim.

[13] On February 16, 2004, SYFC filed a Notice of Motion seeking to join LPL as a Plaintiff, that LPL and that SYFC be appointed to represent the joint venturers operating as SYFC in this proceeding, that the style of cause be amended, and that leave be granted to file a further Amended Statement of Claim.

[14] By Notice of Abandonment filed on March 17, 2004, SYFC abandoned the request set out in para. 2 of its Notice of Motion for the appointment of the intended Plaintiff LPL and the Plaintiff SYFC as the representatives of the joint venturers.

[15] By letter dated May 25, 2004 and filed with the Registry of the Court at Vancouver on May 25, 2004, the Defendant objected to the partial abandonment of the Plaintiff's motion, that is with respect to para. 2, the appointment of the intended Plaintiff LPL and of the Plaintiff SYFC to act in a representative capacity pursuant to former Rule 114 of the *Federal Courts Rules*, SOR/98-106.

[16] On August 25, 2004, the Defendant filed a Notice of Motion seeking an Order for security of costs, as well as an Order that the Plaintiff produce an accurate and complete affidavit of documents and that Mr. Don Oulton be cross-examined upon the Plaintiff's affidavit of documents.

[17] Prothonotary Hargrave directed that SYFC's motion to join LPL be heard at a special sitting before the Court in Whitehorse. By Direction filed on September 13, 2004, the presiding judge directed that the Defendant's motion for security for costs and other relief would be heard at the same time.

[18] Following a hearing in Whitehorse on November 4, 2004, two Orders were issued. In the first Order, SYFC's motion to add LPL as a Plaintiff was dismissed but the motion to advance a claim for breach of contract was allowed.

[19] In the second Order, the Defendant's motion for security for costs was granted and SYFC was ordered to post security for costs in the amount of $20,000. The sum of $20,000 was paid into Court on December 8, 2004, by SYFC in that regard.

[20] SYFC filed a Notice of Appeal on December 7, 2004 relating to the Order dismissing its motion to join LPL as a Plaintiff. The appeal file is A-641-04.

[21] Further to a letter dated December 20, 2004 from the Defendant respecting an apparent discrepancy in the wording of the Order allowing SYFC to advance a claim for breach of contract, a further Order was issued on January 11, 2005.

[22] In the meantime, a further Amended Statement of Claim was filed by the Plaintiff SYFC on December 3, 2004. The Defendant filed her Amended Defence and Counterclaim on December 17, 2004.

[23] By Order dated January 27, 2006, the Federal Court of Appeal allowed the appeal by SYFC from the dismissal of its motion to join LPL as a Plaintiff. The Federal Court of Appeal found that there was no clerical error in the Order of November 23, 2004 and that the Motions Judge had erred in misapprehending the factual basis upon which SYFC sought to join LPL as a Plaintiff, as well as misinterpreting Rule 104.

[24] In its Reasons for allowing the appeal, the Federal Court of Appeal observed that the Defendant was objecting to the Order of the Motions Judge by which leave was granted to introduce a claim for breach of contract and allowing the necessary incidental amendments to the Statement of Claim in that regard. At paras. 36 and 37 of its Reasons, the Federal Court of Appeal said the following:

> [36] I must say, at the outset, that the first Order is clear. There is no ambiguity in that there cannot be any doubt that the Judge allowed the incidental amendments. Not only does the Order provide that the appellant's motion to amend the Statement of Claim and to introduce a claim in contract is allowed, but it directs

> the appellant to serve and file "a clean statement of claim" which is to incorporate the amendments sought, save for those pertaining to the joining of LPL as a plaintiff. The Order made by the Judge follows logically from what she says at paragraphs 23 and 24 of her Reasons. At paragraph 23, she explains that the amendments sought by the appellant are made for the purpose of introducing a new cause of action, i.e. in breach of contract, and for the purpose, *inter alia*, of particularizing the existing claim in negligence against the respondent. At paragraph 24, she refers to the jurisprudence of this Court regarding amendments to pleadings and states that that jurisprudence favours the granting of amendments. Thus, the wording of the first Order comes as no surprise. In fact, both the appellant and the respondent, in serving and filing their amended Statements of Claim and Defence, assumed that the Judge had granted leave to the appellant to make the incidental amendments. In my view, on the wording of the first Order, the appellant and the respondent were correct in their view that the incidental amendments had been allowed.
>
> [37] In any event, it seems to me that, having pleaded to the second amended Statement of Claim without objection, it does not now lie in the respondent's mouth to argue that it is improper. If that is the respondent's view, it ought to have brought its own motion under Rule 58 before pleading to the second amended Statement of Claim.

[25] The Federal Court of Appeal disposed of the appeal by making the following Order:

> [42] For these reasons, I would allow the appeal with costs, set aside the Order of January 11, 2005 and set aside the Order of November 23, 2004, to the extent that it dismissed the appellant's motion to add LPL as a plaintiff. Rendering the judgment which ought to have been rendered, I would allow, in its entirety, the appellant's motion to amend its Statement of Claim. As a result, I would modify the Order of November 23, 2004 as follows:
>
> The plaintiff's motion to join LPL as a plaintiff, to amend its Statement of Claim to add a new cause of action in breach of contract and to make various incidental amendments with respect to existing causes of action is allowed.

> The plaintiff shall serve and file a clean Statement of Claim incorporating all of the amendments, including those pertaining to the joining of LPL as a plaintiff, within ten (10) days of this Order. Leave is granted to the defendant to serve and file an Amended Statement of Defence within two (2) weeks after service of the clean Statement of Claim.

[26] The matter proceeded through pre-trial steps, including discovery examinations that were conducted by both the Plaintiffs and the Defendant.

[27] The trial began in Vancouver on March 31, 2008. Final supplementary submissions were held on September 17, 2008.

III. EVIDENCE

A. General

[28] The evidence in this case consisted of the *viva voce* evidence of nineteen witnesses, including one expert witness, maps, a Response to Request to Admit, answers to undertakings, read-ins from the examination for discovery of the Plaintiffs' representative and more than 1000 individual documents, including one expert report.

[29] There is an exceptional volume of evidence in relation to this proceeding. I will not refer to all of the evidence contained within the record but instead will base my conclusions upon that evidence which I found to be the most relevant, credible and reliable. I have reviewed all of the evidence and have not ignored any evidence to which I do not explicitly refer.

[30] Both parties have submitted multiple volumes of documents. These documents, for the most part, were produced by the parties during the discovery process. However, I take note that numerous, highly relevant, documents were not produced by the Defendant. The Plaintiffs came to possess those documents only through the Access to Information process.

[31] As I noted above, I have reviewed every piece of evidence in this proceeding. I am satisfied that the documents to which I have referred were properly introduced through witnesses or on the consent of both counsel, are business records as described by s. 30 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, or meet the requirements of necessity and reliability, as explained in *R. v. Khan*, [1990] 2 S.C.R. 531. I will however, briefly discuss one exhibit.

[32] Exhibit D-11 was the subject of much discussion throughout the course of this trial. This exhibit consisted of six volumes of documents that the Plaintiffs produced during the discovery process. The Defendant entered these documents for the truth and accuracy of their contents as the Plaintiffs had admitted as much in discovery. The Plaintiffs accepted the admission of these documents as true and accurate.

[33] The Defendant on numerous occasions restated that purpose for which Exhibit D-11 had been entered. In fact there is an agreement between counsel, “Protocol 1”, that is consistent with this position taken by the Defendant. The following evidence was read in from examination for discovery of the Plaintiff, at pages 2962 to 2963 of that transcript:

> Q. Now, yesterday the parties came to an agreement in respect of the admission by the plaintiff as to the an authenticity of

documents and the facts contained in those documents, and with Mr. Preston's permission I'm going to ask the official reporter to read that agreement into the record, and then I'll ask whether Mr. Preston and Mr. Kerr if that is the agreement that we've come to. So if Madam Reporter would read that into the record, please.

COURT REPORTER: (By reading)

"Protocol 1
October 19, 2005.
Penticton, BC
The following has been agreed to by the parties:
The plaintiff admits:

1. as to the authenticity of the documents created by the plaintiffs as contained in all the plaintiff's affidavit of documents.

2. the facts that are stated in the document were at the time of the creation of the document believed by the author, who was peaking for and on behalf of the plaintiff, to be true and accurate based [upon] the information and knowledge of the plaintiff, subject to errors and omissions that may be apparent from the admissible evidence and/or the trial Judge's discretion.

3. this agreement is applicable from Plaintiff's Document 733 and all documents thereafter."

MR. WHITTLE: My learned friend, has the official reporter read the agreement that we have come to correctly?

MR. PRESTON: Yes.

Q. MR. WHITTLE: Mr. Kerr, do you agree that that is the agreement that we have come to?

A. Yes.

[34] However, the Defendant subsequently attempted to resile from the purpose for which these documents were entered. Notwithstanding these attempts, it is a fact that the Defendant entered

these documents for the truth and accuracy of their contents, the Plaintiffs having admitted that the contents of the documents were true and accurate.

[35] Insofar as any document in Exhibit D-11 was created by the Plaintiffs and refers to information which was in the knowledge of the Plaintiffs, I accept them for the truth and accuracy of their contents. The initial discussion relative to Exhibit D-11 can be found at page 550. A further discussion is found at pages 792 to 798 of the transcript.

[36] All quotations from the documentary exhibits, when reproduced below, appear in their original form. Any typographical errors are those of the original author.

B. The Plaintiffs' Witnesses

[37] The first witness called on behalf of the Plaintiffs was Mr. Terrence Sewell. He is currently employed by the Government of Canada, Department of Indian and Northern Affairs in the position of Director-General of the Implementation Branch, Claims and Indian Government Sector. Mr. Sewell was employed by the Government of Canada, DIAND, as the Regional Director General ("RDG"), Yukon Region, stationed in Whitehorse.

[38] He began his employment with the Federal Government in December 1997, following a period of employment with the Yukon Territorial Government (the "YTG") that began in 1982. Prior to that time, Mr. Sewell had worked with the Ontario Government, in a number of positions

for 10 years. He began his employment with the Ontario Government following the completion of a master's degree in economics.

[39] Mr. Sewell worked for DIAND in Whitehorse until September 2001 when he relocated to his current position with DIAND in the National Capital Region, working from an office in Gatineau.

[40] Mr. Sewell was called as a witness for the Plaintiffs, as an adverse witness, pursuant to the combined effect of the *Canada Evidence Act* and the British Columbia *Supreme Court Rules*, B.C. Reg. 221/90. Counsel for the Defendant objected to the proposed process, on the grounds that Counsel for the Plaintiffs had not given prior notice of his intention to call Mr. Sewell. At the same time, Counsel for the Defendant acknowledged receipt, on March 28, 2008, of the list of the witnesses whom the Plaintiffs intended to call. Mr. Sewell's name was on that list.

[41] Following review of the relevant legislation, that is section 40 of the *Canada Evidence Act*, as well as Rule 17 of the British Columbia *Supreme Court Rules* and of the decisions in *Farmer Construction Ltd. v. R.* (1983), 48 N.R. 315 (F.C.A), and *Weywakum Indian Band v. Canada and Wewayakai Indian Band* (1995), 99 F.T.R. 1 (T.D.), aff'd except as to costs (1999), 247 N.R. 350 (F.C.A.), aff'd, [2002] 4 S.C.R. 245 and upon hearing submissions, Mr. Sewell was examined as the representative of an adverse party, that is the Defendant, without prejudice to the rights of the Defendant to call him as a witness on her behalf.

[42] Mr. Sewell provided general background information about the operations of the Regional Office in Whitehorse, as well as evidence about the practice in the public service as to participation in the drafting of replies by the Minster to correspondence and inquiries received concerning matters arising in the region, that is, in the Yukon Territory.

[43] Mr. Sewell was the most senior public servant in the region. He was responsible for the overall management of the Regional Office which was staffed at the time by about 400 people, some of whom worked on a seasonal basis.

[44] DIAND was responsible for the management of natural resources in the Yukon Territory. According to Mr. Sewell, the responsibilities of the Regional Office included regulation of the water, mineral and timber resources.

[45] As well, the Regional Office was mandated to work with First Nations. He said that the office worked with seventeen First Nations, that is fourteen in Yukon and three in British Columbia.

[46] In addition to regulation of natural resources and responsibility for First Nations, Mr. Sewell testified that the Department was responsible for economic development in the area.

[47] Mr. Sewell provided an organizational chart for the “chain of command” in the Regional Office. This document was entered on consent as Exhibit P-1. This shows that the RDG reported to the Deputy Minister (the “DM”) of the Department. The chart also shows that the Director of

Renewable Resources reports to the RDG. During the time frame that is relevant to this action, Ms. Jennifer Guscott was the Director of Renewable Resources, including forestry, and later the Acting Associate Regional Director General ("ARDG").

[48] Mr. Sewell testified that, within the organizational chart of the Yukon Regional Office, the ARDG is "in the same box" as the RDG. He explained that as the RDG, he took the lead on all First Nations matters and the ARDG was responsible for economic development, including forestry. This means that Ms. Guscott occupied the two most senior public service positions with respect to forestry during the relevant period of time.

[49] Mr. Sewell testified that he first became aware of LPL while he was employed as the Assistant Deputy Minister ("ADM") of Economic Development with the YTG.

[50] Mr. Sewell initially testified that he first became aware of SYFC from a newspaper article in late 1998 that indicated that it was opening a sawmill in Watson Lake. He believed that the mill was already in operation at that time and he believed that this was later in 1998. He later testified that his memory had been refreshed and that he was a participant in email communications, with respect to SYFC, in August 1998, before the sawmill was opened.

[51] Mr. Sewell also testified to the actions and knowledge of DIAND throughout the period relevant to this case.

[52] Mr. Leonard Bourgh was the second witness called on behalf of the Plaintiffs. He had worked in and around sawmills all his life, beginning as a young boy during the Second World War. Together with his brother, he had established a sawmill in British Columbia, first in Greenwood and later in the Cariboo area, south of Quesnel. He spent all of his working life in British Columbia until he moved to Watson Lake, Yukon, in 1995.

[53] He had visited the area previously and had concluded that there was a good supply of timber there. He made the move from British Columbia to Watson Lake with the intention "to try to build a sawmill". In pursuit of that goal, Mr. Bourgh incorporated LPL pursuant to Yukon Territory legislation in 1996.

[54] Mr. Bourgh contributed the sum of $220,000, his life savings, to the capital of LPL.

[55] Mr. Bourgh testified about the initial planning and efforts taken by LPL to commence sawmill operations in Yukon. These efforts included the preparation of business plans, meetings with DIAND and with the Minister, at that time the Honourable Ron Irwin, in Dawson City, Yukon.

[56] Mr. Bourgh resigned his position as President of LPL in April 1997.

[57] Mr. William ("Bill") Gurney next testified on behalf of the Plaintiffs. He had worked for twenty years in the forestry industry, both directly and indirectly. He has worked as logging contractor, sawmill owner, teacher of forestry at both high school and college levels, and as a

forestry consultant. He worked in northern British Columbia, the Yukon Territory and in northwestern Alberta.

[58] Mr. Gurney moved to Watson Lake in or around 1995. He wanted to start a forestry consulting business. On a personal level, he had family there; his eldest daughter who was living with her husband Mr. Brian Kerr and their three children, in the town of Watson Lake.

[59] Mr. Gurney is not a shareholder in either LPL or SYFC. He worked for LPL as a consultant in 1996. He left Yukon in the spring of 1997.

[60] In addition to his work for LPL, Mr. Gurney performed consulting work for the YTG in laying out a portion of a main-line logging road south of Watson Lake. He also worked with the Liard First Nation ("LFN"), in 1996, helping them negotiate a timber harvest agreement ("THA") in the amount of 75,000 m^3. This THA was a "training THA" in order to enable the LFN to develop capacity in the forestry industry.

[61] Mr. Gurney testified that it took approximately six months, from start to finish, to negotiate this THA. While performing this task, he worked with employees of DIAND in Whitehorse, including Mr. Jeff Monty, his assistant, Mr. Bill Gladstone and Mr. Michael Ivanski, then the RDG, the senior DIAND official in Yukon.

[62] Mr. Gurney operated as a consultant under the name and style of “Heartwood Consulting”. In his capacity as a consultant to LPL, he prepared a number of documents, including market proposals, on behalf of LPL. This task included a documentary review of the forestry policy, practises and availability of timber in the Yukon Territory at the time.

[63] Mr. Edward (“Ted”) Staffen then testified. He is a member of the Legislative Assembly for the constituency of Riverdale North, Yukon and at the time he testified on behalf of the Plaintiffs, he was the Speaker of the Legislative Assembly.

[64] Mr. Staffen had spent nearly 40 years in Yukon, working in a number of businesses including a period of time working as a consultant with Mr. Ron Gartshore, advising various First Nations and businesses in the Yukon Territory.

[65] Mr. Staffen testified with respect to the consulting he had undertaken for LPL. This included the initial fundraising, participation in meetings with Minister Irwin, and the research and procurement of the initial sawmill equipment.

[66] Mr. Ron Gartshore next testified on behalf of the Plaintiffs. He is a consultant who moved to the Yukon Territory in 1988. He has principally lived and worked in Yukon since that time. He has worked in various positions and performed consulting services for First Nations and for the YTG. He was introduced to Mr. Bourgh, by Mr. Brian Kerr, in 1996. Mr. Bourgh told Mr. Gartshore about his plan to develop a mill in the Watson Lake area.

[67] Mr. Gartshore was involved with Mr. Bourgh and others in 1996 and 1997, in the preparation of business plans, drafting correspondence, and the scheduling and participation in meetings with Minister Irwin and representatives of the Department in Dawson City and Whitehorse. He was involved in raising capital for the project and was himself a shareholder.

[68] Mr. Gartshore worked with Mr. Bourgh and other proponents of the mill project from 1996 until some time in 1998. He was ill for several months in 1997 and unable to work. He stopped working for LPL around 1998.

[69] Mr. Gartshore actively participated in the preparation of the business proposals in 1996 and 1997. The business plans changed over time as a result of feasibility studies. The development of business plans was an evolving process to better reflect a model more suited to the Yukon Territory.

[70] Mr. Gartshore was engaged in raising capital for the project. He testified that the first 50 investors were mainly small businesses and individuals from Yukon, including many who were located in the Watson Lake area.

[71] Mr. Gartshore was active in the planning that preceded the start-up of the mill. Before the mill opened, he worked from an office attached to his home in Whitehorse. He was engaged with meetings with timber suppliers in Florida and financial sources in Calgary. He worked for a six month period from Kelowna before moving away from a daily relationship with the company.

[72] Mr. Brian Kerr was the next witness for the Plaintiffs. He was an early participant in the Watson Lake project. A former member of the Canadian Forces, he later trained as an electrician. He worked in Burns Lake and Smithers, British Columbia, before moving to Watson Lake in 1994. He opened a business as an electrical contractor.

[73] Mr. Kerr first heard about the Watson Lake mill proposal from his father-in-law, Mr. Gurney. At the invitation of Mr. Gurney, he attended a meeting with Mr. Bourgh who expressed an interest in engaging Mr. Kerr to do the electrical work on the mill.

[74] Mr. Kerr invested in the project and was one of the first shareholders. He introduced Mr. Bourgh to his brother Mr. Alan Kerr who had “substantial financial contacts”. Mr. Kerr also arranged the meeting between Mr. Bourgh and Mr. Gartshore.

[75] Mr. Kerr began working with Mr. Bourgh in the fall of 1996. While Mr. Bourgh was leading the effort to raise funds for the project, Mr. Kerr was doing research on the equipment side.

[76] Mr. Kerr was introduced to the B.I.D. Construction Ltd. Group (the “B.I.D. Group”), in Vanderhoof, British Columbia, late in 1996 or early in 1997.

[77] Mr. Kerr attended a meeting, later coined the “due diligence” meeting, on July 15, 1997 in Whitehorse. Mr. Kerr attended as a representative of LPL, with his brother Mr. Alan Kerr, representatives from the B.I.D. Group and the Department. Mr. Kerr said that a representation was made by the Department to supply timber if a mill was built. He said it was a direct result of this representation that the project went ahead and the mill was built in Watson Lake by LPL and SYFC, operating as a joint venture.

[78] Mr. Kerr was actively involved with the mill when it opened in October 1998. The mill suspended operations in December 1998, due to lack of timber. It reopened again on April 30, 1999 and operated until August 4, 2000, when it closed permanently, again due to lack of timber, according to Mr. Kerr.

[79] Mr. Kerr testified as to the events leading up to and surrounding the design, construction, operation and ultimate closure of the Plaintiffs’ sawmill in Watson Lake, Yukon. As well, there was evidence with respect to correspondence and meetings with DIAND and the other joint venture participants.

[80] Mr. Paul Heit was then called to testify on behalf of the Plaintiffs. He is a forest resource technologist by training and he worked for many years in the forest industry. He began employment with Vanderhoof Specialty Wood Products in 1991 as the Woodlands Manager. In 1998, he became the General Manager at that business and around the same time, he took on responsibility as the Woodlands Manager for SYFC in connection with the mill at Watson Lake.

[81] In brief, as Woodlands Manager, Mr. Heit was responsible for getting wood into the mill. In that regard, he familiarized himself with the wood allocation system in Yukon and he did so before the mill was built. He contacted employees of the Department and asked about the process of applying for wood. He learned that there were two existing methods for allocating wood, that is the commercial timber permit ("CTP") process and a THA. Subsequently, Mr. Heit talked to local loggers about the allocation of timber under the CTP process.

[82] Mr. Heit, as the Woodlands Manager for SYFC, was responsible for ensuring a supply of wood for the mill. He oversaw the execution of log purchase agreements during the periods that the mill was operating. Those log purchase agreements related to the purchase of wood cut under the CTP process and the availability of timber depended upon timely processing of permit applications by the Department.

[83] Mr. Heit gave evidence about the necessity of a secure long-term timber supply, in terms of relieving administrative pressures on the Department and allowing SYFC to plan forward in dealing with the various matters associated with the issuance of CTPs. The ability to do forward planning, knowing that there was a secure supply of timber, would contribute to more flexibility in economic and market planning.

[84] Mr. Heit testified that SYFC made it clear from the beginning that it would require 200,000 to 215,000 m^3 of timber per year, to permit it to operate for 250 days a year. SYFC did not

anticipate that it would have to deal with the issue of a short-term timber supply as represented by the CTP. In his view, SYFC faced two challenges as time went on, that is the short-term timber supply and the long-term timber supply.

[85] Mr. Heit gave testimony about forestry practices, the issues in obtaining an adequate log supply, the shortfalls and challenges in the timber allocation system and in the efforts of SYFC to obtain a THA. This testimony included descriptions of meetings with DIAND.

[86] Mr. Keith Spencer was next called to testify on behalf of the Plaintiffs. He has worked in the forestry industry since 1970 and is knowledgeable about the equipment used in that industry, particularly in the area of sawmill equipment. He worked with West Fraser Mills in Quesnel, British Columbia as maintenance supervisor before moving to Vanderhoof, British Columbia in 1982 where he eventually became the General Manager of operations, including supply, with B.C. Timber.

[87] After 1991, Mr. Spencer got involved with the B.I.D. Group in Vanderhoof. This enterprise is engaged in the business of sawmill construction with both new and reconstructed materials. This enterprise also operated fabricating facilities in Vanderhoof.

[88] In 1997, Mr. Spencer became aware of the possibility of becoming involved in a sawmill proposed for Watson Lake for the processing of small logs. There was a meeting in Vanderhoof

with the LPL group; he remembered that Messrs. Brian and Alan Kerr and Don Oulton attended. Mr. Spencer went to Watson Lake in early 1997 to look over the land.

[89] Also, in the summer of 1997, Mr. Spencer went to Whitehorse with Mr. David Fehr. The purpose of that meeting was to talk with representatives of the Department about timber supply. Mr. Fehr is also associated with the B.I.D. Group. Mr. Spencer did not recall who attended from the Department but testified that Mr. Brian Kerr and Mr. Alan Kerr were present, on behalf of LPL.

[90] Mr. Spencer testified that by this time he had already considered if the mill would be a worthwhile investment. He said that a supply of timber and its price were the two benchmarks that had to be met. While the B.I.D. Group was interested in the mill project, this meeting occurred because of outstanding concerns about the security of fibre. Mr. Spencer testified that Mr. Fehr made the decision to participate in the project as a result of this meeting.

[91] Once the decision was made to engage in the project, Mr. Spencer worked from Vanderhoof on the mill design and fabrication. The fabrication work began in September 1997. Much of the mill was made in Vanderhoof using reconditioned equipment. The mill was transported by truck to Watson Lake and installed.

[92] Mr. Spencer was involved, as well, in the training process for the mill employees and he worked on site in Watson Lake for several months beginning in late September, early October 1998.

He was the senior management person in Watson Lake until December 1998 when Mr. Brian Kerr assumed the management role.

[93] Mr. Spencer testified that the focus of SYFC's business plan was on the sales to the Japanese market where there was a high price for tight-grained small-knot products that could be obtained from the wood in the Watson Lake area. He spoke of the timber profile of the wood in the Watson Lake area.

[94] Mr. Spencer also spoke about the advantages of the mill in Watson Lake in relation to the Alaska market. Watson Lake is located on the Alaska Highway. The proximity of the mill to the Alaska Highway would facilitate delivery of the finished product to the Alaska market. Implementation of Phase 2 would have yielded a finished product that would be suitable for construction in Alaska, without the long transport, with the associated costs, from the south.

[95] Mr. Spencer participated in the development of the business plan dealing with Phase 2 of the mill.

[96] Phase 2 of the mill project included a kiln and planer, as well as a cogeneration plant, that is a facility for burning wood waste to create a heat source for heating the kiln and building, as well as generating steam in order to operate a turbine for the production of electricity. Production of electricity by way of a cogeneration facility would reduce operating costs for the facility and provide a source of income by selling excess power to the local power authority.

[97] Mr. Spencer also testified about standard forestry industry practices, SYFC mill operations, the inadequacy of the timber allocation system and the efforts of SYFC to obtain a THA. This evidence included description of meetings with DIAND and the other joint venture participants.

[98] Mr. Spencer frankly described himself as an entrepreneur and as a person who is prepared to take risks. In cross-examination he described a “calculated risk” as one where there is more opportunity to be successful than not. In his opinion, the business plan developed for the mill was credible. He was comfortable with the design of the mill, its machinery and equipment when it began operating.

[99] Mr. David Fehr was the next witness called on behalf of the Plaintiffs. He is a principal of the B.I.D. Group. He met Mr. Brian Kerr in Vanderhoof and discussed the use of reconditioned equipment for construction of the mill in Watson Lake.

[100] In early 1997, Mr. Fehr met in Vanderhoof with LPL; Messrs. Brian and Alan Kerr and Don Oulton attended. Mr. Fehr also flew to Watson Lake to view the LPL operation**.**

[101] Mr. Fehr had a lot of experience working the forestry industry, including the construction of sawmill facilities. He would have been involved in the selection of the equipment to be used for this mill and that equipment would have been chosen on the basis of the volume of fibre that was available. The term fibre can be used interchangeably with timber and wood. He testified that

200,000 m^3 on an annual basis was the quantity of timber required. While Mr. Fehr gave evidence that Mr. Heit and Mr. Brian Kerr would have looked at the details of the project, he would have made the decision to participate.

[102] He attended the meeting in July 1997 in Whitehorse with representatives of both LPL and the Department. He wanted to find out about the security of supply to the mill. He was aware that, at this time, the Federal Government controlled the forest resources in Yukon. He testified that they, that is the proposed investors, were concerned about the security of supply if an investment were to be made.

[103] Mr. Fehr testified that a representation was made at this meeting, by the Department's representatives, that if a mill was built then DIAND would ensure that there was a supply of timber. He said that the decision to build the mill was the result of this representation.

[104] Mr. Fehr testified about the incorporation of SYFC. He said he wanted a new company to act as the operating company since he preferred to "start clean" with the joint venture that his company was going to enter with LPL. He had earlier said, in a July 13, 1997 letter to LPL that he thought that LPL had "too much past baggage" to be the operating company.

[105] Mr. Fehr was questioned about the process of decision-making for the joint venture. He testified that the decision-making of the project would be under the control of the B.I.D. Group, for the purpose of starting-up the mill. Mr. Fehr also testified that he would have been advised by Mr.

Keith Spencer on a regular basis about the situation with profits and losses in connection with the mill. As well, in his letter of July 13th to LPL, Mr. Fehr said that the B.I.D. Group would exercise management control of the sawmill operation through a management agreement.

[106] Mr. Fehr testified that the mill did not operate long enough to get to the stage of profitability. He also testified that there was a "start-up curve" for the project, that although they did not plan to make money on the first day, he anticipated that the project would generate income. He is a businessman and engages in business to make a profit.

[107] Mr. Alan Kerr was the next witness for the Plaintiffs. He is a former player of the National Hockey League, most recently with the Winnipeg Jets, and following his career as a professional hockey player, he is now the vice-president of hockey operations for Okanagan Hockey Schools Ltd. based in Penticton, British Columbia. He is also the brother of Mr. Brian Kerr. He grew up in Smithers, British Columbia where his father was employed in the forest industry.

[108] Mr. Alan Kerr became aware of the proposal to build the mill in Watson Lake from his brother Brian. He understood the proposal to be for a small log manufacturing facility. Mr. Brian Kerr, together with Mr. Gartshore and Mr. Bourgh, visited Mr. Alan Kerr in Kelowna to explain the proposal. Following that meeting, Mr. Alan Kerr invested $50,000 in the project and became a shareholder. This meeting took place after the meeting in Dawson City in May 1996 between Mr. Gartshore and Mr. Bourgh with Minister Irwin, and Mr. Jim Doughty, Minister Irwin's executive assistant.

[109] Mr. Alan Kerr became a director of LPL in 1996. In 1997, he became the President of LPL, following the retirement of Mr. Bourgh. Mr. Alan Kerr served as President for four years, that is during the start-up, operations and final closure of the mill. During this time frame, he participated in meetings with other shareholders and with representatives of the Department.

[110] Mr. Alan Kerr testified about decisions made by SYFC. Those decisions related to the rental, purchase and leasing of equipment, its efforts to collect debts, its expenditures on professional fees including those associated with the entry of Kaska Forest Resources Ltd. ("KFR") into the joint venture and community-based expenditures, including a picnic for the mill employees. He testified that in his opinion, all expenditures were made in a prudent manner.

[111] Mr. Kerr testified about the July 15th, 1997 "due diligence" meeting, the representation he says was made by the Defendant and the reliance upon it to build the mill.

[112] Mr. Alan Kerr also testified that SYFC lost money as the result of the mill closure. The operation would have continued if wood were available and the mill would have expanded through the construction of Phase 2.

[113] Mr. Alan Kerr also gave evidence about the operations of SYFC and LPL, and their efforts to acquire a secure, adequate and long-term timber supply. His testimony, among other things,

addressed meetings with DIAND, both in Whitehorse and Ottawa, and meetings between the joint venture participants.

[114] The final witness called on behalf of the Plaintiffs was Mr. Gerard Van Leeuwen, an expert who was retained by the Plaintiffs for the purpose of addressing the issue of damages. Mr. Van Leeuwen is a consultant in the wood products manufacturing industry with more than 25 years of operational experience in the forestry industry in British Columbia. He is now associated with International Wood Markets Group ("IWMG") based in Vancouver, British Columbia as Vice President and has served in that position since 1998.

[115] Mr. Van Leeuwen testified as to his qualifications as an expert witness. He testified that he received a bachelor of commerce from the University of British Columbia, in 1972. He majored in marketing and finance.

[116] He was employed by Sauder, a wood products company, immediately upon graduation. His work for this company involved the sales, marketing, and distribution of wood products. Over the next ten years he advanced through various management, training and development positions within this company. He held positions such as mill manager, production manager and general manager of the company's sawmill group. This sawmill group included four sawmills that produced five hundred million board feet ("BF") of lumber per year.

[117] This management position included responsibility for all aspects of their operations, day-to-day, capital investments, mill improvements, hiring, training, and labour relations.

[118] Additionally, he was responsible for the marketing and sales of the sawmill group's products. The markets for these mills included Canada, the United States, Europe, Japan, Australia, China, Taiwan and the Middle East.

[119] Mr. Van Leeuwen testified that in 1997 he left Interfor, the successor company of Sauder, and became a consultant with R.E. Taylor & Associates Ltd. This company later became IWMG.

[120] According to Mr. Van Leeuwen, IWMG, and its predecessor R.E. Taylor & Associates Ltd., is a consulting company that specializes in wood products development, marketing and business planning. He testified that IWMG has consulted on evaluation of forestry companies' business plans, financial situation, and market outlook during sawmill acquisitions and as consultants to financial institutions.

[121] Mr. Van Leeuwen specializes in performing manufacturing audits of sawmills and wood manufacturing plants, sawmill performance reviews, developing market and business plans for existing sawmills or for the development of new sawmills.

[122] The Court was referred to seven publications of IWMG. Mr. Van Leeuwen testified that he was involved in the development and participation of almost all of these publications. A list of these

publications and a summary of Mr. Van Leeuwen's education and work experience can be found at Exhibit P-14.

[123] The Plaintiffs submitted that Mr. Van Leeuwen was qualified to give "expert opinion testimony on the projected financial, operational and product marketing analysis of sawmills, including cogeneration facilities, and in particular the sawmill owned and operated by the Plaintiffs." This characterization was based on his extensive work history in the applicable fields; see pages 1950-1951 of the transcript.

[124] The Defendant stated that she was not challenging Mr. Van Leeuwen's qualifications as an expert.

[125] In 2001, Mr. Van Leeuwen was engaged by KFR when his company was called R.E. Taylor & Associates Ltd., to conduct an audit of the Plaintiffs' mill. The audit was titled the "South Yukon Forest Products – Mill Audit & Evaluation of Product & Market Options" (the "Mill Audit"). The Mill Audit was entered as Exhibit D-16. He was subsequently engaged to prepare an expert report on the damages claimed by the Plaintiffs as a result of the mill closure.

[126] In cross-examination, Mr. Van Leeuwen explained what he meant in the Mill Audit by "old, inefficient, cost-ineffective". He also explained what he meant by "half a mill". He drew the distinction between a "mill" and "plant", and he said that the "sawmill is just the part of the mill that

takes the logs and makes rough green lumber"; see the following from pages 1970 and 1971 of the transcript:

> Q. And in your other report, you refer to it as "old, inefficient, cost-ineffective".
>
> A. Because it was only half the mill. I think I was looking - - in this term - - you have to understand, there's a term for a sawmill and there's a term for a plant. You know, they're not the same. They don't mean the same. The sawmill plant means the whole plant with the sawmill, the kilns, the planer mill, the log processing. A sawmill is just the part of the mill that takes the logs and makes rough green lumber.

[127] Mr. Van Leeuwen was the only expert witness who testified on the issue of damages. His expert report on damages was entered as Exhibit P-15. Pursuant to Rules 279 and 280(2), his report was deemed to have been read into the record. The Defendant consented in this regard.

C. The Defendant's Witnesses

[128] Mr. Ron Irwin, a former Minister of DIAND, was the first witness to testify on behalf of the Defendant. Mr. Irwin originally hails from Sault Ste. Marie, Ontario. A lawyer by training, he was first elected to Parliament in 1980 and he was appointed Minister of Indian Affairs and Northern Development in 1993, as well as a member of Treasury Board. He served as a Cabinet Minister until the spring of 1997 and in the course of that appointment, there was contact with representatives of LPL concerning the mill project for Watson Lake in 1996.

[129] Mr. Irwin testified about the mandate of DIAND in the Yukon Territory, including economic development, his understanding of the Yukon forest industry, his communication practices as Minister, and the roles of the Minister and his assistant.

[130] In addition, Mr. Irwin gave testimony on, among other things, the meeting in Dawson City and the correspondence that he, and his Department, had with LPL.

[131] The second witness called by the Defendant was Mr. James Doughty. Like Mr. Irwin, he is originally from Sault Ste. Marie, Ontario. He was appointed special assistant to Mr. Irwin in 1994 and testified that he was hired to assist on economic development within the northern development portfolio in DIAND. He said that his work was mainly with aboriginal groups, consisting of receipt of proposals and ensuring that the "paperwork" went to the right person, whether it was an ADM or RDG.

[132] Mr. Doughty testified that he had no recollection of involvement with the Department's forestry files.

[133] He also accompanied Mr. Irwin on trips. In those circumstances, his primary duty was to make sure that the Minister was "looked after".

[134] Mr. Doughty said that he had no authority to make promises to persons seeking a commitment from the Government. He described himself as a “mailbox” for the Minister, meaning that he would take delivery of proposals and the like.

[135] Mr. Doughty characterized the mandate of the Department as relating to northern development, including economic development, above the 60th parallel; the aboriginal affair aspect of the Department related to all of Canada. He was not familiar with the nature of industry or industrial development in Yukon. While he said that he considered that he ought to have familiarized himself, given his responsibilities, he did not do so in the two years from taking on his responsibilities and participating in the meeting with LPL.

[136] Mr. Doughty met Mr. Gartshore and Mr. Bourgh at the Gold Show in Dawson City in May 1996. He testified about this meeting, his knowledge of forestry matters, the communication practices within the Minister’s office, and his roles, duties and responsibilities within DIAND.

[137] When Mr. Irwin’s appointment as Minister ended in 1997, Mr. Doughty left DIAND.

[138] Mr. David Sherstone was the next witness called by the Defendant. Mr. Sherstone holds a master of arts in the field of physical geography. He was employed from 1993 until 2003 with the Department, working in Whitehorse as the regional manager with water resources. He was mandated with the administration of certain federal statutes including the *Canadian Environmental*

Assessment Act, S.C. 1992, c. 37 ("CEAA") which requires environmental assessments for new projects that involve the use of water.

[139] Mr. Sherstone's exposure to the forestry file occurred when he was the Acting Director of Renewable Resources, filling in for Mr. Bruce Chambers who was the full-time Director. That took place, on and off, during the years 1995 to 1997. In one fiscal year Mr. Sherstone was in this position for approximately five and a half months. At that time, he was responsible for the overall direction of the water, lands and forestry programs.

[140] Mr. Sherstone testified about a blockade of the federal building in Whitehorse that took place in the latter part of October 1996. This blockade was a protest in relation to a number of forestry issues and existing policies, including the allocation of timber in southeast Yukon. Mr. Sherstone testified that the Minister, Mr. Irwin at the time, ordered a program review with the aim of introducing a new policy or regulatory scheme to deal with this issue.

[141] Mr. Sherstone had limited involvement with LPL, and none with SYFC. He testified that his only communication with LPL was during a meeting on November 4, 1996. He gave evidence about his recollection of this meeting.

[142] He acknowledged that the Department had a mandate for encouraging economic initiatives in the Yukon Territory. He was aware that this mandate is set out in the Act. He was aware that there was very high unemployment in Yukon, particularly in the Watson Lake area.

[143] Mr. Sherstone gave evidence about internal DIAND discussions on the LPL proposal, his responsibilities as Acting Director Renewable Resources and the organization of DIAND's Yukon Regional Office.

[144] Mr. Michael Ivanski was then called to testify for the Defendant. At the time, he testified he was the Director-General of Finance and Administration with the Department of Justice, Government of Canada. From 1997 to 2003, he was the Director-General of Finance for DIAND. Before that, he was the RDG for the Yukon region of the Department from July 1993 to July or August 1997. In that position, he managed all the departmental responsibilities for the Yukon region, including those related to forestry. At that time, more than 90 percent of the land base in the Yukon Territory was under federal jurisdiction.

[145] As the RDG, Mr. Ivanski reported to the ADM, Northern Program for the Department. The ADM reports to the DM of the Department, who reports to the Clerk of the Privy Council.

[146] Upon Mr. Ivanski's arrival in Yukon in 1993, the forestry program was a regional one, without special demands. He visited Watson Lake to get an idea of the nature of the business. According to Mr. Ivanski, forestry was not a "problem" file when he arrived, but that changed and the forestry industry came under increasing scrutiny from the public and the forestry industry.

[147] In his position as the RDG, Mr. Ivanski had contact with LPL when the proposal to build the mill was first put forward. He met with LPL in early 1996, attended the Gold Show and responded to the LPL business proposal by letter dated June 6, 1996.

[148] Mr. Ivanski gave evidence about the relevant forestry practices, policy, regulations and legislation. As well, he testified about, among other things, the process of development of departmental communications, the meetings with LPL, and the correspondence to LPL and within the Department.

[149] Mr. Russell Fillmore was then called. He is a graduate technician from the Forest Technical Program of the Ontario Forest Technical School. He has worked with the Ministry of Natural Resources for the Government of Ontario, with the Department of Renewable Resources for the YTG and with DIAND. He began employment with DIAND in March - April 1998 in the position of Regional Manager Forest Resources, for a one year term.

[150] In that regard, he testified about email correspondence exchanged within the Department and with SYFC and LPL about accessing timber. He also testified about having made a tour of the mill in Watson Lake in the fall of 1998 just before the mill opened for operations.

[151] He testified that while he was working with the Department in Yukon, he was unaware that SYFC had been given a guarantee of wood supply. At the same time, Mr. Fillmore was not aware of discussions between LPL or SYFC and the Department prior to the construction of the mill. Mr.

Fillmore also gave evidence about his meetings with representatives of LPL and SYFC, and exchanges of correspondence, often by email, with them. Some of the communications related to acquiring a THA. He understood that the Plaintiffs were looking for a volume of 200,000 m^3 per year. Further, he understood that this figure was constant and did not change.

[152] Mr. Fillmore believed that in order for the Plaintiffs to get a THA, they would have to first prove themselves with demonstrated ability to process timber in the mill. In fact, Mr. Fillmore testified that the Plaintiffs had to demonstrate capacity before they would even be entitled to a 15,000 m^3 CTP.

[153] Mr. Fillmore was involved with others in the Department in dealing with requests from the Plaintiffs and others for the delivery of timely information about access to wood.

[154] In the course of his work with the Department, Mr. Fillmore was responsible for preparing "Backgrounder" or "Background" documents to be used both for internal information and for the media. He either reviewed the documents as prepared by someone else or he prepared them himself, but in any event, he was the person who approved the text.

[155] Mr. Fillmore had a poor memory about some matters including the available volume of timber in the relevant forest management units ("FMU"), that is Y02 and Y03. Additionally, he did not remember what he said to SYFC with respect to what DIAND would expect in order to acquire a THA, the participation of KFR in the joint venture and other relevant matters.

[156] Mr. Fillmore also gave testimony about the regulatory framework for timber licensing, and the concerns of his staff with respect to the conduct of other DIAND employees.

[157] Mr. Jeff Monty was the next witness called on behalf of the Defendant. He holds the degree of bachelor of science in forestry and a certificate of public administration. He was employed by DIAND from 1995 to 2001, working from Whitehorse, as the Regional Manager of Forest Resources. His responsibilities included building the forest program. He focused on the concepts of forest renewal, protection, inventory and planning.

[158] In the mid to late 1990s, devolution of control of the forest resources from the Federal Government to the YTG was pending. Mr. Monty believed it to be prudent to work collaboratively with the Yukon Government in the area of forest management and planning. A Yukon forest strategy had been developed by the Yukon Forest Commission and Mr. Monty was directed to work with it.

[159] While in the Yukon region, Mr. Monty was seconded to the YTG from April 1998 until June, July 1998, working with the Deputy Minister of Natural Resources. His job was to advise on the development of a forest policy prior to devolution.

[160] Mr. Monty first met Mr. Bourgh in 1996 and learned of the proposal to build a mill in Watson Lake. He attended a meeting on April 18, 1996 with LPL and was involved in other meetings over the next 4 years.

[161] Mr. Monty testified at length about the development of forest management plans, with an emphasis on the need for sustainability. He referred to a report that was prepared for the Department in 1990 by Dendron Resource Surveys Ltd. called “Development of a Forest Management Plan of the Southeastern Yukon” (the “Dendron Report”). He also referred to Volume 1 of a “Forest Management Plan for Southeastern Yukon” prepared by Sterling Wood Group Inc., dated March 1991 (the “Draft Sterling Wood Report”). He testified that in his understanding, this plan was not approved. This document, entered as Exhibit D-81, Tab 3 was a draft document.

[162] A final version of the “Forest Management Plan for Southeastern Yukon” prepared by Sterling Wood Group dated August 1991 (the “Final Sterling Wood Report”), consisting of three volumes, was entered as Exhibit P-38 in the course of Mr. Monty’s cross-examination.

[163] Mr. Monty gave evidence about the meetings and correspondence that he had with both the Plaintiffs and other public servants.

[164] Mr. Peter Henry was the next to testify on behalf of the Defendant. He is a graduate of the University of Toronto and holds a bachelor of science in forestry. He began working with DIAND in 1990 as an inventory technician. He looked at the Dendron Report when it was delivered to the

Department early in his term of employment. He also looked at the Sterling Wood Report but was unable to say if he had reviewed the draft report dated June 1991 or the final report dated August 1991.

[165] Between May 1996 and May 1999, Mr. Henry held the position of inventory and planning forester. For a period of time, he held the position of acting head of forest management.

[166] In September – October 1997, Mr. Henry was instructed to prepare a timber supply analysis ("TSA"). He did so, relative to six FMUs across the southern Yukon from west to east. These FMUs were chosen because complete forest inventory information was available for them. Mr. Henry characterized a "timber supply analysis" as analytical work done to support a policy decision on which an annual allowable cut could be based. He completed his report in March 1998.

[167] Mr. Henry testified extensively about the process by which he developed his TSA. His evidence provided a detailed explanation of the use of geomatic information systems, the development of inventory and the environmental, social and political considerations involved in this process.

[168] Mr. Henry's report was not a forest management plan ("FMP"). A FMP is a high level policy document. It is designed to balance, and implement controls over, the various social, environmental, economic and political factors that must be considered with respect to forest use.

[169] Further, this preliminary TSA was directed to the CTP process, that is one year small volume permits, and not to long-term tenure via the THA process. His report was called a "preliminary" TSA because this was the first comprehensive approach to doing a TSA across southern Yukon.

[170] In his preliminary TSA, Mr. Henry imposed a 10-kilometre access constraint. This meant that only that timber that was within that buffer from existing access routes was included in the analysis. Mr. Henry testified that road access in Yukon is relatively poor. The 10-kilometre access constraint was imposed in order to reduce the amount of road construction since, at the time, most wood cutting in Yukon was done pursuant to the CTPs which were issued on an annual basis and there was no guarantee that permit holders would be harvesting in the same area every year. As previously mentioned, this TSA was intended to be applied to the CTP process. This road constraint was a spatial constraint.

[171] Mr. Henry also testified that in preparing the preliminary TSA, he used the "even-flow" approach. This is a harvest flow rule where the amount of timber being harvested in each projected term has to be equal, as opposed to the "non-declining flow" where the volume harvested every term increases but can never decrease. He testified that the even-flow approach is used in every Canadian jurisdiction with the exception of British Columbia and Ontario.

[172] Mr. Henry's evidence with respect to the use of the even-flow approach is contradicted by the "Timber Supply Review for the Coal and Upper Liard Forest Management Units: Information

Report for Forest Management Planning" (the "MacDonell Report"), entered as Exhibit P-79, Tab 384. The MacDonell report was issued in January 2003 by the DIAND/YTG Technical Timber Supply Committee, as headed by Mr. MacDonell.

[173] In his preliminary TSA, Mr. Henry proposed that the harvest ceiling for FMUs Y02 and Y03 be set at 128,000 m^3. This harvest ceiling recommendation was accepted and implemented. This was a significant decrease from the previous annual allowable cut ("AAC"). This change in the AAC was done without public consultation.

[174] There was a period of consultation after the completion of the preliminary TSA. Comments were received from the public and these comments were summarized. A copy of the summary was entered as Exhibit D-53.

[175] Mr. Henry's report was reviewed by Mr. Doug Williams who was engaged by the YTG to conduct a review. Mr. Williams was an independent consultant who does TSA work, according to Mr. Henry. His work was also reviewed by Mr. Herb Hammond under contract with the Yukon Conservation Society ("YCS").

[176] Mr. Henry had limited contact with the Plaintiffs but he learned of the mill project and toured the facility before it opened. He participated in some meetings and was aware of communications within the Whitehorse office about the mill. He was aware of the constraints

imposed by the regulatory amendment, colloquially known as the “60/40 Rule” and the two-tier stumpage regime. These amendments will be discussed in the context section below.

[177] He was also aware that the Department was mandated to encourage economic development and was looking for ways to establish a forestry industry. Mr. Henry was also aware that there was no existing facility in the southeastern Yukon with the capacity to process 350,000 m^3 of timber and further, that the Plaintiffs required an annual volume of 200,000 m^3 of fibre.

[178] Mr. Howard Madill was the next witness called for the Defendant. He worked for DIAND in Yukon, based in Whitehorse, for the period June 1999 to July 2000.

[179] He served as Regional Manager of Forest Resources until June 2000, during the period of time when Mr. Monty was working for the YTG. Following Mr. Monty’s return in June 2000, Mr. Madill worked on matters related to the devolution of the Fire Program to the YTG. Mr. Madill was seconded from his employment with the British Columbia Government to work for the Federal Government.

[180] He was approached for this position due to his relationship with Ms. Guscott. They had previously worked together in the Northwest Territories.

[181] Mr. Madill was examined as to his interactions with the Plaintiffs. He repeatedly said that he endeavoured to treat all clients, that is all applicants for wood supply, in a fair and equitable manner,

with no particular responsibility for the Plaintiffs. He demonstrated no awareness of the email message sent by Mr. Sewell to SYFC on June 7, 1999, entered as Exhibit P-79, Tab 182. In this email, Mr. Sewell advised SYFC that working with them would be a “high priority” for Mr. Madill.

[182] By October 1999, Mr. Madill knew that SYFC was committed to the operation of the mill in Watson Lake and that it had plans for expansion. He knew those plans included a planer and a kiln, as well as the development of a cogeneration plant.

[183] Mr. Madill testified that he had visited the mill on more than one occasion. An email entered as Exhibit P-79, Tab 185, dated June 10, 1999 indicates that he was due to tour the mill on June 22, 1999.

[184] Mr. Madill had no recollection of having been told by anyone at the Department that SYFC had been “guaranteed” a supply of timber.

[185] Mr. Madill acknowledged that upon his arrival at the Regional Office of DIAND, files and records in the office were available to him. He did not recall reviewing a transcript of the meeting held on April 7, 1999. He did not recall reviewing a briefing note, Exhibit P-79, Tab 137, that had been prepared prior to the meeting on April 7th. He did not recall discussions with Ms. Guscott concerning the matters addressed in an email message from Ms. Clark, Exhibit P-79, Tab 155.

[186] Mr. Madill was unaware of the commitment that was made by Mr. Moore in April 1999 for a THA in the summer of 2000. He said that he was not aware of any such commitment having been given to SYFC and he then said “I don’t recall being aware”.

[187] Mr. Madill testified that he was aware of the 60/40 Rule and he considered that to be a means for the development of forest industry in Yukon. He understood that the regulation “requires a certain amount of the wood to be milled in Yukon, and if you don’t have a mill in the Yukon then it can’t be milled in the Yukon”.

[188] Mr. Madill testified about going to Vanderhoof for several meetings on October 19, 1999. He produced a document that purported to be a memo concerning the three meetings that he attended on that day. His memo was entered as Exhibit D-54.

[189] Among the topics discussed at Vanderhoof were concerns with delays in wood supply. Mr. Madill could not recall if other persons were complaining about delays in getting permits for wood.

[190] Lastly, Mr. Sewell was called to testify on behalf of the Defendant.

[191] Mr. Sewell testified that he first became aware of LPL while he was working with the YTG. He had nothing negative to say about any of the employees and shareholders of both LPL and SYFC whom he met while employed with DIAND in Whitehorse.

[192] Mr. Sewell testified about the Department's interest in developing a long-term forest policy for Yukon. He was most interested in seeing the participation of the YTG in the development of that policy since in light of the pending devolution of control over the forest resources, YTG would be involved in the implementation of a new forest policy.

[193] Mr. Sewell testified about the process that the Department was developing relative to a new long-term forest policy and the need for consultation with the community, including the YTG, First Nations and the general public. He spoke about a number of discussion papers and proposals that were developed by the Department. These documents were addressed by a number of witnesses for the Defendant.

[194] Mr. Sewell interacted with representatives of the Plaintiffs, both in meetings and by way of correspondence. He testified that he found the Plaintiffs' representatives to be honest and honourable people.

[195] Mr. Sewell testified that when he was the RDG, settlement of outstanding land claims on behalf of First Nations in Yukon was not a condition for the introduction of a long-term forest policy.

IV. “THE LAY OF THE LAND”: CONTEXT

[196] In the mid to late 1990s, Yukon’s population was approximately 30,000 people. More than 25 percent of the population were First Nations people.

[197] The Yukon Territory covers an area of 48.3 million hectares. Of that total area, 27.5 million hectares is forest land area. Only 7.5 million hectares of forest land is considered productive. Timber in Yukon grows slower than in the more southerly regions. This results in tight rings, smaller knots and a higher tensile strength. As a result, lumber produced from Yukon timber is particularly desirable in the Asian markets where these qualities are highly sought.

[198] The forest resources of the Yukon Territory lay within the legislative mandate of the Government of Canada, pursuant to the *Territorial Lands Act*, R.S.C. 1985, c. T-7 and the *Yukon Timber Regulations*, C.R.C. 1978, c. 1528. Control of the forest resources was transferred to the Yukon Government by the *Yukon Act*, S.C. 2002, c. 7, effective April 1, 2003. The process of the devolution of control of forest and other resources was ongoing for many years as appears from the evidence of many of the Defendant’s witnesses, including Mr. Sewell, Mr. Monty, Mr. Fillmore, Mr. Ivanski and many of the documents that were introduced as exhibits at trial.

[199] For the relevant time in this case, Yukon’s forest resources were under the control of the Department. The legislative mandate of the Department is laid out in the *DIAND Act*. The Act charges the Minister with the responsibility, powers and duties as contained within sections 4 and 5 of the Act, as follows:

> 4. The powers, duties and functions of the Minister extend to and include all matters over which Parliament has jurisdiction, not by law assigned to any other department, board or agency of the Government of Canada, relating to
>
> > (a) Indian affairs;
> >
> > (b) the Yukon Territory and the Northwest Territories and their resources and affairs; and
> >
> > (c) Inuit affairs.
>
> 5. The Minister shall be responsible for
>
> > (a) coordinating the activities in the Yukon Territory and the Northwest Territories of the several departments, boards and agencies of the Government of Canada;
> >
> > (b) undertaking, promoting and recommending policies and programs for the further economic and political development of the Yukon Territory and the Northwest Territories; and
> >
> > (c) fostering, through scientific investigation and technology, knowledge of the Canadian north and of the means of dealing with conditions related to its further development.

[200] The Regional Offices of the Department were located in Whitehorse. The most senior representative of the Department located in Whitehorse was the RDG. In the time frame that is relevant for the purposes of this action, that position was occupied by Mr. Ivanski from July 1993 to July or August 1997 and by Mr. Terrence Sewell from December 1997 until September 2001.

[201] The Yukon forest industry has historically been focused in the region surrounding Watson Lake. Watson Lake is a community 454 kilometres southeast of Whitehorse, with a population in

the mid-1990s of approximately 1500 people. Historically, there had been very high levels of unemployment in the community of Watson Lake. A road trip between Watson Lake and Whitehorse, along the Alaska Highway, was a journey of some 4 - 4 ½ hours duration.

[202] There has been a forest industry in the Yukon Territory since the 1950s. The history of this industry has not been a positive one. George Tough noted that "[t]he Yukon landscape includes too many failed forest enterprises" in his April 2002 report titled "Yukon Forest Issues: A Reality Check and a New Direction – A Report to the Minister of Indian Affairs and Northern Development" (the "Tough Report"). This history includes several forest company bankruptcies and the layoffs and personal hardships for employees, their families and their community that naturally follow.

[203] The industry in 1990 consisted of one large sawmill operation and four smaller operations. The small operators relied upon 15,000 m^3 CTPs to supply their mills. The large operation, Yukon Pacific Forest Products, held a THA for 150,000 m^3 per year. In 1992, KFR purchased Yukon Pacific Forest Products and the THA was conditionally assigned to KFR. KFR is the operating entity of the LFN and the Lower Post First Nation.

[204] In the early 1990s, the Department was concerned about rationalizing the commercial uses of the forest with other conflicting uses. The Dendron Report was produced in April 1990.

[205] In the introduction, the Dendron consultants describe Yukon forests as among the most productive in the world. They noted that the purpose of their study was to develop a framework for "the preparation of an integrated forest management plan of the southeastern Yukon" with reference to the FMUs of Y01, Y02 and Y03, that is the La Biche, Coal and Upper Liard management units, respectively.

[206] The Dendron Report noted that the AAC could be as low as 30,000 m^3 per year, if only large logs were considered, or greater than 1,000,000 m^3 per year if small "pulpwood" logs were included in the harvest. The Dendron Report explained that an AAC "expresses the ability of the planning area to support a certain level of wood production". The AAC must be established, according to the Dendron Report, on a sustained-yield basis before a FMP can be implemented. The next step was to undertake a forest inventory, in conjunction with the development of a FMP.

[207] Subsequently, the Sterling Wood Group Inc. was engaged to conduct a forest inventory and prepare a FMP. The Draft Sterling Report, entered as Exhibit D-81, Tab 3, was produced on January 6, 1991. The Final Sterling Report, marked as Exhibit P-38, was completed in August 1991. This document, that is the Final Sterling Report, was produced not by the Defendant in the course of pre-trial discovery and disclosure of documents, but by the Plaintiffs, in the course of the cross-examination of Mr. Monty, a witness for the Defendant.

[208] Both the Draft Sterling Report and Final Sterling Report referred to the annual sustainable volume of harvestable timber in the southeastern Yukon in Y01, Y02 and Y03 as exceeding 1.5 million m^3.

[209] The Sterling Wood Group reports are evidence that the Department was looking at the issue of forest management by 1990. The two reports indicate that Sterling proceeded with their mandate by considering a number of factors, including the sustainability of the forest and the interests of various stakeholders which were ascertained through their participation on the management plan steering committee and through contributions to, or participation in, the process. Every stakeholder group had involvement in one of these ways.

[210] A similar perspective on the state of the forest resources in Yukon emerges from Exhibit P-75, that is a response developed through the RDG, in reply to a petition that had been presented to the House of Commons on July 6, 1995. The document includes early drafts of the Government's response to the petition from the Yukon Forest Coalition, as well as the final response. The final response is set out in Exhibit P-75, and described the Yukon forest resource as follows:

> The Yukon land base is comprised of 48 million hectares (ha) of which 27 million ha (56%) is forest land – land primarily intended for growing, or supporting, forest. Within the forest land base, 7.4 million ha is considered productive forest land – land capable of producing a merchantable stand within a reasonable length of time.
>
> The annual allowable cut (AAC), the amount of timber that is permitted to be cut annually from a specified area, is used to regulate the harvest level to ensure a long-term supply of timber. The greater Yukon AAC is estimated at 3.4 million cubic meters (m3) (gross merchantable) of which 1.8 million m3 comes from the southeast Yukon. The southeast Yukon is the area where most harvesting

> activity occurs. The total Yukon roundwood harvest in 1992 equaled 128, 000 m3 (1992). This harvest level accounted for only 4% of the territory's estimated AAC. A recent harvest level of 354,000 m3 (1994-95) represents only 10.5% of the estimated AAC limit. Most other jurisdictions in Canada harvest well over 50% of their AAC limits.

[211] The circumstance giving rise to the petition was the establishment of the AAC for 1994/95 as 450,000 m^3. The petitioners demanded a return to historical timber harvest levels which were significantly lower than 450,000 m^3.

[212] The response to the petition referred to the AAC of timber in Yukon, saying that the estimated AAC of the "greater Yukon" is 3.4 million m^3 (gross merchantable) with 1.8 million m^3 attributed to the southeastern region. The response went on to say the following:

> The estimated 1.8 million m3 AAC for the southeast Yukon is based on a comprehensive timber inventory of three southeast forest management units (Units Y01, LaBiche; Y02, Coal; and Y03, Liard). This inventory formed the basis of the forest management plan and AAC limit in August 1991. However, the forest management plan and AAC limit has not been form formally implemented pending further discussions with Yukon forestry constituents including Yukon First Nations. The greater Yukon AAC figure of 3.4 million m3 is based upon a forest inventory that covers approximately 70% of the Yukon forest land base. DIAND has used the estimated AAC limit to guide the allocation of Yukon timber.
>
> …
>
> Furthermore, the AAC for the greater Yukon will be set considerably lower than the current estimated limit. The proposed AAC limit for the 1995-96 harvest season is 450, 000 m3. This AAC limit represents only 13% of the original AAC estimate. DIAND has limited the AAC to 450,000 m3 to maintain the Yukon forest industry which employs approximately 300 direct jobs.

[213] This response refers to the initiative of the Government in conducting an inventory of the timber resources in Y01, Y02 and Y03. The response demonstrates that DIAND publicly represented, including to the Parliament of Canada, that the inventory conducted by the Sterling Wood Group was comprehensive and that a conservative AAC limit was imposed.

[214] It is noteworthy, as well, that at this time, that is in the early 1990s, the timber resources of the Yukon Territory were exempt from the tariffs and countervailing duties imposed pursuant to the Softwood Lumber Agreement with the United States. Any lumber produced in Yukon would have a significant advantage over similar products produced in most other Canadian jurisdictions.

[215] The *Territorial Lands Act* provided two methods by which authority to harvest timber in Yukon could be granted. Timber could be harvested by a permit, referred to as a CTP, or by "other disposition of territorial lands", usually in the form of an agreement between a proponent and the Crown, known as a THA.

[216] The operative sections of the *Territorial Lands Act* for the CTP are sections 17 and 18 (1)(a). These sections provide:

> 17. No person shall cut timber on territorial lands unless that person is the holder of a permit.
>
> 18. (1) The Governor in Council may make regulations
>
> > (a) respecting the issue of permits to cut timber and prescribing the terms and conditions thereof, including the payment of ground rent, and exempting

> any person or class of persons from the provisions of section 17;

[217] Prior to 1995, the only terms and conditions for getting a CTP, prescribed by the *Yukon Timber Regulations*, were:

> 3. These Regulations apply to the cutting and removal of timber on territorial lands under the control, management and administration of the Minister.
>
> 4. The Minister may issue a permit to any individual who is 18 years of age or over or to any corporation for the cutting and removal of timber from territorial lands.
>
> 5. (1) Subject to these Regulations, a forest officer may issue to any individual who is eighteen years of age or over or to any corporation a permit for cutting and removal from territorial lands of timber in an estimated annual volume not exceeding fifteen thousand cubic metres. (SOR/79-508)

[218] In the period of 1994-1995, DIAND experienced a significant increase in the demand for timber permits and for the cutting of wood. This increased demand for access to the timber resources was known in the region as the "Green Rush". Various witnesses for the Defendant described the increase in demand as a "spike", which taxed the personnel of the Department.

[219] Historically, the Regional Office had received 175 applications for CTPs. However, in 1995, over 1300 applications were received for the winter harvesting season. This increased demand for harvestable timber led to increased work for the Regional Office, indeed to the degree that the employees in the region were overwhelmed by the demands for CTPs; see the Regulatory Impact Analysis Statement ("RIAS") to SOR/95-580.

[220] In early 1995, in response to the high demand for access to timber, the Department imposed a moratorium on the issuance of CTPs. In addition to the moratorium, the Department responded to the "Green Rush" with a series of regulatory changes.

[221] This moratorium did not affect the ability of KFR to harvest under the existing THA.

[222] The Minister in 1996 was again indicating a willingness on behalf of the Department to receive business proposals for THAs.

[223] The first regulatory response was implemented by SOR/95-387, which amended the *Yukon Timber Regulations*. This amendment imposed a two-tier stumpage system. Stumpage is the royalty fee that government receives for allowing timber to be harvested. The royalty levied was $\$5.00/m^3$ of harvested timber, if that timber was processed within the Yukon Territory. For raw logs exported without processing in the Yukon Territory, the royalty was $\$10.00/m^3$ of harvested timber. Further amendments followed shortly after.

[224] At one point, in an effort to be "fair" given the number of applicants, the successful applicants for permits were determined by lottery. Department officials put all names into a "bingo drum" and randomly selected the names of the successful applicants.

[225] In protest over the moratorium, the loss of revenue from logging, the stumpage fees and the manner in which Department officials proposed to determine eligibility for CTPs, loggers occupied the Watson Lake office of DIAND, on November 14, 1996. In a continuation of this protest, loggers occupied the Regional Office in Whitehorse on November 16th.

[226] An open letter was sent from the YTG, Government House Leader, to Minister Irwin alleging that the Department had mismanaged the Yukon forest. It was noted that loggers were facing financial ruin. This letter alleged that the mismanagement included failure to listen to the consultation on stumpage and tenure and a failure to meet the established timelines. The YTG asserted that DIAND was doing everything it could to take jobs away from Yukon.

[227] In SOR/95-580, the Department continued its response to the increased number of permits. It introduced the regulatory change known as the 60/40 Rule. Additionally, the eligibility criteria were no longer simply based on age or corporate status. The Department implemented the following regulatory changes:

> 4. (1) The Minister may issue permits for the cutting and removal from territorial lands of timber in an estimated volume not exceeding 15 000 m^3 per permit.
>
> (2) To ensure that sustainable forestry practices are maintained, permits, other than permits issued under subsection 7(1), shall be issued in priority to applicants who have
>
> > (a) demonstrated knowledge of environmental protection and conservation measures related to local timber harvesting conditions;
> > (b) experience in the forest industry;
> > (c) the demonstrated capacity to harvest the amount of timber applied for.

> (3) In determining whether to issue a permit, the Minister shall have regard to whether
>
> > (a) the applicant has contravened these Regulations in respect of any previous permit; and
> > (b) the applicant has fulfilled all of the conditions of any previous permit.
>
> …
>
> 5. Permits issued under subsection 4(1) for the harvesting in each year of a total of 300 000 m^3 of timber shall contain a condition that not less than 60 per cent of the timber harvested under the permit shall be processed within the Yukon Territory.

[228] This change meant that 60 percent of timber harvested under the CTP regime had to be processed in Yukon. Effectively, no harvesting could occur unless there were production facilities capable of processing the timber. According to the RIAS that accompanied the amended regulations, this "amendment supports the objectives of promoting the continued development of the forest industry in the Yukon." The 60/40 Rule was intended to create jobs and generally stimulate the Yukon economy.

[229] The objective of promoting the development of industry in Yukon was unquestionably within the legislative mandate of the Department.

[230] It is clear from the evidence that the Department was making these changes to encourage the private development of a wood processing industry in Yukon. The Department was pleased to have private industry interested in building a mill in Watson Lake. Mr. Ivanksi, Yukon Region RDG,

described the LPL project to Mr. Doughty, the special assistant for Economic Development to Minister Irwin, in an email, entered as Exhibit P-79, Tab 38 and dated November 7, 1996:

> …
> The best news is they are working with the local loggers and have contracted to get the Tier 1 wood to meet their needs for the first couple of years of operation. This makes our tiered system looking pretty good, and opens a market for loogers to sell domestically. Their next phase would include a pellet plant and finishing the processing locally and is a year or two away. This will cause a pressure however as they've already stated that the financiers will require an allocation and tenure before they will make a further substantial investment. But the timing isn't bad. With the consultation on a new policy, tenure and allocations will no doubt be critical components. Having an operator on site, working and paying bills within a few months will certainly focus this discussion, particularly since they will promise more jobs etc but need tenure.
> …

[231] In a later email between DIAND Headquarters personnel, dated June 9, 1999, it was stated that the Department thought "the 60/40 rule would stimulate the development of local industry-we were wrong. Instead it forced loggers out of business because mill did not have the capacity." This email was entered as Exhibit P-79, Tab 184. It is clear that DIAND needed the Plaintiffs' mill to give effect to its policy of encouraging economic development.

[232] This view of the consequences of the Defendant's regulatory changes was also reflected in the RIAS to SOR/96-549. That RIAS stated that "[s]ince the Regulations were last amended, there has been a steady decline in demand for Yukon timber and in market prices."

[233] See also Exhibit D-33 where the Department acknowledged the Yukon people's desire for the promotion and development of a local wood processing industry and value added industry.

[234] The purpose of these regulatory amendments was the encouragement of private industry to build a sawmill capable of processing 60 percent of the timber cut. The evidence is clear that there was no mill in Yukon in 1995 that was capable of processing this volume of timber. The evidence is also clear that the small mills in existence operated sporadically and even if they were all in operation could not handle the volume of timber that would be required to be processed in Yukon.

[235] The RIAS, to SOR/95-580, also noted that the lottery system was unacceptable to both the forest industry and the general public. It was "unacceptable because it did not recognize any past experience or current investment in the forest industry." The regulatory amendments and the evidence demonstrate that the Department required capital investment and proven capacity as pre-conditions to accessing the timber supply.

[236] In the RIAS, the Department foresaw that any "delay in issuing permits would cause the forestry operators in the Yukon economic hardship; some may have to move out of the Territory or lose investments and equipment if they are not allowed back into the forests".

[237] I find that the same harm, that is, economic hardship, was apparent to the Department if no private industry developer undertook to build a mill in Yukon after the passage of these regulations, as would occur if the issuance of permits was delayed. It was the evidence of the Defendant's witnesses that this regulatory amendment meant that no harvesting could occur without a wood processing facility. Economic hardship would also flow from the lack of a wood processing facility.

[238] The RIAS also explained that delaying amendment of the regulations, such that permits could not be issued for the winter harvesting season, would result in the Crown losing $3.7 million in stumpage. Given the impact of the 60/40 Rule, that a mill was necessary or no harvesting could occur, the development of a mill would result in a significant increase in the stumpage fees received by the Crown as harvesting was limited by local milling capacity.

[239] A permitee under the CTP regime was also required to pay $5.00/$m^3$ into a reforestation fund. However, there was no obligation on the logger to actually perform the reforestation.

[240] The framework for authorizing harvesting under a THA is very different. The operative section of the *Territorial Lands Act* for THAs is section 8 which provides:

> 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 prescribe.

This provision is identical to that found in the *Territorial Lands Act*, R.S.C. 1970, c. T-6, s. 4.

[241] It is under the authority of this provision, to authorize an "other disposition of territorial lands", that THAs are granted. However, sections 17 and 18(1)(a) of the *Territorial Lands Act* and section 3.1 of the *Yukon Timber Regulations* are essential for understanding the legislative context of a THA.

[242] Section 17 of the *Territorial Lands Act* is produced above. This provision prohibits the cutting of timber on territorial lands without a permit. This provision is identical to that found in the *Territorial Lands Act*, R.S.C. 1970, c. T-6, s. 13.

[243] Section 18(1)(a) of the *Territorial Lands Act* is produced above. This provision provides the authority for the Governor in Council to make regulations that exempt persons from the operation of section 17.

[244] The *Yukon Timber Regulations*, section 3.1, grant an exemption from the requirement to have a permit in order to harvest timber and a complete exemption from the provision of the *Yukon Timber Regulations*, if the person has a THA. Section 3.1 provides:

> 3.1 Any person with whom the Minister has entered into a long-term timber harvesting agreement pursuant to an order in council under section 4 of the Act is exempted from the provisions of section 13 of the Act and the provision these Regulations. (SOR/87-191) (Emphasis added)

[245] Section 3.1 of the *Yukon Timber Regulations* came into force before the *Territorial Lands Act*, R.S.C. 1985, c. T-7. In order to correctly interpret this provision it is necessary to look at the *Territorial Lands Act*, R.S.C. 1970, c. T-6. As previously mentioned sections 4 and 13 of the *Territorial Lands Act*, R.S.C. 1970, c. T-6 are identical to sections 8 and 17 of *Territorial Lands Act*, R.S.C. 1985, c. T-7 respectively. This is confirmed by the table of concordance.

[246] For the sake of clarity, I have reproduced the regulatory amendment to section 3.1 of the *Yukon Timber Regulations*, effected by SOR/2001-162. This amendment changed the regulation to reflect the current section numbering in the *Territorial Lands Act*, R.S.C. 1985, c. T-7. It provides:

> 3.1 Any person with whom the Minister has entered into a long-term timber harvesting agreement pursuant to an authorization by the Governor in Council under section 8 of the Act is exempted from the provisions of section 17 of the Act.
> (Emphasis added)

[247] The previously worded section 3.1 of the *Yukon Timber Regulations* had exactly the same effect as this newly worded provision through the operation of concordance between the *Territorial Lands Act*, R.S.C. 1970, c. T-6 and the *Territorial Lands Act*, R.S.C. 1985, c. T-7. The effect of section 3.1 of the *Yukon Timber Regulations* is that no permit is necessary to harvest timber, and the regulations do not apply to a THA. That includes the volume restriction of 15,000 m^3 and the 60/40 Rule.

[248] While CTPs were restricted to one year by the *Yukon Timber Regulations*, THAs were granted for longer periods of time, referred to as long-term tenure. As well, the volume of a THA was consistently significantly larger than that possible under a CTP.

[249] In addition to an exemption from the *Yukon Timber Regulations*, the evidence also shows that the harvest from a THA was excluded from the AAC; see Exhibit P-79, Tab 47 and Tab 144.

[250] It is a matter of fact that THA agreements in Yukon required approved business plans and operational level FMPs. These FMPs included, among other things, silviculture plans, roughly replanting and reforestation, and access plans. There is no requirement under the CTP regime to produce a business plan or perform reforestation.

[251] Internal DIAND documents make it clear that the purpose of authorizing a THA is to encourage a proponent to build a mill. In fact, it was a condition of KFR being assigned the pre-existing THA that they construct a mill. The failure of KFR to do so was considered a major breach of the agreement.

[252] The Department's ongoing desire to have a sawmill built in the Yukon is also reflected in the mandatory mill fund into which KFR had to pay. KFR was required to make payment based into this fund on the basis of the volume of timber cut off of the KFR THA. The express purpose of the mill fund was to "get a mill up and running"; see Exhibit P-79, Tab 77; Exhibit P-79, Tab 78; Exhibit P-80, Tab 33; Exhibit P-80, Tab 35.

[253] The Department had a mandate to develop the forest industry. It had taken numerous steps to fulfill that mandate but it lacked a sufficient private industry partner to give affect to its efforts. It required a private industry developer to build a sawmill in Watson Lake. Its efforts to encourage KFR to take the lead on this initiative had failed, notwithstanding the conditional assignment of the THA.

[254] This was the context when Mr. Bourgh came on the scene in 1995.

V. WHAT HAPPENED: A CHRONOLOGY OF EVENTS

A. 1995

[255] The narrative begins in 1995 when Mr. Bourgh moved to the Watson Lake area. He was interested in looking at the woodlands there, with a view to establishing a wood processing facility. After his reconnaissance in the woods, he saw potential for that project.

[256] Mr. Bourgh testified that after his initial investigation in the woods he went to Whitehorse and met with Mr. Gladstone, from the DIAND Regional Office, to discuss timber supply. Mr. Bourgh was assured that there was timber available in Yukon if “you complied” with the rules and regulations.

[257] Mr. Bourgh shared his vision and attracted investors and supporters, including Mr. Gurney, Mr. Gartshore and Mr. Brian Kerr.

[258] Mr. Gurney was involved as a forestry consultant, including development of market plans and forestry documentary review; he was not an investor or shareholder. Mr. Gartshore participated in the development of early business plans. He became involved as a consultant but later became a shareholder and officer of LPL. Mr. Brian Kerr was an electrical contractor. He introduced Mr. Bourgh to Mr. Gartshore. He later became a shareholder, officer and director of LPL. He would eventually become a director of SYFC and the SYFC mill general manager.

B. 1996

[259] By January 1996, LPL had established contact with the Department in Whitehorse and began seeking access to the wood resources.

[260] On January 26, 1996, LPL was incorporated, initially as "Liard Pulp and Lumber". By early 1996, work was underway to prepare a business plan for the proposed development. The initial business plan contemplated an investment of $165 million, requiring 350,000 m^3 per year of fibre (200,000 m^3 licensed to the mill) and would create 420 full time jobs. This initial proposal, entered as Exhibit D-8, included the following:

1. a 15 megawatt steam turbine electrical generating plant fuelled by wood waste;
2. a small log sawmill, including a specialty products mill, planer and drying kilns;
3. a mechanical pulp mill; and
4. a specialty plywood mill

[261] Mr. Gartshore was aware, right from the beginning, that the project would require between 192,000 and 200,000 m^3 of fibre per year.

[262] Mr. Sewell acknowledged that the Plaintiffs had always requested around 200,000 m^3 of timber per year. This evidence is unequivocal and directly contrary to the Defendant's submissions that the quantity requested kept changing.

[263] By 1996, according to the Response to the Request to Admit, the representatives of the Plaintiff LPL had familiarized themselves with the policy and applicable regulations relative to the allocation of timber resources in Yukon. At this time, timber was primarily allocated on the basis of permits, pursuant to the *Yukon Timber Regulations*, although the legislative scheme allowed other forms of authorized harvesting under section 8 of the *Territorial Lands Act.*

[264] In March 1996, Mr. Gurney contacted the Regional Office of DIAND in Whitehorse for the purpose of determining if a secure supply of timber would be made available for LPL's project. Mr. Gurney sought 100,000 m^3 per year of fibre for two years, or until the FMP was in place. However, the business proposal was clear that 200,000 m^3 of fibre was required in the long-term. The business proposal explained that the mill would be built to utilize the largely untouched "pulpwood" sized logs and noted that such quantities could be sustained on the undercut alone for the next 17.5 years.

[265] The request for a secured supply was framed as a request for approval in principle; see Exhibit P-79, Tab 27. Additionally, Mr. Gurney acknowledged, in Exhibit D-11, Tab 1, that LPL knew "that the timber agreement could not necessarily be complete and secure by [July 1, 1996] but the company is asking for an indication that if the requirements were met that the timber supply would be available."

[266] However, LPL was aware of the training THA, in the amount of 75,000 m^3, that had been granted to LFN. It was also aware that a different THA had been assigned to KFR, also in the amount of 75,000 m^3 and that a condition of that THA was that KFR have, or be involved with, a

local wood manufacturing facility. In fact, LPL had detailed knowledge as Mr. Gurney had been intimately involved with LFN being granted this THA. As noted previously, the entire process to authorize this training THA was completed in approximately six months.

[267] A meeting was arranged and took place on April 18, 1996 in Whitehorse. Prior to the meeting, Mr. Gurney had sent a copy of the initial business plan, as detailed above, to the Regional Office. This meeting was attended by Mr. Bourgh and Mr. Gurney on behalf of LPL. Mr. Ivanski, Mr. Chambers, Ms. Guscott, and Mr. Monty attended on behalf of the Department.

[268] Mr. Ivanksi acknowledged on April 24, 1996, by letter entered as Exhibit P-80, Tab 11, that the LPL proposal lacked sufficient detail for the business case to be analyzed and that the timelines were unrealistic. He indicated that DIAND was prepared to consider the concept. However, he stated that "[t]his is not to be considered an exclusive offer..." He also informed LPL that "[b]ased upon historic harvest levels, and the indication of where you propose to cut, it is estimated that there would be sufficient resources to the level estimated in your concept." Also, his letter shows that he was aware that LPL was seeking a tenured fibre supply of 200,000 m^3 per year, and that the mill would use pulpwood sized timber.

[269] As of May 15, 1996, the sole source of fibre for LPL was wood to be obtained from local loggers and the process for obtaining wood, at that time, was the CTP process.

[270] Following the April meeting, representatives of LPL made arrangements to travel to Dawson City for the "Gold Show" for the purpose of meeting the Minister. The Gold Show is an annual trade show held in the Yukon Territory for the placer mining industry. The Gold Show was scheduled for the weekend of May 17, 1996.

[271] According to Mr. Ivanski, then the RDG, it was possible to set up a meeting with the Minister by going through the Regional Office or by going directly to the Minister's office. Mr. Ivanski did not recall being asked to set up any such meeting. Mr. Gartshore, on behalf of LPL, issued a media release, that was entered as Exhibit D-11, Tab 2. This media release advised the community that LPL representatives would attend the 1996 Gold Show for the purpose of a scheduled meeting with the Minister, in order to promote the proposed investment in the Watson Lake area, specifically the construction of a mill.

[272] Mr. Gartshore testified that there was a family connection between his family and Mr. Irwin, arising from Mr. Irwin's days as a lawyer in Sault Ste. Marie. It was through this connection that Mr. Gartshore said that he was able to schedule a meeting with the Minister. Mr. Gartshore, Mr. Staffen and Mr. Bourgh attended the Gold Show where they met briefly with Mr. Irwin and his special assistant, Mr. Doughty.

[273] Mr. Irwin's recollection of the 1996 Gold Show was not as clear as that of Mr. Bourgh and Mr. Gartshore. In his direct examination, Mr. Irwin all but denied anything but a passing prior

acquaintance with Mr. Gartshore's family, although he gave a grudging acknowledgement that indeed he knew Mr. Gartshore's father.

[274] Mr. Gartshore testified that the Irwin family and the Gartshore family were friends. He stated Mr. Irwin was his father's lawyer and that his sister lived next door to the Irwin family. He also testified that Mrs. Irwin came over and greeted him, apparently recognizing Mr. Gartshore from Sault Ste. Marie.

[275] Mr. Bourgh, Mr. Staffen and Mr. Gartshore testified that they met Minister Irwin and his special assistant, Mr. Jim Doughty at the Gold Show. A copy of the business proposal was provided to Mr. Doughty. Although Mr. Doughty testified that it was his practice to relay any materials received to the Regional Office, Mr. Ivanski testified that he did not receive any material from Mr. Doughty relating to the LPL proposal, following the Gold Show.

[276] Mr. Bourgh made notes about his attendance at the Gold Show. Although these notes were written on diary pages dated June 6th, 7th and 8th, there is no doubt that he attended the Gold Show, met Minister Irwin and Mr. Doughty, and that this meeting occurred around May 18, 1996, the dates specified in the press release that was prepared by Mr. Gartshore.

[277] Mr. Bourgh testified that Mr. Gartshore arranged a meeting with Minister Irwin and his special assistant for economic development at the Gold Show. His evidence was that the proposal was explained to the Minister. Mr. Bourgh says that the Minister was told that the mill would

require 200,000 m^3 of timber. According to Mr. Bourgh, the Minister said “well doesn’t sound unreasonable to me” and left his special assistant to finish the meeting. Mr. Bourgh says that Mr. Doughty stated “if you build a mill that will employ a hundred people, why wouldn’t we give you the timber?”; see page 644 of the transcript.

[278] In cross-examination, Mr. Bourgh conceded that no one had actually promised that LPL would be given tenure. Significantly, his evidence was that DIAND had told him that timber was available for a project like the LPL mill. He testified that DIAND told him “that a consistent policy of giving timber to somebody that was coming in and willing to build a mill was in progress and they expected it to be completed soon”; see pages 664-667 of the transcript.

[279] Mr. Staffen testified, see page 907 of the transcript, that when discussing LPL’s proposal to build a mill and the need for a long-term commitment of 200,000 m^3 of timber, that either the Minister or Mr. Doughty “clearly said to us that if you do this, why wouldn’t the Government of Canada give you a timber license?”

[280] In other respects, Mr. Staffen’s memory of this meeting does not accord with the evidence of the other witnesses. He testified that there was a second meeting scheduled with Minister Irwin and Mr. Doughty for the following day. While Mr. Staffen was not cross-examined about the commitment made by the Minister or Mr. Doughty, I do not find his evidence to be reliable about this meeting and give it little weight.

[281] Mr. Staffen also testified that after the meeting with Minister Irwin and Mr. Doughty in Dawson City, LPL proceeded to move forward with planning. He said that the assurances from the Minister's office encouraged LPL to put together an offer and to sell shares in the Yukon Territory.

[282] Mr. Gartshore testified, at page 947 of the transcript, that Mr. Doughty said, in relation to the LPL request for a long-term commitment to 200,000 m^3 of fibre, that,

> if you create, you know, a hundred plus jobs in an economically depressed area and you create a mill and you create employment and, you know, why wouldn't we give it to you? Why wouldn't the government – of course we would. He was almost indignant, that we would think there would be a problem in receiving that measure of a harvesting agreement based on making a major commitment.

[283] Mr. Gartshore was cross-examined in detail with respect to the proposal that LPL presented to the Minister and his special assistant for economic development. He was not cross-examined with respect to his evidence that Mr. Doughty assured him that they would be given access to the necessary timber if they built a mill that provided employment.

[284] As discussed below, I prefer the evidence of the Plaintiffs' witnesses to that of Mr. Irwin and Mr. Doughty. These witnesses for the Defendant were not credible and their evidence is not supported by the *viva voce* evidence of the Defendant's other witnesses nor by the documentary exhibits.

[285] Following the Gold Show, Mr. Ivanski wrote a letter to Mr. Bourgh on behalf of LPL, concerning the proposed mill facility for Watson Lake. This letter, entered as Exhibit D-23 is dated

June 4, 1996. In his letter, Mr. Ivanski noted that LPL had inquired "whether DIAND is fundamentally opposed to the concept…" and advised Mr. Bourgh on behalf of LPL, of the need to satisfy regulatory requirements, including environmental assessments. He pointed out that satisfaction of all the relevant requirements did not guarantee the grant of tenure.

[286] Mr. Ivanski also indicated, in the letter of June 4th, that DIAND had not been entertaining requests for new THAs until an overall forest policy had been developed. That policy development included the development of a FMP.

[287] This aspect of the letter of Mr. Ivanski is at odds with the information given by Minister Irwin to the Member of Parliament ("MP") for Watson Lake, the Honourable Audrey McLaughlin. This is recorded in a letter to LPL from their MP dated April 29, 1996; see Exhibit P-79, Tab 31. Mr. Ivanski's letter is also inconsistent with the letter sent by Minister Irwin, dated June 18, 1996, to the Member of the Legislative Assembly ("MLA") for Watson Lake, the Honourable John Devries; see Exhibit D-20.

[288] Minister Irwin had indicated to both the MP and MLA that DIAND was willing to accept business proposals. The Minister also assured that proper consideration would be given to any proposals received. A business proposal only relates to a THA. A business proposal was not required to apply for a CTP.

[289] Mr. Ivanski concluded his letter of June 4, 1996 by wishing LPL success in its endeavours.

[290] Minister Irwin, in his previously mentioned June 18, 1996 letter, to Mr. Devries expressly acknowledged that the initial LPL proposal was not adequate. As such it cannot be argued that the initial LPL proposal was relied upon by the Defendant. In this letter Minister Irwin said, "I assure you that we will give proper consideration to the project once a proposal has been received." (Emphasis added)

[291] In his letter of June 7th, 1996, Mr. Bourgh thanked the Minister for the opportunity to meet at the Gold Show. He expressed his understanding that the LPL proposal would be given serious consideration. Mr. Bourgh did not refer to the commitments made by Mr. Irwin and Mr. Doughty at the Gold Show. The Plaintiffs allege that this was not an oversight or an omission.

[292] Mr. Gartshore testified that the absence of any mention of the Gold Show commitment in Mr. Bourgh's June 7th letter was a deliberate decision by LPL. This decision was made to avoid offending the RDG and Yukon Regional Office by having "gone over their heads". Mr. Gartshore explained this rationale in a letter to Mr. Brian Kerr on June 17th, entered as Exhibit P-12.

[293] Mr. Gartshore and Mr. Staffen testified that Mr. Ivanski had met with them and expressed his displeasure about LPL having gone over his head. Mr. Gartshore testified that this meeting took place at Panda's Restaurant, in Whitehorse, and Mr. Staffen says that it happened in Mr. Ivanski's office. Mr. Bourgh also remembered having a meeting with Mr. Ivanski at Panda's Restaurant.

[294] Mr. Ivanksi testified that he would not have been offended by a proponent going directly to the Minister as it was the common way of doing business in Yukon. He testified that he could not recall if he had ever met with LPL at this restaurant. However, he did not deny that the meeting happened. He also stated that he did not recall all of the meetings that he had attended with LPL.

[295] In weighing the evidence, I find that this meeting did occur and that Mr. Ivanski had expressed his displeasure that LPL had gone directly to the Minister. I accept LPL's explanation for why it did not refer to the Gold Show commitment in its later communications. It is reasonable, in my view, that LPL would not complain on a daily basis.

[296] In a letter dated July 15, 1996, Mr. Ivanski advised a Mr. Mueller that no LPL proposal to harvest timber had been received. He characterized the LPL proposal as a "concept outline". This letter establishes that the Department was not relying upon the initial LPL business plan; see Exhibit D-24.

[297] Throughout the remainder of 1996, LPL continued to seek investors and capital to finance its business proposal. LPL continued to work towards construction of the mill, to develop business plans and to assess the availability of timber. Mr. Gartshore and Mr. Gurney were involved with these activities.

[298] LPL was aware that the harvest ceiling for Y01, Y02 and Y03 was 350,000 m^3 of timber per year. By September 1996, LPL believed that the harvest ceiling in both Y02 and Y03 would most

likely increase, not decrease. It was unaware of any potential for the harvest ceiling in those two FMUs to decrease.

[299] By October 1996, LPL had leased a property for the purpose of building a sawmill.

[300] Mr. Bourgh testified that LPL was in continuous contact with DIAND asking about the tenure process and asking when LPL was going to get timber. He was concerned by the lack of action by DIAND.

[301] The LPL business plans evolved over time. On November 4, 1996 there was another meeting between LPL and representatives of DIAND. At this meeting, LPL informed DIAND that it had scaled back its project. The business plan presented to DIAND at that meeting now showed an estimated $15 million investment, designed around the high-tech HewSaw, with 45 employees and 100 direct jobs.

[302] At this time LPL estimated that by establishing the mill, the Federal Government would gain $5 million dollars in savings and revenue. This LPL business plan noted that DIAND and YTG had given commitments to provide wood to Yukon mills. LPL also acknowledged in this plan that it was aware that current reports indicated that a specialty mill was a promising industry in Yukon.

[303] This proposed investment was designed around a two phase approach. Phase 1 would see the construction of a HewSaw wood processing facility. A HewSaw is a piece of machinery that is manufactured in Finland and used in a forest environment similar to that in the Watson Lake area.

[304] Phase 2 envisioned the installation of kilns, planers and specialty plants. Until the completion of Phase 2, the mill would produce "green wood" products, that is wood that has not been dried and planed, for the North American markets. Upon completion of Phase 2, the mill would specialize in products for export to markets in Asia. These markets had been confirmed by Mr. Bourgh.

[305] The November 4th meeting was followed up by a letter, dated November 6th, from Mr. Bourgh, on behalf of LPL, written to Minister Irwin. This letter was entered as Exhibit D-11, Tab 4. This letter is presented as being a follow-up to the Gold Show meeting.

[306] In this letter, Mr. Bourgh informed the Minister that LPL had downsized the business proposal and updated him on the progress by LPL in establishing a mill at Watson Lake. He indicated that the downsizing was the result of a major feasibility study and business plan. In this letter, he also explained the two phase approach whereby expansion would be done gradually.

[307] In his November 6th letter, Mr. Bourgh requested a commitment from the Minister for a long-term timber supply of approximately 200,000 m^3. He further states that:

> Our initial timber needs will be approximately 192,000 m^3 of wood fibre annually. We are prepared to purchase some of this wood from

> existing permit holders, however, the lumber market has advised LPL that we need a secure timber supply through some form of commitment towards long term tenure. We now have options to purchase timber from current timber permit holders. The market has advised Liard Plywood and Lumber Manufacturing Inc. that some form of harvesting tenure is needed.
>
> Our request to you, as Minister, is that you provide our company with a commitment for a long term timber supply. The timber supply agreement could be made subject to the construction and operation of our wood processing facility, an acceptable forest management plan, and the successful completion of an Environmental Assessment Review.
>
> We recognize that a process is in place to develop a long term forest management policy for the Yukon. Discussions around tenure lead us to believe that a mill such as ours will have support in accessing the wood that we require. However, we require some form of timber supply arrangement from the federal government in the near term.

[308] Mr. Ivanksi also followed up the meeting of November 4, 1996 with an email to Mr. Doughty, the special assistant for economic development to Minister Irwin. In that email Mr. Ivanksi asked if he should give LPL "positive or negative vibes"; see Exhibit P-79, Tab 38.

[309] By the end of November 1996, LPL intended to maintain a three month supply of fibre in its yard, that is approximately 48,000 m^3. LPL had commitments for the purchase of timber from local loggers to operate at half capacity, one shift, for the next two years.

[310] Mr. Bourgh travelled to Finland to investigate the utility of the HewSaw for the Watson Lake mill. A down payment was made against the price of $7,445,000, but ultimately LPL decided not to complete the purchase and other equipment was chosen.

C. 1997

[311] In late 1996 or early 1997, while researching sawmills that used a HewSaw, Mr. Brian Kerr and Mr. Gartshore came in contact with Mr. Pat Clarke, general manager of RePap, a large sawmill company operating in Smithers, British Columbia. Mr. Clarke recommended that LPL not pursue the HewSaw mill. He suggested that good used equipment, if properly reconditioned and installed, would serve the same purpose at a lower cost.

[312] To that end, Mr. Clarke put Mr. Kerr in touch with the B.I.D. Group. Mr. Clarke made the recommendation on the basis that the B.I.D. Group, led by members of the Fehr family, were experienced in the repairing and reconditioning of sawmill equipment, the construction and operation of sawmills, as well as in the secondary processing of wood. The B.I.D. Group offices, a steel fabricating shop and a wood manufacturing plant, are located in Vanderhoof.

[313] Mr. Brian Kerr testified that while he was in Smithers, he called Mr. Fehr in Vanderhoof. Mr. Fehr suggested that Mr. Kerr come to Vanderhoof at once and meet with him. Mr. Kerr and Mr. Gartshore jumped into Mr. Kerr's truck and drove the three hours to Vanderhoof that very day.

[314] On that same day Mr. Fehr also arranged for a tour, by small airplane, of different B.I.D. Group projects around British Columbia. The purpose of this trip was for Mr. Fehr to show Mr. Kerr and Mr. Gartshore projects that demonstrated the B.I.D. Group's construction capabilities. The

B.I.D. Group was involved in several very large projects for major players in the British Columbia forest industry.

[315] Some time after the initial visit to Vanderhoof, LPL purchased and installed a small portable mill, called a “Scragg Mill”, at the mill site west of Watson Lake. However, it was never the intention to use this mill in the long-term. This Scragg Mill was seized at a later date as the seller did not have clear title to the mill.

[316] Following the initial discussions with these representatives of LPL, Mr. Fehr and Mr. Spencer travelled to Watson Lake to visit the mill site and to get a feel for the lay of the land.

[317] Also early in 1997, the Regional Office of DIAND was working on a reply to LPL’s letter of November 6, 1996. According to both Mr. Ivanski and Mr. Sewell, it was the practice to have the Regional Office draft the reply to correspondence sent to the Minister concerning issues in the Region. Mr. Monty testified that he had some role in the drafting of this letter. The reply letter was dated March 13, 1997 and was signed by the Minister.

[318] The letter dated March 13th from Mr. Irwin as the Minister was specifically written in reply to LPL’s letter of November 6, 1996. The letter was entered as Exhibit P-79, Tab 52. The operative part of the letter provides 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)

[319] According to Mr. Bourgh, on behalf of LPL, he was comforted by this letter. He believed that since the Minister, and no one else, responded to LPL's letter, that DIAND was still interested in the LPL proposal. In that letter, LPL had requested a commitment for long-term timber supply.

[320] As a result, in the following months, LPL continued with its efforts to attract investors and moved ahead with discussions with the B.I.D. Group.

[321] As of March 13th, that is the date of the letter from Minister Irwin, LPL was aware of the Defendant's policies and regulations regarding forestry operations in Yukon. It was also aware that it could be issued only one CTP at a time and that the maximum volume for a CTP was 15,000 m^3.

[322] In April 1997, Mr. Bourgh withdrew from active participation with LPL.

[323] Around this time there was a meeting in Vanderhoof between LPL and the B.I.D. Group. This meeting was to discuss the involvement of the B.I.D. Group in the construction of the mill in Watson Lake.

[324] In a letter dated May 1, 1997, from the B.I.D. Group, written by Mr. Fehr, to LPL, to the attention of Mr. Brian Kerr, B.I.D. expressed its interest in participating in the mill. This letter was entered as Exhibit D-81, Tab 412. Mr. Fehr stated in this letter that the B.I.D. Group would be interested in the construction and set-up of a sawmill "on a turn key basis". The estimated cost was $1,000,000, half of that amount was expected to be paid in cash and the remainder would be shares in LPL.

[325] Around the same time, DIAND commissioned a study entitled "Kaska Forest Products Sawmill Project." The purpose of this study was to "provide an overview on the marketing and products that a new specialty sawmill would focus on, and a conceptual plan/layout of the type of plant" recommended for KFR; see Exhibit P-79, Tab 55.

[326] This report, prepared by the Sterling Wood Group Inc., concluded that the appropriate course of action was a two phase approach. It recommended basically the same approach as would be taken by the joint venturers in constructing the Watson Lake mill. It recommended construction with used and reconditioned milling equipment. The primary markets suggested were Japan, Korea and Taiwan. This report is dated April 21, 1997.

[327] By July 1997, B.I.D. was interested in proceeding but had lingering concerns about the availability of a wood supply. As a result, Mr. Brian Kerr scheduled a meeting with DIAND in Whitehorse for the purpose of discussing wood supply.

[328] On July 13, 1997, Mr. Fehr wrote to Mr. Brian Kerr. This letter was entered as Exhibit D-11, Tab 103. In this letter Mr. Fehr states,

> …
>
> I have reviewed your business plan with Keith and think your project looks like it should proceed. As discussed before, I feel that L.P.L. has too much past baggage to be the operating company. I believe it to be wise to come up with a new name for the partnership we have discussed. L.P.L. will be in joint venture or partnership with the operating group and represented on the board of the operating company based on its percentage of ownership.
>
> …
>
> We also have to seriously discuss a plan on how to ensure we will have an adequate timber supply. So far, we have been relying on your belief that there is a lack of competition up there. These situations change quickly. We can help develop proposals to the government to try and get more security. These things should be happening prior to the construction of a sawmill as discussed before. Hopefully before winter we can show the government some serious

> intent and throughout the following year we can hit them hard on the absolute necessity of more secure tenure.

[329] The meeting was held on July 15th, according to the summary of financial records that was filed at the hearing on July 11, 2008. It was attended by the Kerr brothers, representing LPL; Mr. Fehr and Mr. Spencer, representing the B.I.D. Group; and Mr. Monty and Mr. Gladstone, representing the Department. It was at this meeting that the Plaintiffs say a representation was made to LPL. LPL and the B.I.D. Group relied upon that representation in going ahead with the mill project.

[330] Following that meeting, LPL and the B.I.D. Group continued working towards the construction of a mill in Watson Lake. The work carried on throughout the rest of 1997 and up to October 1998 when the mill commenced operations. The sawmill was constructed in sections in Vanderhoof. The components of the mill were then transported by road from British Columbia.

[331] The decision was made by LPL and 391605 B.C. Ltd., a company associated with the B.I.D. Group, to use existing material, including older, reconditioned equipment. In Mr. Fehr's opinion, the size of the proposed mill and the anticipated volume of wood to be processed, that is 200,000 m^3 a year, did not justify the capital cost of using all new materials and equipment. He had a lot of experience in tearing down old sawmills, putting up new ones and in recycling, reconditioning and reusing material and equipment, and was satisfied that this approach would yield a sawmill facility that was adequate for the task**.**

[332] As previously noted, the use of reconditioned equipment was recommended to DIAND, by one of its own consultants, that is Sterling Wood, with respect to a mill to be built in Watson Lake.

[333] Throughout the summer and fall of 1997 there were meetings between LPL and the B.I.D. Group about the advancement of the Watson Lake mill project.

[334] In late 1997, LPL and 391605 B.C. Ltd. were continuing mill design and construction. Mr. Fehr described himself as the “overseer” in relation to the fabrication of the mill, including the installation of the equipment. He went to Watson Lake several times. He saw the mill when it was operational. He was satisfied with what he saw and he was satisfied that the mill and equipment were adequate for the required purposes.

[335] On November 5, 1997, SYFC was incorporated under the laws of the Yukon Territory. This corporation was the operating vehicle for the joint venture. A joint venture agreement was created between LPL and 391605 B.C. Ltd. It was formalized in a written agreement that was dated January 30, 1998 (the “first joint venture agreement”).

[336] It is clear that the joint venturers, SYFC, LPL and 391605 B.C. Ltd., built the mill at Watson Lake, and I so find.

[337] LPL conducted logging operations for the mill from 1998 until the closure of the mill in August 2000.

[338] Mr. Kerr was part of the fabrication team. He was put to work with his electrical contractor skills to assist in the construction. He testified that the mill was fabricated in Vanderhoof under the experienced direction of Mr. Fehr and Mr. Spencer.

[339] Mr. Kerr testified that the mill design and fabrication were overseen by Mr. Spencer and Mr. Fehr who were very experienced in the field of sawmill design. Mr. Paul Heit, also from the B.I.D. Group, was responsible for sourcing the raw timber for the mill. Mr. Kerr was trained to be the manager of the mill and went to Vanderhoof during the construction of the mill. Although he had a good solid understanding of how sawmill machines worked, due to his background, Mr. Kerr had no background in sawmill management. Mr. Spencer had many years of such experience. Under the tutelage of Mr. Spencer, Mr. Kerr was trained to take over the management of the mill.

[340] At the same time as SYFC, LPL and 391605 B.C. Ltd were proceeding with the design and construction of the sawmill, DIAND was continuing to address the failure of KFR to comply with the conditions of their THA and build a mill. A letter dated November 20, 1997, entered as Exhibit P-80, Tab 21, from Mr. Monty to Ms. Guscott, reflects DIAND's position with respect to establishing a timeline for renewing the KFR THA. Mr. Monty states in this letter that "[a]s soon as Kaska Forest Resources have a 'viable' partner capable of producing a 'viable' mill, then we can address a firm timeline."

D. 1998

[341] The first joint venture agreement was signed on January 30, 1998. It was entered as Exhibit D-11, Tab 108. The parties to this agreement are LPL and 391605 B.C. Ltd. This agreement manifested the intention of the parties to carry on the sawmill enterprise as a joint venture. It recognized that LPL had already taken numerous steps to toward the development of a wood manufacturing complex at Watson Lake. These steps included the "preliminary discussions with the Government of Canada with a view to acquiring timber rights."

[342] I find that these preliminary discussions included the meeting with DIAND on July 15, 1997. I also find that the preliminary discussions included the commitment from DIAND that if a mill were built that a sufficient long-term supply of fibre would be made available.

[343] In the first joint venture agreement, LPL's contributions to the joint venture included "bringing the Project to the Corporation", $625,000 cash, the mill site and any additional capitalization. The contribution of 391605 B.C. Ltd. included the supply and installation of sawmill equipment and the services of Mr. Spencer and Mr. Cliff Harrison for five months "to supply management training and marketing consultation."

[344] The services of Mr. Spencer and Mr. Harrison were provided under the terms of a separate management agreement for five months. This management agreement was schedule "C" to the joint venture agreement. It was signed on January 30, 1998.

[345] There was a meeting between the joint venturers on February 26, 1998. At that meeting Mr. Alan Kerr advised the joint venturers that Mr. Terry Boylan, the SYFC lawyer, had been told by a "DIAND rep" that "SYFC just has to go ahead and put up an operating sawmill after which the wood will become available". The minutes of this meeting are Exhibit D-11, Tab 109.

[346] In early 1998, the construction of the mill was well underway. The efforts to secure a wood supply continued. However, at this time the joint venturers were first beginning to become concerned with the availability of a long-term supply of timber; see Exhibit D-11, Tab 109. By this time, the fabrication of the mill in Vanderhoof was nearly complete.

[347] In March 1998, Mr. Henry, a public servant employed by DIAND in the Yukon Region, completed the Preliminary TSA, Exhibit D-58. This report evaluated the current harvest levels, identified data necessary to determine the AAC, created a tool to assist in evaluating eco-system based management options and determined an estimated wood supply for sustainable forest economy discussions. Mr. Henry acknowledged that this report related to the supply of fibre through the CTP process.

[348] This TSA was recognized by DIAND as a strategy for short-term wood supply; see Exhibit P-79, Tab 64. This is consistent with the evidence of Mr. Henry that the TSA was developed for the CTP process. I find that the TSA was not relevant to the issue of long-term timber supply.

[349] Mr. Henry explained, in Exhibit D-49, that the TSA work was done because there were concerns over the harvest levels for 1997/1998 and a need to determine long-term sustainability for economic development efforts. He explained that the previous AAC level of 350,000 m^3 was loosely based on the Draft Sterling Wood Report.

[350] Ms. Guscott also confirmed the fact that opening new areas to harvesting would change the TSA results; see Exhibit P-79, Tab 103.

[351] By March 1998, the mill complex was completed and ready for delivery to and assembly at Watson Lake. With the installation of the mill complex, Phase 1 would be completed. At this time the joint venturers decided that Phase 2 would be introduced when feasible.

[352] Throughout the summer of 1998, the Department could not adequately issue permits for the supply of timber to the forestry industry. This inability was the result of the conduct of DIAND's employees. This is an irresistible conclusion drawn from the Department's own internal documents of May to June 1998; see for example Exhibit P-79, Tab 70, Tab 71, Tab 72, and Tab 73.

[353] In the late summer of 1998, the Department began to consider the possibility that KFR would participate in the SYFC joint venture in operating the mill at Watson Lake. The Department was concerned about the failure of KFR to satisfy the condition of its THA, that it construct and operate a sawmill. Mr. Sewell would later describe DIAND as "pushing" KFR to SYFC; see Exhibit P-79, Tab 144, at page 1386.

[354] The failure of KFR to construct and operate a sawmill was considered a "major breach" of the terms of the THA assignment. An internal Department presentation noted that:

- A sound wood processing industry would represent an important economic development for the Yukon.
- A sawmill as require under the THA would ensure that initial wood processing from the THA occurs in the Yukon.
- Additional mill capacity will benefit other CTP operators who legal requirements for local processing of their sawlogs
- Could play a key role in capacity building of First Nations and smaller communities
- Will improve overall employment opportunities, particularly in SE Yukon.

This presentation is Exhibit 80, Tab 26.

[355] Mr. Sewell, RDG of the Yukon Region, supported the union of KFR with LPL in the joint venture. The proposal required the use, by KFR, of trust funds held by the Government of Canada. An extension of the KFR THA was also supported by Mr. Sewell. In an email, on September 15th, entered as Exhibit P-79, Tab 78, to Mr. Beaubier at DIAND Headquarters in Ottawa, Mr. Sewell stated:

> …
> Is buying into the newly constructed mill an eligible use of the mill fund that KFR has been paying into?
> ...
>
> The full THA expires May 99 I am told. <u>There is a process in place to move towards consideration of a future multi-year THA</u>
> …<u>dates have slipped badly due to no partner for KFR</u>
> …

> It seems the goal of having the THA support an actual mill (though designed only to handle smaller size logs…10 inches I think) may be close to really happening.
> (Emphasis added)

[356] By September 17th, the Department had decided that the joint venture was a valid use of the trust funds held in the "mill fund". This expenditure was contingent on an evaluation of the joint venture sawmill and the entry into a joint venture agreement.

[357] Exhibit D-81, Tab 402 is the 1998/1999 Client Guide dated September 1998. This document sets out the purpose of the eligibility requirements, that is to provide fair and equitable access for all qualified applicants to the use of a "limited forest resource". Some permits are for volumes greater than 1,000 m^3 and all applicants seeking a greater volume than 1,000 m^3, up to 15,000 m^3, were to be evaluated pursuant to Section 4.2 of the *Yukon Timber Regulations*.

[358] The Client Guide explained that the harvest ceiling levels for 1998/1999 will be determined according to the preliminary TSA that was conducted in 1998. The total harvest ceiling for 1998/1999, for the entire Yukon, was set at 356,500 m^3. The harvest ceiling for Y02, Coal and Y03, Liard, was 50,000 m^3 and 78,000 m^3, respectively, for a total of 128,000 m^3.

[359] As I have already noted, the harvest ceiling for the previous year had been 350,000 m^3 of timber for the southeast FMU. The remainder of Yukon had previously been set at 100,000 m^3.

[360] Mr. Heit testified that he was aware of the reduction in the harvest ceiling for Y02 and Y03 from 350,000 m^3 to 128,000 m^3.

[361] This Client Guide, at page 2618, refers to a "mill harvest area". In order to access timber, an applicant must own a registered mill site. This document sets out the relevant regulations, as well as Chapter 17 of the umbrella final agreement.

[362] There was no direct evidence concerning the significance, or otherwise, of Chapter 17 of the umbrella final agreement, although coy references were made by Mr. Monty to Chapter 17. Mr. Sewell, when testifying on behalf of the Defendant, made at least one reference to this document but without any explanation.

[363] In the months leading up to the opening of the mill in October 1998, LPL and SYFC made arrangements to acquire timber supply. They did so by signing log supply agreements with local loggers.

[364] Mr. Heit testified that the CTP process did not work in the short-term but that is not the same as saying that it could not have worked. He also said that not all CTP holders wished to do business with SYFC. Nevertheless, the short-term timber supply for the mill was derived by accessing timber through the existing CTP process.

[365] The Plaintiffs were aware, prior to the opening of the mill in October 1998, that KFR had a timber harvesting agreement and that KFR could sell wood from their THA without needing to obtain prior permission from the Department.

[366] The mill opened in October 1998 and shut down a couple of months later, due to a lack of timber supply. The mill had been installed, by the joint venture, in Watson Lake, on the site that LPL had leased. The mill was assembled on site after construction in Vanderhoof. It consisted of a building placed on a 20,000 square foot slab of concrete.

[367] The mill operation included an exterior sorting system that was designed to cut wood to length after it had been debarked. The site included a scale to weigh the wood. The weight of wood was used both to calculate the stumpage fee to be paid to the Government and to record inventory in the yard. As well, there were two processing machines to remove limbs or pieces of limbs, called "snipes", from the logs.

[368] The mill, as built, was designed around a 7 inch average diameter of log and required an average of 16,666 m^3 of wood per month, to operate on double shifts. This is a quantity of approximately 200,000 m^3 per year. The mill was built to produce 100,000 of board feet per shift.

[369] Mr. Spencer testified that he was comfortable with the mill design and its equipment when it began operating in October 1998.

[370] The mill, as built, was a dimension mill, capable of producing a wide range of products. The mill produced “rough green lumber”, that is the product that results from the primary breakdown facility. It remains to be dried and planed into a finished product.

[371] The mill was planned to incorporate three independent phases of development, the first being the breakdown of the log into rough green lumber, followed by drying and dressing for the finished product. Mr. Spencer explained that “rough green lumber” means that the timber is cut a little and then shipped for further processing. The first phase was an interim step intended to demonstrate the mill’s capability and thereby secure long-term tenure from DIAND.

[372] The second phase required kilns and a planer mill, and that part of the facility was not realized. The planer would produce finished sides with a smooth surface, for the market. The kiln dries the green wood to a moisture content of less than 19 percent. Included in the second phase was a cogeneration facility to produce heat, for drying the lumber, and electricity to run the mill and to sell into the local electrical grid.

[373] A third phase was also contemplated from the outset. It would involve the construction of a re-manufacturing facility so as to optimize the usage of the timber and provide additional “value-added” to the mill’s products.

[374] With the exception of management, the employees were drawn from the town of Watson Lake. The employees were both First Nations and non-First Nations people. Mr. Keith Spencer

remained on the site for several months to oversee the operation. Mr. Brian Kerr was engaged as the mill manager. Mr. Heit was in charge of sourcing wood supply. When the mill began operating on a single shift, Mr. Kerr testified that 27 - 28 people were employed at the mill site. The employee numbers would be doubled for two shifts.

[375] In or about October 1998, an initial proposal was made by SYFC for federal funding to assist in training the new employees of the mill. The application was made to the Transitional Jobs Fund (“TJF”) of the Federal Government through Human Resources Development Canada (“HRDC”).

[376] Also in November 1998, the Department embarked upon its process to develop THAs. This process was planned to involve extensive First Nations and stakeholder consultations. This process started with discussion papers and consultations about how the process should be developed. The Department’s draft process proposal, entered as Exhibit D-81, Tab 227, noted that a FMP is the key document before any THA can be authorized. Further, it is noted that only 50 percent of a mill’s required timber is normally allocated in a THA.

[377] The representation relied upon by the Plaintiffs was made in July 1997. By October 1998 the Plaintiffs had already built the mill and commenced operations in Watson Lake. The draft THA process proposal was not written until November 1998.

[378] The Department had made a representation that an adequate supply of timber would be available. Adequate for the Plaintiffs' mill meant 200,000 m^3. It was not open to the Defendant to change the quantity of timber committed after the mill was built.

[379] The difficulties experienced by the Department with its employees throughout the summer of 1998 continued through the fall of that year. As noted by Chief Ann Bayne of LFN, in her letter of November 5, 1998:

> We are extremely concerned with the manner and style by which you forestry officials are carrying out their mandates…unhappy with the unilateral decisions by the department...and the lack of communications regarding impending actions. We urge you to consider your officials operational approaches and the impact their behaviour will definitely have on the long term relationship between your department and our First Nation.

[380] The Department was clearly under much pressure but it was not handling the added burdens in a reasonable manner. In this regard, I refer to Exhibit P-79, Tab 88. In that letter, Ms. Guscott, the Director Renewable Resources, declared a "get them off the Director's case day". This was in relation to other mill owners who were also having problems securing timber supply.

[381] Mr. Brian Kerr wrote to Mr. Fentie, the YTG Forest Commissioner in November 1998. This letter was prompted by the continuing difficulties in obtaining fibre; see Exhibit D-11, Tab 117.

[382] The mill operated until December 1998. The Plaintiffs assert that the mill shut down operations on the basis of the lack of fibre supply. I find on the basis of the Plaintiffs' *viva voce*

evidence, which is consistent with the documentary evidence, that the mill did in fact shut down operations due to a lack of timber supply to the mill.

[383] The main concern of SYFC was in obtaining sufficient timber and in that regard, there were continuing communications and meetings with the Department. Mr. Heit participated in some of those meetings. He testified that in the beginning he understood that the process for obtaining a THA may take "upwards of a year"; that time-line was later extended.

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[384] Timber supply was critical in January 1999. The mill had closed in December 1998. As the Plaintiffs were increasingly concerned, they continued contacting the Department in Whitehorse, seeking assurances that a continual supply of timber would be made available to them, in the required amount of 200,000 m^3 a year.

[385] A new joint venture was formalized by a joint venture agreement (the "second joint venture agreement") with an effective date of January 1, 1999. This agreement is Exhibit D-81, Tab 418. This agreement superseded the previous agreement. By this time the joint venturers had changed and 391605 B.C. Ltd. was no longer a party to the agreement. This agreement was made between LPL, Nechako Construction Ltd. ("Nechako") and SYFC. Mr. Fehr testified that Nechako is a related corporation within the B.I.D. Group.

[386] According to this agreement, LPL and Nechako undertook a joint venture for the purposes of constructing and operating a wood manufacturing complex in the area 2 kilometres west of Watson Lake. LPL's contributions included financial support, as well as its interest in the sawmill, equipment and mill site. Nechako's contribution included expertise in connection with the design fabrication and installation and its interest in the sawmill. SYFC was the operating entity and held the bare legal title to the assets of the joint venture. Article 2.4 of the Joint Venture Agreement specifically stated that the joint venture formed under the agreement was not a partnership. 391605 B.C. Ltd. was appointed the manager.

[387] In a "Backgrounder" prepared by the Department's Regional Office for DIAND Headquarters in Ottawa, entered as Exhibit D-32, the Region identified that there was only 186,000 m^3 of fibre available in the southeast Yukon FMU. All applicants were provided with the Client Guide. This guide explained the process and harvest limits.

[388] In this Backgrounder, it was noted that SYFC had not applied for any of the 1,000 cubic metre CTPs. These permits were set aside for sawmills. The Plaintiffs' evidence was that, based on the size of the permit, they did not think that these CTPs were intended for an operation the size of their mill. I note that the very small volume, and the fact that a permit had to be 60 percent complete before a new permit could be issued, did not provide any reasonable value to the Watson Lake sawmill. Quite simply, these permits were too small to have any value to a commercial operation.

[389] A meeting was held on January 21, 1999 between representatives of the Plaintiffs and employees of DIAND. This meeting was attended by Mr. Sewell and Ms. Guscott from DIAND and representatives from the Town of Watson Lake, SYFC, LPL, YTG and Finning. Finning was a major equipment supplier and financer of the mill project.

[390] Following this meeting Mr. Brian Kerr sent a letter, on January 26th to Mr. Sewell, confirming SYFC's understanding of the meeting's outcome. Although there is a handwritten note saying "draft", this letter was sent by Mr. Kerr and received by the Regional Office. In his letter, Mr. Kerr says,

> We understand that DIAND will support an application for a Timber Harvesting Agreement from the Corporation for a five year term, renewable, subject to the Corporations performance, totalling 200,000 cubic meters annually. DIAND will very shortly, with the co-operation of the Yukon Government, provide for the Corporations forest managers, certain target areas that will support the required volumes.
>
> We agree that this is a true and accurate account of the commitments made by both DIAND and South Yukon Forest Corp. at our meeting in Whitehorse on Thursday January 21 1999 commencing at 2:00 P.M. with the following persons present.
>
> Terry Sewell, Jennifer Gusgott, Dennis Fente, Jeff Monty, Alan Kerr, Hugh Macmillan, Donald Oulton, Brian Kerr, Roger Reams, Pat Irvin, and Joe Zackaruk

[391] I infer from this communication that the Plaintiffs were concerned that they could not get a written commitment from DIAND. I do not accept that this letter indicates that there was no pre-existing commitment.

[392] The views of Ms. Guscott, about this meeting, are found in two documents. She sent an email immediately following the meeting to her subordinates. This email was entered as Exhibit P-79, Tab 101. In this email she notes, among other things, that whatever THA process KFR was put through it must be the same for SYFC.

[393] The second email from Ms. Guscott, relative to this meeting, came as a response to Mr. Brian Kerr's letter of January 26th. This email was entered as Exhibit P-79, Tab 103. This email was sent to her supervisor, Mr. Sewell. Ms. Guscott stated that she was concerned that as a result of the Plaintiffs' understanding of the January 21st meeting that she "appeared to have been at a different meeting."

[394] On February 3rd, there was a teleconference between SYFC, LPL and DIAND to discuss timber permits. The minutes of that teleconference were entered as Exhibit P-79, Tab 104. A DIAND region backgrounder, written by Mr. Fillmore, dated February 3rd, stated that the February 3rd meeting was held for the purpose of discussing short and long-term access to timber supply. This backgrounder was entered as Exhibit D-33.

[395] A review of the backgrounder, in comparison to all of the documentary and *viva voce* evidence, shows that there are assertions made within it about SYFC, which are simply not true.

[396] These documents were created for the benefit of DIAND Headquarters in Ottawa. This document is part of a course of conduct taken by DIAND staff at the Regional Office, to cast the joint venture in a bad light to the Departmental Headquarters.

[397] An exchange of letters occurred at this time concerning the failure of DIAND to meet the timelines to which it had committed. These letters were entered as Exhibit D-61; Exhibit D-62; Exhibit D-63; and Exhibit D-64.

[398] In a letter dated February 16th from EnerVest to LPL, EnerVest expressed concern about the security of tenure. If the mill could get its own secure long-term THA, EnerVest was confident that $14,000,000 for Phase 2 could be raised.

[399] More meetings occurred throughout this period between the Regional Office and SYFC.

[400] On February 25th, Ms. Clark corresponded with Alan Chisholm of HRDC, advising of some changes to the original plan of the continuing intention of SYFC to operate the mill at Watson Lake. At this time, SYFC was looking for further funding from the TJF. This letter was entered as Exhibit D-81, Tab 480. She advised that the mill was shutdown in December as a result of fibre shortage and that the shortage was due to delays by DIAND in approving permits for the suppliers of SYFC.

[401] Additional funding from the TJF was provided in excess of $100,000 to assist with the re-opening of the mill.

[402] The Plaintiffs continued their efforts throughout February and March to get a firm answer from the Department concerning secure access to the required volume of wood. During these months, employees of the Department advised the Plaintiffs that steps were underway to develop a process for the issuance of THAs. Pressure was mounting, both on the Plaintiffs who were concerned about the viability of the mill and on the Department, to deliver on its representations that an adequate supply of fibre would be available to the Plaintiffs.

[403] Exhibit D-81, Tab 35 is a letter from Ms. Guscott to Ms. Clark, dated March 18, 1999. In this letter, Ms. Guscott advised that there was no guarantee that SYFC would receive a permit at that site "or at all". She further advised that any steps taken before the resource reports were completed would be at SYFC's own risk.

[404] Ms. Clark responded to this communication by a fax on March 18th, found in Exhibit D-11, Tab 12. Ms. Clark advised that the existing policy did not fit the manufacturing sector and said that she appreciated the priority that DIAND was giving to their concerns.

[405] Exhibit D-13 is another letter from SYFC to Ms. Guscott. It was dated March 19, 1999. This letter was written by Mr. Heit, Wood Supply Manager for SYFC, he said that the Department had given no reasonable guarantee of the timber supply. He said that this was made clear in para. 3 of Ms. Guscott's letter of March 18th. This letter was sent in respect of accessing timber in a specific

location under a future CTP. As such it does not impugn the Plaintiffs' position with respect to the representation made on July 15, 1997.

[406] He advised that the mill start-up would be delayed from April 5 until May 3, 1999 and further, that he would recommend to the owners that the business relocate to a more business-friendly jurisdiction. This letter is also found in Exhibit D-11, Tab 13. It appears that this letter of March 19, 1999 was forwarded by SYFC directly to Mr. James Moore, ADM Northern Affairs, based in Ottawa. This letter from Mr. Heit tells me that SYFC was prepared to leave Watson Lake and find another opportunity for investment.

[407] The Department produced another Client Guide in April 1999, Exhibit D-81, Tab 47. This Client Guide noted that incomplete permit applications would result in delays in issuing the permits. The Client Guide said, at page 1565, that the harvest ceiling may be adjusted based on new TSA information and other factors.

[408] By letter dated March 23, 1999, written by Ms. Clark on behalf of SYFC to the ADM, Mr. Moore, SYFC confirmed a telephone conversation of March 22nd. This document is found in Exhibit D-11, Tab 16.

[409] Ms. Clark said in her letter that the SYFC people would be pleased to meet with Mr. Moore and that SYFC was concerned about the ability to get an adequate timber supply. Specific issues were identified in this letter, including reference to the THA application procedure, short-term

timber availability, cutting permit timing, and policy amendments necessary to allow DIAND staff to meet the timelines.

[410] It is clear that by this time, pressure was mounting. The Defendant characterized this letter as setting out “demands”.

[411] Mr. Moore spoke to Ms. Clark at this time. He agreed to set up a teleconference between representatives of the Regional Office of DIAND, people from Headquarters in Ottawa and representatives of the Plaintiffs. The meeting was scheduled for early April, as recorded in an email sent by Mr. Moore on March 23rd and entered as Exhibit P-79, Tab 128.

[412] In an included message, Ms. Guscott responded to this email and stated that:

> would be my perference as I have been working closely with the company and understand all their ways. I suggest because of past experience with this company that someone (region) take the lead one ensuring good notes and records are kept. (Emphasis added)

[413] The meeting was scheduled for April 7th. In discussing this meeting, Mr. Richard Casey informed Ms. Anne Snider, both DIAND employees in Ottawa that,

> Mr. Moore has made a commitment to SYFC that the April 7 meeting will be a decision making meeting. There are 5 officials from SYFC in attendance and 2 invitees yet to be confirmed. Since I don’t think we can guarantee at this point that SYFC will be granted a cutting permit, at the level they are requesting, I believe they will be very disappointed at the end of the meeting. I don’t want to be negative, but we must operate within the Regulations.

[414] A briefing note, dated April 2, 1999 was prepared for a meeting that was also scheduled for April 7th, between SYFC and the Minister of Industry. The background section in this briefing note, entered as Exhibit D-81, Tab 229, indicated that the author of the briefing note had received a "backgrounder" on SYFC from the Regional Office. The briefing note alleged that SYFC had frequently changed management and had difficulty surviving over the past "15 to 20 years".

[415] This description of SYFC is unfounded in fact. I note that this briefing note was provided from the files of Mr. Fillmore. I also note that while the briefing note indicates that there were attachments, none were provided to the Court.

[416] Also in preparation for the meeting, Ms. Guscott sent an email to Mr. Beaubier in Ottawa. This email was entered as Exhibit P-80, Tab 48. Ms. Guscott was not truthful with respect to the development of the mill and the consultation that occurred with the Regional Office before proceeding to construction. She also admitted in this document that there were delays in the CTP process but attempted to shift the blame for the shortfall in timber supply to the mill.

[417] Further meeting preparation came by way of "talking points" for the ADM. These points were sent by an internal DIAND email that was entered as Exhibit P-79, Tab 143. These talking points disclose that DIAND intended to provide long-term and secure tenure to industry that has made a capital investment.

[418] The meeting was held on April 7th. Representatives of SYFC participated both in person and by teleconference. The teleconference took place between Whitehorse and Ottawa. Representatives of DIAND participated in the same teleconference and a verbatim transcript was maintained of that meeting. That transcript is Exhibit P-79, Tab 144.

[419] Several important points emerged from this meeting. A timeline was established for THA development, the Department re-affirmed the importance of the mill for Yukon and the Department committed to assisting the Plaintiffs in getting the necessary timber. This included commitments to have CTP harvesting off future THA lands and that cutting could commence before the THA was finalized.

[420] It was proposed that THA proposals would be accepted in the fall of 1999 with a view to having approved THAs in place by April 2000; see Exhibit P-79, Tab 143.

[421] The request for proposal ("RFP") was not released until October 2001.

[422] I find it noteworthy that this meeting was arranged and took place so soon after SYFC's letter of March 19th in which Mr. Heit advised that he was going to recommend to the mill owners that the project relocate elsewhere.

[423] Given the discussions and commitments made during this April 7th meeting, the Heit letter of March 19th and the other evidence in the documentary evidence that the Plaintiffs were prepared

to shut down operations if it was not feasible, I find that the meeting of April 7, 1999 induced the Plaintiffs to continue in business with the Watson Lake mill.

[424] Also, in April 1999, the Department produced a THA Development Process document. This was entered as Exhibit D-65. Notes on this exhibit were written by Mr. Sewell. This document identifies the goals and objective of a THA, specifically: sustainability, economic and social objectives including jobs and development of the resources, and the provision of access to a land base that can provide a harvest volume of 50,000 to 140,000 m^3 to a proponent who meets all of its commitments.

[425] The mill remained closed at this time. The Plaintiffs were reviewing their options, that is final closure or reopening of the mill.

[426] Following the April 7th meeting, SYFC sent a letter to DIAND to ensure that it properly understood the commitments of the ADM and the Department. In a letter entered as Exhibit P-79, Tab 147, Ms. Clark, on behalf of SYFC, stated:

> We would appreciate you confirming that we have accurately interpreted the commitments made during our meeting. If there are other commitments you and your staff require of the company, please let me know**.**

[427] Days after the April 7th meeting, a further joint venture agreement was signed. This joint venture agreement, found in Exhibit D-81, Tab 421, formalized the introduction of KFR as a participant in the Watson Lake mill. This joint venture agreement was effective as of April 14th.

[428] This agreement provides that SYFC is the operating entity for the joint venture. The joint venture parties are LPL, 18232 Yukon Inc., KFR and SYFC. Mr. Fehr testified that 18232 Yukon Ltd. was incorporated for the purpose of participating in the joint venture. Clause 2.4 of this agreement provided that the joint venture is not a partnership. 391605 B.C. Ltd. was appointed the manager.

[429] The mill reopened on April 30, 1999; see the Response to Request to Admit.

[430] On May 5th, Ms. Guscott responded to an email, entered as Exhibit P-79, Tab 161, to Mr. Beaubier, in reference to a return call made to the ADM's office by SYFC. In her email Ms. Guscott said:

> We have the matter under control and they are just a pushing company…the company thinks they received more out of the Moore letter than what Moore really said.

I note that this email is one of many from the Defendant's documents that is indicated as being a forwarded message but did not include the original message.

[431] By letter dated May 11th, SYFC replied to a letter from Mr. Moore dated April 30th. In this letter, SYFC recounted that the mill reopened on April 30th and pointed out that it had worked within existing policy and regulations but it was being negatively affected by delays on the part of the Regional Office in issuing cutting permits. This document is found at Exhibit D-11, Tab 19. The

continuing delays by DIAND would result in an indefinite shutdown of the mill, according to SYFC.

[432] Throughout the month of May, Mr. Kennedy reported to Ms. Guscott the internal difficulties at DIAND that were causing the problems in getting wood; see Exhibit P-79, Tab 170, and Tab 173. Ms. Guscott acknowledged that deadlines had been missed; see Exhibit P-79, Tab 175.

[433] Then there was a series of emails between SYFC and DIAND, beginning on June 1, 1999. These emails addressed the supply of wood available by CTP, and DIAND advised SYFC that the estimate of wood available was 190,520 m^3 for the 1999/2000 harvest season. This volume was very close to the volume required by SYFC. Notwithstanding this communication, DIAND did not guarantee availability to SYFC.

[434] On June 4th, Brian Kerr sent an email, entered as Exhibit D-11, Tab 74, to Mr. Sewell, again expressing frustration with the timber supply situation. He asked if things were not straightened out, who was going to tell the people of Watson Lake that no work would be available.

[435] By email dated June 7th, entered as Exhibit P-79, Tab 182, Mr. Sewell responded and told Mr. Kerr that threats and harassment would not work. Mr. Sewell said that "we" have agreed to an aggressive plan. I find this to be a reference to the meeting held on April 7th. He also stated that:

> We all know that there are significant challenges to meeting the wood needs of the company under the current regime. <u>We have agreed to an aggressive plan to work towards a THA type of regime as fast as we can.</u>

> …
>
> I am not finding the recent e-mail and phone activity conducive to this relationship. Threats & harrassment are not helpful.
>
> As we all want the mill to be successful we should be working as a team on this. On May 31 we provided our assessment of the wood available for the next year or so. We had staff travel to Watson Lake to meet with permit holders and seekers to determine how things were shaping up on the ground. I would encourage June to talk to Jennifer/Terry Kennedy to get a debrief on this. Our new Regional Manager of Forest Resources, Howard Madill starts next week and working with the company will be a high priority for him.
>
> Can I ask you to work with us in a positive way so that all our efforts are directed at the challenges facing the company rather than diverting our energies in a variety of non-productive directions. We need to work together on this year's and next year's wood supply and on the THA process.
> (Emphasis added)

[436] By June, the timeline for THAs had started to slip. Exhibit D-66, another THA document created by the Defendant, contained a timeline which anticipated that short-term THAs would be in place by May 2000.

[437] For the remainder of the summer of 1999, the mill operated with a supply of timber that was sufficient for the short-term.

[438] On August 10th, SYFC wrote to the Minister, now Mr. Robert Nault. This letter, found in Exhibit D-11, Tab 58, advised that SYFC had sufficient volume to operate in the summer and fall of 1999 and was interested in securing a THA.

[439] On October 1, 1999, representatives of the forest industry met with Minister Nault in Whitehorse. Ms. Clark attended on behalf of SYFC. Mr. Nault, Mr. Sewell and Ms. Guscott represented DIAND. At this meeting, June Clark reiterated that SYFC needed certainty of wood supply and needed a volume of 200,000 m^3 for a viable mill. A summary of this meeting is found in Exhibit D-81, Tab 257.

[440] By October, the wood supply was again critically short. On October 5th, Mr. Terry Kennedy of DIAND sent an email responding to June Clark, addressing the urgent shortfall of winter volumes. This document is found at Exhibit D-81, Tab 69. Mr. Kennedy stated that "no DIAND official to my knowledge has ever tried to mislead the facts with respect to volumes known at the date of the conversation with a proponent". He further noted that all timber that had been marked had gone into the SYFC mill yard.

[441] In October 1999, three meetings were held in Vanderhoof.

[442] LPL and SYFC participated in one, on their own, to review their options *vis à vis* the mill. Representatives from DIAND attended a second meeting with representatives from SYFC and YTG. The third meeting was held between Mr. Madill and Mr. Spencer.

[443] Mr. Madill prepared a memo dated October 25th. This memo, marked as Exhibit D-54, was addressed to Jennifer Guscott and referred to the meetings of October 19th.

[444] To address the mill's need for timber, Mr. Madill committed at the second meeting that all available timber to the harvest ceiling would be made available to eligible applicants. To help address the timber supply, he assured SYFC that the previous undercuts of wood that had accumulated since the completion of the TSA, would be available. Further, measures were taken that had never been employed in the past, specifically, DIAND sent letters to all eligible applicants. At this second meeting, SYFC repeated its position that if the mill shut down as a result of lack of fibre, it would not open again.

[445] Concerning the application and CTP processes for 1999, SYFC agreed that DIAND had met its original commitments.

[446] Ms. Clark sent another email, on behalf of Mr. Alan Kerr, to Minister Nault on October 20th, again referring to the urgent shortfall of winter wood. In this email, she refers to the meeting with Mr. Madill on October 19th and says the following:

> We have demonstrated our commitment to the people of Watson Lake and the Yukon by living up to our commitments. We have also done everything we were asked to do and have made every effort to work constructively with you staff. Over the past year and a half, we have pointed out the flaws in the system and have asked for appropriate changes to allow for fibre security for our operation. The system for allocating wood in the Yukon has not been modified and is demonstrating that does not support the development of the Forest industry.

This email is Exhibit D-11, Tab 29.

[447] In October 1999, DIAND commissioned Anthony-Seaman, consulting engineers, to evaluate the Watson Lake mill. DIAND wanted this evaluation in order to respond to the joint venturers' request for relaxation of the tree harvesting standards to allow the mill to process larger top diameter. The Anthony-Seaman final report is dated December 2, 1999 and was entered as Exhibit P-79, Tab 226.

[448] This report found that the "existing level of technology in the South Yukon Forest Corporation sawmill at Watson Lake, is appropriate for the circumstances and log supply". It was recommended that the next level of "value-added" include the ability to dry and plane the lumber. Further, the report recommended a cogeneration facility for better utilization of wood waste.

[449] These recommendations are identical to the joint venturers' plan for Phase 2.

[450] By November 1999, the THA timeline had slipped again. In a DIAND THA document dated November 8th, entered as Exhibit D-68, cutting was planned to be authorized for September 2000. This document also discussed two sizes of planned THA. The first type would be volume-based and authorize under 30,000 m^3 of timber per year. The second type would be between 30,000 – 150,000 m^3 of timber per year.

[451] There were continuing problems with wood supply. In a further email on December 23rd, again from June Clark to Mr. Madill, she advised that SYFC anticipated that there would be one

month shortfall of wood. This email is found at Exhibit D-11, Tab 64 and again, referred to the fact that SYFC needed a commitment from DIAND to meet timelines.

[452] By late December 1999, SYFC was critically concerned with the lack of action by DIAND in moving the THA process forward. This is evident from the emails exchanged between SYFC and the Department, up to and including December 30, 1999.

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[453] Mr. Kennedy replied to the December 30, 1999 email on January 4, 2000, on behalf of Ms. Skaalid. Mr. Kennedy explained that DIAND staff did their best to meet the timelines to which it committed. He also rejected the suggestion that timelines had been extended due to staff leave.

[454] At this time, the Department showed sensitivity to the concerns of SYFC and re-affirmed the importance of the mill to the Department and to the Yukon economy. This is apparent from an email dated January 4th, entered as Exhibit D-81, Tab 166.

[455] By letter dated January 14, 2000, SYFC submitted its representations concerning the proposed amendments to the *Yukon Timber Regulations*. This letter was written by Mr. Heit and was entered as Exhibit D-11, Tab 66.

[456] In his letter Mr. Heit acknowledged the major differences in "both the values of the timber as well as the costs of harvesting and lumber processing". He suggested that the proposed

regulations would implement changes that were not consistent with other Canadian jurisdictions and that would negatively impact the Yukon industry. As such, he suggested "that this entire proposal be thrown out and new options be considered."

[457] "The Development of Timber Harvest Agreements: A Framework for THA's in the Yukon – A Document for Public Discussion" was released in February 2000 by DIAND. This document was entered as Exhibit D-81, Tab 316. This framework contemplated the development of two types of THAs, that is a large THA of 30,000-150,000 m^3 of timber per year and a small THA of less than 30,000 m^3 of timber per year.

[458] The THA timetable continued to be adjusted. This discussion paper said that by July 2000 successful proponents would be notified and final negotiations would occur between the proponents and DIAND. However, as I have previously remarked, no RFP was released until October 2001.

[459] On February 25th, Timberline Forest Inventory Consultants Ltd. ("Timberline") completed the "Candidate Areas for Timber Harvest Areas (THAs) Final Report" (the "Timberline Report #1"), entered as Exhibit P-79, Tab 252. This report was prepared for DIAND. The purpose of this report was to "complete a feasibility assessment of the study area and determine potential candidate areas that may be suitable for long term tenure as Timber Harvest Areas", "perform an analysis and/or assessment of the candidate areas" and "conduct consultation with key stakeholders".

[460] The Timberline Report #1 examined the development of two types of THAs: large, 30,000 – 150,000 m^3 of timber per year, and small, less than 30,000 m^3 of timber per year. In the analysis, the report relied upon the existing TSA prepared by Mr. Henry. However, it criticized the use of the even-flow harvest constraint and the inclusion of a 30 percent non-specific reserve. The report said that these factors caused the AAC to be artificially low with a resulting "high mortality loss of coniferous area due to an under utilization of the resource in the long-term". The report also acknowledged that the age of the forest inventory data was of significant concern.

[461] In Timberline Report #1, several different THA configurations were modelled. All of these models utilized long-term timber, that is timber not limited by the 10 kilometre access constraint. In all models the long-term wood supply was significantly in excess of that provided for in the preliminary TSA.

[462] The difficulties in maintaining a constant, adequate supply of timber continued, as disclosed by the emails between SYFC and DIAND on March 1st. These emails are found in Exhibit D-81, Tab 95.

[463] The joint venturers held a further meeting among themselves on April 7th. The minutes of this meeting are found in Exhibit D-11, Tab 127. The important matters discussed at that meeting were concerns raised about Mr. Brian Kerr, concerning his spending and lack of forestry experience, and the log profile that was being received at the mill. Mr. Fehr expressed concerns about continuing the operation if the correct log profile could not be brought into the mill yard.

[464] There was another meeting between DIAND and SYFC on April 27th. In a series of emails to DIAND found at Exhibit D-81, Tab 193, Ms. Clark set out SYFC's understanding of that meeting. The response to her emails from Mr. Ballantyne is included in this exhibit.

[465] The Council of Yukon First Nations (the "CYFN") sent a letter, dated June 8th, entered as Exhibit D-71, expressing dissatisfaction with the proposed THA process and suggesting that the THA process be deferred until a formalized tri-partite agreement was reached among the Yukon First Nations, DIAND and YTG. However, the CYFN supported the allocation of short-term tenures while the appropriate planning exercises and consultation occurred.

[466] Exhibit D-72 is a summary of public comments received by DIAND on the April 2000 discussion paper. This exhibit also includes a cover letter from Mr. Monty dated June 16, 2000. SYFC had provided its comments on the THA development process.

[467] Minister Nault, Mr. Sewell, and Ms. Guscott met with the Yukon Forest Industry Association ("YFIA") over the May long weekend. Among the industry participants were the Kerr brothers. At this meeting, SYFC indicated to the Minister that they were planning to progress to Phase 2 of their business plan. The Minutes of this meeting are found in Exhibit P-79, Tab 282.

[468] In discussion with the YFIA, the subject of volume of timber possible in a CTP was discussed. At that time, Minister Nault likened the 15,000 m^3 allocation of timber per year to

"firewood". I infer from that comment that Minister Nault acknowledged that the forest industry required access to significantly larger volumes than the CTP process could provide, in order to be viable.

[469] On June 8th, SYFC wrote to Mr. Nault, thanking him for the recent meeting in Whitehorse over the May long weekend. This letter was entered as Exhibit D-11, Tab 91. Mr. Alan Kerr thanked Minister Nault for the "commitment" of addressing the short-term wood supply while the long-term tenure process was finalized. Mr. Kerr said this commitment was extremely important to SYFC, ensuring that they had a continuous fibre supply to operate while working under the existing permit system. Mr. Kerr noted that he was encouraged by the efforts of Ms. Guscott.

[470] Mr. Monty, the DIAND Regional Manager, Forest Resources, wrote an "internal use only" memorandum to Mr. Ballantyne on June 14th, entered as Exhibit P-43.

[471] In this memorandum Mr. Monty said that the cumulative AAC for FMU Y02 and Y03 was 128,000 m^3 of timber per year. He noted that the forecasted needs for SYFC and Allied Forest Products ("AFP"), another corporate sawmill, were in excess of 260,000 m^3. He suggested that there would be problems once the corporations began seeking volumes of timber beyond the sustainable level. Among other options to address this shortfall, Mr. Monty proposed closure of a mill or limiting future sawmills through land use permits. He also noted that the proposed THA process may be capable of producing only one viable corporate THA.

[472] Mr. Ballantyne, then holding the position of DIAND Director of Renewable Resources in Yukon, responded to Mr. Monty's concerns on June 16th. This memorandum was entered as Exhibit P-44. Mr. Ballantyne reassured Mr. Monty that sustainable forestry would not be compromised and directed him to raise these issues at the next meeting.

[473] Mr. Kennedy, Head Policy and Industry Forester, wrote to his supervisor, Mr. Monty, on June 18th. This memorandum was entered as Exhibit P-45. Mr. Kennedy expressed his concerns with the THA process. Specifically, he was concerned that the instructions that were provided in how to proceed, were being ignored. He also expressed concern about the manner in which consultation was being used to delay the process.

[474] In Exhibit P-45, Mr. Kennedy, the DIAND Head Policy and Industry Forester, clearly accepted that the preliminary TSA was a short-term wood supply analysis. He further accepts that a THA based solely on the short-term wood supply was not economically viable for the mills nor capable of supporting the development of the infrastructure necessary to access the long-term wood supply. Mr. Kennedy strongly suggested that he wanted these problems to be communicated.

[475] There is no evidence that SYFC, or the forest industry in general, was ever told about these concerns.

[476] Two days after Mr. Kennedy presented Mr. Monty with his proposal for getting the THA process back on the timetable, Mr. Monty sent a letter to Mr. Ballantyne. The letter addressed the timelines for the THA process.

[477] Mr. Monty sent this letter as the Chair, THA Working Group. It is not an internal memorandum. It was written as an external communication from the Working Group to DIAND, notwithstanding that Mr. Ballantyne is Mr. Monty's supervisor.

[478] Mr. Monty stated that the Working Group had recognized that the public input on the process indicated a desire for more consultation. As such, the projected date for negotiations was extended to March 2001 with a caution that September 2001 may be more appropriate.

[479] I note that Mr. Kennedy was also a member of the THA Working Group.

[480] There is a handwritten note on this exhibit, signed by Mr. Ballantyne, that is addressed to Mr. Monty. Mr. Ballantyne says, "[a]s discussed we have to keep with the timelines contained in the public document on THAs under "Next Steps" Minister committed to timelines."

[481] On June 22, 2000, SYFC wrote to Alan Chisholm, HRDC. This letter, written by Mr. Alan Kerr, said that the Board of SYFC had approved funding of up to $14,500,000 for Phase 2 on condition that there be financial participation from the Canada Jobs Fund and the YTG, and that the THA process continued as presented by DIAND. This letter is found at Exhibit D-11, Tab 92.

[482] However, there is another letter in Exhibit D-11, Tab 93, also dated June 22nd, from SYFC to Mr. Chisholm in which Mr. Kerr said that no funding would be approved by SYFC until SYFC had been approved as eligible for a THA and until HRDC had approved partnership funding for Phase 2.

[483] These letters are consistent. They both identify the required prerequisites to any further funding commitment by SYFC and I so find.

[484] SYFC issued a press release on June 26th. In that press release, entered as Exhibit D-11, Tab 134, SYFC informed the public that they would be shutting down operations on June 30th. The closure occurred due to the timing of CTP issuance. SYFC indicated that the length of the closure would depend on the ability to have certainty of a continuous supply of timber to take the mill through the summer and winter harvest seasons.

[485] With the closure of the mill, 125 direct jobs were lost. At that time, the mill was the largest single private employer in the Yukon Territory.

[486] On June 29th, Mr. Monty sent an email to Mr. Ballantyne, Re: THA Process. This email was entered as Exhibit P-46. In this email Mr. Monty provided his supervisor with an update on the Working Group's thinking to date:

> We propose issuance of small THA s to those individuals who have proven mill capacity over the last two years (ie Bowie, Dakawada,

> YRT, a few others). As a group, we concluded that based on Yukon Forest Strategy, lack of an access policy, response received, that by entering into THA with these candidates, and providing them with 5 years worth of wood within a designated portion of the FMU AAC and land base we could cater to 90 % of sawmill sin the Yukon. Politically we are of the opinion that it would lower the steam level on teh home front. What it does in Ottawa may be different? The down side is that it would constrain SYFC and AFP to our harvest ceilings in Y02, Y03. So in essence they could receive yup 30 000 each. Far below SYFC expectations. However, it must be emphasised again, that unless we can access the long term base in Y02 through some form of effective public or private access management plan, then we are dealing with the short term land base. ie 126 000 m3. Issuance of small short term THA will provide a breaching space to conclude land claims, YPAS, Forest management planning. Which is what the people want. I don't; believe senior management of grasp this point. Hence, the urgency to curtail further mill site land use permits. Demand has fast exceeded supply, AND THIS MUST STOP. Otherwise our collective graves are getting deeper.
>
> …
>
> SYFC and AFP would not like this option at all. SYFC more so. In order to meet their forecasted needs and maintains viable CTP levels, the n we need access to the long term base. This requires road building 50 km in Y02. Hard to build on short term tenure. Need to amortize cost of road over 5 to 10. AFP may be more amenable to a secure floor supply of wood. (Emphasis in original)

[487] While Mr. Monty's email is difficult to read with the numerous typographical errors, it is an important and telling email. It reflects the beliefs and conduct of the operational level DIAND forestry employees. There was a conscious effort on the part of these employees to delay this process.

[488] I note that on the list of mills having demonstrated capacity, and proposed as eligible for a small THA, Mr. Monty has excluded the Plaintiffs.

[489] This is remarkable given the fact that SYFC was the largest production facility in operation in the entire Territory. This is not a fair, open and transparent procedure. On the contrary, it is a further manifestation of bad faith.

[490] The proposed change to the THA was a significant deviation from all prior THA documentation produced. Restricting the available THA to 30,000 m^3 of timber per year had never been the subject of consultation.

[491] Mr. Monty proposed this solution to decrease the "steam level" politically in Yukon. Further, Mr. Monty expressly acknowledged that his recommendation gave effect to an issue that he believed that senior management did not grasp.

[492] On the same day, SYFC wrote to YTG, Economic Development. This letter, written by Mr. Alan Kerr, described equipment that SYFC wanted to buy with a $4,000,000 loan. The equipment included a Kara Saw and optimill line. An earlier letter dated May 29, 2000, found in Exhibit D-11, Tab 219, referred to a HewSaw. The letter of June 29th is found in Exhibit D-11, Tab 220.

[493] This correspondence throughout the late spring, early summer of 2000 shows that the joint venturers were intent on expanding the mill. This correspondence shows that the mill was producing

but was suffering under continuing uncertainty about access to a secure supply of timber and continuing uncertainty about the THA process.

[494] There are two letters dated July 5th from Alan Kerr on behalf of SYFC to the Bank of Nova Scotia, concerning a request for funding for Phase 2 of the mill. He advised that presently the mill was producing 140,000 board feet per day on two shifts. He outlined the problems that SYFC had overcome to date.

[495] The Minister, Mr. Nault, sent a letter on July 17th to Mr. Fentie, M.L.A. for Watson Lake, entered as Exhibit P-80, Tab 75. In this letter the Minister stated that DIAND has "concluded our consultation on long-term access to timber and are currently working co-operatively with the YTG in developing the next steps." He further assured Mr. Fentie that the Department is "committed to the timelines outlined in our THA process."

[496] On July 28th, Mr. Ballantyne, from DIAND, wrote to SYFC. This letter, found at Exhibit D-81, Tab 118, responded to inquiries from Mr. Alan Kerr about the THA process in Yukon.

[497] Mr. Ballantyne told Mr. Kerr that the Regional Office was working with the Yukon Government to develop a THA process by the end of September 2000. DIAND's objectives were to provide longer tenure and higher volumes than could presently be provided under the CTP process, ensure proper forest management and provide increased certainty for industry**.**

[498] Mr. Ballantyne said that DIAND would be “releasing a public consultation document throughout the Yukon which will elaborate on how we see this process unfolding…” and that DIAND was committed to ensuring meaningful input from stakeholders.

[499] However, this was of little comfort to the Plaintiffs. On August 3, 2000 the decision was made to not re-open the mill. The mill closed on August 4, 2000.

[500] At this time Mr. Spencer advised Mr. Fehr to close the mill down and “cut your losses”. This advice was based upon the time spent in trying to get a secure log supply for the mill. Mr. Spencer believed that the project, including the cogeneration facility, was feasible, if a secure log supply was available.

[501] It is a fact that from May 1999 until its closing in August 2000, the mill had been operating. The mill had produced and sold its rough green lumber throughout that period.

[502] Mr. Brian Kerr testified that when the decision was made to close the mill for good, he gathered all the employees and broke the news. His involvement with the Plaintiff SYFC ended in August 2000. Mr. Kerr left Yukon and relocated to Vanderhoof, British Columbia.

[503] After SYFC had given notice of the lay-offs on June 26, 2000, DIAND continued to receive reports about wood supply.

[504] In July 2000, DIAND again approached Timberline to do a follow-up analysis to the Timberline Report #1. On August 8th, Timberline completed the "Timber Supply Areas To Be Considered for Candidate Timber Harvest Areas (THAs) in Southeast Yukon" (the "Timberline Report #2"). It was entered as Exhibit P-48. This report was prepared for DIAND. The purpose was "to perform a follow-up analysis to refine the potential THA configurations and Timber Supply Analysis (TSA) assumptions outlined in the [Timberline Report #1]".

[505] This report provided the recommendations and conclusions of a workshop held in Edmonton from July 27-28, 2000. The workshop participants were three representatives from Timberline, four representatives from DIAND and one representative from YTG.

[506] The discussions focused on long-term allocation issues such as access constraints, land base exclusions, and strategic forest management issues. It was agreed at this workshop "to avoid being overly conservative and focus on developing THAs with realistic AAC estimates using the best information available". As such, the access constraint, even-flow policy and the 30 percent non-specific reserves were removed. Instead, a non-declining harvest flow policy and additional specific exclusions to account for caribou habitat and future protected areas were added.

[507] The design focused on one THA to sustain all current permit commitments and two THAs that had a potential AAC of approximately 100,000 m^3 of timber per year.

[508] SYFC had announced that it would lay off its employees as of June 30, 2000. I find that it is no coincidence that DIAND approached Timberline in July to attempt to find solutions to the long-term timber supply, since the closure of the largest private employer in southeast Yukon was surely a serious matter.

[509] On August 8th, Ms. Clark wrote to Mr. Beaubier in Ottawa, reporting upon the circumstances that led to the closure of the mill. The mill closed due to a lack of wood. She advised that investors were not willing to advance further money without long-term tenure or sufficient short-term supply of wood. This letter is Exhibit P-79, Tab 312.

[510] On August 9, 2000, Mr. Kennedy sent an email to Ms. Guscott, again addressing forest management planning and noting that the Timberline Report #2 had been received.

[511] Mr. Kennedy had participated in the workshop in Edmonton. In his email he stated that there were "[s]ome major number changes once we removed some hidden constraints to management that were in previous."

[512] The official opposition in the Yukon Legislative Assembly wrote to Prime Minister Chretien on August 23rd, requesting an inquiry into the management of the Yukon forest resources by DIAND. The letter noted that "[t]he department, under three successive Ministers, has failed to honour the commitments made by Minister Irwin…" The official opposition asserted that the closure of the SYFC mill was a direct result of the failure to "ensure long-term access to timber".

[513] On August 31st, a briefing note was prepared by the Regional Office of DIAND, noting the official opposition's call for an inquiry into the gross mismanagement of forestry resources in Yukon. This document is found in Exhibit P-79, Tab 323.

[514] The briefing note prepared by Ms. Stewart and approved by Mr. Sewell states:

> Closure of the South Yukon Forest Corporation (SYFC) mill occurred as a result of a number of factors:
>
> - Low North American price of lumber.
> - Uncertainties associated with the end of the Canada-US Softwood Lumber Agreement and the advantages to SYFC associated with it.
> - SYFC mill would need to expand its capabilities to produce finished products to remain profitable after the Canada-US Softwood Lumber agreement ends. This would include increased mill efficiencies to deal with the small trees available in Yukon.
> - Even if an area based THA was available to SYFC, road infrastructure investment would be necessary to access the wood. This would be additional investment dollars over and above the needed mill expansion.
> - The lower harvest ceiling in the forest management units close to Watson Lake did have an additional adverse effect on the mill. However, it seems that market conditions in general had the greatest impact on SYFC and it's decision to shut down.

[515] The Yukon Regional Office failed to identify the single factor that SYFC identified as the reason for mill closure. Instead, it suggested a series of factors, none of which were accepted by the Plaintiffs as causing the closure. Further, I note that the causative factors that the region identified conveniently absolve the region of any responsibility.

[516] The closure of the mill was an important issue for Minister Nault. In a letter dated September 19th, entered as Exhibit P-79, Tab 327, to Ms. Hardy, MP for Watson Lake, the Minister noted that:

> Much attention has been placed on the closure of this mill. Such concern is understandable and shared by the Department of Indian Affairs and Northern Development (DIAND).
>
> The South Yukon Forest Corporation is an important employer in Yukon and the community of Watson Lake. The closure of the company's mill is taken very seriously and I would like to assure you that DIAND's Yukon regional officials are exploring every available option in an effort to return the mill to production.
>
> I am pleased to see your support for DIAND's initiative to strengthen First Nation economic capacity and business development. DIAND is currently evaluating a joint venture proposal submitted by the Liard First Nation under the Regional Partnership fund and Major Business Projects.
> (Emphasis added)

[517] Indeed, in September 2000, Ms. Jennifer Guscott, then ARDG signed a recommendation in favour of investment by the Department of $5.5 million to support KFR in taking over 51 percent of SYFC, pursuant to the Regional Partnership Fund and Major Business Projects. This recommendation was made after the mill had closed.

[518] This $5.5 million investment was part of a larger $7.3 million investment in the SYFC mill by KFR. This investment would see KFR assume a 51 percent equity share in the mill.

[519] This recommendation, found at Exhibit P-79, Tab 334, noted that the mill would be upgraded with the addition of a kiln and planer, log home venture and the renewal of the KFR THA.

The recommendation noted that forestry is one of the Yukon Region's priorities. The recommendation commented on the anticipated benefits as follows:

> Has significant regional impact and wide ranging socio-economic benefits to Liard and Lower Post First Nation as well as Kaska Nation, town of Watson Lake and City of Whitehorse.
>
> Reinstatement of 125 jobs with SYFC in Watson Lake. Creating employment and business opportunities as a result of the upgrades.

[520] The recommendation also commented on the level of risk that was involved, as follows:

> The proposal was assess internally by the program manager, then reviewed/recommended by the Regional Director General.
>
> This project is considered to be medium to high risk due depending on ability to obtain adequate forest tenure to meet market demand. However, the THA environmental assessment is currently under way, management is in place and experienced workers are available to start operation immediately. (Emphasis added)

[521] By letter dated September 19th, Minister Nault wrote to Mr. Fentie, then M.L.A. for Watson Lake. This letter, found in Exhibit D-81, Tab 123, repeated the position taken by the Minister in writing to MP Hardy. The closure of the mill was taken seriously and the Department was exploring every available option in an effort to return the mill to production.

[522] In September 2000, the Department released a draft RFP. The Plaintiffs characterized this as the "first trial balloon" relative to a proposal to grant a THA. This document is in Exhibit P-79, Tab 331. This draft RFP invited proponents to submit proposals for a THA. Four different THAs were contemplated in this document.

[523] The Hyland-Coal THA would have an AAC of approximately 90,000-105,000 m^3 of timber per year. Three other THAs would each be for 30,000 m^3 of timber per year. The tenure term would be for five years with provision for an extension of another five years on the basis of performance. December 4, 2000 was the deadline for proponents to submit all required elements of the RFP.

[524] The evaluation and selection criteria were particularly favourable to the Plaintiffs' mill. They included, among other things, employment, existing plant, demonstrated experience, local processing and local participation, local hire and training initiatives.

[525] By letter dated October 5th, Mr. Don Oulton, Acting President of SYFC, wrote to Mr. Monty at the Regional Office of DIAND in Whitehorse. His letter addressed the THAs and SYFC's response to them. Mr. Oulton posed several questions about the objectives, proposed approval process and requirements for specific aspects of forest management planning.

[526] He further said in this letter that the responses to those questions would allow SYFC to make a thorough, complete and accurate THA proposal. This letter is found in Exhibit D-81, Tab 124.

[527] As the submission date for RFP drew closer, the Federal election had intervened and the Department was prevented from finalizing the consultation process. Mr. Monty on November 7th

asked Mr. Ballantyne and Ms. Stewart if they had given "[a]ny thought to officially informing the public wrt extension, focus groups, workshop, etc."

[528] In response Ms. Stewart noted that "HQ has put a no comment on us related to any policy-based ruminations and we are very restricted in our media outreach, which rules out news bulletins and much public comment."

G. 2001

[529] In early 2001, Mr. Oulton contacted Mr. L.D. Hartley of Woodline Services. On behalf of SYFC, Mr. Oulton asked Mr. Hartley to travel to the mill site from Westbank, B.C. and provide an assessment of the mill at Watson Lake. Mr. Hartley completed the "Woodline Report", entered as Exhibit D-77, in January 2001. He visited the mill on January 17th and 18th.

[530] The assessment, contained within the Woodline Report, included comments and suggestions to help improve the mill production, the lumber recovery rate and production of a more valuable product. The report focused on the equipment and procedures employed at the mill site. This report was very critical of the sawmill equipment and the processing procedures. It noted that the equipment was antiquated and opined that it was improperly or inefficiently installed. Further the report estimated that the mill, as set up, was very inefficient in the amount of lumber that it could produce from the timber it was receiving.

[531] As mentioned earlier, a separate Mill Audit was performed in March 2001 by Mr. Van Leeuwen and Mr. Russell Taylor, of R.E. Taylor & Associates Ltd. This report was prepared for KFR and was paid for by KFR, LPL and DIAND. The purpose of this audit was to determine if the mill project was suitable for support by the previously mentioned $5.5 million investment from the Department.

[532] The Mill Audit reported that mill operations were curtailed due to the lack of a committed log supply, continuous and increasing operating losses and a weakening lumber market. It also noted that from January - August 2000 the mill had a net loss of $2 million.

[533] The Mill Audit noted that the limited start-up capital that had been invested resulted in a limited capability and no value-added facilities, specifically, no dry kilns or planers. It was also suggested that limited start-up capital was the reason why old and inefficient sawmill technology was employed. The audit concluded that the equipment and procedures resulted in a mill that was a high cost lumber producer and unable to compete in the North American markets.

[534] Among other things, the audit noted that the ability to secure a continuous, reliable, good quality and cost effective log supply became an issue. It noted the unlikelihood that this project could progress without a major portion of the supply guaranteed through tenure. The audit commented on the impact of the Softwood Lumber Agreement upon the future operations of the mill. Lastly, the Mill Audit noted that value added facilities, dry kilns and planers, must be implemented if the mill were to be re-opened.

[535] On May 8, 2001, Mr. David Loeks, of TransNorthern Management completed the "Final Report: Timber Harvest Agreement Consultations and Analysis" (the "Loeks Report"), entered as Exhibit P-6. This report was prepared for Mr. Ballantyne, Director Renewable Resources, DIAND Yukon Region and Mr. Gay, Regional Manager, Forest Resources, DIAND Yukon Region. Mr. Loeks had been contracted by DIAND to perform consultation and analysis on the draft RFP that was released in September 2000.

[536] Mr. Loeks recommended releasing an RFP for two THAs of a mere 30,000 m^3. He suggested that the existing short-term TSA, with a maximum volume of 128,000 m^3 of timber per year, was a constraint on the issuance of any THA. However, he also noted that "without a secure timber supply, several companies are likely to go out business".

[537] It is clear from the evidence, including the closure of the mill, that this warning about companies going out of business specifically relates to SYFC.

[538] This report was followed by an email on May 11th from Mr. Loeks to Mr. Ballantyne concerning the YCS. This email was sent as a part of his duties for DIAND. This email was entered as Exhibit P-76.

[539] In his email, Mr. Loeks mentioned concern about a possible "media war" with the YCS. He included in his message to Mr. Ballantyne the email he had sent to YCS. In that email Mr. Loeks

explained to YCS that the DIAND Regional Office had accepted his recommendation on how to fulfill the Minister's THA commitment. He further told YCS that DIAND would proceed due to Minister Nault's commitment.

[540] Mr. Loeks advised YCS that:

> The [Watson Lake] committee represents our collective best chance to get it right. If it falls apart, we all are back to where we were in September, but with a big difference: DIAND will move ahead regardless of media wars because they can convincingly demonstrate that they invested the time and money into good faith, even-handed consultation and process design. They will be forced to move ahead because of Nault's committment. The basis for legal action has become threadbare, since DIAND has in fact done the right things since the autumn.
>
> …
>
> Consistent with our many discussions and with the findings of both workships, I have recommended that a new TSA is necessary for Y02 and Y03
>
> …
>
> The town of Watson Lake also wants hope of strengthening their economy. We all know that offering 60% of 128,000 m3/yr will guarantee that only 2 modest operations and the small mills will be able to open their doors. The larger outfits and the town's interests will be left out in the cold.

[541] The situation that existed in September 2000 was for four different THAs, including one of approximately 100,000 m^3 of timber per year. That is very different from the proposed maximum THA of 30,000 m^3 recommended by Mr. Loeks. The larger outfits to which Mr. Loeks referred without question included SYFC.

[542] On June 15, 2001, Mr. Loeks sent a letter to Mr. Ballantyne, this time dealing with the TSA.

This letter is found in Exhibit P-80, Tab 82. Mr. Loeks said:

> DIAND will be in a position to release an RFP for two 30,000m^3/yr 5-year THAs in Southeast Yukon by the end of June. This will help to relieve the department of a nagging commitment and a serious public controversy. However, it will not substantially solve the problem faced by industry, since the THAs are small relative to expected industry demand.
>
> …
>
> Currently new inventory data are available, and there is better-informed thinking about assumptions. Therefore DIAND, the Yukon Government, industry, and stakeholders agree that a new TSA is needed to provide the basis for better certainty to guide planning and management for all parties in SE Yukon. An important objective is also to provide a TSA that can be accepted by all parties.
>
> Several companies – and much of the town of Watson Lake – insist that it is imperative that the TSA be done quickly. They were promised THAs more than a year ago and they feel that the size of the THAs that will be offered is inadequate at best, and is evidence of bad faith at worst. In a recent meeting with DIAND and YTG, South Yukon Forest Corporation stated that they will be forced out of business if DIAND remains limited by the existing harvest ceiling.
>
> …
>
> Compared with forest districts elsewhere, Southeast Yukon is not a complex area for resource values. As a planning area, it is further simplified by its topographical constraints and by relatively low levels of resource competition.
>
> …
>
> If SYFC loses a fair THA bid, so be it. On the other hand, there will be vicious recriminations if they collapse because government takes another half-year to provide planning certainty.
> (Emphasis added)

[543] At this time the joint venture mill had been closed since August 4, 2000, for want of adequate supplies of timber.

[544] Mr. Pat MacDonell, a respected forester, was hired by DIAND to work on the THA process. He sent an email on June 19, 2001 to Mr. Gay at DIAND. Mr. MacDonell noted that the harvest ceiling of 128,000 m^3 was made pursuant to the Henry Report, and he said that it was conservative, in part, due to unsettled land claims.

[545] Mr. MacDonell also recommended that it was time for a new TSA. He acknowledged that a number of TSAs had been completed since 1998. He stated that all TSAs are valid, including the Timberline Report #2 where access constraints were removed and a timber supply of 400,000 m^3 was found. He also noted that DIAND does not conduct economic viability studies; industry must determine if it can successfully proceed. This email is found in Exhibit P-79, Tab 340.

[546] In September 2001, the Department released a second and significantly decreased draft RFP to grant a THA. This draft RFP was in accordance with the proposal by Mr. Loeks to release small THAs, that would not sustain SYFC, but would relieve the "nagging commitment". Each THA was offered with a volume up to 150,000 m^3 over five years, that is 30,000 m^3 per year. This document is in Exhibit 79, Tab 349.

[547] The "real" request for proposals for Watson Lake THAs was issued by DIAND on October 2, 2001. The "Timber Harvest Agreements: Request for Proposals Watson Lake, Final Version",

was entered as Exhibit D-73. This relates only to Y02 and Y03 and was limited to a volume of 30,000 m^3 for five years. The timber harvested must be processed by a mill in Watson Lake. This document sets out extensive obligations on the THA holder, for very little benefit.

[548] However, by this time extensive regulatory amendments had been introduced on May 2, 2001, by SOR/2001-162. CTPs were now available for 20,000 - 40,000 m^3 of timber per year. The obligations placed on THA proponents were not imposed on holders of the new and increased CTPs.

[549] This “real” RFP actually offered less timber than was possible through one class of CTP. Even the smallest volume possible under the revised CTP was a mere 10,000 m^3 below the THA. Notably, these CTPs were not burdened with the significant and excessive obligations that a THA proponent would have to undertake.

[550] On October 18, 2001, Mr. Oulton of SYFC wrote to the new RDG of DIAND in Yukon, Mr. John Brown. This letter is found in Exhibit D-11, Tab 70. In his letter, Mr. Oulton said that the reason why a mill had never been built before SYFC built its mill was that a long-term timber contract could not be secured from the Federal Government.

[551] Mr. Oulton noted that a commitment for a secure supply of timber had been given by DIAND before the mill was built. He stated that the mill closed because it was unable to operate

without the promised timber. This letter, as part of Exhibit D-11, was entered for the truth and accuracy of its contents.

[552] On November 9th, this action was commenced with the filing of a Statement of Claim by SYFC**.**

[553] On November 11th, Minister Nault wrote to Mr. Dennis Fentie, MLA for Watson Lake, in reply to Mr. Fentie's letter of October 24th. This letter is found in Exhibit P-80, Tab 86.

[554] Here, Minister Nault said that a THA in the amount of 30,000 m^3 met the "principles of sustainability, economic viability and social acceptability". The letter that was entered as the exhibit is not signed. Accordingly, I give it little weight.

[555] Shortly after this letter, a meeting was held in Watson Lake on November 14th between members of the YFIA and Minister Nault. The transcript of this meeting is found in Exhibit P-79, Tab 357. At this meeting, numerous mistakes and problems with the DIAND Regional Office's handling of issuing CTPs were discussed.

[556] A few days after this meeting, by email dated November 19th, Mr. MacDonell wrote to Mr. Wortley, concerning an industry TSA run for the Minister. In this email, found at Exhibit P-80, Tab 87, Mr. MacDonell recommended that the Minister wait and get the report and then consider all options presented to determine the AAC.

[557] Mr. MacDonell was in the process of completing a new TSA which would consider the criteria proposed by industry, trappers, environmentalists and other forest users. His concern related to ensuring that the Minister received a balanced picture, and not just the industry preference. Mr. MacDonell also noted that he was six weeks away from completing the TSA report.

[558] Notwithstanding the claim that the report was almost ready, this report was not issued until January 2003 when the DIAND/YTG Technical Timber Supply Committee issued the MacDonell Report.

[559] This report concluded that Y02 and Y03 contain approximately 5.1 million hectares of land. The maximum biological potential, that is the scientifically sustainable harvest, before sociological and environmental net downs, was 1.6 million m^3 of timber per year. All stakeholders who were consulted, except the Trappers Association, believed that the TSA of 128,000 m^3 was too low. It also noted that even-flow harvest policies were only used in two jurisdictions in Canada.

VI. DISCUSSION

A. Introduction

[560] At the beginning of my discussion, I have a preliminary comment.

[561] The trial judge in *Carrier Lumber Ltd. v. British Columbia* (1999), 30 C.E.L.R. (N.S.) 219 (B.C.S.C.) said:

> 479 In some respects counsel on both sides of this action have, in my respectful view, fallen into the trap lawyers, particularly lawyers involved with issues of contract, often fall into. The focus of much of their efforts in argument has been on a series of highly refined and narrowly focused issues in which their attention has been engaged with issues which the general public might well view as the splitting of hairs.
>
> 480 In these comments I do not wish to be taken as being critical of counsel or their efforts, indeed this is a case in which the gratitude of the court should be extended to the counsel who appeared at this trial. In attempting to carry out their task, counsel is required to refine and articulate their respective clients' positions in seeking to advance them. It is a process which is by design and necessity, a partisan one in which, in theory, the truth emerges from the adversarial process.
>
> 481 The nature of the discipline of law and the techniques of legal analysis tend towards a type of focused and narrow analysis which isolates attention on narrow issues.
>
> 482 The task of the trial judge must be to bring to the process a detached examination of the case as a whole before turning to any microscopic examination of any individual issue.
>
> …
>
> 484 These characterizations move the conflict from the personal to the theoretical, they engage amorphous and broad issues of public policy and focus attention on technical matters.
>
> 485 With respect, that is not, in reality, what this action is about. This case is about a much more profound and yet simple question. Can the defendant induce a private citizen, in this case a corporation, to enter into a contract which offers to the plaintiff payment in very specific terms by delivery of 5,000,000 cubic metres of wood, and then through use of its power and legislative capacity fundamentally change the bargain, years later?

[562] While there are factual differences between *Carrier Lumber Ltd.* and the present case, there are some similarities, including the “series of highly refined and narrowly focused issues…which the general public might well view as the splitting of hairs” that were argued by the Defendant. As

the trial judge said in *Carrier Lumber Ltd.*, the characterization of this case by the Defendant has "moved the conflict from the personal to the theoretical". The present action also concerns "more profound and yet simple" questions.

[563] This action is about the construction of a mill in Watson Lake, located in southeast Yukon. The questions to be answered are why did the Plaintiffs build the mill, why did the mill close and what are the legal consequences? The answers to these questions depend on my assessment of the evidence that was submitted.

[564] Prior to calling their witnesses, each side presented an opening statement and identified, from their respective points of view, the legal issues in play.

[565] The Plaintiffs said that their claims fall into the categories of negligence, misrepresentation, breach of contract, breach of fiduciary duty and misfeasance in public office.

[566] For her part, the Defendant pleaded a denial of all the claims advanced by the Plaintiffs. She then advanced alternative defences in agency, assignment, cost, damages, estoppel, fiducia, joint venture, laches, limitations, malice, misfeasance in public office, negligence, negligent misrepresentation, partnership, prerogative right of the Crown, representative proceedings and trust. While she identified these as the issues, in her opening statement, the Defendant did not address all of these issues in her closing submissions.

B. Preliminary Issues

[567] Insofar as some of the defences raised by the Defendant have the potential to defeat the claims of LPL, relative to the issues of assignment and limitations, and of both Plaintiffs, in respect of the arguments about the availability of judicial review, these matters will be addressed first.

[568] As noted in the procedural history, this action was commenced initially only in the name of SYFC. LPL became a party pursuant to the Order of the Federal Court of Appeal made on January 27, 2006. In its Reasons for Judgment, the Court of Appeal commented on the necessity for LPL to be a party, in the event that a purported assignment of its rights of action to SYFC could not be established. In this regard, I refer to the following passage from the decision of the Federal Court of Appeal at paras. 28 to 30 as follows:

> [28] These considerations are irrelevant. What was before the Motions Judge was not whether LPL effectively assigned its rights to the appellant, but whether, in the circumstances, it was necessary to allow the joining of LPL as a plaintiff in order to permit a proper determination of the issues raised by the pleadings. In my view, the answer to that question can only be in the affirmative.
>
> [29] The position asserted by the appellant and LPL appears clearly in paragraphs 6 and 7 of the proposed second Amended Statement of Claim, which I have already reproduced. The appellant and LPL take the position that LPL's rights of action against the respondent have been assigned to the appellant. If that contention is right, then, should there be liability on the part of the respondent, the appellant may be entitled to obtain the remedies which it seeks. However, should the assignment not be effective, then full recovery against the respondent will not be possible unless LPL is joined as a party.
>
> [30] Consequently, in these circumstances, contrary to the position taken by the respondent, I do not see that on its motion to add LPL as a plaintiff, the appellant need go further than allege the

> assignment which, it says, was made by LPL. Whether or not, in the end, it succeeds on that issue is not a relevant consideration for us in this appeal, nor should it have been for the Motions Judge.

[569] In her written closing submissions, which were filed at the hearing, the Defendant specifically raised the argument of limitations against the Plaintiff LPL, in respect of the causes of action alleged for breach of contract and for breach of fiduciary relationship. In her Second Amended Statement of Defence and Counterclaim that was filed pursuant to the Order of the Federal Court of Appeal, Her Majesty advanced a limitations defence against LPL.

[570] Notwithstanding the silence in the Defendant's written submissions on the limitations issue with respect to the causes of action advanced in tort by LPL, I will consider the availability of that defence in relation to all the causes of action advanced by LPL.

[571] The applicable statute of limitations in this case is *Limitations of Actions Act,* R.S.Y. 2002, c. 139. This is a result of subsection 39 (1) of the *Federal Courts Act*, which provides as follows:

Prescription and limitation on proceedings	Prescription — Fait survenu
39 (1) Except as expressly provided by any other Act, the laws relating to prescription and the limitation of actions in force in a province between subject and subject apply to any proceedings in the Federal Court of Appeal or the Federal Court in respect of any cause	39 (1) Sauf disposition contraire d'une autre loi, les règles de droit en matière de prescription qui, dans une province, régissent les rapports entre particuliers s'appliquent à toute instance devant la Cour d'appel fédérale ou la Cour fédérale dont le fait générateur

of action arising in that province.	est survenu dans cette province.

[572] The *Interpretation Act*, R.S.C. 1985, c. I-21, s. 35 defines "province" as follows:

"province" means a province of Canada, and includes Yukon, the Northwest Territories and Nunavut;	« province » Province du Canada, ainsi que le Yukon, les Territoires du Nord-Ouest et le territoire du Nunavut.

[573] The application of subsection 39(1), together with the definition of "province" in the *Interpretation Act*, means that the *Limitations of Actions Act* of the Yukon Territory applies here.

[574] The Defendant relies upon subsection 2(1) of the *Limitations of Actions Act.* The applicable provisions are the following:

Periods of limitations	Délais de prescription
2 (1) Subject to subsection (3), the following actions shall be commenced within and not after the times respectively hereinafter mentioned	2 (1) Sous réserve du paragraphe (3), les actions suivantes se prescrivent par les délais respectivement indiqués ci-après :
(f) actions for the recovery of money, except in respect of a debt charged on land, whether recoverable as a debt or damages or otherwise, and whether on a recognizance, bond, covenant, or other specialty or on a simple contract, express or implied, and actions for an account or for not accounting, within six years after the cause of action arose;	f) l'action en recouvrement d'une somme, sauf l'action relative à une créance grevant un bien-fonds, que cette somme soit recouvrable notamment à titre de créance ou de dommages-intérêts, ou que cette somme découle d'un engagement, d'un cautionnement, d'un covenant ou autre contrat formaliste, ou d'un contrat nu verbal, exprès ou tacite, se prescrit par six ans

(h) actions grounded on accident, mistake or other equitable ground or relief not hereinbefore specially dealt with, within six years from the discovery of the cause of action;	à compter de la naissance de la cause d'action; il en est de même de l'action en reddition de comptes ou pour non-reddition de comptes;
(j) any other action not in this Act or any other Act specially provided for, within six years after the cause of action arose.	h) l'action fondée sur un accident, une erreur, un autre moyen en equity ou une autre mesure de redressement en equity, sauf ceux susmentionnés, se prescrit par six ans à compter de la découverte de la cause d'action;
	j) toute autre action qui ne fait pas explicitement l'objet d'une disposition de la présente loi ou d'une autre loi se prescrit par six ans à compter de la naissance de la cause d'action.

[575] It is appropriate, in my opinion, to address the Defendant's arguments relative to a limitation defence and the lack of a valid assignment, at the same time, because they are related.

[576] As I understand it, the Defendant argues that the claims of LPL should be defeated because it did not commence this action within the time provided in the *Limitations of Actions Act* referred to above. Section 2(1) of that statute provides that all causes of action alleged in this case shall be commenced within six years after the cause of action arose. This puts in issue the time when LPL's cause of action against the Defendant arose.

[577] In responding to this issue, the Plaintiffs rely upon the decision in *Stewart v. Canadian Broadcasting Corp.* (1997), 152 D.L.R. (4th) 102 (Ont. G.D.) where the Court found that a cause of action arises when its constituent elements have occurred. Insofar as LPL advances causes of action in negligence, negligent misrepresentation, breach of contract, breach of fiduciary duty and misfeasance in public office, the Court must consider when each of these causes of action arose.

[578] It is sufficient for me to say, at this time, that the causes of action in negligence, negligent misrepresentation, breach of contract, breach of fiduciary duty and misfeasance in public office arose when the mill in Watson Lake closed. That is the event that gave rise to the injury for which recovery is claimed in this action.

[579] It is an admitted fact, pursuant to the Response to Request to Admit, that the Watson Lake mill closed on August 4, 2000. Applying the relevant limitation period as set out in the *Limitations of Actions Act*, that is six years, the time for the commencement of action would expire on August 4, 2006.

[580] The Second Amended Statement of Claim on behalf of the Plaintiffs was filed with the Registry of this Court on February 6, 2006, as appears from the Index of Recorded Entries relating to this cause.

[581] The Defendant argues that the limitation period for any action against her commenced on June 4, 1996, that is the date of a letter written by Mr. Ivanski to LPL.

[582] I reject that argument. That letter, which will be discussed further, does not constitute a "constituent element" of any of the causes of action advanced by LPL or indeed, of both Plaintiffs.

[583] Insofar as SYFC filed a motion seeking leave for the joinder of LPL as a Plaintiff, that motion was filed on February 16, 2004. By Directions issued by Prothonotary John Hargrave on June 8, 2004, the motion was set down for an oral hearing before a judge of the Court sitting at Whitehorse. The motion was heard at Whitehorse on November 1, 2004. The motion was dismissed by an Order filed on November 24, 2004. A Notice of Appeal against that Order was filed on December 15th in Appeal Court File A-641-04.

[584] For whatever reason, the appeal did not proceed for hearing until December 1, 2005 and a decision was rendered by the Federal Court of Appeal on January 27, 2006.

[585] In its Reasons for Judgment, the Federal Court of Appeal said that the Motions Judge was wrong and it proceeded to make the order that "the motions judge should have made," as follows:

> [42] … Rendering the judgment which ought to have been rendered, I would allow, in its entirety, the appellant's motion to amend its Statement of Claim. As a result, I would modify the Order of November 23, 2004 as follows:
>
> > The plaintiff's motion to join LPL as a plaintiff, to amend its Statement of Claim to add a new cause of action in breach of contract and to make various incidental amendments with respect to existing causes of action is allowed.

> The plaintiff shall serve and file a clean Statement of Claim incorporating all of the amendments, including those pertaining to the joining of LPL as a plaintiff, within ten (10) days of this Order. Leave is granted to the defendant to serve and file an Amended Statement of Defence within two (2) weeks after service of the clean Statement of Claim.

[586] Since I have found that the causes of action in this case did not arise until the closure of the mill, which is admitted to have occurred on August 4, 2000, it is clear that the status of LPL as a Plaintiff was well within the limitation period since the Second Amended Statement of Claim, naming it as a Plaintiff, was filed on February 6, 2006. It is not necessary for me to say more than was said by the Court of Appeal.

[587] My determination on this point disposes of any challenge to the validity of any recorded assignment by LPL of its causes of action to SYFC. The validity of an assignment, or indeed the existence of an assignment, is irrelevant if LPL has commenced its action against the Defendant on a timely basis. The submissions of the Defendant in respect of these two matters cannot succeed.

[588] In her opening statement, the Defendant referred to many issues, as I have mentioned earlier. She did not refer to all of these issues directly in her closing submissions, that is both the oral and written submissions. However, she made particular mention in her opening remarks, at page 2202 of the transcript, about a representative proceeding, as follows:

> …representative proceeding, and trust.
>
> JUSTICE: Representative proceeding, I didn't think that was on the table. I thought that was off the table before the motions were argued in Whitehorse in November of 2004.

> MR. WHITTLE: The pleadings I will argue in my closing suggest a representative.

[589] The reference to "November of 2004" is to the Notice of Motion filed on February 16, 2004, in which SYFC sought various relief, including the nomination of the Plaintiffs to represent the joint venturers operating as SYFC, pursuant to the Rules.

[590] SYFC later abandoned this part of its Notice of Motion, and the Defendant objected to this partial abandonment, as appears from the Index of Recorded Entries.

[591] I note that the only reference the Defendant made to representative proceedings in relation to this trial was in her opening statement. There was never an adjudication of a motion, filed on behalf of LPL, SYFC or indeed, by the Defendant that LPL or SYFC was acting in the capacity of a representative pursuant to Rule 114. In these circumstances, I need only consider the presence of LPL and SYFC, as Plaintiffs, before the Court.

[592] I turn now to the Defendant's arguments, advanced only in closing submissions, that the action should be dismissed because it is a collateral attack on an administrative decision for which the Plaintiffs should have sought a remedy by way of judicial review.

[593] In this regard, the Defendant relies upon the decision in *Grenier v. Canada*, [2006] 2 F.C.R. 287 (C.A.), where the Federal Court of Appeal said as follows:

20 For the reasons expressed below, I think the conclusion our colleague, Madam Justice Desjardins, arrived at in *Tremblay*, is the right one in that it is the conclusion sought by Parliament and mandated by the *Federal Courts Act*. She held that a litigant who seeks to impugn a federal agency's decision is not free to choose between a judicial review proceeding and an action in damages; he must proceed by judicial review in order to have the decision invalidated.

21 Under section 17 of the *Federal Courts Act*, the Federal Court has concurrent jurisdiction with the courts of the provinces to try a claim for damages under the *Crown Liability and Proceedings Act*. Section 17 is reproduced in part:

[section 17 not reproduced]

22 However, Parliament thought it was appropriate to grant and reserve the Federal Court exclusive jurisdiction to review the lawfulness of the decisions made by any federal board, commission or other tribunal:

[section 18 not reproduced]

23 In *Canada c. Capobianco*, 2005 QCCA 209, the Quebec Court of Appeal acknowledged this exclusive jurisdiction and held that the action for damages brought in the Superior Court of Quebec was premature since the plaintiff's claim was essentially based on the premise that the decisions made in relation to him by the federal tribunals from which his damage resulted were illegal: only the Federal Court had jurisdiction to condemn this illegality which, under subsection 18(3), is exercised through the judicial review procedure provided by Parliament.

24 In creating the Federal Court and in enacting section 18, Parliament sought to put an end to the existing division in the review of the lawfulness of the decisions made by federal agencies. At the time, this review was performed by the courts of the provinces: see Patrice Garant, *Droit administratif*, 4th ed., Vol. 2, (Yvon Blais, 1996, at pages 11 - 15. Harmonization of disparities in judicial decisions had to be achieved at the level of the Supreme Court of Canada. In the interests of justice, equity and efficiency, subject to the exceptions in section 28, [citation removed] Parliament assigned the exercise of reviewing the lawfulness of the decisions of federal agencies to a single court, the Federal Court. This review must be exercised under section 18, and only by filing an application for judicial review. The Federal Court of Appeal is

> the court assigned to ensure harmonization in the case of conflicting decisions, thereby relieving the Supreme Court of Canada of a substantial volume of work, while reserving it the option to intervene in those cases that it considers of national interest.

[594] First, I note that the Defendant did not plead this issue. There is nothing in the further Defence filed by the Defendant in which she says that the Plaintiffs, or either of them, should have pursued an administrative law remedy. This issue was raised for the first time by the Defendant in her closing submissions.

[595] Second, I observe that the Defendant did not move to strike the Statement of Claim on this basis. Indeed, it verges on the astonishing that at the stage of closing arguments, the Defendant advanced *Grenier* as some kind of answer or defence to the Plaintiffs' action.

[596] The Index of Recorded Entries discloses that on May 29, 2002, the Defendant filed a Notice of Motion for an Order to strike certain parts of the original Statement of Claim, as well as for an Order for further and better particulars. That motion was argued before the Court sitting at Whitehorse on August 16, 2002.

[597] By an Order dated the same day, Prothonotary Hargrave granted the motion in part and the Plaintiffs were given leave to file an Amended Statement of Claim, deleting any reference to the discretionary remedy of *mandamus* which is available only upon an application for judicial review.

[598] Both the Plaintiffs and the Defendant addressed this issue, that is the pursuit of administrative law remedies, in closing submissions in July 2008 and again, pursuant to a Direction of the Court, on September 17, 2008. The ground was well and truly covered, and each party was given the opportunity to address jurisprudence of this Court and of the Federal Court of Appeal which post-dates the decision in *Grenier*.

[599] On September 17, 2008, the Defendant particularized her submissions about the Plaintiffs' failure to pursue administrative law remedies.

[600] She submitted that insofar as the Plaintiffs were challenging the reduction of the AAC for FMU Y01, Y02 and Y03 from 350,000 m^3 to 128,000 m^3, they should have proceeded by way of judicial review. The Defendant also argued that insofar as the Plaintiffs considered this reduction in the AAC to be a breach of the terms of an implied contract, they should have sought *mandamus* to compel the Defendant to do something.

[601] The Defendant's arguments in this regard are wholly unfounded.

[602] In this action, the Plaintiffs are asserting common law causes of action in negligence, negligent misrepresentation, breach of contract, breach of fiduciary relationship and misfeasance in public office. To the extent that the Defendant relies on the decision of the Federal Court of Appeal in *Grenier*, that reliance is misplaced. In no way are the Plaintiffs challenging the lawfulness of an administrative decision.

(i) ***Nature of the Proceeding***

[603] It is appropriate, at this stage, for me to comment on the nature of the proceeding.

[604] This is a civil action, taken pursuant to the *Crown Liability and Proceedings Act*, R.S.C. 1985, C-50 and the *Federal Courts Act*. Sections 3 and 10 of the *Crown Liability and Proceedings Act* are relevant and provide as follows:

Liability	Responsabilité
3. The Crown is liable for the damages for which, if it were a person, it would be liable	3. En matière de responsabilité, l'État est assimilé à une personne pour :
(a) in the Province of Quebec, in respect of	a) dans la province de Québec :
(i) the damage caused by the fault of a servant of the Crown, or	(i) le dommage causé par la faute de ses préposés,
(ii) the damage resulting from the act of a thing in the custody of or owned by the Crown or by the fault of the Crown as custodian or owner; and	(ii) le dommage causé par le fait des biens qu'il a sous sa garde ou dont il est propriétaire ou par sa faute à l'un ou l'autre de ces titres;
(b) in any other province, in respect of	b) dans les autres provinces :
(i) a tort committed by a servant of the Crown, or	(i) les délits civils commis par ses préposés,
(ii) a breach of duty attaching to the ownership, occupation, possession or control of property.	(ii) les manquements aux obligations liées à la propriété, à l'occupation, à la possession ou à la garde de biens.
	…

…

Liability for acts of servants	Responsabilité quant aux actes de préposés
10. No proceedings lie against the Crown by virtue of subparagraph 3(a)(i) or (b)(i) in respect of any act or omission of a servant of the Crown unless the act or omission would, apart from the provisions of this Act, have given rise to a cause of action for liability against that servant or the servant's personal representative or succession.	10. L'État ne peut être poursuivi, sur le fondement des sous-alinéas 3a)(i) ou b)(i), pour les actes ou omissions de ses préposés que lorsqu'il y a lieu en l'occurrence, compte non tenu de la présente loi, à une action en responsabilité contre leur auteur, ses représentants personnels ou sa succession.

(ii) ***Burden of Proof***

[605] This is a civil action where the burden of proving the case lies upon the Plaintiffs. The burden of proof in a civil action is proof on the balance of probabilities, a burden that was discussed recently by the Supreme Court of Canada in the decision *F.H. v. McDougall*, [2008] 3 S.C.R. 41 where the Court said the following:

> 46 Similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency. In serious cases, like the present, judges may be faced with evidence of events that are alleged to have occurred many years before, where there is little other evidence than that of the plaintiff and defendant. As difficult as the task may be, the judge must make a decision. If a responsible judge finds for the plaintiff, it must be accepted that the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test.
>
> …

> 49 In the result, I would reaffirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.

[606] The present action is fact driven. The outcome will depend upon the factual findings, whether those facts have been admitted or are findings that I have made upon consideration of the evidence. The case turns on credibility and inferences that are reasonably drawn from the evidence.

[607] In some respects, this case may be described as a "circumstantial" case since the evidence invites me to draw conclusions that are consistent with the totality of the evidence. I refer to the decision *Folch v. Canadian Airlines International* (1992), 17 C.H.R.R. D/261 (Cdn. Human Rights Trib.), at para. 50, where the tribunal explained that "[c]ircumstantial evidence is evidence that is consistent with the fact that is sought to be proven and inconsistent with any other rational conclusion".

[608] Similarly, Justice MacGuigan in *Minister of Employment and Immigration v. Satiacum* (1989), 99 N.R. 171 (F.C.A.), stated that:

> The common law has long recognized the difference between reasonable inference and pure conjecture. Lord Macmillan put the distinction this way in Jones v. Great Western Railway Co. (1930), 47 T.L.R. 39 at 45, 144 L.T. 194 at 202 (H.L.):
>
> > The dividing line between conjecture and inference is often a very difficult one to draw. A conjecture may be plausible but it is of no legal value, for its essence is that it is a mere guess. An inference in the legal sense, on the other hand, is a deduction

> from the evidence, and if it is a reasonable deduction it may have the validity of legal proof. The attribution of an occurrence to a cause is, I take it, always a matter of inference.

[609] I have drawn inferences from the evidence, as will appear from my Reasons.

C. Credibility Assessment

(i) ***General***

[610] Credibility of witnesses does not depend on marital status, religious affiliation or practise, professional designations or civic honours. It is to be determined in accordance with the factors that have been identified in the jurisprudence, as summarized in the seminal decision dealing with the assessment of credibility, *Faryna v. Chorny* (1951), 4 W.W.R. (N.S.) 171 (B.C.C.A.).

[611] In that case the Court said the following at page 174:

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial Judge to say "I believe him because I judge him to be telling the truth", is to come to a conclusion on consideration of only

> half the problem. In truth it may easily be self-direction of a dangerous kind.

(ii) ***Plaintiffs' Witnesses***

[612] I found the Plaintiffs' witnesses to be honest, truthful and credible. Their evidence is supported by and consistent with the documentary exhibits, including the documents emanating from the Defendant.

[613] While there were some "soft" spots in the evidence of Mr. Bourgh, for example as to the date of the Gold Show in Dawson City in 1996, this was not something that undermined the substance of his evidence about the events in the early days of LPL and his involvement with the Watson Lake mill. Overall, I accept him to have been an honest and credible witness.

[614] Mr. Gartshore also suffered some memory lapses but he provided an explanation in that regard. He had suffered a serious illness in 1997. However, his testimony about his involvement in the development of the early business plan was supported by the production of the documents in question.

[615] Mr. Staffen's evidence as to his participation in the meeting with Minister Irwin and Mr. Doughty and the Gold Show is not consistent with the evidence provided in the Plaintiffs' Reply to the Notice to Admit and will be discounted.

[616] Mr. Gurney is an unassuming man. He delivered his evidence in a straight-forward manner and credibly. I note that he was never an investor, officer, director or employee of the Plaintiffs. He was a plausible witness.

[617] Mr. Heit impressed me as knowledgeable and competent. Although he did not possess all of the formal qualifications held by some other witnesses, he knew what he was talking about in terms of harvesting timber. He was a solidly credible witness.

[618] Mr. Spencer was a steadfast witness. He is a straight-forward man who gave straight-forward evidence. He frankly admitted that he is an entrepreneur, in business to make money and prepared to take calculated risks in pursuit of opportunities. He was a credible witness.

[619] Mr. Fehr was a steady and credible witness. He, too, is a businessman. He was plausible in replying to questions in both direct and cross-examination.

[620] Mr. Brian Kerr was consistent and credible in his evidence, addressing relevant matters. He was unshaken in cross-examination when questioned about material matters such as “no guarantee” letters.

[621] Mr. Alan Kerr was straight-forward and consistent in his evidence. He was a credible witness whose evidence was reliable.

[622] Mr. Gerry Van Leeuwen, the expert witness called on behalf of the Plaintiffs, was direct and credible in his evidence. When asked to explain the apparent inconsistency between his report on the efficiencies of the mill which he prepared in 2001 and his current report projecting future loss of profits arising from the closure of the mill, he did so in a straight-forward manner. He was not shaken in cross-examination. He was plausible and reliable.

(iii) ***Defendant's Witnesses***

[623] In general, the Defendant's witnesses were less satisfactory.

[624] Mr. Ronald Irwin, formerly a Minister, was the first witness to testify on behalf of the Defendant. His manner of testifying and the inconsistencies of his evidence, in comparison with the evidence of other defence witnesses and the documentary exhibits lead me to conclude that he was not a credible witness.

[625] Mr. Irwin demonstrated a selective memory. In cross-examination, he sparred unnecessarily with counsel, in order to avoid answering questions. He frequently chose to avoid the question asked; rather, he added irrelevant comments designed to distract from the main issues. His evidence was also internally contradictory. This occurred on several occasions due to his propensity to respond to questions with self-serving answers. One example, among others, appears at pages 2263 to 2264 of the transcript where the following exchange is recorded:

> Q. Did you understand there was any kind of a forestry industry at all in the Yukon while you were the Minister?
>
> A. All insolvent. So, there was no industry, it was insolvent.

> Q. Did you understand there were logging operations in the Yukon?
>
> A. I couldn't give you specifics. My briefing at the time, and it was hearsay, is that the lumber industry was insolvent in the Yukon.
>
> Q. No, that -- Mr. Irwin. please listen to my questions. Did you understand there were logging operations in the Yukon during the course of the time that you were the Minister?
>
> A. Yes.
>
> Q. Yes or no?
>
> A. Yes, because they sent me a letter wanting to export 75 percent of their logs.

[626] Mr. Irwin was a highly unsatisfactory witness and his evidence will be weighed accordingly.

[627] Mr. Doughty was a former special assistant to Mr. Irwin when he was the Minister. Like Mr. Irwin, Mr. Doughty was not believable, not least because he apparently had no idea of his duties and described himself as a “mail box”. He had a poor memory as to the events relating to LPL in 1996. His testimony was not consistent with the other defence witnesses. His evidence will be given little weight.

[628] Mr. Michael Ivanski was a cautious witness. Much of his evidence was not relevant. He testified about his dealings with LPL prior to his departure from the Regional Office of DIAND in July/August 1997. He found the LPL representatives to be credible people who did not provide

misinformation to the Department. However, Mr. Ivanski also occasionally displayed a poor memory, notably in connection with Exhibit P-38, the final Sterling Wood Report.

[629] Mr. Fillmore suffered from a poor memory, as appears from the transcript. He purported to refresh his memory prior to trial by referring to a journal which was not produced at trial. His reliability overall is diminished by the signs of a defective but selective memory.

[630] Mr. Monty's most frequent response was "I don't recall". The frequency with which he responded with this answer can be seen in the transcript. The transcript also shows the frequency with which he referred to subjects that are not relevant to the issues in this action, for example outstanding land claims and consultations with the community. Mr. Monty was an unreliable witness.

[631] Mr. Peter Henry was an earnest witness. He was a junior employee of the Department when LPL came on the scene. He conducted the work on the TSA according to the instructions given to him.

[632] I do not impute to him personal knowledge of the manner in which, later, his work was manipulated by other employees of the Regional Office of DIAND in Whitehorse. To the extent that his evidence addressed relevant matters, he was credible.

[633] Mr. Madill was another witness who failed to impress me as credible. He did not recall having seen Exhibit P-38. He did not recall to whom he made inquiries concerning a FMP for Yukon. He could not recall whether anyone had provided him with the Draft Sterling Wood Report or the final report.

[634] Mr. Madill could not recall if he had been informed of the existence of the Sterling Wood Reports, either the draft or final versions. He did not recall if there was a FMP in place for Yukon. He did not recall if he was informed, while he was the Manager of Forest Resources that the AAC for southeast Yukon from the early 1990s to the mid 1990s was 350,000 m^3.

[635] Mr. Madill referred to a diary that he had maintained while he was working for DIAND but that diary was not available at the time he testified at trial. He offered two different explanations as to the unavailability of his diary.

[636] At page 4027, Mr. Madill said that he did not recall the involvement of LPL in the mill operation in Watson Lake, independent of the joint venture. In practically the same breath, he said he recalled that Minister Irwin was involved in meetings about milling in the South Yukon, but then went on to say that he did not recall where he got that information.

[637] Mr. Madill was a highly unsatisfactory witness. He was not credible. He backtracked, reversed himself and tried to backfill.

[638] Mr. Terrence Sewell was the designated representative of the Defendant for the purposes of this action. He was the Defendant's witness who was produced for discovery examination pursuant to Rule 237(1) of the Rules.

[639] Mr. Sewell too, was a careful witness. He was not slow to correct his evidence, when required, as for example when he first became aware of the mill.

[640] Mr. Sewell did not have the most frequent interactions with the Plaintiffs after his commencement of his employment with DIAND in Whitehorse in December 1997 but, as the senior employee of that office, he was aware of the Plaintiffs, their activities and of the difficulties that led to the closure of the mill. He found the representatives of the Plaintiffs to be honourable in their dealings.

[641] His evidence, respecting the matters in issue, including the nature of the relationship between the Plaintiffs and DIAND, the history of the interaction between the Plaintiffs and DIAND and the actions of the employees of DIAND, is relevant and will be weighed in terms of its credibility.

[642] However, Mr. Sewell was surprisingly unfamiliar with Exhibit P-38, the final Sterling Wood Report, having regard to the facts that he was the RDG when the Plaintiffs began building the mill and he was the chosen designated representative of the Defendant for the purposes of the discovery examination and in the trial.

[643] Having regard to these facts, I question the steps that he took to inform himself about relevant matters. This is important in light of his evidence, in cross-examination, about this document and others and affects his credibility.

[644] Indeed, the evidence of all of the Defendant's witnesses was punctuated by "I don't remember", "I don't recall". These responses invite inquiry as to what the Defendant did to prepare her witnesses to address the matters in issue in this action.

D. The Causes of Action

[645] There are critical questions to be addressed. Did the Defendant make representations, promises and commitments to the Plaintiffs or either of them? What is the relationship between the parties? What are the legal consequences of that relationship?

[646] As I said at the beginning, this action is about a mill. A key question is why did the Plaintiffs build the mill in Watson Lake?

[647] I have identified the five causes of action pursued by the Plaintiffs. Insofar as there is an overlap between the causes of action advanced in negligence and negligent misrepresentation, I will begin with the broad question of negligence.

[648] As noted above, the Plaintiffs advance several causes of action and each one will be discussed in turn. However, it is useful at this point to note that common to all five causes of action is the idea of relationship.

[649] In the course of their argument, the Plaintiffs referred to the manner in which their interests were aligned with those of the Defendant.

[650] "Alignment of interest" is a way of describing relationship, that is a relationship between the parties. The existence of a relationship between the Plaintiffs and the Defendant, in this action, is an element that is common to all five causes of action. That alignment of interest or relationship will be discussed in respect of each of those causes of action, in turn.

1. Negligence

[651] The legal test for liability in negligence includes four elements: that the defendant owes a duty of care to the plaintiff, that the duty of care has been breached, that the plaintiff has suffered foreseeable damage, and that the damages suffered were caused by the defendant's breach.

(i) ***Is there a Duty of Care?***

[652] The Federal Court of Appeal in *Premakumaran v. Canada*, [2007] 2 F.C.R. 191 (C.A.), at para. 16, explained that before conducting a full duty of care analysis it is necessary to first consider if the jurisprudence has already established a duty of care.

[653] In *Design Services v. Canada*, [2008] 1 S.C.R. 737, the Supreme Court of Canada reaffirmed the "five different categories of negligence claims for which a duty of care has been found with respect to pure economic loss", as recognized by Justice La Forest in *Canadian National Railway Co. v. Norsk Pacific Steamships Co.*, [1992] 1 S.C.R. 1021. These categories include the independent liability of statutory public authorities.

[654] Justice Rothstein in *Design Services* found that independent liability of statutory public authorities did not apply in that case because there was no "inspecting, granting, issuing or enforcing something mandated by law".

[655] In the present case, the Plaintiffs alleged negligence in the issuing of CTPs and inordinate delay in implementing the policy to have long-term tenure. As such, I find that the present case falls within an existing category and a detailed analysis need not be conducted.

[656] Nevertheless, after conducting a complete duty of care analysis below, I find that a duty of care existed.

[657] The existence of a duty of care depends upon the nature of the relationship between the plaintiff and the defendant and whether that relationship is sufficiently close.

[658] This test was set out in the decision of the Supreme Court of Canada in *Kamloops (City of) v. Nielson et al.*, [1984] 2 S.C.R. 2, when the Supreme Court adopted the test for the liability of

public authorities in negligence as set out in the decision of *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.). The test as initially adopted in *Kamloops* at page 10 has two parts:

> (1) is there a sufficiently close relationship between the parties (the local authority and the person who has suffered the damage) so that, in the reasonable contemplation of the authority, carelessness on its part might cause damage to that person? If so,
>
> (2) are there any considerations which ought to negative or limit
> (a) the scope of the duty

[659] The "*Anns*" test for duty of care was further refined in Canada in the decision of the Supreme Court of Canada in *Cooper v. Hobart*, [2001] 3 S.C.R. 537 where the Supreme Court set out the test at para. 30 as follows:

> In brief compass, we suggest that at this stage in the evolution of the law, both in Canada and abroad, the *Anns* analysis is best understood as follows. At the first stage of the *Anns* test, two questions arise: (1) was the harm that occurred the reasonably foreseeable consequence of the defendant's act? and (2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here? The proximity analysis involved at the first stage of the *Anns* test focuses on factors arising from the relationship between the plaintiff and the defendant. These factors include questions of policy, in the broad sense of that word. If foreseeability and proximity are established at the first stage, a *prima facie* duty of care arises. At the second stage of the *Anns* test, the question still remains whether there are residual policy considerations outside the relationship of the parties that may negative the imposition of a duty of care. It may be, as the Privy Council suggests in *Yuen Kun Yeu*, that such considerations will not often prevail. However, we think it useful expressly to ask, before imposing a new duty of care, whether despite foreseeability and proximity of relationship, there are other policy reasons why the duty should not be imposed.
> (Emphasis in original)

[660] In *Childs v. Desormeaux*, [2006] 1 S.C.R. 643, the Supreme Court of Canada restated the "*Anns*" test at para. 11 as follows:

> In *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.), Lord Wilberforce proposed a two-part test for determining whether a duty of care arises. The first stage focuses on the relationship between the plaintiff and the defendant, and asks whether it is close or "proximate" enough to give rise to a duty of care (p. 742). The second stage asks whether there are countervailing policy considerations that negative the duty of care. The two-stage approach of *Anns* was adopted by this Court in *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2, at pp. 10-11, and recast as follows:
>
> (1) is there "a sufficiently close relationship between the parties" or "proximity" to justify imposition of a duty and, if so,
>
> (2) are there policy considerations which ought to negative or limit the scope of the duty, the class of persons to whom it is owed or the damages to which breach may give rise?

[661] Once a plaintiff has shown that a duty of care exists, the burden shifts to the defendant to show that there are policy considerations that may negate the imposition of a duty of care. In *Childs* the Court said the following at para. 13:

> The plaintiff bears the ultimate legal burden of establishing a valid cause of action, and hence a duty of care: *Odhavji*. However, once the plaintiff establishes a *prima facie* duty of care, the evidentiary burden of showing countervailing policy considerations shifts to the defendant, following the general rule that the party asserting a point should be required to establish it.

[662] Those policy decisions must have been made *bona fide* to exempt the Defendant from the duty of care; see *Just v. British Columbia*, [1989] 2 S.C.R. 1228, at 1242-1245.

(a) Proximity

[663] In the present case, as in *Brewer Bros. et al v. Canada (Attorney General)* (1991), 129 N.R. 3 (F.C.A.), there is a close and specific relationship between the Plaintiffs and the Defendant. This close, even intimate relationship, was fostered over many years.

[664] The Defendant argued that there was no special relationship with the Plaintiffs that can support recognition of a duty of care. She relies on the decision in *Hercules Managements v. Ernst & Young*, [1997] 2 S.C.R. 165, at para. 24, where the Supreme Court said that there was no proximity of "such a nature that the defendant may be said to be under an obligation to be mindful of the plaintiff's legitimate interests in conducting his or her affairs".

[665] The Defendant argued that since the duty of care, under the relevant statutes and regulations, is owed to the public at large, the Plaintiffs cannot establish proximity, which is the first essential element for the recognition of a duty of care.

[666] As well, the Defendant argued that the Plaintiffs enjoyed no closer relationship with her than any other applicant for a CTP or THA and that in any event, the Plaintiffs' economic interests "must be subordinated to the greater purpose of the legislation, which benefits the public as a whole".

[667] Further, the Defendant cited the decision in *A.O Farms Inc. v. Canada* (2000), 28 Admin. L.R. (3d) 315 (F.C.T.D.) to argue that the basis for finding a duty of care must be found in the governing statutes.

[668] This reliance by the Defendant upon the decision in *A.O. Farms* is misplaced. In *Renova Holdings Ltd. et al. v. Canadian Wheat Board* (2006), 286 F.T.R. 201 (F.C.). Mr. Justice Blanchard explained the limited relevance of *A.O. Farms* at para. 46 as follows:

> 46 The Defendants submit that the jurisprudence reveals no analogous categories where proximity between the Wheat Board and the Plaintiffs is identified. The Defendants point to **Riske**, above; **M-Jay Farms Enterprises Ltd. v. Canadian Wheat Board**, [1997] M.J. No. 462; 118 Man. R. (2d) 258; 149 W.A.C. 258 (C.A.); and **A.O. Farms Inc. v. Canada (Minister of Agriculture) et al.,** [2000] F.T.R. uned. 510; [2000] F.C.J. No. 1771 (T.D.), as establishing that there is no private law duty of care in the context of the Wheat Board and the **Act**. In my opinion, these cases can be distinguished from the circumstances in the present case. In **A.O. Farms**, while Mr. Justice Hugessen held that there was no proximity between "the government and the governed", the matter before the Court concerned a legislative decision by the Minister and not an operational decision of the Wheat Board. Further, I note that neither in **Riske** nor **M-Jay Farms** did the Court conclude that no proximity existed between the plaintiffs and the defendant Wheat Board… (Emphasis in original)

[669] Further, the Defendant submitted that the relevant statutory schemes as set out in the Act, the *Territorial Lands Act* and the *Yukon Timber Regulations* do not create a private law duty in favour of the Plaintiffs but rather that these are legislative schemes that apply to the public at large. The Defendant relied on the decisions in *Cooper* and *Edwards v. Law Society of Upper Canada*, [2001] 3 S.C.R. 562, in support of this argument.

[670] The Defendant is misguided in relying on the decisions in *Cooper* and *Edwards* to argue a lack of proximity between the parties to this action.

[671] *Cooper* and *Edwards* are dealing with issues of regulatory negligence where the Supreme Court of Canada found that the defendants were engaged in third-party relationships with plaintiffs and there was no proximate relationship. The difference between instances of regulatory negligence and direct negligence was addressed by the Ontario Court of Appeal in *Attis v. Canada (Minister of Health)* (2008), 300 D.L.R. (4th) 415 (Ont. C.A.), leave to appeal to the Supreme Court of Canada refused (2009), 303 D.L.R. (4th) vi.

[672] In *Heaslip Estate v. Mansfield Ski Club Inc.* (2009), 310 D.L.R. (4th) 506 (Ont. C.A.), the Ontario Court of Appeal commented on the regulatory negligence cases at paras. 19 and 20 as follows:

> 19 This case is distinguishable from cases like *Cooper* and *Attis*. In those cases, the plaintiffs suffered harm at the hands of a party involved in an activity subject to regulatory authority, and then alleged negligence on the part of the governmental authority charged with the duty of regulating the activity that gave rise to the plaintiff's loss. *Cooper* and *Attis* hold that such plaintiffs have no direct relationship with the governmental authority and can assert no higher claim to a duty of care than any other member of the public.
>
> 20 The claim asserted here does not rest solely upon a statute conferring regulatory powers, as in *Cooper* and *Attis*, but is focused instead on the specific interaction that took place between Patrick Heaslip and Ontario when the request for an air ambulance was made. In this case, the relationship between Patrick Heaslip and the governmental authority is direct, rather than being mediated by a party subject to the regulatory control of the governmental authority.

[673] The Ontario Court of Appeal noted that the emphasis, in considering proximity for the purposes of recognizing a duty of care, is upon the direct relationship between the parties.

[674] Similarly, the Defendant's reliance on *Design Services*, to vitiate the proximity on policy grounds, is misplaced. In that decision, the Supreme Court of Canada rejected a *prima facie* duty of care due to its finding on a policy consideration. The policy consideration was the failure of the appellant to protect itself by contract from the economic loss.

[675] The case of *Design Services* arose in a very different factual context from the present action.

[676] *Design Services* was a tendering case where the subcontractors sought to impose liability on the owners. It was a case of third party liability. There is no third party liability in the case at bar.

[677] Further, I accept the Plaintiffs' evidence that they attempted to obtain assurances in writing from the Department; see for example Exhibit D-11, Tab 106, among other evidence in the record.

[678] Given the significant differences between the factual context in this case and that in *Design Services*, the absence of third party liability and the efforts of the Plaintiffs to secure assurances from the Department, it is my opinion that *Design Services* does not apply here.

[679] In the present action, there is ample evidence to show that the relationship between the Plaintiffs and the Defendant is direct and proximate. It is impossible to refer to each specific piece of evidence that underlies and supports my findings of proximity. The evidence is in the record. Some examples of the supporting evidence will be discussed in respect of each Plaintiff.

[680] I will first address the relationship between LPL and the Defendant.

[681] That relationship began in 1996 and deepened over time, but the interests of LPL and the Defendant were parallel from the beginning. LPL wanted to build a mill and the Defendant wanted to see economic development. This alignment of interests was necessary to implement the 60/40 Rule, given the failure of KFR to build a mill.

[682] LPL was incorporated on January 26, 1996. Soon after, representatives of LPL were in constant communication with the Regional Office in Whitehorse, for example, forwarding business plans and asking for information about accessing timber supply. A meeting was held with representatives of DIAND on April 18, 1996 and a scheduled meeting with Minister Irwin and representatives of LPL was held at the Gold Show in Dawson City in June 1996.

[683] Following the Gold Show, on June 4th, Mr. Ivanski wrote a letter, entered as Exhibit D-81, Tab 13, to Mr. Bourgh on behalf of LPL, concerning the proposed mill facility for Watson Lake. In his letter, Mr. Ivanski advised Mr. Bourgh on behalf of LPL, of the necessary steps to receive a THA. He also stated that fulfilling all the relevant requirements did not guarantee the grant of tenure. As well, Mr. Ivanski informed Mr. Bourgh that:

> as you know, for some time now we have been trying to ensure that timber be processed locally, and thereby create employment during the value-added process. We have established a two-tier stumpage system for timber – locally-processed woodis only one half the stumpage of export wood, thereby providing a financial incentive for local processing. As I understand you concept, two of the fundamental tenets are a THA and a mill. Given the apparent match,

> we would be interested in seeing an actual proposal which provides more details.
> (Emphasis added)

[684] In order to facilitate the apparent match, the Department requested that LPL prepare a comprehensive business proposal. In response, LPL undertook a major feasibility study in order to comply with the Department's request; see Exhibit, D-81, Tab 14.

[685] By November 1996, the Defendant knew that LPL had leased a "mill site" on a seventeen hectare property, located two kilometres west of Watson Lake adjacent to the Alaska Highway.

[686] On November 4, 1996 there was another meeting between LPL and DIAND. This meeting occurred so that LPL could brief DIAND on its new business plan that resulted from the feasibility study LPL had undertaken.

[687] The constant communications between the parties included letters to and from the Minister, and additional meetings. Of particular importance is the meeting of July 1997 in Whitehorse. At that meeting, which will be discussed later in more detail, representatives from LPL, the B.I.D. Group and the Department discussed timber supply.

[688] Mr. Brian Kerr gave unchallenged evidence that he scheduled this July meeting with DIAND at their offices. He testified that DIAND stated that "you are the exact type of company that

we've been looking for." He believed this to be in relation to the regulatory changes that favoured local production.

[689] At this meeting the Plaintiffs' witnesses, Mr. Fehr, Mr. Spencer and the Kerr Brothers, all agreed that DIAND had indicated that if they built a mill they would be given access to the necessary timber to operate it.

[690] It is clear from the Plaintiffs' witnesses that it was on the strength of this assurance that mill construction proceeded. Their evidence was not challenged on cross-examination or by the evidence of any of the Defendant's witnesses.

[691] There were more meetings and more letters between the LPL and the Defendant. On the totality of the evidence, I find that these meetings occurred for the mutually beneficial purpose of establishing a sawmill in Watson Lake. In plain terms, this project was important to DIAND; see also Exhibit P-79, Tab 109.

[692] A meeting was held on April 9, 1998, between LPL and 391605 B.C. Ltd., then the parties to the joint venture that was operating the mill. Minutes of this meeting were entered as Exhibit D-11, Tab 111.

[693] Timber supply was the topic of conversation. It was discussed that the joint venture would be "getting 20,000 m^3 in short order, at the expense of local permit holders (they are apparently not

happy with this decision)". I note that this document is part of Exhibit D-11 and was entered for the truth and accuracy of its contents.

[694] In July of 1998, Mr. Brian Kerr, on behalf of LPL, contacted Mr. Fillmore about a possible THA site in an area near the Hyland River where there had been a forest fire, such areas are known as "burns". As a result Mr. Kennedy, a Professional Forester employed by the Department in Whitehorse, went and personally conducted an aerial reconnaissance of the Hyland River burn. This reconnaissance was conducted to determine the feasibility of a long-term supply of timber for SYFC in that area. Mr. Kennedy noted that the burn was "[n]ot economical unless used as bait or enticement in THA option." (Emphasis added)

[695] This was a relationship with aligned and intertwined interests. It was a relationship of sufficient proximity that a *prima facie* duty of care should be recognized if there was foreseeability of harm to this Plaintiff.

[696] There is evidence that some of the Defendant's servants were not aware that LPL was involved in the Watson Lake mill. That is not surprising given the constant turnover of employees in Whitehorse.

[697] However, it is surprising that they did not take appropriate actions to make themselves aware. The knowledge of newly arrived employees is not the question. The question is "did the Defendant herself know that LPL was involved in the construction and operation of the mill"?

[698] In my opinion, she did. For this reason, my findings with respect to the relationship between LPL and the Defendant are the basis for examining the relationship between SYFC and the Defendant.

[699] SYFC was incorporated on November 5, 1997 and work began for the construction of the mill components which were to be transported to Watson Lake.

[700] Throughout 1998, prior to the opening of the mill in October 1998, the Plaintiffs remained in communication with DIAND. The Defendant was aware that the mill project was going ahead, as appears from the documentary exhibits and testimony, as numerous members of DIAND's staff toured the mill, for example, including Mr. Henry, Mr. Sewell and Mr. Rick Dale.

[701] Mr. Dale sent an email on August 28th, describing his visit to the Plaintiffs' mill at Watson Lake. This email was entered as Exhibit P-79, Tab 76. In his email Mr. Dale described the mill in the following terms:

> …This mill is a modern facility and is very impressive (to me as I have had several opportunities to work with and on various types of mills)…

[702] The importance of the mill to the local economy is clear from the testimony that there was a very high unemployment rate in Yukon, and even more so in Watson Lake. The evidence of Mr. Brian Kerr was that the mill was the largest private sector employer in Yukon. The importance of the mill to DIAND was recognized at all times. See also Exhibit D-81, Tab 166.

[703] This high unemployment, and the Defendant's desire to alleviate it, was the reason for the federal funding to assist in training employees to work in the mill. The Defendant provided $450,000 to SYFC through the TJF. This money was granted for the creation of 24 permanent full time jobs; see the Response to the Request to Admit. As well, the documentary evidence includes correspondence from SYFC in this regard.

[704] The Defendant also provided approximately $100,000, in the spring of 1999, to assist in restarting the mill after the December shutdown due to lack of timber.

[705] Mr. Fillmore, Regional Manager Forest Resources for one year from March - April 1998, testified that "my involvement with SYFC was looking, or trying to find wood supply for their mill"; see pages 2847 to 2848 of the transcript.

[706] The evidence also shows that by September 1998 the Regional Office in Whitehorse was promoting the participation of KFR in the Watson Lake mill project. Mr. Sewell later acknowledged that he, as the most Senior Departmental official in Yukon, had been "pushing" KFR and SYFC together into this mill project; see Exhibit P-79, Tab 144, page 1386.

[707] In fact, the Defendant authorized the expenditure of $500,000 of trust funds from the mill fund to allow KFR to "buy in" to the joint venture. The Department also funded a study to

determine the suitability of the mill at Watson Lake as a condition of KFR's participation in the project.

[708] I find that this occurred to ensure the accomplishment of the Department's goals. These goals were also the Defendant's goals.

[709] The proximity of the relationship is supported by the comments of Mr. Sewell at the meeting of April 7, 1999. The verbatim transcript, entered as Exhibit P-79, Tab 144, reveals the following exchange between Ms. Clark, of SYFC, and Mr. Sewell, RDG:

> JUNE CLARK: I guess what we need to understand is do we want this mill to succeed? Is this a priority?
>
> TERRY SEWELL: Yes, that's been asked frequently, and I think it's always been answered in the affirmative.

[710] On May 6, 1999, Ms. Jane Stewart, then the Minister, responded to a letter from Mr. Fentie, the YTG Forest Commissioner. This response was entered as Exhibit P-79, Tab 162. Ms. Stewart said:

> I have asked my departmental officials in the Yukon Region to work closely with the company as I share your view of the importance of this mill to Yukon's economy.
>
> I am advised that a number of recent meetings involving my staff, the Yukon government and SYFC have been positive and productive.
>
> I am hopeful that this partnership among our respective governments and industry will lead to satisfactorily addressing the challenges, and a successful and sustainable mill.

[711] I also note that there is documentary evidence that shows that SYFC was given "special access" to information relative to the wood supply and that DIAND was modifying its procedures to keep the wood supply moving to the Plaintiffs' mill.

[712] See for example Exhibit P-79, Tab 181. This is a DIAND internal email sent on June 2nd by Ms. Guscott to Ms. Snider and Mr. Casey, in Ottawa. Ms. Guscott says in her email:

> The call went far better than expected and really June, myself and company reps had discussed the issues in our weekly conference call and summer wood supply is on track. June was the SYFC rep on the call Monday (maybe a good sign – everyone was busy doing work work)
>
> …
>
> 7. The company were advised that we were holding a mill reserve of 30,000 cm that could be accessed to meet any shortfall, but ask them not to broadcast????
>
> 8. The company we told straight out until we have a THA in place purchase locally is the only real option, and surprise they did not go off the deep end yet??? But most of there kind of shareholders have winter and summer wood supply. We have also agreed to streamline our processes when ever possible to keep supply going, but the company must work with permit holders to obtain necessary volume.
>
> 9. If we can keep up the pace we finally have June on the ropes and it is my intention to keep up the pace and keep her on the ropes. I do not anticipate any letters or heat seeking missels incoming.
>
> 10. We have started to establish trust with the company now the company has to deliver.
> (Emphasis added)

[713] Significantly, this email also notes that the Regional Office was having a "weekly conference call" with SYFC about wood supply.

[714] As previously noted, Mr. Madill was the Regional Manager Forest Resources for one year from June 1999 - July 2000. In an email sent on June 7, 1999, entered as Exhibit P-79, Tab 182, Mr. Sewell advised SYFC that working with the Company would be a “high priority” for Mr. Madill.

[715] It is a matter of fact, and I so find, that the Department was conducting itself in such a manner that it appeared even to its own employees, that SYFC was being given special treatment. As stated by Mr. Ballantyne in an email to Ms. Clark:

> We think the meeting with the SYFC representatives was a positive one and served to clarify our position regarding THA development. In particular that it is going forward as we outlined at the meeting in Watson Lake some weeks ago. Subsequent to the meeting however, we had to assure field staff that due process would continue to be followed and no favoritism was being contemplated.
> (Emphasis added)

[716] The Department also paid for, or contributed significant amounts of money to, consultants for reports that directly benefited SYFC; see for example Exhibit D-11, Tab 187, Exhibit D-16; and Exhibit P-79, Tab 226.

[717] By letter dated February 4, 2000, Minister Nault told Ms. Clark, in reply to her letter of October 8, 1999, to work with the Region. In para. 2 of this letter, Mr. Nault says that “the process, within the mandate of the program, to help secure a wood supply for your company is progressing”. This letter is found in Exhibit D-81, Tab 88.

[718] This is not the casual relationship between a disinterested government department and a mere potential licensee. These facts, and many others in the record, show that there was a very close relationship between the parties to this action. I find that there was a close and proximate relationship between the Plaintiffs and the Defendant.

(b) Foreeseeability of Harm

[719] The next question to be addressed is whether injury to the Plaintiffs was foreseeable. In my opinion, having regard to the totality of the evidence, including the nature of the enterprise, that answer is “yes”.

[720] The Defendant’s primary position on the issue of foreseeability of harm is set out in her written submissions as follows:

> Although it may have been reasonably foreseeable that if CTPs or THAs were not issued to the plaintiffs the plaintiffs would suffer damages, the same can be said for any applicant for CTPs or THAs. Foreseeability in this sense is not sufficient to ground a *prima facie* duty of care. (para. 10, c. 4)

[721] The Defendant knew what was being built by the Plaintiffs, when, why and where. She was aware that the Plaintiffs planned a major capital investment. She was aware that any mill capable of processing wood in the southeast Yukon would require such an investment. She was aware that a mill, such as the one proposed and built, required a reliable supply of wood in order to function and that lack of such reliable fibre supply would be fatal to the viability of the mill. She was also aware that a mill of this size would require a supply of fibre substantially greater than that available through an individual CTP.

[722] The Defendant's witnesses testified that a mill without timber is not going to be successful. As well, the Defendant was aware that this was the only mill of its size in the Yukon Territory. In my opinion, it was foreseeable that these Plaintiffs would be personally harmed by any negligence that resulted in disruptions to the wood supply.

[723] I also note that the commitment that a supply of wood would be available was addressed to LPL, then to SYFC, and was the subject of further inducements and encouragements. In these circumstances, it is clear that negligent delays in formulating the process by which the wood would be delivered would harm these Plaintiffs.

[724] The transcript of the May 20, 2000 meeting, entered at P-79, Tab 282, also establishes that the Department knew that damage to the Plaintiffs was reasonably foreseeable if there were an inordinate delay in implementing long-term tenure.

[725] At that May 20, 2000 meeting, Minister Nault acknowledged that the Plaintiffs were planning future expansions. He was aware of the Plaintiffs' business plans and their future course of action. He discussed with the Plaintiffs the development of future value-added facilities to enable complete utilization of the timber harvested. In my opinion, this shows knowledge that any shutdown of the mill would result in expectation losses.

[726] In my opinion, the foreseeability of harm arising from these facts is not the same as that flowing to any other applicant.

[727] Regardless, after the first closure of the mill in December 1998 there is no longer a question of reasonable foreseeability of harm, there was actual foresight of harm, that is the closure of the mill and the liability that would flow from it. This is clear from internal DIAND memoranda and the Department's requests for legal advice about its liability. There are numerous examples of this foresight in the record but I will only reference a few at this time, in the next few paragraphs.

[728] Mr. Kennedy sent a confidential handwritten memorandum to Ms. Guscott on June 2, 1998. This memorandum was entered as Exhibit P-79, Tab 71. Mr. Kennedy, in evident concern over the conduct of his co-workers and the liability of the Department, expressed the following concerns:

> …
>
> I made the error of trusting that professionals would meet their commitments of insuring that propore documents fiduciary and pre screenings were being done. I should have known better but I trusted that individuals would put ethics and functions above personal agenda's and meet commitments. I was a fool. After yesterday's briefing and today's legal briefing on obligations I believe that Forest Resources has not met our commitments and obligations as promised, within timelines given.
>
> …
>
> Forest Resources, of which I am a member, cannot rationalize its actions on wood supply to industry, by Friday. You, as both a friend and to protect the credibility of your position of Director; must at all costs protect and prepare yourself for the Friday meeting.
>
> …

> Protect yourself and the director's position, I do not feel we presently deserve, through inaction, the same. Take care.
> (Emphasis added)

[729] In a memorandum written by Ms. Guscott on June 8, 1998, entered as Exhibit P-79, Tab 72, she expressed frustration with the criticisms of her staff. She also acknowledged that by the time SYFC gets its CTP it will have been a four month process. In her signed handwritten notes she states:

> In an effort to move forward, we decided to have a public meeting so the company etc could address 'significant' concerns of public, gov't, FN's, key stakeholders etc. I have a meeting with Justice at 2:30 pm to again have them give me their best legal advice on our process, should we be subject to 'any' challenge.
> (Emphasis in original)

[730] This foresight of liability continued as can be seen in Exhibit P-44. In this memorandum Mr. Ballantyne, in commenting on the availability of wood supply, questions when SYFC should be informed and says:

> Given that South Yukon Forest Corporation is planning a $17 million upgrade, you should prepare a strategy in the short term for how we should break the news to them, that there isn't enough wood. You might also consider with Justice the ramifications of not advising the company prior to their planned expansion.
> (Emphasis added)

[731] Acknowledgement of the risk of legal liability for the Department's conduct was also expressed in a report completed by KPMG on July 18, 2000 for DIAND. This report was titled "Yukon Timber Permit Process" (the "KPMG Report") and was entered as Exhibit P-47.

[732] Similarly, Mr. Loeks advised the Department that there would be "vicious recriminations if they [SYFC] collapse because government takes another half-year to provide planning certainty". This warning illustrates that the Department knew that there was a possibility of SYFC failing as a result of the inordinate delay in implementing long-term tenure. This warning also demonstrates that the Department had notice that there would be consequences if such a collapse occurred.

[733] It is my finding that throughout the course of this relationship, there was reasonable foreseeability of harm, or actual foresight of harm, flowing to the Plaintiffs if CTPs were issued negligently or if the implementation of the long-term tenure was inordinately delayed.

(c) Conclusion on *Prima Facie* Duty of Care

[734] I am satisfied that the Plaintiffs have shown that the Defendant owed them a *prima facie* duty of care, arising from the close relationship and foreseeability of harm. The relationship was direct and proximate. The mill needed wood to be successful. The Department needed a mill to provide economic development of a forest industry and the Department controlled access to the wood supply. The evidence I have mentioned proves the relationship. There is further evidence in the record which supports this conclusion.

[735] The duty of care arose in relation to LPL in 1997 following the "due diligence" meeting in Whitehorse in the summer of 1997 and I so find.

[736] The duty of care in relation to SYFC could not arise before the incorporation of that entity. I find that the duty of care owed to SYFC arose in February 1998 when the Department told Mr. Terry Boylan, a lawyer acting for the Plaintiffs, that "SYFC just has to go ahead and put up an operating sawmill after which the wood will become available"; see Exhibit D-11, Tab 109.

[737] In any event, I find that by the time that the Defendant decided to meddle with the makeup of this business, by "pushing" KFR into the joint venture in September 1998, the parties were involved in a sufficiently close relationship that invites the recognition of a duty of care by the Defendant to both Plaintiffs, and I find that such a duty of care existed.

[738] Any facts to which I have referred, that occurred after the time at which I determined the duty of care arose, are used to illustrate the continued conduct of the Defendant as an indication of the relationship in which it believed it was in.

(ii) ***Policy Considerations***

[739] In these circumstances, the burden shifts to the Defendant to show that no duty of care should be imposed, under the second part of the *Cooper/Childs* test, on the basis that there are policy reasons why a duty of care should not be imposed on the Defendant.

[740] Where does the policy issue arise in the present case?

[741] There is no doubt that the Defendant, through DIAND, can make choices as to the manner in which wood supply, either long-term or short-term, is awarded. The *Territorial Lands Act* authorizes the passage of regulations in that regard. The *Yukon Timber Regulations* concerning the CTP regime are an expression of policy. The section of the *Territorial Lands Act* that authorizes the grant of a THA is likewise an expression of policy.

[742] The Defendant produced, as documentary exhibits, many copies of discussion papers relating to a "proposed THA process", as well as draft versions of those documents. As well, the Defendant produced, as documentary exhibits, discussion papers relating to consultation processes relative to the proposed THA process. While these documents may well be considered expressions of policy, they are not relevant to the main issues before the Court, that is whether the Defendant is liable, on any ground, to the Plaintiffs in respect of the closure of the Watson Lake mill.

[743] These documentary exhibits, including Exhibit D-59, are relevant insofar as they show the conduct of the Defendant over the number of years between the presentation by LPL of its first proposal for the Watson Lake mill and its closure in August of 2000.

[744] The Defendant refers to the decision of the Supreme Court of Canada in *Brown v. British Columbia (Minister of Transportation and Highways)*, [1994] 1 S.C.R. 420 where Justice Cory writing for the majority, described the differences between policy and operational decisions at page 441 as follows:

> 38 In distinguishing what is policy and what is operations, it may be helpful to review some of the relevant factors that should be

> considered in making that determination. These factors can be derived from the following decisions of this Court: *Laurentide Motels Ltd. v. Beauport (City)*, [1989] 1 S.C.R. 705; *Barratt v. District of North Vancouver*, [1980] 2 S.C.R. 418; and *Just*, *supra*; and can be summarized as follows:
>
> > True policy decisions involve social, political and economic factors. In such decisions, the authority attempts to strike a balance between efficiency and thrift, in the context of planning and predetermining the boundaries of its undertakings and of their actual performance. True policy decisions will usually be dictated by financial, economic, social and political factors or constraints.
> >
> > The operational area is concerned with the practical implementation of the formulated policies, it mainly covers the performance or carrying out of a policy. Operational decisions will usually be made on the basis of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness.

[745] Relying on this guidance, the Defendant argues that any decisions made by DIAND relating to the issuance of CTPs or otherwise were policy decisions and accordingly immune from review by the Court in this proceeding. I disagree.

[746] The decisions, for example, on what types of permits should be authorized or the selection criteria are policy decisions. The actual implementation of that policy decision is an operational decision. An example from this case is illustrative.

[747] In 1995 the Department, in an effort to be fair, decided that it would randomly select the successful applicants for CTPs. That is a policy decision. In implementing that decision the

Department employed a local community hall and its “bingo drum” and selected the names of the successful applicants out of the drum. If the Defendant’s submission is correct, the selection of a name out of that “bingo drum” would qualify as a “true policy decision” and would exempt the government from liability in negligence. That submission is wrong in principle.

[748] Justice Cory, in *Just* at page 1242, explained that:

> The duty of care should apply to a public authority unless there is a valid basis for its exclusion. A true policy decision undertaken by a government agency constitutes such a valid basis for exclusion. What constitutes a policy decision may vary infinitely and may be made at different levels although usually at a high level.
> (Emphasis added)

[749] The Defendant relied upon a series of Judgments made under the *Fisheries Act*, R.S.C. 1985, c. F-14 to argue that management of the forest resources in the Yukon Territory is, like the management of the fisheries, a matter left to the discretion of the Minister in the preservation and management of a public resource. This argument is not well-founded and the many decisions cited by the Defendant are not relevant to the issues in play in this action.

[750] In this regard, the Defendant relied on the decision of the Federal Court of Appeal in *Comeau’s Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)*, [1995] 2 F.C. 467 (C.A.). The Defendant relied on this decision and other decisions made relative to the *Fisheries Act* to argue that the Plaintiffs’ claims in this action are all focused on policy choices and are accordingly, non-justiciable.

[751] As noted by Mr. Justice Major in the final disposition of *Comeau's Sea Foods* by the Supreme Court of Canada, reported at [1997], 1 S.C.R. 12, section 7 of the *Fisheries Act* regarding the Minister's authority over licences, confers "unique powers" upon that Minister. I refer to paras. 24 and 25 as follows:

> The statute expressly provides for the circumstances in which an issued licence may be revoked but it is silent on the circumstances in which the Minister may cancel an authorization to issue a licence. The trial judge and Court of Appeal held that a licence once authorized is as good as issued. If this is so, once the Minister authorized the issuance of a licence, he could not revoke the authorization although he could by virtue of s. 9 revoke the issued licence.
>
> There is a "gap" in the Fisheries Act to the extent that the text gives no direction as to whether the Minister can revoke an authorization previously given. The twofold powers of the Minister under s. 7 date from the Fisheries Act, S.C. 1868, c. 60, s. 2, and are unique in that unlike any other federal statute he has both the power to issue the licence and the power to authorize its issuance.
> (Emphasis added)

[752] There is no such special power conferred upon the Minister of Indian and Northern Affairs under the *DIAND Act* and the *Territorial Lands Act*. The Defendant's reliance upon the *Fisheries Act* and the jurisprudence developed relative to the issuances of licences, or otherwise, under that statutory regime cannot succeed.

[753] This case is also distinguishable on the facts from *Comeau's Sea Foods.* In *Comeau's Sea Foods*, the Supreme Court of Canada remarked, at para. 53, that "[t]he sole ground of negligence alleged by the appellant was breach of the 'defendant's statutory duty'". The Court found that the Minister had legitimately exercised his authority. As a result the Court found that there was no

duty of care and that there was no breach of the standard of care. In the present case, the Plaintiffs are not alleging a breach of the Defendant's statutory duty.

[754] In this case, the Plaintiffs are not challenging the policy decisions of the Defendant to introduce the 60/40 Rule, the two-tier stumpage regime, the use of long-term tenure in Yukon as a means of establishing local processing, nor the establishment of the TSA harvest ceiling for CTPs. Rather, the Plaintiffs are basing their claim upon the negligent issuance of CTPs and inordinate delay in implementing the policy to establish long-term tenure.

[755] The Plaintiffs complained about the negligence that occurred in the issuance of CTPs for short-term supplies of timber. For example, the delays in issuing the CTPs, the absence of adequate field reconnaissance, resulting in CTPs where there was no wood, and the general failure of DIAND in managing its personnel and resources are operational issues.

[756] The view that the challenged conduct of the Defendant was not a policy decision is supported by the Defendant's documentary evidence and the testimony of her witnesses. There is ample evidence in the record that supports this proposition. I will only refer to two examples.

[757] First, I refer to the testimony of Mr. Monty in cross-examination, where he was asked about the requirements to obtain a CTP. At page 3264 of the transcript, the following appears:

> Q. When you arrived on the scene, if you were 18 years of age, you were alive, and a Canadian citizen, you qualified. Is that about right?

A. Absolutely, yes, My Lady.

[758] It is clear that the issuance of a CTP was simply an administrative act and I so find.

[759] I also refer to the email from Mr. Moore to Ms. Clark, dated January 4, 2000, entered as Exhibit D-81, Tab 166. In this email, Mr. Moore was responding to SYFC's concerns that delayed CTPs would result in a one month shortfall of timber for the mill. Mr. Moore stated that there were "[l]imits to what can be done with the bounds of good program management and sound policy implementation." (Emphasis added)

[760] I find that the negligent issuance of CTPs was an administrative act or the implementation of policy. The decision to implement policy is operational in nature. The Defendant is not immune from a finding that a duty of care exists, for the manner in which her policies were implemented.

[761] According to the decision of the Newfoundland and Labrador Supreme Court, Court of Appeal in *Atlantic Leasing Ltd. v. Newfoundland* (1998), 164 Nfld & P.E.I.R. 119 (Nfld. C.A.), inordinate delay cannot be a policy. In that case, the Court found that the Government of Newfoundland was liable to the plaintiff for its inordinate delay relative to renewal of a commercial lease for office space.

[762] I adopt the finding of the Newfoundland and Labrador Supreme Court, Court of Appeal, that there can be no policy of inordinate delay. Insofar as the Plaintiffs complain of the Defendant's

inordinate delay, that inordinate delay is not a policy that can immunize the Defendant from owing a duty of care to the Plaintiffs.

[763] In addition, the Defendant submits that there are residual policy considerations that should negate the imposition of a duty of care, specifically the prospect of indeterminate liability with the possibility that every person who was refused a permit or harvest licence would sue for damages.

[764] I reject the Defendant's submissions that such policy reasons exist, including the risk of indeterminate liability. As observed by the Ontario Court of Appeal in *Heaslip*, that argument fails to acknowledge the "very specific nature of the claim" advanced by the Plaintiffs. The Plaintiffs base their action on the specific nature of a specific representation that was made by the Defendant. The circumstances are unique to these parties. There is no risk of indeterminate liability.

[765] The point was also addressed by the Courts of Newfoundland and Labrador in *Atlantic Leasing* where at para. 86, the Newfoundland and Labrador Supreme Court, Court of Appeal said the following:

> [86] The main policy consideration that affects the appropriateness of whether or not a duty of care to prevent economic loss should be recognized is the problem of indeterminate liability. That is much more a problem in the context of relational economic loss. In the circumstance of the current case, it is really not a concern. The relationship which existed between the Crown and Atlantic was a known and defined relationship and the scope of liability to which the Crown could be exposed was defined by that known, and limited relationship. The Crown knew that its inaction would affect a determinate party, rather than an indeterminate group. For that reason, I do not see any policy consideration which ought to limit the prima facie duty of care that otherwise arises in these circumstances.

[766] Considering the evidence presented, the Defendant has not discharged its burden on the balance of probabilities of proving that there are policy reasons why a duty of care should not be imposed.

(a) Bad Faith

[767] As I noted above, Justice Cory in *Just*, at para. 29, held that the policy decisions which can exempt the Government from a duty of care must be made *bona fide*. I have found that the conduct in question in this case was operational and not policy based. I also conclude that there was an absence of *bona fides* in this conduct as well.

[768] Throughout the summer of 1998, the Department could not adequately permit a supply of timber to the forestry industry. I find that this inability was the result of the misconduct of DIAND's employees. One example of dubious conduct is found in the email sent by Mr. Kennedy to Mr. Fillmore, on May 25, 1998. This email was entered as Exhibit P-79, Tab 70. Mr. Kennedy reported to Mr. Fillmore, his supervisor and Regional Manager Forest Resources, that:

> On May 17 a letter was sent to the districts advising them of the areas permit applications would be accepted. Since that time three new Wood Supply lists have appeared on the scene. The only way I received a copy of this moving target of Forest Practises is by receiving what is said to be the latest copy from you this afternoon. This system of information flow is not acceptable to the be responsible for accepting and approving areas for permits. The fact that the wood supply areas so drastically change in a week period causes me to believe that we really are guessing at the wood supply and at best did not prepare for the areas before my letter of May 15, 1998. I can not believe the attitude that is being taken towards the

> industry need, promises made publicly, and total lack of involvement of key players in the process.
> (Emphasis added)
>
> …
>
> The latest paper shows Rancheria wood but at 1pm today we finally realized that the wood was not there – so we now have a plan along Campbell hiway.
>
> …
>
> We have not kept our word to industry, we are in panic stage now selecting wood on the fly. I checked with Ken and Peter, key players in the process of wood supply and they were not aware of the latest Wood Supply Summary. We need a meeting to sort this mess out. The constantly moving wood supply areas makes it impossible to accept applications in an orderly manner and be credible. Shirley and I have now in the last week used three different official lists from Harvest Practises to accept applications.

[769] Mr. Kennedy, apparently not satisfied with the result of his email of May 25th, sent a confidential handwritten memorandum to Ms. Guscott on June 2nd. This document was entered as Exhibit P-79, Tab 71. Mr. Kennedy in evident disquiet over the conduct of his co-workers expressed the following concerns:

> We, in Forest Resources, and I say we, with little pride, in the lack of team work exibited to meet our set objectives of wood supply, have not met promises made internally to yourself, or publically to industry. Our commitment to issue 1000 m^3 and under in April is two months late. The promise to have wood ready for harvest, to the TSA, for June is frankly a dream unless a co-ordinated, urgent effort is made to do so. After a wood supply briefing yesterday, and a legal briefing today on financing and pre screening, consultation obligations, it is my belief that we have not met our mandate.
>
> I have as of Satuday approved the 1000 m^3 and under applications in all districts except in Y02 & Y03, because no wood was provided until yesterday in those units. I could not provide the 20% Limit in Y04 as Harvest Practices did not do any layout in this FMU…The

action I took to approve the applications up to 20% of the eligibility requirements for <1000 m^3 was an attempt to not delay further the industry's opportunity to get some wood.

…

I made the error of trusting that professionals would meet their commitments of insuring that propore documents fiduciary and pre screenings were being done. I should have known better but I trusted that individuals would put ethics and functions above personal agenda's and meet commitments. I was a fool. After yesterday's briefing and today's legal briefing on obligations I believe that Forest Resources has not met our commitments and obligations as promised, within timelines given.

…

I do however worry about my ethics in being part of a "team" that did not meet our obligations to yourself (or DIAND); about delaying industry from a wood supply (and the subsequent family and financial problems associated) and my promises to staff, industry and management (inc. Justice) to provide a level playing field under the regulations by doing our functions within the time and scope defined.

Forest Resources, of which I am a member, cannot rationalize its actions on wood supply to industry, by Friday. You, as both a friend and to protect the credibility of your position of Director; must at all costs protect and prepare yourself for the Friday meeting…

(1) Demand by F.M.U. a documented written copy of the fiduciary and prescreening actions, and consultations carried out. If the documents are available they should be provided by 1700 hrs today (Wednes), if they are not it allows you tomorrow (Thursday) to prepare the DG, seek legal advice and deal with us decisively. If these documents are not available, and accurate, you must protect the Department, and the Director's credibility by cutting us loose and dealing with us as a disciplinary problem. DIAND, at management level, must no loose trust with industry, it is all that is left.

(2) The efforts to hold to the regs for all, on a level field must be re inforced. It is action that is supported by the legitimate industry, and will eventually weed out the corrupt and dead weight of both industry and staff. (Both Forest Resources and …)

…

Industry is not stupid, they know this process has not occurred, as it is public, and they know it takes 30+ days.

…

(7) Move immediately to stop the "5th" column acting out of forest management that is manipulating First Nations reactions against our processes. The actions are not helping, in the long term, the FN;s being used; they are not productive and are causing internal divisions and will cause an industry backlash if continued. Finally these actions violate DIAND's code of ethics, for employees.

I should also clarify that I do not wish to imply that Russ Fillmore is any way responsible or implicated by our sections inaction to date. Frankly I believe the depth of the problem has been overwhelming to him, he has been misled and lied too and he has not had the time to correct a situation, partially covered up. The rest of us have no excuse as employees of Forest Resources. I knew what was occurring and should have cried out longer and harder. Too many of the staff traded ethics for quiet acceptance rather than question the lack of progress and process. The lack of wood for 1998 was and is no accident, it was well planned by inaction, complacency, disrespect of management and industry need and subtle disobedience. (Forester level and above not the worker "bees")

…

I should also clarify that I do no wish to imply that Russ Fillmore is in any way responsible or implicated by our sections in action to date. Frankly, I believe the depth of the problem has been overwhelming to him, he has been misled and lied to and he has not had the time to correct a situation partially covered up.

…

Protect yourself and the director's position, I do not feel we presently deserve, through inaction, the same. Take care.
(Emphasis added)

[770] Mr. Kennedy's memoranda are particularly harmful to the Defendant.

[771] Further examples of bad faith can be found within the documentary exhibits. There are numerous instances of the Regional Office inaccurately presenting the situation to the Departmental Headquarters in Ottawa and to other Ministers.

[772] A DIAND region backgrounder, written by Mr. Fillmore, on February 3rd, was entered as Exhibit D-33. In this document Mr. Fillmore has incorrectly identified SYFC as South East Yukon Forest Product. The Regional Office states:

> DIAND senior officials met via conference call at 4 p.m. yesterday afternoon to lay out a strategy for mill, South Yukon Forest Products, to access long and short term timber supply to keep the mill open. In the interim, the company has chosen the media as a mechanism to gain leverage to access wood supply. The facts of the matter are that South East Yukon Forest Products has never approached DIAND and those involved in the issuance of permits until recently.
>
> …
>
> DIAND recognizes the desire of Yukon peoples to promote and develop a local processing and value added industry. However, in this case, part of the problem is that suppressed wood prices have had a negative impact on the logging industry in the Yukon. This has resulted in a reduced number of loggers requesting permits, or delaying their project descriptions until they have secured a market for their wood. In addition, others have decided not to log, as it is not economically feasible. Further, part of the problem may also be the low prices South East Yukon Forest Product is willing to pay for wood.
> (Emphasis added)

[773] On all of the evidence, the joint venturers, either LPL or SYFC, had been in constant contact with the Department since 1995. I have previously accepted the evidence of the Plaintiffs that the reason that the mill closed in December 1998 was a lack of timber. The supposition and explanation

offered by Mr. Fillmore is part of a continuing course of conduct where the Regional Office is attempting to shift blame for its failures. Moreover, in the first paragraph of the document quoted above, Mr. Fillmore makes a blatant misstatement of fact. The Plaintiffs had been asking DIAND about access to wood for a long time before February 3, 1999.

[774] Mr. Kennedy, Head Policy and Industry Forester, wrote to his supervisor, Mr. Monty, on June 18, 2000. This memorandum was entered as Exhibit P-45. Mr. Kennedy identified his concerns with the THA process.

[775] In this memorandum, Mr. Kennedy explained that, on March 13, 2000, he had been asked to prepare a strategy to get the THA process back on the timetable. He proposed three options to get the process back on track. With respect to the shifting THA timelines he noted:

> The first modifications to the process were to the time line prior to the publishing of "The Development of Yukon Timber Harvest Agreements, A Framework for THA's in the Yukon" where we pushed the time frame back to September, 2000. The workshop that was held April 4 and 5, 2000 was to bring all the stakeholders together to consult on a reasonable process, then, to proceed with the Request for Proposal, on a given land base in South East Yukon, in a timely manner. Commitments were made to senior levels to meet the time frames given. As a result of a Joint Yukon and DIAND meeting in early January, 2000, we were directed to proceed with the knowledge that the forest management planning process would be part of the development of the criteria required of the proponent, and not precede the selection process. This does not seem to be clear to all members of the working group, and leaves me wondering if with the changes to Yukon Government, and the internal changes in management, if we are under the same direction given that January day.
>
> …

> As the Head, Policy & Industry, and as per previous direction, I am concerned that the process is attempting to revert to the forest management process and not the concentration required for the RFP.
>
> …
>
> We must listen to the consultation, and incorporate where desired, but we must also start building trust with industry, and the stakeholders, by keeping our commitments. Timing has become a critical commitment.
>
> …
>
> At each turn we seem to add another level of consultation to the THA process.
> …
>
> I often feel that some pressure to further consult with groups on every component is either, an indecisive direction to proceed, or a method of delaying the process to incorporate more Government resource planning prior to the proponent being invited for proposals.
>
> …
>
> We, frankly, will never reach the point of knowing all the components, and the continuous discussion reaches a point of diminishing return.
> (Emphasis added)

[776] On August 31, 2000, a briefing note was prepared by the Regional Office of DIAND, noting the official opposition call for an inquiry into the gross mismanagement of forestry resources in Yukon. This document is found in Exhibit P-79, Tab 323. The briefing note prepared by Ms. Stewart and approved by Mr. Sewell states:

> Closure of the South Yukon Forest Corporation (SYFC) mill occurred as a result of a number of factors:
>
> - Low North American price of lumber.

- Uncertainties associated with the end of the Canada-US Softwood Lumber Agreement and the advantages to SYFC associated with it.
- SYFC mill would need to expand its capabilities to produce finished products to remain profitable after the Canada-US Softwood Lumber agreement ends. This would include increased mill efficiencies to deal with the small trees available in Yukon.
- Even if an area based THA was available to SYFC, road infrastructure investment would be necessary to access the wood. This would be additional investment dollars over and above the needed mill expansion.
- The lower harvest ceiling in the forest management units close to Watson Lake did have an additional adverse effect on the mill. However, it seems that market conditions in general had the greatest impact on SYFC and it's decision to shut down.

[777] The Yukon Regional Office fails to identify the single factor that the joint venturers identified as the reason for the mill closure. Instead they suggest a series of factors, none of which was accepted by the Plaintiffs as causing the closure. Further, I note that the causative factors that the region identified conveniently absolve the Regional Office of any responsibility.

[778] I also find that the TSA of Mr. Henry was improperly manipulated. In this regard, I refer to the evidence of Mr. Henry about the multiple "runs" of data, at pages 3694 to 3696 of the transcript:

> Q. Did you go back from time to time to the experts to get more or additional information or further input?
>
> A. Yes, and to pass the -- <u>essentially take the results and show it to people</u>, because this documents the final inputs that we used.
>
> Q. Did you get different inputs as a result of going back to your colleagues?
>
> A. My recollection is yes, we did modify things along the way.

Q. And sir, that would be after you had already completed a run through to that time, correct?

A. Correct.

Q. So what would be the justification for changing inputs after you completed a run?

A. The -- well, based on the outputs that we were getting, whether we liked them or not, or it if caused pinch points in the model in terms of timber supply.

Q. Well, when you say whether you liked them or not, what that tells me is that, to be clear, you pressed the run button and out comes a result, correct?

A. Correct.

Q. And then you made the determination as to whether or not you like the results and then you went back and inputted different information, correct?

A. You evaluated the results and made modifications based on those results, yes.

Q. So we see before us in the material you have before you, this tab 61, what you would characterize as but one of several runs, would you agree?

A. Yes.

Q. And this one here that we have before the court is one that was developed over time after changing inputs that you collaborated with your colleagues on, do you agree?

A. Yes.

(Emphasis added)

[779] This evidence shows that the TSA results were manipulated. After each “run” of the TSA computer model, the DIAND staff considered whether they “liked” the resulting volume of

available sustainable timber. When they did not like the results, the DIAND staff changed the inputs and re-ran the computer model until they achieved a result that they "liked". The volume that was finally achieved, after the manipulation of the "runs", was 128,000 m^3. This resulted in a number based on the personal preferences of the DIAND employees and not on science.

[780] This is particularly suspicious in light of the petition of 1995. That petition complained of the decision by the Department to establish an AAC of 450,000 m^3. The petitioners demanded a return to historical timber harvest levels. The Department expressly declined to change the AAC by returning to the historical harvest levels.

[781] In the response to this petition, Exhibit P-75, the Department noted that 128,000 m^3, was the historical volume of roundwood actually cut in 1992. The AAC was based on a "comprehensive timber inventory" and was supported on the basis that it represented a small fraction of the available sustainable timber.

[782] The previously mentioned manipulations of the TSA resulted in a change to the harvest ceiling to 128,000 m^3. This change was based on the TSA results regarding the volume of available sustainable timber. The new harvest level of 128,000 m^3 was the same level that had been expressly rejected in the response to the 1995 petition. By this manipulation, the employees of DIAND circumvented the establishment of an AAC based on science, not on historical harvest levels, and substituted their own preference.

[783] This change to the harvest level was made without consultation.

[784] With respect to manipulation, I also refer to Mr. Kennedy's memorandum of June 2, 1998, where he expresses concern about manipulating the First Nations responses. Portions of this memorandum are reproduced above. It was entered as Exhibit P-79, Tab 71.

[785] In a memorandum dated June 16, 2000, entered as Exhibit P-44, Mr. Ballantyne responds to Mr. Monty's assertion that there is not enough wood for the Plaintiffs' mill; a copy was also sent to Ms. Guscott and Mr. Sewell. In this memorandum Mr. Ballantyne states:

> Given that South Yukon Forest Corporation is planning a $17 million upgrade, you should prepare a strategy in the short term for how we should break the news to them, that there isn't enough wood. You might also consider with Justice the ramifications of not advising the company prior to their planned expansion.
>
> While the information you have provided in your letter is critical to management decision making, I find it rather extraordinary that at this late stage in the game, we are going to serve ourselves yet another large serving of crow. More than a few may ask why we've taken so long to identify the problem.

[786] Notwithstanding the very close relationship existing between the Defendant and the Plaintiffs, the Department was prepared to stand silent, knowing that the Plaintiffs planned to undertake a major mill expansion. The Department was ready to say nothing about its sudden discovery that there was insufficient wood. There is no evidence that the Department informed the Plaintiffs of this "discovery" until 2001.

[787] On August 9, 2000, Mr. Kennedy reported to Ms. Guscott that the Timberline Report #2 had been received. This email was entered as Exhibit P-80, Tab 77. In his email, Mr. Kennedy explained to Ms. Guscott that she needed to review the new document. With respect to volume in the previous TSA, Kennedy stated that there were "[s]ome major number changes once we removed some hidden constraints to management that were in previous." (Emphasis added)

[788] These "hidden constraints to management" were the basis for Mr. Monty identifying to Mr. Ballantyne, as mentioned previously, that there was insufficient wood for the Watson Lake mill.

[789] The draft RFP, that is the "first trial balloon" according to the Plaintiffs, was released in September 2000. This RFP was based on the analysis from the Timberline #2 Report. However, before the actual RFP was released in 2001, the size and number of THAs were altered without explanation. The new RFP reverted to the previous Timberline Report #1, which had been based on the preliminary TSA with its "hidden constraints to management".

[790] The "first trial balloon" contained several different options for THAs including both large and small volume THAs. The actual RFP when it was released had two THAs, each with a maximum volume of 30,000 m^3 per year of timber.

[791] This change was accepted by DIAND for the express purpose of resolving what the Department called a "nagging commitment". The words "nagging commitment" were used by Mr. Dave Loeks, a consultant to DIAND, in his letter of June 15, 2001 to Mr. Joe Ballantyne, DIAND

Director of Renewable Resources. The “nagging commitment” refers to a commitment made by the Minister.

[792] There is no direct evidence as to the commitment made by Minister Nault because he did not testify.

[793] The change in the volume of timber that is offered in the RFP is much lower than the volume discussed in Timberline #2 and the draft RFP. It appears that the Regional Office was actively circumventing the Minister’s commitment by reducing the volume on offer to two 30,000 m^3 THAs.

[794] Mr. Sewell testified that he was unaware of any instructions given to revert to Timberline #1, and not follow the recommendations in Timberline #2. The reversion to Timberline #1 was problematic since the first draft RFP, based on Timberline #2, was the RFP upon which the Department conducted consultations from September 2000 to September 2001. In September 2001, the second draft RFP was released without explanation.

[795] It is a matter of fact that the Department knew that the volumes contemplated were insufficient for the existing mill. I refer to Exhibit P-79, Tab 116, an internal email sent by Mr. Sewell, to other DIAND staff, in March 1999. In that email Mr. Sewell said, “I think we all realize that THAs are the solution not a 5,000 cu metre increase and a three year tenure when the mill is looking for 200,000 cu metres.”

[796] On the basis of the evidence, I find that the Department knew that the size of the RFP was insufficient for the Plaintiffs' mill. One further example is Exhibit P-46. I also find that the Defendant intentionally chose to proceed with this inadequate RFP for no proper purpose. It was to be rid of the "nagging commitment" and to decrease the political pressure on the "home front".

[797] When making the decisions "to be rid of the nagging commitment", by reducing the volume on offer in the RFP, the Department knew that it would directly and negatively affect the Plaintiffs' mill. In making this finding, I refer to the email, entered as Exhibit P-76, from Mr. Loeks, a DIAND consultant, that was sent to Mr. Ballantyne. In that email he includes a message he had sent to YCS. In that email Mr. Loeks explained to YCS that the DIAND Regional Office has accepted his recommendation on how to fulfill the Minister's THA commitment. Mr. Loeks explained to YCS that:

> The town of Watson Lake also wants hope of strengthening their economy. We all know that offering 60% of 128,000 m3/yr will guarantee that only 2 modest operations and the small mills will be able to open their doors. The larger outfits and the town's interests will be left out in the cold.

[798] It is clear from the evidence that the Plaintiffs' mill was the largest mill. Reference to the "larger outfits" can only include the Plaintiffs' mill in Watson Lake.

[799] It is noteworthy that Mr. Monty had previously advised his supervisor Mr. Ballantyne about the recipients of these smaller THAs. Mr. Monty's advice was based on "proven mill capacity". Mr. Monty identified the local mills that had proven capacity. In spite of the fact that the Plaintiffs' mill

was the largest processing facility in Yukon and that it had proven capacity, it was not among those listed by Mr. Monty. In Exhibit P-46, Mr. Monty stated:

> We propose issuance of small THA s to those individuals who have proven mill capacity over the last two years (ie Bowie, Dakawada, YRT, a few others).

[800] From the beginning of the relationship between the parties, the Department had consistently maintained that there could be no long-term tenure agreements until a FMP was completed.

[801] As well, Mr. Monty testified that all land claims had to be settled before a THA could be granted. However, this is inconsistent with the evidence of Mr. Sewell who testified that land claims were an issue for YTG but not for DIAND.

[802] Nevertheless, the final RFP was released before a FMP was completed or land claims settled. This indicates that the FMP and settled land claims were not true requirements, the Department had abandoned these conditions, or the RFP was released in bad faith to absolve the Department of its commitments.

[803] In the final result, this RFP was never acted upon.

[804] It is also clear that there was a level of animosity felt towards the joint venture, and Ms. Clark of SYFC in particular, by Ms. Guscott. Ms. Guscott undertook what could be characterized as a smear campaign.

[805] In preparation for the meeting of April 7, 1999, Ms. Guscott, responded to an email from Mr. Moore, ADM, on March 23, 1999, as found in Exhibit P-79, Tab 128. In this email she stated that it:

> would be my perference as I have been working closely with the company and understand all their ways. I suggest because of past experience with this company that someone (region) take the lead one ensuring good notes and records are kept.

[806] She also sent an email to Mr. Beaubier in Ottawa in preparation for this meeting. This email was entered as Exhibit P-80, Tab 48. Ms. Guscott says:

> With caution I provide you the following background information, but felt it only fair that you have the appropriate background. The company built the mill without ever consulting or meeting with DIAND, they chose to do all their deals with YTG, we were approached late in the game.
> (Emphasis added)

[807] As previously noted, this is factually inaccurate. More importantly, on the basis of the documentary evidence, it is clear that Ms. Guscott knew that this was inaccurate. She goes on in the same email to admit that:

> Yes, we were late getting permits out but there was plenty of wood available for purchase in December, they chose to blame us, and I guess if I was a company trying to get the community on side I would do the same, but they broke a fair amount of deals to buy wood and not everyone is happy with them in the community, the bottom line is they could not run the mill based on their analysis of 28cm and they have had to go back a rethink, and seek to obtain concessions from government to have a monopoly on all the wood??
> (Emphasis added)

[808] In my opinion, the views expressed by Ms. Guscott in this email are nothing less than an attempt by her to contaminate the impressions of the Plaintiffs in the Ottawa offices of DIAND, prior to the meeting that was scheduled for April 7, 1999 between representatives of DIAND and the Plaintiffs.

[809] Within days after SYFC filed its Statement of Claim, Jennifer Guscott sent an email to John Brown, then the RDG Yukon Region, on November 15th, 2001. This email is found in Exhibit P-79, Tab 361. In this email, Ms. Guscott states:

> For SYFC this is no surprise they have been threatening for some years. We have an extensive file on these folks, and I am sure our actions are defensible. They are not clean.
>
> …
>
> Part of the issue here is that the Minister was not properly briefed before he met with the forest industry – he had all the information just needed the explanation. I guess not much we can do with last minute meetings but I had hoped time would have been found somewhere before he met with them, as they can be slick.
>
> …
>
> I still feel it would only be fair that the truthfull story gets told. But will the people who have a true story to tell ever get the opportunity because events are overtaking them – oh well wish I was there to help out this is a difficult file but we have been up against the same pressure before just call Mike Ivanski, Hiram Beaubier, John Rayer, Bruce Chambers, Lois Craig and a list of Regional Managers who were driven out by bad actors and some of the same industry. folks. Maybe it is time for another moratorium while key peices of work get done and only issue permits to the volume of 5,000 cubic meters???If everyone is so unhappy maybe the moratorium should last until April 2003 ha ha
> (Emphasis added)

[810] This is an extraordinary email and very damaging to the Defendant. It is worth noting that this email was not produced voluntarily by the Defendant but was obtained by the Plaintiffs pursuant to an Access to Information Request. It is noteworthy, as well, that the email is a "forward" and the original message has not been provided.

[811] Surprisingly, Ms. Guscott in spite of her desire to have the "truthfull (*sic*) story told" and her admission to at least partial responsibility, was not called to testify and explain.

[812] The failure of the Defendant to call Ms. Guscott is put in starker relief when considered in light of the evidence of Mr. Sewell that Ms. Guscott was present for at least part of the discovery examination of Mr. Alan Kerr; see transcript pages 4210-4211. Further, Ms. Guscott was the only person who was continuously employed in the DIAND Regional Office from 1996-2000; see the evidence of Mr. Madill at page 4028 of the transcript.

[813] I draw the reasonable inference that if she had been called, her evidence would have been harmful to the Defendant's case. No satisfactory explanation was offered or provided concerning her absence.

[814] The law is well-settled that the failure of a party to call a witness with personal knowledge of facts that she alleges, will give rise to a negative inference on the part of the trier of fact, that the "absent evidence" would be harmful to the party that failed to call the witness, in this case the Defendant.

[815] I refer to the case of *WCC Containers Sales Ltd. v. Haul-All Equipment Ltd.* (2003), 238 F.T.R. 45 (F.C.), at para. 42, where Justice Kelen said:

> …This evidence was not cross-examined or contradicted. The Court will draw the natural inference that the respondent did not cross-examine because it did not want the deponent to expand upon, and buttress, facts unfavourable to the respondent regarding the functionality of the sloped design. As per Pigeon J. in **Levesque et al. v. Comeau et al**. (1970), 16 D.L.R. (3d) 425 at p. 432 (S.C.C.), an analogous case where a party did not call an obviously relevant witness:
>
> > "In my opinion, the rule to be applied in such circumstances is that a Court must presume that such evidence would adversely affect her case."

[816] This issue was also discussed by the Federal Court of Appeal in *Milliken & Company et al. v. Interface Flooring Systems (Canada) Inc.* (2000), 251 N.R. 358 (F.C.A.) where Justice Rothstein said the following at paras. 11 to 13:

> [11] …However, even if the presumption was applicable, the failure to call Ms. Iles to testify as to the creation date indicates as the most natural inference, that the appellants were afraid to call her and this fear is some evidence that if she were called, she would have exposed facts unfavourable to the appellants. In drawing an adverse inference, the learned trial judge relied on the following passage from **Wigmore on Evidence** [see footnote 8] which is relevant to the issue.
>
> > "The failure to bring before the tribunal some circumstance, document or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstances or document or witness, if brought, would have exposed facts unfavourable to the party. These

> inferences, to be sure, cannot fairly be made except upon certain conditions: and they are also open always to explanation by circumstances which make some other hypothesis a more natural one than the parties fear of exposure. But the propriety of such an inference in general is not doubted."
>
> I think this is sufficient to displace any presumption. It was not necessary for the respondent to call evidence on the point.
>
> [12] In addition to the reasons of the trial judge for drawing an adverse inference, which I think are sufficient on their own, it is noteworthy that the appellants refused to disclose their witnesses in advance of trial. As the creation date of September 1988 was pleaded by the appellants, and the respondent in its statement of defence put the appellants to the strict proof thereof, it was reasonable for the respondent to expect that the appellants would lead evidence on the point. In these circumstances, it is no answer for the appellants to say that the witness was equally available to the respondent. Nor is it an adequate excuse that the witness was outside the jurisdiction. See **Lévesque v. Comeau et al.** [see footnote 9]
>
> [13] I can find no fault in the approach and the finding of the learned trial judge. She was entitled to draw an adverse inference in these circumstances and to conclude that the Harmonie work was created prior to June 8, 1988.
> (Emphasis in original)

[817] I also note that the Defendant's witnesses Mr. Sewell and Mr. Ivanksi, and others, agreed that in all dealings they had with the Plaintiffs that the Plaintiffs' representatives were honest and straightforward. Ms. Guscott, on the other hand, frequently maligned the representatives of the Plaintiffs, all without justification.

[818] The record is replete with examples of the bad faith basis of the conduct of the Department's employees. Insofar as any decision or conduct may be considered "true policy", I find that it was based on bad faith and there is no exemption from the duty of care.

(b) Conclusion on Duty of Care

[819] Having found that a *prima facie* duty of care existed due to the direct and proximate relationship between the Plaintiffs and the Defendant, and having found that there are no policy reasons to negate that duty, I find that the Defendant owed the Plaintiffs a duty of care.

[820] Regardless, any possible exemption from the imposition of a duty of care for policy reasons is vitiated by the bad faith of the Defendant's servants.

(iii) *Breach of the Standard of Care*

[821] In *Keeping v. Canada (Attorney General)* (2003), 226 D.L.R. (4th) 285 (Nfld. S.C.) another decision of the Newfoundland and Labrador Supreme Court, Trial Division, the Court said that the standard of care to be expected from a Crown agent is to perform his duties in a reasonably competent manner.

[822] The Plaintiffs allege that the Defendant was negligent in the manner in which it issued the CTPs and that the negligence included delays in the permitting process. Those delays impacted upon the ability of the Plaintiffs to acquire wood to feed its mill. The delays were not single

occurrences but occurred over a period of time. This created a situation, as in *Brewer Bros.*, where the negligence was not a single act or omission at a precise moment in time, but was cumulative.

[823] The Plaintiffs through their Response to Request to Admit have defined "material time" as the period beginning on April 1, 1999 and concluding on August 4, 2000. The "material time" received little mention during the trial; see pages 144 to 149 and 5732 and 5733. It seems that the "material time" relates to the CTP process.

[824] On the basis of the evidence submitted, in particular the documentary evidence, I find that there was cumulative negligence in the present case. I will commence by discussing two reports which are in the record.

[825] First, the KPMG Report, entered as Exhibit P-47, was prepared for DIAND to "evaluate and make recommendations with regard to the timber permitting processes used in the Yukon." It was prepared by performing interviews solely with Federal Government personnel. KPMG interviewed persons internal to DIAND, including Mr. Monty, Mr. Ballantyne, Mr. Kennedy and others. Additionally, KPMG interviewed Mr. Malcolm Florence, Counsel, Group Head, with the Department of Justice in Whitehorse.

[826] The report noted that there had been three main issues: first, client dissatisfaction stemming from "the timeliness of timber permit issuance and the granting of authority to commence timber harvesting; second, "Crown liability or exposure of the government to civil action" for failing to

adequately issue CTPs; and third, quality and accuracy of permit documentation were below reasonable levels.

[827] It is important to remember that KPMG only interviewed personnel from DIAND and the Department of Justice. The KPMG report expressed the opinions and beliefs of the Defendant at that time.

[828] As a result KPMG identified three broad areas for improvement. Of importance to this case is the observation that the planning function was not supporting the timber allocation and permitting process. Additionally, KPMG noted that the quality control function had not been integrated into the permitting process. It was noted that a number of instances had been observed where quality or accuracy had been below reasonably acceptable limits.

[829] Second, the Minister commissioned a report by Mr. George Tough in 2001 after the November 2001 meeting with the YFIA. In April 2002, the Tough Report was produced. This report was entered as Exhibit P-79, Tab 379.

[830] Several witnesses commented on this report, including Mr. Irwin and Mr. Sewell. Mr. Irwin and Mr. Sewell both said that the Tough Report was credible and that Mr. Tough was credible. In his report, Mr. Tough observed that the Yukon land space includes too many failed forest enterprises. He posed a critical question: “Where was DIAND?”

[831] Of particular importance, Mr. Tough noted that:

> [w]hile the immediate stimulus for this assignment may have been issues related to the Watson lake area forest industry, it became apparent that many of those issues were, in one way or another, Yukon-wide. They were symptoms of broader problems in the forest policy and management system.

Internal factors identified by Mr. Tough included management weaknesses and vacanies, staff moral and turnover, and understaffing.

[832] In my opinion, the deficiencies identified by KPMG and the Tough Report are breaches of the standard of care and I so find.

[833] Both the KPMG Report and the Tough Report were written outside of the "material time" for complaints about the CTP process. However, these reports were written to address the problems within DIAND during the "material time". There is no prejudice to the Defendant in the Court considering these reports.

[834] While these reports describe much of the negligent conduct on the part of the Defendant, I need only refer to them as a summary. The evidence of the Defendant's conduct is in the record and I am satisfied, on the balance of probabilities, that the Defendant breached the standard of care. The conduct of DIAND in this regard is established and documented in the Defendant's documents.

[835] There were continuing delays on the part of the Regional Office in processing the necessary reports and applications prior to the issuance of CTPs. They were authorizing cutting in areas

without timber. There were repeated failures to meet timelines to which DIAND had committed. There were numerous other difficulties that meant the mill did not receive an adequate supply of timber; see Exhibit D-11, Tab 19, Tab 20, and Tab 74; Exhibit D-63; Exhibit P-79, Tab 170 and Tab 173; Exhibit P-80, Tab 48; and Exhibit D-81, Tab 480, among many others.

[836] In Exhibit P-79, Tab 170, Mr. Kennedy in an internal email noted that SYFC had raised legitimate concerns with wood supply that would be easy to fix if DIAND was on track.

[837] I find that the delays, inadequate permits, and failures to meet timelines occurred as the result of the negligence of Departmental staff. They did not perform their duties with the reasonable care expected of a public servant.

[838] I also find that Department senior staff failed to familiarize themselves with their roles and responsibilities, or failed to seek out the most basic information that was essential to performing their duties, or both.

[839] For example, Mr. Irwin in testimony initially seemed unaware of the Department's mandate for economic development, Mr. Doughty never familiarized himself with the economic situation in Yukon, Mr. Ivanski and Mr. Monty did not read Final Sterling Wood Report, Exhibit P-38, and Mr. Sewell and others at the Regional Office were not even aware of Exhibit P-38 during the terms of their employment with the Regional Office.

[840] Mr. Madill appeared oblivious of his duty, according to Mr. Sewell, to accord "high priority" to SYFC. There are many other examples of this negligence, even remarkably, an email dated January 29, 1999, where Ms. Guscott exhibits confusion and lack of awareness of the volume of timber that the mill had been asking for since 1995; see Exhibit P-79, Tab 103.

[841] There is also substantial evidence that the process was delayed by the bad faith conduct of Departmental staff. I infer from this evidence that the DIAND managers failed to adequately supervise the employees under their charge; for example see Exhibits P-47; and P-79, Tab 71 and Tab 302. This flows as a foreseeable consequence from the failure of the senior staff to familiarize themselves with the basic information necessary to perform their duties.

[842] It is also clear that there was an unfounded, and unknown to the Plaintiffs, level of animosity on the part of Ms. Guscott with respect to the Plaintiffs. In this regard, I find that mismanagement of the DIAND personnel, including a failure to remove Ms. Guscott from the SYFC file, constituted conduct that did not meet the standard of care of a reasonable public servant.

[843] Mr. Sewell, the most senior public servant in the Regional Office, was aware of Ms. Guscott's behaviour as she sent him numerous emails that reflected her dislike of the Plaintiffs. In concluding his initial evidence at trial, Mr. Sewell said that he would have done things differently.

> Q. Okay. I don't in any way want to demean or belittle you. But I take it that you would acknowledge that if you had things to do over again while you were there, you would have done many things differently in relation to these issues.
>
> A. I would agree with that, sir, yes.

[844] As in *Brewer Bros.*, the cumulative conduct of the Defendant's servants fell below the standard of care of a reasonably competent public servant. I find that the Defendant was negligent.

[845] I also find that the failure of the Department to develop a process for accessing long-term supplies of timber was due to inordinate delay. As has been established by the evidence, including the documentary evidence produced by the Defendant, there was an inordinate delay in the implementation of the policy.

[846] Time after time, the Defendant's servants and agents said to the Plaintiffs and others that the implementation of long-term tenure required a FMP and that the first thing to be done in introducing a FMP was the completion of an up-to-date inventory. In 1997, the Minister indicated that the timeline for completion of a FMP was two to three years.

[847] The discussion of long-term tenure with LPL began in 1996. The timeline for issuance of THAs, as presented to the Plaintiffs in 1999, was April 2000. The timelines were continually delayed. By August 2000, when the mill closed, the Department had not finalized the administrative process which would commence the application for a THA. By November 2001, when this action commenced, no THA had yet been issued.

[848] That inventory was not commissioned until January 2000 and even as of the date of the trial, no FMP was in place for southeast Yukon. A FMP had been created in 1991 but according to the

evidence of the Defendant's witnesses, that plan, Sterling Wood, was not adopted. The actions of the Defendant can be described only as a manifestation of inordinate delay. That is a breach of the standard of care. As in *Atlantic Leasing*, I find this inordinate delay constitutes negligence and is but another act of negligence in this case.

(a) Foreseeable Harm

[849] In *Keeping*, the Court found that the negligence of the Crown agent meant that the plaintiffs did not get a fishing licence. Damages were calculated as the loss of profits that the plaintiffs would have received. The Court characterized the damages as expectation losses. Mr. Van Leeuwen, the expert witness retained by the Plaintiffs, also addressed "expectation losses".

[850] As I have discussed previously, under the duty of care analysis, there is no question that it was reasonably foreseeable that harm would occur to the Plaintiffs as a result of not getting an adequate wood supply. In my opinion, foreseeability of harm was present regardless of which conduct of the Defendant breached the standard of care. In all of these cases it was foreseeable to the Defendant that the Plaintiffs would be personally injured.

[851] The fact that the mill had previously closed is particularly relevant to the expectation losses. The Department knew that the lack of a wood supply had resulted in a previous closure. Further, the Plaintiffs had made it clear to the Defendant on numerous occasions that without a supply of wood the mill could not be financed and could not operate. Lastly, it is clear from the evidence that the Defendant's agents were aware of the common sense proposition that a mill without wood will go

out of business. In these circumstances, I have previously found that not only was the harm foreseeable, but the Defendant had actual foresight of the consequences of her actions.

[852] I find that it was reasonably foreseeable to the Defendant that her conduct would result in expectation losses to the Plaintiffs.

(b) Causation

[853] The next question to be faced is the effect of that negligence. Did the negligence of the Defendant cause damage to the Plaintiffs? According to the decision of the Supreme Court of Canada in *Snell v. Farrell*, [1990] 2 S.C.R. 311, in assessing causation a court must take a robust and pragmatic approach to the undisputed primary facts of the case. In other words, assessment of causation requires the application of common sense to the established facts.

[854] In order to establish causation, the plaintiff must prove on the balance of probabilities that the defendant caused or contributed to the injury. However, it is not necessary that the Defendant be the only cause. The Supreme Court of Canada explained this in *Athey v. Leonetti*, [1996] 3 S.C.R. 458, at paras. 16 to 17:

> In *Snell v. Farrell*, *supra*, this Court recently confirmed that the plaintiff must prove that the defendant's tortious conduct caused or contributed to the plaintiff's injury. The causation test is not to be applied too rigidly. Causation need not be determined by scientific precision; as Lord Salmon stated in *Alphacell Ltd. v. Woodward*, [1972] 2 All E.R. 475, at p. 490, and as was quoted by Sopinka J. at p. 328, it is "essentially a practical question of fact which can best be answered by ordinary common sense". Although the burden of proof remains with the plaintiff, in some circumstances

> an inference of causation may be drawn from the evidence without positive scientific proof.
>
> It is not now necessary, nor has it ever been, for the plaintiff to establish that the defendant's negligence was the sole cause of the injury. There will frequently be a myriad of other background events which were necessary preconditions to the injury occurring. To borrow an example from Professor Fleming (*The Law of Torts* (8th ed. 1992) at p. 193), a "fire ignited in a wastepaper basket is . . . caused not only by the dropping of a lighted match, but also by the presence of combustible material and oxygen, a failure of the cleaner to empty the basket and so forth". As long as a defendant is part of the cause of an injury, the defendant is liable, even though his act alone was not enough to create the injury. There is no basis for a reduction of liability because of the existence of other preconditions: defendants remain liable for all injuries caused or contributed to by their negligence.
> (Emphasis in original)

[855] In our legal system, a defendant does not escape liability because other factors contributed to the harm. As was discussed in *Athey* at paras. 19 to 20:

> The law does not excuse a defendant from liability merely because other causal factors for which he is not responsible also helped produce the harm: Fleming, *supra*, at p. 200. It is sufficient if the defendant's negligence was a cause of the harm: *School Division of Assiniboine South, No. 3 v. Greater Winnipeg Gas Co.*, [1971] 4 W.W.R. 746 (Man. C.A.), at p. 753, aff'd [1973] 6 W.W.R. 765 (S.C.C.), [1973] S.C.R. vi; Ken Cooper-Stephenson, *Personal Injury Damages in* Canada (2nd ed. 1996), at p. 748.
>
> This position is entrenched in our law and there is no reason at present to depart from it. If the law permitted apportionment between tortious causes and non-tortious causes, a plaintiff could recover 100 percent of his or her loss only when the defendant's negligence was the sole cause of the injuries. Since most events are the result of a complex set of causes, there will frequently be non-tortious causes contributing to the injury. Defendants could frequently and easily identify non-tortious contributing causes, so plaintiffs would rarely receive full compensation even after proving that the defendant caused the injury. This would be contrary to established principles and the essential purpose of tort

> law, which is to restore the plaintiff to the position he or she would have enjoyed but for the negligence of the defendant.
> (Emphasis in original)

[856] In *Athey* at para. 14, the Court held that "[t]he general, but not conclusive, test for causation is the "but for" test, which requires the plaintiff to show that the injury would not have occurred but for the negligence of the defendant…"

[857] In the result, it is sufficient for me to determine that the Defendant's negligence was a substantial cause. It is not necessary that the Defendant be the only cause. If but for the Defendant's negligence, the Plaintiffs would not have been harmed, liability for that negligence will flow. As I have previously discussed, the harm in this case was the expectation losses that occurred when the mill closed due to the lack of timber supply.

[858] I have found that there were numerous breaches of the standard of care from which reasonably foreseeable harm flowed. In my opinion, they all equate to negligence that resulted in an inadequate supply of timber being available to the mill. It is the inadequate supply of timber that caused the closure of the mill.

[859] I find that if the Defendant had adequately met the standard of care, the Plaintiffs' mill would not have closed. There would have been timber in the yard and products coming off the line.

[860] The Defendant drew the Court's attention to the fact that mill had received 215,000 m^3 in the period of May 1999-August 2000. It is clear from the Defendant's representative, Mr. Sewell, and the documentary evidence, that the Department was aware that the volume of timber necessary to operate the mill was 200,000 m^3 per year.

[861] The evidence of Mr. Spencer, and the evidence contained in the Response to the Request to Admit, was that the mill was built to efficiently process an average log size of 7 inches. The documentary evidence confirms that small logs are most common in Yukon. These logs are referred to as "pulpwood" size in many of the reports.

[862] It is a fact that the Defendant knew the profile of timber for which the mill was constructed; see p. 2922 of the transcript and Exhibit D-11, Tab 196. In fact, the profile necessary for the mill had been discussed between the SYFC and the Department; see Exhibit D-11, Tab 111.

[863] I accept the evidence that DIAND was issuing permits in "old areas", meaning previously cut, and in areas where the timber was below average in size; see for example Exhibit P-79, Tab 316. This resulted in the wrong log profile, a below average size log, being delivered to the mill yard; see Exhibit D-11, Tab 127 and the Response to the Request to Admit.

[864] The evidence shows that sawmills are designed around a certain profile sized log. Processing logs that are either too large or too small decreases the efficiency of the mill. For both of

these reasons, while it is true that there was 215,000 m^3 harvested and delivered to the mill, between May 1999 and June 2000, I find that it was "not an adequate supply."

[865] The Defendant did not plead that the mill was inadequately designed or constructed. Nevertheless, on the totality of the evidence, I accept that the design of the mill was appropriate.

[866] I am confounded by the Defendant's arguments relative to the alleged inadequacy of the mill. It is a fact, relevant to this case, that the Defendant pushed KFR into the joint venture that owns the Watson Lake mill. It is also a fact that the Defendant authorized the use of trust funds for that purpose. Under these circumstances, if the mill were inadequate, there would be serious consequences for the Defendant as trustee of those funds.

[867] The evidence of Mr. Sewell was that he never considered the mill inadequate. In cross-examination, he conceded that if he had felt that the mill was unsuitable, he would never have recommended the additional expenditure of $5.5 million on the mill through the Regional Partnership Fund & Major Business Projects.

[868] Moreover, the recommendation under the Regional Partnership Fund & Major Business Projects stated that the mill had management and experienced employees in place. Mr. Sewell, in cross-examination, accepted that he would not have made the recommendation if he felt that there was "poor management in place" at the mill. This recommendation is Exhibit P-79, Tab 334.

[869] This conduct, including review by Department of Justice lawyers, does not suggest that the Defendant ever thought that the mill was inadequate. It appears to be an unfounded argument raised as an opportunistic defence to this action.

[870] I find that the Plaintiffs' mill was designed by experienced forest industry businessmen for the specific purpose of milling Yukon timber; see the evidence of Mr. Spencer and Mr. Fehr. This finding is also supported by Exhibit P-79, Tab 226. This is the Anthony-Seaman Report dated December 2, 1999, a report commissioned and paid for by DIAND. This report concluded that the "existing level of technology...is appropriate for the circumstances and log supply." This report also stated that the "sawmill in Watson Lake contains all necessary facilities, equipment and people to produce accurately sized…rough green lumber…"

[871] Further, the design of the mill and the findings of the Anthony-Seaman Report were consistent with the advice given to DIAND in the Kaska Forest Products Sawmill Project Study of April 1997. That Study was completed before the Plaintiffs commenced construction of their mill.

[872] Mr. Madill testified that he heard no complaints within DIAND about the mill design or construction.

[873] I am aware of the Woodline Report, entered as Exhibit D-77, but give it little weight as there was no evidence provided about the author's qualifications or experience, nor was he subject to cross-examination on this report. Further, while the Mill Audit questioned the design of the mill, I

find that this was adequately explained in Mr. Van Leeuwen's evidence at trial. On the basis of the evidence, I find that the mill was appropriate for milling Yukon timber.

[874] However, the fact that 215,000 m^3 of timber was delivered to the mill shows that the Plaintiffs had adequate contracts with loggers for a sufficient supply of timber. The inadequacies of that supply, with respect to profile, I attribute to DIAND's negligence in issuing CTPs.

[875] As well, I refer to the recommendation that was made under the Regional Partnership Fund & Major Business Projects, entered at Exhibit P-79, Tab 334. In this recommendation, signed by Ms. Guscott, the mill was "considered to be medium to high risk due depending on ability to obtain adequate forest tenure to meet market demand." This was the only risk identified in recommending the investment of $5.5 million dollars.

[876] The Defendant had exclusive control of the forest. The Defendant's documentary evidence and representative witness, Mr. Sewell, accepted that the only risk was getting adequate forest tenure. In my opinion, the Defendant was the cause of the mill shutdown.

[877] The Defendant claims that other factors may have also contributed to the shutdown of the mill. This is not supported by the evidence. Nevertheless, as I have discussed above, it is sufficient that the Defendant be a cause. I accept that the mill shut down because of inadequate timber supply. I find that this shutdown was in whole or in part caused by the negligence of the Defendant. `

[878] In the result, I find that but for the Defendant's cumulative negligence in failing to adequately issue CTPs, the Plaintiff would not have been forced to close the mill and the expectation losses would not have occurred.

[879] It has also been established on the balance of probabilities that the Defendant was negligent through the inordinate delay in completing a process for long-term access to timber.

[880] The Plaintiffs have proven that an adequate supply of timber was essential to the continued financing and operation of the mill. By August 2000, it was clear that the end of the process to apply for long-term tenure was not in sight. In reality, the first steps to this process were taken in 1995. By 2000, when the Plaintiffs finally "threw in the towel", the Department was still floundering through the development of a process. It was also evident that the problems in obtaining adequate short-term timber were going to continue.

[881] It is important to keep in mind the fact that THAs were nothing new to the Department and that the Department had issued a 75,000 m^3 THA to LFN in approximately six months.

[882] As I understand the Defendant's conduct of the case and submissions, she argued that granting a THA is a discretionary decision. There was no guarantee that the Plaintiffs would be the successful candidate of any RFP. She concludes by submitting that causation cannot be established.

[883] I reject that argument for two reasons. It seems to me that the Defendant has missed a subtle distinction in the Plaintiffs' case. The evidence demonstrates that the Plaintiffs built their mill after having been told by the Minister that a new process would be completed in two to three years. There is no question that the process was undertaken. The heart of this claim is the inordinate delay in implementing the policy decision to have long-term tenure.

[884] This is not an attack on a policy decision, as the claim relates to the implementation of the policy. Regardless, as I have remarked earlier, inordinate delay is not a policy. There is also evidence of bad faith in delaying the process.

[885] Further, it is my opinion that the Defendant's argument fails to take a common sense and pragmatic approach to the evidence. It is a highly technical approach that ignores the basic facts. The Department had a policy in place that required local processing capacity or there could be no timber harvesting. This policy had the express purpose of encouraging economic development, in furtherance of the mandate set out in the DIAND Act.

[886] Specifically, it is clear that the Defendant wanted a sawmill in Watson Lake. Further, the evidence shows that the Defendant was advised, by a consultant, that a mill with very similar design, capacity, products and markets as the Plaintiffs' mill was the appropriate course of action; see Exhibit P-79, Tab 55.

[887] Unfortunately, for whatever reason, KFR did not build such a mill. However, the Plaintiffs did. I find that the Plaintiffs' mill was the only mill of sufficient capacity to give effect to the Defendant's aforementioned policies.

[888] This mill was the largest private employer in Yukon. It had an entirely local workforce, relied on local loggers, except for one instance, and had a guaranteed level of First Nations employees. In fact, the mill was partially owned by LFN through its operating entity KFR. This mill had also proven its ability to both harvest and process timber.

[889] I also take note that when the RFP was finally released these factors were among those that were to be considered in selection of successful proponents. There was no other person, company or corporation who could meet these requirements better than the Plaintiffs.

[890] The proximity of the relationship and the lengths that the Department undertook to ensure a wood supply to this mill cannot be overlooked. I also refer to the meeting of April 7, 1999, when it was actually proposed that the Plaintiffs' CTPs would be issued on the land that would later encompass the THA.

[891] In my opinion, it defies common sense and reason to suggest that the Plaintiffs would not have been among the successful proponents. It also defies common sense and reason to suggest that the Plaintiffs would be unable to claim for the inordinate delay that caused them to close the mill.

[892] The Defendant also appears to argue that the delays were caused by the duty to consult with First Nations. Again I disagree with this argument.

[893] This case is not about the level of necessary consultation. The inordinate delay cannot be excused by the requirement to consult in good faith. As I have discussed above, in some respects the process was commenced in 1995. Insofar as the Defendant was unhappy with the timber inventory produced in the Final Sterling Wood Group Report, they did not undertake a new inventory until 2000. This delay is not explained by consultation.

[894] As well, the evidence suggests that the consultations were being used to manipulate the process. There is also evidence that the Department was willing to manipulate the First Nations responses. I observe that the final RFP was released in 2001 with very limited consultation and without a FMP.

[895] I find that it is simple common sense, when viewed on the balance of probabilities, that but for the inordinate delay in establishing a process for long-term timber supply, the Plaintiffs' mill would not have closed and they would not have suffered the expectation losses.

(c) Contributory Negligence

[896] The Defendant relies upon the *Contributory Negligence Act*, R.S.Y. 2002, c. 42, to argue that the liability for damage to the Plaintiff should be apportioned between the Defendant and the Plaintiff.

[897] As I understand the Defendant's argument, she presents at least two bases for why the Plaintiffs are contributorily negligent. It appears to me that she complains about the design of the mill and the decision to continue to operate in the face of the failure of the Department to ensure an adequate supply of timber.

[898] With regard to the inadequacies of the design and construction of the mill, the Defendant did not plead this allegation. Nevertheless, my discussion and findings are sufficient to dispense with this allegation. The mill was adequately designed and built.

[899] The question that is left to be answered is, in the face of continuing delays which amounted to inordinate delay in the present case, was it reasonable for the Plaintiffs to stay in operation until they finally "pulled the plug" on August 30?

[900] In *Atlantic Leasing*, the Newfoundland and Labrador Supreme Court, Court of Appeal had occasion to consider that question. In that case the Court considered if it was reasonable for Atlantic Leasing, the plaintiff, to not give a notice of quit to terminate a lease on a building, occupied by a branch of the Newfoundland and Labrador Government, and to await the completion of the renewal process.

[901] The same question arises in the present case. Did the Plaintiffs act reasonably when they reopened the mill in April 1999, following its closure in December 1998? Did they act reasonably in continuing to operate the mill from April 1999 until the final closure in August 2000?

[902] In *Atlantic Leasing*, the Court, at para. 67, accepted the trial judge's findings that:

> …If, for whatever reason, it became apparent to the decision-makers that they could not act on the issue in a timely way, there was an obligation, at the very least, to disabuse Atlantic of its continued expectation that a decision was forthcoming so that Atlantic could act expeditiously with respect to possibly seeking other tenants for the space and thereby save the building. It must be remembered that the trial judge concluded that "in the absence of a communication from Government to the effect that the lease was in doubt" it would have been unreasonable for Atlantic to have given Government a notice to quit; rather, continuing to wait was, in the circumstances, "an entirely reasonable" position to take. I agree with that assessment.

[903] In my opinion, in this case it was also entirely reasonable for the Plaintiffs to "stay the course".

[904] LPL had been informed in 1997 that a process for long-term tenure was underway and would be completed in two to three years. The Plaintiffs knew that this was a reasonable time-frame to complete such a process. LPL also knew that DIAND had approved a THA for LFN in approximately six months. The Plaintiffs had made a significant capital investment in erecting the mill at Watson Lake in 1997 - 1998. The mill operated for almost three months between October and December 1998 when it closed for lack of wood.

[905] Throughout 1998, the Plaintiffs kept DIAND advised of problems with wood supply. As a result of the wood shortage the mill closed in December 1998. In January 1999, there was a meeting between The Town of Watson Lake, SYFC, Finning, YTG and DIAND.

[906] After this meeting, Mr. Kerr wrote a letter, dated January 26th, to Mr. Sewell stating that he felt that DIAND understood the importance of SYFC to Yukon. This letter was entered as Exhibit P-79, Tab 102.

[907] Another result of this meeting was an exchange of letters between Finning and Mr. Sewell. The response from Mr. Sewell to Finning was dated February 8th. It was entered as Exhibit P-79, Tab 109. In his response Mr. Sewell advised Finning, an equipment supplier to and financier of the joint venturer's mill, that "[w]e share your enthusiasm for a successful project, and look forward to working closely with you and the other key players to achieve this end."

[908] There was continuing correspondence between the Plaintiffs and the Defendant between January and March 1999, addressing the issue of wood supply. By letter dated February 16, 1999, Ms. Guscott wrote to Mr. Brian Kerr of SYFC, following up on a meeting held on February 16th. This letter was entered as Exhibit D-81, Tab 33. In that letter, she said the following:

> We will continue to provide you information on following areas of concern as soon as available:
>
> - summer wood supply
> - the process and timing for Timber Harvesting Agreements

[909] Ms. Guscott also said that she hoped that the positive working relationship with SYFC would continue. However, SYFC was not content to limit its communications only with the Regional Office.

[910] By letter dated March 2, 1999, SYFC wrote directly to Ms. Jane Stewart, then the Minister. Ms. Clark said that urgent supply issues had caused the mill to shut down. The supply issues were directly related to the delays in the issuance of cutting permits to permit holders from whom SYFC purchased logs. Ms. Clark said in her letter that "if we have to take another shutdown due to lack of supply of logs, it will be difficult to convince the shareholders to continue to do business in the Yukon".

[911] By letter dated March 19, 1999, Mr. Paul Heit, Woods Manager for SYFC, wrote to Ms. Guscott. He said, among other things, that the mill reopening was postponed due to insecurity of timber supply. He also advised that he was strongly recommending to the owners that the mill close down permanently and move to a more business friendly jurisdiction, if there were not a reasonable level of optimism regarding timber supply.

[912] A further letter was sent by SYFC to DIAND on March 23, 1999. This letter is found in Exhibit D-11, Tab 16. SYFC identified issues that required answers.

[913] Obviously, things were grim in March 1999. The Department's response, to the SYFC letters sent to the Minister and to the Regional Office, was to convene a meeting with the ADM,

James Moore. That meeting was held by teleconference between Ottawa and Whitehorse on April 7, 1999. A verbatim transcript of the meeting is Exhibit P-79, Tab 144. According to that transcript, DIAND agreed to "err on the side of economic development." The Department also made commitments as to when long-term tenure would be available. It is clear from the discussion that the Plaintiffs' mill was very important to DIAND and they would take all legal steps to assist the mill.

[914] It was also a relevant consideration that as the Watson Lake mill re-opened in 1999, DIAND authorized release of the mill fund for the purpose of allowing KFR to invest in the Plaintiffs' mill; see Exhibit P-80, Tab 55.

[915] In the spring of 1999, the Department informed the Plaintiffs that 190,520 m^3 of timber would be available for the next harvesting season. This volume of timber was substantially more than the Department had previously indicated as available for harvesting. It was also almost the amount required by the mill, that is 200,000 m^3. This increase in available timber was a positive factor in considering that the Plaintiffs' continued operation of the mill was reasonable.

[916] In this context and in these circumstances, it was reasonable for the Plaintiffs to stay in Watson Lake and to continue with the operation of the mill. When SYFC first raised the prospect of relocating, the Defendant's response was to convene a meeting at a high level, involving both Headquarters in Ottawa and the Regional Office in Whitehorse, and to make very specific commitments to the Plaintiffs about the timelines for issuing a THA. As noted in *Atlantic Leasing*,

the Defendant had an obligation to “disabuse” the Plaintiffs of their belief that action with respect to long-term tenure would be imminent.

[917] This was particularly so, in light of the planned $17 million expansion of the Watson Lake mill. Mr. Sewell testified, at page 4373 of the transcript, that he knew that the mill could not expand without long-term security of tenure.

[918] As well, I find that the Defendant had an obligation to “disabuse” the Plaintiffs of their belief that there was an adequate inventory of timber. In June 2000, the employees of the Department asserted that there was insufficient timber in southeastern Yukon for the existing mills. Mr. Sewell testified that he never informed the Plaintiffs about the Department’s concerns with volume available for long-term tenure.

[919] If the Defendant had “disabused” the Plaintiffs, respecting delays or a problem with the sufficiency of timber, the Plaintiffs may have followed up on the possibility identified in Mr. Heit’s letter of March 19, 1999 of relocating their operations elsewhere.

[920] In this case, the Defendant did exactly the opposite. It encouraged and induced the Plaintiffs to stay where they were.

[921] The Defendant also argued that the failure of the mill was the fault of the “Manager” of the mill. The Joint Venture Agreements all contained a separate Management Agreement whereby

391605 B.C. Ltd. was given the authority to make all management decisions including shutdowns of the mill.

[922] The Defendant submitted that "any losses suffered due to the first opening and shut-down, are as a result of the Manager's decision and not as a result of anything done or omitted to be done by the defendant"; Defendant's Written Closing Submissions.

[923] I have already decided that it was reasonable to re-open the mill given the communications with the Department, including the inducements to reopen.

[924] Further, the "Manager" is not a party to these proceedings. The Defendant, had she wished to forward an argument that the "Manager" was at fault for the loss, should have taken steps to make it a party to this action. Nevertheless, as the "Manager" is not a party to these proceedings, I cannot apportion liability to it. This argument fails.

[925] Finally, as I have previously discussed, in the recommendation to expend $5.5 million from Regional Partnership Fund and Major Business Projects, the Department stated that the risk in the Watson Lake mill project was in getting adequate forest tenure to meet market demands. I find that in describing the risk in this manner, that the Department accepted that there was in fact a market demand for the products from the Plaintiffs' mill. It is equally clear that the Department did not believe that there was any risk in continuing to operate the mill if long-term adequate tenure for timber were provided. As previously noted, the Department controlled the forest resources.

[926] The onus of proving contributory negligence is on the Defendant. I find that the Defendant has not met her burden. On the balance of probabilities, I find the Plaintiffs are not contributorily negligent.

[927] In my opinion, my findings with respect to contributory negligence are also sufficient to address any allegations that the Plaintiffs failed to mitigate their losses. Where the Defendant had encouraged and induced the Plaintiffs to remain in operation, I find that there is no valid claim that the Plaintiffs failed to mitigate their damages.

(d) Conclusion on Negligence

[928] For the reasons above, I find that the Defendant had a duty of care to the Plaintiff, that she breached her standard of care and was negligent in a manner that resulted in reasonably foreseeable expectation losses for the Plaintiffs.

2. Negligent Misrepresentation

[929] The Plaintiffs also advance a claim in negligent misrepresentation. The test for negligent misrepresentation is set out in the decision of the Supreme Court of Canada in *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87. There are five general requirements:

> (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 the misrepresentation;

(4) The representee must have relied, in a reasonable manner, on the negligent misrepresentation; and

(5) The reliance must have been detrimental to the representee in the sense that damages resulted.

[930] I note that in *Cognos*, the Supreme Court of Canada said that a claim in negligent misrepresentation may lie even if the parties are in a contractual relationship, which was the situation in that case.

(i) ***Duty of Care***

[931] Since the claim of negligent misrepresentation is being advanced against the Crown as Defendant, consideration must be given to the *Cooper/Childs* test. According to the decision of the Federal Court of Appeal in *Premakumaran v. Canada*, [2007] 2 F.C.R. 191 (C.A.), the Court advised that it is unnecessary to conduct a full duty of care analysis when the case is one of negligent misrepresentation. At paras. 16 to 19, the Federal Court of Appeal said the following:

> [16] Before doing the *Anns/Cooper* analysis, however, the Supreme Court reaffirmed in *Childs* that a "preliminary point" arises: the court must decide whether the jurisprudence has already established a duty of care because, if the case is within either a category in which precedent has held that a duty is owed or an analogous category, it is "unnecessary to go through the *Anns* analysis", which is reserved only for novel duty situations (para. 15). The doctrine of precedent has not been abolished by *Cooper*. As the court explains in *Childs*, "[t]he reference to categories simply captures the basic notion of precedent" (paragraph 15). It is, therefore, only new duty situations, not established categories and

those analogous thereto, that are to be analysed with the newly framed test (*Childs*, paragraph 15).

[17] This review of the current state of the law demonstrates that the full *Anns/Cooper* analysis need not have been undertaken in this case. The essence of the negligence claim in this case is one of "liability for negligent misstatement", an existing category of case listed in *Cooper v. Hobart*, where proximity can be posited (paragraph 36). The Canadian law in this area was well-articulated prior to *Cooper v. Hobart* in two Supreme Court of Canada decisions, *The Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 and *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165.

[18] Since the now-famous decision in *Hedley Byrne & Co., Ltd. v. Heller & Partners Ltd.*, [1963] 2 All E.R. 575 (H.L.), courts have recognized that an action in tort may lie, in appropriate circumstances, for damage caused by negligent misstatement or negligent misrepresentations. In *Queen v. Cognos Inc.*, the Supreme Court of Canada summarized the jurisprudence in this area and outlined five general requirements for imposing liability for negligent representations:

> 33 ... (1) there must 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 representation; (4) the representee must have relied, in a reasonable manner, on said misrepresentation; and (5) the reliance must have been detrimental to the representee in the sense that damages resulted.

[19] *Cognos* affirmed that a duty of care exists with respect to representations when a "special relationship" between the representor and representee is present. As explained in *Hercules*, utilizing the *Anns v. Merton* test, such a "special relationship" exists *prima facie* when reliance by the representee is both reasonably foreseeable and reasonable in the circumstances (at paragraph 43):

…

[932] For the reasons noted above, I have already found that there is a special relationship between the Plaintiffs and the Defendant which gave rise to a duty of care. However, I also note that negligent misrepresentation is an existing category recognized in *Cooper.* As such the Federal Court of Appeal has stated that a *prima facie* duty of care exists, in cases of negligent misrepresentation, when "reliance by the representee is both reasonably foreseeable and reasonable in the circumstances"; see *Premakumaran*, para. 19.

[933] Insofar as the Defendant relied on *Design Services* to argue against a duty of care in negligent misrepresentation, that reliance is misplaced. In *Design Services*, the Supreme Court of Canada found that there was no *prima facie* duty of care, on the basis of a policy consideration. That policy consideration was the failure of the appellant to protect itself by contract from the economic loss. However, with respect to negligent misrepresentation, *Design Services* does not apply.

[934] As I have explained, negligent misrepresentation is an existing category recognized in *Cooper*. Further, I have found in this case that there was a negligent misrepresentation by the Defendant's servants to the Plaintiff LPL. I have found that this misrepresentation was reasonably relied upon and that it was reasonably foreseeable that it would be relied upon. As a result a *prima facie* duty of care arises; see *Premakumaran*, para. 19.

[935] I also refer to my comments above, in the negligence discussion, as to why *Design Services* should be distinguished or is inapplicable to the facts of this case.

[936] The Defendant can avoid this *prima facie* duty of care by policy considerations such as indeterminate liability; see *Hercules Managements*. Further, there is no liability for the policy decisions of government; see *Premakumaran*, at para. 20.

[937] As I have discussed above, there are no policy considerations that should exempt the Defendant from the *prima facie* duty of care. There was no indeterminate liability as this was a specific representation made at a scheduled meeting, to two specific parties.

[938] The Defendant had a policy of encouraging economic development in the forest industry. The decision to have a system of long-term tenure is also a policy decision. This action is not a challenge to a political or legislative decision. On the facts of this case, I find that the representation made on July 15, 1997 was the implementation of the Defendant's policies, and was not a policy decision in and of itself. The implementation of a policy is an operational decision and not exempt from a duty of care.

(ii) ***The Representation***

[939] The Plaintiffs claim that the Defendant made a representation that if a mill were built, an adequate supply for the operation of that mill would be made available.

[940] According to the evidence adduced, this representation was made at the "due diligence" meeting held on July 15, 1997 when Mr. Alan Kerr and Mr. Brian Kerr, on behalf of LPL, and Mr. Spencer and Mr. Fehr went to Whitehorse to meet with representatives of DIAND to discuss the

proposed mill project. Mr. Monty and Mr. Gladstone attended this meeting on behalf of DIAND. Only Mr. Monty testified at trial about this meeting, on behalf of DIAND.

[941] The representation at that time, that is July 15, 1997, was made to LPL. SYFC was not incorporated until some months later. However, the relationship between LPL and the Defendant had begun in April 1996, with the first meeting between LPL and employees of DIAND in Whitehorse on April 18, 1996. As I have said before, that relationship was encouraged and nourished over the ensuing months by DIAND. It is unnecessary for me to find any "consummation" of the relationship, it was a continuing relationship with a deepening alignment of interests between LPL and the Defendant.

[942] While the letter of March 13, 1997 to LPL from Mr. Irwin, then the Minister, figures as part of the background and context, the meeting in July 1997 was critical. It was on the basis of that meeting that Mr. Spencer and Mr. Fehr, on behalf of the B.I.D. Group, decided to participate.

[943] Mr. Spencer testified that by this time, he had already looked at business pro formas to see if the project was worth the time and investment. In his opinion, there were two critical benchmarks that had to be met in deciding to go forward. They were log supply and price, and lumber recovery and market. Although the B.I.D. Group was interested in the project, there was lingering concern about the security of fibre.

[944] Mr. Brian Kerr said that the B.I.D. Group was ready to become a part of the sawmill venture except for concerns about the "security of timber". He testified that these concerns led to a meeting in Whitehorse in July 1997 between B.I.D., LPL and representatives of the Department.

[945] Mr. Brian Kerr said that this was a pivotal meeting. He said that before the meeting there were "glaring holes" in the project, specifically in the construction and management areas of expertise. This meeting was critical because it would determine if the B.I.D. Group would come onboard with their expertise. It would be the meeting that determined if the project would go ahead.

[946] It was for this meeting that Mr. Fehr and Mr. Spencer, two capable businessmen, drove 17 hours to Whitehorse in July 1997, from Vanderhoof. This meeting was arranged by Mr. Brian Kerr with B.I.D., LPL and representatives of the Department, and was scheduled to be held at the DIAND offices.

[947] Mr. Monty, for the Defendant, confirmed that this meeting occurred in July 1997 in Whitehorse, in the DIAND offices. He described the meeting as simply information sharing. However, his recollection of this meeting is entirely unsatisfactory.

[948] The sole purpose of this meeting, according to Mr. Spencer, was to "get an understanding about the willingness to make available timber for the sawmill." He said that the whole discussion, and focus of the meeting, was the "willingness to make available timber for the sawmill," in the volume of 200,000 m^3 per year.

[949] Mr. Fehr's evidence was that this meeting occurred because of his concern that "we needed some secure supply of timber if an investment was going to be made."

[950] Mr. Brian Kerr testified that DIAND stated that "you are the exact type of company that we've been looking for." He believed this to be in relation to the regulatory changes that encouraged local production.

[951] He also testified that DIAND expressed concerned that there had been poor performance by forestry industry operators in the past. He says that DIAND "made it very clear that they weren't prepared to carte blanche grant anybody timber before a facility was built, based on their previous experience." He also testified that Mr. Gladstone said "you build the mill, you'll get the wood."

[952] This concern about the past performance of the forest industry and the requirement to prove capacity is supported by the evidence of Mr. Fillmore, and by amendments to the CTP process. After 1995 it became necessary to prove capacity to be issued even a very limited CTP.

[953] I find that this was a formal and scheduled meeting convened for the purpose of discussing the availability of timber supply, the proposed mill development and the Department's willingness to commit to a supply of fibre.

[954] Mr. Spencer and Mr. Fehr testified that they left the meeting in confidence that if they built the mill, the wood would follow. In direct examination, Mr. Spencer said that the B.I.D. Group wanted to have an understanding of "where the commitment would be in availability of the timber for the mill". He testified that "during that meeting the comments were very positive, and that there was an interest, a keen interest" by DIAND in having a mill constructed.

[955] Mr. Spencer testified that there was a discussion about the credibility of the proposal. The Department's representatives were concerned about the intentions of the B.I.D. Group. According to Mr. Spencer, the Department was not interested in discussing wood supply if the venture would be in Yukon short-term and solely to make profits and return to B.C.

[956] In his direct examination, Mr. Fehr said that "the federal representatives were very adamant that there would be no timber granted to some that didn't have a production facility. So when we left our belief was that if a facility was built, the timber would be granted to the facility." His understanding upon completion of this meeting was that "if we built a facility, that they would ensure that it had logs to feed it." He testified that this understanding was based on the statements of the representatives of the Defendant at this meeting.

[957] Mr. Alan Kerr testified in direct examination that the DIAND representatives said that 200,000 m^3 of timber seemed like a reasonable amount for a THA. When asked to put this in writing, the representatives of the Department refused because "they've given out THAs or wood in the past to people that said they were going to do thing that didn't follow through with their

commitments and they've been burnt." He says that he was told that "the next THA that would be given out in the Yukon the people would have to provide proof. They would have to basically build a facility and prove that they had the capacity to operate it." Mr. Alan Kerr believed that at this meeting, there was a commitment that if you build the mill that the wood would be there.

[958] Mr. Brian Kerr was not cross-examined at all about the meeting in July 1997. Mr. Fehr was not cross-examined as to the substance of the July 1997 meeting. The only question was whether Mr. Fehr had asked for the statements of the Department's representatives to be put into writing; see p. 1688 of the transcript. Similarly, Mr. Spencer was not asked any questions in cross-examination about the commitments made by DIAND. He was asked about what geographic area the supply would come from and if there was a request to put the commitment in writing; see p. 1561-1563 of the transcript.

[959] Mr. Alan Kerr was cross-examined about the prior communications with LPL, with respect to the prerequisites for issuance of a THA; see pages 1782-1791 of the transcript. However, he was never directly asked about the commitment made by Mr. Monty and Mr. Gladstone at the July 1997 meeting. In a related question, Mr. Kerr was asked if any of the Defendant's servants had ever informed him that the completion of the THA prerequisites would not ensure issuance of a THA? Mr. Kerr answered, "My understanding from day one was that the company had to construct and build a mill and employ local people as much as possible and a THA would be issued to the company."

[960] Mr. Gladstone was not called by the Defendant to testify. Mr. Sewell, the Defendant's representative for the trial, testified that he made no effort to locate Mr. Gladstone.

[961] Mr. Monty testified for the Defendant. His evidence in examination-in-chief was that he did not know who Mr. Fehr was and he was unsure who Mr. Spencer was, except to say that he was somehow involved in the project; see p. 3034 of the transcript. He confirmed that he and Mr. Gladstone were the representatives of the Defendant present at that meeting. He did not remember if Mr. Fehr, Mr. Brian Kerr or Mr. Alan Kerr attended. However, he believed that Mr. Spencer had attended and, in a courtroom identification, said that Mr. Don Oulton was present at the meeting.

[962] Mr. Monty said that he would have told LPL that long-term tenure would require land use planning and lands claims to be completed. However, he did not remember actually making that statement and did not recall exactly what was said. He did not recall if there were discussions with respect to THA or the volume that mill would require. He also did not recall if either he or Mr. Gladstone had advised LPL that a sawmill had to built before long-term tenure could be awarded. In effect he had no recollection of this meeting; see pages 3204-3211 of the transcript.

[963] On cross-examination, Mr. Monty agreed that he was satisfied to the best of his knowledge that he had given whatever recollection he could of that meeting.

[964] Overall, the evidence of Mr. Monty was unsatisfactory. His recollection was very poor to the point of unreliability. Mr. Monty's evidence was also internally contradictory. Finally, my

observations of his manner of testifying with respect to this issue lead me to conclude that his evidence is untrustworthy and will be given very little weight. There is no issue of unfairness to this witness because all assertions that have been posited by the Plaintiffs were put to Mr. Monty by the Defendant's own counsel and he had no recollection.

[965] The testimony of the Defendant's witness concerning the meeting of July 15th was unconvincing and there is no evidence that contradicts the LPL's version of events. I also take note of the failure of the Defendant to call Mr. Gladstone and the failure to cross-examine the Plaintiffs' witnesses about the statements made in the July 1997 meeting. As a result, I draw an adverse inference that this evidence would have been harmful to the Defendant's case; see *Milliken & Company et al.* and *WCC Containers Sales Ltd.*

[966] I find, on the balance of probabilities, that Mr. Gladstone made a representation, and a commitment, at the July 1997 meeting that if a mill was built that LPL would receive the timber to operate it. This finding is consistent with the totality of the evidence.

[967] As I have discussed above in my observations of the Plaintiffs' witnesses, they testified in a straightforward and honest manner. Their testimony is consistent with the other evidence in the record.

[968] My finding, as to the representation is supported by the factual context as it was known to DIAND at the time. The THA that had been assigned to KFR was subject to the condition that KFR

build a mill. This condition was part of the agreement with the Defendant. That did not happen and the failure of KFR to build a mill was a matter of great concern to DIAND and the subject of discussion internally.

[969] In Exhibit P-80, Tab 5, Mr. Chambers expressed the Department's frustration that no mill had been built. In Exhibit P-79, Tab 48, Mr. Aubin states that he "was under the impression that the THA (and all THA's in the Yukon) was to ensure the implementation of a local wood processing industry." See also Exhibit P-80, Tab 26, an internal DIAND presentation, where the failure to build the mill is portrayed as a "major breach".

[970] A mill was necessary to give effect to the 60/40 Rule that was introduced as a regulation in 1995. As previously noted, DIAND publicly acknowledged in the RIAS that accompanied the amended regulations under the *Territorial Lands Act* in 1995 that this "amendment supports the objectives of promoting the continued development of the forest industry in the Yukon."

[971] The Defendant's witnesses were clear that there could be no timber harvesting without a processing plant in Yukon. The evidence is equally clear that there was insufficient processing capacity at that time. A mill was necessary.

[972] There was only one other mill operating in the Watson Lake area in October 1999. The other mills were "shut down, or partially demolished." The older local sawmills were described as "using old, inefficient and unsafe equipment and processes"; see Exhibit P-79, Tab 210.

[973] As well, the fact that DIAND required KFR to pay into a mill fund also confirms the importance that the Department gave to having an operating mill in Yukon.

[974] DIAND informed KFR that local processing of timber was a key requirement that was necessary before a new THA would be recommended to the Minister; see Exhibit P-80, Tab 56. Furthermore, in the event of a shutdown of the Plaintiffs' mill, KFR was required to make alternative arrangements for local processing of the timber harvested from their THA. These two requirements from DIAND emphasize the importance placed on local processing by the Department; see Exhibit P-80, Tab 33 and Tab 35.

[975] On February 26, 1998 there was a meeting between the joint venturers. The minutes of this meeting were entered as Exhibit D-11, Tab 109. At that meeting Mr. Alan Kerr related that Mr. Terry Boylan, the SYFC lawyer, had been told by DIAND that "SYFC just has to go ahead and put up an operating sawmill after which the wood will become available". This document was entered for the truth and accuracy of its contents by the Defendant. This evidence also supports my finding that a representation was made.

[976] The Defendant drew the Court's attention to statements made by Mr. Brian Kerr to the effect that there had been no guarantee of timber from any Government; see for example Exhibit D-11, Tab 117; and Exhibit D-63. I accept Mr. Kerr's explanation in cross-examination, at pages 1284-1286 of the transcript, where he said:

> A. Yeah, I would because the context of that statement, anywhere its read, is – again, I was in Watson Lake before this project came into existence, and what the poor performance of the past negated the government from giving that type of upfront commitment. It was always basically a, you show us and we'll do it type of scenario. That's not a guarantee. That is not a guarantee. We have to perform and we understood that, and that is the context of those statements, in every document that you see it, is that their actions, the government actions, it was always based upon our corporation's performance and in doing what we said we would do.

[977] I find that this statement is consistent with Mr. Kerr's testimony about the July 15, 1997 meeting. I am satisfied, on the balance of probabilities, that the representation was made on July 15, 1997.

[978] My finding as to this representation is also supported by events which occurred at the October 1, 1999, meeting between representatives of the forest industry and Minister Nault in Whitehorse. Ms. Clark attended on behalf of the mill. Mr. Nault, Mr. Sewell and Ms. Guscott represented DIAND. At this meeting, June Clark reiterated that SYFC needs certainty of wood supply and needs a volume of 200,000 m^3 for a viable mill. A summary of this meeting is found in Exhibit D-81, Tab 257.

[979] In her presentation, a copy of which was entered at Exhibit D-11, Tab 203, Ms. Clark asserted that the Department had given "clear direction to the company over 2 years ago that there would be no commitment to a THA in the Yukon until we first built a facility. We built the facility and are operating it in Watson Lake". She further asserted that the mill had met or over-delivered on

all of its commitments. There is no indication that the Minister disputed either assertion. The documents in Exhibit D-11 were entered for the truth and accuracy of their contents.

[980] I am satisfied, on a balance of probabilities and having regard to the evidence before me, that in the meeting of November 14, 2001, with representatives of the forest industry in Whitehorse, Minister Nault admitted that a promise had been made to supply wood if a mill was built. I find that Minister Nault admitted that a promise had been made. The transcript, entered as Exhibit P-79, Tab 357, shows the following exchange between Minister Nault and Mr. Peterson, the owner of another Watson Lake sawmill:

> Peterson: We didn't roll into town and fall off a turnip truck, thinking that we were going to get tenure just because we built a saw mill. We were told we would get tenure if we had a saw mill there.
>
> Nault: I know you were.

[981] In a later exchange at that meeting and recorded in the same transcript, Minister Nault says:

> Nault: But I can't live with the argument that we're putting the squeeze on the industry so bad that there is no industry; because if we'd have done that, we should have done that five years ago. We should have just said, "Forget it, guys. Don't come around here and spend all this money, because we're not have an industry." But is seems to me so far we're almost suggesting there's not going to be an industry but not really telling you straight up.

[982] I have two observations about the remarks of Mr. Nault, as recorded at the meeting held on November 14, 2001.

[983] In the first place, while this exchange does not specifically relate to the promise made by the Defendant to LPL, it is consistent with and strongly supports their assertion that such a promise was made to them as well.

[984] Mr. Sewell, upon being called to testify on behalf of the Defendant, said that the "commitment" mentioned by Mr. Nault was a commitment to a process.

[985] This is a critical point.

[986] With respect, Mr. Sewell is not the witness to say what Mr. Nault meant. Mr. Nault is that witness and he was not called to testify, even though arrangements had been made to accommodate his schedule. Counsel for the Plaintiffs had agreed to defer the commencement of his cross-examination to allow Mr. Nault to testify. The following appears at page 4206 of the transcript for Friday, May 30, 2008:

> If it suits Mr. Whittle and the Crown, we will hear the evidence of Mr. Nault before Mr. Sali begins his cross-examination of Mr. Sewell. And it's the cross-examination, because his was a prior - - his prior examination was an examination, albeit conducted as it was under the combined effect of the *Canada Evidence Act* and the *British Columbia Rules of Procedure*.

[987] No explanation was offered or provided by the Defendant concerning the failure to call Mr. Nault to the stand, as appears from the transcript at page 4207 for Monday, June 2, 2008 as follows:

> MR. SALI: I understand, My Lady, that Mr. Nault will not be a witness, as a consequence of which we are moving to the cross-examination of Mr. Sewell.

> JUSTICE: Mr. Nault is not going to be a witness at all? Is that correct, Mr. Whittle?
>
> MR. WHITTLE: That's correct, My Lady.

[988] In my opinion, Mr. Nault was a crucial witness who could have provided an explanation of this highly relevant and damaging evidence as recorded in Exhibit P-79, Tab 357, quoted above. I draw the natural inference that his evidence would have been detrimental to the Defendant's case; see *Milliken & Company et al.* and *WCC Containers Sales Ltd.*

[989] I draw an adverse inference from his failure to testify when the hour of his evidence had been accommodated. I observe the suggestion in the record that Mr. Nault had been physically present in Vancouver on the weekend preceding his anticipated appearance on Monday, June 2nd. I refer in this regard to the cross-examination of Mr. Sewell on June 2nd, transcript page 4269, lines 20 to 22.

[990] In the second place, I note Mr. Nault's specific reference to "five years ago". This is no coincidence, in my opinion, having regard to the facts in the record of this trial, notably the fact that five years prior to the meeting, LPL was already in a proximate relationship with the Defendant, arising in relation to the Plaintiffs' mill in Watson Lake.

[991] I draw attention to the email dated November 7, 1996, sent by Mr. Ivanski, in his capacity as RDG, to Ottawa to Mr. Doughty, special assistant to Minister Irwin and to Mr. James Moore, ADM. This email, which is Exhibit P-79, Tab 38, has already been referred to in my Reasons.

[992] By November 7, 1996, Mr. Ivanski had received a scaled down proposal from LPL for the proposed facility in Watson Lake. He communicated with the Minister's office in Ottawa asking for guidance with respect to that most recent proposal, using the language "positive or negative vibes".

[993] At no time did anyone from DIAND give "negative vibes" to LPL. On the contrary, there were continuing inducements. It is tempting to draw the conclusion that, as Mr. Nault suggested, DIAND was "almost suggesting that there's not going to be an industry but not really telling you straight up". However, it is not my task to draw that conclusion at large, my task is limited to adjudicating the claims advanced by LPL against the Defendant for negligent misrepresentation.

[994] These remarks of Mr. Nault are consistent with the evidence of the Plaintiffs and the evidence from the Defendant's own documents. This evidence from Mr. Nault meets the criteria of circumstantial evidence to which I referred earlier.

[995] The Defendant had the opportunity to call evidence to answer the questions, inquiries and inferences that she must have known would be raised by this record of remarks made by a Minister of DIAND, relating to the issues in play in this litigation. She did not do so. Accordingly, she must live with the consequences of her choices in that regard.

[996] Moreover, the evidence of Mr. Sewell was that he too had been informed, by the forest industry, that the Department had told members of the industry that if they built a mill then they would get tenure; see page 4371 of the transcript.

[997] The Defendant argued that the representation in this case was a future promise and not a representation of current facts. This argument cannot succeed.

[998] I find, on the totality of the evidence, that the representation that "if you build a mill, we will give you timber" contained the implied representations that there was an existing commitment to provide a long-term adequate volume of timber to whoever built a mill in southeast Yukon, together with the ability to provide the timber; see *Cognos* and *Moin v. Collingwood (Township)* (2000), 135 O.A.C. 278 (C.A.).

[999] This implied representation is in reality a statement as to existing facts, not merely a future promise.

(a) Was the representation misleading, inaccurate or untrue?

[1000] I am satisfied that the representation made at that time was misleading, insofar as the agents and employees of DIAND knew that as of July 1997, the Department was not in a position to make that volume of wood available to LPL, as a proponent of the mill. Further, it was untrue, as is clear from the evidence that Plaintiffs' mill did not receive an adequate supply of timber to operate.

[1001] The Defendant drew the Court's attention to the fact that mill had received 215,000 m^3 in the period of May 1999-August 2000. It is clear from the Defendant's representative, Mr. Sewell, and the documentary evidence, that the Department was aware that the volume of timber necessary to operate the mill was 200,000 m^3 per year.

[1002] As I have discussed above, the available timber was inadequate due to the very small log profile. I attribute this inadequacy to the conduct of the Department. I find that the representation, that an adequate supply of timber would be provided, was untrue.

[1003] In the summer of 2000, the Plaintiffs began again to experience difficulties in securing a timber supply. They also learned that the timeline for THA RFPs would not be met.

[1004] As explained by Mr. Justice Linden, in *Spinks v. Canada*, [1996] 2 F.C. 563 (C.A.), at para. 29:

> …A person may be "misled" by a failure to divulge as much as by advice that is inaccurate or untrue. In the same way that absent information can be "erroneous", as discussed above, missing information can be misleading…

[1005] I conclude that the representation made was untrue or misleading because the timber supplied was inadequate. It should be noted that the inadequacy of the timber was the result of DIAND's own actions. This representation was also untrue or misleading because as of August 2000, the shortage of timber supply resulted in the mill closing for good.

(b) Was the representation made negligently?

[1006] It is necessary now to determine if the statement was negligently made. That determination is made on the standard of reasonableness. It is not sufficient that it was inaccurate, misleading, or untrue, which finding is only one step in the *Hercules* test.

[1007] In *Cognos*, the Supreme Court of Canada recognized that in some situations the standard of care will include an obligation to reveal highly relevant information. At pages 122 to 124, Mr. Justice Iacobucci explained:

> Unlike Finlayson J.A., I do not read the trial judge's reasons as suggesting that the respondent and its representative had a duty to make "full disclosure" in the sense described above, and that the respondent was liable for a failure to meet this duty. Rather, I read his reasons as suggesting that, in all the circumstances of this case, Mr. Johnston breached a duty to exercise reasonable care by, *inter alia*, representing the employment opportunity in the way he did without, at the same time, informing the appellant about the precarious nature of the respondent's financial commitment to the development of Multiview. In reality, the trial judge did not impose a duty to make full disclosure on the respondent and its representative. He simply imposed a duty of care, the respect of which required, among other things and in the circumstances of this case, that the appellant be given highly relevant information about the nature and existence of the employment opportunity for which he had applied.
>
> There are many reported cases in which a failure to divulge highly relevant information is a pertinent consideration in determining whether a misrepresentation was negligently made: see, for example, *Fine's Flowers Ltd. v. General Accident Assurance Co.* (1974), 5 O.R. (2d) 137 (H.C.), at p. 147, aff'd (1977), 17 O.R. (2d) 529 (C.A.); *Grenier v. Timmins Board of Education*, *supra*; *H.B. Nickerson & Sons v. Wooldridge*, *supra*; *Hendrick v. De Marsh* (1984), 45 O.R. (2d) 463 (H.C.), aff'd on other grounds

> (1986), 54 O.R. (2d) 185 (C.A.); *Steer v. Aerovox*, *supra*; *W. B. Anderson & Sons Ltd. v. Rhodes (Liverpool), Ltd.*, [1967] 2 All E.R. 850 (Liverpool Assizes); and *V.K. Mason Construction*, *supra*. In the last case, Wilson J. said the following speaking for this Court (at p. 284):
>
> > The statement was negligent because it was made without revealing that the Bank was giving an assurance based solely on a loan arrangement which Mason had already said was insufficient assurance to it of the existence of adequate financing.
>
> In so doing, these cases and the trial judgment in the case at bar are not applying a standard of *uberrima fides* to the transactions involved therein. Quite frankly, this notion is irrelevant to a determination of whether the representor has breached a common law duty of care in tort. These decisions simply reflect the applicable law by taking into account all relevant circumstances in deciding whether the representor's conduct was negligent. In some cases, this includes the failure to divulge highly pertinent information.

[1008] The Federal Court of Appeal in *Spinks* addressed this principle. Mr. Justice Linden said, at para. 33, the following:

> I might emphasize that the standard of care here is that which is reasonably expected of a staffing officer in the circumstances. I am not suggesting that the failure to divulge every bit of irrelevant and arcane information will breach the standard of care. An advisor's responsibility is not one of complete or perfect disclosure. Trivia need not be mentioned. The duty rather, is one of reasonable disclosure, and what is reasonable varies according to circumstances. The mere failure to divulge is but one factor among others to be considered in deciding whether there has been negligence. This point of view was affirmed in Cognos, where Iacobucci J. stated:
>
> > There are many reported cases in which a failure to divulge highly relevant information is a pertinent consideration in determining whether a misrepresentation was negligently made.

> Thus, where an advising person possesses or can easily obtain important and relevant information, and where this advising person fails to divulge this information in circumstances where economic loss is reasonably expected, the standard of care will have been breached…

[1009] As in *Cognos* and *Spinks*, I find that the Defendant's representatives, at the July 15, 1997 meeting, failed to reveal necessary and highly relevant information. Specifically, I find that the Department believed that the inventory within the Sterling Wood Report was too high. The information that the inventory was believed to be too high was in the exclusive control of the Defendant. The Defendant knew that LPL had relied upon the Sterling Wood Report inventory in making its business plans. The Defendant's failure to disclose this exclusive information is aggravated by the fact that the Defendant had made public statements in support of the timber inventory. I will refer to those public statements shortly.

[1010] The Sterling Wood Report was the only completed FMP for the Yukon Territory. It included a "comprehensive timber inventory" of southeast Yukon. This FMP was fully completed except for the required consultations. According to this report, the inventory of timber harvestable on a long-term sustainable yield was more than 1,600,000 m^3 annually. The FMP, with its included inventory, was never implemented.

[1011] The Draft Sterling Wood Report produced by the Defendant, entered as Exhibit D-81, Tab 3, has extensive handwritten notations throughout it. These notations are exceptionally critical of the Draft Sterling Wood Report. While the author of these notations was never identified in trial, this production was from the Defendant's records. At the very least, these notations indicate that some

person or persons associated with the Department had misgivings about the Draft Sterling Wood Report.

[1012] Mr. Ivanski was cross-examined about the Sterling Wood Report. The following evidence about this report is found at page 2696 of the transcript:

> Q. While -- I'm going to suggest to you that while it had been completed, it hadn't -- simply hadn't been formally implemented. Correct? That's what it says? If –
>
> A. I'm not quite sure -- there's a big difference between having a report prepared and implementing the recommendations of the report, and I'm not sure that stating that was simply not implemented is fully accurate. We had input. The department had received some input on this report. The recommendations had not been implemented, and there is a number of reasons that could have led to that conclusion.
> (Emphasis added)

[1013] It was more than simply “input” about the report. Later evidence of Mr. Ivanski showed that there were concerns with the inventory that was included in the Sterling Wood Report. The following evidence about the inventory within the Sterling Wood Report is found at pages 2702-2703 of the transcript:

> Q. So the inventory we should assume as determined in total is in excess of 1.6 million cubic metres.
>
> A. Correct.
>
> Q. Thank you. Now, what you then have at page 795 of the same documents, is as follows. Under the heading "Annual allowable cut," you have two scenarios presented. Do you see that?
>
> A. Correct.

> Q. And you understood those to be the two options then being considered. Correct?
>
> A. That we tabled for discussion, yes.
>
> Q. Now, before we go on to any further documents, in terms of the issue of the inventory, or the sustained yield, I take it, sir, that nothing changed as to your information bank through to the time that you began your discussions with LPL in 1996. Do you agree?
>
> A. In terms of the information available to me –
>
> Q. Yes.
>
> A. -- no, but there were questions raised about the information that I had.
> (Emphasis added)

[1014] In a later response found at page 2772 of the transcript, Mr. Ivanski said the following about the inventory:

> A. With one caveat and that was by that time, in my mind, there was significant question as to the accuracy or the reliability of this data, and that's why I went to headquarters and secured additional funding to do photo interpretation and timber cruising, et cetera, to come up with a scientific basis to say what the annual allowable cut should be.

[1015] As previously noted, the Sterling Wood Report was never implemented by DIAND. The failure to implement the Sterling Wood Report is in my opinion consistent with the concerns of the Department that the inventory was too high.

[1016] Notwithstanding the underlying concerns with the inventory, the Regional Office relied upon the Sterling Wood Report inventory in drafting the response for the Minister to the petition of the Yukon Forest Coalition that was presented to Parliament on July 6, 1995. The response to that

petition was entered as Exhibit P-75. The Defendant's servants in drafting this response provided the following information to the public and to Parliament:

> This harvest level accounted for only 4% of the territory's estimated AAC. A recent harvest level of 354,000 m3 (1994-95) represents only 10.5% of the estimated AAC limit. Most other jurisdictions in Canada harvest well over 50% of their AAC limits.
>
> The estimated 1.8 million m3 AAC for the southeast Yukon is based on a comprehensive timber inventory of three southeast forest management units (Units Y01, LaBiche; Y02, Coal; and Y03, Liard).

[1017] Mr. Monty's testimony was also consistent with the view that the Defendant was concerned that the inventory was too high. When cross-examined about the purpose behind the preliminary TSA, Mr. Monty stated the following, at page 3319 of the transcript:

> Q. And as best you can remember today, recognizing this is a long time ago, and I'm not trying to embarrass you in any way, just tell us what it was that you can recall Mr. Henry's mandate to have been at that time, which gave rise to the preparation of this material?
>
> A. The mandate was to basically determine a sustainable harvest cut level in YO2, YO3, and using appropriate modern techniques and appropriate -- most current information.
>
> Q. Now, sir, let's just step back for a minute. Through to the time that he was given that mandate, and I'm not going to review all of the history of what we've reviewed so far, given the nature of Minister Irwin's letter, was there reason that you had for looking to lower the number or raise the number?
>
> A. No, My Lady, the reason was to ensure good stewardship.

[1018] The Sterling Wood Report had provided an inventory of the sustainable yield of timber. It was rejected. The reliability or accuracy of that inventory, as discussed above, was in question. In Mr. Monty's evidence the preliminary TSA was necessary to "ensure good stewardship". I find,

considering the balance of Mr. Monty's evidence, that "good stewardship" refers to decreasing the inventory of sustainable timber.

[1019] I have also previously found that the TSA runs performed by Mr. Henry were manipulated to produce a lower quantity of available timber.

[1020] I find, on the balance of probabilities, that the Defendant believed that the Sterling Wood Report inventory of sustainable timber was too high.

[1021] As Mr. Monty does not have a reliable memory of the July 15, 1997 meeting he cannot say what he did to prepare or what he said at that meeting.

[1022] As I have previously noted, Mr. Gladstone did not testify. I have already drawn an adverse inference with respect to his failure to testify about the representation that he made. I also draw an adverse inference with respect to non-disclosure of the Department's concern that the inventory was too high and further, I draw an adverse inference about the steps that Mr. Gladstone took to prepare for the meeting.

[1023] I find that the Defendant was aware that LPL had expressly referred to, and relied upon, the Sterling Wood Report and its associated inventory in its business plan. The Sterling Wood Report and the inventory were referenced in the business plans that LPL sent to the Defendant.

[1024] I find that highly relevant information, that is the Department's concern that the timber inventory was too high, should have been disclosed to LPL at the July 15, 1997 meeting. It was not.

[1025] The evidence is clear that the joint venturers were aware that there were concerns with the timber supply. It was for that exact purpose that this July 1997 "due diligence" meeting occurred. However, as a result of the assurances given at this meeting the decision was made to proceed with the Watson Lake sawmill project.

[1026] In considering the evidence, I find that the Plaintiffs became aware in 1998 of the proposed reduction in the harvest ceiling for Y02 and Y03 from 350,000 m^3 per year to 128,000 m^3 per year; see the Response to the Request to Admit and there is other evidence to that effect. I conclude that this state of knowledge is consistent with the failure of the Defendant to reveal their concerns about the inventory.

[1027] It is also important to remember that, as I have previously discussed, the Defendant had publicly relied upon the impugned inventory. This public reliance makes the Defendant's failure to disclose highly relevant information within the exclusive control even more egregious.

[1028] Considering that the very purpose of the July 1997 meeting was to determine if timber would be provided to a proposed mill, given the significant investment proposed, and the continually developing proximate relationship with LPL, the Defendant was obliged to have informed LPL that the Department believed that the inventory was too high. The information that

was withheld addressed the nature and extent of the timber inventory. It was insufficient that LPL knew that the inventory could change.

[1029] On the facts of this case, I find that there was a concern within the Regional Office that the inventory, as produced in the Sterling Wood report, was too high. As such the Regional Office should have informed LPL of this fact at the July 15, 1997 meeting. The failure to do so breached the standard of care.

[1030] This finding is not based on the fact that the Defendant might change the AAC, which is a discretionary policy decision in the authority of the Defendant. My finding is based on the fact that the Defendant had exclusive knowledge that she believed that the inventory was too high. The inventory was relied upon by LPL in formulating its business plans. Just because the AAC is derived from the inventory does not mean that a change in the inventory is a "policy decision" which may be immune from review.

[1031] Moreover, I note that Mr. Monty, the only witness for the Defendant who attended the July 1997 meeting, testified that he did not have the authority to make the representation that was made. In light of my findings, that the reliance was foreseeable, that there would be reliance, and that the Defendant knew that LPL was basing its planned business plans on the existing inventory, I find that on the facts of this case that the standard of care was breached.

(c) Was there reasonable reliance?

[1032] Upon leaving the July 15, 1997 meeting, Mr. Fehr told Mr. Spencer and the Kerr brothers "we're in". The Plaintiffs' witnesses all consistently testified that the mill was built because of this meeting; see pages 1144, 1495, 1651, and 1715 to 1716 of the transcript.

[1033] The Defendant has taken an unreasonable and highly technical position in her defence. As I understand the submissions made, she argues that the reason why LPL went ahead with the mill was because Mr. Fehr said "we're in". In essence, the Defendant argues that the reliance was on Mr. Fehr and not on the representation of DIAND. I reject that argument.

[1034] In determining if there was reliance, it is necessary to take a pragmatic view of whether LPL's subsequent conduct was the result of reliance on the representation.

[1035] The Department made a representation that if a mill was built an adequate supply of wood would be made available. The evidence of the Plaintiffs' witnesses was clear, the assurance of a supply of timber was the last hurdle before the B.I.D. Group would come on board the project. As a result of the representation, the last piece of the puzzle fell into place for LPL. LPL together with the B.I.D. Group commenced designing and building the mill.

[1036] I find that on the balance of probabilities, that LPL relied upon the commitments and representations made in the July 1997 meeting, in deciding to build the sawmill in Watson Lake.

[1037] Was that reliance reasonable?

[1038] The jurisprudence provides guidance as to what constitutes "reasonable reliance". In *Hercules Managements Limited* at para. 43, the Supreme Court of Canada identified five general indicia of reasonable reliance as follows:

(1) The defendant had a direct or indirect financial interest in the transaction in respect of which the representation was made;

(2) The defendant was a professional or someone who possessed special skills, judgment or knowledge;

(3) The advice or information was provided in the course of the defendant's business;

(4) The information or advice was given deliberately, and not on a social occasion; and

(5) The information or advice was given in response to a specific inquiry or request.

(1) Direct or Indirect Financial Interest

[1039] The seminal cases on negligent misrepresentation have arisen in the commercial context between private actors. As such, the discussion of the factors indicating that there was reasonably foreseeable reliance have focused on that financial context. When dealing with the Government, the factors are somewhat different.

[1040] In *Meates v. Attorney-General*, [1983] NZLR 308, the New Zealand Court of Appeal found that in all cases a financial interest is not necessary. In *Meates*, the political benefit to the Government was considered by the Court. In plain terms, when dealing with the Government a

political interest can be found to be analogous to a financial interest, for the purpose of determining if there was reasonable reliance. I accept that proposition.

[1041] The statutory mandate set out in the *DIAND Act* charges that Department with economic development in Yukon. For obvious reasons, it is difficult to find that the Defendant has a "financial interest" in promoting a transaction or enterprise in respect of which the representation was made but in the particular circumstances of this case, it is undeniable that the Defendant had a special, particular interest in the development of the mill.

[1042] The Defendant had a direct political interest in seeing the mill project proceed. The issue of forestry in Yukon may have been a small political issue for the rest of Canada, but in Yukon, and for the Department, it was an issue of utmost importance. This is clear from the record.

[1043] There were petitions, protests, blockades of the Regional Office, and meetings with Ministers. The number of letters which were sent both to the Regional Office and to Ottawa also speaks to the importance of the issue to Yukoners. There are numerous other examples in the record of the politically charged nature of the forestry issue in Yukon; see for example Exhibit P-46; and Exhibit P-80, Tab 82.

[1044] In addressing many of the concerns, DIAND introduced regulatory changes that required local processing. This required a local mill. There is evidence on the record in this trial that shows that it was a condition for the grant of the THA to KFR that a mill be built. The failure of KFR to

build a mill was considered a serious breach of the conditions attached to the THA. It is clear that DIAND needed a private investor to implement its policy.

[1045] I accept that there was a political benefit to the Government and to the Regional Office in having a private investor in Watson Lake proceed with a mill. This is evident from the communication from Mr. Ivanksi to Mr. Doughty, the special assistant for Economic Development to Minister Irwin, in an email, entered as Exhibit P-79, Tab 38 and dated November 7, 1996. This email is included above but for convenience I will reproduce it again:

> …
> The best news is they are working with the local loggers and have contracted to get the Tier 1 wood to meet their needs for the first couple of years of operation. This makes our tiered system looking pretty good, and opens a market for loogers to sell domestically. Their next phase would include a pellet plant and finishing the processing locally and is a year or two away. This will cause a pressure however as they've already stated that the financiers will require an allocation and tenure before they will make a further substantial investment. But the timing isn't bad. With the consultation on a new policy, tenure and allocations will no doubt be critical components. Having an operator on site, working and paying bills within a few months will certainly focus this discussion, particularly since they will promise more jobs etc but need tenure.
> …

[1046] Moreover, there is evidence in this trial that there is a very high unemployment rate in Watson Lake. The forest industry in Yukon operates primarily out of Watson Lake. A mill that provides much needed employment would give real political and social benefits. The mill that the joint venturers constructed in Watson Lake was the largest private employer in the Territory when it closed its doors in 2000.

[1047] I find that the political and social benefits gained by the Defendant were significant and point towards reasonable reliance on the facts of this case.

[1048] In addition to the political and social benefits, it must be remembered that the Government would gain a direct or indirect financial benefit from the mill. The 60/40 Rule required that there be local processing in order to harvest timber. A mill, such as the one discussed at the July 1997 meeting, would have dramatically increased the local processing capacity.

[1049] An increase in processing capacity would have increased permissible harvesting. The evidence shows that a stumpage royalty was paid on all harvested timber. The development of this mill had the potential to significantly increase the royalties received by the Defendant by increasing the volume of timber that could be harvested.

[1050] The RIAS to SOR/95-387 estimated that regulatory changes that increased stumpage fees would generate an average of $3,000,000 to $5,000,000 per year in revenue for the Government. This regulatory change was one in the series of responses to the “Green Rush”.

[1051] A later RIAS to SOR/95-580, which implemented the 60/40 Rule, noted that delays in harvesting permits would result in the Crown losing $3.7 million in stumpage. This statement in the RIAS was made before there was a mill that could process the remainder of the AAC in that year. Given the two references in different RIAS, I draw the conclusion that these stumpage fees were a consideration for the Defendant.

[1052] As a result, I find that there was a direct or indirect financial benefit to the Defendant.

(2) Professionals with special skill, judgment or knowledge

[1053] The agents of the Defendant who attended that meeting and made the representation, Mr. Monty and Mr. Gladstone, were professionals, persons possessing special skills, judgment or knowledge. Mr. Monty was the Regional Manager of Forest Resources. Mr. Gladstone was the Operations Forester in the Forest Resources Group, working with Mr. Monty.

[1054] Furthermore, in my mind that can be no question that the forestry staff of the Department had special judgment or knowledge. In this regard, I adopt the following statement of the New Zealand Court of Appeal in *Meates* at page 335:

> …Furthermore it was both a situation where the likelihood of the translation of policy into action was peculiarly within Government knowledge and entirely under Government control and also one where it was essential for the shareholders to know whether they could responsibly embark upon and later continue with the mission.

As such I find that the Crown servants were professionals with special skill, knowledge and judgment.

(3) Information given within the course of the Defendant's business

[1055] I am equally convinced that the representation was provided in the course of the Defendant's business. These were representatives from the Regional Office of DIAND whose

particular employment required them to be knowledgeable about the Forest Resources in the Yukon Territories, in particular in southeast Yukon.

[1056] It is undisputed that the Defendant had control of the forest resources. It was the Defendant's statutory mandate to encourage economic development. Accordingly, I find that this meeting fell squarely within the "course of the Defendant's business".

(4) Information given deliberately and not on a social occasion

[1057] Equally, there can be no doubt that the information or advice was given deliberately and not on a social occasion. That meeting on July 15, 1997 was a planned and scheduled meeting, specifically for the purpose of discussing the availability of wood for the proposed Watson Lake mill.

(5) Information given in response to a specific inquiry

[1058] Again, that information or advice was given in response to a specific inquiry. This was no *ad hoc* occasion. LPL attended the meeting, together with representatives of the B.I.D. Group, in order to obtain relevant and important information upon which they could rely in making a decision whether to proceed with the proposed mill for Watson Lake.

(6) Conclusion on reasonable reliance

[1059] Mr. Sewell, the RDG, then the most senior official of the Department in Whitehorse, testified at trial that he believed that members of the public can rely on what they are told by public

servants. That was a subjective statement by Mr. Sewell and it is highly relevant to a consideration now of whether the Plaintiff LPL could reasonably have relied upon the representation, information and advice given to it by agents and employees of DIAND at that July 1997 meeting.

[1060] I agree with Mr. Sewell in general, especially in the circumstances surrounding this representation. My review of the factors from *Hercules* leads me to find that it was reasonable for LPL to rely upon the representation that was made to it. I also find that it was reasonably foreseeable the LPL would rely upon this representation.

(d) Did the reliance on the representation result in damages?

[1061] Causation was explained by the Supreme Court in *Snell v. Farrell*, [1990] 2 S.C.R. 311. The Court said the following at page 326:

> Causation is an expression of the relationship that must be found to exist between the tortious act of the wrongdoer and the injury to the victim in order to justify compensation of the latter out of the pocket of the former. Is the requirement that the plaintiff prove that the defendant's tortious conduct caused or contributed to the plaintiff's injury too onerous? Is some lesser relationship sufficient to justify compensation?...

[1062] In *Snell*, the Supreme Court said that in assessing causation a court must take a robust and pragmatic approach to the undisputed primary facts of the case. In other words, assessment of causation requires the application of common sense to the established facts. Causation must still be proven on the balance of probabilities.

[1063] In *Athey* at para. 14, the Court held that "[t]he general, but not conclusive, test for causation is the "but for" test, which requires the plaintiff to show that the injury would not have occurred but for the negligence of the defendant…"

[1064] While it is necessary to apply the "but for" test on the balance of probabilities, it is not necessary to prove that the Defendant was the only cause of the harm; see *Athey*, at paras. 17-19.

[1065] The harm suffered by the LPL was the expectation losses resulting from the closure of the mill. On the balance of probabilities and having regard to the totality of the evidence, I find that if the Defendant had informed LPL that they had specific concerns with the inventory contained within the Final Sterling Wood Report, the joint venture would not have proceeded.

[1066] I find on the balance of probabilities that "but for" the Defendant's negligent misrepresentation, the Plaintiffs would not have built the mill, the mill would not have closed and the Plaintiffs would not have suffered the expectation losses.

(iii) *Contributory Negligence*

[1067] The Defendant relies upon the *Contributory Negligence Act*, to argue that the liability for damage to the Plaintiffs should be apportioned between the Defendant and the Plaintiffs.

[1068] As I understand the Defendant's argument, she relies upon *A.O. Farms* to argue that LPL should not have relied upon the representations of the Government. In *A.O. Farms*, Mr. Justice Hugessen stated at para. 9, that:

> Without wishing to sound unduly cynical, I would say that very few people today would consider that it was reasonable to rely on promises made by politicians especially in a pre-election period.

[1069] It is unclear to me if the Defendant extends this argument to the Department's employees or only the Minister. Regardless, in *Avco Financial Services Realty Ltd. v. Norman* (2003), 64 O.R. (3d) 239 (C.A.), leave to appeal refused (2003), 68 O.R. (3d) xvii, the Court said at para. 27:

> …Indeed, if the allegation of contributory negligence is based on the contention that the injured party acted unreasonably in relying on the misstatement, the question will already have been determined on the main claim, and the plea of contributory negligence will not succeed. …

[1070] I have already determined that LPL reasonably relied on the representation of the Defendant and that it was reasonably foreseeable that it would do so. This argument is without merit.

[1071] Insofar as the Defendant spent considerable energy discussing the fitness of the mill, I will repeat that this was not a defence that was pled. Nevertheless, I have found above that on the basis of the evidence, the mill was adequately designed and constructed.

[1072] Finally, with respect to reasonableness of re-opening the mill, I have previously found that this action was reasonable. The Defendant took great efforts to encourage the Plaintiffs to remain in

Watson Lake after the first mill closure. This included further assurances and inducements. Under those circumstances, the Defendant cannot rely upon the reopening of the mill as a defence.

[1073] The Defendant also argued that the fault lies on the "Manager", as detailed in the Management Agreement within the Joint Venture Agreement, for failing to close the mill. This argument fails for the two reasons I have explained above. I have already found that it was reasonable to re-open the mill. I have also explained that I cannot apportion liability to the Manager as that corporation is not a party to this proceeding.

[1074] The onus of proving contributory negligence is on the Defendant. I find that the Defendant has not met her burden. On the balance of probabilities, I find LPL is not contributorily negligent.

(iv) ***Conclusion on Negligent Misrepresentation***

[1075] I find that, on the balance of probabilities, the Defendant made a negligent misrepresentation to LPL, that LPL relied on it to its detriment and expectation losses occurred as a result.

3. Breach of Contract

[1076] As a further alternative, the Plaintiffs allege that the Defendant breached a contract with them. They rely upon the existence of a contract that came into existence as the result of a promise made by the Defendant, that is a promise for the long-term provision of a supply of wood sufficient to feed the mill, if the Plaintiffs built the mill. In other words, the Plaintiffs plead a unilateral

contract. Liability can arise concurrently under the headings of contract and tort; see *Atlantic Leasing Ltd.*

[1077] The existence of a contract requires an offer, an acceptance and consideration. Here, the Plaintiffs argue that the offer was a commitment by the Defendant to provide wood for the mill if the Plaintiffs built it. The Plaintiffs submit that once they built the mill, the contract was formed, relying on the recognition of unilateral contracts in the decision in *United Dominions Trust (Commercial), Ltd. v. Eagle Aircraft Services Ltd.*, [1968] 1 All E.R. 104 (C.A.). *United Dominions Trust* has been followed by Canadian Courts; see *Hubrisca Enterprises Ltd. v. Canada (Attorney General)* (2001), 85 B.C.L.R. (3d) 126 (S.C.) and *Sail Labrador Ltd. v. Challenge One (The)*, [1999] 1 S.C.R. 265.

[1078] The arguments of the Defendant on the issue of contract are many and varied. However, these arguments do not answer the Plaintiffs' submissions that a contract arose, as a matter of law, from the course of dealings between the parties. The basic premise of the Plaintiffs' argument is simple. They say that a representation was made that if they built a mill, then an adequate wood supply would be made available.

[1079] The Defendant denies that any contract arose from the interactions between the parties. She further argues that the relevant statutory framework, as provided by the *Territorial Lands Act*, and the lack of a THA issued by the Privy Council by way of an Order in Council completely undermine any basis for finding a contract. She submits that letters sent out by Mr. Ivanski on June

4, 1996 and Minister Irwin on March 13, 1997 cannot, and do not, provide a basis for finding a contract.

[1080] The Defendant focuses on the absence of a THA and argues that without this agreement, the Plaintiffs' plea of contract is fatally wounded.

[1081] The Plaintiffs are not asserting that there was a contract with the Defendant that a THA would be granted. They advance a cause of action that is available to them on the basis of the known facts and the evidence submitted in the trial of this matter.

[1082] The Plaintiffs, beginning with LPL in 1996, approached the agents and employees of the Defendant with inquiries about getting access to wood to supply a mill to be built in Watson Lake. The initial overtures in 1996 led to the introduction of Mr. Brian Kerr to members of the B.I.D. Group who are based in Vanderhoof, British Columbia. That introduction occurred in late 1996 to early 1997. In July 1997, Mr. Spencer and Mr. Fehr of the B.I.D. Group travelled to Whitehorse for a meeting with representatives of DIAND. Mr. Alan Kerr and Mr. Brian Kerr attended that meeting as well, on behalf of LPL.

[1083] Mr. Spencer and Mr. Fehr testified that as a result of that meeting, they were satisfied that the Defendant had committed to provide an adequate supply of timber if the mill were built.

[1084] Mr. Alan Kerr and Mr. Brian Kerr, representatives of LPL, also testified that they understood that the Defendant had committed to providing the wood that was required to operate the mill.

[1085] On the basis of that representation, LPL decided to move ahead, in a joint venture, where SYFC was chosen as the operating entity of the joint venture. The Plaintiffs built the mill in 1997 and 1998, and it first began operating in October 1998.

[1086] The starting point in dealing with the issue of a contract is, once more, the relationship between the parties. The Defendant was the custodian of the forest resources in southeast Yukon and the Plaintiffs were private corporate citizens with an interest in pursuing business interests in that region, involving the construction and operation of a mill that would provide employment in an area with chronically high levels of unemployment and that would allow the policies embodied in the regulation regarding the 60/40 Rule, to work, also contributing to employment for woodsmen and loggers. There was an alignment of interests.

[1087] As I have earlier found, the Defendant made a representation to LPL at the “due diligence” meeting on July 15, 1997. In brief, there was a representation that “if you build a mill, we will give you timber”. This representation contains the implied representations that there was an existing commitment to provide a long-term adequate volume of timber to whoever built a mill in southeast Yukon, together with the ability to provide the timber.

[1088] I repeat here that my view of the representation is supported by the factual context as it was known to DIAND at the time; see the discussion under negligent misrepresentation. My finding is that by the fall of 1998, there was no doubt that officials of DIAND in Ottawa knew that the mill had been built by the Plaintiffs and that it was suffering from a lack of wood.

[1089] I refer again to the meeting of November 14, 2001, with representatives of the forest industry in Whitehorse. In that meeting, Minister Nault admitted that a promise had been made to supply wood if a mill was built.

[1090] As I have previously observed, Mr. Nault was not called to testify by the Defendant. I have found an adverse inference that his evidence would be harmful to the Defendant's case.

[1091] I have found, as a matter of fact, that a representation was made to LPL in the summer of 1997. The representation as to provision of an adequate wood supply was a continuing representation. In my opinion, this representation induced the Plaintiffs to build the mill and to carry on in re-opening the mill in April 1999, after the initial operation from October to December 1998. In *Esso Petroleum Co. Ltd. v. Mardon*, [1976] 2 All E.R. 5 (C.A.), the Court recognized that a representation that induces a contract can give rise to liability.

[1092] In the present case, I find that the Defendant made a representation that, when acted upon by the Plaintiffs, gave rise to a contract between the parties.

[1093] Given the nature of a unilateral contract, I find that the binding contract was between both Plaintiffs and the Defendant. The evidence establishes that the Department, in trying to discharge its legislative mandate of economic development in Yukon, had made this unilateral commitment to any interested party; for example see page 4371 of the transcript and Exhibit P-79, Tab 357. As the commitment appears to have been general in nature, it was binding between the Defendant and whoever took up the offer and built a mill. It is clear that both LPL and SYFC participated collaboratively in the construction of the Watson Lake mill.

[1094] Further, the commitment was not binding upon the Defendant until the Plaintiffs built a mill. In the result, the fact that SYFC did not exist at the time of the original commitment is not a bar to finding a contract.

[1095] In *United Dominions Trust* Lord Diplock discussed "unilateral" contracts at pages 109 and 110 as follows:

> Under contracts which are only unilateral – which I have elsewhere described as "if" contracts – one party, whom I will call "the promisor", undertakes to do or to refrain from doing something on his part if another party, "the promisee", does or refrains from doing something, but the promisee does not himself undertake to do or to refrain from doing that thing. The commonest contracts of this kind in English law are options for good consideration to buy or to sell or to grant or take a lease, competitions for prizes, and such contracts as that discussed in *Carlill v. Carbolic Smoke Ball Co.* (9). A unilateral contract does not give rise to any immediate obligation on the part of either party to do or to refrain from doing anything except possibly an obligation on the part of the promisor to refrain from putting it out of his power to perform his undertaking in the future. This apart, a unilateral contract may never give rise to any obligation on the part of the promisor; it will only do so on the occurrence of the event specified in the contract, viz., the doing (or refraining from doing) by

the promisee of a particular thing. It never gives rise, however, to any obligation on the promisee to bring about the event by doing or refraining from doing that particular thing. Indeed, a unilateral contract of itself never gives rise to any obligation on the promisee to do or to refrain from doing anything. In its simplest form (e.g., "If you pay the entrance fee and win the race, I will pay you £100"), no obligations on the part of the promisee result from it at all. But in its more complex and more usual form, as in an option, the promisor's undertaking may be to enter into a synallagmatic contract with the promisee on the occurance of the event specified in the unilateral contract, and in that case the event so specified must be, or at least include, the communication by the promisee to the promisor of the promisee's acceptance of his obligations under the synallagmatic contract. By entering into the subsequent synallagmatic contract on the occurrence of the specified event, the promisor discharges his obligation under the unilateral contract and accepts new obligations under the synallagmatic contract. Any obligations of the promisee arise, not out of the unilateral contract, but out of the subsequent synallagmatic contract into which he was not obliged to enter but has chosen to do so.

Two consequences follow from this. The first is that there is no room for any inquiry whether any act done by the promisee in purported performance of a unilateral contract amounts to a breach of warranty or a breach of condition on his part, for he is under no obligation to do or to refrain from doing any act at all. The second is that, as respects the promisor, the initial inquiry is whether the event, which under the unilateral contract gives rise to obligations on the part of the promisor, has occurred. To that inquiry the answer can only be a simple "Yes" or "No". The event must be identified by its description in the unilateral contract; but if what has occurred does not comply with that description, there is an end of the matter. It is not for the court to ascribe any different consequences to non-compliance with one part of the description of the event than to any other part if the parties by their contract have not done so. See the cases about options: *Weston v. Collins* (10); *Hare v. Nicoll,* (11). For the inquiry here is: "What have the parties agreed to do?" – not "What are the consequences of their having failed to do what they have agreed to do?" as it was in the *Hong Kong Fir* case (12). Such an inquiry cannot arise under a unilateral contract unless and until the event giving rise to the promisor's obligations has occurred.

[1096] The Plaintiffs submit that the same principles and analysis apply in the present case. They say that on the basis of the representation made by the Defendant in the summer of 1997, they went ahead and built the mill.

[1097] The Defendant is correct that there is no Order in Council granting a THA. The contract between the parties was not for a THA; it was for a long-term adequate supply of timber. It is not for this Court to tell the parties to a contract how to fulfill their contractual obligations. The Defendant asserted throughout its relationship with the Plaintiffs that the process of timber supply was changing. It lay within the power of the Defendant to change the process or seek the necessary authorization in accordance with her contractual obligations.

[1098] In my opinion, the Defendant was not entitled to fail to take the necessary steps to complete a contract, and then rely upon its inability to complete the contract. This was particularly so after the Plaintiffs built the Watson Lake mill.

[1099] It is critical to keep in mind the circumstances surrounding the representation made by the Defendant. The Defendant needed the Plaintiffs' mill.

[1100] Mr. Sewell testified that the Regional Office would honour its oral commitments. It is clear that he knew that the Plaintiffs needed long-term tenure in order to successfully operate their mill. Further, Mr. Sewell testified that getting an OIC "should be fairly straightforward".

[1101] In 1996, the LFN had been granted a THA in approximately six months. This included an OIC.

[1102] There was a meeting between the YFIA and DIAND, including Minister Nault, on May 20, 2000. At the May 20th meeting, Minister Nault characterized the industry's difficulties in accessing a long term adequate supply of timber as a "little hurdle". SYFC was represented at this meeting; see Exhibit P-79, Tab 282.

[1103] In any event, it is my opinion that the absence of an OIC is not fatal to the Plaintiffs' cause of action for breach of contract and I so find.

[1104] The Defendant complains that there is no consideration for the alleged contract. I disagree.

[1105] In the case of this unilateral contract, the "consideration" was the construction of the mill. As explained by the Supreme Court of Canada, in *Sail Labrador*, at para. 33:

> …a unilateral contract is a contract in which only one party undertakes a promise. This promise takes the form of an offer which can only be accepted by performance of the required act or forbearance. Such performance provides the other party's consideration, allowing it to enforce the original promise (Treitel, at pp. 35-36; Waddams, at p. 111; *United Dominions Trust (Commercial), Ltd.* v. *Eagle Aircraft Services, Ltd.*, [1968] 1 All E.R. 104 (C.A.)).

[1106] The construction of the mill is the event which provided the consideration to the Defendant and led to the crystallization of the unilateral contract. In support of this finding I refer to the

decision in *Daulia Ltd. v. Four Millbank Nominees Ltd.*, [1978] 2 All E.R. 557 (C.A.), at 560 to 561 as follows:

> The concept of a unilateral or 'if' contract is somewhat anomalous, because it is clear that, at all events until the offeree starts to perform the condition, there is no contract at all, but merely an offer which the offeror is free to revoke. Doubts have been expressed whether the offeror becomes bound so soon as the offeree starts to perform or satisfy the condition, or only when he has fully done so. In my judgment, however, we are not concerned in this case with any such problem, because in my view the plaintiffs had fully performed or satisfied the condition when they presented themselves at the time and place appointed with a banker's draft for the deposit and their part of the written contract for sale duly engrossed and signed, and the retendered the same, which I understood to mean proferred it for exchange. Actual exchange, which never took place, would not in my view have been part of the satisfaction of the condition but something additional which was inherently necessary to be done by the plaintiffs to enable, not to bind, the defendants to perform the unilateral contract.
>
> Accordingly in my judgment, the answer to the first question must be in the affirmative.
>
> Even if my reasoning so far be wrong the conclusion in my view is still the same for the following reasons. Whilst I think the true view of a unilateral contract must in general be that the offeror is entitled to require full performance of the condition which he has imposed and short of that he is not bound, that must be subject to one important qualification, which stems from the fact that there must be an implied obligation on the part of the offeror not to prevent the condition becoming satisfied, which obligation it seems to me must arise as soon as the offeree starts to perform. Until then the offeror can revoke the whole thing, but once the offeree has embarked on performance it is too late for the offeror to revoke his offer.

[1107] The benefits of the mill were not meant to be one-sided. Employment would be provided as local woodsmen would have the opportunity to engage in the timber industry in accordance with the regulations that required 60 percent of all timber cut in Yukon to be processed there, before one log

could be processed outside the Yukon Territory. The Defendant would benefit politically because it would be able to claim credit for steps toward economic development in the Yukon Territory. Additionally, with a facility to process timber, more timber harvesting could occur and the Government would receive millions of dollars in stumpage royalties.

[1108] Further, the Defendant argues that no statement from a Minister alone was sufficient to give rise to a contract. In this regard, she argues that the alleged contract relates to an interest in land and accordingly, must be reduced to writing, pursuant to section 4 of the *Statute of Frauds*, 1677 (Eng.), 29 Car 2, c. 3, as follows:

> No action shall be brought ... upon any contract of sale of lands ... or any interest in or concerning them ... unless the Agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.

[1109] The Plaintiffs' response to this argument is that the *Statute of Frauds* cannot operate to defeat a partially performed oral contract. In this regard, the Plaintiffs rely on the decision in *Hill v. Nova Scotia (Attorney General)*, [1997] 1 S.C.R. 69 where the Supreme Court of Canada recognized the equitable doctrine of part performance. At para. 8, the Court said the following:

> The province promised Mr. Hill access to the highway. It complied with and carried out that promise by building and maintaining for 27 years ramps giving access to the highway from Mr. Hill's land. Accordingly, Mr. Hill acquired what could be called an "equitable permission" (or interest) to enter upon and cross the highway. It is true that s. 21(1)(a) of the *Public Highways Act*, R.S.N.S. 1954, c. 235, requires that such permission be in writing and it may well be that this requirement was satisfied in this case. However assuming it was not, the writing requirement is merely a reflection of the *Statute of Frauds*, whose purpose is to prevent "many fraudulent practices,

> which are commonly endeavoured to be upheld by perjury and subornation of perjury". See *Steadman v. Steadman*, [1976] A.C. 536 (H.L.), at p. 558, quoting the preamble to the *Statute of Frauds*, 1677 (Eng.).

[1110] At para. 18, the Court summarized its findings, as follows:

> In summary, there was then a representation made by authorized representatives of the Crown that Hill would have an interest orally and by letters in land permitting him to cross the highway with cattle and equipment. There was the compliance by the Crown with its representations by means of both construction and maintenance. It was contemplated that Hill would, as he did, rely upon them. He did so to his detriment. The words and actions of the Crown created an equitable interest in the land in the form of a right of way over the highway. The Crown intended it to be used and it was for over 27 years. It would be unjust not to recognize the representations and actions of the Crown which created the equitable interest in land when they were relied upon by Hill. That equitable interest in the land comes within the definition of land in the Expropriation Act and damages arising from its taking should as a general rule be compensable. It remains only to determine if the release signed by Ross Hill stands as a bar to recovery.

[1111] In the result, the Supreme Court found that the equitable doctrine of part performance applied in respect of the Crown, albeit the Crown in right of the Province of Nova Scotia and not the Federal Crown. I see no reason in principle why the Federal Crown is exempt from the application of this equitable doctrine and refer to para. 16 of *Hill* when the Supreme Court said the following:

> To the extent that the decision of the House of Lords in *Howell v. Falmouth Boat Construction Co.*, [1951] A.C. 837, is to the contrary, I would not follow it. It is true that an estoppel cannot be raised against the Crown in the face of a contrary statutory requirement. Yet, a writing requirement cannot circumvent the application of the doctrine of part performance. As the decision of the House of Lords in *Steadman*, supra, makes clear, the very purpose of the doctrine of part performance is to avoid the inequitable operation of the *Statute of Frauds.* Nor does it matter that in this case one of the parties is the Crown. The requirement of writing is not more pressing with respect

> to the Crown than it is with respect to private persons. However, it must be said that this reasoning cannot be extended to permit estoppel in the face of statutes other than the *Statute of Frauds* (and its equivalents). The writing requirement is specifically required to give way in the face of part performance or estoppel by conduct, because the part performance or conduct fulfils the very purpose of a written document. Yet other statutory provisions may so differ in their aim and purpose that their requirements for the execution of written forms or document will generally be mandatory.

[1112] There was partial performance and the Defendant cannot rely upon the *Statute of Frauds* to avoid the consequences of her breach of contract.

[1113] The Defendant also alleges that if a contract existed, she was induced to enter the contract by the misrepresentations of LPL. This argument cannot succeed.

[1114] While the initial business proposals contemplated the construction of a facility that was substantially larger than the mill that was built, the Defendant had notice, from Mr. Gurney, for LPL, that this business proposal was a “talking piece or starting point”; see Exhibit D-81, Tab 222. I also note that Mr. Ivanski was aware that the project had been scaled back. He forwarded information in that regard to Minister Irwin’s office on November 7, 1996; see Exhibit P-79, Tab 38:

> Just a note on the group that you met with in Dawson during the Gold Show. Their original concept was a mega project involving $150 million plus if you recall. They have scalled back somewhat and are proceeding. They presented an overview to us a couple of days ago, calling for a mill which could process 150-200 k m3 of timber per annum, which would then be finished in Vancouver and shipped to Japan.

[1115] The Defendant relies on the proposition that a contractor dealing with the Government is presumed to be aware of statutory requirements; see *The Queen v. Woodburn* (1898), 29 S.C.R. 112, at 123.

[1116] The Defendant also argues that there can be no contract until the parties have agreed to all of the terms, except those which the law will supply. She argues that there is no certainty of essential terms.

[1117] The terms which the Defendant identifies as necessary for finding a contract are the following:

(1) volume of wood;

(2) duration of the agreement;

(3) location to be harvested;

(4) environmental protection;

(5) safety standards;

(6) employment standards;

(7) utilization standards;

(8) stumpage;

(9) silviculture requirements;

(10) number of jobs to be created;

(11) First Nations involvement;

(12) equipment to be used in harvesting and milling;

(13) phases, timing and financing of the project phases; and

(14) benefits of co-generation.

[1118] In my opinion some of these terms are essential. However, I do not accept the Defendant's argument that these terms are all essential. I refer to the fact that the existing contract with KFR did not adequately address many of the terms that the Defendant now argues are essential; see Exhibit P-80, Tab 35.

[1119] In my opinion, many of these terms are desirable for the Department, but there is no evidence that they would be necessary, for example, the level of First Nations involvement and the number of jobs to be created.

[1120] I have found that the commitment made by the Defendant to the Plaintiffs included an implied representation to provide a long-term adequate volume of timber to whoever built a mill.

[1121] The Defendant knew that the Plaintiffs required 200,000 m^3 per annum to operate the mill on an economically sound basis. Mr. Sewell, the Defendant's representative, acknowledged that the Department knew that the volume required was 200,000 m^3. There is no uncertainty with respect to volume.

[1122] I find that it was an implied term of the unilateral contract that the annual volume of timber under the agreement was 200,000 m^3.

[1123] With respect to the duration of the agreement, the implied representation of a long-term adequate supply was for a 20 year supply.

[1124] Mr. Sewell's evidence was that a THA had been "around" since the 1960s and had been assigned to various enterprises before its assignment to KFR.

[1125] Exhibit P-80, Tab 26, an internal DIAND document, stated that the THA which was assigned to KFR in 1992, was signed in 1979. It also stated that the KFR THA would expire in 1999. The KFR THA confirms the Department's prior conduct of granting THAs of a 20 year duration.

[1126] I also refer to the context that was prevailing in southeast Yukon when LPL "came on the scene" in 1996. At this time, as I have recounted earlier, regulatory changes concerning access to timber were in contemplation and underway. The Department was seriously concerned about the failure of KFR to build a mill, which was a condition for the assignment of the THA to KFR in the first place. The time was right to encourage private industry to come in and build a mill. Such encouragement was extended to LPL and later, to SYFC.

[1127] The evidence of Mr. Sewell, at page 4128 of the transcript, was that long-term tenure was necessary for future economic development.

[1128] The evidence was that a long-term tenure of at least 20 years is consistent with industry practices in other jurisdictions.

[1129] It was also the evidence of Mr. Gartshore, at pages 1062 to 1063 of the transcript, that when discussing “long-term”, the duration would be 20 years, particularly considering the major funding necessary for Phase 2.

[1130] Having regard to the significant capital investment involved in constructing a mill, having regard to the facts that the KFR THA had been in existence since the late 1960s and its latest iteration had been continued for 20 years, and having regard to the fact that the regulatory changes introduced by the Department in the mid 1990s required the construction of a local sawmill operation, I find that it was an implied term of the unilateral contract that the duration of that contract would be 20 years.

[1131] The fact that various draft proposals relative to the THA process talked about a renewable five year term for a THA does not change my opinion in this regard. The draft proposals were created after the commitment was made, and after the mill had been built.

[1132] The Defendant’s focus on a location to be harvested is a further indication that she misunderstood that the claim for breach of contract did not arise from the failure to issue a THA. The location to be harvested is not an essential term. In my opinion, the provision of a long-term

adequate supply of timber is not necessarily limited to one specific geographic region within FMUs Y02 and Y03.

[1133] The Defendant also alleges that numerous matters, which are properly business decisions of the Plaintiffs, were essential terms. She submits that there could be no contract unless there were settled terms as to the equipment to be used, the phases, timing and financing of the mill project, and the benefits of cogeneration. I find that these issues are all business decisions that solely rest with the Plaintiffs. These terms were not necessary in order to find a contract between the Plaintiffs and the Defendant.

[1134] The Defendant's argument is contrary to the evidence in the record. The Defendant's documentary evidence and the testimony of her witnesses show that the Department does not make business decisions for project proponents.

[1135] In my opinion, the remaining alleged essential terms are supplied by existing legislation, regulations or Departmental policies. The Plaintiffs are deemed to know the legislation and regulations. It is also clear that the Plaintiffs were aware of the Department's policies.

[1136] In the result, I conclude that there was no uncertainty as to the necessary terms.

[1137] The Defendant also drew the Court's attention to the fact that Mr. Fehr testified that there was no contract. The finding of a contract is a question of law for this Court and not for Mr. Fehr.

[1138] I am satisfied on the balance of probabilities, that there was a unilateral contract between the parties and that the Defendant breached this agreement by failing to supply 200,000 m^3 of adequate timber.

[1139] To some extent, the Plaintiffs' wood supply depended upon their ability to purchase wood from CTP holders. When there were delays by DIAND in processing CTP applications, wood was not available for purchase. Overall, the process for developing a long-term timber harvesting process was bogged down in a morass of drafting and redrafting and calls for consultations. There is a discernible air of administrative "overload" which did not contribute to the orderly handling of CTPs or to reasonable time frames for responding to the Plaintiffs' many requests for information about timelines for action.

[1140] Nevertheless, the Defendant made this bargain. The prudence in promising to do something, parts of which may have been beyond the Defendant's control, is not for this Court to decide.

[1141] Once a contract came into existence between the Plaintiffs and the Defendant, the Plaintiffs were entitled to be dealt with fairly, that is, in good faith. Upon the evidence presented, that was not the case.

[1142] In *Carrier Lumber Ltd.* the British Columbia Supreme Court found liability against the defendant for breach of contract and at paras. 460 and 461 said the following:

> In the circumstances of this case, I find that the defendant breached the terms of their agreement with Carrier; firstly, by failing to provide the volume of wood required under the licence; secondly, by manipulating the administrative procedures within its power to withhold cutting permits improperly and to use its powers to suspend and cancel improperly to frustrate performance of the contract; and thirdly, by making promises and commitments to the First Nations peoples which clearly had the effect of preventing any reasonable resolution of the dispute and hence prevented the performance of their contract with Carrier.
>
> These breaches went to the root of the contract between the parties and constituted a fundamental breach of that contract.

[1143] These comments are apt in the present case. In the first place, the Defendant here in this action failed to provide the wood supply to the Plaintiffs pursuant to the promise that gave rise to the contract with the Plaintiffs. Second, there is evidence that servants and agents of the Defendant, that is employees of DIAND in the Regional Office in Whitehorse, were manipulating processes in such a way as to render the wood unavailable to the Plaintiffs. In this regard, I refer to the method by which the TSA was created and the RFP was changed. I also refer to my comments on bad faith under the negligence discussion.

[1144] Further, I take note of the numerous false statements made by the Regional Office to the DIAND Headquarters in Ottawa with respect to the history, conduct and performance of the Plaintiffs.

[1145] It appears that the current state of the law in Canada does not recognize an independent duty of good faith based on the law of contract. In *Schluessel v. Maier* (2001), 85 B.C.L.R. (3d) 239

(S.C.), reversed in part on other grounds (2003), 15 B.C.L.R. (4th) 209 (C.A.), at paras. 129 to 130, Justice Harvey of the British Columbia Supreme Court said the following:

> …In my opinion, it is therefore not possible to endorse the view that a general duty of good faith exists in law. The duty of good faith, where it exists, is a matter of fact to be found in the express terms of the contract or derived by implication from the reasonable expectations of the parties.
>
> It is however possible to endorse a related and somewhat narrower proposition – namely, that a party to contract may not act in relation to the contract in such a way as to nullify the bargained objective or benefit moving to the other party under the contract. This proposition is expressly adopted by the B.C. Court of Appeal in *Mannpar Enterprises v. Canada* (1999), 173 D.L.R. (4th) 243 (B.C.C.A.). The parties did not cite this case, perhaps because it deals specifically with good faith requirements in the context of agreements to negotiate and therefore triggers considerations not directly relevant to fully crystallized contracts. Nevertheless, I believe that the Court of Appeal is affirming a general principle of contract law, irrespective of the context of its application.

[1146] This view of the law is consistent with the statement of Lord Justice Goff in *Daulia*. It is not open to a party to a contract to engage in behaviour that would defeat the purpose of the contract. In the present case, that purpose was to have a mill in southeast Yukon with a long-term wood supply of 200,000 m^3 that would enable the efficient and economical operations of the said mill.

[1147] In the present case, I find that the Defendant has engaged in behaviour that falls within the prohibited behaviour identified in *Schluessel*.

[1148] In summary, I have found that there was a unilateral contract, that the Plaintiffs acted upon the Defendant's representation and built the mill, and that the Defendant breached that contract.

4. Breach of Fiduciary Duty

[1149] As a further alternative, the Plaintiffs allege that the Defendant has breached a fiduciary obligation that was owed to them. In this regard, the Plaintiffs argue that a *per se* fiduciary relationship arose from the fact that the Defendant, in her capacity as the trustee of the mill fund, authorized the investment of some $500,000 into the Watson Lake mill, an investment that was formalized by an amendment to the joint venture agreement that was effective as of April 14, 1999. The investment was made on behalf of KFR, the corporate operating entity of LFN, and made KFR a participant in the joint venture.

[1150] The Plaintiffs submit that once the investment was made, the Defendant owed the same duty to the other joint venture participants as it did to KFR, to act for the benefit of all participants in the joint venture. The Plaintiffs point to the close relationship between them and the Defendant as a factor in favour of finding the existence of a fiduciary relationship. Relying on the decision of the Supreme Court of Canada in *Guerin v. The Queen*, [1984] 2 S.C.R. 335, the Plaintiffs say that the Courts have said that the categories of fiduciary relationships are not closed and that the facts of each case must be examined closely to determine if such a relationship exists.

[1151] In *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, the Supreme Court of Canada further developed its discussion about the genesis and existence of a fiduciary relationship. In that decision, the Supreme Court reviewed the development of finding liability for breach of fiduciary obligations and noted that the respective vulnerability of the parties, while not a “hallmark” is an “important

indicium of its existence...It is, in fact, the "golden thread" that unites such related causes of action as breach of fiduciary duty, undue influence, unconscionability and negligent misrepresentation". The Court identified relevant indicators for finding the existence of a fiduciary relationship such as the availability for the unilateral exercise of some discretion or power.

[1152] However, I am unable to conclude that the Defendant was acting in a fiduciary relationship in her dealings with the Plaintiffs regarding the supply of timber for the Watson Lake mill.

[1153] The legal test is clear, that fiduciary must act in the interests of the beneficiary to the exclusion of its own interests. That obligation cannot be imposed on the Defendant on the facts of this case. The Defendant is mandated to manage the forest resources for the benefit of many, not only for the Plaintiffs.

[1154] The Plaintiffs do not claim that they had an exclusive right to an adequate timber supply; their claim is quite specific and limited to a supply of 200,000 m^3 per year. The requirement that a fiduciary must act for the benefit of the Plaintiffs would create a conflict with the discharge of the Defendant's public law duties in general, an issue that was addressed by Mr. Justice Rothstein (as he then was) in *Fairford First Nation v. Canada (Attorney General)*, [1999] 2 F.C. 48 (T.D.), at para. 67, as follows:

> It would place the government in a conflict between its responsibility to act in the public interest and its fiduciary duty of loyalty to the Indian band to the exclusion of other interests. In the absence of legislative or constitutional provisions to the contrary, the law of fiduciary duties, in the Aboriginal context, cannot be interpreted to

> place the Crown in the untenable position of having to forego its public law duties when such duties conflict with Indian interests.

[1155] While *Fairford First Nation* dealt with an analysis of fiduciary duty in an aboriginal context, this is a correct statement of the law when dealing with the Crown as a fiduciary in general; see *Harris v. Canada*, [2002] 2 F.C. 484 (T.D.).

[1156] In the circumstances of this case and in light of the recent decision of the Supreme Court of Canada in *Galambos v. Perez*, [2009] 3 S.C.R. 247, concerning the essential requirements to ground a fiduciary relationship, I conclude that no such relationship arose between the Plaintiffs and the Defendant upon the facts of this case. This cause of action is dismissed**.**

5. Misfeasance in Public Office

[1157] As a further and final alternative, the Plaintiffs plead misfeasance in public office, specifically in respect of certain promises made by Ms. Guscott, then the DIAND Director Renewable Resources to Allied Resources Ltd. The claim is set out in paras. 31 to 32 as follows:

> 31. Between March of 1997 and August 2001, DIAND, through its' employee and agent Jennifer Guscott, the Director of Renewable Resources, Yukon Region, and in her capacity as a public official of the Defendant, exercised her authority and powers as a public official for the improper and malicious purpose and intent of causing harm and damage to the Plaintiffs by promising timber harvesting rights in the Watson Lake area to third parties to wit, Allied Resources Ltd., for the purpose of enticing Allied Resources Ltd. to establish a sawmill in the Watson Lake area when she knew that there was insufficient timber available to fulfil the assurances, representations, commitments and promises the Defendant had made to the Plaintiffs, and for the purpose of depriving the Plaintiffs of timber harvesting rights or timber contrary to the assurances, representations, commitments and promises aforesaid made to the Plaintiffs, and

> knowing that the timber supply had been previously assured, represented, committed and promised to the Plaintiffs, all of which constituted an abuse of public office.
>
> 32. As a result of the promises made to the said third party, Allied Resources Ltd., the third party established as sawmill in the Watson Lake area in the fall of 1999, and acquired approximately 100,000 cubic metres of wood annually for its sawmill thereby depriving the Plaintiffs of that timber supply for its sawmill, resulting in loss and damage to the Plaintiffs.

[1158] The test for establishing the tort of misfeasance in public office was addressed by the Supreme Court of Canada in *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263, at para. 23, as follows:

> In my view, there are two such elements. First, the public officer must have engaged in deliberate and unlawful conduct in his or her capacity as a public officer. Second, the public officer must have been aware both that his or her conduct was unlawful and that it was likely to harm the plaintiff. What distinguishes one form of misfeasance in a public office from the other is the manner in which the plaintiff proves each ingredient of the tort. In Category B, the plaintiff must prove the two ingredients of the tort independently of one another. In Category A, the fact that the public officer has acted for the express purpose of harming the plaintiff is sufficient to satisfy each ingredient of the tort, owing to the fact that a public officer does not have the authority to exercise his or her powers for an improper purpose, such as deliberately harming a member of the public. In each instance, the tort involves deliberate disregard of official duty coupled with knowledge that the misconduct is likely to injure the plaintiff.

[1159] At para. 32, Mr. Justice Iacobucci, writing for the Supreme Court, summarized the elements of the tort of misfeasance in public office as follows:

> To summarize, I am of the opinion that the tort of misfeasance in a public office is an intentional tort whose distinguishing elements are twofold: (i) deliberate unlawful conduct in the exercise of public functions; and (ii) awareness that the conduct is unlawful and likely

> to injure the plaintiff. Alongside deliberate unlawful conduct and the requisite knowledge, a plaintiff must also prove the other requirements common to all torts. More specifically, the plaintiff must prove that the tortious conduct was the legal cause of his or her injuries, and that the injuries suffered are compensable in tort law.

[1160] The Plaintiffs led no evidence to establish the specific allegations that they alleged in their Amended Statement of Claim regarding the promise allegedly made to provide Allied Resources Ltd. with a timber supply in the amount of 100,000 m^3. The closest evidentiary basis is the reply given by the Plaintiffs to the Notice to Admit that was submitted by the Defendant.

[1161] None of the witnesses addressed this matter of the alleged promise to Allied Resources Ltd. Ms. Guscott did not testify and the emails that were produced in her name do not address the promise of a wood supply to Allied Resources Ltd.

[1162] There is evidence of misconduct on the part of Ms. Guscott and others, misconduct which is documented in the exhibits. I refer to the applicable sections in my prior discussion under bad faith. There is no question that the conduct of these public servants was not up to the standard that would be expected by the reasonable Canadian public.

[1163] However, this evidence is insufficient to prove the tort of misfeasance in public office as it is framed in the Amended Statement of Claim. While the rules on pleadings allow some leeway in the framing of those pleadings, the key factor being that the Defendant knows what is being alleged, there is insufficient evidence before me to support this cause of action.

[1164] The evidence presented in this case may have been enough to support the commission of the tort of misfeasance in public office if the pleadings had been different. However, I am not satisfied that the Plaintiffs have shown that the precise tort, as pleaded, was committed and this cause of action is dismissed.

6. Damages

(i) *General*

[1165] The Plaintiffs seek the recovery of damages under any one of the causes of action that they have advanced. I have found that the Plaintiffs have successfully established claims in negligence, negligent misrepresentation and for breach of contract. Although the Amended Statement of Claim advances a claim in paragraph 1. b) for the recovery of special damages, the Plaintiffs' response to undertakings arising from the discovery examination of Mr. Alan Kerr makes it clear that claim is not being pursued.

[1166] The answer to Undertaking No. 16 is found at page 15 of the "Excerpts From Examination For Discovery Of The Plaintiffs To Be Read At Trial", a document that was filed at trial on July 4, 2008 as part of the evidence for the Defendant pursuant to Rule 288. The Reply to the Undertaking is as follows:

> UNDERTAKING NO. 16: Page 0075
>
> **PROVIDE A LIST OF THE SPECIAL DAMAGES AND ANY DOCUMENTS THAT ARE RELATED TO THAT CLAIM FOR SPECIAL DAMAGES.**

> There are no special damages that have been identified by the Plaintiffs. The incurred business expenses, loss of good will and other damages pled at paragraph 23(a) to (d) of the Amended Statement of Claim fall within the category of general damages, as stated at pages 648 to 651 of the examination for discovery of Alan Kerr.

[1167] In addition to general damages, the Plaintiffs seek recovery of punitive damages as set out in paragraph 1. c) of the Amended Statement of Claim.

[1168] The only evidence submitted with respect to damages was presented by the Plaintiffs. That evidence consisted of the expert report prepared by Mr. Van Leeuwen, the testimony of Mr. Van Leeuwen and Mr. Alan Kerr, and the Plaintiffs' financial records.

[1169] The Defendant did not present evidence on damages. Rather, she rested upon the cross-examinations of Mr. Van Leeuwen and of Mr. Alan Kerr. Mr. Alan Kerr had been recalled on May 6, 2008 solely for the purpose of addressing the issue of damages.

[1170] The expert report was provided to the Defendant in January of 2009, and Mr. Van Leeuwen did not testify until May 5, 2009. Nevertheless, the Defendant chose not to lead any expert evidence to counter Mr. Van Leeuwen's report.

[1171] The burden of proof for damages lies on the Plaintiffs. The standard of proof is the civil standard, the balance of probabilities.

[1172] Mr. Van Leeuwen's report, dated January 2008, entered as Exhibit P-15, addresses expectation losses, that is future loss of profits, accruing to the Plaintiffs as the result of the closure of the mill.

[1173] The Plaintiffs' financial records were entered as Exhibit P-78. This exhibit consists of 24 bankers boxes of financial records. This exhibit was numbered P-365 for the purpose of the discovery process.

[1174] The financial documents had been made available to the Defendant prior to the entry of Exhibit P-78 as appears from the following excerpts of the transcript from the hearing on May 6, 2008:

> MR. WILSON: My Lady, before we call Mr. Kerr, the plaintiffs' last witness, a couple of housekeeping matters, with exhibits to tender.
>
> The first is the agreement which we discussed in your chambers yesterday, as to the financial statements prepared by the plaintiffs and defendants.
>
> JUSTICE: Thank you. Okay, we will put this on the record, it's not going to be an exhibit, but it's going to be a document on the record. Now, what shall I call it, Registrar? File it at hearing, and during the break - - does everybody have a copy of this?
>
> MR. FLORENCE: Yes we do, My Lady.
>
> …
>
> MR. WILSON: Now, My Lady, pursuant to that agreement, most of the financial statements that are captured by this agreement are already in the materials, either in the plaintiffs' exhibit binders or the defendant's exhibit binders, and likely both, with the exception of

> two, which I propose to put in now, if that's acceptable to my friends, or I can put them in through the witness. I don't think there's - -
>
> JUSTICE: Well I mean, they're coming in anyway, aren't they? Mr. Florence?
>
> MR. FLORENCE: We have no problem with them going in now.
>
> JUSTICE: Have you given copies, Mr. Wilson, to your friends?
>
> MR. WILSON: I have now.

[1175] On July 17, 2008, in the course of her closing submissions, the Defendant argued that the contents of Exhibit P-78 were not proper evidence and further, that she did not have the opportunity to cross-examine Mr. Kerr relative to those financial documents.

[1176] The following appears in the transcript of the proceedings for July 17, 2008:

> MR. WHITTLE: Our submission is, they haven't pointed to anything in there, they've just loaded up a wheelbarrow and put it in front of you. I submit that that's not proper. That's not proof, on a balance of probabilities, to expect you - -
>
> JUSTICE: Well, wait a minute.
>
> MR. WHITTLE: May I finish, please? To expect you to go through and therefore to come to some determination without giving to the defendant the opportunity to respond to what in those documents they say provides the proof. Thank you, My Lady.
>
> JUSTICE: Well, let me say something to you, Mr. Whittle. I understand that those documents, number one, were disclosed in the pre-trial process of discovery. Number two, it's a novel suggestion - - I'm not saying you're wrong, but I'm not saying you're right either, that it's insufficient just to give me financial records. It's evidence like any other documentary evidence that I get to assess and to weigh. It seems to me. I'm not - - I mean, that's something else that I

will have to look at. I'm very well aware as to where the burden of proof lies here.

MR. WHITTLE: Thank you. And just to respond, My Lady, yes, I have indicated to the court throughout this trial that I have read all of the documents in P-365, so I'm presuming that everything in those boxes in the courtroom I have also read. I submit that that's not sufficient proof. They have not reproduced those to provide to us the opportunity to cross-examine Mr. Kerr upon them. They've simply just wheeled them into court and said, "My Lady, it's up to you to pick and choose what evidence you will rely upon."

JUSTICE: Just one minute, Mr. Whittle. Agreement as to exhibits, filed at hearing May 12th, 2008. Are you suggesting - - there's nothing in there about - - have you got this handy?

MR. WHITTLE: No, but I'm familiar with it, My Lady.

JUSTICE: There's nothing in here about having access to the documents for the purpose of cross-examination or wishing to take advantage of the opportunity to cross-examine. And there's specific mention in here - - there's not specific mention in here of those financial documents, but there's specific mention in here of the records and documents that would be entered as exhibits.

We had some discussion in the course of this trial about exhibit - - what is now 360 - - excuse me, Exhibit 78. Just one minute, while I find another book that I have up here. I believe that must have been the morning when Mr. Kerr was recalled for the purposes of addressing damages, and that was April 14th, 2008.

Now, Mr. Sali is on his feet. You have something to say, Mr. Sali?

MR. SALI: My Lady, to suggest that Mr. Whittle or Mr. Florence did not have the ability to cross-examine Mr. Kerr when he re-took the stand on these documents is simply wrong. Moreover, I'm quoting Mr. Whittle. He says, "questionable financial statements". Volume 5 of Exhibit 11, the black binders put in by the defendant for the truth and accuracy of their contents, we now hear Mr. Whittle saying "questionable financial statements".

…

> MR. WHITTLE: I am satisfied that the court will do what the court will do with those documents.
>
> JUSTICE: I'm concerned at your suggestion that you didn't have the opportunity to cross-examine on them, but however, I will take a look at the transcripts for April 14th, and having regard to the hour we will adjourn until 9:00 tomorrow morning.

[1177] On July 18, 2008, the Defendant clarified her position with respect to P-78 and her opportunity to cross-examine Mr. Alan Kerr. The following appears at pages 5863 to 5866 of the transcript of the proceedings on July 18, 2008:

> JUSTICE: Before we start I have some remarks to make. First one is concerning the submissions made at the end of the day yesterday by Mr. Whittle with respect to the financial records that were admitted as Exhibit 78 on July 4th. I understood that this exhibit went in by consent. And I'm asking counsel to review the transcript at some time. I am not expecting it in the next five minutes or even today, but by Monday, to give me the page references in that regard.
>
> …
>
> MR. WHITTLE: My Lady, all counsel have discussed financial boxes and all counsel have discussed the statement that I made regarding the financial statements as being questionable when late in the day yesterday I made that submission. Yesterday evening Mr. Florence and I reviewed our understanding of the financial statements, first, and yesterday I had forgotten that there had been an agreement between counsel, that the - - or the financial statements where there is an agreement before the court were tendered as having been properly prepared in accordance with the requirements of the Chartered Accountants of Canada. I therefore respectfully withdraw the statement that I made that such statements were questionable and I apologize to the plaintiffs for having made that statement, to my learned friend, to my friend and to the court.
>
> MR. SALI: We accept that, My Lady.
>
> JUSTICE: Thank you.

> MR. WHITTLE: Secondly, the exhibit that is contained in the 24 boxes was, as the four counsel understand, agreed to be entered on July 4th after the plaintiffs had closed their case, and Mr. Florence and I, again last evening discussing this, realized that that was the purpose for which the agreement was made. We did have the opportunity to review all of those documents when they were in Mr. Sali's room over the course of the trial and we had the full opportunity to review those for the purposes of cross-examining Mr. Kerr when he took the stand for the second time to testify to damages.
>
> I appreciate the court wishes us to look to the transcript to find those references. If it pleases the court, all four counsel are agreed that that was the opportunity that was provided to me, that that opportunity was not taken when Mr. Kerr took the witness stand. However, we still are in the court's hands as to whether you wish us to go back to the transcript and to find those entries. But as far as I am concerned as counsel, I had that opportunity if I wanted to take it.
>
> JUSTICE: Thank you for that clarification and it's on the record that the Crown had the opportunity to cross-examine Mr. Kerr with respect to those documents and did not do so. So that being so, it is not necessary to go back and find the specific references.

[1178] Contained within the record are financial statements that were prepared for the Plaintiffs. These financial statements were the subject of an agreement between counsel for the parties. That agreement was filed at the hearing on May 6, 2008. That agreement, signed by Mr. Sali, Q.C. of Counsel for the Plaintiffs and Mr. G. Malcolm Florence of Counsel for the Defendant, provides as follows:

> **SYFC v. THE QUEEN – AGREEMENT AS TO FINANCIAL STATEMENTS**
>
> Each of the financial statements prepared for LPL and SYFC for the years 1996 through 2003 inclusive (both audited and unaudited) is deemed to be authentic. Further, it is agreed that they accurately reflect the assets, liabilities, equity, revenues and expenses of the companies as stated. However, the description of some of the various

> items thereof may be inaccurate, although the corresponding amount listed is accurate.

[1179] It was further understood that the Defendant is not admitting that any of the expenses or losses set out in the financial statement constitute damages in the event of a finding of liability against the Defendant.

[1180] As well, a summary of the financial statements was placed on the record. This summary was provided to the Court by the Plaintiffs, with the agreement of the Defendant.

(ii) ***Legal Principles***

[1181] Turning now to the heart of the matter, the basis for awarding damages in cases of both tort, including the tort of negligent misrepresentations, and for breach of contract is to compensate the injured party for losses flowing from the negligent act or the breach of contract, as the case may be.

[1182] The Plaintiffs have suffered an injury and are entitled to compensation. I agree with their submissions that given the nature of their enterprise and the causes of action upon which they have succeeded, it is not necessary to attribute those damages to a specific cause of action.

[1183] In *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147, the Supreme Court of Canada held that concurrent or alternative liability in contract and tort will not be permitted where the duty of care arises from the terms of the contract. I am satisfied in this case that the Plaintiffs have established a duty of care that arises independent of their contractual relationship with the Defendant. As such, I

find that on the facts of this case, the Plaintiffs are entitled to recover concurrently in either contract or tort.

[1184] The Plaintiffs' claim here, whether in contract or in tort, is one for pure economic loss.

[1185] In *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021, the Supreme Court of Canada recognized the right to recover for pure economic loss in both of the torts which the Plaintiffs have made out.

[1186] In *V.K. Mason Construction v. Bank of Nova Scotia*, [1985] 1 S.C.R. 271, Justice Wilson made the following observations at page 288 about damages in cases of negligent misrepresentation:

> (2) Although damages for negligent misrepresentation would normally be assessed in terms of actual loss, including lost opportunity, rather than loss of anticipated profit, in this case the commercial context in which the parties operated dictates that Mason's loss should be calculated in the same way in tort as it would be in contract. Mason is accordingly entitled to damages in the sum of $1,138,151.63, being the entire balance outstanding under its contract with Courtot, plus interest on this amount at the rate of 9 per cent per annum from October 7, 1974 to March 21, 1980.

[1187] Further, I find that this is an action arising in a commercial context. The Plaintiffs' losses can be fairly and reasonably described as "expectation losses" and will be assessed accordingly.

[1188] It is not disputed that the Plaintiffs built the mill in Watson Lake as a business venture. The evidence was that the mill was expected to make a profit. There was also evidence that the Plaintiffs were prepared to shut down sawmilling operations if there was no prospect of the joint venture being a viable business.

[1189] There is evidence that the Plaintiffs were aware of their options of making other investments. For example, I refer to the letter of Mr. Heit to Ms. Guscott, dated March 19, 1999; see Exhibit D-13. In his letter, Mr. Heit advised the Department that unless there was a reasonable level of optimism, with respect to the availability of timber, he would recommend that the mill close, and the operation move to a more business friendly jurisdiction.

[1190] I find, from Mr. Heit's March 19th letter and all of the surrounding circumstances, that the Plaintiffs were prepared to shut down the Watson Lake sawmill operation and invest in building a business in a different jurisdiction.

[1191] I have already found that the Plaintiffs have succeeded in their causes of action for breach of contract, negligence and negligent misrepresentation. I also find that they have met their burden with respect to evidence, on the balance of probabilities, concerning their losses.

[1192] The Defendant addressed the issue of damages in her closing submissions. She argued that the damages claimed by the Plaintiff were speculative and consequently, could not be recovered. In

this regard, she relied on the decision in *Marigold Hldg. Ltd. v. Norem Const. Ltd.*, [1988] 5 W.W.R. 710 (Alta. Q.B.).

[1193] I disagree. The Plaintiffs have submitted expert evidence based on facts and reasonable assumptions supported by the totality of the evidence. These damages are not speculative. They were the reasonably foreseeable result of the Defendant's conduct. I will discuss the sufficiency of the expert evidence below.

[1194] The Defendant independently addressed the issues of damages for breach of contract, lost profit, remoteness, damages for negligent misrepresentation and the adequacy of the evidence tendered by the Plaintiffs.

[1195] It is not necessary for me to review each of the arguments made by the Defendant in detail. I have already referred to the decision of the Supreme Court of Canada in *V.K. Mason* where the Court said that regardless of success in a claim for breach of contract or in tort, the approach to the assessment of damages is the same.

[1196] Insofar as any aspect of the calculation of general damages is not clear-cut in the sense that mathematical certainty is not available, I rely on the decision of the Manitoba Court of Appeal, in *Abraham v. Wingate Properties Limited* [1986] 1 W.W.R. 568 (Man. C.A.). In *Wingate* the Manitoba Court of Appeal was tasked with the assessment of damages after finding that a breach of contract gave rise to damages. At pages 574 to 575, the Court said the following:

…The difficulty in fixing an amount of damages must not deter us from doing justice in this case. The English Court of Appeal in *Chaplin v. Hicks*, [1911] 2 K.B. 786 at 795, spoke of this difficulty thus, per Fletcher Moulton J.:

> "... 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."

This was quoted with approval by the Appellate Division of the Supreme Court of Ontario in *Wood v. Grand Valley Ry. Co.* (1913), 30 O.L.R. 44, 16 D.L.R. 361 at p. 366. When *Wood v. Grand Valley Ry. Co.* reached the Supreme Court, Davies J. (as he then was) being part of the majority said ((1915) 51 S.C.R. 283 at 289), 22 D.L.R. 614:

> "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'."

These authorities were all quoted with approval in the more recent decision of the Supreme Court of Canada in *Penvidic Contracting Co. v. Int. Nickel Co. of Can. Ltd.*, [1976] 1 S.C..R. 267, 53 D.L.R. (3d) 748 at 756-57, 4 N.R. 1 [Ont.].

A court or judge must, of course, use some logical basis for making his estimate of the damages suffered, but better that the damaged party receive a reasonable, if not mathematically measurable, amount than that there should be no compensation for the loss.

[1197] The Supreme Court of Canada took the same approach to the assessment of damages in *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142 at para. 99, as did the Federal Court of Appeal in *Redpath Industries Ltd. v. Cisco (The)*, [1994] 2 F.C. 279 (C.A.), at 295-296.

(iii) *Evidence on Damages*

[1198] As noted above, only the Plaintiffs led evidence on damages. That evidence consisted of the evidence of Mr. Alan Kerr, 24 boxes of financial records and the evidence of Mr. Van Leeuwen, the expert retained by the Plaintiffs, including his report.

[1199] Mr. Kerr testified generally about the financial situation of SYFC, including profits, operating losses, expenses, debts and capital assets. He explained the fundraising by LPL and SYFC with respect start-up costs. He also gave evidence about the operations of the mill.

[1200] The boxes of financial records that were entered as Exhibit P-78 contain utility bills, bank statements, cancelled cheques and accounting records. A guide to the contents of Exhibit P-78 was filed at the hearing on July 11, 2008.

[1201] The Plaintiffs tendered the financial records as an alternative basis for the Court's assessment of damages, in the event that the evidence of Mr. Van Leeuwen was not accepted. As discussed below, I accept the evidence of Mr. Van Leeuwen, subject to the modifications discussed below.

[1202] In closing argument, the Defendant challenged aspects of Mr. Van Leeuwen's evidence, upon which she had not cross-examined. The failure to cross-examine him is problematic and raises two issues.

[1203] First is the issue of fairness to Mr. Van Leeuwen. The House of Lords in *Browne v. Dunn* (1893), 6 R. 67, at 70 (H.L.) stated:

> My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses.

[1204] The rule in *Browne v. Dunn* applies both to contradictory evidence and to closing argument.

[1205] The rule is not absolute, but, in my opinion, it applies in this case. Mr. Van Leeuwen is an expert in his field and his qualifications and capabilities were challenged by the Defendant in closing argument, although she did not challenge his credentials when he was introduced as an expert witness. His reputation, if not his credibility, was put in question. In that situation, Mr. Van Leeuwen should have been given the opportunity to explain his report and his testimony.

[1206] Second, the failure to cross-examine Mr. Van Leeuwen on these matters denied the Court the benefit of his evidence. It must be remembered that an expert witness is presented to assist the Court.

[1207] In the result, I find that the evidence of Mr. Van Leeuwen, on those aspects that were not tested by cross-examination, remains unchallenged. I accept his evidence as reliable and credible.

[1208] Mr. Van Leeuwen described his mandate as the preparation of a "financial performance scenario that could have developed for the company [SYFC] if a 200,000 m^3 per year timber supply" had been provided for the Watson Lake mill. This statement appears in the introduction to his report. The report deals with financial projections for SYFC, the operating entity of the joint venture.

[1209] In the course of writing his report, Mr. Van Leeuwen consulted many documents. Key documents included financial statements that were provided by the Plaintiffs, business proposals, business development plans, *Veco/Siemens Canada Technical Report* of July 2000, the *Yukon Timber Regulations*, documents prepared by DIAND, the preliminary TSA prepared by Mr. Peter Henry for DIAND and a Mill Audit and Evaluation that was prepared in March 2001 relative to the Watson Lake mill. Section 7.5 of his report provides a partial bibliography of the material that he reviewed.

[1210] As well, Mr. Van Leeuwen drew upon his lengthy personal experiences in the forest industry. His *curriculum vitae* was entered as Exhibit P-14. He was accepted as an expert witness, without challenge or objection from the Defendant, upon the following terms:

> …I suppose what I should do is summarize by saying, consistent with my discussions with Mr. Florence, I have offered the evidence of Mr. Van Leeuwen as a person having the ability to give expert

> opinion testimony on the projected financial operational and product marketing analysis of sawmills, including cogeneration facilities, and in particular the sawmill owned and operated by the plaintiffs in Watson Lake; as a gentleman with experience and a long work history in wood product sales and marketing, both domestic and international; wood product company and sawmill business plan development; and wood product company and sawmill financial and operational analysis.
>
> Subject to that, unless there are questions relating to that last matter, those are my questions of Mr. Van Leeuwen.
>
> JUSTICE: Thank you. And I understood that defence counsel took the position they were not challenging the qualifications of Mr. Van Leeuwen as an expert. Am I right or wrong in that?
>
> MR. FLORENCE: We're not challenging his qualifications as an expert. We may address some of the information he obtained from the - -
>
> JUSTICE: Oh, yes. But that's just per usual.
>
> MR. FLORENCE: Yes, okay.

[1211] I am satisfied that on the basis of his education and work experience, as set out in his *curriculum vitae* that was entered as Exhibit P-14, that Mr. Van Leeuwen is qualified to offer the opinions that were set out in his report, Exhibit P-15, and I recognize Mr. Van Leeuwen as an expert witness.

[1212] The evidence of Mr. Van Leeuwen was offered in support of the Plaintiffs' claim for damages but the final decision in that regard lies with the Court. It is for the Court to assess the value and utility of the expert evidence that was tendered; see the decision in *Fraser River Pile & Dredge Ltd. v. Empire Tug Boats Ltd. et al.* (1995), 95 F.T.R. 43 (T.D.).

[1213] In his *viva voce* evidence, Mr. Van Leeuwen said that his company does consulting work for a diversified client base, working roughly half the time with clients in Canada and the United States. The remaining 50 percent of the time is spent working with clients "offshore". His company, IWMG, has offices in Beijing, China and Vancouver, British Columbia.

[1214] Mr. Van Leeuwen observed that, based on the outlook for the short-term log supply and the Government's commitment to provide SYFC with a long-term THA, the Plaintiffs proceeded with the Phase 1 construction plan in 1997-1998. This is a fact. The Plaintiffs did embark on the construction of the mill, having regard to these factors.

[1215] Additionally, Mr. Van Leeuwen stated, at pages 3 to 4 of his report, that Phase 1 of the mill project was undertaken due to a number of favourable factors.

[1216] Mr. Van Leeuwen noted that in January 1998, the AAC for commercial timber harvesting was 450,000 m^3. The draft timber management plan, otherwise known as the draft FMP, estimated that an AAC in excess of 1.5 million m^3 was sustainable. The 1998 AAC was only 25 percent of the potential AAC. Mr. Van Leeuwen referred to this as a matter of fact and again, he was weakly challenged on the source of his information. He was not shaken.

[1217] Mr. Van Leeuwen noted that the Yukon AAC of 450,000 m^3 was almost fully allocated to individual permit holders, most of whom were looking for a viable market for their timber. In cross-examination, he was asked about the source of this information and at pages 1959-1960, he replied

that it "came directly from a report which was published by the Yukon government, which was supplied to me by South Yukon Forest Corporation."

[1218] In my opinion, Mr. Van Leeuwen was basing his opinion on either established facts or on reasonable assumptions. The evidence about the "green rush" in the mid-1990s supports his opinion.

[1219] Mr. Van Leeuwen also said that in 1997, there was minimal log processing activity in Yukon, less than 100,000 m^3. He said that most of the log harvest was exported to sawmills in northern B.C.

[1220] This statement by Mr. Van Leeuwen is incorrect, since the regulations concerning the 60/40 Rule were in place in December 1995. That regulation prevented the export of the first 60 percent of harvested logs. However, Mr. Van Leeuwen was not cross-examined on this point. Further, this was the state of affairs which resulted in the 60/40 Rule.

[1221] In my opinion, this factual misstatement is not relevant to Mr. Van Leeuwen's projections and does not effect the conclusions of his report.

[1222] He noted in his report that changes in regulations in 1996-1997 required that a minimum of 60 percent of the timber harvested in Yukon must be processed in Yukon. He said that the owners

of SYFC believed that the new regulatory requirement for local processing would increase the availability of wood for SYFC.

[1223] In cross-examination, Mr. Van Leeuwen said that the regulatory changes did not impact on the THA because it was for a different time period. He stated that the regulatory scheme was beneficial to the mill because additional volume would be available to SYFC.

[1224] Mr. Van Leeuwen noted that SYFC had arranged to purchase logs from local loggers and CTP holders. It was assumed that the new mill would buy the required log input volume at current market prices from individual CTP holders for a 2 – 3 year start-up period. In this regard, Mr. Van Leeuwen is simply stating a fact, since SYFC had indeed arranged to purchase logs for local CTP holders.

[1225] Mr. Van Leeuwen noted that in 1998, SYFC made plans to formalize log purchase contracts of 140,000 m^3 of saw logs per year and considered the establishment of log purchase agreements for a minimum of 3 years. This is factually correct and the Plaintiffs were successful in obtaining 215,000 m^3 of wood in 1999-2000.

[1226] There are also copies of log supply agreements in the documentary evidence.

[1227] Insofar as he stated that the Plaintiffs would be able to purchase logs for an initial 2 – 3 year start-up period, this assumption is reasonable, in my opinion, and not relevant to his projections.

[1228] Mr. Van Leeuwen said that the owners of SYFC actively pursued the objective of securing a long-term THA before construction of the mill. I accept this statement on the basis of the meetings, and other communications, with the Department.

[1229] He also considered the factor that both levels of government indicated support for the long-term allocation of timber for Yukon sawmills. This statement is contradicted by some evidence and supported by other evidence. Regardless, Mr. Van Leeuwen was not cross-examined on this point. Further, I have found that the Department committed to such an allocation. It is also a fact that only DIAND was authorized to make such an allocation. It is my opinion that there is no negative impact on Mr. Van Leeuwen's report resulting from this statement.

[1230] In order to determine the expectation losses of the Plaintiffs, Mr. Van Leeuwen prepared two pro forma projections of the earnings of the mill between 2001 and 2010. These projections were based upon some 17 assumptions that are set out at pages 11 and 12 of his report.

[1231] I will not address all of Mr. Van Leeuwen's assumptions. I find that his assumptions were either based on established facts or reasonable assumptions based on his extensive experience and expertise. I will discuss some of the more important assumptions.

[1232] The key assumption, common to both projections, was that a 20 year timber supply agreement, for 200,000 m^3 of timber annually, was in place. I will address Mr. Van Leeuwen's

assumption that the Plaintiffs would have received a 20 year THA, for 200,000 m^3 annually, below. Suffice it to say at this point, I find that it was not an assumption but rather a fact. As such, the use of this assumption in his calculations was reasonable`.

[1233] Also common to both projections was the assumption that once the mill had a secure timber supply, it would run for 12 months of the year and produce an average of 100,000 BF per shift, working two shifts.

[1234] I find that as a matter of fact, the Plaintiffs' mill was built to produce 100,000 BF. I also find that when adequate timber was available, the mill worked two shifts and did produce 100,000 BF per shift.

[1235] Another common assumption included a $5 million investment in 2002 to improve the sawmill's efficiency and lumber recovery factor.

[1236] Lumber recovery factor ("LRF"), as defined by Mr. Brian Kerr, at page 1320 of the transcript, is, "basically a number that is derived by how many board feet of finished product you're getting out of a round log, from any particular piece of sawmill equipment".

[1237] With respect to the $5 million re-investment, Mr. Van Leeuwen testified, at page 1923, that:

> A. Well, I assumed the sawmill was – or assumed the sawmill was profitable, reasonably profitable, and I was advised by shareholders of the company that, given the profits the

> company would have been generating, that the company would have continued to re-invest part of these profits, which is a very normal practice in the sawmill industry. When you make money, you re-invest and improve your mill.
>
> So, here we're showing that the company re-invested $5 million of earned profits to further upgrade and improve the mill. And these upgrades were related mainly to improving the lumber recovery factor, which is basically using computers and optimization to enhance the sawing accuracy of the mill.

[1238] Based on the expert evidence of Mr. Van Leeuwen, that this upgrading was the normal practice in the industry, I find that this assumption was reasonable and not speculative.

[1239] Mr. Van Leeuwen also assumed that Phase 2 of the mill project would have been completed. Phase 2 contemplated dry kilns, planers and a cogeneration facility which would burn waste products from the mill, generating electricity to operate the mill and allowing the Watson Lake sawmill to sell excess power to the Watson Lake grid.

[1240] There is ample evidence in the record that Phase 2 was an integral part of the Plaintiffs' business plan. There is also evidence that the Plaintiffs had undertaken the initial steps necessary to commence Phase 2. I refer to the cogeneration consultation report created by *Veco/Siemens*. I also refer to the read-ins of the examination for discovery of Mr. Alan Kerr. Mr. Kerr was questioned about expenditures on Phase 2, at pages 2933 to 2934 of that transcript. The evidence was:

> Q. But you did expend money on Phase II after the date of this document, didn't you?

> A. With our study and costs, yeah, there was probably some money.

[1241] Mr. Van Leeuwen assumed that SYFC would borrow the money necessary to complete Phase 2, that is the addition of the dry kilns, the planers and the cogeneration plant. His report includes, at Appendix 7.8, a table of the prime interest rates from 1980 to 2005.

[1242] Mr. Van Leeuwen noted that SYFC had received an assurance from EnerVest that it would be able to raise the $14 million necessary to complete Phase 2, if a THA of 200,000 m^3 was available. This observation by Mr. Van Leeuwen is based on fact, as appears from the correspondence from EnerVest found in Exhibit D-81, Tab 32. He was not challenged on this assertion, in cross-examination.

[1243] I find, on the balance of probabilities, that the Plaintiffs would have proceeded with Phase 2 of the mill project, but for the lack of a secure and adequate source of fibre for the mill. There is ample evidence in the record to support this finding.

[1244] A related common assumption, upon which Mr. Van Leeuwen's projections were based, was that the Plaintiffs would have been able to sell excess electricity to the Yukon Power Authority.

[1245] The evidence was that Watson Lake was not connected to an external power grid. As such it generated its own electricity with diesel generators. Mr. Van Leeuwen considered the actual price of

diesel and the actual price of electricity in Watson Lake. He concluded that his calculations were very conservative given the significant increase in oil prices since he had completed his report.

[1246] Mr. Van Leeuwen's projections were based on the cogeneration facility that would have been built if a secure timber supply had been provided.

[1247] He considered the actual electrical requirements for Watson Lake and projected the usage of the mill. In his cross-examination he explained that this information was derived from the *Veco/Siemens Technical Report* and from a meeting with the manager of Veco's Burnaby office.

[1248] I also note that the cogeneration facility had been in the Plaintiffs' business plans as provided to the Defendant since the beginning of 1996.

[1249] It was also recommended to DIAND, in the Anthony-Seaman Report at Exhibit P-79, Tab 226, by the consultants the Department hired to review the Watson Lake mill, that:

> The utilization of the whole tree and the next steps in value adding are much more important goals than the addition of a few more points of green lumber recovery. The co-generation plant using mill residuals that is being proposed by South Yukon Forest Corporation to provide mill and local electricity are projects that should be encouraged and supported, as a part of whole tree utilization.

[1250] On the basis of the evidence, I find that it was reasonable to conclude that the Plaintiffs would have been able to sell the excess electricity produced by the cogeneration facility, as contemplated in Phase 2.

[1251] Mr. Van Leeuwen testified about his familiarity with cogeneration facilities, at page 1904 of the transcript, where he said:

> Q. Are you familiar with the operation of cogeneration facilities?
>
> A. Yes, I am.
>
> Q. And are you familiar with the operation of cogeneration facilities in the context of sawmills?
>
> A. Yes, I am.

[1252] He was challenged in cross-examination about his expertise in assessing the value of the cogeneration facility. He acknowledged that his company did not consult on cogeneration or the construction of cogeneration plants. As mentioned above, Mr. Van Leeuwen had sought information from the *Veco/Siemens Technical Report* and followed up receipt of information from Veco by meeting with the manager of the Burnaby office.

[1253] Mr. Van Leeuwen testified that the purpose of that meeting was to review the report that he had received, that is the *Veco/Siemens Canada Technical Report*, and to seek clarification. As well, according to his testimony, Mr. Van Leeuwen asked some specific questions about the power used by the mill and about the availability of excess power. He used that information in his report.

[1254] In my opinion, the reliance by Mr. Van Leeuwen upon factual information obtained by knowledgeable sources, including the Yukon Power Authority in Watson Lake, does not diminish

the weight to be given to his evidence. He gave a factual context for his calculations of income from the cogeneration facility. His evidence in that regard was not shaken in cross-examination. In my opinion, Mr. Van Leeuwen was credible and reliable in his evidence in this regard.

[1255] In any event, Mr. Van Leeuwen was introduced as an expert in the following terms:

> …on the projected financial operational and product marketing analysis of sawmills, including cogeneration facilities,…wood product company and sawmill business plan development; and wood product company and sawmill financial and operational analysis…

[1256] The Defendant did not challenge Mr. Van Leeuwen's qualification as an expert in these areas. The Court accepts Mr. Van Leeuwen as an expert in these areas. As such, I accept his evidence in respect of the expected profits of a sawmill operation with an included cogeneration facility.

[1257] Although he only provided a detailed projection for the years 2001 to 2010 in his report, he said that he expected the foregone profits for the ten year period 2010 to 2020 to parallel those that he had calculated for the period 2001 to 2010, as set out in the diagrams that form part of his report, Exhibit P-15.

(iv) ***Damages 2001 to 2010***

[1258] I will first address the damages for 2001 to 2010.

[1259] Mr. Van Leeuwen noted in his report that he had produced two pro formas**.** His two pro formas addressed financial projections for SYFC over a 10 year period from 2001 up to and including 2010.

[1260] The Plaintiffs seek recovery of damages in the amount set out in pro forma no. 1 of the report tendered by Mr. Van Leeuwen. Pro forma no. 1 was based upon the further assumption that the Plaintiff SYFC would have invested approximately $3 to $4 million to make a number of improvements to the mill in mid-1999, during the construction stage of Phase 2. On the basis of the assumptions that he made, Mr. Van Leeuwen projected earnings before interest, taxes, depreciation and allowances ("EBITDA") over 10 years from 2001 to 2010, inclusive, as $48,906,893. He projected the earnings of the Plaintiff SYFC, over the same time frame, on the basis of earnings before taxes and after depreciation and interest ("EBT") as $35,906,893.

[1261] His summary for pro forma no. 1 is as follows:

- Summary of Financial Project #1:
- Projected 10 year unrealized Earnings Before Interest, Taxes, Depreciation and Amortization (EBITDA) from 2001 to 2010 equal $35.5 million. Projected 10 year unrealized Earnings Before Taxes (EBT) equals $28.6 million;
- Projected 10 year unrealized EBITDA for the 2 megawatt co-generation facility from 2001 to 2010 equals $13.4 million. Projected 10 year unrealized EBT equals $7.34 million, and
- Total SYFC unrealized EBITDA for 2001 to 2010 equals $48.9 million.
  Projected unrealized 10 year EBT equals $35.9 million.

[1262] Mr. Van Leeuwen prepared pro forma no. 2 upon the same basis as pro forma no. 1, for the same time frame, with the exception that he excluded the investment of some $3 - $4 million. He assumed that the money that was available for the completion of Phase 2, in the amount of $14.5 million, would have been spent on "new dry kilns, a planer mill and a wood fuelled co-generation plant as planned".

[1263] In the more restricted projections for pro forma no. 2, Mr. Van Leeuwen projected the EBITDA as $42,469,973. He projected the EBT for pro forma no. 2 as $30,069,973. His report provides the following summary with respect to pro forma no. 2:

> Summary of Financial Projection #2:
>
> - Projected 10 year unrealized EBITDA earnings from 2001 to 2010 equal $29.1 million. Projected 10 year unrealized EBT equals $22.7 million;
> - Projected 10 year unrealized EBITDA for the 2 megawatt co-generation facility from 2001 to 2010 equals $13.4 million. Projected 10 year unrealized EBT equals $7.34 million, and
> - Total SYFC unrealized EBITDA for 2001 to 2010 equals $42.5 million. Projected unrealized 10 year EBT equals $30.1 million.

[1264] Exhibit P-15 contains charts showing the calculations that Mr. Van Leeuwen made.

[1265] His assumption that the Plaintiffs would have invested approximately $3 to $4 million to make a number of improvements in 1999 was based solely on the advice of Mr. Oulton to Mr. Van Leeuwen. There is no other evidence in this regard. In the circumstances, in my view it is more prudent to rely on pro forma no. 2 as prepared by Mr. Van Leeuwen.

[1266] Mr. Van Leeuwen did not include revenues in respect of the proposed Phase 3 for the project, that is the value-added plant. “Value-added concept” means that low value wood is turned into something with a higher value.

[1267] In his report, Mr Van Leeuwen reviewed the potential markets for the products from the Plaintiffs’ mill. He based his assumptions about revenues in the years 2001 through to 2007 upon the actual and real prices of wood. Mr. Van Leeuwen made it very clear in both his written report and in his oral evidence that he used “real” values for lumber in his report for the years 2001 to 2007 inclusive because those figures were available to him. Mr. Van Leeuwen used actual revenue figures in the industry as reported by *Random Lengths*.

[1268] For the years when the actual wood prices were not available, Mr. Van Leeuwen projected those prices, on the basis of his experience in the industry. He characterized his future projection of dimension lumber prices as “conservative”.

[1269] He also based the cost of diesel fuel on actual prices up to 2007. He then projected the price for the remaining three years. With respect to the high cost of oil, he characterized his costs for diesel fuel as “conservative”.

[1270] I note that Mr. Van Leeuwen testified that he had considered a 50 year time-span in order to project the cycle of wood prices. I am satisfied that Mr. Van Leeuwen’s projections were

reasonable. The estimation of market factors and costs, with respect to sawmill operation, falls within Mr. Van Leeuwen's expertise.

[1271] He also used the actual stumpage rates in generating his projections. On cross-examination he testified that he was unaware that the stumpage rates between the Plaintiffs and the Defendant would have been the subject of negotiation.

[1272] The actual stumpage rates under the *Yukon Timber Regulations* were amended in 1995 by SOR/95-387. The stumpage royalty for logs processed in the Yukon was $\$5.00/m^3$. In 1996 the stumpage royalty, for this category of timber, was reduced to $\$2.62/m^3$, by SOR/96-549.

[1273] There is evidence in the record with respect to the stumpage paid by KFR for timber cut off their commercial THA; see Exhibit P-80, Tab 26. That evidence shows that stumpage royalties for KFR were set at $\$1.75/m^3$ for pine logs for the years 1995 to 1997.

[1274] There is evidence in the record that shows that the Watson Lake mill was designed for the small upland pine logs.

[1275] As a result, I am satisfied that by relying upon actual stumpage Mr. Van Leeuwen's projections would be conservative. As such, I find that the fact that he did not know that stumpage rates were subject to negotiation, does not affect the reliability of his projections.

[1276] Mr. Van Leeuwen based his projections of the Plaintiffs' lost income upon the assumption that SYFC would sell 100 percent of its production in the readily accessible markets of the Yukon Territory and Alaska. Although he was aware that the Plaintiffs were also considering sales to the Japanese market and he said in his oral evidence that probably about 15 percent of the mill's production would be exported to Japan, he did not use any sales to the Japanese market in calculating the average value of SYFC's product.

[1277] Mr. Van Leeuwen grounded his opinion as to sales from the mill upon the view that 75 percent of the kiln-dried, planed lumber would be sold to the Alaska market, with generally the remaining 25 percent sold to the local market in Yukon. The "kiln-dried, planed lumber" would be the product after completion of Phase 2 of the capital investment plan, a fundamental assumption in the preparation of his report.

[1278] With respect to the Alaska market, Mr. Van Leeuwen estimated that some 65 to 70 million board feet per year would be consumed in that market. This is a reasonable estimate that he derived from the MacDowell Report. He was cross-examined at pages 1988-1989 about the different types of measuring but not as to any implication of there being a difference.

[1279] In commenting on the Alaska market, Mr. Van Leeuwen noted that this used only 20 percent spruce, pine and fir ("SPF") in 1998. He assumed that the consumption of SPF would increase due to the significant cost advantages and he assumed that 75 percent of the lumber produced by SYFC would be sold to the Alaska market.

[1280] In cross-examination, Mr. Van Leeuwen slightly reduced the volume that would be sold to the Alaska market to the range of 50 – 60 percent. As a result, the projected losses of the Plaintiffs will be reduced accordingly.

[1281] He supported his opinion as to the likelihood of a "local" market, including the Alaska market, by reference to the "unique" location of the mill on a site adjacent to the Alaska Highway, a fact that meant significant reduction to the costs of transporting wood to the Alaska market. Transportation by road was available and that mode of transportation was significantly lower than the costs of transporting lumber from the usual sources for that market, that is the states of Washington and Oregon in the United States.

[1282] Mr. Van Leeuwen's observations in this regard are based on fact. He was cross-examined briefly at pages 1978 to 1979:

> Q. "High-quality structural lumber". Again in the same sentence, "…the SPF would have a considerable freight cost advantage over imported lumber. You're talking freight cost advantage to Alaska?
>
> A. Yes, and to the Yukon.
>
> …
>
> Q. Was that freight cost advantage incorporated into the premium that you had set out in your *pro formas*, for the number?
>
> A. Yes. Yes, it is.

Q. So that's where the difference in price came mainly, was the freight cost advantage?

A. Yes.

Q. Thank you.

A. And again, I was conservative. But that's right.

[1283] Mr. Van Leeuwen, both in his report and his oral evidence, commented upon the value of the fact that the timber resources of the Yukon Territory were exempt from the countervailing anti-dumping duties of 20 – 25 percent that were imposed by the United States Government relative to the softwood lumber dispute with Canada. He also noted that the timber from Yukon was not subject to the 15 percent export tax that was imposed on certain Canadian lumber products when the countervailing anti-dumping duties were ended in 2003. These features meant that the cost structure of wood from Yukon was attractive.

[1284] It makes sense to me that Yukon would be a ready and willing market to purchase lumber from the Plaintiffs' mill. The mill would be employing local residents and generating income in Watson Lake, possibly elsewhere in southeast Yukon. The work provided by the operations of the mill would enable the residents to purchase wood products for their personal use.

[1285] Given the obvious boost to the Yukon economy from continued operation of the Plaintiffs' mill, the price advantage resulting from reduced shipping costs and the opportunity to buy from a "home town" manufacturer, I see no reason to question Mr. Van Leeuwen's assumption that 25 percent of SYFC's production would be purchased in Yukon.

[1286] Mr. Van Leeuwen, in the course of cross-examination, was also questioned about his role in the audit of the Watson Lake mill that was completed in March 2001. A copy of the audit report prepared by Mr. Van Leeuwen was entered as Exhibit D-16. In that report, Mr. Van Leeuwen described the Plaintiffs' undertaking as a "half-built" mill.

[1287] In cross-examination, Mr. Van Leeuwen explained what he meant in the Mill Audit by "half-built mill". He also explained what he meant by "old, inefficient, cost-ineffective". He drew the distinction between a "mill" and "plant", and he said that the "sawmill is just the part of the mill that takes the logs and makes rough green lumber"; pages 1970 and 1971 of the transcript:

> Q. And in your other report, you refer to it as "old, inefficient, cost-ineffective".
>
> A. Because it was only half the mill. I think I was looking - - in this term - - you have to understand, there's a term for a sawmill and there's a term for a plant. You know, they're not the same. They don't mean the same. The sawmill plant means the whole plant with the sawmill, the kilns, the planer mill, the log processing. A sawmill is just the part of the mill that takes the logs and makes rough green lumber.

[1288] Mr. Van Leeuwen testified that "half a sawmill" could only produce rough green lumber. He explained that it did not use kilns to dry the lumber nor a planer which is needed to produce dimensional lumber. He said, relative to Exhibit D-16, that he was describing what he saw when he did the Mill Audit.

[1289] This response, in my opinion, is reasonable. In my view, his report at Exhibit P-15, is an opinion premised upon other factors and other considerations than were addressed in the Mill Audit. The two documents deal with two very different mandates. His expectation losses were based on the reasonable assumptions that a $5 million upgrade and that the development of Phase 2 would occur. As a result, his assessment of the mill before the upgrade and development of Phase 2 does not negatively affect his projections.

[1290] Mr. Van Leeuwen was challenged in cross-examination about the LRF used in his projections.

[1291] Mr. Van Leeuwen testified that he did not know specifically how SYFC measured its LRF. The possibility that the LRF assumed by Mr. Van Leeuwen was not accurate, could affect the quantity of lumber produced by 10 percent. Mr. Van Leeuwen himself acknowledged this; see page 2012.

[1292] This could mean an approximate increase in costs per year of $300,000, which would result in a corresponding decrease in profits of the same amount; see pages 2013 to 2014.

[1293] Mr. Van Leewuan was also questioned about his assumption that the LRF would improve over time, even without any additional investment. In my view, Mr. Van Leeuwen’s opinion that the LRF would improve in the future, without additional investment, was reasonable. Once the mill was operating on a steady basis, that is on a full-time basis without shut-downs occasioned by the lack of

a secure timber supply, the employees would become more efficient and able to maximize the production from the logs.

[1294] The longer the mill was in operation, the more experienced and capable its employees would become and there would be a corresponding increase in productivity.

(v) ***Damages 2011 to 2020***

[1295] I will now address the expectation losses for 2011 to 2020.

[1296] There is a question as to the applicable time frame for calculating damages. Is it reasonable to assess damages by reference to a 20 year period? In my opinion, the answer is "yes".

[1297] Mr. Van Leeuwen has provided detailed projections for a ten year period, that is 2001 to 2010. He did not carry out the same detailed analysis for the next decade, 2011 to 2020. Yet, he provided the written opinion that he had no reason to expect that the profit for the period 2011 to 2020 would differ significantly from those for 2001 to 2010.

[1298] Mr. Van Leeuwen's report addresses this at page 5 of Exhibit P-15 as follows:

> It is important to note that SYFC applied for, and expected to receive, a 20 year timber harvesting area (THA) of 200,000 m3 per year. IWMG has only provided a detailed ten year financial projection (2001 to 2010). However, it can be assumed that the SYFC mill would have had similar earnings from 2011 to 2020 based on typical 10 year and long term North American lumber supply/demand (price) trends. Although detailed annual financial

> projections are not possible for 2011 to 2020 (could only be based on long range price trends), it can be assumed, based on long term industry supply/demand (price) trends, that the company could achieve similar EBITDA and EBIT earnings from 2011 to 2020 as projected for 2001 to 2010.
> (Emphasis in original)

[1299] In his oral evidence he said it was difficult to project those earnings due to the cyclical nature of the lumber industry. However, in cross-examination he testified as follows, at pages 1905 to 1907:

> A. It's very ugly today. And lumber prices are probably 50 percent lower than they were only two years ago. So as a result, companies that were making a lot of money two years ago are now losing a lot of money.
>
> But the concept I was referring to here is that, even though as a consulting company, we were very uncomfortable developing a ten-year forecast showing year by year all the detail of what the lumber selling price would be, what would be the value for the generation of electricity. We do believe that the lumber industry over the last 50 years has worked in a very cyclical manner. In other words, the lumber market is constantly moving up or down. It's never flat. And that movement of up and down is cyclical in nature and, if you look at about a 50-year time span, you will see that almost every ten years there is a peak and there is a bottom within ten-year periods, which is related to U.S. housing starts. So what I'm conveying here is that the ten years which I did analyze and project show a span of time in which the – a very typical span of time in the lumber industry where the market went to a peak in 2005, has come to a valley in 2008, and is expected to improve in 2009 and then 2010 and gradually build up strength again into the early 2011, 2012.
>
> So, what I'm maintaining, or what we're maintaining, is that we expect the period 2011 to 2020 to contain a similar cycle peak and valley that we experienced from 2001 to 2010.
>
> Q. So, to be clear, sir, while the schedule that we'll refer to in a few minutes projects losses or profits, however you choose to characterize them, through to the end of 2010, what you are saying in this particular paragraph is that, if you take it to the next ten-year period beyond that, then that is a further consideration.

> A. Definitely. Because, as I indicated, we're in the valley. We expect lumber prices to improve in 2011, 2012, 2013. When the next peak will be in that ten-year period is hard to say, but we do believe there will be a peak, and then there will be another valley, somewhere in that 2011 to 2020 period.

[1300] The reasonableness of Mr. Van Leeuwen's 20 year projections is inexorably linked with the reasonableness of his assumption that the Plaintiffs would have received 20 year long-term tenure from the Defendant, with a secure supply of wood in the volume of 200,000 m^3 per year.

[1301] Did Mr. Van Leeuwen reasonably assume that the Plaintiffs would have received a 20 year THA? Having regard to the totality of the evidence, in my view Mr. Van Leeuwen's assumption about a THA for 20 years is reasonable.

[1302] In my opinion, it was reasonable for Mr. Van Leeuwen to base his opinion as to the Plaintiffs' future losses, upon the assumption that the Plaintiffs would have had secure long-term tenure. After all, that is what this action is about and I have already found that such a commitment was indeed made to the Plaintiffs.

[1303] Specifically, I have made a finding that for the purposes of the Plaintiffs' mill, 200,000 m^3 was "an adequate supply". I have also made a finding that the commitment was for a 20 year supply of timber.

[1304] In light of those facts, I find that it was reasonable to make the assumption that the Plaintiffs' had received a 20 year agreement for access to a supply of 200,000 m^3 of timber per year. I also find that it was reasonable to evaluate the expectation losses over a period of 20 years.

[1305] In his report, Mr. Van Leeuwen said that the Plaintiff SYFC had "applied for, and expected to receive, a 20 year THA of 200,000 m^3 per year". As I have said earlier, this is not true because SYFC had not applied for a 20 year THA, indeed it had not applied for a THA of any duration. However, underlying this assumption is the Plaintiffs' assertion that the Defendant had made a commitment to provide a long-term and adequate supply of wood, if a mill were built.

[1306] I have made a finding that this commitment was made.

[1307] In these circumstances, the fact that Mr. Van Leeuwen misstated the fact in this part of his report does not matter.

(vi) ***Conclusion on Damages***

[1308] As noted earlier, the Defendant did not lead any independent evidence on damages. This, of course, was her right since the Plaintiffs bear the burden of establishing that they have suffered a loss and the quantum of that loss, upon the usual burden in civil matters, that is the balance of probabilities.

[1309] The Defendant cross-examined Mr. Alan Kerr and Mr. Van Leeuwen. In neither instance did she seriously challenge the evidence that was presented on behalf of the Plaintiffs.

[1310] In the cross-examination of Mr. Van Leeuwen, the Defendant questioned him about some of his assumptions. I am satisfied that in his answers, Mr. Van Leeuwen adequately explained what he had written in his report. In those few instances where he misstated the facts, those factual misstatements have no material effect.

[1311] I have noted the salient points of Mr. Van Leeuwen's evidence. He was a steady witness who was not shaken in cross-examination. He offered a reasonable explanation for the superficially opposing views expressed in Exhibits P-15 and D-16. His evidence, in Exhibit P-15 and in cross-examination, is based upon his personal knowledge of relevant facts relating to the lumber industry and review of relevant documents, as well as his opinion based upon his professional skill and experience. I accept his evidence as credible, relevant, useful for the determination of damages and not subject to any exclusionary rule; see *R. v. Mohan*, [1994] 2 S.C.R. 9 and *Merck & Co. v. Apotex Inc. et al.* (2005), 274 F.T.R. 113 (F.C.).

[1312] I am satisfied that the assumptions relied upon by Mr. Van Leeuwen in making these financial projections are reasonable, subject to my observations about a reduction in profits having regard to the modification in his evidence as to the volume of the Plaintiffs' products that will be sold in the Alaska market and also having regard to some uncertainty about the LRF.

[1313] Mr. Van Leeuwen initially calculated under pro forma no. 2 that the mill had an unrealized EBITDA of $42,500,000, for 2001 to 2010. As I previously stated, this amount must be reduced due to the change in Mr. Van Leeuwen's evidence with respect to the Alaska market. It must also be reduced to account for the LRF. As such, I find that on the balance of probabilities the Plaintiffs' expectation losses for 2001 to 2010 were $31,000,000. The Plaintiffs are entitled to recover these expectation losses as damages.

[1314] I have chosen to rely on the precise calculation of expectation losses from Mr. Van Leeuwen's evidence, but in any event these damages, totalling $31,000,000, represent a reasonable amount of compensation for the expectation losses of 2001 to 2010. Any difficulties in calculation should not prevent the Plaintiffs from recovery of this reasonable quantum of compensation; see *Wingate*.

[1315] Further, I have accepted that it was reasonable to project the expectation losses for 20 years. However, I find that the calculation of the further 10 years of expectation losses, for 2011 to 2020, is not capable of a precise mathematical calculation. Nevertheless, I agree with the Manitoba Court of Appeal in *Wingate* that it is "better that the damaged party receive a reasonable, if not mathematically measurable, amount than that there should be no compensation for the loss."

[1316] The Defendant was aware of the Plaintiffs' intentions to proceed with value-added facilities. As such she had notice that failure to fulfill her obligations would prevent the Plaintiffs from realizing their expectations with respect to Phase 3; see Exhibit P-79, Tab 282.

[1317] As well, the Defendant had been advised in the Kaska Forest Products Sawmill Project Study in April 1997, that the primary markets of a Watson Lake sawmill should be Japan, Korea and Taiwan.

[1318] Mr. Van Leeuwen did not consider the impacts of any future improvements to the mill, the construction of the planned value-added plant or sales to the Japanese market. As such, I believe that the reasonable expectation losses would be somewhat higher in the second 10 year projection, that is 2011-2020.

[1319] As a result, and considering all of the evidence, I find on the balance of probabilities that the Plaintiffs' reasonable expectation losses for 2011 to 2020 are $36,000,000. The Plaintiffs are entitled to recover these expectation losses as damages.

[1320] I find that the Plaintiffs are entitled to recover their expectation losses from 2001-2020, in the amount of $67,000,000, together with pre-judgment interest as discussed below.

7. Punitive Damages

[1321] The Plaintiffs seek recovery of punitive damages as well. This is a special category of damages, for which the award is subject to special considerations. In *Honda Canada Inc. v. Keays*, [2008] 2 S.C.R. 362, the Supreme Court of Canada issued the following caution at para. 68:

> [68] Even if I were to give deference to the trial judge on this issue, this Court has stated that punitive damages should "receive the most

> careful consideration and the discretion to award them should be most cautiously exercised" (*Vorvis*, at pp. 1104-5). Courts should only resort to punitive damages in exceptional cases (*Whiten*, at para. 69). The independent actionable wrong requirement is but one of many factors that merit careful consideration by the courts in allocating punitive damages. Another important thing to be considered is that conduct meriting punitive damages awards must be "harsh, vindictive, reprehensible and malicious", as well as "extreme in its nature and such that by any reasonable standard it is deserving of full condemnation and punishment" (*Vorvis*, at p. 1108). …

[1322] The test for the award of punitive damages was set out by the Supreme Court in *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595, at para. 36 as follows:

> Punitive damages are awarded against a defendant in exceptional cases for "malicious, oppressive and high-handed" misconduct that "offends the court's sense of decency": *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 196. The test thus limits the award to misconduct that represents a marked departure from ordinary standards of decent behaviour. Because their objective is to punish the defendant rather than compensate a plaintiff (whose just compensation will already have been assessed), punitive damages straddle the frontier between civil law (compensation) and criminal law (punishment).

[1323] The test is not easy to meet but I am satisfied on the basis of the evidence in this case that the Plaintiffs have met the test.

[1324] In *Whiten*, at para. 92, the Supreme Court said that “punitive damages are directed to the quality of the defendant’s conduct, not the quantity (if any) of the plaintiff’s loss.”

[1325] Further, at para. 94, the Court identified factors to be considered by the trier of fact in awarding punitive damages as follows:

> To this end, not only should the pleadings of punitive damages be more rigorous in the future than in the past (see para. 87 above), but it would be helpful if the trial judge's charge to the jury included words to convey an understanding of the following points, even at the risk of some repetition for emphasis. (1) Punitive damages are very much the exception rather than the rule, (2) imposed *only* if there has been high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour. (3) Where they are awarded, punitive damages should be assessed in an amount reasonably proportionate to such factors as the harm caused, the degree of the misconduct, the relative vulnerability of the plaintiff and any advantage or profit gained by the defendant, (4) having regard to any other fines or penalties suffered by the defendant for the misconduct in question. (5) Punitive damages are generally given only where the misconduct would otherwise be unpunished or where other penalties are or are likely to be inadequate to achieve the objectives of retribution, deterrence and denunciation. (6) Their purpose is not to compensate the plaintiff, but (7) to give a defendant his or her just desert (retribution), to deter the defendant and others from similar misconduct in the future (deterrence), and to mark the community's collective condemnation (denunciation) of what has happened. (8) Punitive damages are awarded only where compensatory damages, which to some extent are punitive, are insufficient to accomplish these objectives, and (9) they are given in an amount that is no greater than necessary to rationally accomplish their purpose. (10) While normally the state would be the recipient of any fine or penalty for misconduct, the plaintiff will keep punitive damages as a "windfall" in addition to compensatory damages. (11) Judges and juries in our system have usually found that moderate awards of punitive damages, which inevitably carry a stigma in the broader community, are generally sufficient.
> (Emphasis in original)

[1326] In *Whiten*, a claim under an insurance policy, the Supreme Court found that punitive damages were justified on the basis that the defendant was in breach of the distinct and separate obligation to deal with its policyholders in good faith. It found that this breach was independent of and in addition to the breach of the contractual duty to pay the loss.

[1327] In the present case, I have found that the Defendant breached its contract to supply the Plaintiffs with an adequate supply of wood, once the Plaintiffs had acted on the Defendant's promise in that regard and built the mill.

[1328] In *Whiten*, the Supreme Court held that an award of punitive damages required the Plaintiffs to show that they have suffered an "actionable wrong" that is independent of the causes of action for which they will be compensated. In this action, I have found that the Plaintiffs have succeeded in their claims for breach of contract, negligence and negligent misrepresentation.

[1329] It is my view that the conduct of the Defendant relating to the breach of contract here amount to an "actionable wrong" as discussed in *Vorvis* and *Whiten*. At para. 79 of *Whiten*, the Supreme Court said the following:

> In the case at bar, Pilot acknowledges that an insurer is under a duty of good faith and fair dealing. Pilot says that this is a contractual duty. *Vorvis*, it says, requires a tort. However, in my view, a breach of the contractual duty of good faith is independent of and in addition to the breach of contractual duty to pay the loss. It constitutes an "actionable wrong" within the *Vorvis* rule, which does not require an independent tort. I say this for several reasons.

[1330] In my opinion, the conduct of the Defendant here was misconduct. It was conduct that caused the breach of the contract. The breach was the failure to deliver an adequate supply of timber for the Watson Lake mill. However, the misconduct of the Defendant was such that it frustrated the fulfillment of her contractual obligations.

[1331] The Defendant has tried to characterize the conduct of its employees and agents as acting in the interest of Canadians by responsibly protecting the forest resources. I reject that argument. This contention by the Defendant is similar to the argument presented in *LaPointe et al. v. Canada (Minister of Fisheries and Oceans) et al.* (1992), 51 F.T.R. 161 (T.D.). Justice Collier, in *LaPointe*, observed, at para. 64, that:

> The defendants have maintained throughout, their actions were not undertaken in a high-handed or arrogant manner but rather were proceeded with after much deliberation and with the sole objective of protecting and preserving the fishing industry. I am not persuaded in the least, by this assertion.

[1332] I find that the conduct of the Defendant in this regard amounts to a breach of the obligation to discharge a contractual duty in good faith, an independent actionable wrong as discussed by the Supreme Court in *Whiten*.

[1333] I find that the action of some of the Defendant's employees and agents were "harsh, vindictive, reprehensible and malicious", the criteria identified by the Supreme Court in *Honda*. I have reviewed in some detail in my discussion of bad faith in that part of this judgment dealing with negligence.

[1334] I have also reviewed the conduct of the Defendant during the trial in my discussion about the conduct of the trial.

[1335] In *Whiten*, the Supreme Court of Canada capped an award of punitive damages at $1 million.

[1336] I am mindful of the reason for the award of punitive damages, that is to punish behaviour that offends decent society. As well, I acknowledge the guidance in *Whiten* that an award of punitive damages must be proportionate to the need for deterrence and that the award must be reasonable and rational.

[1337] Having regard to these factors, I am satisfied that an award of punitive damages in this case is warranted but in an amount less than the maximum. I assess those damages in a nominal amount of $50,000, having regard to my assessment of general compensatory damages for the Plaintiffs' expectation losses.

[1338] The record is replete with evidence illustrating the high-handed, arbitrary and highly reprehensible behaviour by servants and agents of the Defendant. I have already identified several examples of such behaviour.

[1339] The Defendant should be warned against the future repetition of this manner of conduct. At para. 37 of *Whiten*, the Supreme Court commented on the purpose of punitive damages, as follows:

> Punishment is a legitimate objective not only of the criminal law but of the civil law as well. Punitive damages serve a need that is not met either by the pure civil law or the pure criminal law. In the present case, for example, no one other than the appellant could rationally be expected to invest legal costs of $320,000 in lengthy proceedings to establish that on this particular file the insurer had behaved abominably. Over-compensation of a plaintiff is given in exchange for this socially useful service.

8. Interest

[1340] The Plaintiffs claimed interest upon any judgment awarded to them in this action. Both the *Federal Courts Act* and the *Crown Liability and Proceedings Act* address the award of pre-judgment interest and judgment interest, also known as post-judgment interest. Each of these statutes make provision for the award of interest by reference to the prevailing rate of interest in the province when the "cause of action" arises in the province. Prejudgment interest is provided for in subsection 36(1) of the *Federal Courts Act*, as follows:

Prejudgment interest — cause of action within province	Intérêt avant jugement — Fait survenu dans une province
36 (1) Except as otherwise provided in any other Act of Parliament, and subject to subsection (2), the laws relating to prejudgment interest in proceedings between subject and subject that are in force in a province apply to any proceedings in the Federal Court of Appeal or the Federal Court in respect of any cause of action arising in that province.	36 (1) Sauf disposition contraire de toute autre loi fédérale, et sous réserve du paragraphe (2), les règles de droit en matière d'intérêt avant jugement qui, dans une province, régissent les rapports entre particuliers s'appliquent à toute instance devant la Cour d'appel fédérale ou la Cour fédérale et dont le fait générateur est survenu dans cette province.

[1341] Judgment interest is authorized by subsection 37(1) of the *Federal Courts Act*, as follows:

Judgment interest — causes of action within province	Intérêt sur les jugements — Fait survenu dans une seule province
37 (1) Except as otherwise provided in any other Act of Parliament and subject to subsection (2), the laws relating to interest on judgments in causes of action between subject and subject	37 (1) Sauf disposition contraire de toute autre loi fédérale et sous réserve du paragraphe (2), les règles de droit en matière d'intérêt pour les jugements qui, dans une province, régissent les rapports

that are in force in a province apply to judgments of the Federal Court of Appeal or the Federal Court in respect of any cause of action arising in that province.	entre particuliers s'appliquent à toute instance devant la Cour d'appel fédérale ou la Cour fédérale et dont le fait générateur est survenu dans cette province.

[1342] Sections 31 and 31.1 of the *Crown Liability and Proceedings Act* are also relevant.

Subsection 31(1) is applicable and provides as follows:

Prejudgment interest, cause of action within province	Intérêt avant jugement — Fait survenu dans une province
31 (1) Except as otherwise provided in any other Act of Parliament and subject to subsection (2), the laws relating to prejudgment interest in proceedings between subject and subject that are in force in a province apply to any proceedings against the Crown in any court in respect of any cause of action arising in that province.	31 (1) Sauf disposition contraire de toute autre loi fédérale, et sous réserve du paragraphe (2), les règles de droit en matière d'intérêt avant jugement qui, dans une province, régissent les rapports entre particuliers s'appliquent à toute instance visant l'État devant le tribunal et dont le fait générateur est survenu dans cette province.

[1343] Subsection 31.1(1) is also relevant and provides as follows:

Judgment interest, causes of action within province	Intérêts sur les jugements — Fait survenu dans une province
31.1 (1) Except as otherwise provided in any other Act of Parliament and subject to subsection (2), the laws relating to interest on judgments in causes of action between subject and subject that are in force in a province apply to judgments against the Crown in respect of any cause of action	31.1 (1) Sauf disposition contraire de toute autre loi fédérale et sous réserve du paragraphe (2), les règles de droit en matière d'intérêt pour les jugements qui, dans une province, régissent les rapports entre particuliers s'appliquent aux jugements rendus contre l'État dans les cas où un fait

arising in that province.	générateur est survenu dans cette province.

[1344] The causes of action at issue here arose in Yukon. Having regard to the definition of "province" in the *Interpretation Act*, cited earlier, the law in force in Yukon applies. As such, the applicable law is the *Judicature Act*, R.S.Y. 1986, c. 96, sections 35 and 36, which provide as follows:

Pre-judgment interest	Intérêts avant jugement
35 (1) In this section, "prime rate" means the lowest rate of interest quoted by chartered banks to the most credit-worthy borrowers for prime business loans, as determined and published by the Bank of Canada.	35 (1) Au présent article, « taux préférentiel » s'entend du taux d'intérêt le plus bas demandé par une banque à charte à ses clients les mieux cotés pour un prêt commercial accordé au taux préférentiel tel que ce taux est déterminé et publié par la Banque du Canada.
(2) For the purpose of establishing the prime rate, the periodic publication entitled the *Bank of Canada Review* purporting to be published by the Bank of Canada is admissible in evidence as conclusive proof of the prime rate as set out therein, without further proof of the authenticity of the publication.	(2) Pour établir le taux préférentiel, la publication intitulée *Revue de la Banque du Canada* donnée comme publiée par la Banque du Canada est admissible en preuve et fait foi du taux préférentiel y indiqué, sans qu'il soit nécessaire de fournir une autre preuve de l'authenticité de la publication.
(3) Subject to subsection (7), a person who is entitled to a judgment for the payment of money is entitled to claim and have included in the judgment an award of interest thereon at	(3) Sous réserve du paragraphe (7), le bénéficiaire d'un jugement portant paiement d'une somme a le droit de réclamer et de faire ajouter au jugement des intérêts sur cette

the prime rate existing for the month preceding the month in which the action was commenced calculated from the date the cause of action arose to the date of judgment.	somme au taux préférentiel en vigueur au cours du mois précédant celui où l'action a été introduite. Ces intérêts sont calculés à compter de la date à laquelle la cause d'action a pris naissance jusqu'à la date du jugement.
…	…
(5) Interest under this section shall not be awarded (a) on exemplary or punitive damages; (b) on interest accruing under this section; (c) on an award of costs in the action; or (d) on that part of the judgment that represents pecuniary loss arising after the date of the judgment and that is identified by a finding of the court.	(5) Les intérêts calculés sous le régime du présent article ne sont pas accordés dans les cas suivants : a) sur les dommages-intérêts exemplaires ou punitifs; b) sur les intérêts courus en vertu du présent article; c) sur les dépens adjugés dans l'action; d) sur la partie du jugement correspondant à la perte pécuniaire survenue après la date du jugement et déterminée par le tribunal.
…	…
(7) The judge may, if considered just to do so in all the circumstances, in respect of the whole or any part of the amount for which judgment is given, (a) disallow interest under this section; (b) set a rate of interest higher or lower than the prime rate; or (c) allow interest under this section for a period other than that provided.	(7) Dans la mesure où il l'estime juste, compte tenu de toutes les circonstances et à l'égard de la totalité ou d'une partie du montant du jugement, le juge peut : a) refuser d'accorder l'intérêt prévu au présent article; b) fixer un taux d'intérêt différent du taux préférentiel; c) accorder l'intérêt pour une période différente de celle que prévoit le présent article.

Post-judgment interest	Intérêts postérieurs au jugement
36 (1) In this section, “prime rate” has the same meaning as in section 35.	36 (1) Au présent article, « taux préférentiel » a le même sens qu’à l’article 35.
(2) A judgment for the payment of money shall bear interest at the prime rate from the day the judgment is pronounced or the date money is payable under the judgment.	(2) Un jugement condamnant au paiement d’une somme d’argent porte intérêt au taux préférentiel à partir de la date où a été rendu le jugement ou à partir de la date fixée par le jugement.
(3) During the first six months of a year interest shall be calculated at the prime rate as at January 1 and during the last six months interest shall be calculated at the prime rate as at July 1.	(3) Durant les six premiers mois de l’année, l’intérêt est calculé au taux préférentiel établi le 1er janvier. Pour les six derniers mois, l’intérêt est calculé au taux préférentiel en vigueur le 1er juillet.
…	…
(5) If the court considers it appropriate, it may, on the application of the person affected by, or interested in a judgment, vary the rate of interest applicable under this section or set a different date from which the interest shall be calculated.	(5) Si le tribunal l’estime indiqué, il peut, si la personne visée par le jugement ou que le jugement intéresse en fait la demande, modifier le taux d’intérêt applicable en application du présent article ou fixer une autre date à partir de laquelle l’intérêt est calculé.
…	…
(9) This section comes into force on the date that sections 11 to 14 of the Interest Act (Canada) cease to have effect in the Yukon Territory.	(9) Le présent article entre en vigueur à la date où les articles 11 à 14 de la Loi sur l’intérêt (Canada) cessent d’avoir force de loi au territoire du Yukon.

[1345] With regard to subsection 36(9) of the *Judicature Act*, I note that sections 11 to 14 of the *Interest Act*, R.S.C. 1985, c. I-15, ceased to have effect in the Yukon Territory on September 30, 1993; see SI/93-195.

[1346] Under the *Judicature Act*, pre-judgment interest on monetary damages is discretionary but should be awarded unless there are exceptional circumstances or there is an exclusion under section 35(5); see the findings of the Alberta Court of Appeal in *Brooks v. Stefura* (2000), 192 D.L.R. (4th) 40 (Alta. C.A.) relative to similar legislation. The provisions of the *Federal Courts Act* and the *Crown Liability and Proceedings Act* are also substantively the same.

[1347] In this case, the Defendant has not shown a reason for any deviation from the general rule that pre-judgment interest should be awarded.

[1348] Where a party has suffered damage, pre-judgment interest forms part of the compensation. The purpose of pre-judgment interest is "compensation for being deprived of damages from the date they are suffered"; see *Tridan Developments Ltd. v. Shell Canada Products Ltd.* (2002), 154 O.A.C. 1 (C.A.).

[1349] If the party is not awarded pre-judgment interest then it may be undercompensated for the loss. This principle is based upon the assumption that the injured party would have invested the money.

[1350] Similarly, the Court must also ensure that the party is not overcompensated. It is this consideration that is the basis for the exclusion in para. 35(5)(d) of the *Judicature Act*. Subsection 35(5)(d) precludes the awarding of damages for any pecuniary losses that arise after the date of judgment. Overcompensation would occur if the party is awarded interest on the future pecuniary losses, and then subsequently invests that money and collects interest on it.

[1351] As Lord Denning explained in *Jefford v. Gee*, [1970] 2 Q.B. 130 (C.A.), at 147:

> Where the loss or damage to the plaintiff is *future pecuniary loss*, e.g. loss of future earning, there should in principle be *no* interest. The judges always give the present value at the date of trial, i.e., the sum which, invested at interest, would be sufficient to compensate the plaintiff for his future loss, having regard to all contingencies. There should be no interest awarded on this: because the plaintiff will not have been kept out of any money. On the contrary, he will have received it in advance.
> (Emphasis in original)

[1352] There will be no prejudgment interest on those losses which are projected to occur in the future.

[1353] Section 35(3) of the *Judicature Act* provides that interest shall be calculated from the date that the cause of action arose to the date of judgment.

[1354] In the result, I find that prejudgment interest is appropriate on the damages incurred from the date the cause of action arose, August 3, 2000 until today. This interest is awarded on the damages I have assessed up to 2010.

[1355] The Plaintiffs have asked the Court to award compound interest and in this regard, rely on the decision in *Alberta v. Nilsson* (2002), 288 W.A.C. 88 (Alta. C.A.).

[1356] I have found these causes of action arose in a commercial context. The evidence is that the Plaintiffs would have sought a more business friendly jurisdiction in which to invest. However, there is no evidence that the Plaintiffs would have changed the form of their investment, that is, a sawmill. As such, I find that compound interest would result in overcompensation and I decline to exercise my discretion to grant compound interest.

[1357] Post-judgment interest will be paid from the date of judgment until the date that the judgment is paid, in accordance with section 36 of the *Judicature Act*.

[1358] The *Judicature Act* provides that the interest rate, for prejudgment interest, is the Bank of Canada prime business interest rate for the month prior to the cause of action arising. However, the Plaintiffs did not draw my attention to the Bank of Canada prime business interest rate for July 2000.

[1359] Further, given the dramatic change in the national economic situation over the last 10 years, and the lengthy time in completing this litigation, it is appropriate for me to exercise my discretion with respect to the interest rate. I intend to do so in order to prevent overcompensation of the Plaintiffs with respect to varying interest rates.

[1360] Counsel for both parties will make submissions on interest. These submissions with respect to interest will only address the following issues:

a) the Bank of Canada prime business rate of interest, as contemplated by subsection 35(1) of the *Judicature Act*, monthly from July 2000 to May 2010;

b) the appropriate rate of interest to be awarded given my concerns with varying interest rates and overcompensation. There will be no compound interest; and

c) the quantum of interest on the damage award up to 2010, in accordance with the *Judicature Act* and my findings.

[1361] These submissions on interest will be made as part of the submissions on costs and a Direction will issue regarding the timelines for service and filing of motion records in that regard.

9. Partnership or Joint Venture

[1362] The Defendant focused a great deal of effort in her cross-examination of the Plaintiff's witnesses, and in written argument, on the issue of whether the mill in Watson Lake was built by a partnership or a joint venture.

[1363] In her written submissions, Counsel for the Defendant argued that this finding was important for the following reasons:

a. Should this Court dismiss this action with costs, it is submitted that every partner in will be liable jointly with the other partners, to the last vestige of his property for all debts and obligations of the firm, including the costs of this action.

b. It is submitted that the venturers have continued these proceedings in the comfort that, as the plaintiffs are broke, they can run up the costs of this action.
c. This Court should be hesitant to permit litigants to act in this manner.

d. A finding of partnership will act as a deterrent for other like-minded "joint venturers".

[1364] These reasons for requesting a finding of partnership do not relate to the liability or a defence from the causes of action, nor is it a finding that is necessary for costs. As there is no requirement to make such a finding, I decline to do so.

[1365] It appears on the face of the Defendant's argument that this finding is sought so that she could seek recovery for the anticipated costs of this action, from the other alleged partners, in a separate cause of action. The authority to recover a debt against another partner arises from the *Partnership and Business Names Act*, R.S.Y. 2002, c. 166. However, that will be a private action between two private parties and is a question properly for the Courts of Yukon. There is no jurisdiction for this Court to make such a finding.

[1366] As well, the Defendant is asking the court to find a partnership among four separate legal personalities. The consequence of a finding of partnership brings with it significant legal obligations, and potentially severe consequences. It is for that reason that a determination of partnership relies primarily on the intention of the alleged partners; see *Perreault v. Churchill*, [1994] Y.J. No. 121 (S.C.)(Q.L.).

[1367] However, two of the four alleged partners are not parties to this action. The absence of two parties supports my decision to decline to answer this question.

[1368] That is not to say that the Court cannot award costs against non-parties. It can do so on the basis of its inherent jurisdiction of the Court to prevent an abuse of process; see *Richardson International Ltd. v. Ship Mys Chikhacheva et al.* (2002), 220 F.T.R. 81 (T.D.) and *Lower Similkameem Indian Band v. Allison et al.* (1995), 99 F.T.R. 305 (T.D.), both decisions of the late Prothonotary Hargrave. However, such an order does not require a finding of partnership. It is simply not necessary to make a finding that has such serious and far-reaching effects without the benefit of hearing from the other parties and in the correct forum, in order to protect the rights of the litigants in this proceeding.

[1369] In summary on this point, I will make one comment about this request from the Crown. It is clear from all of the evidence that the alleged partners include LPL, SYFC, 18232 Yukon Inc. and KFR. It is also clear that the Crown "pushed" KFR into the joint venture. It is shocking to me that at this juncture the Crown would seek a finding that would allow recovery against KFR under those circumstances and without an opportunity to present argument.

10. The Counterclaim

[1370] The Defendant filed a Counterclaim on February 26, 2003 against the Plaintiff SYFC, advancing various claims relative to certain lands next to the Alaska Highway in the Yukon Territory, pursuant to a lease that was entered into on October 21, 1992 between the Defendant and

The North Contracting Ltd. According to the Counterclaim, that lease was subsequently amended as to the description of the lands leased.

[1371] The Counterclaim alleges that the lease was assigned by The North Contracting Ltd. to LPL on November 15, 1996.

[1372] The Counterclaim further alleges, at para. 42, that on August 11, 1997, the Defendant and The North Contracting Ltd. made a further "amendment of the Lease pursuant to which provision was made for a renewal of the Lease and the parties expressly agreed that all other terms and conditions of the Lease are confirmed".

[1373] According to para. 43 of the Counterclaim, LPL assigned the lease to SYFC. Para. 43 of the Counterclaim further states that:

> …it was an express term of the said assignment that the Defendant by Counterclaim shall and will, from time to time during all of the residue of the Lease pay the rent and perform the covenants, conditions and agreements contained in the Lease.

[1374] According to paragraph 44 of the Counterclaim, a further agreement amending the lease was made on July 12, 2000. Para. 44 of the Counterclaim provides as follows:

> On July 12, 2000, the Plaintiff by Counterclaim and the Defendant by Counterclaim entered into an amendment of the Lease pursuant to which, *inter alia*, the description of the land was expressly amended as the Lands and the annual rental fee recital was expressly cancelled and replaced such that the Defendant by Counterclaim yield and pay to the Plaintiff by Counterclaim yearly and every year in advance a rental of four thousand and sixty dollars ($4,060.00), or such other rental as may be fixed by the Minister of Indian Affairs and Northern

> Development pursuant to clause 26 of the Lease and the parties expressly agreed that all other terms and conditions of the Lease are confirmed.

[1375] The Defendant, in paragraph 45, alleges that on September 1, 2001, the Plaintiff SYFC failed to "deliver" the rental of $4,060 plus Goods and Services Tax upon that amount.

[1376] In paragraph 46, the Defendant alleges that she performed her obligations under the lease. In paragraph 47, she alleges that she had "made demands for payment of the said arrears upon Defendant by Counterclaim [SYFC] and Defendant by Counterclaim has refused or neglected to make payment thereof in full or in part".

[1377] The Defendant confirmed, on the record at trial, that she was only pursuing relief in respect of paragraph 30 B of the Counterclaim which provides as follows:

> Her Majesty the Queen the Queen in Right of Canada claims as plaintiff by counterclaim, to whom is hereinafter referred in this counterclaim as the "Plaintiff by Counterclaim", against South Yukon Forest Corporation as defendant by counterclaim, to which is hereinafter referred in this counterclaim as the "Defendant by Counterclaim", as follows:
>
> 30.
> …
>
> B. judgment in the amount of $4,060.00 plus Goods and Services Tax and interest calculated at 3% *per annum* or, in the alternative, interest pursuant to the *Judicature Act infra*;

[1378] A Defence to the Counterclaim was filed on behalf of SYFC on October 30, 2003. Although the Defendant filed a Second Amended Defence and Counterclaim on December 17, 2004 and a

further Amended Defence and Counterclaim on February 6, 2006, there were no substantive changes to the Counterclaim and SYFC chose not to file an Amended Defence to the Counterclaim but to rely on the pleading that had been filed on October 30, 2003.

[1379] In the Defence to the Counterclaim that had been filed on October 30, 2003, the Plaintiff SYFC replied to paras, 43 and 44 of the Counterclaim as follows:

> 6. In answer to paragraph 43 of the Counterclaim, the Defendant by Counterclaim admits that Liard Plywood and Lumber Manufacturing Inc. assigned to it the Lease but says that the covenant of the Defendant by Counterclaim to pay the rent and perform the covenants, conditions and agreements contained in the Lease, was with the Assignor, Liard Plywood and Lumber Manufacturing Inc., and not the Plaintiff by Counterclaim.
>
> 7. In answer to paragraph 44 of the Counterclaim, the Defendant by Counterclaim admits that on or about July 2, 2000, the Plaintiff by Counterclaim and the Defendant by Counterclaim entered into an amendment of the Lease wherein, *inter alia*, the description of the land was amended as the Lands and the annual rental changed to $4,060 plus GST payable yearly in advance, but the Defendant by Counterclaim denies that there was any covenant in the said amendment that required the Defendant by Counterclaim to pay to the Plaintiff by Counterclaim the said rent.

[1380] The Plaintiff's Defence to paragraph 47 of the Counterclaim is set out in paragraph 8 of its Statement of Defence as follows:

> 8. In answer to paragraphs 45 and 46 of the Counterclaim, the Defendant by Counterclaim admits that it failed to deliver to the Plaintiff by Counterclaim the rental of $4,060 plus GST as alleged, but says that it was an implied term of the Lease that if the Plaintiff by Counterclaim did not grant timber harvesting rights to the Defendant by Counterclaim, as alleged in the Amended Statement of Claim, that payment of the annual rent would be waived by the Plaintiff by Counterclaim, or alternatively payment of the annual rent would be deferred until such time as the said timber harvesting rights

> were granted by the Plaintiff by Counterclaim to the Defendant by Counterclaim. The Plaintiff by Counterclaim refused or failed to grant the said timber harvesting rights, and by reason thereof, the said annual rent of $4,060 plus GST was not due, owing and payable by The North Contracting Ltd., Liard Plywood and Lumber Manufacturing Inc, or the Defendant by Counterclaim, to the Plaintiff by Counterclaim.

[1381] In the course of her closing submissions, the Defendant said that the lease had not been produced in the course of the trial, as appears from page 5929 of the transcript as follows:

> …that we realize that the contract of tenancy was not put before the court, therefore we have no ground upon which to claim the contractual interest of three percent per annum and therefore we rely solely on the *Judicature Act* for any interest that the court may be please to award to Her Majesty. The evidence of Mr. Kerr, and I believe I've read that to the court earlier this week, where he admits that this amount is outstanding and due and owing to the Crown, that's my submission as to what he has said.
>
> JUSTICE: Well, all I want now - - just so I am crystal clear on this, that Her Majesty the - - the defendant is withdrawing the counterclaim except for Her prayer for recovery of rent in this amount as set out in paragraph upper case B on page 12 of the defendant's second amended Statement of defence and counterclaim.
>
> MR. WHITTLE: Yes, My Lady.
>
> JUSTICE: That's correct? Fine.
>
> MR. WHITTLE: That is correct.

[1382] The references to the evidence of Mr. Alan Kerr are found at pages 5545 and 5546 of the transcript, that is on July 16, 2008. At page 5545, the Defendant referred to the evidence of Mr. Kerr found at pages 1830 and 1831 of the transcript, that is from the cross-examination of Mr. Kerr on April 14, 2008. Lines 24, page 1830 to line 21, page 1831 read as follows:

> Q You will admit today on behalf of both companies that they entered into a lease with the government of Canada for the site at which the mill is located?
>
> A Yes.
>
> Q And that under that lease there were lease payments to be made?
>
> A Yes.
>
> Q Will you admit today that the lease payments were not fully made?
>
> A I'm not sure when they would have ceased being paid. They have. Assuming your question, I guess they have. I know they were paid all the way through the operation and even after the operation of the mill to at least a certain date.
>
> Q Will you admit today that there is the outstanding amount of $4,060 plus Goods and Services Tax in respect of the last payment owed to Her Majesty the Queen under that lease?
>
> A I can't verify it either way, but, again, if you're presenting those numbers from the Government of Canada, I believe it to be true.

[1383] The Defendant bears the burden of establishing the breach of contract and recovery of damages as alleged in paragraph 30B of the Counterclaim.

[1384] The Counterclaim is advanced pursuant to Rule 189 of the Rules. The Defendant must show that, independent of the Court's jurisdiction in respect of the main claim, there is jurisdiction with respect to the Counterclaim. In this regard, I refer to the decision in *Gaudet v. Canada et al.* (1998), 148 F.T.R. 13 (T.D.).

[1385] The Defendant's claim is based upon a contract. According to the Counterclaim, the lease was subject to the *Territorial Lands Act* and the *Territorial Lands Regulations*. Both meet the status of "federal law", as discussed in *Mueller (Karl) Construction Ltd. v. Canada* (1992), 59 F.T.R. 161 (T.D.). Assuming that this Court has the jurisdiction to entertain the Defendant's Counterclaim relative to an alleged breach of contract, but not deciding the point, I note that jurisdiction is one thing and proof, upon the balance of probabilities, is another.

[1386] The only evidence tendered by the Defendant is the indefinite evidence from Mr. Alan Kerr, quoted above. If this evidence constitutes an admission, it is subject to being weighed in terms of its probative value and relevance. In this regard, I refer to the decision in *Clarke v. Minister of National Revenue* (2000), 189 F.T.R. 76 (T.D.), at para. 46.

[1387] In my opinion, the evidence of Mr. Kerr as to any outstanding rent is equivocal at best. He does not profess personal knowledge of the matter. He appears to accept at face value the dollar amount alleged by the Defendant, but he does not accept that rent had ceased to be paid.

[1388] There is no evidence at all about the terms of the original lease, of any of the amendments, or of any of the assignments. There is no basis for the Court to determine if any of the amendments or the assignments affected the liability of SYFC in the matter of paying rent under the original lease. Indeed, para. 6 of the Defence to Counterclaim, quoted above, presents a complex answer to liability of SYFC in that regard. The Defendant made no submissions in that regard.

[1389] For what it is worth, paragraph 44 of the Counterclaim, also quoted above, suggests a lack of certainty about the terms relating to the amount of the rental, referring to “four thousand and sixty dollars ($4,060.00) or such other rental as may be fixed by the Minister of Indian Affairs and Northern Development” (Emphasis added).

[1390] The only evidence offered by the Defendant in respect of the Counterclaim is not sufficient. Mr. Kerr’s answer in cross-examination on April 14, 2008 was no more than a “guess”, in my opinion and fails to meet the burden of proof required in a civil proceeding, that is the balance of probabilities.

[1391] In the result, the Counterclaim is dismissed. Costs in this regard will be addressed later by the parties.

11. The Conduct of the Case

[1392] In closing, it is appropriate for me to make some brief remarks about the conduct of this case.

[1393] This has been a time-consuming matter. The clock can be set in 1996 when LPL first approached DIAND and the bell rang when the mill closed in August 2000. The clock was re-set with the issuance of the Statement of Claim in November 2001; another bell sounded when the trial began on March 31, 2008.

[1394] There were many witnesses and an enormous number of documentary exhibits. Many of the documents were produced by the Defendant from her files but that production, in spite of the great volume of documents, was not complete.

[1395] In this regard, I note that the email accounts of certain key employees of the Defendant were not produced. The copies of emails from those persons have been introduced from the accounts of the recipients and not from the accounts of the senders, specifically, the email accounts of Ms. Guscott and Mr. Sewell.

[1396] As well, some of the emails that were produced indicate that they are forwarded messages. However, they do not include the original message that had been forwarded. This means that the email exhibits, which constitute business records under the *Canada Evidence Act*, tell the Court what the recipient-responder says but not what the sender-speaker says. Examples of this are Exhibit P-79, Tab 161, and Tab 313.

[1397] Additionally, certain key documents relating to this case were not produced by the Defendant at all, but were retrieved by the Plaintiffs pursuant to access requests directed to both the YTG and the Federal Government. These exhibits include Exhibit P-79, Tab 24, Tab 48 and Tab 361.

[1398] This invites inquiry as to why did not the Defendant herself disclose these documents.

[1399] Next, I must comment on the non-disclosure of Exhibit P-38, the August 1991 final version of the Sterling Wood Report. The Defendant disclosed the draft version of this document in her trial documents, later entered as part of Exhibit D-81, at Tab 3.

[1400] Exhibit P-38 was entered as an exhibit on day 19 of the trial. Exhibit P-38, the Sterling Wood Report, is a FMP. It was entered as an exhibit during the cross-examination of the Defendant's witness, Mr. Monty. Mr. Monty was the sixth witness called on behalf of the Defendant. As of the last day of hearing in this trial, that is September 17, 2008, Exhibit P-38 was the only FMP that had been produced as an exhibit in this action.

[1401] Why was this not disclosed prior to the beginning of the trial? Why was it not produced when the Defendant began her case?

[1402] Mr. Ivanski, the RDG when LPL first approached DIAND about building a mill in Watson Lake, was the fourth witness called by the Defendant. Mr. Ivanski testified, in cross-examination, about P-38.

[1403] In my opinion, Mr. Ivanski's evidence is internally contradictory. On the one hand, he stated at page 2655 of the transcript:

> Q And sir, you spoke yesterday of a forest management plan, do you remember that?
>
> A Yes.

> Q And you knew there was a forest management plan in place at that time. That's what you said.
>
> A I knew there was a -- yes.
>
> Q Thank you. Now, did you come to understand, sir, that a company by the name of Stirling, or the Stirling Group had participated in the creation or development of that forest management plan?
>
> A I don't remember or recollect any particular name.

[1404] He later testified, at page 2669 of the transcript that:

> Q Now sir, did anybody show you a copy of the forest management plan that was in existence?
>
> A I don't remember ever seeing it, no.
>
> Q Did you ever ask to see a copy of it?
>
> A I don't remember ever asking for it.

[1405] On the other hand, he said that the Department had “input on the report” and stated that options contained within the report had been tabled. This evidence is found at page 2702 of the transcript:

> Q Thank you. Now, what you then have at page 795 of the same documents, is as follows. Under the heading "Annual allowable cut," you have two scenarios presented. Do you see that?
>
> A Correct.
>
> Q And you understood those to be the two options then being considered. Correct?
>
> A That we tabled for discussion, yes.

[1406] These internal contradictions undermine the reliability of Mr. Ivanski's evidence.

[1407] Mr. Sewell, RDG in the Whitehorse office from December 1997 to December 2001, was also cross-examined about P-38 when he was called as a witness for the Defendant. The following evidence appears at pages 4218 to 4222 as follows:

> Q. Now sir, in the course of your evidence that you gave in responding to questions asked of you by Mr. Whittle, you were asked some questions in relation to the Sterling Wood Report. Do you remember that?
>
> A. I do remember that.
>
> Q. And as I understand it, sir, the first time that you personally became familiar with the existence of such a document or report was in the course of litigation and in the course of examinations for discovery, is that true?
>
> A. That's my recollection, yes.
>
> Q. If I were to suggest to you that that likely took place well after your own examination for discovery but during the course of Mr. Kerr's discovery, would that also be consistent with your memory?
>
> A. I'm not sure exactly during the period of discovery when I first encountered that document.
>
> Q. Let's see if I can assist you in this respect. And Mr. Whittle will undoubtedly have a better memory of this than do, I but this is designed to refresh your memory on the issue, sir.
>
> In a discovery, which took place in February of '03, Mr. Alan Kerr, the deponent for the plaintiffs, made reference to the Sterling Wood report and then was asked to produce that report. The plaintiffs were unable to do so, and then some years later in January of 2007, Mr. Kerr was further examined by Mr. Whittle, at which time Mr. Whittle brought a copy of the report or reports to the discovery process.

Now does that generally accord with your memory?

A. Yes it does, sir.

Q. Now, what I want to do is determine which document you are referring to, whether or not it's the March draft or the August report.

And I would ask that the witness be shown defendant's white volume tab 3, as well as exhibit P-28 - - P-38, I'm sorry.

Now sir you've got before you defendant's white binder volume 1, tab 3. That should be some documentation bearing a date of June 1st, 1991 from Sterling Wood Group. Do you see that?

A. I have that at tab 3 of volume 1 of the white binders, yes.

Q. And there are lots of handwritten notations on that material, you are aware of that?

A. I see that, yes.

Q. And then, sir, you see Exhibit P-38, which is the documentation dated August, 1991. Do you see that?

A. I see that, yes.

Q. Now, Exhibit P-38 did not surface in this trial until I cross-examined Mr. Monty. Do you remember that?

A. I don't recall that, no.

Q. Now sir, which of the two documents which are before you, did you come to be aware of late in the discovery process? Or did you come to be aware of both during the discovery process?

A. I don't recall ever seeing the one - - I don't recall the one with the June 3rd memo on top of it. I recall seeing it as a stand alone document, perhaps more resembling the August of '91 version.

Q. Do you recall seeing P-38 during the course of the examination for discovery process late 2006, early 2007?

A. I believe so, yes sir.

Q. So that's the document, as opposed to the June 1st document, that you saw during the course of the discovery process. Am I right?

A. The one that I would have seen during the discovery process would be the one, as you've described that Mr. Whittle presented, I believe here in Vancouver, during discovery. So I'm just not - - I believe it to be the P-38 document, but it would be whichever one that was produced at that time.

Q. All right. Well, part of the reason for my question is you refer to it in your evidence and I was searching for the reason why P-38 wasn't included in the white binders. And whatever the case is, we now know that - - your memory of the situation as it exists today. Okay?

A. Yes sir.

Q. Now sir, however you choose to characterize it, I take it that you as the Regional Director General were unaware, you were unaware of the existence of this material prior to late '06, early '07 is that right?

A. I may have heard the title of it, but I certainly had never sent he document during my - - I don't recall seeing the document during the period that I was Regional Director General.

JUSTICE: Excuse me, Mr. Sali, you said "this material". What are you talking about?

MR. SALI: Either of the documents.

JUSTICE: Thank you.

MR. Sali:

Q. Would that be true, Mr. - -

A. It would be the same answer, yes.

[1408] This evidence is disturbing. The Sterling Wood Report is an important document. Mr. Sewell testified that he first saw this document, either the final report or the draft report, during the

discovery examination of Mr. Alan Kerr in January 2007. Why was Mr. Sewell, as the RDG, unfamiliar with this document? Why was this document not produced in the Defendant's documents?

[1409] Why did both Mr. Ivanski and Mr. Sewell, each the RDG at times that are relevant to this action, profess unawareness of the existence and contents of Exhibit P-38?

[1410] Finally, I turn to Exhibit D-11, an exhibit consisting of six binders of documents that had been produced by the Plaintiffs in the course of pre-trial discovery examinations. It was referred to on April 2, 2008, day 3 of a trial that spanned several months, as containing documents that had been proven for the truth and accuracy of their contents. The following appears at page 550 of the transcript for April 2:

> MR. WHITTLE: Well, my understanding of an exhibit is that it's an exhibit that's been proven admissible in court, either for the purpose of the truth of the contents or for the fact that the document was made. Now, we have -- in our documents, we're prepared six binders which we say are proven for the contents and authenticity. And the documents in there are also documents that I'm seeing come up in some of these documents, and then of course you have white binders of the Crown as well, which are there for identification.

[1411] The following discussion appears in the transcript for April 4, 2008, at pages 792 to 798:

> MR. WHITTLE: All right. The white documents are documents that we're putting forward to the court for identification. We would say that that should be marked as an exhibit for identification. We've informed our learned friend when he came on the file that we have approximately 223 documents which we have obtained admissions on discovery from. And we invited our learned friend to - - we've apprised him of that. We told him that we

intended to submit those as documents, which have been proven for both authenticity and the truth of the contents.

There is an agreement called Protocol 1 on the discovery that speaks to that. As well there are documents in which the plaintiffs have admitted as true and accurate.

So yes, we can speed this up by entering that as a full exhibit, all 223. I'm not sure my learned friend's prepared to agree to that.

MR. SALI: Mr. Whittle, My Lady, there has never been an occasion, that I am aware of, in which the plaintiffs have ever suggested that any of the documents of this nature are not true copies of originals. That's number 1.

Number 2, if there was a protocol established as between Mr. Preston, my predecessor, and Mr. Whittle, that's a perfectly acceptable binding protocol, and it deals with other issues.

Now, the simple fact of the matter is, is that as Your Ladyship pointed out yesterday, when you have documents as part of the business records of a corporation, and they're viewed as being true copies, obviously unless and until somebody distances themselves from those documents, there's a presumption, and we're bound by that presumption and I'm not going to take any position other than that.

…

MR. WHITTLE: Is my learned friend going to admit that the contents are true and accurate?

MR. SALI: Your learned friend is going to admit that the rules of evidence that apply, as I've just mentioned, govern each one of these - - each one of us in these proceedings. And as to whether or not truth of contents, if you want to go that far for other reason, that if, as and when you get the opportunity to put your case in, do it.

JUSTICE: Mr. Whittle, I have to take a look at the *Canada Evidence Act*, but from what I recollect, business records, I have to agree with what Mr. Sali is saying.

MR. WHITTLE: My Lady, we spent a lot of time at discovery getting the admissions that we have. We're happy with those

submissions. In terms - - there may be documents in there that may not be subject to *Canada Evidence Act*, and we have taken the time at discovery to do all of that. And we submit that every document in that binder is true and accurate, and admitted as such by the plaintiffs.

JUSTICE: You mean in your black binders?

MR. WHITTLE: Yes, ma'am.

JUSTICE: In your six black binders. Well, if that's - - I mean, an admission by the plaintiff remains an admission by the plaintiff, and an admission made in discovery, which is a new one - - I won't say it's new to me to have an admission in discovery. Documents that were admitted in discovery remain admitted for the purposes of this trial. The discovery examination itself, that's another story. That's subject to the limitations of our rules, which differ in some regards from the provincial rules of procedure on the use of discovery. But we don't have a problem with that right now.

But insofar - - I mean, Mr. Sali is nodding his head. The admissions made at the discovery process remain admissions, and if it'll help things out, why don't we have this collection of black books admitted right away. Mr. Sali?

MR. SALI: My Lady, if it'll speed things up, yes.

JUSTICE: Mr. Whittle?

MR. WHITTLE: If my learned friend is saying he admits that the contents of those documents are true and accurate, I'm happy to move on.

JUSTICE: But didn't you just tell us that this was - - you went through all of this at the discovery?

MR. WHITTLE: Yes.

JUSTICE: Well then, why are we doing it again? The admissions made at discovery still binds the plaintiff.

Mr. Sali, am I right in saying that?

MR. SALI: Yes, My Lady.

JUSTICE: Well, if I'm right, I'm right, and - - well, it's not a question of me being right. The admissions made at the discovery with respect to documents, or anything else that was admitted at the discovery, would still apply and bind the plaintiffs.

MR. WHITTLE: Yes, My Lady. And - - I realize that.

JUSTICE: Well then what - - why - -

…

MR. WHITTLE: Okay. Because my learned friend has never until this day said he's prepared to admit those documents. I did not want to stand here at the end of trial and read 223 references to documents. I'm not as satisfied at this point in time about the application of the *Canada Evidence Act* to the extent that the contents are true and accurate of all those documents in there, and that's why I took the time at discovery to do that.

I'm satisfied with what I've heard. If we could have those documents admitted as the next exhibit, then I'm satisfied.

JUSTICE: What I'm saying - - I'm going to say it again. Leaving aside the question of the *Canada Evidence Act* and how it applies to business records, for the very limited purpose of what we are now talking about, which is the contents of the six binders of - - the six black binders prepared by the defendant, I understand that these binders contain documents that were admitted, the truth and correctness of which were admitted during the discovery of the plaintiffs. It is my understanding that as a matter of law, an admission of that kind, made in the discovery process, is binding on the plaintiff right now for the purposes of this trial, and that it will be just and expedient and in the interests of justice to have these documents admitted right now as an exhibit, because they have not been contested by the plaintiffs, and obviously the plaintiffs having admitted them cannot now contest them.

Mr. Sali, do you agree?

MR. SALI: I agree.

[1412] On April 14, day 11 of the trial, the Defendant cross-examined Mr. Alan Kerr upon a letter dated May 29, 2000 that is contained in Exhibit D-11, Tab 219. This letter was put to Mr. Kerr in the following manner, as appears from pages 1847 to 1849 of the transcript:

> Q. Black volume 6, and that's black - - defendant's black. And Mr. Kerr, tab 219, please.
>
> A. I have it, yes.
>
> …
>
> Q. You should have in front of you again a letter without letterhead dated May 29th, 2000 with the page number for identification 9745. That's the one you have?
>
> A. Yes, I do.
>
> …
>
> Q. I just want you to confirm that this is a letter that was sent.
>
> A. I don't know if it was sent or not. What I'm saying is, the amount stayed the same. It was - - I believe it was at that amount, $4 million. But the contents within the letter may have changed. I'm not sure if it's a final version or not.
>
> Q. And just so you're aware, Mr. Kerr, you'll remember throughout the discovery I asked you on a number of documents whether they were true and accurate, and then we got protocol one. You'll remember all that, of course.
>
> A. Yes, I do.
>
> Q. And in this proceeding, <u>that document has been entered as proof of the truth of the contents. In other words, it's a document you admitted at one point in the discovery.</u> (Emphasis added)

[1413] On May 12th, day 17 of the trial during the cross-examination of Mr. Ivanski, a witness for the Defendant, the following statement was made by the Defendant respecting the status of Exhibit 11, at page 2743 of the transcript:

> MR. WHITTLE: With the exception of the black binders that the Crown has submitted as for the proof of the truth of the contents, that's always been my understanding.

[1414] On May 30th, day 24 of the trial, during the direct examination of Mr. Sewell when he appeared as a witness for the Defendant, the following statement was made concerning Exhibit D-11 at page 4162, as follows:

> MR. WHITTLE: No, My Lady. The black binders, as we all know, are submitted for the proof of truth of the contents.

[1415] The Defendant, subsequently, attempted to resile from the entry of Exhibit D-11 as documents that were admitted for the truth and accuracy of their contents. I refer to the following commentary that appears at pages 4317 and 4318 of the transcript on June 2nd, day 25 of the trial:

> MR. FLORENCE: My Lady, if I could speak to one matter first. I've mentioned to my learned friend that I was going to raise this issue.
>
> Prior to the lunch break Mr. Sali was putting some questions to Mr. Sewell with respect to the defendant's black binders as being admissions by the defendant that the contents thereof are proof of the truth of the contents. I just wanted to go on the record that it is the defendant's position that is not what those documents were put in for. They were put in as admissions on discovery by the plaintiff, and I believe the transcript will reflect that.
>
> JUSTICE: Thank you.
>
> MR. SALI: My Lady, so there is no misunderstanding, my position is two fold. You cannot put documents in for the truth and

content and expect it to be one sided. Secondly I'm going to quote from Mr. Whittle's submission at page 795 of the transcript.

JUSTICE: Do I need it or I just make a note of the page? I mean, I have these books too, but you read it to me.

MR. SALI: Yes. I'll just - - but it's a one-sentence submission,

> "And we submit that every document in that binder is true and accurate and admitted as such by the plaintiffs."

[1416] In closing submissions, Counsel for the Defendant made the following comments, at page 5895 and 5896 of the transcript, about Exhibit D-11:

MR. FLORENCE: I'd like to briefly address Exhibit D-11. I briefly put the defendant's position before the court on June 25th, during Mr. Sali's cross-examination of Terry Sewell. That's found in volume 25, page 4317, lines 11 to 24. I don't wish to read that back to the court at this time. I wish to repeat our position.

It's the defendant's position that these documents were entered as an exhibit on April 3rd, during the cross-examination of Mr. Bourgh. Page 798, volume 4, transcript, Your Ladyship stated at lines 11 to 28, I'm not going to read the whole part.

> "…It is my understanding that as a matter of law, an admission of that kind, made in the discover process, is binding on the plaintiff right now for the purpose of this trial, and that will be just and expedient and in the interests of justice to have these documents admitted right now as an exhibit, because they have not been contested by the plaintiffs, and obviously the plaintiffs having admitted them cannot now contest them."

It was intention of the defendant these documents go in as an exhibit for that purpose. It was not the defendant's position that the defendant was admitting the proof of the truth of the contents of these document, merely that the plaintiffs had admitted it. In addition, as you can see from the evidence of the defendant's witnesses, not one of them admitted making a promise or

> commitment or a contract for long-term tenure with the plaintiffs or any other guarantee of tenure.
>
> JUSTICE: Or any other?
>
> MR. FLORENCE: Any other guarantee of tenure. And we simply ask that you take this into consideration when deciding what weight to give to the documents enclosed in that exhibit.

[1417] The Defendant consistently took the position that Exhibit D-11 was entered for the truth and accuracy of its contents. The exhibits consist of 6 binders holding 223 documents. The Defendant sought an admission from the Plaintiffs, at trial, that the documents were true and accurate. Once that admission was made, the Defendant entered this collection of documents as an exhibit.

[1418] She cannot, in the course of her closing submissions, repudiate that which she has adopted as her own evidence. Neither can she opt to rely on those parts of the exhibit that she prefers and repudiate those other components that may be less helpful to her. I endorse and accept the submission made on behalf of the Plaintiffs at page 4318 of the transcript, quoted above.

12. Costs

[1419] In the course of the trial, Counsel for the Plaintiffs asked for the opportunity to make submissions on costs. I agreed. A Direction will issue regarding the timelines for service and filing of motion records in this regard.

VII. CONCLUSION

[1420] At the beginning of these Reasons, I said that this action was about a mill that was built in Watson Lake, a town situated in the southeastern part of the Yukon Territory.

[1421] I also said that these Reasons would address three questions: why was the mill built, why did it close and what are the legal consequences that follow.

[1422] The Plaintiffs advanced five causes of action: breach of contract, negligence, negligent misrepresentation, breach of fiduciary duty and misfeasance in public office. The claims for breach of fiduciary duty and misfeasance in public office have been dismissed and no further comment is required.

[1423] I revert to the three questions above. They relate directly to the remaining causes of action for breach of contract, negligence and negligent misrepresentation.

[1424] The questions are simple ones. At the end of the day, after a 39 day trial with evidence from 19 witnesses and the contents of more than 1000 individual documents, the answers are also simple.

[1425] The Plaintiffs built the mill because the Defendant made a commitment. The commitment was to provide an adequate supply of timber, if a mill were built. The making of the commitment, by itself, did not carry consequences in law. However, once it was acted upon by the Plaintiffs, a unilateral contract came into existence, between the Plaintiffs and the Defendant.

[1426] I have made a finding upon the basis of the evidence that was before me, that the commitment was to supply an adequate supply of wood over a long term which I have found to be a 20 year period.

[1427] The existence of a contract gave rise to legal obligations.

[1428] The Defendant breached the contract by failing to provide the adequate timber supply in the volume of 200,000 m^3 per year, over a 20 year term. That failure to provide the necessary timber supply caused the mill to close down.

[1429] The Defendant's breach of contract was a direct result of the negligence and bad faith of her servants and agents in the Yukon Regional Office. I have set out my findings in that regard above.

[1430] The breach of contract caused direct financial loss to the Plaintiffs.

[1431] The Defendant's promise to provide an adequate supply of timber for the mill was not only the foundation of a contract between LPL, SYFC and the Defendant, it was also a negligent misrepresentation *vis à vis* LPL. The negligent misrepresentation is a cause of action advanced and established by LPL.

[1432] The commitment, otherwise called a “promise”, was made during the scheduled “due diligence” meeting of July 15, 1997. The commitment was made to LPL.

[1433] The Defendant’s promise was intended to induce the construction of the mill. That promise, or commitment, was negligently made by the Defendant’s servants who knew, at the time, that the representation was untrue and would be relied upon. I have addressed earlier the constituent elements of negligent misrepresentation and my findings in that regard.

[1434] In closing submissions, Counsel for the Plaintiffs argued that the Defendant’s own documents proved the case for the Plaintiffs. I agree. By the “Defendant’s own documents”, I mean the documents created by the Defendant, including those documents that she did not produce. I refer in that regard to the documents obtained by the Plaintiffs pursuant to access requests, and otherwise.

[1435] Those documents plainly show that DIAND wanted to have a mill built in southeast Yukon. The Defendant’s policy decisions, as expressed in the Regulations that I mentioned earlier, required a mill. The statutory mandate of DIAND required promotion of economic development in the Yukon Territory. The mill fund had been established for the purpose of building a mill.

[1436] I refer, once again, to the decision in *Carrier Lumber* where the Court commented that the issues had been clouded by an overly technical approach.

[1437] The same can be said here.

[1438] The Defendant chose to structure her defence around the characterization of the actions of her servants and agents as “policy” decisions. She then went on to complicate and obfuscate the issues by a belated emphasis on administrative law remedies upon which she had been silent for a long time.

[1439] The Defendant did not plead this as a defence nor did she move to strike the Plaintiffs’ Amended Statement of Claim on this basis.

[1440] Instead, the Defendant chose to spring this defence in the course of closing arguments. She chose to advance technical and complicated arguments. She chose to paint the representatives as feckless adventurers. I have found otherwise.

[1441] This case was fact-driven. I have based my factual findings on the evidence, that is from the testimony of the witnesses and the documents, and upon reasonable inferences, including negative ones.

[1442] The relationship between the Plaintiffs and the Defendant gave rise to legal obligations. The breach of those obligations by the Defendant gave rise to consequences that the law recognizes as damages, in other words, a monetary award.

[1443] At the end of the day, I am satisfied that the Plaintiffs have met their legal and evidentiary burdens. They are entitled to judgment against the Defendant, in accordance with these Reasons.

"E. Heneghan"
Judge

Ottawa, Ontario
May 5, 2010

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FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2012-01
STYLE OF CAUSE:	SOUTH YUKON FOREST CORPORATION and LIARD PLYWOOD AND LUMBER MANUFACTURING INC. v. HER MAJESTY THE QUEEN
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DATED:	May 5, 2010

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