Federal Court  Cour fédérale

Date: 20110120

Docket: T-1049-95

Citation: 2011 FC 70

Ottawa, Ontario, January 20, 2011

PRESENT: The Honourable Mr. Justice Crampton

BETWEEN:

TREVOR NICHOLAS CONSTRUCTION CO. LIMITED

Plaintiff

and

HER MAJESTY THE QUEEN AS REPRESENTED BY THE MINISTER FOR PUBLIC WORKS CANADA

Defendant

REASONS FOR ORDER AND ORDER

[1] The defendant brought this motion for summary judgment on the issue of whether it breached its implied obligation to treat the plaintiff fairly in respect of tenders that the plaintiff submitted in response to four separate invitations to tender issued by the defendant.

[2] For the reasons that follow, I find that the defendant has satisfied the test for summary judgment on this issue. This motion will therefore be granted.

I. Background

[3] The plaintiff, Trevor Nicholas Construction Co. Limited, is a small contractor. It has been represented in this proceeding by its President, Mr. John Susin.

[4] Between 1989 and 1993, the plaintiff submitted the lowest bids in response to five invitations to tender that were advertised by the Department of Public Works Canada ("PWC"). The first of the tenders concerned a 1989 contract to dredge a part of the St. Clair River for the Canadian Coast Guard. The second tender concerned a contract to dredge the Lower Livingston Channel at Amherstburg, Ontario.

[5] On October 15, 1990, Mr. B.J. Vienot, on behalf of the defendant, informed the plaintiff in writing that it had been by-passed in favour of the second-lowest bidder on each of the two above-mentioned tenders based on: (i) its previous unsatisfactory work; and (ii) the apparent incapacity of the plaintiff to perform the work tendered upon. In that letter (the "By-Pass Letter"), the defendant also advised the plaintiff that "it is the intention of the Department to continue to recommend by-pass of tenders from your company until such time as you can demonstrate competence to perform the work."

[6] Notwithstanding the By-Pass Letter, the plaintiff submitted bids in response to three further invitations to tender. In each case, those bids were by-passed even though they were the lowest bids

submitted. Specifically, in August 1993, the plaintiff submitted a bid for certain repair work in Cobourg, Ontario, and, in October 1993, it submitted a bid for harbour dredging work at Collingwood, Ontario. A fifth bid, submitted on October 18, 1990 in connection with a dredging project at Meaford, Ontario, was the subject of a separate proceeding (the "Meaford Proceeding") that will be referenced at various points in these reasons.

[7] In 1995, the plaintiff filed a Statement of Claim in respect of the first four tenders alleging, among other things, that: (i) it had been treated unfairly by the defendant; (ii) the defendant had breached an implied term of each contract that it would be awarded to the lowest qualified bidder; and (iii) it had suffered damages in the sum of $1,171,000.00.

[8] In 2001, Justice MacKay issued an Order granting summary judgment in favour of the defendant on the plaintiff's breach of contract claim and permitting the matter to proceed to trial on the following issues:

i. Was there an implied obligation on the part of the defendant to treat the plaintiff fairly?

ii. If so, was that obligation breached?

iii. If that obligation was breached, what, if any, damages are recoverable as a result of the breach? (*Trevor Nicholas Construction Company Limited v. Her Majesty the Queen as Represented by the Minister for Public Works Canada*, Docket: T-1049-95, Order dated May 16, 2001.)

[9] The defendant has conceded that it had an implied obligation to treat the plaintiff fairly.

[10] Justice MacKay's Order followed a similar Order granted in May 2000 by Justice Pelletier, as he then was, in the Meaford Proceeding (*Trevor Nicholas Construction Company Limited v. Her Majesty the Queen as Represented by the Minister for Public Works Canada*, Docket T-2034-91, Reasons for Order and Order ("TNCCL 1")).

[11] In November 2001, after a two day trial, Justice Simpson granted judgment in favour of the defendant in the Meaford Proceeding, on the sole issue that then remained, namely, whether the defendant had breached its implied obligation to treat the plaintiff fairly (*Trevor Nicholas Construction Co. Limited v. Canada (Minister for Public Works)*, 2001 FCT 1282 ("TNCCL 2")).

[12] In June 2001, the defendant brought a motion in this proceeding for summary judgment on that same issue, as it relates to the four tenders (the "Tenders") that are the subject of this proceeding. In September 2001, that motion was adjourned *sine die* by Justice Blais, as he then was.

[13] In January 2005, after the completion of discoveries, the defendant brought the present motion for summary judgment on the fairness issue.

II. **Preliminary Issues**

A. *Jurisdiction to bring this motion*

[14] Relying on Rule 213(2) of the *Federal Courts Rules*, SOR/98-106 (the "Rules"), the plaintiff submitted that the defendant is precluded from bringing this motion because it did not seek and obtain leave of the Court to bring the motion.

[15] Rule 213(2) states:

Further motion	**Nouvelle requête**
213. (2) If a party brings a motion for summary judgment or summary trial, the party may not bring a further motion for either summary judgment or summary trial except with leave of the Court.	**213.** (2) Si une partie présente l'une de ces requêtes en jugement sommaire ou en procès sommaire, elle ne peut présenter de nouveau l'une ou l'autre de ces requêtes à moins d'obtenir l'autorisation de la Cour.

[16] Rule 213(2) came into force in December 2009. Prior to that time, there was no requirement to seek and obtain leave of the Court to bring a further motion for summary judgment after having brought a previous motion for summary judgment in the same matter. Accordingly, given that the present motion was filed no later than January 5, 2005, well before Rule 213(2) came into force, the defendant did not require leave of the Court to bring this motion.

[17] The plaintiff further submitted that, in the absence of explicit authority in the Rules permitting a party to bring a second motion for summary judgment in the same proceeding, the Court had no jurisdiction to permit such a motion to be filed.

[18] I disagree, for three separate reasons.

[19] First, this motion was filed approximately six years ago, at the very latest. In the interim, the plaintiff has been actively and extensively engaged with the defendant and the Court with respect to this motion. It is too late, at this stage, to raise and rely upon the argument that the Court has no jurisdiction to entertain this motion. Although the plaintiff now claims to have "alerted" the defendant to this issue in February 2010, it did so by way of: (i) a cross-motion in response to this motion, which was rejected by the case management judge; and (ii) a Notice of Motion seeking an order for partial summary judgment, which the case management judge directed could not be heard until after this motion was heard. Quite apart from whether this was an acceptable manner in which to raise this issue, these communications were too late, as they came many years after this motion was brought, and after the plaintiff's active and extensive involvement in various matters relating to this motion.

[20] Second, the "motion" filed on January 5, 2005 is better viewed as a return of the motion initially brought in June 2001, and adjourned *sine die* in September 2001, rather than as a second and separate motion for summary judgment.

[21] Third, former Rule 213(2), which is the applicable Rule that was in force at the time this motion was brought, allowed a defendant to bring a motion for summary judgment at any time after serving and filing its defence. That Rule did not limit the number of such motions that could be brought by a defendant. The *Regulatory Impact Analysis Statement* that accompanied the 2009 amendments to the Rules explained the change to rule Rule 213(2) as follows: "Rule 213(2) is replaced by a provision which limits a party to bringing one motion for summary judgment or summary trial. Subsequent motions pursuant to rule 213(1) may only be brought with leave of the Court." In my view, this statement implicitly recognizes that, under the Rules as they stood prior to

the amendments in December 2009, it was possible to bring more than one motion for summary judgment in a proceeding, without obtaining leave of the Court. This distinguishes the case at bar from the cases relied upon by the plaintiff.

[22] In response to my direction for further submissions "regarding this Court's jurisdiction under the *Federal Courts Rules* to accept and hear a filing of a second motion for summary judgment in these proceedings," the plaintiff raised, for the first time in this proceeding, three new arguments. In my view, it was too late for the plaintiff to raise these arguments. Therefore, they fail on that ground alone.

[23] In addition, the three new arguments fail on their merits.

[24] First, the plaintiff claimed that there was a lack of jurisdiction to proceed with this motion because of the defendant's failure "to comply with the requirement to include the Plaintiff's Reply as part of the proceedings." The defendant was not bound by any such requirement. Moreover, the plaintiff was not prejudiced by the fact that the defendant failed to include the plaintiff's Reply in its motion record. Having reviewed that Reply, which the plaintiff submitted with its response to my direction, I am satisfied that there was no information in that document that was of potential relevance to this motion and that was not already before the Court on this motion.

[25] Second, the plaintiff claimed that the defendant is estopped from bringing the present motion by Justice Pelletier's ruling, in the Meaford Proceeding, that the issue of fairness which was raised in that proceeding should proceed to trial (TNCCL 1, above, at para. 33). However, as the

plaintiff vigorously argued for another purpose in this motion, there were significant differences between the facts at issue in the Meaford Proceeding and those that are at issue in this motion.

[26] Third, the plaintiff claimed that the defendant was precluded from bringing this motion because the plaintiff had already been directed "to set this Action down for trial." However, former Rule 213(2), like current Rule 213(1), only precluded the defendant from bringing this motion "before the time and place for trial are fixed." That has not yet occurred in this proceeding.

B. *Disclosure of terms of settlement*

[27] During oral argument, the plaintiff requested leave to disclose the terms of settlement that it was precluded from raising in these proceedings, pursuant to an Order previously issued by Justice von Finckenstein (*Trevor Nicholas Construction Co. Limited v. Her Majesty the Queen as represented by the Minister for Public Works*, 2005 FC 1301). Those terms of settlement involved litigation between the parties with respect to another matter (the "Treasure Island Proceeding").

[28] When the defendant made its decisions to by-pass the plaintiff's bids in connection with the Tenders (the "By-Pass Decisions"), it based those decisions in part on a report that it received from the Project Manager on the Treasure Island project. The terms of settlement were reached several years after the defendant made the By-Pass Decisions, and after new facts came to light which may have suggested that the plaintiff's performance on the Treasure Island project was not quite as unsatisfactory as the defendant believed at the time the By-Pass Decisions were made, during the period from 1989 to 1993. Notwithstanding Justice von Finckenstein's Order, the terms of settlement appear to be reflected in the very short Minutes of Settlement, dated February 24, 2000,

that were attached at pages 86 and 87 of the Responding Motion Record filed by the plaintiff in this motion.

[29] In any event, the plaintiff submitted that the terms of settlement vindicated it in respect of its performance on the Treasure Island project. The plaintiff also asserted that the terms of settlement demonstrate that the defendant relied on facts that it knew were false, when it made the By-Pass Decisions.

[30] There is nothing in the aforementioned Minutes of Settlement or elsewhere in the plaintiff's Responding Motion Record that would indicate or suggest in any way that the defendant knew, at the time when it made the By-Pass Decisions, that any of the facts upon which it relied in making those decisions were false, erroneous or misleading. Despite my repeated requests during the oral hearing, the plaintiff was not able to identify any basis for this claim, other than its mere belief that the defendant knew that some of those facts were false.

[31] As Associate Chief Justice Lutfy, as he then was, observed during the defendant's motion to strike a paragraph from the plaintiff's Reply and to remove the settlement document concerning the Treasure Island Proceeding, one cannot have a trial on a settlement (Responding Motion Record, at p. 70). This is because it is typically difficult to know why a party has settled litigation. The plaintiff has not given me any reason whatsoever to believe that there is anything in the terms of settlement that may indicate that the defendant was aware, or ought to have been aware, at the time the By-Pass Decisions were made, that some of the facts upon which it relied when it made those decisions were inaccurate.

[32] Accordingly, the plaintiff's request to disclose the terms of settlement relating to the Treasure Island Proceeding is rejected.

C. *The exhibits to Joseph Grossi's affidavit*

[33] The plaintiff submitted that many of the exhibits included with the affidavit of Joseph Grossi, sworn on December 23, 2004 (the "Grossi Affidavit"), constitute hearsay evidence that should be disregarded because Mr. Grossi was not in a position to swear to the truth of the contents of those documents and he did not in fact swear to the truth of the contents of those documents.

[34] This submission confuses the issue of the defendant's use of the exhibits with the truth of the contents of those exhibits. Mr. Grossi did not swear to the truth of the contents of the exhibits in question. He simply swore to the truth of the fact that the defendant took the contents of the exhibits into account when it made the By-Pass Decisions.

[35] The plaintiff further submitted that Mr. Grossi was not part of the defendant's decision-making process in relation to the By-Pass Decisions. In support of this, he noted that Mr. Grossi conceded, in cross-examination, that he was not present in the room when the final decision was made in respect of any of the four Tenders. He further asserted that Mr. Grossi had a relatively junior position with the defendant.

[36] With respect to the latter assertion, I note that Mr. Grossi was sufficiently senior to sign the aforementioned Minutes of Settlement in the Treasury Island Proceeding on behalf of the defendant, although it is not clear whether he had been promoted to a more senior position by that time.

[37] In any event, it is readily apparent from the Grossi Affidavit, and from the various excerpts of the transcripts of Mr. Grossi's cross-examination that were included in the plaintiff's Responding Motion Record, that Mr. Grossi: (i) had primary responsibility for reviewing the plaintiff's bids on three of the four Tenders; (ii) was intimately involved with the defendant's review of the Tenders; and (iii) has personal knowledge of the principal factors upon which the defendant relied in making each of the By-Pass Decisions. The plaintiff was not able to demonstrate the contrary and did not establish that Mr. Grossi had not in fact appropriately informed himself of the basis upon which the By-Pass Decisions were made by the defendant. Accordingly, the plaintiff's submission that the exhibits in question should be disregarded is rejected.

[38] The cases relied upon by the plaintiff on this issue are distinguishable. In *Expressvu Inc. v. NII Norsat International Inc.*, [1997] F.C.J. No. 276, at paras. 5-7 (T.D.), Associate Chief Justice Jerome struck certain parts of affidavits filed by the plaintiffs on the basis that they constituted "expressions of opinion on the very questions of law which the Court is being called upon to decide," and contained "conjecture, speculation about hypothetical events or what is in the mind of other persons, [and] statements which are irrelevant or immaterial to the issues in this litigation, or which are based on information and belief without stating the source of the information." In *Inhesion Industrial Co. v. Anglo Canadian Mercantile Co.* (2000), 6 C.P.R. (4th) 362, at paras. 21-24 (F.C.T.D.), Justice O'Keefe declined to accept affidavit evidence regarding the assignment of a copyright, which was a vital issue in the case, because the affiant did not speak with the author of

the pattern in question and had little personal knowledge of the transfer of the copyright in the pattern to the plaintiff. By contrast, as noted above, Mr. Grossi was intimately involved with the defendant's review of the Tenders and had personal knowledge that the exhibits in question were considered by the defendant in making the By-Pass Decisions. His affidavit therefore complied with Rule 81(1) of the Rules. In *Green v. Canada (Minister of National Defence)* (1997), 138 F.T.R. 226, and in *Canada (Minister of Citizenship & Immigration) v. Dueck* (1998), 156 F.T.R. 150, the issue was whether hearsay evidence met the criteria of "necessity" and "reliability." It was found that the test of "necessity" was not met in the former case and the test of "reliability" was not met in the latter case. In *Canadian Tire Corp. v. P.S. Partsource Inc.*, 2001 FCA 8, the evidence in question did not concern facts of which the affiant had firsthand knowledge.

D. *Res judicata*

[39] The defendant submitted that it has been established, as a matter of *res judicata*, that the plaintiff was treated fairly when the defendant made the By-Pass Decisions. The defendant based this position on the fact that Justice Simpson granted judgment in favour of the defendant on this issue in the Meaford Proceeding (TNCCL 2, above). The defendant asserted that: (i) the Statements of Claim filed by the plaintiff in that case and in the case at bar are virtually identical; (ii) the Meaford Proceeding was identical to the present case in all important respects; (iii) the tenders, evaluations and the parties in the two cases are virtually identical; (iv) Justice MacKay considered the facts of the two cases sufficiently similar to recommend that the two cases be tried together; and (v) based on the findings made by Justice Simpson, there is no longer any dispute between the parties with respect to the central facts of the evaluations that were conducted in making the By-Pass Decisions.

[40] The plaintiff disagreed. It submitted that: (i) important new evidence which has a bearing on the fairness issue in the case at bar has come to light since Justice Simpson's decision; (ii) the facts relating to the By-Pass Decisions are not identical to those that formed the basis for Justice Simpson's decision; and (iii) the defendant has relied on key allegations of fact that were not addressed by Justice Simpson, including the reports produced by Mr. Grossi in respect of three of the four Tenders, certain allegations relating to the plaintiff's lack of adequate equipment on the Treasure Island project, and the allegation that the plaintiff's performance on the Belle River project was not entirely satisfactory.

[41] I am inclined to agree with the plaintiff. In my view, there are sufficient differences between the facts and allegations in the case at bar and those that were addressed by Justice Simpson to preclude the application of the doctrine of *res judicata* and to distinguish the case at bar from the situation that arose in *Grandview v. Doering*, [1976] 2 S.C.R. 621, at 639. In contrast to the situation in the case at bar, all conditions in *Grandview*, except for the years in which the damage was alleged to have occurred, were found to have been "exactly the same" as those at issue in the prior litigation.

[42] Notwithstanding the foregoing, as I have noted at certain points in the reasons below, I agree with some of the conclusions reached by Justice Simpson in the Meaford Proceeding.

III. Analysis

A. *The general legal principles applicable to this motion*

[43] Pursuant to Rule 215(1), summary judgment may be granted if the Court is satisfied that there is no genuine issue for trial. This is the same test that was set forth under former Rule 216(1).

Pursuant to Rule 214, a response to a motion for summary judgment shall not rely on what might be adduced as evidence at a later stage in the proceedings, but rather must set out specific facts and adduce the evidence showing that there is a genuine issue for trial. Former Rule 215 contained a similar provision.

[44] In short, under the current and former Rules: (i) to succeed in its motion for summary judgment dismissing the plaintiff's statement of claim, the defendant has the burden of establishing that all the relevant issues can properly be decided on the evidence before the Court; and (ii) the plaintiff must show that there is a genuine issue for trial. In this regard, the plaintiff is not required to prove all the facts in its case, but also cannot simply rely on bare "allegations or denials of the pleadings." Each party is required to "put its best foot forward," to enable the Court to determine whether there is an issue that should go to trial (*Canada (Attorney General) v. Lameman*, [2008] 1 S.C.R. 372, at para. 11; *F. Von Langsdorff Licensing Ltd. v. S.F. Concrete Technology Inc.* (1999), 165 F.T.R. 74, at paras. 9-12; *AMR Technology, Inc. v. Novopharm Ltd.*, 2008 FC 970, at paras. 6-8; *MacNeil Estate v. Canada (Department of Indian and Northern Affairs)*, 2004 FCA 50, at para. 25). However, "the test is not whether the plaintiff cannot succeed at trial; rather, it is whether the court reaches the conclusion that the case is so doubtful that it does not deserve consideration by the trier of fact at a future trial. Claims clearly without foundation should not take up the time and incur the costs of a trial" (*AMR Technology*, above, at para. 7). In addition, "each case must be interpreted in its own context and if the necessary facts cannot be found, or if there are serious issues of credibility, the matter should go to trial" (*Suntec Environmental Inc. v. Trojan Technologies Inc.*, 2004 FCA 140, at para. 4; *Emu Polishes Inc. v. Spenco Medical Corp.*, 2005 FCA 130, at para. 2). Finally, "a motions judge must subject the evidence to a 'hard look' in order to determine whether

there are factual issues that really do require the kind of assessment and weighing of evidence that should properly be done by the trier of fact" (*Von Langsdorff*, above, at para. 13).

[45] On this motion, the issue is whether I am satisfied that the evidence discloses no genuine issue for trial with respect to whether the defendant breached its implied obligation to treat the plaintiff fairly when it made the By-Pass Decisions.

[46] The defendant's implied obligation to treat the plaintiff fairly flows from its "obligation to treat all bidders fairly in the sense of not giving any of them an unfair advantage over the others" and not unfairly preferring one bidder over another (*Northeast Marine Services Limited v. Atlantic Pilotage Authority*, [1993] 1 F.C. 371, at 411-412 (T.D.), reversed on other grounds, [1995] 2 F.C. 132 (C.A.)). In assessing whether this obligation was breached, it must therefore be determined whether the plaintiff was treated unfairly, relative to other bidders. This assessment should include a determination as to whether the By-Pass Decisions were made on the basis of considerations that were extraneous to those set forth or implied in the tender documentation (*M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619, at paras. 45-48; *Best Cleaners and Contractors Ltd. v. The Queen in right of Canada*, [1985] 2 F.C. 293, at 306-307 (C.A.); *Direct Underground Inc. v. Pickering (City)* (2000), 6 B.L.R. (4th) 147, at paras. 17-18 (Ont. S.C.J.)). In my view, the assessment should also include a determination as to whether the defendant was biased against the plaintiff or made one or more of the By-Pass Decisions in bad faith, for example, by basing any of the By-Pass Decisions on facts that the defendant knew or ought to have known were untrue at the time those decisions were made.

B. *General allegations*

[47] The plaintiff alleged that it was not treated fairly or equally, relative to other bidders on the Tenders, mainly because:

i. Mr. Grossi misrepresented numerous facts in support of his recommendations to his superiors to by-pass the plaintiff's bids;

ii. Mr. Grossi and other representatives of the defendant relied on information regarding the plaintiff's performance on other contracts that they knew or ought to have known was improper and inaccurate;

iii. Mr. Grossi and possibly other representatives of the defendant failed to give the plaintiff an opportunity to prove itself, engaged in fraudulent conduct and lied regarding certain matters, including some matters relating to the plaintiff's performance on the Treasure Island project;

iv. Mr. Grossi and Mr. Colin Fairn, the principal of a consultant firm, C.B. Fairn & Associates Ltd., that was retained to assist with the defendant's assessment of some of the Tenders, did not have the requisite experience, did not take the appropriate steps to assess the plaintiff's equipment and abilities, made important errors in their assessments, and generally conducted their assessments of the plaintiff's bids in an incompetent manner;

v. the defendant relied on the inaccurate information and incompetent reports prepared by Mr. Grossi and Mr. Fairn, and provided by others, in making the By-Pass Decisions; and

vi. Mr. Fairn was retained to find fault with the plaintiff's equipment and was for many years the President of a competitor.

[48] In response, the defendant denied the plaintiff's allegations and stated that, for each project, it reviewed the Tenders in exactly the same fashion. For each Tender, it contacted the two lowest bidders, assessed their proposed methodology for completing the work, requested further information from each of them as to their equipment, personnel, strategy and other details required to evaluate the tenders, and reviewed the bidders' past performances on government projects. In addition, on the first two Tenders, the defendant retained Mr. Fairn to perform an independent evaluation of the plaintiff's equipment and methodology. After conducting its assessment, the defendant decided that the plaintiff did not appear to be able to perform the work tendered upon. The defendant also took into account information that it received which suggested that the plaintiff's performance on other government projects had been unsatisfactory. In this latter regard, the defendant noted that the tender documents for each Tender made it clear that past performance would be considered. Specifically, those documents requested that each bidder identify past work which was similar to the work contemplated by the Tender.

[49] For the reasons that follow, I am satisfied that the defendant has established that: (i) all the relevant issues can properly be decided on the basis of the evidence before the Court on this motion; (ii) there is no genuine issue for trial with respect to the issue of whether the defendant breached its

implied obligation to treat the plaintiff fairly when it made the By-Pass Decisions; and (iii) the defendant did not in fact breach that implied obligation.

[50] The plaintiff's general allegations, and the more specific allegations made by the plaintiff with respect to each of the Tenders at issue in this proceeding, will be addressed below.

C. *The St. Clair River Tender*

[51] Mr. Grossi stated in his affidavit that, after receiving the plaintiff's tender documentation, he contacted the plaintiff for further information, reviewed its proposed workplan and made a visit to inspect and evaluate its equipment.

[52] In a report dated August 14, 1989, he expressed concern over: (i) the plaintiff's ability to perform the work contemplated by the tender documentation; (ii) the adequacy of the plaintiff's equipment for the project; and (iii) the run-down condition of the plaintiff's barge, the Seneca. That report also reviewed the plaintiff's unsatisfactory performance on past projects, including the Treasure Island project at Kingston, Ontario, in 1988-1989.

[53] More specifically, among other things, Mr. Grossi's report noted that:

i. the Seneca was unfit to complete the project within the specifications;

ii. the plaintiff is a small company with only one full time employee (Mr. John Susin) and had not finalized any of the hiring required for the project;

iii. the plaintiff proposed to dredge the shoal by dragline methods, rather than by the cut methods specified in the tender documentation;

iv. the proposed type of dredging activity was not recommended at the location in question;

v. the plaintiff's production estimate of 70 cubic meters per hour for a 12 hour shift over 83 working days, and its estimated loss of time of two to three days per month for breakdowns and other unforeseen circumstances, was overly optimistic;

vi. the plaintiff's only other completed contract with the defendant, involving a floating plant at Belle River in 1984-1985, had been poorly executed with many contractual problems;

vii. the plaintiff "had succeeded in causing unnecessary hardship in project implementation by not following environmental requirements requested by various agencies" in relation to the Treasure Island project, which he had not completed to date;

viii. the projects upon which the plaintiff had worked in the past were relatively small ($350,000.00 in value), such that its financial ability to handle a contract valued at $623,000.00 was unknown; and

ix. the plaintiff had a poor reputation in the industry.

[54] With respect to the latter point, Mr. Grossi's report noted that many contractors would not deal with Mr. Susin, due to his business practices. There was also a handwritten addition immediately following that paragraph of his report, in which it was noted that "at this time there remains a minimum of $55,000 in unpaid accounts to sub-contractors and suppliers for the Treasure Island project."

[55] Based on the foregoing, Mr. Grossi recommended that the plaintiff not be awarded the contract to dredge the St. Clair River.

[56] On cross-examination, Mr. Grossi also noted that the plaintiff's responses to certain information that he had requested from the plaintiff were "very vague."

[57] In his affidavit, Mr. Grossi stated that the defendant also relied upon: (i) correspondence from the Canadian Coast Guard ("CCG"), dated August 16, 1989, to Mr. Grossi's superior, Mr. E.G. Wurts, in which the CCG concurred with the defendant's recommendation to by-pass the plaintiff's bid, based on the CCG's experience with the plaintiff on two prior contracts; and (ii) a report from Mr. J.J. Finerty, Project Manager of the Treasure Island project, which recommended that the plaintiff not be allowed to continue work on that project due to Mr. Susin's "lack of sensitivity for the requirements of the environmental authorities." Mr. Finerty's report also identified various deficiencies and incomplete work on that project.

[58] In addition, Mr. Grossi stated in his affidavit that the defendant relied upon a report prepared by Mr. Fairn, who concluded that the plaintiff was unable to perform the work described in the tender documentation. Specifically, Mr. Fairn concluded, among other things, that:

i. the Seneca and deck-mounted Lima crane were both old and in need of substantial repairs to bring them up to an acceptable operating condition;

ii. the selection of a dragline to perform the required dredging on the project was highly questionable and, to Mr. Fairn's knowledge, had never been used to perform maintenance dredging in similar conditions;

iii. there was a serious question as to whether the Seneca was qualified to work on contracts for the defendant, given that it is a U.S.-built vessel registered in Canada; and

iv. if the contract were awarded to the plaintiff, the work would not be completed within the specified time.

[59] The plaintiff asserted that it was treated unfairly because Mr. Grossi was not qualified to make some of the statements that he made in his report regarding the condition of the plaintiff's equipment, and that, as an engineer, Mr. Grossi should have known better than to make some of those statements. The plaintiff maintained that Mr. Grossi knew, or should have known, that some of those statements were inaccurate. The plaintiff added that Mr. Grossi admitted in cross-examination that he was not an expert on assessing the condition of heavy equipment and had never

supervised the operation or repair of heavy equipment or barges. The plaintiff further noted that Mr. Grossi's appraisal of the condition of its equipment conflicted in a substantial and material way with how the equipment was described in a survey, dated November 16, 1990, that was prepared for insurance purposes, by an accredited marine surveyor.

[60] The plaintiff further alleged that its estimate was so far under Mr. Grossi's own estimate of the amount that the defendant would have to pay for the work contemplated by this contract, that Mr. Grossi recommended a by-pass of the plaintiff's bid to avoid "losing face." The plaintiff asserted that Mr. Grossi identified and misrepresented shortcomings with the plaintiff's equipment as a pretence, to prevent the plaintiff from being awarded the contract.

[61] As to the Treasure Island project, the plaintiff insisted that Mr. Grossi had access to financial records and other information, apart from Mr. Finerty's above-mentioned report, which demonstrated that the plaintiff's performance on that project was not in fact unsatisfactory. It was at this point during the oral hearing that the plaintiff alleged that the defendant's reliance on Mr. Finerty's report was fraudulent. The plaintiff maintained that the financial records would have confirmed that the quantity of dredging work for which the defendant ultimately paid the plaintiff, was greater than what was reflected in Mr. Finerty's above-mentioned report, upon which Mr. Grossi and the defendant purported to rely in making their decision to by-pass the plaintiff on this contract. The plaintiff alleged that Mr. Grossi and perhaps other representatives of the defendant knew or ought to have known that the information in Mr. Finerty's report was false. He also alleged that they lied about the quantity of dredging work for which they paid the plaintiff, in an effort to conceal that the plaintiff had performed substantially more, rather than substantially less, dredging than contemplated by the contract in question.

[62] The plaintiff further noted that Dean Construction Company Limited ("Dean Construction") completed the subsequent contract in Amherstburg, Ontario at a production rate which worked out to 120 cubic metres per hour, such that it was erroneous for Mr. Grossi to have questioned the plaintiff's estimated rate of production of 70 cubic metres per hour.

[63] Moreover, the plaintiff insisted that it was ultimately exonerated with respect to the alleged $55,000 in unpaid accounts with sub-contractors and suppliers, because it succeeded in: (i) having the major claim in question set aside; (ii) obtaining judgment on a counter-claim in the amount of $50,615.50; and (iii) having the smaller claims dismissed.

[64] In addition, the plaintiff asserted that it could easily have completed the work that was outstanding on the Treasure Island Project when the defendant invited another contractor to complete that work, despite the plaintiff's request for a short extension. The plaintiff added that other correspondence disclosed by the defendant indicated that the identified deficiencies were not as serious as reflected in Mr. Finerty's report, and that there were weather-related reasons why it might take some time before the work in question could be completed.

[65] As to the Belle River contract, the plaintiff noted that Mr. Grossi relied on a memorandum authored by one of his superiors, Mr. Corkum, and that he had no personal knowledge of the information provided to him. The plaintiff insisted that its workmanship on that project was "second to none," that an inspection by it in 2000 revealed no signs of deterioration, and that all claims that it initiated on behalf of the general contractor were settled with the defendant in an amicable manner. In addition, the plaintiff noted that its downtime on that project was less than 6 days during a period

of over three months, and that this demonstrated that its estimate of 2-3 days per month of downtime on the St. Clair River project was not unrealistic, as Mr. Grossi had claimed.

[66] With respect to the Fairn report, the plaintiff asserted that it was unfair for the defendant to have failed to check Mr. Fairn's background and experience to perform the independent assessment of the plaintiff's equipment and abilities. The plaintiff stated that, as the former President of Canadian Dredge & Dock Company, Mr. Fairn would not have gained that particular type of experience, because the work in question would have been performed by more junior people in his organization. As a result, the plaintiff maintained that Mr. Fairn was not competent to perform the assessment of the plaintiff's equipment and proposed methodology. Moreover, the plaintiff claimed that Mr. Fairn and Mr. Grossi conspired to find fault with the plaintiff's equipment and overall bid.

[67] In my view, the plaintiff's claims with respect to the St. Clair River Tender are clearly without any foundation. The defendant has met its burden of establishing that all the relevant issues can properly be decided on the evidence before the Court. The plaintiff has not identified specific facts or adduced evidence showing that there is a genuine issue for trial in respect of its claim that the defendant breached its implied obligation to treat the plaintiff fairly when it made the By-Pass Decision in relation to this project.

[68] The plaintiff's claims with respect to the St. Clair River Tender are largely bald assertions or based on information that came to light many years after the defendant made its decision to by-pass the plaintiff's bid on this project. Even if the plaintiff could establish that the defendant based its decision on information that may have been erroneous, that alone does not raise a genuine issue as to whether the defendant breached its obligation to treat the plaintiff fairly.

[69] To raise such a genuine issue in respect of that particular claim, the plaintiff would have to set out specific facts or adduce evidence showing that: (i) Mr. Grossi or other representatives of the defendant knew or ought to have known at the time the By-Pass Decision was made that some of the information relied upon in recommending or making that decision was erroneous or inaccurate; or (ii) the plaintiff may have been otherwise treated unfairly, relative to other bidders. I am satisfied that the plaintiff has not set out such facts or adduced such evidence.

[70] Similarly, the plaintiff has not shown that there is a genuine issue for trial arising from any of the other claims made in respect of the St. Clair River project. For example, the plaintiff has not set out any specific facts or adduced any evidence to substantiate its bald and unwarranted allegations that Mr. Grossi and possibly other representatives of the defendant knowingly misrepresented any facts, engaged in fraudulent conduct, lied, or made incompetent or otherwise unfair assessments of its equipment or its tender.

[71] The same is true with respect to Mr. Fairn and the possibility that the defendant retained his firm in bad faith. Given the size of the St. Clair River contract and the information that was available to the defendant with respect to the plaintiff's performance on other projects, the fact that the defendant retained Mr. Fairn does not raise a genuine issue for trial with respect to whether the plaintiff was treated unfairly, relative to other bidders. Moreover, I agree with Justice Simpson's conclusion that, in the absence of any evidence to suggest that Mr. Fairn may have conducted his assessment in bad faith, it was not unfair of the defendant to have relied on that assessment (TNCCL 2, above, at para. 25).

[72] As it turned out, the assessments prepared by Mr. Fairn and Mr. Grossi were not only consistent with each other, they were also consistent with the reports that the defendant received from the CCG and from Mr. Finerty regarding the plaintiff's performance on other contracts.

[73] Given that it was made abundantly clear in the tender documentation that the plaintiff's experience with other contracts would be considered in reviewing the tendered bids, the defendant was entitled to consider the information that it received from other sources with respect to that prior experience. As Justice Simpson concluded in the Meaford Proceeding, there was "no reason [for the Plaintiff] to expect that its tender would receive an evaluation which was isolated from its reputation" (TNCCL2, above, at para. 18). Based on the specific facts set out and the evidence adduced by the parties on this motion, I agree with the conclusion reached by Justice Simpson that even if the defendant may have "exaggerated some of the Plaintiff's failings … its conclusion about the Plaintiff's poor performance on the Treasure Island Project was nonetheless fair" (TNCCL 2, above, at para. 21). I reach the same conclusion with respect to the reliance that the defendant placed on the information that it received regarding the plaintiff's performance on the Belle River contract.

[74] In summary, in my view, none of the facts set out and none of the evidence adduced by the plaintiff raises a genuine issue as to whether: (i) the defendant knew or ought to have known that any of the information that it relied upon in recommending or making the By-Pass Decision on this project was erroneous or inaccurate; (ii) there was any bad faith on the defendant's part when it made the By-Pass Decision; (iii) the By-Pass Decision was made on the basis of considerations that were extraneous to those set forth or implied in the tender documentation; or (iv) the plaintiff was otherwise treated unfairly, relative to other bidders.

D. *The Amherstburg Tender*

[75] The facts with respect to this Tender, which occurred in mid 1990, are very similar to those discussed above with respect to the St. Clair River Tender.

[76] Once again, assessments were prepared by Mr. Grossi and Mr. Fairn, although this time they each also conducted an assessment of the second-lowest, and ultimately successful, bidder, Dean Construction. According to Mr. Grossi's affidavit, the defendant relied on those assessments and took into account the plaintiff's poor performance on other government contracts in deciding to by-pass the plaintiff's bid in favour of Dean Construction's bid.

[77] The assessments of the plaintiff's tender that were prepared by Mr. Grossi and Mr. Fairn were consistent with the assessments that they prepared in connection with the plaintiff's tender on the St. Clair River project. Mr. Fairn's assessment also noted that the shallow water dredging experience that the plaintiff obtained on the Belle River project was very different from the experience that would be required to dredge the deeper water that would be involved in the Amherstburg project. By contrast, both Mr. Grossi's and Mr. Fairn's assessments of Dean Construction's tender were favourable and included positive references to the experience of, and prior work performed by, that company.

[78] In addition, the defendant relied upon an internal memorandum, dated June 26, 1990, that discussed the reports prepared by Mr. Grossi and Mr. Fairn as well as the plaintiff's unsatisfactory performance on other contracts. That memorandum was prepared by one of Mr. Grossi's superiors, Mr. Owen Corkum, Regional Director - Ontario, Architectural & Engineering Services, Public

Works Canada. Among other things, Mr. Corkum noted that due to "previous experience and concerns regarding the low bidder, it was decided that an expert opinion should be sought from another P.W.C. dredging expert, Mr. V. White, of the Atlantic Region, who has not had any previous association with this firm." Mr. Corkum proceeded to note that Mr. White's report was consistent with those prepared by Mr. Grossi and Mr. Fairn. He therefore strongly recommended awarding the contract to Dean Construction and excluding the plaintiff from bidding on the defendant's projects for a minimum of 2 years.

[79] The plaintiff's claims and allegations of unfairness regarding the defendant's By-Pass Decision on this project were essentially the same as they were with respect to the By-Pass Decision on the St. Clair River project.

[80] For the same reasons provided in Section III.C. above, I am satisfied that the plaintiff's claims are clearly without any foundation. Once again, the defendant has met its burden of establishing that all the relevant issues can properly be decided on the evidence before the Court. The plaintiff has not identified specific facts or adduced evidence showing that there is a genuine issue for trial in respect of its claim that the defendant breached its implied obligation to treat the plaintiff fairly when it made the By-Pass Decision in relation to this project. On the contrary, the evidence before the Court demonstrates that the defendant went to great lengths and incurred considerable expense to treat the plaintiff fairly.

E. *The Cobourg Tender*

[81] As noted at paragraph 5 above, between the Amherstburg Tender and the Cobourg Tender, the defendant sent the By-Pass Letter to the plaintiff. In that letter, the plaintiff was advised of the

reasons why it had been by-passed on the St. Clair River and Amherstburg Tenders and was informed that "it is the intention of the Department to continue to recommend by-pass of tenders from your company until such time as you can demonstrate competence to perform the work."

[82] The plaintiff claimed that it responded to the By-Pass Letter. However, it did not adduce that response into evidence and was unable to produce a copy of it or to provide any other information in respect of it when questioned about it during the oral hearing on this motion. By contrast, Mr. Grossi stated in his affidavit that the plaintiff did not provide any information in response to the By-Pass Letter "which would support a change in the defendant's assessment of [the plaintiff's] incapacity to work on these dredging projects."

[83] The plaintiff further claimed that it was informed by the defendant that the defendant would be prepared to continue to review its bids on their merits, subject to "certain conditions." However, once again the plaintiff was unable to produce any evidence regarding that alleged understanding or to articulate even the general parameters of that understanding during the oral hearing on this motion. The defendant maintained that it never formally acknowledged that it would consider any tenders made by the plaintiff after the By-Pass letter was sent. In the absence of any evidence from either party on this point, one is left with the contents of the By-Pass Letter itself.

[84] In addition, the plaintiff claimed that the defendant waived its notice or threat to ignore the plaintiff's future bids by continuing to receive and to evaluate those bids in the normal course.

[85] In my view, in the particular circumstances of this case, the mere fact that the defendant may have continued to review on their merits the tenders subsequently submitted by the plaintiff was not

sufficient to constitute a waiver of the defendant's right to rely on the By-Pass Letter as having modified its implied obligation to treat the plaintiff fairly in respect of any such tenders. This is particularly so given the absence of any evidence to suggest that the defendant may have given the plaintiff any basis for believing that any of the specific concerns previously identified by the defendant had been alleviated in any way.

[86] Similarly, the fact that the By-Pass Letter may not have prevented the plaintiff from continuing to bid on the defendant's contracts did not change the fact that the By-Pass Letter reduced the defendant's implied obligations toward the plaintiff going forward. It bears emphasizing that the plaintiff has not set out any facts or adduced any evidence which might indicate that the defendant expressly or impliedly gave the plaintiff any reasonable basis whatsoever for believing that it had succeeded in alleviating any of the concerns that the defendant had previously identified and that were summarized in the By-Pass Letter.

[87] I do not accept the plaintiff's position that the courtesy letter, dated November 22, 1990, which was sent by the defendant to the plaintiff in respect of a project in Beaver Creek, Ontario, provided the basis for any such belief. That letter simply expressed the defendant's appreciation for the interest shown by the plaintiff in tendering on that project, and advised the plaintiff that the tender call on that project had been cancelled. The plaintiff has adduced no evidence whatsoever to support its contention that "all indications were that the Plaintiff would receive an award of [that] contract."

[88] In my view, the defendant has adduced persuasive evidence that, at the time it made the By-Pass Decision on the Cobourg contract, it continued to have the concerns previously identified to the plaintiff, and it made those concerns known to the plaintiff.

[89] In particular, at Exhibit K of his affidavit, Mr. Grossi attached a letter, dated October 4, 1993, that clearly explained to the plaintiff that a "major consideration" which led to the By-Pass Decision on this project was that "we have experienced unsatisfactory performance by your company on previous projects." That letter further noted that a letter sent to the defendant by the plaintiff, dated September 16, 1993, "did not provide information which would support a change in our assessment of the capacity of your company." In addition, the defendant's letter stated that the defendant had conveyed these same views to the plaintiff in a separate letter dated September 21, 1993. Notwithstanding the foregoing, the letter added that the defendant had attempted to contact the reference provided by the plaintiff, Mr. Domenic O'Neill at the Seaway Authority, but were unsuccessful. After noting that the defendant understood that Mr. O'Neill "is no longer living in Canada," the letter stated that the defendant was "not able to locate anyone else with the Seaway Authority able to confirm the success of your work on the Canal."

[90] I do not accept the plaintiff's position that the defendant's failure to make greater efforts to contact someone else at the Seaway Authority who was familiar with the plaintiff's work raises a genuine issue as to whether the plaintiff was treated unfairly by the defendant in respect of the Cobourg Tender.

[91] In addition, at Exhibit L of his affidavit, Mr. Grossi attached another letter, dated October 27, 1993, which reiterated and significantly elaborated upon the concerns that had been identified in prior correspondence to the plaintiff. That letter concluded by stating:

> We do not take the position that your company has never successfully completed marine projects for PWC or other owners. We are not aware of very many of these however, considering the length of time that the company has been in business. As pointed out above, our own experience with your company has, in general, been less than satisfactory. This, along with your apparent unwillingness or inability to provide performance or labour and material bonds, creates further uncertainty.
>
> All of the foregoing raises serious concerns with respect to the capacity of the company and its present management to reliably undertake further projects. It is therefore our intention to continue to recommend by-pass of tenders from your company until improved capacity is demonstrated.

[92] In his affidavit, Mr. Grossi confirmed that the decision to by-pass the plaintiff's bid on the Cobourg Tender was based on essentially the same concerns that had previously been identified to the plaintiff.

[93] The plaintiff disputed this claim by Mr. Grossi. However, it has not set out any facts or adduced any evidence that might tend to show that any aspect of the defendant's By-Pass Decision on the Cobourg Tender, or any aspect of the manner in which the defendant reached that decision, may have been unfair to the plaintiff.

[94] As with the By-Pass Decisions that were made in respect of the St. Clair River and Amherstburg Tenders, the plaintiff's claims that it was treated unfairly by the defendant in respect of the Cobourg Tender rest on bald, unsubstantiated allegations. The plaintiff has not set out any

facts or adduced any evidence to show that there is any genuine issue for trial in respect of its claim that it was treated unfairly by the defendant when the By-Pass Decision on the Cobourg Tender was made.

[95] In these circumstances, the fact that the defendant was unable to produce further additional support, during discovery and cross-examination, to substantiate its position that it did not treat the plaintiff unfairly on the Cobourg Tender does not raise a genuine issue for trial.

[96] Indeed, based on the evidence adduced on this motion, I agree with Justice Simpson's finding that, having sent the By-Pass Letter, the defendant "was not required to evaluate the Plaintiff's Tender, yet it did conduct an evaluation …[which] … from a procedural point of view, was more than fair" (TNCCL 2, above, at para. 18).

[97] I am satisfied that the plaintiff's claims with respect to the Cobourg Tender are clearly without foundation.

F. *The Collingwood Tender*

[98] As with the other Tenders, the plaintiff claimed that the defendant was unable to provide any reliable or credible evidence in support of its defence to the claims in respect of the Collingwood Tender. Once again, I disagree, and find that it is rather the plaintiff who has failed to set out specific facts and adduce evidence showing that there is a genuine issue for trial.

[99] At Tab M of Mr. Grossi's affidavit, he attached a memorandum, dated November 3, 1993, that he wrote to Mr. I. Schenkman, Project Manager, Marine, PWC. In that memorandum, Mr.

Grossi began by expressing concern about the low price that was bid by the plaintiff on this project. That price was less than half of what was submitted by the second-lowest bidder and was approximately one-third lower than the department's internal estimate. Mr. Grossi explained that he spoke with Mr. Susin concerning his tender. He then summarized the information that Mr. Susin had provided to him regarding his Tender. Mr. Grossi then explained in detail the various reasons why he recommended against awarding the contract to the plaintiff. Finally, Mr. Grossi summarized the information that he had obtained from the second-lowest bidder, noted that that contractor had completed the harbour clean-up work for Environment Canada at the same site, and observed that the contractor was familiar with both the site and the work required for the project. His memorandum concluded by recommending that there is no substantial reason why that contractor's bid should be by-passed, and that if that contractor were awarded the contract, it should be closely monitored to ensure the work is completed satisfactorily. Ultimately, the contract was awarded to that contractor.

[100] In his affidavit, Mr. Grossi confirmed that he recommended that the plaintiff not be awarded the contract for this project "because of its extremely low price, which would cause it financial hardship, and because it was apparent to me that the plaintiff had little experience in hydraulic dredging work." Mr. Grossi also confirmed that, notwithstanding the By-Pass Letter, the plaintiff's bid on this project was evaluated on its merits and was not evaluated any differently than the tender of the contractor who won the contract.

[101] The plaintiff asserted that, on this project, it was relying on the services of a well-established public company, Sani-Mobile, which owned its own hydraulic dredge, to perform the dredging. The plaintiff also noted that Mr. Grossi admitted during cross-examination that he had mistakenly

assumed that an eight-inch plastic discharge pipe located on the site of the project belonged to the second-lowest bidder. In fact, that pipe belonged to Sani-Mobile. The plaintiff adduced no evidence whatsoever which might suggest that the defendant was aware, or ought to have been aware, that the plastic pipe belonged to Sani-Mobile, or that the defendant otherwise made the By-Pass decision on this Tender in bad faith, on the basis of considerations extraneous to the tender documentation, or in any other manner that might be unfair to the plaintiff.

[102] Accordingly, I am satisfied that: (i) the defendant has met its burden of establishing that all the relevant issues relating to the plaintiff's claim in respect of this Tender can properly be decided on the basis of the evidence before me; (ii) the plaintiff's claims in respect of this tender are clearly without foundation; and (iii) the plaintiff has not shown that there is a genuine issue for trial.

G. *Credibility*

[103] The plaintiff submitted that the differences between the evidence that it adduced and the evidence adduced by Mr. Grossi gave rise to a credibility issue that cannot be determined in a motion for summary judgment, but must be addressed in a trial (*Suntec Environmental*, above).

[104] I disagree. In reaching my conclusions on this motion, I was not required to choose between contradictory evidence provided by Mr. Grossi and the plaintiff. For the reasons I have already stated, I concluded that the plaintiff has not set out any specific facts or adduced any evidence whatsoever that raises a genuine issue as to whether the defendant breached its implied obligation to treat the plaintiff fairly in reviewing the Tenders.

H. *Unclean hands*

[105] The plaintiff baldly asserted that the defendant came to this Court with "unclean hands" and therefore is not entitled to the relief it seeks.

[106] Given that the plaintiff has not adduced any credible evidence whatsoever in support of this assertion, it is rejected.

IV. Conclusion

[107] I am satisfied that the plaintiff's claims with respect to each of the Tenders are clearly without any foundation. The defendant has met its burden of establishing that all the relevant issues can properly be decided on the evidence before the Court. The plaintiff has not identified specific facts or adduced evidence showing that there is a genuine issue for trial in respect of its claim that the defendant breached its implied obligation to treat the plaintiff fairly when it made the By-Pass Decisions in respect of the Tenders. Having submitted the evidence to a "hard look," I am satisfied that there are no "factual issues that really do require the kind of assessment and weighing of evidence that should properly be done by the trier of fact" (*Von Langsdorff*, above, at para. 13).

[108] In summary, none of the facts set out and none of the evidence adduced by the plaintiff raises a genuine issue as to whether: (i) the defendant knew or ought to have known that any of the information upon which it relied in recommending or making the By-Pass Decisions was erroneous or inaccurate; (ii) there was any bad faith on the defendant's part when it made the By-Pass Decisions; (iii) the By-Pass Decisions were made on the basis of considerations that were extraneous to those set forth or implied in the tender documentation; or (iv) the plaintiff was otherwise treated unfairly, relative to other bidders.

[109] On the contrary, the evidence before me on this motion strongly suggests that the defendant went to great lengths, and incurred substantial time and expense, which ultimately was borne by the Canadian taxpayers, to treat the plaintiff fairly. Indeed, that evidence suggests that the defendant went significantly beyond what was required by its implied obligation to treat the plaintiff fairly.

[110] This motion is therefore granted.

ORDER

THIS COURT ORDERS THAT:

1. This motion is granted. There is no genuine issue for trial with respect to the plaintiff's claim that the defendant breached its implied obligation to treat the plaintiff fairly in respect of the four tenders that are the subject of this action. Summary judgment is granted in favour of the defendant.

2. The costs of this motion and the action are awarded to the Defendant. The parties shall make brief written submissions, not exceeding five (5) double-spaced pages, excluding their bills of costs, regarding the quantum of costs to be awarded, including what would be an appropriate lump sum amount to award to the defendant. The defendant shall serve and fill its submissions with the plaintiff and the Court within 10 days of the date of this Order. The plaintiff shall then file its submissions within 10 days of the date of service of the defendant's submissions. The defendant shall then have the right to serve a reply within five days of the date of service of the plaintiff's submissions.

"Paul S. Crampton"

_____

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1049-95
STYLE OF CAUSE:	TREVOR NICHOLAS CONSTRUCTION CO. LIMITED v. HER MAJESTY THE QUEEN AS REPRESENTED BY THE MINISTER FOR PUBLIC WORKS CANADA
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	December 15, 2010
REASONS FOR ORDER AND ORDER:	Crampton J.
DATED:	January 20, 2011

APPEARANCES:

John Susin	FOR THE PLAINTIFF
Derek Allen	FOR THE DEFENDANT

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