Federal Court of Appeal Cour d'appel fédérale

Date: 20130715

Docket: A-373-11

Citation: 2013 FCA 183

CORAM: SHARLOW J.A.
DAWSON J.A.
TRUDEL J.A.

BETWEEN:

TPG TECHNOLOGY CONSULTING LTD.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Ottawa, Ontario, on April 23, 2013.

Judgment delivered at Ottawa, Ontario, on July 15, 2013.

REASONS FOR JUDGMENT BY: SHARLOW J.A.

CONCURRED IN BY: DAWSON J.A.
TRUDEL J.A.

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REASONS FOR JUDGMENT

SHARLOW J.A.

[1] In 2008, the appellant TPG Technology Consulting Ltd. commenced an action against the federal government for damages relating to a procurement of engineering and technical support services. In 2010, the Crown moved for summary dismissal of the claim. The Crown's motion was granted by a judge of the Federal Court (2011 FC 1054). TPG now appeals to this Court, fundamentally on the basis that the judge misapplied the test for summary judgment. For the following reasons, I agree with TPG and I would allow this appeal.

Summary judgment in the Federal Court

[2] In the Federal Court, summary judgment is governed by Rules 213 to 215 of the *Federal Courts Rules*, SOR/98-106, which are fully set out in the appendix to these reasons.

[3] Summary judgment is a tool for balancing two competing considerations in the management of court resources in the resolution of civil disputes. One consideration is that a trial is expensive in terms of time and money, not only for the litigants but also for the courts which are publicly funded. The competing consideration is that the sound resolution of a legal dispute is more likely to emerge from a trial than a summary proceeding where there are important factual disputes that cannot be resolved without determining questions of credibility and the inferences to be drawn from conflicting evidence. Generally, a judge who hears and observes witnesses giving evidence orally in chief and under cross-examination is in a better position to assess credibility and to draw inferences than a judge who must depend solely on affidavits and documentary evidence. Summary judgment recognizes that the expenditure of the resources required for a trial is warranted only if there is a genuine issue for trial.

[4] The burden on a plaintiff responding to a motion for summary dismissal of a claim is not, and is not intended to be, as onerous as the plaintiff's burden in a trial. It is an evidentiary burden only. The question for the judge on a summary judgment motion is whether the plaintiff has met the "evidentiary burden to put forward evidence showing that there is a genuine issue for trial" (per Justice Sexton, writing for this Court in *MacNeil Estate* v. *Canada (Department of Indian and Northern Affairs)*, [2004] 3 F.C.R. 3, 2004 FCA 50, at paragraph 25, citing what was then Rule 215 and is now Rule 214).

Factual background

[5] TPG's claim against the Crown for damages relates to a 2006 request for proposals for a contract with the Crown for engineering and technical services. The proposed contract was intended to replace an existing contract expiring in December of 2007. The estimated value of the new contract was approximately $428 million. The contract in place in 2006 was held by TPG which had, since 1999, supplied the required services through numerous subcontractors (referred to as "resources" in the terminology used in the request for proposals). Three bids for the contract were accepted as compliant. One was from TPG. Another was from TPG's competitor, CGI Information Systems and Management Consultants. In 2007, the contract was awarded to CGI. The TPG bid proposed the lowest price, but the CGI bid was successful because it was awarded more points on the technical evaluation.

[6] In 2008, TPG commenced this action for damages for breach of contract, inducing breach of contract by TPG's subcontractors, intentional interference with TPG's economic interests, and negligence. The claims relate primarily to allegations relating to the evaluation of the bids. In March of 2010, the Crown filed a motion for summary judgment dismissing the action. It appears that by the time the motion was heard in March of 2011, the matter had proceeded to the point where examinations for discovery were substantially complete.

[7] After reviewing a large body of documentary evidence and considering submissions made in a lengthy hearing, the judge granted the motion for summary dismissal. I summarize as follows what appear to me to be the three key conclusions that led the judge to decide as he did:

(a) TPG asserts a claim for breach of contract based on an allegation of bias in the bid evaluation process, and an allegation that the evaluations were inexplicably changed at some point to the disadvantage of TPG. Those claims are supported by no evidence that is sufficiently probative to warrant a trial.

(b) TPG's claim for breach of contract is also based on allegations of certain acts by federal government officials in relation to the transition from TPG to CGI. The transition occurred after the contract was awarded to CGI. As a matter of law, events that occur during the transition cannot form the basis of a claim by TPG for breach of contract because, according to *Double N Earthmovers Ltd. v. Edmonton (City)*, 2007 SCC 3, [2007] 1 SCR 116, all contractual obligations that the federal government owed to TPG were discharged once the contract was awarded to CGI.

(c) The claims in tort (for inducing breach of contract, for unlawful interference with economic interests, and for negligence) are based on the allegation that federal government officials participated with CGI in leading TPG's subcontractors to breach their contracts with TPG in order to work for CGI after it won the bid. There is no evidence that is capable of supporting that allegation.

Analysis

[8] In my respectful view, the judge misapplied the summary judgment rule. I reach that conclusion for a number of reasons, as explained below.

The principal claim – damages for breach of contract

[9] The judge's description of TPG's claim for damages for breach of contract in relation to the bid evaluation process refers to allegations of bias and inexplicable changes to the evaluations. However, that is not a complete description. The complaint in substance is that the bids were not fairly evaluated. Although the Crown adduced considerable evidence in an attempt to establish the integrity of the evaluation process, that evidence did not squarely answer all questions about the fairness of the bid evaluations.

[10] I will illustrate this point by one example: the documents that refer to the evaluation of the bids in respect of sections 3.3.3 and 3.3.5 of the request for proposals. Those provisions deal with performance and service level metrics. TPG alleges, and the Crown does not deny, that the scoring of those provisions was of critical importance in the final ranking of the bids. If they were unfairly evaluated, it is probable that the entire bid was unfairly evaluated.

[11] The record discloses some evidence of confusion on the part of the evaluation team about the meaning of sections 3.3.3 and 3.3.5 and how they ought to be scored, which indicates a controversy about their correct interpretation. It is not denied that there was some confusion in that regard in the course of the evaluation process.

[12] More importantly, however, there is evidence that could support the allegation of TPG that the final scoring of those items is not reasonably justifiable. I refer to the report of James Over, who provided the following opinion in support of TPG's opposition to the Crown's summary judgment motion (Appeal Book, Tab 93):

> The issues that arise from the actual scoring results of sections 3.3.3 and 3.3.5 of the RFP, include:
>
> - CGI had 100 (87%) of 115 items accepted in section 3.3.3 and all 50 items submitted in section 3.3.5 were accepted, this appears to be a remarkable performance to achieve a 90% overall acceptance rate while the next best performance was a mere 53.5%.
>
> - Meanwhile TPG, the incumbent service provider for the previous 7 years, who has been collecting most of the proposed metrics and measurements, which were available to ITSB [the federal government] achieves an unbelievably low 16.7% overall acceptance rate.
>
> - With such an unbelievable variance between CGI's evaluation performance and TPG's results it should be apparent that the above two situations (3.3.3 and 3.3.5) would certainly require substantial documented justification on how the evaluation process could credibly arrive at the consensus results above. This has not been provided.

[13] The Crown referred this Court to no document in the record that addresses the criticisms stated by Mr. Over in this report. That is not to say that his criticisms are well founded, or that they cannot be answered. However, applying the correct legal test for summary judgment, the only reasonable conclusion, in my view, is that there is sufficient evidence to establish the existence of a genuine issue for trial on the allegation of an unfair bid evaluation.

Whether *Double N* bars the claim for damages for breach of contract

[14] The judge concluded that the principle in the *Double N* case bars the claim of TPG for breach of contract to the extent it is based on events that occurred during the transition from TPG to CGI. In my respectful view, that conclusion is based on a misapprehension of TPG's claim. Before explaining why I reached that conclusion, I will set out the analytical framework applied in *Double N* (that is, the Contract A/Contract B framework developed in the jurisprudence on contract bids), and I will summarize the *Double N* decision.

[15] A request for the tender of bids for a contract (which, in the case of a procurement by the federal government, is a request for proposals) is an offer by the requesting party to consider the bids tendered and to enter into a contract with the party whose bid is accepted. A bidder accepts that offer by tendering a compliant bid. This gives rise to a completed contract – Contract A – the terms of which are governed by the documents comprising the request for the tender of bids. The submission of a compliant bid is also an offer to the requesting party to enter into another contract, Contract B. When a compliant bid is accepted, the tender documents and the bid documents are the terms of Contract B.

[16] The issue in *Double N* was whether an unsuccessful bidder for a contract with the City of Edmonton was entitled to damages for breach of Contract A when the City, having called for tenders for equipment that was “1980 or newer”, permitted the winning bidder to supply an item of equipment that was manufactured in 1979.

[17] The Supreme Court of Canada held, by a majority of 5 to 4, that (1) the winning bid was compliant even though its description of the equipment was ambiguous as to the date of manufacture, and (2) the City did not breach any contractual obligation under Contract A when it permitted the winning bidder, after Contract B was in place, to supply equipment manufactured prior to 1980. The obligation of the City under Contract A was to evaluate all compliant bids fairly and then to enter into Contract B on the terms set out in the tender documents. Once that was done, Contract A was fully performed and the City had no further obligations under it. Contract B is a separate contract to which unsuccessful bidders are not privy.

[18] Under the Contract A/Contract B analytical framework, Contract A is breached if a non-compliant bid is accepted. Therefore, a claim for damages based on an allegation that a non-compliant bid was accepted is not barred by the principle in *Double N*. As I understand the argument of TPG, that is the nature of the claim asserted in this case. Specifically, TPG is alleging that the Crown breached the provision in the request for proposals to the effect that the successful bidder would be deemed to have certified that each of its proposed resources (the individuals who would actually do the contracted work) was either an employee of the bidder, an individual who had consented to be named as a resource, or an individual whose employer had so consented.

[19] According to TPG's interpretation of the relevant provisions in the request for proposals, a bid is non-compliant unless, when the bid is submitted, each of the bidder's proposed resources is either an employee of the bidder, an individual who had consented to be named as a resource, or an individual whose employer had so consented. This necessarily implies, in TPG's submission, that a bid is non-compliant if the bidder proposes to rely on incumbent resources (that is, the resources of TPG) for whom consents do not exist and cannot be obtained. The Crown does not agree with that interpretation of the provision.

[20] The Court was referred to a number of provisions in the request for proposals and related documents that are said to assist in defining the bidder's obligation to establish that if awarded the contract it will have the resources to perform the services required by the contract. However, in my view the contractual documents are ambiguous on that point, and therefore the merits of TPG's proposed interpretation cannot be determined in the absence of a full evidentiary record. That is sufficient to establish the existence of a trial issue on a fundamental aspect of TPG's claim.

[21] At the hearing of the appeal, the Crown argued that the statement of claim does not include an allegation of a breach of Contract A. In response to the Crown's objection, TPG referred the Court to paragraph 71 of the relevant pleadings, the Amended Amended Statement of Claim. Paragraph 71 is not a model of clear pleading, but in my view it is a sufficient answer to the Crown's argument. It reads as follows:

> 71. Notwithstanding the above terms of contract A, the [Crown] knew in September 2006, as a result of its review of the bids, that CGI's bid was premised on recruiting many or most of [TPG's] subcontractors, rather than offering CGI's own resources to provide the required services. For this reason, even before the [Crown] awarded the [contract] to CGI, the [Crown] had concerns about the risk involved in an award to CGI. The risk identified by the [Crown] was that CGI might not be able to recruit the incumbent resources because the incumbent resources were known to be under contract to [TPG] at the time. The [Crown] nonetheless proceeded to award the [contract] to CGI.

[22] As I understand paragraph 71, read in the context of the other allegations, TPG is alleging that the Crown knew when the contract was awarded to CGI that (a) CGI had made its bid on the premise that if it was awarded the contract, it planned to recruit TPG's incumbent resources, and (b) CGI might not be able to recruit incumbent resources. This is reasonably consistent with the argument of TPG that the Crown knew, or had the means of knowing, that the CGI bid was non-complaint when submitted because CGI had not obtained the consents necessary to recruit TPG's incumbent resources.

[23] In the circumstances of this case, it seems to me arguable that it makes no difference that some of the evidence upon which TPG relies to prove the breach of Contract A relates to events that occurred during the transition phase. TPG is relying on CGI's post-award recruitment of incumbent resources to establish that the bid of CGI was not compliant when submitted. In my view, *Double N*

does not necessarily bar a claim for breach of Contract A merely because the breach is proved in part by evidence of events that occurred after the contract was awarded.

[24] I conclude that the Crown's summary judgment motion should have been dismissed in relation to TPG's claim for breach of Contract A.

<u>Other claims for damages in contract and tort</u>

[25] As indicated above, TPG alleges that CGI recruited TPG's subcontractors after CGI was awarded the contract. That is the basis of TPG's claim for damages against the Crown for inducing breach of the contracts between TPG and its incumbent resources.

[26] Based on the material to which the Crown was referred in argument, this appears to be a relatively weak claim. If the claim for breach of Contract A succeeds, then CGI's recruitment of TPG's incumbent resources may not increase TPG's claim for damages. On the other hand, if the claim for breach of Contract A fails, there may be nothing left of the claim for inducing breach of contract. However, since the factual foundation of both claims is the same and will involve the same evidence, there is no practical reason at this stage not to let both claims continue to trial.

[27] The claims in tort appear to be substantially weaker than the claims in contract, but they too are based largely on the same factual allegations. If the record as it now stands represents all of the evidence adduced at trial, these claims are unlikely to succeed. However, given that they are inextricably linked to the claims in contract, I see no practical reason at this stage not to permit them to continue to trial if TPG is so advised.

<u>Conclusion</u>

[28] For these reasons, I would allow the appeal with costs and set aside the judgment of the Federal Court. Making the order that should have been made by the Federal Court, I would dismiss the Crown's motion for summary judgment and dismissal of the action, with costs payable in any event of the cause.

"K. Sharlow"
J.A.

"I agree
Eleanor R. Dawson J.A."

"I agree
Johanne Trudel J.A."

APPENDIX

Summary Judgment -- Rules 213 to 215 of the *Federal Courts Rules*, SOR/98-106

213. (1) A party may bring a motion for summary judgment or summary trial on all or some of the issues raised in the pleadings at any time after the defendant has filed a defence but before the time and place for trial have been fixed.	**213.** (1) Une partie peut présenter une requête en jugement sommaire ou en procès sommaire à l'égard de toutes ou d'une partie des questions que soulèvent les actes de procédure. Le cas échéant, elle la présente après le dépôt de la défense du défendeur et avant que les heure, date et lieu de l'instruction soient fixés.
(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.	(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.
(3) A motion for summary judgment or summary trial in an action may be brought by serving and filing a notice of motion and motion record at least 20 days before the day set out in the notice for the hearing of the motion.	(3) La requête en jugement sommaire ou en procès sommaire dans une action est présentée par signification et dépôt d'un avis de requête et d'un dossier de requête au moins vingt jours avant la date de l'audition de la requête indiquée dans l'avis.
(4) A party served with a motion for summary judgment or summary trial shall serve and file a respondent's motion record not later than 10 days before the day set out in the notice of motion for the hearing of the motion.	(4) La partie qui reçoit signification de la requête signifie et dépose un dossier de réponse au moins dix jours avant la date de l'audition de la requête indiquée dans l'avis de requête.
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. It must set out specific facts and adduce the evidence showing that there is a genuine issue for trial.	**214.** La réponse à une requête en jugement sommaire ne peut être fondée sur un élément qui pourrait être produit ultérieurement en preuve dans l'instance. Elle doit énoncer les faits précis et produire les éléments de preuve démontrant l'existence d'une véritable question litigieuse.

215. (1) If on a motion for summary judgment the Court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the Court shall grant summary judgment accordingly.

(2) If the Court is satisfied that the only genuine issue is

(a) the amount to which the moving party is entitled, the Court may order a trial of that issue or grant summary judgment with a reference under rule 153 to determine the amount; or

(b) a question of law, the Court may determine the question and grant summary judgment accordingly.

(3) If the Court is satisfied that there is a genuine issue of fact or law for trial with respect to a claim or a defence, the Court may

(a) nevertheless determine that issue by way of summary trial and make any order necessary for the conduct of the summary trial; or

(b) dismiss the motion in whole or in part and order that the action, or the issues in the action not disposed of by summary judgment, proceed to trial or that the action be conducted as a specially managed proceeding.

215. (1) Si, par suite d'une requête en jugement sommaire, la Cour est convaincue qu'il n'existe pas de véritable question litigieuse quant à une déclaration ou à une défense, elle rend un jugement sommaire en conséquence.

(2) Si la Cour est convaincue que la seule véritable question litigieuse est :

a) la somme à laquelle le requérant a droit, elle peut ordonner l'instruction de cette question ou rendre un jugement sommaire assorti d'un renvoi pour détermination de la somme conformément à la règle 153;

b) un point de droit, elle peut statuer sur celui-ci et rendre un jugement sommaire en conséquence.

(3) Si la Cour est convaincue qu'il existe une véritable question de fait ou de droit litigieuse à l'égard d'une déclaration ou d'une défense, elle peut :

a) néanmoins trancher cette question par voie de procès sommaire et rendre toute ordonnance nécessaire pour le déroulement de ce procès;

b) rejeter la requête en tout ou en partie et ordonner que l'action ou toute question litigieuse non tranchée par jugement sommaire soit instruite ou que l'action se poursuive à titre d'instance à gestion spéciale.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-373-11

(APPEAL FROM AN ORDER OF THE HONOURABLE MR. JUSTICE NEAR OF THE FEDERAL COURT OF CANADA DATED SEPTEMBER 7, 2011 (DOCKET NUMBER T-494-08))

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DATED:	July 15, 2013

APPEARANCES:

Peter Mantas Leslie Wilbur	FOR THE APPELLANT
Elizabeth Richards Brian Harvey	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Fasken Martineau DuMoulin LLP Ottawa, ON Counsel TPG Technology Consulting Ltd. Ottawa, ON	FOR THE APPELLANT
William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENT