

Federal Court  
of Appeal



Cour d'appel  
fédérale

**Date: 20120411**

**Docket: A-69-11**

**Citation: 2012 FCA 110**

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

**BETWEEN:**

**TREVOR NICHOLAS CONSTRUCTION CO. LIMITED**

**Appellant**

**and**

**HER MAJESTY THE QUEEN**

**Respondent**

Heard at Toronto, Ontario, on March 28, 2012.

Judgment delivered at Ottawa, Ontario, on April 11, 2012.

REASONS FOR JUDGMENT BY:

DAWSON J.A.

CONCURRED IN BY:

EVANS J.A.  
SHARLOW J.A.

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**REASONS FOR JUDGMENT**

**DAWSON J.A.**

[1] In 1995, Trevor Nicholas Construction Co. Limited (plaintiff or appellant) sued the federal Crown (defendant) in respect of four tenders advertised by Public Works Canada. Three of the tenders were for dredging services at three locations: on the St. Clair River, at Amherstburg and at Collingwood. The fourth tender was for installation of rock and armor stone at Cobourg. Two causes of action were pled. The plaintiff alleged that the defendant had treated the plaintiff unfairly and also that it had breached an implied term of the contracts which were created when the plaintiff delivered four fully qualified low tenders.

[2] By order dated May 16, 2001, the Federal Court granted summary judgment dismissing the plaintiff's claim to damages under the implied contractual terms. The Federal Court ordered that:

2. This matter shall proceed to trial on the following issues:
  - (i) In light of the claim of the Plaintiff that it was treated unfairly, was there an implied obligation on the part of the Defendant that the Plaintiff be treated fairly?
  - (ii) If there was such an obligation, was that obligation breached?
  - (iii) If that obligation was breached, what if any damages are recoverable as a result of the breach?

[3] Subsequently, by order dated January 20, 2011, a judge of the Federal Court granted summary judgment dismissing the balance of the plaintiff's claim (2011 FC 70, 328 D.L.R. (4th) 665). The Judge found there was no genuine issue for trial with respect to the plaintiff's claim that the defendant breached its obligation to treat the plaintiff fairly in respect of the four tenders.

[4] This is an appeal from the January 20, 2011 order of the Federal Court dismissing the plaintiff's action.

### The Issues

[5] The plaintiff raised ten grounds of appeal in its memorandum of fact and law. I would frame the issues to be decided on this appeal as follows:

1. Was the order of the Federal Court vitiated by some procedural defect?
2. Could the motion for summary judgment succeed in view of the Judge's finding that the issue of whether the plaintiff was treated fairly was not *res judicata*?
3. Did the Judge improperly receive hearsay evidence?

4. Did the evidence before the Federal Court raise one or more issues of credibility which could only be determined after a trial?
5. Did the evidence raise a genuine issue for trial?

Consideration of the Issues

1. Was the order of the Federal Court vitiated by some procedural defect?

[6] The appellant asserts that:

- a. The defendant lacked status to bring the second motion for summary judgment in view of the wording of the Federal Court order of May 16, 2001 which directed that the “matter shall proceed to trial”. In the circumstances, the Judge lacked jurisdiction to hear the motion for summary judgment.
- b. The Judge also lacked jurisdiction to hear the motion for summary judgment because the defendant neither sought nor obtained leave to bring a second motion for summary judgment.
- c. Declaratory relief is not available on a motion for summary judgment.
- d. The summary judgment motion materials were defective because not all of the relevant pleadings were before the Court. Specifically, the defendant failed to include the plaintiff’s reply pleading as part of the motion materials.

[7] For the following reasons, I find there was no procedural defect that vitiated the summary judgment proceeding. Each alleged procedural defect is responded to below in the order advanced by the appellant:

- a. When the May 16, 2001 order is read fairly, in the context of the supporting reasons, it is apparent that the Federal Court was not adjudicating upon the mechanism by which the issue of unfair treatment was to be decided. Rather, the Court was dismissing the claim relating to alleged breaches of contracts, while allowing the allegation of unfair treatment to proceed. The Federal Court at all times retained discretion to decide how the issue of unfair treatment would be adjudicated.
- b. The plaintiff relies upon Rule 213(2) of the *Federal Courts Rules*, SOR/98-106 which currently provides:

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.

The present motion for summary judgment was filed on or about January 4, 2005. However, as the Judge correctly noted, Rule 213(2) came into force in its present form in December of 2009. Prior to December 2009, Rule 213(2) did not limit the number of summary judgment motions that could be brought by a party. The Regulatory Impact Analysis Statement which accompanied the *Rules Amending the Federal Courts Rules (Summary Judgment and Summary Trial)*, SOR/2009-331 expressly noted that "Rule 213(2) is replaced by a provision which limits a party to

bringing one motion for summary judgment or summary trial”. It follows that the Judge correctly concluded that at the time the motion was brought, the defendant did not require leave to bring its second summary judgment motion. Moreover, even if the previous rule contained any implied limit on the number of summary judgment motions, the Judge possessed the discretion under Rule 55 to vary the rule or dispense with its compliance.

- c. The Federal Court did not grant declaratory relief. The Judge simply found there was no genuine issue for trial with respect to the plaintiff’s claim that the defendant breached its implied obligation to treat it fairly. Moreover, while declaratory relief cannot be granted on an interlocutory basis, I see no reason in principle why declaratory relief cannot be granted on summary judgment. See, for example, *Canada (Minister of Citizenship and Immigration) v. Schneeberger*, 2003 FC 970, [2004] 1 F.C.R. 280.
- d. The Judge found that the defendant was not bound to include the plaintiff’s reply in its motion materials. Moreover, the Judge concluded that the plaintiff was not prejudiced by the defendant’s failure to include the reply in its motion record because there was no information contained in the reply that was of potential relevance to the motion that was not already before the Court. The appellant has not shown that the Judge committed any error in his appreciation of the defendant’s obligation to produce the plaintiff’s pleading or the lack of materiality of the content of the plaintiff’s reply. In any event, the appellant advised in oral argument that it put the reply before the Judge

on the summary judgment motion. No complaint can be made when the document was before the Court on the motion for summary judgment.

2. Could the motion for summary judgment succeed in view of the Judge's finding that the issue of whether the plaintiff was treated fairly was not *res judicata*?

[8] On the summary judgment motion the defendant argued that it was established, as a matter of *res judicata*, that the plaintiff was treated fairly by the defendant. The defendant relied upon the decision of the Federal Court in a related proceeding cited as 2001 FCT 1282. The Judge accepted the plaintiff's argument that there were sufficient differences between the facts and allegations in the case before him and the facts and allegations addressed in 2001 FCT 1282 so as to preclude the application of the doctrine of *res judicata*. On this appeal, the appellant now argues that this finding was fatal to the defendant's motion for summary judgment.

[9] I respectfully disagree. Even though the principle of *res judicata* was found not to be applicable, the Judge was still required to assess the evidence before him in order to ascertain whether a genuine issue for trial existed (see the first ground relied upon in the defendant's motion for summary judgment). It was open to the Judge to find that no genuine issue existed based upon the remaining evidence relied upon by the defendant.

3. Did the Judge improperly receive hearsay evidence?

[10] The appellant argues that hearsay evidence is not permitted on a motion for summary judgment unless the evidence meets one of the exceptions to the hearsay rule. Specifically, the plaintiff complains that he could not effectively cross-examine the defendant's deponent, Mr. Grossi, on the exhibits to his affidavit and therefore suffered prejudice.

[11] The Judge dealt with the plaintiff's argument concerning hearsay evidence at paragraphs 33, 34 and 38 of his reasons:

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.

[...]

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.

[12] The appellant has not established any error in the Judge's analysis of the use to be made of the exhibits attached to Mr. Grossi's affidavit or the relevance of cross-examination directed to events that occurred after the decisions were made not to accept the plaintiff's tenders.

[13] The Judge was required to assess whether a genuine issue existed that the defendant breached its obligation to treat the plaintiff fairly. This required the Judge to first consider what the duty of fair treatment required. The Judge correctly stated the law concerning the content of the obligation of fair treatment at paragraph 46 of his reasons:

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.  
[underlining added]

[14] Of significance is that it was necessary to consider whether the defendant knew or ought to have known when it decided not to accept the plaintiff's tenders that it was basing its decision on irrelevant or incorrect factors. The information the plaintiff sought to cross-examine Mr. Grossi upon was, in the words of the Judge, "information that came to light many years after the defendant made its decision to by-pass the plaintiff". (Reasons paragraph 68. See also paragraphs 69, 79, 80, 94 and 101). Information received after the by-pass decisions were made was irrelevant to the issue before the Court. No prejudice could arise from the inability to cross-examine upon irrelevant issues.

4. Did the evidence before the Federal Court raise one or more issues of credibility which could only be determined after a trial?

[15] The appellant argues that the evidence raised an issue of credibility which "required a hearing before a trial Judge".

[16] The Judge dealt with this issue at paragraphs 103 and 104 of his reasons:

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).

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.

[17] The appellant has not shown that the Judge committed any palpable and overriding error in his appreciation of the evidence that would warrant our intervention. Specifically, the appellant has not pointed to any instances where the Judge was required to choose between truly contradictory evidence.

[18] During oral argument, the appellant endeavoured to show examples of instances where the evidence of the defendant's witness, Mr. Grossi, was impugned. For example, Mr. Grossi gave clear evidence in his affidavit about the information and reports relied upon when the decision was made to by-pass tenders from the appellant. The appellant then pointed to an admission from Mr. Grossi that he was not in the room when the decision was made. However, that admission by itself is not determinative of whether Mr. Grossi, who had been intimately involved in the tender process, knew what the decision-maker relied upon. Mr. Grossi could well have known what was put before the decision-maker even though he was not in the room with the decision-maker. The appellant confirmed in oral argument that Mr. Grossi was never directly challenged as to how he knew which information was relied upon. There was therefore no true conflict in the evidence to be resolved.

[19] In oral argument the appellant also argued that credibility issues arose because the Judge did not dismiss the affidavits the plaintiff relied upon, and so was obliged to give some weight to them. However, the plaintiff had no direct evidence to show that when making his decision not to accept the plaintiff's tenders, the decision-maker knew that the information before him was incorrect or based upon irrelevant factors. At best, the plaintiff's evidence took issue with the accuracy of various opinions placed before the decision-maker. The Judge was entitled to weigh this evidence against the

evidence provided by the defendant and determine the plaintiff's evidence was of insufficient weight to create a genuine issue for trial.

5. Did the evidence raise a genuine issue for trial?

[20] The appellant has not demonstrated any error in the Judge's articulation of the legal principles which were applicable to the defendant's motion for summary judgment. Nor has the appellant demonstrated any error in the Judge's articulation of the legal content of the applicable duty of fairness and what would be required at law in order to establish a breach of that duty.

[21] The Judge considered the plaintiff's assertions and evidence relating to each of the four tenders. At paragraph 30 of his reasons, the Judge wrote that there was nothing in the plaintiff's 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.

[22] After setting out the plaintiff's general allegations and describing the evidence, the Judge characterized the plaintiff's claims as "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" that were "clearly without any foundation" (see Reasons at paragraphs 67-68. See also paragraphs 79-80, 88-94 and 102). The Judge made a finding of fact that the defendant "went to great lengths and incurred considerable expense to treat the plaintiff fairly" (Reasons at paragraph 80).

[23] The appellant has failed to demonstrate any palpable and overriding error in the Judge's assessment of the evidence that led him to conclude that there was no genuine issue for trial. There is therefore no basis for our intervention.

Conclusion

[24] For these reasons, I would dismiss the appeal with costs fixed in the all-inclusive amount of \$500.00.

“Eleanor R. Dawson”

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J.A.

“I agree.

John M. Evans J.A.”

“I agree.

K. Sharlow J.A.”

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-69-11

**STYLE OF CAUSE:** Trevor Nicholas Construction Co. Limited v. Her Majesty the Queen

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** March 28, 2012

**REASONS FOR JUDGMENT BY:** Dawson J.A.

**CONCURRED IN BY:** Evans J.A.  
Sharlow J.A.

**DATED:** April 11, 2012

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