Federal Court  Cour fédérale

Date: 20110907

Docket: T-494-08

Citation: 2011 FC 1054

Ottawa, Ontario, September 7, 2011

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

TPG TECHNOLOGY CONSULTING LTD.

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

REASONS FOR ORDER AND ORDER

[1] The Plaintiff/Respondent, TPG Technology Consulting Ltd. (TPG) has brought an action in the Federal Court alleging breach of contract and other tortious conduct on the part of the Defendant/Moving Party, Her Majesty the Queen (the Crown). The alleged conduct arises from a solicitation process undertaken by the Department of Public Works and Government Services Canada (PWGSC) to acquire engineering and technical support (ETS) services for the Information Technology Services Branch (ITSB).

[2] TPG was the incumbent contractor, providing ETS to the Crown from1999 until December 2007. TPG was unsuccessful in bidding for the subsequent contract, which was awarded to CGI Information Systems and Management Consultants (CGI) on October 31, 2007.

[3] TPG seeks to recover damages in excess of $251,000,000 for negligence, breach of contract, inducing breach of contract and intentional interference with economic interests by unlawful means.

[4] The present matter is a motion for summary judgement dismissing the action as pleaded in the Amended Amended Statement of Claim in whole or in part, brought by the Crown. The Crown claims that the action is an abuse of process and that TPG has failed to establish any genuine issue for which a trial is warranted.

I. Background

A. *Facts*

[5] TPG is a Canadian corporation that supplies specialized information technology (IT) services. TPG primarily provides these services to the Crown.

[6] TPG held the ETS contract, the subject of this action, from 1999 until December 21, 2007, at which time the contract expired. TPG supplied ETS services to the ITSB through the deployment of approximately 200 subcontractors. The subsequent contract was awarded to CGI. CGI is a direct competitor of the TPG.

[7] TPG alleges that the procurement process conducted by PWGSC in order to award the ETS contract was improper.

[8] In anticipation of the expiration of the ETS contract, PWGSC published a request for proposals for a new ETS contract (the ETS RFP) on May 30, 2006. The estimated value of the new ETS contract was $428 million. The procurement was subject to international trade agreements including WTO-AGP, NAFTA and AIT. PWGSC retained Mr. Robert Tibbo of PPI Consulting Ltd., through a public tendering process to assist in drafting the ETS RFP and to facilitate the technical evaluation of the proposals.

[9] PGWSC received three proposals, including one from TPG and one from CGI. All three solicitation responses were determined to be compliant with the requirements of the ETS RFP. The Crown submits that the proposals were assessed as per the evaluation process set out in the ETS RFP. This process was reviewed and approved by the Office of the Chief Risk Officer. CGI was awarded the new ETS contract on October 31, 2007 and TPG was formally advised of this on November 5, 2007.

[10] In 2007, TPG made four complaints to the Canadian International Trade Tribunal (CITT) regarding the ETS solicitation, alleging that the process was unfair. The CITT rejected two of the complaints, refused to conduct an inquiry into one of the complaints, and found that another complaint was time-barred.

[11] In June 2006, TPG had its subcontractors sign teaming agreements restricting them from offering their services to any entity competing with TPG on the ETS solicitation. In June 2007, prior to contract award, TPG had its subcontractors sign amendments to these agreements which would restrict the subcontractors from working for a winning bidder other than itself until four months after the completion of the transition of the new ETS contract.

[12] The Crown submits that CGI met all the contractual requirements for the transition phase to the new contract. TPG disputes this.

[13] TPG commenced the action for damages on March 27, 2008. TPG alleges that the Crown implemented a plan from the evaluation process all the way to and through contract award, to award the ETS contact to CGI and induce breaches of contract by TPG's subcontractors. TPG argues that this issue could not have been, and was not before the CITT.

[14] A ten week trial is to be scheduled by the Judicial Administrator, starting sometime after April 15, 2012.

II. Issues

[15] The issues to be decided by this Court on this Motion are:

(a) Whether this Court has jurisdiction to hear actions in procurement cases in light of the CITT's existence, or whether the *Canadian International Trade Tribunal Act*, RSC, 1985,

c 47 (4th Supp) (CITT Act) grants exclusive jurisdiction to the CITT to hear and determine complaints regarding the fairness of the evaluation process;

(b) Whether TPG's action is *res judicata* as a result of TPG's previous CITT complaints and is otherwise an abuse of process;

(c) Whether there are genuine issues for trial relating to TPG's allegations of breach of contract and tortious conduct.

Summary Judgement – the Applicable Legal Principles

[16] The availability of summary judgment is governed by rules 213 to 219 of the *Federal Courts Rules*, SOR/98-106. These rules were amended effective December 10, 2009 as the result of a consultation process that concluded that the interests of justice would be better served by the adoption of a summary trial procedure.

[17] The purpose of summary judgement rules is to prevent claims or defences that have no chance of success from proceeding to trial (*Canada (Attorney General) v Lameman*, 2008 SCC 14, [2008] 1 SCR 372). Summary trial rules promote efficiency by enabling courts to dispose of actions efficiently.

[18] Rule 213 provides that a defendant may bring a motion for summary judgment dismissing all or some of the issues set out in the Statement of Claim at any time before the time and place for trial have been fixed. The response to such a motion cannot be based on conjecture as to what the evidence might be at a later stage in the proceedings. Rule 214 requires the response to set out

specific facts and adduce the evidence showing that there is a genuine issue for trial. Both sides are required to file such evidence as is reasonably available to them.

[19] If, on a motion for summary judgement, the Court is satisfied that there is no genuine issue for trial, according to Rule 215, the Court shall grant summary judgement. If the Court finds that there is a genuine issue of fact or law, it may determine that issue by way of summary trial, or dismiss the motion in whole or in part and order that the issues not disposed of proceed to trial (Rule 215(3)).

[20] The Federal Court of Appeal adopted the basic principles governing summary judgements as set out by Justice Daniele Tremblay-Lamer in *Granville Shipping Co. v Pegasus Lines Ltd SA*, [1996] 2 FC 853, [1996] FCJ No 481 (QL) (FTD) at para 8:

> 1. the purpose of the provisions is to allow the Court to summarily dispense with cases which ought not proceed to trial because there is no genuine issue to be tried (Old Fish Market Restaurants v. 1000357 Ontario Inc. et al);
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> 2. there is no determinative test (Feoso Oil Limited v. Sarla) but Stone J. A. seems to have adopted the reasons of Henry J. in Pizza Pizza Ltd. v. Gillespie (Pizza Pizza). It is not whether a party cannot possibly succeed at trial, it is whether the case is so doubtful that it does not deserve consideration by the trier of fact at a future trial;
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> 3. each case should be interpreted in reference to its own contextual framework (Blyth and Feoso);
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> 4. provincial practice rules (especially Rule 20 of the Ontario Rules) can aid in interpretation (Feoso and Collie);
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> 5. this Court may determine questions of fact and law on the motion for summary judgment if this can be done on the material before the Court (this is broader than Rule 20 of the Ontario Rules of Civil Procedure) (Patrick);

> 6. on the whole of the evidence, summary judgment cannot be granted if the necessary facts cannot be found or if it would be unjust to do so (Pallman and Sears);
>
> 7. in the case of a serious issue with respect to credibility, the case should go to trial because the parties should be cross-examined before the trial judge (Forde and Sears). The mere existence of apparent conflict in the evidence does not preclude summary judgment; the court should take a "hard look" at the merits and decide if there are issues of credibility to be resolved (Stokes).

[21] More recently, Justice Paul Crampton of this Court summarized the evidentiary burden of the parties when considering motions for summary judgement in *Trevor Nicholas Construction Co. v Canada (Minister for Public Works)*, 2011 FC 70 at para 44:

> [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).

[22] It remains important for the motions judge to consider a motion for summary judgement with great care. As stated by Justice Anne Mactavish in *Canada (Minister of Citizenship and Immigration) v Laroche*, 2008 FC 528, 169 ACWS (3d) 866 at para 18:

> [18] […] the effect of the granting of summary judgment will be to preclude a party from presenting any evidence at trial with respect to the issue in dispute. In other words, the unsuccessful responding party will lose its "day in court": see *Apotex Inc. v. Merck & Co.*, 248 F.T.R. 82, at para. 12, aff'd [2004] F.C.J. No. 1495, 2004 FCA 298.

[23] In the present matter, the Crown bears the legal onus of establishing the facts necessary to obtain summary judgement, while TPG has the evidentiary burden of showing that there is a genuine issue for trial. Both parties submit that the other party has failed to carry out his required task in order to succeed.

Preliminary Issue: Are TPG's Affidavits in Compliance with Rule 81?

[24] The Crown submits, as preliminary matter, that all five of TPG's affidavits filed in response to this motion are seriously flawed and in violation of Rule 81(1) of the Rules. The Crown argues that these affidavits are replete with speculation, hearsay, opinion, legal argument and conclusion, and contain statements that are either irrelevant or lacking any foundation or are clearly beyond the personal knowledge of the deponent. The Crown further argues that TPG is attempting to subvert the Court's Rule on the maximum length of a party's Memorandum of Fact and Law by attaching

the 150 page affidavit of Mr. Powell which largely contains argument and speculation. The Crown asks the Court to strike out each of the Affidavits in their entirety.

[25] TPG counters the Crown's submission with the assertion that the affidavits of Mr. Powell, Mr. Estabrooks, Mr. Watts, Ms. Bright and Mr. Fleming are all confined to facts within each deponent's personal knowledge. TPG further submits that the Crown should have brought a motion to strike parts of these affidavits before proceeding with the cross-examinations of TPG's affiants. TPG argues that the Crown has not even referenced which specific portions of the various affidavits it finds objectionable, and that a bald assertion that all five affidavits are seriously flawed is not sufficient to strike parts of an affidavit.

[26] Rule 81(1) requires that affidavits be confined to facts within the deponent's personal knowledge. Affidavits are meant to adduce facts relevant to the dispute "without gloss or explanation" (*Canada (Attorney General) v Quadrini*, 2010 FCA 47, 399 NR 33 at para 18). As the Crown submits, this Court will strike out parts of affidavits that are abusive, argumentative or opinionated and contain legal conclusions (*McNabb v Canada Post Corp*, 2006 FC 1130, 300 FTR 57 at para 52, *Quadrini*, above). The Crown suggests that in the present matter it is impossible to separate the admissible from the inadmissible, and thus the affidavits in their entirety ought to be rejected (*Foodcorp Limited v Hardee's Food Systems Inc*, [1982] 1 FC 821 (FCA); *Van Duyvenbode v Canada (Attorney General)*, 2009 FCA 120 at para 3).

[27] The affidavit of Mr. Powell is indeed suspiciously lengthy and replete with speculation. However, as TPG submits, the Crown has not properly brought forward a motion to strike the

affidavits, a failure which has in the past lead this Court to deny the motion to strike. In *Burns Lake Native Development Corp v Canada (Commissioner of Competition)*, 2005 FCA 256, 141 ACWS (3d) 697 the Court held at para 13:

> [13] It is unusual for a party answering a motion to determine the content of the appeal book to seek, in that answer, the striking out of parts of the affidavit given in support of the motion. The normal procedure for striking out an affidavit or parts of it is to bring a motion to that effect. Thus, the party who produced the affidavit can adequately respond by serving and filing a respondent record. It would not be fair to the appellants to rule on the Commissioner's request that part of the affidavit in support of their motion be struck. I am, therefore, denying the Commissioner's request to strike parts of Ms. Wood's affidavit.

[28] Another of TPG's submissions, which is indeed supported by the jurisprudence of this Court, is that in order to succeed in striking affidavits or portions thereof, the Crown is required to show prejudice. TPG submits that the Crown has failed to do so.

[29] The caselaw of this Court emphasizes that the discretion to strike out affidavits ought to be exercised sparingly and only where it is in the interests to do so, for example where a party would be materially prejudiced or where not striking would impair the orderly hearing of the application (*Armstrong v Canada (Attorney General)*, 2005 FC 1013, 141 ACWS (3d) 5 at para 4). Justice James Hugessen dealt with this issue in *Sawridge Band v Canada*, 95 ACWS (3d) 20, [2000] FCJ No 192 (QL), a case cited with approval by Justice François Lemieux in *Armstrong*, above and by TPG. At paras 5 and 6 Justice Hugessen wrote:

> [5] Dealing first with the motion brought by the interveners that the affidavit of Clara Midbo should be struck out as it is an improper affidavit within the meaning of the Rules, I may say that upon examination of that affidavit, I have no doubt whatever that it is improper. It is replete with conclusory and argumentative allegations, almost all of them being on matters of law as to which the deponent

> is not apparently qualified. I set out below, simply by way of example, paragraphs 3 and 4 of the affidavit in which the deponent attempts to interpret the pleadings, the Rules and various orders that have been made in this case, something which she is eminently unqualified to do and something which is clearly not a matter for evidence in any event:
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> […]
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> [6] That said, I have not been persuaded that the affidavit should be struck. In my view, in a sane modern procedure, irregularities in proceedings should not be made the subject of motions and should not require the Court to give orders striking out or correcting such irregularities unless the party attacking the irregularity can show that it suffer some sort of prejudice as a result thereof. I put that point squarely to counsel for the interveners and the only prejudice he was able to suggest to me that his clients might suffer was that the Court, when it hears the main motion, might be induced to believe that these highly tendentious allegations in the affidavit were uncontested matters of fact. I think that counsel is ascribing to the Court a degree of gullibility which I hope he is not justified in doing. Accordingly, absent any showing of prejudice and notwithstanding that almost all of the affidavit is irregular and should not be before the Court, I have no grounds that would justify me in striking it out. Counsel for the interveners admits readily that virtually every paragraph of the affidavit is proper argument and can properly be made by counsel for plaintiffs and indeed has been made by counsel for plaintiffs in his written submissions in support of the main motion. I am therefore going to dismiss the motion to strike the affidavit.

[30] I take the view that at this late stage, and on a motion for summary judgement it would be inappropriate to strike all of TPG's affidavits. Indeed, this was not seriously pursued by the Crown at the hearing. I reiterate Justice Hugessen's words in *Sawridge*, above- the Crown need not worry that the Court is so gullible as to uncritically accept the evidence contained in the affidavits. The Crown has not properly brought a motion to strike the affidavits, and at this time, absent a showing of genuine prejudice on the part of the Crown, I am not inclined to acquiesce to the Crown's request.

A. *Does the Federal Court have Jurisdiction to Hear this Claim?*

[31] The Crown submits that the Federal Court lacks the jurisdiction to consider the fairness of the tender evaluation due to the existence of the CITT. The Crown takes the position that the CITT Act and its associated regulations, the Canadian International Trade Tribunal Procurement Inquiry Regulations bestow exclusive jurisdiction on the CITT to resolve complaints and disputes regarding allegedly unfair or improper procurement processes.

[32] TPG disputes that Parliament has ousted the jurisdiction of this Court to hear causes of action against the Crown arising from public tendering processes through the enaction of subparagraph 30.11 of the CITT Act. TPG asserts that the CITT only has a narrow jurisdiction to hear complaints relating to breaches of trade agreements, not to adjudicate actions alleging tortuous conduct, breaches of contract, or other legal obligations rooted in common law.

[33] Sections 30.1 – 30.19 of the CITT Act lays out a complete code of procedure for addressing procurement complaints. Potential suppliers may advance a complaint with respect to any aspect of a procurement process that is governed by an applicable trade agreement. In response to a complaint the CITT can conduct an inquiry. Section 30.15 of the CITT Act gives the CITT broad discretion to recommend a remedy it considers appropriate. Judicial review from decisions of the CITT is available in the Federal Court of Appeal. The Federal Court of Appeal described the process leading up to an inquiry, and the conduct of the inquiry itself in *Canada (Attorney General) v Almon Equipment Ltd*, 2010 FCA 193, 405 NR 91 starting at para 11:

[11] The Tribunal has oversight jurisdiction under this regulatory regime. In response to a complaint, it can conduct an inquiry and recommend remedies. The process leading up to an inquiry, and the conduct of the inquiry itself, is as follows:

(a) *Complaints* (sections 30.11 and 30.12 of the Act). A potential supplier may file a compliant with the Tribunal. The complaint must be regarding "any aspect of the procurement process" that relates to "a contract for the supply of goods or services that has been or is proposed to be awarded by a government institution" or a contract designated in the regulations. "Interested parties" are notified of the complaint.

(b) *Screening* (subsection 30.13(5) of the Act). The Tribunal may decide not to conduct an inquiry into the complaint.

(c) *Inquiry* (subsections 30.13(1), 30.13(2) and 30.14(1) of the Act). If the Tribunal decides to conduct an inquiry, it gives notice to the complainant, the relevant government institution and interested parties. They have an opportunity to make representations. The Act does not require the Tribunal to hold a hearing as part of its inquiry, but can do so. The Tribunal's inquiry is limited to the subject-matter of the complaint.

[12] At the end of the inquiry, under subsection 30.14(2) of the Act, the Tribunal must determine whether the complaint is valid, based on particular grounds:

30.14. (2) At the conclusion of an inquiry, the Tribunal shall determine whether the complaint is valid on the basis of whether the procedures and other requirements prescribed in respect of the designated contract, or the class of contracts to which it belongs, have been or are being observed.	**30.14**. (2) Le Tribunal détermine la validité de la plainte en fonction des critères et procédures établis par règlement pour le contrat spécifique ou la catégorie dont il fait partie.

[13] Section 11 of the Regulations empowers the Tribunal to assess the complaint based on other grounds:

11. If the Tribunal conducts an inquiry into a complaint, it shall	11. Lorsque le Tribunal enquête sur une plainte, il

determine whether the procurement was conducted in accordance with the requirements set out in whichever of NAFTA, the Agreement on Internal Trade, the Agreement on Government Procurement, the CCFTA or the CPFTA applies.	décide si la procédure du marché public a été suivie conformément aux exigences de l'ALÉNA, de l'Accord sur le commerce intérieur, de l'Accord sur les marchés publics, de l'ALÉCC ou de l'ALÉCP, selon le cas.

[…]

[16] Where the Tribunal finds the complaint to be valid, it may recommend remedies. Subsections 30.15(2) and 30.15(3) govern these remedies.

[17] Subsection 30.15(2) of the Act is a list of remedies that the Tribunal may award:

30.15. (2) Subject to the regulations, where the Tribunal determines that a complaint is valid, it may recommend such remedy as it considers appropriate, including any one or more of the following remedies:	**30.15.** (2) Sous réserve des règlements, le Tribunal peut, lorsqu'il donne gain de cause au plaignant, recommander que soient prises des mesures correctives, notamment les suivantes :
(a) that a new solicitation for the designated contract be issued;	a) un nouvel appel d'offres;
(b) that the bids be re-evaluated;	b) la réévaluation des soumissions présentées;
(c) that the designated contract be terminated;	c) la résiliation du contrat spécifique;
(d) that the designated contract be awarded to the complainant; or	d) l'attribution du contrat spécifique au plaignant;
(e) that the complainant be compensated by an amount specified by the Tribunal.	e) le versement d'une indemnité, dont il précise le montant, au plaignant.

[18] Subsection 30.15(3) is a mandatory recipe that the Tribunal must follow when considering its recommendation on remedies:

30.15. (3) The Tribunal shall, in recommending an appropriate remedy under subsection (2), consider all the circumstances relevant to the procurement of the goods or services to which the designated contract relates, including	**30.15.** (3) Dans sa décision, le Tribunal tient compte de tous les facteurs qui interviennent dans le marché de fournitures ou services visé par le contrat spécifique, notamment des suivants:
(a) the seriousness of any deficiency in the procurement process found by the Tribunal;	a) la gravité des irrégularités qu'il a constatées dans la procédure des marchés publics;
(b) the degree to which the complainant and all other interested parties were prejudiced;	b) l'ampleur du préjudice causé au plaignant ou à tout autre intéressé;
(c) the degree to which the integrity and efficiency of the competitive procurement system was prejudiced;	c) l'ampleur du préjudice causé à l'intégrité ou à l'efficacité du mécanisme d'adjudication;
(d) whether the parties acted in good faith; and	d) la bonne foi des parties;
(e) the extent to which the contract was performed.	e) le degré d'exécution du contrat.

[19] In addition to the above remedies, the Tribunal also may provide "comments and observations on any matter...in connection with the procurement process" to a government institution: section 30.19 of the Act.

[20] After receiving the Tribunal's recommendation under subsection 30.15(3) of the Act, the affected government institution

> shall, subject to the Regulations, "implement the recommendations to the greatest extent possible" and report on its progress. If it "does not intend to implement them fully," it must set out "the reasons for not doing so": section 30.18 of the Act.

[34] The Crown maintains that the purpose of this statutory scheme is to ensure that allegations related to improper procurements are wholly dealt with by the CITT since it is an administrative tribunal with recognized expertise in dealing with procurement disputes. The Crown provides examples of courts recognizing that where Parliament has created a complete statutory code for dealing with a specific subject matter, the jurisdiction of the Court to hear complaints related to that subject matter is ousted (*Neles Controls Ltd v Canada*, 2002 FCA 107, 288 NR 260 at para 15; *CB Powell Ltd v Canada (Border Services Agency)*, 2010 FCA 61, 400 NR 367 at paras 30 and 31).

[35] On this point, I accept the submission of TPG that the CITT Act cannot have been intended to completely insulate the Crown from common law actions relating to public procurements. While the Crown is correct that the CITT has been tasked by Parliament to investigate complaints regarding procurement processes related to “designated” contracts, this scheme does not, as in the cases cited by the Crown, provide relief that “occup[ies] the whole field in terms of the relief available” (*Neles*, above, at para 15), nor does it duplicate relief that could be offered by a Court.

[36] In essence, the parties disagree as to whether the doctrine of “adequate alternate remedy” applies in the present matter. This doctrine provides, as submitted by the Crown, that the Federal Court should not exercise its jurisdiction if there is an adequate alternate remedy provided by Parliament. Typically, this applies in the context of the Court declining to exercise judicial review. As per the Federal Court of Appeal in *CB Powell*, above, at para 31:

> [31] […] absent exceptional circumstances, parties cannot proceed to the court system until the administrative process has run its course. This means that, absent exceptional circumstances, those who are dissatisfied with some matter arising in the ongoing administrative process must pursue all effective remedies that are available within that process; only when the administrative process has finished or when the administrative process affords no effective remedy can they proceed to court. Put another way, absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted.

[37] Justice Michael Kelen listed the factors to be considered under the adequate alternate remedy test at para 44 of *Agustawestland International Ltd. v Canada (Minister of Public Works and Government Services)*, 2004 FC 1545, 263 FTR 54 [*Agusta* 2004]:

> 1. the powers and nature of the alternate body;
> 2. the nature of the error;
> 3. the convenience of the alternate remedy;
> 4. the legal framework out of which the matter arises;
> 5. the burden of a previous finding;
> 6. expeditiousness; and
> 7. costs.

[38] TPG argues that, in accordance with the test, the remedies that the CITT can issue are not adequate alternatives to an enforceable court judgement, because firstly, it is not clear that a CITT remedy is enforceable and secondly, the government institution seems to have some degree of discretion over whether and how much to comply with the CITT's recommendations. Although the CITT procedure may be more expeditious, it is at the cost of dispensing with procedural steps that would be available to the complainant in a court action.

[39] In *Agusta 2004*, above, Justice Kelen disagreed with the applicant's submission that the CITT procurement process would not be an adequate alternative remedy to an application for

judicial review in the Federal Court. At issue in that case was whether the applicant was a "Canadian supplier" for the purpose of accessing the jurisdiction of the CITT. However, the applicant also argued that the CITT was not an adequate alternate remedy because the procurement review process conducted by the CITT would not apply to the common law duty of fairness in the federal procurement contract process or to the law of bias. However, Justice Kelen refuted this argument, citing *Cougar Aviation Ltd. v Canada (Minister of Public Works and Government Services)*, (2000) 264 NR 49, 26 Admin LR (3d) 30, in which the Federal Court of Appeal held that the CITT's procurement review jurisdiction included the duty of fairness, impartiality and the right of an unsuccessful bidder to raise an allegation of a reasonable apprehension on bias. Indeed, TPG's four complaints before the CITT raised exactly these issues. In *Cougar Aviation*, above, Justice John Maxwell Evans stated at paras 23 and 24:

> [23] In my opinion, the various obligations imposed on the parties by the relevant Articles of the Agreement should be interpreted, to the extent that their language permits, in a manner consistent with the common law duty of fairness as it applies to the federal procurement contract process. In the context of administrative procedure, "impartiality" normally includes the appearance of impartiality.
>
> [24] Furthermore, it would unduly fragment a challenge to an award of a contract if an unsuccessful bidder were required to raise an allegation of a reasonable apprehension of bias, not in the Tribunal which might be the appropriate forum for other aspects of a complaint, but on an application for judicial review in the Federal Court, Trial Division. Given the technical nature of the tendering process, and the legislative regime within which it is conducted, it would seem inconsistent with the statutory scheme to interpret the Tribunal's jurisdiction this narrowly.

[40] Broadly, the present matter does require the Court to examine allegations of unfairness and impartiality in the tender process. This would normally fall under the jurisdiction of the CITT, which would represent an adequate alternative remedy. However, it is a distinct situation, in my

view, that the present matter is an action and not an application for judicial review. TPG allege specific common law causes of action - specific torts and breach of contract, not the violation of a trade agreement. These causes of action are not provided for under the CITT Act.

[41] TPG cites *Agustawestland International Ltd. v Canada (Minister of Public Works and Government Services)*, 2006 FC 767, 307 FTR 62 [*Agustawestland 2006*] for the proposition that the doctrine of adequate alternate remedy does not apply to actions for breach of contract and tort arising from public tendering processes. Justice Kelen explained at para 46 of *Agustawestland 2006*:

> [46] This action, in addition to judicial review, sues the defendants for breach of contract and for tort. These causes of action are not restricted by the doctrine that the Court should not assume jurisdiction if there is an adequate alternate remedy provided by statute.

[42] Justice Kelen went on to note that while administrative decisions are generally subject to judicial review, acts by the Crown are subject to legal actions for breach of contract or tort.

[43] Furthermore, as argued by TPG, the CITT Act does not expressly state that no civil proceedings lie against the Crown as in other statutes that state this intention explicitly and clearly. Additionally, the CITT has itself held that issues of contract administration or contract performance do not fall within its jurisdiction (*Airsolid Inc. v Canada (Public Works and Government Services*), 2010 CanLII 15681 (CITT) at para 16). I take these two facts to indicate that the CITT Act has not completely precluded Crown liability for tort and breach of contract in the context of public tendering.

[44] I am also persuaded by TPG's submissions that the CITT Act and the procedure followed by the CITT suggest that its primary function is to determine whether Canada has breached obligations under specified international and domestic trade agreements. The CITT is not a court for the resolution of common law claims against the Crown.

[45] I am sensitive to the Crown's argument that Parliament intended the CITT to provide an expeditious venue for the resolution of complaints regarding the procurement process and I am mindful of the danger of chipping away at the jurisdiction bestowed by Parliament onto the CITT by allowing actions largely dealing with allegations properly under the umbrella of the CITT entry into the Courtroom. However, given the nature and scope of the allegations in the present action, I am not satisfied that the CITT's mandate has replaced the Court as the proper forum in which to try breach of contract and tort allegations that fall outside the scope of trade agreements.

B. *Res Judicata*

[46] The Crown submits that TPG is precluded from bringing this action on the basis of the doctrine of *res judicata*. TPG previously filed four complaints with the CITT. The Crown characterizes these complaints as a challenge to the fairness of the evaluation and decision to award the contract to CGI in broad terms, the same elements founding TPG's cause of action.

[47] TPG submits that there is no merit to this argument because the issues in this action have not been previously decided.

[48] *Res judicata* has been defined as "something that has clearly been decided" (*R. v Duhamel*, [1984] 2 SCR 555, 14 DLR (4th) 92). The doctrine of *res judicata* springs from the idea that no one should be twice vexed by the same cause and the recognized need for judicial finality. The courts refuse to tolerate needless litigation. *Res judicata* takes two forms: cause of action estoppel and issue estoppel. Issue estoppel applies when a particular question has been decided in a previous proceeding, whereas cause of action estoppel applies when the question could have been decided.

(1) Issue Estoppel

[49] The essential elements of issue estoppel are:

(a) the same question must have been decided;

(b) the judicial decision which is said to create the estoppel was final; and

(c) the parties to the judicial decision must be the same.

(*Danyluk v Ainsworth Technologies Inc*., 2001 SCC 44, [2001] 2 SCR 460 at para 25)

[50] Both parties agree that the fundamental aspect of issue estoppel is an analysis of whether the question in the subsequent litigation can be said to be the "same". The Crown submits that a different characterization of the question and a different process or different relief requested does not mean a different question. On the other hand, TPG asserts that there is no issue estoppel if the question arose collaterally or incidentally in the first proceeding or if the question must be inferred by argument from the decision (*Danyluk*, above, at para 24).

[51] Both parties admit that issue estoppel applies only to issues that were fundamental to the decision arrived at in earlier proceedings. However, the parties differ on their characterization of TPG's earlier CITT complaints.

[52] With respect to TPG's allegations of breach of contract, the Crown insists that the issues raised relate to the fairness and transparency of the procurement process, and these issues have already been before the CITT. In the Crown's eyes, TPG brought four complaints in respect of the ETS evaluation, alleging variously that the Crown did not evaluate the bids fairly, impartially and in accordance with the RFP, that there was a reasonable apprehension of bias in the evaluation process, that the evaluation methodology had been altered after bid closing, all so as to favour one bidder over others.

[53] TPG submits that the CITT only ruled on very narrow questions based on provisions of the applicable trade agreements. TPG argues that two of the CITT complaints were never decided on the merits, and of the other two, one complaint dealt with the narrow issue of whether evaluators could give scores besides 0, 1 and 2 for one small subset of the RFP requirements, and the other whether PWGSC verified project references provided in each of the proposals. TPG insists that none of the narrow issues dealt with by the CITT are being re-litigated in this action.

[54] TPG brought four complaints to the CITT between the completion of the evaluation and the ultimate award of the contract to CGI. The complaints are as follows:

1) Complaint PR-2006-050 was initiated on March 23, 2007. TPG alleged that PWGSC did not evaluate the bids fairly, impartially and in accordance with the RFP,

and that there was a reasonable apprehension of bias in the evaluation process. The CITT found that both grounds of complaint were time barred and consequently did not accept the complaint for inquiry. The Federal Court of Appeal allowed TPG's application for judicial review, finding that the Tribunal had no factual grounds on which it could determine the starting point of the limitation period and that the CITT was patently unreasonable in its characterization of the second ground. Nonetheless, the complaint was premature given that there had been no formal communication of the results at the time the complaint was brought.

2) Complaint PR-2007-025 was initiated on June 27, 2007. TPG alleged that the evaluation methodology set out in the RFP was modified after bid closing and for some criterion scores of 0, 1 or 2 were given, instead of scores of 0 or 2. TPG argued this allowed evaluators to favour weak bidders. While the CITT found that the complaint was valid for 7 criteria out of 237 items in the evaluation matrix, the tribunal found no pattern indicating that one bidder was favoured over another. Further, the CITT concluded that the results would have been the same notwithstanding the irregularity, hence TPG suffered no prejudice, and there was no evidence that PWGSC had acted in bad faith. TPG sought, but then discontinued, an application for judicial review.

3) Complaint PR-2007-033 was initiated on August 29, 2007. TPG alleged the following: (1) PWGSC failed to fairly evaluate TPG's proposal; (2) there was a reasonable apprehension of bias and/or an appearance of conflict of interest in the evaluation of bids and in the contract award; and (3) the procurement procedures

were not fair, open, transparent and impartial. The tribunal found that it had already dealt with allegations 1 and 3 in its consideration PR-2006-050 and had therefore exhausted its legal authority to deal with those grounds. With respect to the second ground, TPG failed to provide sufficient supporting evidence to indicate non-compliance with the trade agreement beyond bare accusations. The CITT declined to conduct an inquiry. TPG did not seek judicial review of this decision.

4) Complaint PR-2007-060 was initiated on October 5, 2007. TPG alleged that the evaluation methodology had been modified to potentially favour some bidders as references were not contacted in accordance with the RFP. TPG asked for the point-rated portion of the evaluation to be set aside and for the CITT to direct that the contract be awarded to the bidder that submitted the lowest-priced compliant proposal. The tribunal found that PWGSC was not unreasonable in the manner in which it conducted reference checks as part of its evaluation process. TPG did not seek judicial review of this decision.

[55] In my view, there is some merit to the Crown's position that a review of these decisions in light of the issue estoppel test shows that TPG ought to be estopped from bringing forth the action in so far as it relates to allegations of the Crown breaching its duty of fairness. The Crown argues that all three preconditions of the issue estoppel test are met. While I agree that the second and third conditions of the test are met, and if inclined to give a broad strokes reading of the CITT decisions, it is arguable that the "same questions" test is met, I am of the opinion that this might be unfair to TPG, especially given the procedural limitations of the CITT process.

[56] In any case, TPG submits that should the Court find that all the preconditions of the issue estoppel test are met, the Court should nonetheless use its discretion and decide not to apply issue estoppel. The doctrine should not be applied where its application would result in an injustice. TPG cites Justice Ian Binnie in *Danyluk*, above, wherein he stated at para 33:

> [33] The rules governing issue estoppel should not be mechanically applied. The underlying purpose is to balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case.

[57] Justice Binnie went on to list seven factors that ought to be considered when determining whether, as a matter of discretion, issue estoppel ought to be applied where the finding relied on to support issue estoppel was made by a tribunal:

> (a) the wording of the statute from which the power to issue the administrative order derives;
> (b) the purpose of the legislation;
> (c) the availability of an appeal;
> (d) the safeguards available to the parties in the administrative procedure;
> (e) the expertise of the administrative decision maker;
> (f) the circumstances giving rise to the prior administrative proceeding; and
> (g) the potential injustice.

[58] TPG submits, *inter alia*, that the CITT plays a regulatory role and is not merely an adjudicator of complaints, the CITT cannot award damages on the same common law basis as the Court, the Crown did not disclose relevant and important information that was exclusively in its possession in the course of the CITT proceedings, and as a result applying issue estoppel in this case would constitute an injustice.

[59] In my view, the questions of jurisdiction and issue estoppel are somewhat murky. It is clear Parliament intended most complaints relating to procurement to be dealt with through the CITT. However, having found that the Court retains jurisdiction to entertain common law actions against the Crown, it would seem inconsistent to then decide that issue estoppel applies to complaints that were clearly considered in a very specific context, not related to common law duties and theories. Certainly, the findings of the CITT might be relevant in determining whether TPG is able to demonstrate at this stage that there is a genuine issue for trial, but, I am not comfortable granting a summary judgement to the Crown on the basis of issue estoppel without examining the submitted evidence.

(2) Cause of Action Estoppel

[60] The Crown also argues that the doctrine of cause of action estoppel applies to bar TPG's action. Cause of action estoppel is governed by four factors:

1. There must be a final decision of a court of competent jurisdiction in the prior action;

2. The parties to the subsequent litigation must have been parties to or in privy with the parties to the prior action [mutuality];

3. The cause of action in the prior action must not be separate and distinct; and

4. The basis of the cause of action and the subsequent action was argued or could have been argued in the prior action if the parties had exercised reasonable diligence.

(*Bjarnarson v Manitoba (Government of)*, 38 DLR (4th) 32, 48 Man R (2d) 149 (Man QB) citing *Doering v Grandview (Town)*, [1976] 2 SCR 621, 61 DLR (3d) 455)

[61] The purpose of cause of action estoppel is to prevent a party from attempting to re-litigate a case by advancing a new legal theory in support of a claim based on essentially the same facts or a combination of facts (*Britannia Airways Ltd. v Royal Bank of Canada*, 5 CPC (6th) 262, 136 ACWS (3d) 56 at para 14). The Crown submits that this is exactly what TPG is attempting to do. It is the Crown's position that TPG has already argued before the CITT that the conduct of the bid evaluations was unfair and breached an obligation of fairness and that all other matters raised by this litigation with respect to the tender evaluation could have been raised at that time in any of the four complaints.

[62] The Nova Scotia Court of Appeal reviewed the cause of action estoppel jurisprudence in *Hoque v Montreal Trust Co of Canada* (1997), 162 NSR (2d) 321, 75 ACWS (3d) 541, summarizing at para 37:

> [37] Although many of these authorities cite with approval the broad language of Henderson v. Henderson, supra, to the effect that any matter which the parties had the opportunity to raise will be barred, I think, however, that this language is somewhat too wide. The better principle is that those issues which the parties had the opportunity to raise and, in all the circumstances, should have raised, will be barred. In determining whether the matter should have been raised, a court will consider whether the proceeding constitutes a collateral attack on the earlier findings, whether it simply asserts a new legal conception of facts previously litigated, whether it relies on "new" evidence that could have been discovered in the earlier proceeding with reasonable diligence, whether the two proceedings relate to separate and distinct causes of action and whether, in all the circumstances, the second proceeding constitutes an abuse of process.

[63] On this point, I am inclined to accept the submissions of TPG that TPG could not have, and it cannot be said that TPG should have, raised all of the causes of action that constitute the present litigation before the CITT. TPG's present action is based on breach of contract (for which I would

be more likely to accept the *res judicata* argument) and tort, including the tort of inducing breach of contract, unlawful interference with economic interests, and negligence. The tort claims could not have been raised before the CITT, for the CITT clearly does not have the jurisdiction to deal with them. TPG's position with respect to the breach of contract claim is much weaker since the obligations of the contract that TPG argues existed between itself and the Crown consist almost entirely of the duty to deal fairly. This issue was essentially before the CITT. However, TPG submits that all of the facts relating to the evaluation of bids were solely in the possession of the Crown, and were not obtained by TPG until 2008, after the complaints to the CITT. I accept TPG's submission that in this respect, TPG relies on "fresh" evidence that was not capable of being discovered at an earlier stage.

C. *Genuine Issue for Trial*

[64] TPG claims that PWGSC set out to award the contract to CGI even though TPG had successfully provided ETS services to the federal government for 7 years. TPG claims: 1) that PWGSC did not evaluate the bids fairly and impartially; 2) that the participation of Mr. Danek in the process resulted in a reasonable apprehension of bias; 3) that the transition from TPG to CGI as ETS provider was not carried out in accordance with the RFP and 4) that PWGSC pressured TPG subcontractors to breach teaming agreements that they had signed with TPG. TPG roots its action in breach of contract, and various torts.

[65] TPG claims that PPI, the third party facilitator "had a manifest bias against awarding the contract to TPG and disparaged TPG as a "body shop"" (see Powell affidavit para 15). The

evaluation consisted of a consensus score model whereby the five evaluators would meet to discuss their individual scores and then arrive at a consensus score. TPG alleges that these consensus scores were arbitrarily applied to unjustifiably reduce TPG's scores. Additionally, PPI maintained control over the evaluation record and at some point changes were made to the evaluation record that resulted in lower scores for TPG.

[66] After a two-and-a-half day hearing and a review of the record, I have come to the conclusion that there is no genuine issue for trial. TPG has been unable to convince me that there is any factual basis for their claims – that there is either evidence already in existence or that will be adduced at the trial that will support their theory of the case. The evidence is speculative at best, and proceeding to trial will only allow TPG to engage in a further fishing expedition at PWGSC's expense. As argued by the Crown, TPG's action seems to stem from the belief that as the incumbent contractor, no one else was more capable of delivering the services required, and that the consensus scoring model should have produced the average or median score of the five evaluators' individual scores – any mathematical aberration has been taken as a sign of wrong-doing, albeit non-specified wrong-doing.

(1) Breach of Contract

[67] TPG submits that in accordance with the law of tendering, a legally enforceable contract was formed between itself and the Crown when it submitted a compliant response to the RFP. TPG takes the position that some provisions of this contract (Contract A) survived the award of the ETS

contract to CGI. TPG's action seeks damages arising from the breach of Contract A, in so far as the Crown failed to treat all bidders fairly and equally.

[68] TPG alleges that the Crown had a bias in favour of CGI and against TPG as evidenced through the application of scoring metrics not disclosed in the RFP, and applied inconsistently by the evaluation team. TPG argues that the evaluation of the bids was conducted in an unfair manner and that CGI's proposal was accepted even though it was non-compliant with the RFP and therefore not eligible for acceptance. Additionally, TPG argues that in accordance with the ETS RFP, the Crown would have been required to terminate the new ETS contract with CGI when it became clear that CGI was unable to deliver the required resources in time. The Crown did not terminate the new ETS contract, and so breached its duty of good faith to TPG.

[69] Ultimately, on this motion TPG submits that the interpretation of Contract A, coupled with an assessment of the intentions of the contracting parties, and the course of conduct over time are genuine issues for trial best left to the trier of fact.

[70] The Crown takes the position that the procurement process was conducted fairly and transparently. The Crown argues that TPG has provided no evidence to support the allegations of wrongdoing that TPG has levied against employees of PWGSC. The Crown cites jurisprudence holding that relying on such bald allegations without any supporting evidence is reprehensible and an abuse of process (*Grinshpun v Canada*, 2001 FCT 1252, 110 ACWS (3d) 260 at para 21). The Crown submits that TPG has failed to put its best foot forward with regards to a theory of the case.

[71] The Crown also argues that the Crown's obligations to TPG under Contract A did not survive the creation of Contract B with CGI. As TPG is not privy to Contract B, it cannot ground a claim for damages in the Crown's failure to enforce certain RFP requirements following the award of a contract to which it was not a party. The Crown submits that in any case, CGI did adhere to the terms of Contract B, and as a result, TPG has failed to raise a genuine issue that requires a trial.

[72] At this point it is helpful to give a more thorough description of the evaluation process. The technical evaluation was undertaken by five evaluators, Jim Bezanson, Don Bartlett, Louis Boudreault, Paul Swimmings and Vikas Verma and transpired in two distinct phases. First each evaluator individually evaluated and scored each item. In the second phase, they then came together at a consensus meeting, led by Mr. Tibbo, to discuss their individual scores and agree on a final consensus score.

[73] Mr. Tibbo explains in his affidavit that he was retained to help draft the RFP and facilitate the technical evaluation, and was directed in this respect by Mr. Mark Henderson and Mr. Pierre Demers of PWGSC. Mr. Tibbo had no involvement in the financial evaluation or the combined technical and financial scoring.

[74] When the consensus phase was completed, the pre-set weights were applied to the scores and the results were added to reach the final score for each bidder. The consensus phase took place between September 22 and September 27, 2006. During the meetings, Mr. Tibbo was assisted by Ms. Mairi Curran, who entered individual scores into the PPI computer. The computer was connected to a projector which displayed the monitor on a screen for all of the evaluators to see. If

all five evaluators entered the same score, that would be recorded as the consensus score. When the scores were different, a moderated discussion ensued. Mr. Tibbo recorded the consensus scores in a paper back-up referred to as the Master Evaluation Binder. The evaluators would then record the consensus score in their individual binders.

[75] Although PPI would normally print out a copy of the report on site for the evaluators sign-off, Mr. Tibbo explained that they did not have access to a printer at that facility where the technical evaluation took place. Consequently, Mr. Tibbo printed off copies of the report on October 2, 2006 and provided them to Mr. Hamid Mohammad, Contracting Authority for PWGSC. On October 3, 2006 Mr. Tibbo e-mailed Mr. Mohammad a summary spreadsheet. The data had been manually entered into the spreadsheet. On October 12, 2006 the final results spreadsheet was provided – this was extracted directly from the ERGOV software onto the spreadsheet.

[76] Mr. Tibbo admits that there was an error in the spreadsheet that he manually compiled on October 2, 2006. What he initially thought was a rounding error turned out to be a transposition error. This error, however, had no effect on the final technical result. Additionally, the final October 12 spreadsheet did not contain any human errors.

[77] A meeting was held on October 27, 2006 to address the concerns of Mr. Mohammad. Substantiating comments were provided for some consensus scores as a result, but no scores were changed. The evaluators then signed off on each bid. Mr. Tibbo swears in his affidavit that at no time prior during or after was he approached by or influenced by anyone seeking to secure a

particular outcome, nor did he witness any such activity. Similarly, Mr. Bartlett provided an affidavit testifying to the fairness and transparency of the evaluation process.

[78] In my view, TPG has failed to provide any evidence that supports their theory that there was some kind of wrong-doing on the part of the PWGSC either during the evaluation process or following contract award. TPG's theory seems to largely rest on the claim that PWGSC was biased against TPG and that the technical evaluation scores were changed at some point. TPG cannot explain where the alleged bias came from or how it was manifested, nor can TPG explain who changed the marks, or when and how they were changed. The theory that they were indeed changed is based on the fact that the "official" technical scores differed from allegedly rumoured and expected scores.

[79] During his examination for discovery, Mr. Powell admitted that he had no concerns with the honesty and integrity of any of the five evaluators, but was concerned that there was some kind of re-evaluation after the evaluators submitted their scores, resulting in arbitrarily lowered scores for TPG. Mr. Powell surmises that Mr. Tibbo changed the scores since he controlled the scores at the time they must have been changed (see tab 3 of the Relevant Portions of the Examination of Donald Powell) and that he was likely directed to change the scores by PWGSC officials. Mr. Powell was unable to elaborate on who might have directed Mr. Tibbo to change the scores, answering question 419 on examination for discovery, "I imagine he was directed, but I don't know who directed him, I don't know, you know, I'm not the FBI, I can't find out who told him to do it." (Applicant's Motion Record, pg 2107). The questioning continued:

> Q: And how do you know, sir, what basis do you allege that, in fact, the scores were changed by anybody?

> A: Because the scores are simply impossible to believe, for starters. And they don't make sense on certain wise and the bias against our score was obvious.
>
> Q: Is it not possible, sir, that the original five evaluators came to what you've described as the impossible results and that Mr. Tibeault [sic] had nothing to do with it?
>
> A: No, it's not possible. Jim Bezanson told us what the scores were like, and he was really in charge of the evaluation team. He had no idea what the new scores were like, not a clue. He knew what the old scores were like, the real scores.

[80] Mr. Powell and Mr. Stanley Estabrooks, Infrastructure Manager at TPG, refer to Jim Bezanson as the ETS RFP Evaluation team leader throughout their affidavits. The Crown clarified at the hearing that Jim Bezanson was in fact, just a member of the five-person evaluation team. Mr. Bezanson left PWGCS after receiving a job offer at Canada Post in mid-November 2006, after the evaluation had been completed. The above exchange refers to a telephone conversation that Mr. Estabrooks initiated with Mr. Bezanson in March 2007, during which Mr. Bezanson allegedly expressed surprise that CGI was rumoured to have received a much higher technical score, as he was under the impression that the results of the technical evaluation were, "very close" (see Estabrooks affidavit at para 22). Mr. Estabrooks conceded on cross-examination that he did not know what Mr. Bezanson meant by "very close" (Applicant's Motion Record, Vol 7, pg 1975). Mr. Estabrooks nonetheless relayed the contents of this conversation to Mr. Powell who concluded as a result, that the technical scores had been changed without Mr. Bezanson's knowledge or participation and that litigation was necessary to determine exactly how the "official" technical scores had been derived, and how they had been changed without Mr. Bezanson's knowledge.

[81] I am not satisfied that TPG is able to provide any evidence beyond mere speculation and conjecture to suggest that a trial is warranted to further flesh out this allegation. The theory that the scores changed is based on vague, second-hand information extracted in the course of a personal phone call interpreted with the most conspiratorial gloss. I am sure that TPG was disappointed with the results, and this disappointment has largely fuelled this litigation.

[82] Mr. Powell was asked in several iterations during discovery if he had any evidence to support the allegation that the consensus scores were changed after the consensus meetings. Reading the discovery transcript presents nothing beyond the bald accusation that Mr. Tibbo must have changed the scores sometime after September 27, 2006, because in Mr. Powell's opinion they are not "close" as described by Mr. Bezanson in passing to Mr. Estabrooks, (see Relevant Portions of the Discovery of Donald Powell Tab 11), they are "absurd", "inherently wrong" and "unreasonably low" when compared with the individual evaluators' scores, and Mr. Tibbo had the time and opportunity.

[83] However, in the record, there is nothing to lead to the conclusion that the marks were changed. On the cross-examination of Mr. Powell's affidavit, Mr. Powell admits that he can't prove what happened at the moment, but he will require witness testimony to establish the mechanics of the score change at trial (see Applicants Motion Record, Vol 7, Tab 15, Q's 90-92). Mr. Powell similarly responds to several queries, stating that he needs a trial to establish what happened (see Q's 101, 128, 142, 149, 151). A typical exchange is found starting at question 169 (Applicant's Motion Record, Vol 7, tab 15, pg 1894):

> Q: You have sworn in your Affidavit – what I am entitled to know, sir, then is this: You have sworn already in your previous

> discovery that the Plaintiff allegations are as against what Mr. Tibbo allegedly did when the evaluation was completed, and you swore to that back in March 2009. Now that was an accurate statement, wasn't it?
>
> A: It is certainly my belief that that is what happened. I think when we get to trial, we will get more details, but yes.
>
> Q: At this point then you have no information or no knowledge of anything else that may have occurred that caused the scores to allegedly change?
>
> A: I didn't understand the question I would have to say. Are you asking about mechanics again or the results.
>
> Q: Both
>
> A: Well, the results are very strange what Mr. Bezanson told us, and if you analyze individual scores compared to these consensus scores they are extremely inconsistent, but the mechanics of all the details of what was done to produce these documents we don't know. We will find out when we go to trial

[84] The Crown later calls Mr. Powell on the quality of his allegations saying, at question 182 (pg 1899):

> Q: All of the factors appear to have the same quality to them, which is just a broad allegation with no basis whatsoever.
>
> To which Mr. Powell replies,
>
> A: Why don't we go to trial to find out

[85] Mr. Powell also takes the position that the Master Evaluation Record may not be, in fact, the actual Master Evaluation Record, because the Evaluators only signed off on the cover pages for each bid after the October 27, 2007 meeting. Because they did not initial each page, he doubts the veracity of the contents of the Record. Moreover, TPG argued at the hearing that one of the evaluators, Don Bartlett, who swore in an affidavit that the evaluation was fair and uninfluenced,

could not recall signing the Master Evaluation Record. Absent other supporting evidence, it is not reasonable to infer that signatures on the cover-sheet only, mean that the attached documents were changed. And although Mr. Bartlett did not recall reviewing the attachment, he did, "remember being together with the team to sign these off but it is four years ago and I can't say much more than that" (See Applicant's Motion Record, pg 1698).

[86] Mr. Powell's allegations are not only limited to the evaluation and transition process. During his cross-examination Mr. Powell questions the authenticity of the scores that were identified by the Crown as Mr. Bezanson's. This score-sheet allegedly calls into question the fairness of the process as it appears that Mr. Bezanson only evaluated the first 100 metrics submitted by TPG in relation to item 3.3.3, while evaluating more than 100 metrics for CGI (see Powell affidavit at para 125). It was later clarified at a consensus meeting that the evaluators should have considered all proposed metrics, and a consensus score was accordingly agreed upon (see cross-examination of Mr. Bartlett, Applicant's Motion Record, Vol 7, pg 1684). When cross-examined on his affidavit, Mr. Powell's nascent theory begins to spin out of control when he begins to question whether Mr. Bezanson's score sheet is actually Mr. Bezanson's score sheet in response to questions concerning the allegation he makes in his affidavit, starting at question 217 (Applicant's Motion Record, Vol 7, pg1907):

> Q: Okay, then how do you know that the documents you are referring to, which are the documents that show an unfair evaluation, can be connected to Mr. Bezanson?
>
> A: Well the Crown provided them as Mr. Bezanson's documents.
>
> Q: So are you suggesting that the numbers that may be written on a piece of paper provided by the Crown, and the Crown said that Mr. Bezanson's numbers are in fact not Mr. Bezanson's numbers?

> […]
>
> A: No, I just said this is what the documents show. I don't know who created them. The Crown gave them to us as Mr. Bezanson's scores.
>
> Q: And you are doubting that those are in fact Mr. Bezanson's scores.
>
> A: I would want to see proof by questioning all these people. That's all we are asking for. Let's go to trial and find out.
>
> Q: Say it again.
>
> A: Let's go to trial and find out what happened.

[87] The appropriateness and effectiveness of consensus method itself, specifically chosen by PWGSC in an effort to produce the fairest result by ensuring that evaluators are using a consistent understanding of the requirements, is questioned by TPG. During the hearing, counsel for TPG advanced the argument that PWGSC intentionally selected the consensus model, the most subjective model in their view, as a way to allow personal bias and preferences to infiltrate the process. The bias was one against "body shops" – TPG maintaining that Mr. Tibbo might have had a prejudice against small companies and "body shops" as Mr. Howard Grant, president of PPI was quoted in an industry publication in 2009, as speaking disparagingly of "body shops."

[88] However, on cross-examination Mr. Tibbo could not recall ever having heard the term "body shop" used in the context of the ETS evaluation, but instead maintained that there were discussions regarding PWGSC decision to move from a per diem to a managed services model contract (For instance, see cross-examination of Mr. Tibbo, Applicant's Motion Record, pg 1748, Q 185. When asked if PWGSC thought that TPG promoted a "body shop" approach, Mr. Tibbo

answered, “I remember our discussion was talking about what they were trying to accomplish moving from per diem to service management based contract. I know other people have used the word “body shop”. That is a colloquial term and I would not use that as part of my answer. I know the objective of the project was to move from a per diem based contract to a managed services contract.) As such, I can find no evidentiary support for Mr. Powell’s claim at para 52 of his affidavit:

> PWGSC arbitrarily, and without justification, held the view that only CGI was capable of providing ETS services as a “managed service”, and that neither TPG nor IBM was capable of providing ETC services on the basis of a managed service.

[89] Mr. Powell has provided the expert reports of Mr. Jim Over and Mr. Tom McIlwham, which both state that, in their opinion, a number of low scores awarded to TPG do not have a legitimate technical basis. I understand that the Crown has already been unsuccessful in seeking to have these expert reports struck. However, they do not go very far to provide TPG with a necessary evidentiary foundation to support TPG’s claims. These reports are of low probative value on this motion, as they do not support TPG’s theory of the case.

[90] The report of Mr. Over, an evaluator of the 1999 ETS contract, suggests that the evaluators changed the test for relevancy at the consensus stage. Mr. Over’s conclusion is that the results of the technical evaluation are unfair. The Crown tried to clarify the connection between Mr. Over’s report and Mr. Powell’s allegation during the cross-examination of Mr. Powell’s affidavit. Beginning at Q 138 (see Applicant’s Motion Record, pg 1886)

> Q: What I will put to your, sir, is, based upon your evidence, the Affidavit, and the expert’s report of Mr. Over, has no connection to what your evidence is –

A: Of course, it does.

Q: -- which is that marks were changed after the evaluation process, including the consensus evaluation, was concluded?

A: What? I don't know what you are talking about honestly. Jim was asked to look was the result fair or not, and he said it wasn't. We didn't ask him how did they make it unfair. We didn't ask him that at all. He wouldn't know who Bob Tibbo was. We didn't ask him to look at any of that stuff and he didn't.

Q: You did not ask how they made it unfair?

A: No.

Q: How can you say that? We have just pointed out on page 16 of Mr. Over's report that how they made it unfair, allegedly, according to Mr. Over, was that they changed the test for how relevancy is applied?

A: Who is they? We don't know who they is. Mr. Over certainly doesn't know who they is. We didn't know who they is. We didn't ask him who they was.

Q: They would be the technical evaluators, isn't that correct?

A: How do we know that? That's why we need a trial to find out.

[91] The details of TPG's allegations are confusing and inconsistent. TPG insistently and repeatedly alleges that an elaborate plan was carried out to oust TPG and enter CGI, but provides no workable details to explain why there was a plan, the details of the plan, and how it was carried out beyond bold assertions that are just not reasonably supported by any available evidence.

[92] TPG has also alleged that the Crown breached Contract A by changing the transition terms of the RFP. Mr. Powell claims that CGI requested amendments to the ETS contract immediately after contract award, the first amendment being issued on December 12, 2007. Based on

Mr. Powell's experience, he does not believe that there is a legitimate technical reason for issuing a contract amendment so soon after contract award. However, once again, on examination Mr. Powell admits that he has no direct knowledge regarding the transition plan and his allegations were originally based on a document that may or may not have been the approved transition plan (Relevant Portions of the examination of Donald Powell, Tab 27, Q 1610). Mr. Powell essentially admits that he does not know what is in the approved transition plan, so, as argued by the Crown, the allegation that PWGSC has violated the transition plan become baseless. Mr. Pierre Demers, Manager of Contracts Management and Administrative Services for PWGSC at the material time, has sworn a very detailed affidavit describing what CGI did and how CGI complied with the transition plan.

[93] According to Mr. Demers, CGI submitted a proposed transition plan as required, on November 14, 2007 within 10 working days of contract award. PWGSC determined that revisions were needed. CGI had questions about the proposed changes, and discussions ensued. On November 28, 2007 CGI submitted a further revised transition plan. This plan was accepted by the Project Authority on November 28, 2007 in accordance with the timeline set out in the RFP. The transition plan provided CGI with 60 working days within which to have all functions ready. The contract allowed for up to three 15 day extensions. CGI requested and received two 15 day extensions. According to Mr. Demers, CGI successfully completed the transition phase on March 26, 2008 as required under the contract.

[94] Although it appears that TPG may have wished to frustrate the transition by contractually inhibiting its resources from being available to CGI, as a question of fact, there is no evidence to

support TPG's theory that the Crown breached its duty of good faith. As a question of law, I agree with the Crown, that the Supreme Court has definitively stated that obligations under Contract A do not outlive the award of Contract B. At para 71 of *Double N Earthmovers Ltd v Edmonton (City)*, 2007 SCC 3, [2007] 1 SCR 116, the Supreme Court concluded:

> [71] […] Where an owner undertakes a fair evaluation and enters into Contract B on the terms set out in the tender documents, Contract A is fully performed. Thus, any obligations on the part of the owner to unsuccessful bidders have been fully discharged. […]

[95] I agree with the Crown, that Mr. Powell has made wide-sweeping allegations that he is unable to reasonably support. A court trial is not the appropriate forum for working out a theory based purely on speculation, conjecture and bald accusations. It is equally inappropriate to argue that the court's time is not wasted because evidence may appear after others are forced to participate in this exercise via subpoena. TPG has not put its best foot forward in formulating a theory of the case and simply relies on bare allegations. I find that TPG's claim that PWGSC breached Contract A to be so doubtful that it does not deserve consideration at a future trial.

(2) Claims in Tort

[96] TPG advances several claims in tort, including, inducement to breach of contract, interference with economic interests and negligence. The Crown submits as a preliminary point that all of these torts require TPG to establish that it suffered economic loss, and that TPG has failed to do so. TPG has not provided any evidence that it was unable to bid on other requests for proposals, or that it failed to win other contracts as a result of some of the contractors choosing not to abide by the teaming agreements and accepting employment with CGI. The Crown argues that in addition to

this failure, TPG has also not provided credible evidence as to the remaining elements of the tort claims.

(a) *Inducing Breach of Contract*

[97] In order to establish a claim for the tort of inducing breach of contract, TPG must show:

1) There existed a valid and enforceable contract between TPG and its various subcontractors;
2) The Crown was aware of the existence of these contracts;
3) The Crown wrongfully and without justification interfered with these contracts procuring a breach; and
4) TPG suffered damages.

[98] The Crown takes the position that TPG meets none of these criteria, while TPG argues that the evidence establishes each element of the tort.

[99] The Crown firstly takes issues with the teaming agreements characterizing them as *prima facie* unenforceable as a restraint of trade and employment, contrary to public policy. In the Crown's view, the agreements were designed and intended to make it difficult if not impossible for the employees who signed them to continue to work in the ETS contract if another bidder was successful. The Supreme Court has held that contracts which, due to an imbalance in bargaining power, "may lead to oppression and a denial of the right of the employee to exploit, following termination of employment, in the public interest and in his own interest, knowledge and skills

obtained during employment," are unenforceable (*J.G. Collins Insurance Agencies Ltd v Elsley Estate*, [1978] 2 SCR 916, 83 DLR (3d) 1).

[100] Furthermore, the Crown denies that the Crown interfered with these contracts. The issue of staffing the ETS contract with persons who formerly worked for TPG was between TPG, CGI and the individual subcontractors. The Crown maintains that it had no legal obligation to prevent CGI from recruiting resources from TPG.

[101] TPG disputes the Crown's characterization of the teaming agreements and asserts that the agreements were limited to a specific contract and to a specific relevant time period, and that they were therefore reasonable and necessary. TPG adds that there is no evidence that the parties to the agreements felt they were oppressive or unreasonable.

[102] Without feeling the need to comment on the enforceability of the teaming agreements, I find that, once again, TPG has failed to establish that there is a genuine issue for trial. TPG claims that the Crown provided CGI with lists of TPG's incumbent resources they wished CGI to retain, and although the Crown was aware of the teaming agreements, it made no effort to ensure that CGI did not hire TPG subcontractors. TPG argues that a trial is needed to assess the Crown's knowledge and intent. I disagree. Although TPG submits that a Court needs to weigh and assess the evidence of both parties, I find that TPG has failed to produce any evidence beyond bald allegations that the Crown interfered with TPG's teaming agreements.

[103] PWGSC was aware of the teaming agreements, but ITSB managers were specifically instructed not to discuss details regarding TPG subcontractors. When PWGSC became aware that CGI was contacting TPG resources, they were advised not to contact incumbent resources using the government electronic directory or during working hours (Demers affidavit at para 42). On November 23, 2007 TPG sent a letter to PWGSC attaching a list of resources that were not eligible to work on the new ETS contract. According to Mr. Demers, only six of the 133 proposed resources submitted by CGI as part of their transition plan matched names on TPG's list. Of the six, four had not signed teaming agreements, one had an agreement which expired on December 31, 2007 and only one had an agreement that extended to February 28, 2008 (see Demers affidavit para 49).

[104] There is no basis for Mr. Powell's assertion that, "the Defendant contacted, and facilitated CGI's contacting, the various individuals under contract with TPG to enter into an arrangement with CGI resulting in the existing resources continuing to do work while removing TPG as a contractor." (Powell affidavit at para 603). Based on the record, it seems that several TPG sub-contractors attempted to abide by their teaming agreements, or asked Mr. Powell to waive the terms of the agreement before eventually "capitulating" and going to work with CGI (see cross-examination of Mr. Powell, Applicant's Record, pg 2530). Mr. Powell wanted CGI to negotiate directly with TPG for the use of TPG's incumbent resources. CGI refused, so Mr. Powell refused to waive the non-compete agreements since CGI was "behaving in such an outrageous way," (Examination of Mr. Powell, Applicant's Motion Record, pg 2529). But Mr. Powell provides no evidence of the Crown persuading TPG subcontractors to breach their contracts.

[105] Two TPG subcontractors, privy to teaming agreements, swore affidavits on TPG's behalf for this motion. Valerie Bright met with PWGSC employees on the last day of her TPG contract. They "pointed out that I no longer had a job and asked what I was going to do. I took this as an effort on their part to encourage me to contact CGI." (Bright affidavit at para 9). Ms. Bright later became employed by CGI when they created a position that had not previously existed under the former ETS contract. She believed that this would allow her to work for CGI without breaching the terms of the teaming agreement.

[106] The other affidavit was provided by Brian Fleming. He found out in November 2007 that his resume had been submitted by CGI as a resource when his PWGSC manager asked if he had consented to its use. He expressed to his manager his feeling that this was extremely inappropriate as it was without his consent. His manager indicated that he would mention this issue to Ms. Rita Jain, the PWGSC Transition Manager. Mr. Fleming was later informed by his manager that Ms. Jain told him that the submission of his resume had been in error.

[107] I do not find that this is evidence of any kind of unlawful interference on behalf of PWGSC, such that they encouraged TPG subcontractors to breach their teaming agreements. On cross-examination, both Ms. Bright and Mr. Fleming asserted that they would not breach agreements with TPG notwithstanding encouragement from PWGSC or CGI.

[108] At this point in time, Mr. Powell is unable to provide a list of TPG subcontractors who breached their teaming agreements, nor can he provide names of Crown employees who persuaded the unidentified TPG incumbents to breach their teaming agreements. Mr. Powell claims that once

he has a list of employees he will ask them who cajoled them (see Examination of Mr. Powell, Applicant's Motion Record, pg 2536). I do not find that there is a sufficient evidentiary basis for TPG's claims such to warrant a full trial.

(b) *Unlawful Interference with Economic Relations*

[109] The tort of unlawful interference requires that a plaintiff prove:

> […]
>
> 1) An intention to injure the plaintiff;
> 2) Interference with another's method of gaining his or her living or business by illegal or unlawful means; and
> 3) A resulting economic loss.
>
> (*Drouillard v Cogeco Cable Inc*, 2007 ONCA 322, 86 OR (3d) 431 at para 14)

[110] The Crown submits that there is no evidence on the record as to any of the three elements of this tort and consequently, this issue does not merit a full trial.

[111] TPG, however, maintains that the Crown decided in advance of issuing the RFP that CGI was the most suitable candidate and set out to ensure that CGI was awarded the contract. Moreover, the Crown, in TPG's telling of events, set about to ensure that it kept TPG's incumbent resources, by having those resources contract with CGI. TPG argues that this establishes intent. The interference element is shown by the evidence that the Crown encouraged TPG incumbents to contact CGI and provided them with CGI business cards. As a result, TPG lost the contract which

represented 70% of TPG's revenue, which TPG describes as a significant and devastating economic loss to TPG.

[112] The question that needs to be answered in the context of this motion for summary judgment is whether TPG will be able to prove at trial, the elements of this tort. TPG's evidence in this regard is purely speculative and theoretical. More importantly, it is squarely contradicted by the Crown. There is no genuine issue for trial.

(c) *Conflict of Interest*

[113] TPG asserts that there was a conflict of interest or the appearance of a conflict of interest with respect to Mr. Jirka Danek, who was the Director General of Products and Services with ITSB at the time of bid evaluation and contract award. Prior to being hired at PWGSC, Mr. Danek was the Chief Executive Officer of Avalon Works, a competitor of TPG. TPG claims that PWGSC's preference for CGI may have emanated from Mr. Danek, as he had a longstanding relationship with CGI.

[114] The Crown takes the position that TPG has failed to provide any evidence that Mr. Danek was in any way involved with the evaluation of ETS tenders, or that he ever communicated with any of the persons involved in the ETS evaluation.

[115] I find that this allegation, that there was an appearance of a conflict of interest, does not warrant a trial as there is no evidence in the record to support it. During the examination of

Mr. Powell, he conceded that Mr. Danek left CGI in 1991. Furthermore, Avalon Works was a subcontractor to TPG on the first ETS contractor, so not a direct competitor. More importantly, Mr. Danek swore an affidavit in 2007, as part of the judicial review of the CITT decision, that his sector had no involvement in the procurement process, and that he had no interest in what was going to happen to Avalon Works (see cross-examination of Mr. Danek, Respondent's Motion Record Vol 8, pg 2647). Mr. Powell conceded on examination that Mr. Danek was not directly involved, and he did not know what his involvement was (examination of Mr. Powell, Applicant's Motion Record, pg 2235).

[116] There is no corroboration for TPG's allegations, and as such, no genuine issue for trial.

(d) *Negligence*

[117] To establish a claim for negligence, the plaintiff must prove that:

1) the defendant owed him a duty of care;

2) the defendant breached the applicable standard of care; and

3) the plaintiff must have suffered some compensable injury as a result of this breach.

[118] Like with the other tort claims, the Crown takes the position that TPG has failed to establish the elements of this tort. The Crown argues that TPG cannot show that any breaches of the teaming agreements would not have happened but for the actions of the Crown, or that any damages arose because of the actions of the Crown. Further, the Crown submits, if any damages were suffered, they would be too remote to be compensated.

[119] TPG maintains that the Crown is under a *prima facie* duty to treat all bidders fairly, and that the Crown breached this duty by unfairly evaluating, awarding and improperly allowing the transition of the ETS contract to CGI. TPG again claims the loss of the contract and the consequent loss of income as the damage.

[120] In my opinion, TPG has failed to show any evidence of wrong-doing on the part of the Crown. Mr. Powell's allegations are speculative, and he is unable to posit a workable case theory.

III. Conclusion

[121] Although I find that the Court would have jurisdiction to hear this action, I am not convinced that there is a genuine issue for trial. TPG has failed to provide credible evidence such that the elements for any of the claims of actions it seeks to try would be established. The Crown quite rightly cited *Havana House Cigar & Tobacco Merchants Ltd v Naeini (c.o.b. Pacific Tobacco, Pacific Region)*, 147 FTR 189, 80 CPR (3d) 132 at para 16 where this Court has held that:

> [16] […] an action is not a speculative exercise, to be launched, in whole or in part, where it is clear that the onus of proof rests upon the plaintiff and yet the plaintiff has no evidence or foundations of fact on which to support its claims. […]

[122] Although TPG has ably attempted to argue that the evidence filed presents discrepancies, conflicting testimony and issues of credibility that are best left for a trier of fact, I cannot agree with this characterization. TPG has essentially reversed the onus of proof and asks the Crown to come to court to disprove Mr. Powell's claims and allegations which are largely baseless. Having given the

evidence a hard look, I do not think it requires or deserves assessment and weighing by a trier of fact. I am satisfied that the ten-week trial TPG claims is necessary to discover what actually happened in the fall of 2007 should not take up the time of the Court or incur the costs of a trial. Accordingly, I will grant this motion for summary judgment in its entirety and costs are awarded to the Crown.

[123] The Crown's request to have the Court find some of TPG's allegations to be an abuse of process has been considered, but given the outcome, I find it unnecessary to further address this issue.

ORDER

THIS COURT ORDERS that this motion for summary judgment is granted and costs are awarded to the Crown.

" D. G. Near "
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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PLACE OF HEARING:	**OTTAWA**
DATE OF HEARING:	**MARCH 22, 23 & 24, 2011**
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