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**Nunavunmi Maligaliuqtiit**
**NUNAVUT COURT OF JUSTICE**
Cour de justice du Nunavut

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| Citation: | ***Adlair Aviation (1983) Ltd. v. Commissioner of Nunavut, Government of Nunavut and Mark McCulloch,* 2017 NUCJ 19** |
| Date: | 20171013 |
| Docket: | 21-12-709 |
| Registry: | Iqaluit |
| Applicant (Defendant): | **Commissioner of Nunavut, Government of Nunavut and Mark McCulloch** |
| | -and- |
| Respondent (Plaintiff): | **Adlair Aviation (1983) Ltd** |

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| Before: | The Honourable Mr. Justice Paul Bychok |
| Applicant (Defendant): | Vincent DeRose |
| Respondent (Plaintiff): | Ed Brogden |
| Location Heard: | Iqaluit, Nunavut |
| Date Heard: | April 26-27, 2017 |
| Matters: | Application for summary judgment – decision |

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## REASONS FOR JUDGMENT

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(NOTE: This document may have been edited for publication)

## I. OVERVIEW

[1] The plaintiff started an action in December 2012 seeking damages and various remedies following the award of a Government of Nunavut (GN) medevac contract to a competitor, Aqsaqniq Airways Ltd. (Aqsaqniq). The plaintiff filed its Statement of Claim on December 17, 2012. The plaintiff later filed supporting affidavits. The defendants filed their Statement of Defence on February 13, 2013. The plaintiff is represented by Ed Brogden of Toronto. The defendants are represented by Vincent DeRose of Ottawa.

[2] On April 13, 2016, after a hearing, I struck the plaintiff's affidavits from the record because they were based almost entirely on improper argument, inadmissible hearsay and speculation. I ordered Mr. Brogden and the plaintiff to share solicitor-client costs (the highest of the two available tariffs) to be paid to the defendants.[1] Counsel for the plaintiff later filed replacement affidavits.

[3] On April 27, 2017, I heard argument on an application, also called a motion, by the defendants for summary judgment. Summary judgment is a process designed to provide relief to a party without having to hold a trial. A court may grant summary judgment if the plaintiff's claim is one for which "no legal relief is available".[2] I reserved my decision to review the evidence.

## II. BACKGROUND

[4] Some background is necessary to put this civil action into context.

[5] The Department of Health operates medical facilities in all 25 of Nunavut's remote communities. Except for the Qikiqtani Regional Hospital in Iqaluit, these facilities are not equipped to handle cases involving life-threatening trauma. (Even then, the Iqaluit hospital does not have the same capacities as most southern hospitals.) Nunavummiut depend on reliable air ambulance services as a literal life-line.

### A. Request for Proposals for Kitikmeot Region air ambulance services

[6] In February 2011, the GN issued a "Request for Proposals" (RFP) respecting the provision of air ambulance services for the Kitikmeot Region. The responsible agency was the GN's Department of Community and

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[1] *Adlair v Nunavut*, 2016 NUCJ 23, 2016 NUCJ 23 (CanLII).
[2] Halsbury's Laws of Canada, *Civil Procedure 2017*, 1st (Markham, ON: LexisNexis, Canada, 2017) at 572. I will comment further on summary judgment later in my decision.

Government Services (CGS). The Honourable Lorne Kusugak was then its Minister. The closing date for receipt of proposals was April 8, 2011. The plaintiff submitted a proposal for consideration on April 8, 2011.

[7] The RFP contained detailed instructions to prospective proponents (or applicants), terms of reference, evaluation criteria, and terms and conditions. In the "Instructions to Proponents", the RFP stated among other things:

> 1.5 This is not a Request for Tenders or otherwise an offer. The GN is not bound to accept the proposal that provides for the lowest cost or price to the GN nor any proposal of those submitted.
>
> 1.6 If a contract is to be awarded as a result of this RFP, it shall be awarded to the Proponent who is responsible and whose proposal provides the best potential value to the GN.
>
> 1.7 Notice in writing to a Proponent and the subsequent execution of a written agreement shall constitute the making of the contract. No Proponent shall acquire any legal or equitable rights or privileges whatsoever until the contract is signed.
>
> 1.8 The contract will contain the relevant provisions of this RFP, the accepted proposal as well as such other terms as may be mutually agreed upon, whether arising from the accepted proposal or as a result of any negotiations prior or subsequent thereto. The GN reserves the right to negotiate modifications with any Proponent who has submitted a proposal.
> …
> 1.14 Proponents may amend their proposal up to the closing date and time by facsimile. But after the closing date and time a proposal may not be amended, but may be withdrawn by the Proponent at any time prior to acceptance.[3]

[8] Central to this application are the provisions respecting application of the Nunavummi Nangminiqaqtunik Ikajuuti (NNI) policy outlined in sections 2.7 and 2.8 of the RFP:

> 2.7.1. One of the priorities of the GN is to ensure that Inuit, Local, and Nunavut businesses supply materials, equipment and services, and that Inuit, Local and Nunavut labour are used to the fullest extent practical on any GN contract. Therefore, NNI Policy applies to this Request for Proposals. To receive the benefits of this Policy, Proponents are required to identify cost components for Inuit, Nunavut and Local content including the names of any

[3] Government of Nunavut, Department of Community and Government Services, Procurement and Logistics, *Request for Proposals, RFP # 2011-21, Air Ambulance Services Kitikmeot Region* (18 February 2011), included as Exhibit "D" of the Affidavit of Mark McCulloch, sworn September 1, 2015, volume 1, at 4 [RFP # 2011-21].

> subcontractors, suppliers, and the residency of project team members and personnel and any other labour proposed to carry out the work. Consideration will also be given for the proponent's Inuit firm and/or Nunavut Business status.
>
> …
>
> 2.8.1. In compliance with Article 24 of the Nunavut Final Agreement, the GN will provide consideration for the use of Inuit firm's goods and services, and for Inuit labour. Proponents should describe fully the proposed Inuit content. This Inuit content will be the percentage of work completed by an Inuit firm listed on the registry of Inuit firms available from Nunavut Tunngavik Inc. (NTI) and the amount of Inuit employment created.[4]

[9] To this end, the RFP package included at page 31 two tables requiring "RFP NNI Adjusted Price Calculation Information". The tables were titled "Value of Labour / Work to be completed by the Contractor or Sub-Contractors", and "Value of Supplies / Materials to be provided by NNI Named Companies". The party submitting a proposal (proponent) was required to provide the following information in each category: the total dollar value of work, with seven per cent adjustments made for Inuit, Nunavut and/or Local businesses. Proponents were advised that this information was mandatory, if bid adjustments were to be awarded:

> The following information MUST be completed by proponents to receive any NNI bid adjustments. If the information is not completed, bid adjustments will NOT be granted. Values provided must be substantiated by the information contained within the RFP response. It will be necessary to outline the names of staff along with their location of residence and or the names of subcontractors.[5] [Original emphasis]

[10] In response to this part of the RFP, the plaintiff provided in its proposal a document which it described as "a partial list of Inuit firms used by Adlair Aviation and describes the nature of that business". The document did not contain any of the required dollar values or calculations of available bid adjustments.[6]

[11] The plaintiff and Unaalik Aviation (2004) Inc. each filed a proposal to secure the contract, as did the eventual winner, Aqsaqniq, which filed four separate proposals.

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[4] *Ibid* at 28.
[5] *Ibid* at 31.
[6] Adlair Aviation (1983) Ltd, *Air Ambulance Services, Kitikmeot Region, Territory of Nunavut, RFP 2011-21*, (8 April 2011), included as Exhibit "E" in the Affidavit of Mark McCulloch, sworn September 1, 2015, volume 1, at 29.

[12] According to the Statement of Claim, the plaintiff is owned and operated by the Laserich family that lives in Cambridge Bay. According to its proposals, Aqsaqniq listed the following persons as contacts: Dennis Lyall, President of Aqsaqniq; Peter Arychuk, President of Air Tindi Ltd.; and Sean Ivens, President of Medic North Nunavut.

[13] I understand from Mr. Brogden's oral argument that Chuck Parker was involved somehow in the Aqsaqniq group. The extent of his involvement was never made clear. According to the evidence, Mr. Parker was Executive Vice-President for Discovery Air which was a business partner of both Air Tindi and Medic North Nunavut. I mention his name as he will appear again as the story unfolds.

## B. Six proposals were evaluated and the contract was awarded to Aqsaqniq

[14] CGS struck a five-person Evaluation Committee which reviewed and scored the six proposals on a line-by-line basis. The Committee was composed of Mark McCulloch, Senior Manager of Procurement, Contracts and Logistics at CGS, and four persons from the Department of Health.[7] The Honourable Tagak Curley was Health Minister at the time.

[15] In the end, Aqsaqniq's "Option C" finished first overall with a total score of 1,642 points. Aqsaqniq's "Option A" received 1,630 points. "Option A" was identical, for the most part, to "Option C", but included a Learjet. Senior management at the Department of Health decided that "Option A" offered a "better service", as it included use of a Learjet. The GN accepted "Option A" and awarded the contract to Aqsaqniq.

[16] The plaintiff's proposal came in fifth position with a total score of 1,544 points.[8] The 86-point difference between Aqsaqniq's "Option A" and the plaintiff's proposal in part was due to the plaintiff's failure to provide the required information on Inuit, Nunavut and Local content. Aqsaqniq's "Option A" received 150 points in this category. The plaintiff's proposal received none.[9]

[17] The Court was told during the application that at some point after the six competing proposals were filed and the competition closed, there was communication between Mr. McCulloch and two of the proponents, Adlair and

[7] The other members were Bill Neish, Dr. Melissa Allen, Clair Evalik and Kim Dunlop.
[8] Pre-Hearing Brief of the Defendants, 14 March 2017, at paras 4, 5.
[9] Fifty points were awarded for Inuit Firms and 100 points for Inuit Labour. Evaluation Notes – Evaluation Committee, Exhibit "F" to the Affidavit of Mark McCulloch, sworn September 1, 2015, volume 1, at 5.

Aqsaqniq. The legal implications of these communications are contested by the parties. This is what Mr. Brogden said:

> They – Aqsaqniq called them and said we need to look up some things, there's some things … we need clarified. That's a discussion. That was not offered to Tindi – to Adlair. There was one question, only one: What's the serial number of the aircraft you don't own yet but you're talking about buying? … That's the only question they were asked.[10]

[18] I found this part of Mr. Brogden's oral argument to be completely confusing. He started by saying Aqsaqniq had contacted Mr. McCulloch to get information about its own proposal which, apart from not making sense, never happened. He continued and garbled several different events and could not keep the parties straight. [As an aside, I have concerns about Mr. Brogden's careless advocacy. I will say more about that in paragraph 69.]

[19] Mr. DeRose, the defendants' lawyer promptly objected to this description of what happened. Mr. DeRose stated there had never been any telephone call. He said the evidence which emerged at discovery was that Mr. McCulloch, for the GN, had contacted Aqsaqniq by email to maintain a paper record. To this objection, Mr. Brogden replied: "… but there was a telephone exchange, there was an email exchange".

[20] What actually happened can be found in the evidence.

[21] Mr. McCulloch was cross-examined by Mr. Brogden on his affidavit during the discovery. The evidence shows that Mr. McCulloch tried to conduct all his communications by email so there would be a record. At some point, Mr. McCulloch may have had an actual verbal conversation with Mr. Parker, although I found the transcript ambiguous on the circumstances. Mr. McCulloch had sought clarification from Mr. Parker about certain pieces of information included in Aqsaqniq's proposals. These clarifications concerned the numbers of staff and their staff schedules, as well as assurances that their proposed aircraft would be able to service the Kitikmeot's communities. As we will see later, Mr. Parker helped prepare a proposal for a medevac contract for the Kivalliq Region and this was the subject of another lawsuit against the defendants.

[22] Mr. McCulloch also stated in that discovery cross-examination that he did not seek any clarifications from the plaintiff concerning its Inuit, Nunavut and Local content. He did not do so because the plaintiff had not submitted this

[10] Transcript of Proceedings, 26 April 2017, at 102 [Transcript].

information, so the Evaluation Committee "didn't have any questions about what was submitted, there was nothing."[11]

[23] The evidence also shows that at some point, Mr. McCulloch called Paul Laserich, one of the plaintiff's principals. Mr. McCulloch did so to ask for the serial number of the aircraft that the plaintiff intended to purchase.[12]

[24] The defendants advised the plaintiff by letter dated August 15, 2011 that they had not been awarded the medevac contract. Mr. McCulloch signed the letter. In the letter, Mr. McCulloch set out a summary of the evaluation results. The results were contained in two broad sections, "Air Ambulance Equipment" and "Air Medical Flight Crew" broken down into 19 categories. Of the 19 categories, the plaintiff's proposal was rated "excellent" nine times, including its proposed aircraft. Four categories received a "good" rating. Four categories were rated "poor". It was these four "poor" results which ultimately scuttled the plaintiff's proposal. The remaining two categories dealt with the reason why no bid adjustments could be given to the plaintiff.

[25] The reasons given by Mr. McCulloch for the four "poor" ratings bear close examination. "Poor" ratings were awarded for both "Inuit Labour" and "Inuit Firm" in both "Air Ambulance Equipment" and "Air Medical Flight Crew" sections as follows:

> On page 31 of the RFP document, details of Inuit Labour and business with Inuit Firms was requested. Your proposal did not include the completed table. The required level of expenditures was not submitted in your proposal.[13]

[26] Mr. McCulloch's letter also stated that no bid adjustment[14] could be awarded either to the plaintiff because it failed to provide the information concerning Inuit labour and firms as required and noted on page 31 of the RFP. I note a bid adjustment had been awarded to Aqsaqniq.

[27] However, it appears Aqsaqniq was not able immediately to provide the contracted medevac services after it won the contract. CGS then contracted

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[11] Transcript of the Cross Examination of Mark McCulloch on Affidavits, October 27, 2016, at 21.
[12] *Ibid* at 17.
[13] Department of Community and Government Services, Letter to Adlair Aviation Ltd. 1983, GNE002033/1 (15 August 2011), included as Exhibit "G" to the Affidavit of Mark McCulloch, sworn September 1, 2015, volume 1.
[14] Bid adjustments were (and are) designed to give preference to Inuit, Nunavut and local businesses. In 2011, the NNI policy defined bid adjustments as "the amount by which the face value of a Bid is reduced in accordance with the Policy. The Bid Adjustment is used for Bid evaluation purposes only. The Bid price minus the Bid adjustment will be referred to as the adjusted price". Government of Nunavut, *Nunavummi Nangminiqaqtunik Ikajuuti* (NNI Policy) (20 April 2006), at Appendix "A", online: http://nni.nu.ca/sites/nni.gov.nu.ca/files/01nnPolicyEng.pdf.

with the plaintiff to provide interim air ambulance services. The only sketchy information Mr. Brogden provided about this development was:

> They (Aqsaqniq) couldn't do it at first and the contract had to be renewed with Adlair. And in fact in the long run the only way they could do it is they had lease Adlair's own aircraft. [sic] They had to lease the King 150 from Adlair – 250 I believe. But anyway – or 200.[15]

[28] I have referred earlier to Mr. Brogden's careless advocacy. Here, he described the aircraft leased by Aqsaqniq from the plaintiff in three different ways in one sentence.

## C. Adlair's appeal to the NNI Contracting Appeals Board

[29] On August 26, 2011, the plaintiff appealed the award of the contract to Aqsaqniq. The appeal was heard by the Nunavummi Nangminiqaqtunik Ikajuuti Contracting Appeals Board on September 12 and October 11, 2011.

[30] At the appeal hearing, the plaintiff presented evidence of the difficulties Aqsaqniq had in fulfilling the contract. However, the Board said it did not have the authority to receive new information concerning events which happened after the contract to Aqsaqniq had been awarded. In its written decision, the Board stated it had conducted "a thorough review of all the documents involved in the awarding of the contract" after the closing of the RFP. The Board ruled the Contracting Authority (the defendants) "properly awarded the bid adjustments" to Aqsaqniq and not to Adlair. Additionally, the Board ruled it was "the responsibility of each proponent to provide the information that they wish the Contracting Authority to consider … and not the responsibility of the Contracting Authority to request missing information."[16]

[31] The Board dismissed the plaintiff's appeal on October 29, 2011.

[32] The plaintiff did not apply to the Nunavut Court of Justice for judicial review of the Board's decision until Mr. Brogden filed a Notice on August 12, 2015, almost four years after the decision. The plaintiff's motion stated it sought "judicial review and damages for a failure of procedural fairness by government administrators and a government tribunal".[17] Given my previous comments on the quality of Mr. Brogden's work, I note that this motion was not filed according

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[15] Transcript, *supra* note 10 at 145-146.
[16] NNI Contracting Appeals Board decision, 29 October 2011, included as Exhibit "K" to the affidavit of Mark McCulloch, sworn September 1, 2015, volume 1, at 4.
[17] Motion Memorandum, filed 12 August 2015, at 1.

to the rules of the Court; it was filed too late; and damages are not available through judicial review.

**D. The "Keewatin action"**

[33] This case is haunted by the spectre of what the parties call the "Keewatin action". This "action" was a lawsuit filed on July 14, 2011, against the GN and Mr. McCulloch respecting a parallel RFP for medevac services in the Kivalliq (Keewatin) Region. Much was said about this lawsuit, but I was never provided a concise explanation of exactly what happened.

[34] On December 3, 2010, the GN issued an RFP for air ambulance services in the Kivalliq Region. The initial closing date for proposals was January 21, 2011. At some point, it appears the closing was extended to February 4, 2011. On February 4, a proposal was submitted by Kivallingmiut Aviation Inc. / Medic North Nunavut (KAI/MNN). The proposal listed the following contacts: Victor Tootoo, President of KAI; Peter Arychuk, President of Air Tindi Ltd.; and Sean Ives, President of MNN. Chuck Parker, Executive Vice President for Discovery Air Inc. (DAI), assisted in preparing the proponent's proposal; DAI was a business partner of KAI/MNN.

[35] This is where Mr. Brogden finds the supposed link between the Keewatin action and the present case: Air Tindi, Medic North Nunavut and Chuck Parker were also behind the proposals filed by Aqsaqniq for the Kitikmeot contract.

[36] Several weeks later, on March 29, 2011 the GN issued a POST-RFP addendum. This addendum included a requirement for the successful proponent to be able to launch three simultaneous medevac flights.[18] On June 13, 2011, the GN advised KAI / MNN that they were not successful.

[37] On July 14, 2011, KAI / MNN started a civil action seeking damages against the GN and Mr. McCulloch. On September 20, 2011, KAI/ MNN discontinued their Keewatin action.[19] At some point, basically the same parties—in the corporate form of Aqsaqniq—were awarded the Kitikmeot contract.

[18] *Kivallingmiut Aviation Inc v Nunavut*, NCJ court file 18-11-463, Statement of Claim, at para 11.
[19] *Ibid.*

## III. PARTIES' POSITIONS

### A. The plaintiff

[38] I found the written pleadings and oral arguments presented by the plaintiff's counsel to be rambling and without focus. Mr. Brogden's written legal brief failed to contain any references to the law. Mr. Brogden's basic argument appears to be that the defendants "contravened the principles of fairness and justice" in administrative law and "violated the laws and principles of the Regulations of Nunavut" in the award of the contract.[20]

[39] Mr. Brogden submitted that the defendants breached their "duty to be fair and just" by considering the Aqsaqniq proposals while "knowing" that Aqsaqniq "had no equipment, aircraft, staff, infrastructure, aviation licenses, operating certificates, facilities or presence in Cambridge Bay".[21] Furthermore, he submitted that Aqsaqniq proposed to use an "illegal Lear jet".[22] He said the defendants "must have some responsibility for checking who's making the tender".[23] He asserted the plaintiff's proposal was treated unfairly as a "bid" while the Evaluation Committee treated Aqsaqniq's proposal as a "proposal".[24] He says the Evaluation Committee should have declared a conflict of interest when the Keewatin action started.[25]

[40] Mr. Brogden is troubled by the timing of the dismissal of the Keewatin Action and the award of the Kitikmeot contract to several of the same principals, saying: "the defendants have not produced one scrap of evidence to say there was not a deal."[26] He claimed the defendants were biased in favour of Aqsaqniq and they acted unfairly and unjustly by denying the plaintiff NNI bid adjustments based on Inuit and local content.[27] He says there is missing evidence which has yet to come to light. The plaintiff claims various categories of damages totalling more than $31,000,000.

[41] Mr. Brogden's submissions and oral argument arrived eventually at the actual reason for having the hearing: whether I ought to grant summary judgment to the defendants. He stated: "Without meaning to be mundane,

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[20] Statement of Claim, filed 17 December 2012, at para 43 [Statement of Claim].
[21] *Ibid* at para 71.
[22] Pre-Hearing Brief of the Plaintiffs, 6 April 2017, at 41 [Pre-hearing Brief of the Plaintiffs].
[23] Transcript, *supra* note 10 at 98.
[24] *Ibid* at 103-104.
[25] *Ibid* at 91, 96.
[26] *Ibid* at 116.
[27] Statement of Claim, *supra* note 20 at paras 51-54, 72-73.

there is no onus on the plaintiff (motion respondent) to prove anything in this motion".[28] I shall comment on that assertion later.

[42] In his Pre-Hearing Brief, he stated: "… these questions, and more, must be resolved against citizens before the state can be granted immunity from being tested by the underpinning basis of the Right of Law – the trial" [sic].[29] This passage is virtually incomprehensible. At the hearing, Mr. Brogden stated: "It's an issue that needs the witnesses to be checked and their credibility checked, have corroboration, extensive corroboration". He anticipates "tens of thousands of pages of paper" to be tendered at trial.[30] In Mr. Brogden's view, a full blown trial is necessary.

### B. The defendants

[43] Counsel for the defendants, Mr. DeRose, says the GN Evaluation Committee acted in good faith and based its decision only on the information provided by each proponent in its respective proposal. Mr. DeRose asserted that the plaintiff's proposal was "faulty" and incomplete, and "quite simply, they didn't win. Fair and square".[31] He stated the Keewatin action was irrelevant. Mr. DeRose also stated that Mr. McCulloch is not personally liable; every action Mr. McCulloch took was within the scope of his employment with the GN. Mr. DeRose says the Court should grant the defendants summary judgment because there is no genuine issue requiring a trial.[32]

## IV. ISSUE

[44] The issue I must decide is the following: has the plaintiff established a genuine issue which requires a trial to determine the case on its merits? In my respectful view, the plaintiff has not done so.

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[28] Pre-Hearing Brief of the Plaintiffs, *supra* note 22. The brief is sloppy and appears to be a cut-and-paste exercise given its disparate fonts and spacing. This part of the brief did not contain numbered references, either for the page or paragraphs.
[29] *Ibid* at 14.
[30] Transcript, *supra* note 10 at 129.
[31] *Ibid* at 30. "They lost because they put in a faulty proposal". *Ibid* at 42.
[32] Pre-Hearing Brief of the Defendants, 14 March 2017, at paras 43-53.

## V. LAW

### A. Summary judgment

[45] Access to affordable and timely justice has been a pressing recent issue in Canadian civil courts. The costs of litigation can be enormous; this makes access to the courts simply out of reach for many people. Our common law has evolved to address this challenge. Summary judgment is a remedy available to a party where the lawsuit may fairly be resolved without a lengthy and expensive trial. The leading Supreme Court of Canada case setting out the guiding principles in this area is *Hryniak v Mauldin*.[33]

[46] An application by a party for summary judgment may be made in Nunavut pursuant to Part 12 of the *Rules of the Supreme Court of the Northwest Territories* as adopted for Nunavut.[34] If such an application is made, the responding party — in this case the plaintiff — must present sworn affidavits or other evidence showing that there "is a genuine issue for trial".[35] To resist a summary judgment application, a party cannot rest merely on its unsupported allegations. That party has a positive "obligation to put their best foot forward on the motion".[36]

[47] Recently, the meaning of section 176 (1) of the *Rules of Court*[37] has been judicially considered by Justice Shaner in *Leishman v Hoechsmann et al*.[38] Justice Shaner stated that the party who resists the application for summary judgment must, in fact, show there "is a genuine issue which requires a trial for fair and just resolution".[39] [Emphasis added] Nunavut inherited its civil rules at division from the Northwest Territories. The wording of Part 12 remains identical in each Territory. Justice Shaner's Supreme Court of the Northwest Territories decision in *Leishman* is persuasive; in my view, it reflects the state of the law respecting summary judgment in Nunavut.

[48] I have already referenced the *Sweda Farms* case. In that case, the Ontario Court of Appeal accepted the Superior Court's view that *Hryniak* has resulted in an entirely new approach to summary judgment. The Superior Court said:

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[33] *Hryniak v Mauldin*, 2014 SCC 7, [2014] 1 SCR 87 [*Hryniak*].
[34] *Rules of the Supreme Court of the Northwest Territories,* NWT Reg (Nu) 010-96, ss 174-184 [*Rules of Court*].
[35] *Ibid*, s 176 (1).
[36] *Sweda Farms Ltd v Egg Farmers of Ontario*, 2014 ONCA 878 at para 4, [2014] OJ No 5815 [*Sweda Farms II*].
[37] *Rules of the Supreme Court of the Northwest Territories,* NWT Reg 010-96, s 176(1).
[38] *Leishman v Hoechsmann et al,* 2016 NWTSC 27, [2016] NWTJ No 34.
[39] *Ibid* at para 42.

> *Hryniak* also provides a basis for a sort of reverse engineering of this motion … The Supreme Court of Canada is clear that the motions court should ask itself why it should not grant summary judgment. …
>
> ... The plaintiffs must show that there is evidence to support their allegations. A party may not rest on allegations in its pleadings on a motion for summary judgment. The party must "put its best foot forward" or "lead trumps or risk losing".[40] [Emphasis added]

[49] Decisions of appeal courts in other jurisdictions are not binding on the Nunavut Court of Justice. However, I find the reasoning of the judges in the *Sweda Farms* case to be persuasive. In my respectful view, *Sweda Farms* represents the law in Nunavut as well.

## B. The law of government procurement

[50] All three levels of government play an increasingly active role in society. To fulfill their constitutional responsibilities, governments spend enormous sums of money each year procuring goods and services. The common-law has evolved to provide a legal framework intended to promote fairness and the integrity of the procurement process.

[51] In procurement law, the party seeking proposals is often referred to as the 'owner'. The parties making proposals are variously called bidders, contractors, proponents and tenderers. When I refer to "owner" in this section, I am referring to the defendants. There are two ways an owner can put out a call for goods or services, those being by a call for either tenders or proposals. Different legal expectations and obligations arise depending on which route is chosen. The present case deals with a request for proposals.

[52] In the context of this proposal case, the following legal principles are relevant:

1. Owners have a duty to conduct a fair RFP process.[41]

2. An RFP process does not necessarily create any contractual relationship between the owner and successful proponent. This process is an invitation for expressions of interest. An owner may, or may not, wish to

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[40] *Sweda Farms v Egg Farmers of Ontario*, 2014 ONSC 1200 at paras 15, 26, [2014] OJ No851 [*Sweda Farms* I] affirmed by *Sweda Farms* II, supra note 36.

[41] *MJB Enterprises Ltd v Defence Construction (1951) Ltd*, [1999] 1 SCR 619, 170 DLR (4th) 577; See generally, Paul Emanuelli, *Government Procurement,* 3 ed, (Toronto: LexisNexis Canada, 2017) at 630.

negotiate with any given proponent with a view to potentially entering into a contract. The key consideration is the intention of the parties. Here, the wording contained in the RFP must be examined.[42]

3. An owner does not have a duty to investigate competing proposals.[43]

[53] These are the legal principles I must apply to the evidence in this application.

## VI. ANALYSIS

[54] In Canada, the parties to a civil lawsuit engage in pre-trial 'discovery'. Each party is required to disclose all relevant documents in their possession to the other side. Lawyers question the principal witnesses. These proceedings are recorded and become part of the record. In this process, evidence is discovered and outstanding issues are clarified. By the end of this process, each party should be able to make a hard and realistic assessment of the strength of their position. Not surprisingly, many cases are resolved or abandoned after the rigours of the civil discovery process.

[55] There was discovery in this case. Documents were exchanged. Witnesses were questioned. Evidence was collected. The plaintiff filed with the Court sworn affidavits, documents and transcripts of discovery questioning. The question I must ask is: has the plaintiff established a genuine issue which requires a trial to determine the case on its merits? In my respectful view, the plaintiff has not.

[56] This is an application or motion by the defendants for summary judgment. Mr. Brogden claimed there was no onus on the plaintiff to establish anything on the motion. This assertion revealed a staggering ignorance of the law. I have already explained the applicable law. There was a positive duty on the plaintiff to put its best foot forward. The plaintiff was required to base its position on evidence demonstrating the requirement of a full-blown trial. The plaintiff came to court with no plan to meet its burden.

[57] Mr. Brogden had an ethical duty to familiarize himself with the law. It is clear he did not, just as he failed earlier to follow the basic rules governing the

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[42] *Mellco Developments Ltd v Portage La Prairie (City)*, 2002 MBCA 125 at paras 73-74, 222 DLR (4th) 67; *Tercon Contractors Ltd v British Columbia (Minister of Transportation & Highways)*, 2010 SCC 4, [2010] 1 SRC 69; Paul Sandori & William M Pigott, *Bidding and Tendering: What is the Law?,* fifth ed (Markham, ON: LexisNexis Canada, 2015) at 67-68.

[43] *Double N Earthmovers Ltd v Edmonton (City)*, 2007 SCC 3 at para 54, [2007] 1 SCR 116 [*Double N*]; *Penney v Eastern Region Integrated Health Authority*, [2016] NJ No 270, 2015 CarswellNfld 99.

proper content and use of affidavits, and by his lack of understanding of the law of judicial review. A lawyer holds himself out to be knowledgeable and capable in practising law. He has an ongoing ethical duty to keep abreast of changes in the law in his practice areas. It is clear Mr. Brogden has failed to do so and that he has failed the most basic ethical obligations of a lawyer.

[58] Mr. Brogden asserted several ways in which he says the Kitikmeot RFP process was unjust. I will deal with each one of these assertions in turn.

[59] Mr. Brogden submitted the defendants "violated the laws and principles of the Regulations of Nunavut".[44] However, he made no specific reference to any Nunavut law or regulation which he claims the defendants violated.

[60] Mr. Brogden said the defendants had known Aqsaqniq did not have a physical presence in Nunavut and the defendants ought to have investigated Aqsaqniq's four bids. I specifically asked Mr. Brogden if he had any legal authority to support his argument. He replied: "No".[45] In fact, the law established by the Supreme Court of Canada is clear: there is no legal duty on a contracting authority to investigate bids or proposals.[46]

[61] Mr. Brogden submitted Aqsaqniq's proposed Learjet was "illegal". He did not provide any evidence of "illegality" in the proposed use of a Learjet. There is no legal cause of action here.

[62] Mr. Brogden said the defendants should have contacted the plaintiff to give it a chance to provide the NNI content information. His reason was that Mr. McCulloch had contacted Aqsaqniq to get further information about their proposals. Mr. Brogden said the defendants treated Adlair's proposal as a "bid" and Aqsaqniq's proposal as a "proposal". In my respectful view, there is no merit to this submission.

[63] I will not elaborate on the law pertaining to tendering bids as this is not a tendering bid case. The RFP plainly stated that the GN was not seeking bids giving rise to a tendering contract.[47] The RFP clearly stated the GN was seeking proposals. The RFP clearly stated that no equitable or legal rights accrued to a proponent until a contract was signed. The RFP clearly stated any ensuing contract would be the result of any negotiations between the parties either before or after a proposal was selected for further examination.[48]

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[44] Statement of Claim, *supra* note 20 at para 43.
[45] Transcript, *supra* note 10 at 110.
[46] *Double N*, *supra* note 43, para 54.
[47] RFP # 2011-21, *supra* note 3, s 1.5.
[48] *Ibid*, ss 1.7 and 1.8.

These clauses set the playing field for the process — one of potential discussion and negotiation prior to the formation of any potential contract.

[64] As noted, the RFP stated in plain language that the defendants reserved the right to speak to any proponent about a proposal if the defendants chose to do so. In this case, the evidence is that Mr. McCulloch contacted Mr. Parker for Aqsaqniq seeking clarification about parts of their proposal. Mr. McCulloch did not seek similar information from the plaintiff, and the defendants were under no legal obligation to do so.

[65] I reject Mr. Brogden's assertion that the defendants ought to have alerted the plaintiff about the missing NNI content document. There is a critical distinction between seeking to clarify a point of information submitted in a proposal, and seeking to invite the submission of information which was absent in the proposal. The RFP specifically stated, again in plain language, that no further information could be submitted after closing.[49] While the defendants had a right to clarify the information provided by Aqsaqniq, it would have been unjust to the other proponents to seek out missing information from the plaintiff after the closing date. Again, the plaintiff has failed to establish a cause of action. In everyday language, there is no legal remedy available to the plaintiff.

[66] I also do not find any merit in Mr. Brogden's assertion that the Keewatin action put the Evaluation Committee members in a conflict of interest. Owners and proponents have a duty to avoid conflicts of interest as this factor goes to the integrity of the procurement process. The case law is extensive in this area and it focuses on proponents or bidders trying to take advantage of inside knowledge.[50] Mr. Brogden did not provide or refer the Court to any case involving a conflict of interest in government procurement due to an unrelated litigation with one of the proponents.

[67] The evidence here revealed that Mr. McCulloch did ask the GN lawyers whether he should be "worried" by the Keewatin action. GN Justice Counsel advised him there was no need for him to worry.[51] In addition, Mr. McCulloch was but one out of five members on the Evaluation Committee. The fact that Mr. McCulloch was named as a party in both the Kivalliq and Kitikmeot actions does not, on its own, meet the applicable legal standard of "probability of mischief".[52] Again, the plaintiff has presented no evidence to substantiate this argument.

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[49] *Ibid*, s 1.14. This would have been what is called 'bid repair'.
[50] See *Kaymar Rehabilitation Inc v Champlain Community Care Access Center*, 2017 ONSC 1843 at paras 89-94, 2017 CarswellOnt 4131.
[51] Transcript, *supra* note 10 at 75.
[52] *Irving Shipbuilding Inc v Canada (Attorney General)*, 2008 FC 1102 at para 54, [2008] FCJ No 1500 at para 54, affirmed 2009 FCA 116, [2009] FCJ No 449.

[68] I turn now to the question of the points that the Evaluation Committee did not award the plaintiff respecting Inuit content. In his oral submission, Mr. Brogden stated several times that the plaintiff had supplied the information, only it was elsewhere in its proposal. I asked him to show me where in the plaintiff's proposal that information could be found. He replied: "I can't".[53] The supposed information was not there. In fact, the evidence showed that the plaintiff had made a "mistake" in not including Inuit content information.[54]

[69] In Canada, lawyers are 'officers of the court'. Lawyers have a duty to be candid when they address the court. They have a duty to be accurate and careful in their submissions when they refer to evidence. Mr. Brogden failed to meet that high standard when he misconstrued the nature of the contact between Mr. McCulloch and Aqsaqniq referred to in paragraphs 18 and 19. He failed to meet that standard when he repeatedly referred the Court to non-existent evidence concerning Inuit content in the plaintiff's proposal.

[70] The fact is the plaintiff failed to provide mandatory information concerning two important aspects of its proposal: Inuit, Nunavut and Local labour and the use of Inuit, Nunavut and Local firms. The RFP required specific quantified percentages and dollar amounts of the proponent's NNI content to be stated in the appropriate form. The plaintiff failed to provide that mandatory information in the form required. Therefore, the plaintiff's proposal was deficient. The Evaluation Committee cannot be faulted for failing to award the plaintiff points in those categories. Again, the plaintiff has failed to establish any legal cause of action.

[71] Mr. Brogden argued there is missing evidence. The law says if that is suspected, then the plaintiff has a duty to show he has taken reasonable steps to secure that evidence, and that the evidence is material.[55] Again, the plaintiff has not done so.

[72] In my respectful view, the plaintiff's lawsuit is not grounded in any evidence of any unjust actions by the defendants. The driving force behind this litigation is the apparent indignation shared by Rene Laserich, a principal of the plaintiff, and Mr. Brogden concerning the possible implications of the Keewatin action.[56]

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[53] Transcript, *supra* note 10 at 136.

[54] The plaintiff's proposal was prepared by Brian Yeo. In cross-examination on his affidavit during the discovery, Mr. Yeo was asked whether it was a conscious decision not to provide specifics on the Inuit content in the proposal. He replied: "Hindsight, I am sure we would – well, we would have – I would say it is a mistake, yeah". Transcript of Cross-Examination on Affidavit of Brian Yeo, at Yellowknife on August 26, 2016, at 30.

[55] *Sweda Farms* I, *supra* note 40 at paras 27- 28.

[56] Mr. Brogden said: "Aqsaqniq is a front, a paper company…We feel, I can tell you that if I don't say this my client will be disturbed because this is what he feels from the day I was first called on this matter, in fact, from

The plaintiff's concern appears to be two-fold: firstly, that the defendants awarded the medevac contract to "a paper company" unable to deliver on the contract and, secondly, that the award of the Kitikmeot contract to Aqsaqniq was a trade-off for the abandonment of the Keewatin action.

[73] I pointedly asked the defendants' lawyer if there was any evidence on the record which suggested there might have been a *quid pro quo* involved in the award of the contract to Aqsaqniq. In other words, 'you folks drop the Keewatin action, and we will award you the Kitikmeot contract.' Or possibly, 'we will drop the Keewatin action against you if you award us the Kitikmeot contract.' Mr. DeRose's answer was: "No, no, no, no".[57]

[74] When it was his turn to speak, Mr. Brogden said the following about the Keewatin action:

> The plaintiff on the other hand, says this probably explains everything and it explains what else, what happened. And we – as I've already said – we're not going to find the smoking gun, we're not going to find a letter where they say let's make a deal. It's not a television show. It's not going to show up and you're not going to get that in any situation similar to this. But what we have is a number of coincidences, it's just – it would be very hard for somebody looking at this material to state, to look at it and say wow, what a coincidence. It is just too much to be pure coincidence.[58] [Emphasis added]

[75] Whatever the obvious coincidence, there is no evidence before this Court of any such *quid pro quo*.

[76] One of our society's most important pillars is the rule of law. Civil and criminal cases must only be decided upon probative and relevant evidence, either accepted by the parties or tested in court in the crucible of cross-examination. Justice cannot find anchor in the shifting waters of coincidence, speculation or suspicion. Whatever may be said on policy grounds about awarding a vital medevac contract to a "paper company", the plaintiff has failed to establish, or present any evidence suggesting, a conspiracy which would require a trial of this issue. That said, the plaintiff surprisingly failed to plead a conspiracy in tort law.

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knowing his father for 40 years. They are concerned about the people of Kitikmeot. That's where they live. They've lived there for three generations in Cambridge Bay. They're not outsiders. You notice the list of companies, they're local. Because that's where they live, that's who they hire, that's who they use. Tindi, Discovery, that money is going to Ontario and other places. It's not staying in Kitikmeot". Transcript, *supra* note 10 at 149

[57] *Ibid* at 71.

[58] *Ibid* at 89.

## VII. CONCLUSION

[77] In his oral submission, Mr. Brogden referred to "tens of thousands of pages" of evidence waiting in the wings. Was any of that "evidence" probative or relevant? If so, it was his duty to provide this evidence to the Court. Rule 176(1) of the *Rules of Court* says a plaintiff:

> *may not rest on the mere allegations … in his or her pleadings*.[59]

Yet, this is exactly what the plaintiff has done here. The plaintiff has not presented evidence establishing any cause of action or legal issue requiring a trial.

[78] In the words of Justice Karakatsanis of the Supreme Court of Canada, I am able "to reach a fair and just determination on the merits"[60] based on this summary judgment motion. The evidence has permitted me to ascertain the facts and to apply the relevant law. This process "is a proportionate, more expeditious and less expensive means to achieve a just result" than a trial.[61]

[79] I grant the application for summary judgment, and I dismiss the plaintiff's claim.

## VIII. COSTS

[80] In my respectful view, the plaintiff ought to have reassessed the merits of its case after discovery was completed. Had the plaintiff done so realistically, this application would not have been necessary. Finite, valuable court time and resources would not have been squandered. I award costs against the plaintiff on a solicitor-client basis (the higher of the two available tariffs). The defendant shall file its bill of costs with the Court within 10 business days.

Dated at the City of Iqaluit this 13th day of October, 2017

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Justice Paul Bychok
Nunavut Court of Justice

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[59] *Rules of Court, supra* note 34, s 176(1).
[60] *Hryniak, supra* note 33 at para 49.
[61] *Ibid*; See also *Nunavut Tunngavik Incorporated v Canada (Attorney General)*, 2014 NUCA 2 at para 98, 2014 CarswellNun 14.