COURT FILE NO.: 96-CU-113354
DATE: 20030807

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
AMERTEK INC., AMERKON CAPITAL CORPORATION, LINDA FORDER, Executor and Trustee Under The Last Will and Testament of William Forder, deceased, and VICTOR MELE	)	*R.C. Taylor, L.M. Bolton and J.D. McCamus*, for the Plaintiffs
Plaintiffs	)	
	)	
- and -	)	*I.R. Dick, C.L. Mitchell, L.E. Lehmann and V. Anderson*, for the Government Defendants
	)	
CANADIAN COMMERCIAL CORPORATION, ATTORNEY GENERAL OF CANADA, AND FIRST INVESTORS CAPITAL CORPORATION	)	
Defendants	)	
	)	**Heard at Toronto:** February 11, 12, 13, 14, 15, 18, 19, 20, 25, 26, 27, 28; March 1, 4, 5, 6, 7, 8, 11, 12, 13, 14, 15, 18, 19, 20, 21, 25, 26, 27; April 3, 4, 5, 8, 9, 10, 11, 15, 16, 17, 18, 22, 23, 24, 25, 26, 29, 30; May 1, 2, 3, 6, 7, 8, 9, 13, 14, 15, 16, 21, 22, 23, 24, 27, 28, 29, 30, 31; June 3, 4, 5, 6, 7, 11, 12, 13, 14, 17, 18, 19, 20, 21, 27, 28; July 2, 3, and 4, 2002.

O'DRISCOLL J.:

I. NATURE OF PROCEEDINGS

[1] Prior to trial, the plaintiffs discontinued their action against First Investors Capital Corporation (First Investors).

[2] In its Amended Fresh Amended Statement of Claim, Amertek Inc. (Amertek) claims against the Canadian Commercial Corporation (CCC) and Attorney General of Canada (AG):

(a) payment of $100 M

(b) aggravated, exemplary and punitive damages of $100 M

(c) compound interest or, in the alternative, pre-judgment interest in accordance with the *Courts of Justice Act*, R.S.O. 1990, C. 43 (CJA)

(d) costs on a solicitor and client scale.

[3] The remaining plaintiffs claim against CCC and the AG:

(a) damages in the amount of $6 M

(b) aggravated, exemplary and punitive damages of $2 M

(c) compound interest or, in the alternative, pre-judgment interest in accordance with the CJA

(d) costs on a solicitor and client scale.

[4] The plaintiffs' action succeeds, but not in the amounts claimed.

II. LENGTH OF THE TRIAL

[5] Court assembled on eighty-seven days (87) for this trial. The first eighty (80) days were taken up with motions and evidence. The last seven (7) days were devoted to the submissions of counsel.

[6] Attached to these reasons and marked Appendix A is a “List of Abbreviations”.

[7] Counsel for the plaintiffs called sixteen (16) witnesses. Appendix B is a list of their witnesses in the order in which they were called accompanied by my brief resume of the witness.

[8] Counsel for the defendants called an equal number of witnesses for the defence. Appendix C to these reasons lists, in chronological order, the witnesses called by the defence with my brief resume of the witness.

[9] Appendix D to these reasons is the “Plaintiffs’ Chronology of Documents and Events”. It was invaluable in coordinating the who, what, where and when of the evidence.

[10] Counsel advised that during the document discovery process some twenty-five thousand (25,000) documents were exchanged.

[11] During the trial, counsel filed exhibits ending with Number 212. Exhibit 1 to 14, inclusive, are binders. Each binder is entitled “Joint Trial Book” with the “date span” indicated. Each binder contains several hundred pages. There is no Exhibit 15.

[12] On May 27, 2002, the court assembled at 10:00 a.m. but adjourned shortly thereafter because the scheduled witness for the defence (Réne Richard) was too ill to attend and no other witness was scheduled.

[13] On June 12, 2002, court assembled at 10:00 a.m. but adjourned shortly thereafter because the particular counsel for the Government Defendants, who was to conduct the examination in chief of the witness scheduled for that day, was, unfortunately in hospital for tests.

III. THE PARTIES

[14] The plaintiff, Amertek, is an Ontario public corporation located in the City of Toronto. Prior to November 12, 1985, Amertek was known as Belgium Standard Limited (BSL), a federal company established in 1945. BSL was a small Waterloo, Ontario manufacturer of aluminum truck bodies for dump trucks and garbage trucks. BSL obtained listing on the NASDAQ Exchange in 1983-84.

[15] The plaintiff, William Forder, was a physician residing in Toronto. He died in 2002, leaving his widow, Linda Forder, four (4) young children and an insolvent estate. His widow, Executor and Trustee, carried on the litigation.

[16] The plaintiff, Victor Mele, is a physician and a friend of Dr. Forder; he resides in the City of Markham.

[17] The plaintiff, Amerkon, an Ontario corporation, was the corporate vehicle used by Drs. Forder and Mele to invest in Amertek.

[18] The defendant, CCC, is a Canadian Crown corporation incorporated by an act of Parliament in 1946. The legislation relevant to this lawsuit is the *Canadian Commercial Corporation Act,* R.S.C. 1985, c. C. 14 (CCC Act).

[19] CCC is wholly owned by the Government of Canada (CDNG).

[20] The Department of Supply and Services (DSS), now called Public Works and Government Services Canada (PWGSC), and the Department of National Defence (DND) are departments of CDNG. Proceedings against the CDNG have been taken in the name of the Attorney General of Canada (AG) pursuant to s. 23(1) of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C. 50 (CLP Act).

[21] The CCC Act states, in part:

> s. 4. The Corporation is for all its purposes an agent of Her Majesty in right of Canada.
>
> . . .
>
> s. 9. (1) The Corporation is established for the following purposes: . . .
>
> (b) to assist persons in Canada . . .
>
> (ii) to dispose of goods and commodities that are available for export from Canada (Ex. 51)

[22] On the examination for discovery of the defendants' representative, it was admitted that "persons in Canada", under s. 9(1)(b) of the CCC Act, included BSL/Amertek and that "to assist" means "to help".

[23] As pleaded by the plaintiffs and admitted by the defendants, in 1946, CCC began assisting Canadians to dispose of their goods to other countries where, by reason of legislation in such countries, it was necessary that transactions be handled, in whole or in part, through a government agency. Various U.S.A. trade statutes prevented Canadian companies from selling military equipment and services (U.S. military work) directly to the United States Government (USG).

IV. THE LETTER AGREEMENT - DPSA

[24] On July 27, 1956 (effective after October 1, 1956), the CDNG and U.S. Department of Defence (USDOD) entered into the "Canada – United States Defence Production Sharing Arrangement (DPSA), a unique government – government military purchasing agreement. (Ex. 1: p. 27-54)

[25] Under the DPSA, the USG waived the restrictions of various U.S.A. trade statutes against only one Canadian company, CCC, allowing CCC to submit bids to the USG seeking the award of U.S. military work, to compete against U.S. bidders and to enter prime contracts with the USG for such work. In the absence of USDOD waivers, Canadian suppliers wishing to sell goods to USDOD can only sell through the participation of CCC.

[26] The Letter Agreement/DPSA and implementing USG regulations provide that:

> (a) each time CCC wished to submit a bid to the USG seeking the award of US Military Work, CCC would do so on behalf of a specific Canadian company which had submitted a bid to CCC offering to perform such work as a subcontractor to CCC ("CDN Subcontractor");
>
> (b) CCC would submit the CDN Subcontractor's bid to the USG by "certifying" and "endorsing" such bid to the USG as CCC's own prime contract bid;
>
> (c) if CCC's bid was accepted by the USG, CCC would then enter into a USG Prime Contract for the performance of such US Military Work;
>
> . . .
>
> (e) CCC would be required to subcontract 100% of the US Military Work described in such USG Prime Contract to CCC's CDN Subcontractor;
>
> (f) CCC would be prohibited from transferring any or all of such US Military Work to any other subcontractor without the USG's prior written consent;
>
> . . .
>
> (i) the CDNG guaranteed to the USG that CCC would complete all obligations contained in each USG Prime Contract entered into by CCC.
>
> (Statement of Claim: para. [36]; admitted)

[27] The Letter Agreement/DPSA does not exclude its application from the area of reprocurements nor does it draw any distinction between "procurements" and "reprocurements". In his evidence, Raymond V. Hession, Deputy Minister for DSS in 1984-85, testified that there was no distinction between the original bidder and the replacement subcontractor. Mr. Hession also testified that CCC's obligation set out in

the Letter Agreement/DPSA applied equally whether CCC was dealing with the original first tier subcontractor or a replacement subcontractor (Transcript: in chief: March 6, 2002: p. 69-70).

[28] It is agreed that CCC did not have a legal obligation to any CDN subcontractor to bid on any specific USG military work and, therefore, CCC had complete discretion whether or not to submit a bid.

[29] The present Director General, DSS, Janice Thorsteinson, a witness called by the Government Defendants, testified that CCC must carry out all its obligations under the DPSA because "it is the policy of the Canadian Government to honour its agreements".

[30] The parties agree with the following paragraphs of the Statement of Claim:

> 44. CCC had also amassed significant knowledge and expertise related to the DPSA, USG procurement of US Military Work, and CDNG procurement of military equipment. During CCC's fiscal year ended March 31, 1984, CCC executed approximately 2,200 USG Prime Contracts totalling approximately $629 million dollars and had achieved cumulative sales of about $11 billion dollars.
>
> 45. In its advertising, promotion, and other materials, CCC actively promoted:
>
> (a) CCC's "expert" status with respect to the conduct of DPSA procurements;
>
> (b) the extensive "benefits" CCC provided to potential CDN Subcontractors which included:
>
> (i) providing additional safeguards through CCC's technical and risk analysis; and

(ii) assisting the CDN Subcontractor through all phases leading to the conclusion of a transaction.

[31] CCC's Annual Reports show that in 1984 the USG was, and still remains, CCC's largest customer. (Ex. 11)

[32] A hard copy of CCC's website services as of January 3, 2002, before the trial commenced, states:

> At the request of the U.S. DoD, all purchases from Canadian companies over $100,000 must be contracted through CCC. We help you to sell to the U.S. DoD by endorsing your bid and providing our government-backed guarantee of contract performance.
>
> ……
>
> Experienced staff provide valuable guidance and advice on how best to meet your buyer's contractual requirements and how to navigate the procedures and regulations of complex foreign markets.
>
> CCC acts as the Prime Contractor and submits the bid or proposal to the buyer. CCC's endorsement of the bid puts the support of the Government of Canada behind the deal through our government-backed guarantee of contract performance.
>
> CCC helps Canadian exporters win sales in government and private-sector markets around the world, through our unique government-backed guarantee of contract performance.
>
> Before we can provide our guarantee, we assess your company's technical, managerial and financial capacity.
>
> CCC looks for the technical ability, skill, labour force, and know-how to meet terms and conditions of the contract.
>
> CCC looks for the management skills to plan, organize, control and direct daily operations required to carry out and manage the contract successfully.

> CCC looks to see if you have or can obtain adequate financial resources to carry out the contract successfully. (Ex. 1: p. 404-405)

[33] A hard copy of CCC's website services as of June 19, 2002, a few weeks before the trial ended, does not have the sentence: "Before we can provide our guarantee, we assess your company's technical managerial and financial capacity".

[34] It is admitted that CCC carried out advertising of this type in 1984-85. CCC's current website (6/19/2002), describes the "assistance" that CCC currently provides in similar terms (Ex. 1: p. 407-407A). There is no suggestion in any of CCC's advertising that the "assistance" is limited to "overseas" contracts, as suggested by Mr. Douglas Patriquin, current President of CCC.

The Relationship Between CCC and DSS

[35] In 1984-85, CCC did not have many employees but had a very close relationship with DSS whose personnel often wrote correspondence on CCC letterhead and CCC personnel signed correspondence that was on DSS letterhead. The Deputy Minister of DSS was also a member of the Board of Directors of CCC.

[36] In 1984-85, before the prevalence of computers and the ability of bidders to access the www, the DSS maintained a list – the "DSS Qualified Source List" – of Canadian corporations that DSS believed were capable of supplying a particular type of product or service. The list was used by DSS in 1984-85 to locate possible suppliers for

both competitive and sole source procurements. BSL was not on the DSS Qualified Source List.

[37] DSS handled most of the procurement activities of the CDNG for its own needs and had acquired considerable experience in the acquisitions of goods and services. The relationship and fee for service structure between CCC and DSS was set out in their Memorandum of Understanding (MOU). By the terms of the MOU, DSS agreed to supply its "unquestioned expertise" to CCC in matters of procurement and related services. (Ex. 1: p. 40).

[38] The Statement of Claim (admitted) states:

> 28. As part of the CDNG's practices, policies and procedures pertaining to defence procurement, the CDNG issued written directives governing CCC and DSS's involvement in DPSA related procurements ("DSS Directives").

Mr. Hession testified that within a year of his joining DSS in 1982, he made the DSS Directives available to CDNG suppliers so that the suppliers would know what to expect in their dealings with DSS.

CDNG's "Practices, Policies and Procedures"

[39] The Letter Agreement/DPSA states, in part:

> 2.(a) The Corporation [CCC] agrees that it will cause all first-tier subcontracts under contracts covered by this agreement to be placed in accordance with the practices, policies and procedures of the Government of Canada covering procurement for defence purposes; (Ex. 1: p. 27)

[40] The CDNG's practices, policies and procedures governing its own defence procurements are contained in:

(1) the *Financial Administration Act*,

(2) the Treasury Board Manual,

(3) the Supply Policy Manual (SPM), including the "7,000 Series".

Directives which relate to CCC's DPSA Activities

[41] A former employee of DSS, Karl Morgenroth, testified that, at DSS, SPM was referred to as the "Bible". Mr. Hession, a former Deputy Minister of DSS, testified that if a contract officer strayed from the SPM, he/she risked disciplinary action. Peter Smith, a witness for the defendants and the former Assistant Deputy Minister of Supply Operations in 1984-85, testified that if a contract officer derogated from SPM, the contract would not be awarded. Messrs. Hession and Smith agreed that if there were to be a deviation from the SPM, the approval of at least a Director was required.

[42] During the trial, I was led through various DSS Directives, including 7034, 7005, 7013, 7008, 1831, 1500-9, 7027, 3200 and 6152 (Ex.1: p. 159-307). It is agreed that where words such as "shall" "must" or "requires" appear in the DSS Directives, such words are mandatory.

[43] In a memorandum accompanying an updated (November 30, 1987) SPM, Mr. Hession's successor, Georgina Wyman, wrote:

> As a common service agency, we must balance the provision of an efficient and effective service to our customers with fair and equitable treatment of suppliers. At the same time, the general public must view our contracting procedures as fair and impartial.
>
> The Supply Policy Manual is a consolidation of contracting policies and guidelines that provide direction to contracting officers and staff. Its format follows the chronological phases of the procurement cycle wherever possible.
>
> However, the Manual can never be a substitute for sound judgement and common sense, nor can it be considered exhaustive. In the changing function of supply, the Manual will be amended and updated regularly. (Ex. 1: p. 159).

[44] The Treasury Board Manual, dated May 31, 1993, states:

> Contracting
>
> Policy
>
> 1. Policy objective
>
> The objective of government procurement contracting is to acquire goods and services and to carry out construction in a manner that enhances access, competition and fairness and results in best value or if appropriate, the optimal balance of overall benefits to the Crown and the Canadian people.
>
> 2. Policy statement
>
> Government contracting shall be conducted in a manner that will:
>
> (a) stand the test of public scrutiny in matters of prudence and probity, facilitate access, encourage competition, and reflect fairness in the spending of public funds; (Ex. 1: p. 311).

[45] The Concise Oxford Dictionary defines “probity” as: a noun meaning “uprightness, honesty”.

[46] R.V. Hession, who had a significant part in writing the SPM, testified that “fairness” was directed primarily to bidders.

[47] It was R.V. Hession’s view that “fairness” involved CCC/DSS affording the same treatment to all bidders of the same procurement and to provide those bidders with the fullest disclosure in defining the requirement and disclosing all facts material to the bidder before, during and after the bid process. It was Mr. Hession’s view that “fairness” to suppliers applied equally to competitive or sole source procurements and also to reprocurements (Transcript: in chief: p. 73-80 and cross-examination: p. 27). R.V. Hession was of the view that prudence and probity should govern all DSS activities. In cross-examination, at p. 30, Mr. Hession said:

> I made it clear in many many speeches, many interactions with my management team, that they must treat our suppliers with the same level of respect that we treat our customers which wasn’t always the case.

[48] An April 5, 2002 hard copy extract from the PWGSC’s website repeats this policy/philosophy and states: “Integrity: PWGSC supply activities will be open, fair and honest”.

[49] During the examination for discovery of the defendants’ representative, Michel Fairfield, he said that CCC and DSS considered themselves bound by an obligation of fairness towards parties with whom it contracted, including BSL/Amertek. It was also acknowledged that CCC/DSS had an obligation to be honest with its

subcontractors, including BSL/Amertek. (Examination for discovery of Michel Fairfield, Q. 10735-8 and Q. 10752).

DSS and Its “Directives” and “Branches”

[50] Because DSS handled the acquisition of most of the goods and services for CNDG, it had acquired considerable expertise in that field.

[51] One of DSS’s “directorates” was entitled “Industrial and Commercial Products” (ICP). The employees of this DSS directorate assisted CCC in the matters before the Court. ICP had a branch entitled “Transportation and Energy Products Branch” (TEPB). TEPB contained a subgroup called “Special and Standard Vehicular Group” – it specialized in the procurement of vehicles.

Assessment of Risk – DSS Directive 7013

[52] The following paragraphs of the Statement of Claim are admitted by the defendants:

> 39. Pursuant to the DSS Directives, DSS supplied expertise, risk assessment, and other specialized services related to CCC’s DPSA activities.
>
> 40. Assessment of risk by CCC and DSS was a critical component in DPSA procurements. Various DSS Directives required that:
>
> (a) CCC and DSS source US Military Work only from CDN subcontractors producing the commodity in question;
>
> (b) CCC and DSS determine whether the proposed CDN Subcontractor was financially and technically capable of performing such USG Military Work at the prices quoted and within the delivery times specified;

> (c) the level of risk be assessed accurately at the earliest practical point in the contractual cycle and be monitored as the contract proceeded; and
>
> (d) if there was abnormal risk, specific approval from CCC headquarters was required to proceed with the submission of the bid to the USG.

[53] DPSA contracts, whether "prime" or a "back to back contract", have risks for all parties. The CDNG is at risk because it guarantees the performance of the Prime Contract. The subcontractor has risks as it must fulfill the terms of CCC's contract with the USG. CCC and the CDNG subcontractor face many common risks. Accordingly, it was important for CCC/DSS to assess, critically and correctly, the risk factor prior to "certifying" and "endorsing" a subcontractor's bid so as to ensure that the subcontractor was technically and financially competent to perform the contract.

[54] Directive 7013 of the SPM speaks of "risk" and "abnormal risk" and states, in part:

> 1. Of the special characteristics associated with CCC contracts, the most important is that of the level or risk of financial loss to the Government of Canada in acceptance by the Corporation of a contract with a foreign government.
>
> 2. Basically, in every such contract, risk exists because the Corporation commits itself contractually to a foreign government for delivery of a specified item at a given time and for a specific price. There is not the same flexibility in CCC contracts that exists in procurements for Canadian requirements where adjustments can be made….
>
> 3. In the interest of Canadian industry, it is important that no reasonable opportunity be lost to secure orders from foreign governments for Canadian goods and services. Recognizing that some degree of risk is unavoidable in export contracting, it becomes essential that the level of

> risk be assessed accurately at the earliest practicable point in the contractual cycle and monitored continuously as the contract proceeds.
>
> 4. In contracts where abnormal risks may be involved, no commitments are to be made on behalf of the Corporation without prior approval of CCC Headquarters. Abnormal risks, for example, may include (but are not limited to) such situations as the following:
>
> (a) the Canadian supplier must undertake substantial concurrent development and production activities on a firm price basis;
>
> (b) the supplier may have difficulty in maintaining an adequate working capital position;
>
> . . .
>
> (d) the supplier may have to obtain special facilities;
>
> 5. The responsibility for assessment of the level or risk involved in potential CCC contracts with Canadian suppliers rests with the DSS Product Centre.
>
> . . .
>
> 12. It is the responsibility of the Product Centre Director General to ensure that special attention is given to the progress of CCC contracts which contain elements of potential abnormal risk and to provide status reports to the Director, ESC, on a quarterly basis for onward transmission to CCC Headquarters. (Ex. 1: p. 263-4)

[55] In his examination for discovery on behalf of the Government Defendants, Michel Fairfield stated:

> 1003. Q. So with respect to Belgium Standard, your evidence is that of the factors in paragraph 4 of directive 7013 paragraphs A and C applied, but with respect to D you have a question as to whether special would apply?
>
> A. Yes, because in my view it's subjective in nature. (see: [54] above)
>
> …….
>
> 4769. Q. I'm not saying it's appropriate

A. It would be riskier. There is no doubt in my mind this deal was risky.

4770. Q. You're talking about the deal with Belgium Standard?

A. Yes. It was risky, but CCC takes risks.

4771. Q. Why was it risky?

A. For some of the reasons you have just given out, but the main reason was that BSL had a plan but didn't have a plant or a facility. They would have had to hire a work force. Presumably what they had in mind having already hired key personnel from King Seagrave they were planning to rehire some of the work force that used to work for King Seagrave and who knows some from Walter.

[56] The form of the US Army Procurement in the case at bar was a higher risk than other types of procurement because it required the subcontractor to quote a fixed price for a performance specification contract to be carried out over a period of five years for a vehicle never before produced. Karl Morgenroth, a production engineer at DSS, involved in the Light Armoured Vehicle (LAV) project for the US Marine Corps at General Motors, London, Ontario, testified that a "Performance Specification Contract" was the riskiest type of USDOD procurement because it is the hardest for which to estimate costs and has the highest risk of design problems. Mr. Morgenroth went on to say that the risk for an inexperienced contractor bidding on a contract with all three of the abnormal risk elements of Directive 7013, as present in this case, is "astronomical".

V. Chronology of Events

[57] DSS was the government department responsible for procuring rapid intervention vehicles (RIVs) for the Department of Transport (DOT). DOT planned to use RIVs, a type of crash truck, at airports to extinguish fires on aircraft.

[58] On April 19, 1984, the Minister of DSS approved a plan for the procurement of fifty-seven (57) DOT crash trucks at an estimated cost of Cdn. $26,150,900.00.

[59] The procurement plan stated:

> SOURCING
>
> 12. Two Canadian companies have the design, logistics and marketing capability and meet the criteria listed above in the PRC Record of Review. The two firms capable of producing airport crash trucks in Canada for domestic and export market are:
>
> (a) Walter Trucks Inc., Ville d'Anjou, Québec
>
> (b) Pierre Thibault Trucks Inc., Pierreville, Québec
>
> 13. As the GATT Agreement on Government Procurement does not apply on purchases for DOT, competition will be restricted to the above-noted Canadian companies.
>
> …….
>
> INDUSTRIAL AND REGIONAL BENEFITS
>
> 29. There are not enough Canadian crash truck requirements to support an industry; therefore, survival depends on a capability of penetrating the export market. The award of contract for this requirement will allow a Canadian manufacturer to produce crash trucks to the latest ICAO standards. This will place the Contractor in a better position to compete in the foreign market which could provide more job opportunities for Canadians. Both potential contractors are situated in Québec in areas of high unemployment.
>
> BUSINESS/TECHNICAL RISK

> 30. This requirement is within the normal type of business transaction for the companies to be invited to submit proposals and business risk is considered to be low. This requirement includes the latest ICAO standards; however, these crash trucks are very sophisticated or complicated vehicles that require a high level of engineering, production and quality assurance. If a company other than those invited to bid submits a proposal and such company becomes the successful Contractor then the technical risks will be that much greater. In any event, risk will be considered in evaluation of proposals. (Ex. 3: p. 6 and p. 8)

[60] After DSS's technical team visited both Walter Trucks Inc. (Walter) and Pierre Thibault Trucks Inc. (Thibault), the Government Defendants determined that Thibault was not capable of fulfilling the DOT contract. That left Walter as the only contractor said to be capable of performing the DOT contract (Ex. 3: p. 94-95).

[61] On November 29, 1984, Treasury Board approved the award of a contract amounting to $17.3 M to Walter for the manufacture of sixty-eight (68) crash trucks for Transport Canada (Ex. 5: p. 19).

U.S. Army Crash Trucks

[62] In 1984, the US Government (USG) issued an invitation to bid (ITB) for the supply of three hundred and sixty-two (362) multi-purpose fire trucks for the US Army to be supplied over a five (5) year period. The crash trucks were to be used for:

(a) fires in downed aircraft

(b) fires in a building on the Army bases and

(c) brush fires on Army bases.

[63] The US Army specifications required that the crash trucks were to have four (4) wheel drive, all terrain capability and be air transportable. This imposed weight, height and other design limits on the vehicle.

[64] The US Army's ITB was based on a "performance specification" as opposed to a "design specification". A "performance specification" does not request bids for a particular vehicle but sets out the parameters of what is required of the vehicle and leaves the design to the bidder. Therefore, more innovation is left to the bidder, which also leaves the possibility for a greater price variance.

[65] The evidence of the plaintiffs' witnesses Professor Kirk Rosenhan, a fire truck engineering expert, and William McNeilly, the designer of the crash truck that forms the subject matter of this case, persuades me that previous to the summer of 1984, no manufacturer had ever produced a crash truck to meet all three (3) of the above mentioned functions. My conclusion includes a finding that the Oshkosh P-19 would not fulfill all three (3) requirements as claimed by Jackson Medley, a witness called by the Government Defendants.

[66] William McNeilly inspected a P-19 truck before giving his evidence. Mr. Medley reviewed only the specifications before giving his evidence.

[67] The US Army's ITB referred to the crash/fire trucks as a "military adapted commercial item" (MACI) or "military adapted commercial equipment" (MACE). The intent was to use commercially available components rather than components specially manufactured exclusively for military use. Nevertheless, Professor Kirk Rosenhan was

of the opinion that the US Army's ITB performance specification, design and quality assurance/inspection requirements for the MACE were much more complex than a municipal fire truck.

[68] The following paragraphs of the Statement of Claim are admitted:

> 49. The successful bidder would be required to design and build one pre-production Army Fire Truck ("First Article") which would be subject to Army testing to ensure it met all requirements of the relevant USG Prime Contract. The design of the First Article would be then frozen thus ending the design phase of the Army Program ("Design Phase").
>
> 50. Thereafter, no changes to the First Article could be made without Army approval. All subsequent production vehicles would then be manufactured to comply with the design of the First Article ("Production Phase").

[69] Although not admitted, the evidence is overwhelming that the ITB required a successful bidder to complete the contract within a firm, fixed price; the USG Prime Contract imposed significant technical, financial and other risks on the successful bidder.

[70] Paragraph 52 of the Statement of Claim is admitted:

> 52. Each bidder submitting an acceptable step 1 technical proposal ("Technical Proposal") would be invited by the USG to submit a step 2 pricing proposal ("Pricing Proposal"). After evaluation of each Pricing Proposal, the Army Program would be awarded by the USG.

[71] In his examination for discovery, the representative of the Government Defendants, Michel Fairfield, agreed at Q. 816 that CCC's endorsement of a Canadian

supplier could result in a binding “prime contract” if the USG accepted CCC’s bid and CCC entered into a “back to back” subcontract with a Canadian subcontractor/supplier. Because of the risk to CCC, it was important for the Government Defendants to ensure, before any “endorsement” was given by CCC, that the Canadian subcontractor was found to be technically and financially competent to perform the contract.

[72] The contracts and promises of CCC are guaranteed by the Government of Canada. CCC will not “go out of business”. However, a Canadian subcontractor could go out of business. R.V. Hession, the Deputy Minister of DSS from 1982-86, stated in his examination in chief:

> Q. Okay. And if those aren’t available or if it’s not possible to have recourse to them then CCC always has the Government of Canada to cover its losses?
>
> A. Indeed.
>
> Q. Is there also risk for the Canadian supplier in entering into a DPSA contract with CCC?
>
> A. The same risks that are experienced by CCC, yes. And those that are consequential. By consequential I simply mean that the performance of the contract in terms of delivering the goods is obviously unique to the subcontractor. But in every other respect the risks are the same.
>
> Q. And why do you say the risks are the same between the supplier to CCC and with CCC to the U.S. Department of Defence?
>
> A. The substance of the two agreements are in the vernacular back to back and would be symmetric, one with the other.
>
> Q. So in that sense does the Canadian supplier undertake the same risk that CCC does in a DPSA contract?
>
> A. Yes, that would be the normal model. Again, my comments are entirely focused in the timeframe.

Q. Yes, we're talking about 1985.

A. Yes, we are; yes, we are.

(Transcript: p. 86, line 19 to p. 87, line 10).

[73] Walter of Canada Inc. (Walter) of d'Anjou, Montréal, Québec, was controlled by Georges Laporte, President and his partners. Walter was known to the Government Defendants as an experienced manufacturer of crash trucks and military fire trucks.

[74] King Seagrave (1982) Inc. (KS), 873 Devonshire Place, Woodstock, Ontario was a designer and manufacturer of municipal fire trucks which were purchased and used by municipal fire departments. KS was wholly owned by Walter. Walter acquired the assets of KS following the bankruptcy of a prior company.

[75] The following paragraphs of the Statement of Claim are admitted:

> 53. In June 1984, using the DSS Qualified Source List, CCC solicited bids for the Army Program from eleven (11) Canadian companies which manufactured fire trucks.
>
> 54. The only bidder which responded was KS, a subsidiary of Walter, one of the two Québec companies specifically mentioned in the DOT Procurement Plan.
>
> (See also: Ex. 3: p. 114)

[76] The plaintiffs allege (and the defendants deny) that DSS saw the US Army program as an opportunity to implement the DOT Procurement Plan and that Federal Government assistance to KS and Walter would ensure the survival of the Canadian

crash truck industry and create jobs in the Province of Québec. It will be recalled that the April 19, 1984 DOT Procurement Plan for RIVs stated:

> 29. There are not enough Canadian crash truck requirements to support an industry; therefore, survival depends on a capability of penetrating the export market. The award of contract for this requirement will allow a Canadian manufacturer to produce crash trucks to the latest ICAO standards. This will place the Contractor in a better position to compete in the foreign market which could provide more job opportunities for Canadians. Both potential contractors are situated in Québec in areas of high unemployment. (Ex. 3: p. 8)

[77] If and insofar as it is necessary for my decision in this case, I find, on the totality of the evidence, that the plaintiffs' allegations on this issue are well founded. DSS wanted to support the Québec based crash truck industry but needed an export contract at its foundation for its survival. I so find notwithstanding the evidence of R.V. Hession, Ms. Janice Thorsteinson and other CCC personnel who testified that "domestic politics" (distributing socio-economic benefits within Canada) was not supposed to infiltrate nor influence CCC's policies and decisions. The plaintiffs' submissions, based on the evidence, provide the only feasible reason for what happened. The Government Defendants did not put forward any alternative feasible explanation for their lengthy, heroic efforts to keep KS and Walter afloat as CCC's/DSS's subcontractor and for continuing to do so long after it was, or should have been, obvious to everyone at CCC and DSS that KS and Walter were awash and drowning in their own red ink. As stated under "credibility" (infra), the personal friendship between Georges Laporte (President of KS and Walter) and A.F. Sanderson (DSS) may have caused the delay in the arrival of "the day of reckoning".

[78] William McNeilly, KS's chief engineer, prepared a Proposed Design of a US Army crash truck for KS's technical proposal bid on the 362 crash truck ITB.

[79] On July 11, 1984, DSS "certified" KS's "Step 1" technical proposal (Ex. 3: p. 305A and p. 306).

[80] On the same day, July 11, 1984, CCC sent a telex to Troop Support Command (TROSCOM) (US Army) in St. Louis, Missouri U.S.A. "endorsing" KS's Technical Proposal and "certifying" that KS's bid was within the technical and delivery capabilities of KS (Ex. 3: p. 307).

[81] On August 15, 1984, the US Army notified DSS that KS's Step 1 Technical Proposal was acceptable (Ex. 3: p. 323). Four (4) American bidders received the same notification (see Statement of Claim, paragraph 59 (admitted) and Ex. 3: p. 306).

[82] KS then prepared its Pricing Proposal in the amount of US $45,286,452.00. The material and labour costing was prepared for the most part by KS's design engineer, William McNeilly. The price was set by Georges Laporte, President of Walter, which owned KS. The Pricing Proposal submitted to the Government Defendants covered options for 362 US crash trucks. On August 27, 1984, DSS "certified" KS as being financially capable of performing the five (5) year fixed price CCC Prime Contract. On August 27, 1984, CCC "endorsed" and submitted KS's Price Proposal to the USG as CCC's bid for the Prime Contract thereby obligating CCC to complete the contract for US $45,286,452.00 (Ex. 3: p. 448).

[83] The evidence of Mr. Sandy Sanderson, acting Divisional Chief and Group Manager, Special and Standard Vehicles Group, Transportation and Energy Products Branch, DSS, his letter of February 4, 1985 to Ernst & Whinney and the December 7, 1984 memorandum to Mr. Sanderson from A. Ilchenko, Financial/Cost Analysis Group and Industrial and Commercial Product Support Branch (DSS), disclose:

(1) DSS first saw KS's June 1984 financial statements in September 1984 after DSS had "certified" and CCC had "endorsed" KS's Pricing Proposal to USG.

(2) The June 30, 1984 audited financial statement for King Seagrave (1982) Inc. and for Walter Canada Inc. show a net loss of $170,000.00.

(3) The November 6, 1984 revised audited financial statements show a net loss of approximately $605,923.00, a difference of $435,000.00 from the June 30, 1984 statement.

(4) Ernst & Whinney called back all the June 30, 1984 audited financial statements and destroyed them. (Ex. 4: p. 481-2; Ex. 5: p. 188-192)

[84] The plaintiffs submit that there is no evidence that DSS/CCC performed a "pre-award" survey or "facility survey" of KS to determine its financial, technical or managerial competence before DSS "certified" and CCC "endorsed" KS's bid to the US Government. Indeed, no such assessments were produced by the Government Defendants. The plaintiffs also point out that DSS/CCC made no effort to perform a

"should cost" or "standard hour analysis" before "endorsing" and "certifying" KS's bid. These procedures were described by Karl Morgenroth, a production engineer at DSS involved with the Light Armoured Vehicle (LAV) US Marine Corps Procurement located at GM, London, Ontario. "Should cost" and "standard hour analysis" procedures had been carried out at LAV. R.V. Hession, in his examination in chief, testified:

> Q. All right. Would it make a difference where CCC is in a reprocurement situation that has a prior history of bids and analysis of prices; would the duty of disclosure arise in those circumstances to disclose the results of the should cost analysis?
>
> A. Yeah. If that had been a cause for the reprocurement action, again by inference, a "should cost estimate" would be buttressed by the inadequacy of the price of the original bidder, presumably. It's evidence of a risk, and in CCC contracting it's axiomatic that insofar as a risk is concerned the parties share that risk to the extent that CCC engages a foreign government by way of contract, and then lays off that risk. In a symmetric contract with a subcontractor, it would certainly be material in my mind if there was knowledge of inadequate pricing. That information would be made known. Otherwise, you have a symmetric risk, and that's just not what CCC is about.
>
> (Transcript: p. 82, line 17 to p. 83, line 2)

[85] The Government Defendants did not examine any of KS's and/or Walter's bank statements nor did they do any credit bureau searches on either company.

[86] The plaintiffs submit that in the summer of 1984 KS/Walter were in obvious financial trouble and KS's bid should not have been "certified" by DSS and "endorsed" by CCC.

[87] The plaintiffs submit that this conduct by DSS/CCC officials adds fuel to the plaintiffs' submission that there was only one reason for the actions of the

Government Defendants: they supported KS's attempt to implement DOT Procurement Plan by using the MACE contract as the much needed "export contract" to provide financial support to KS's parent, Walter, one of the Québec based fire truck manufacturers.

[88] On August 27, 1984, Ms. C. Dei Santi (contracting officer, TROSCOM) prepared an abstract of "Pricing Proposals" submitted in Stage two (2) of the bidding. The bids submitted and the amounts were:

1.CCC	US $45,286,452.00
2. Fire Truck Inc. (FTI)	US $55,535,276.00
3. Grumman	US $63,818,232.00
4. Kovatch	US $67,398,498.00
5. Emergency One Inc. (E-1)	US $74,326,610.00

Bid Price Verification

[89] All bidders, except CCC, were U.S. corporations. Because CCC's price was approximately US $10,254,824.00 (23%) lower than the next lowest bidder (FTI), USG sent a pricing verification request to CCC immediately after the bids were opened. The Federal Acquisition Regulation (US) required the US Army contracting officer to advise the bidder that "his bid is so much lower than the other bid or bids as to indicate a possibility of error". The regulation stipulates that if the contracting officer is

persuaded that an error has occurred, the bidder is allowed to withdraw the bid. (FAR 2-406.3(e)(1) – Ex. 1: p. 120-21).

[90] The current Director General DSS, Janice Thorsteinson, during cross-examination, testified that CCC had a similar written policy. Ms. Thorsteinson agreed that the policy applied to all bids, including reprocurements. Such a written policy was never produced by the Government Defendants during the trial nor, as indicated by the evidence, was such a policy followed.

[91] Karl Morgenroth, a production engineer, testified that the differential between competent manufacturers for a performance specification contract for a new design might be 10% at most. He was further of the view that a differential greater than 10% would be cause for concern and would suggest that the bid's cost structure may not be sound. Professor A.K. Rosenhan agreed that the range of bids, including those of the other unsuccessful bidders as shown on Ex. 94, would raise a "red flag" for him. The Government Defendants' own witness, Mr. Sanderson, when asked about the bid differential shown on Ex. 94, agreed that anything more than 10% would suggest a problem with the bid and anything more than 20% would certainly trigger a bid price verification. Richard L. Moorhouse, the Government Defendants' expert on USG contracts, testified during his examination in chief that a 10% differential would be significant to him.

[92] During his cross-examination, it was suggested to Karl Morgenroth, that the 23% differential between KS and FTI was explained by the fact that KS could/would

achieve costs savings over other bidders by manufacturing its own chassis. Karl Morgenroth testified that if a contractor proposed to build his own chassis, it would cause him, Morgenroth, greater concern because the unit cost for a commercial (purchased) chassis is usually lower than the cost of building a chassis.

[93] During his cross-examination, the Government Defendants' witness, Mr. Sandy Sanderson said that there would be no cost penalty to CCC if it withdrew its bid in response to the price verification request. However, he said that such action would have resulted in the loss of a good export contract and it would be embarrassing for CCC to admit to USG that they had endorsed an erroneous bid. Obed Ivan (Obie) Matthews, Acting President of CCC in 1984-1985 and William Charles Ames, a DSS contract officer in 1984-1985, gave similar evidence.

Government Defendants' Response to USG Bid Price Verification Request

[94] On August 13, 1984, three (3) days after the bid verification request, the Government Defendants dispatched W.C. Ames (DSS) to visit the KS plant to check KS's price/bid on the MACE subcontract.

[95] R.V. Hession, former Deputy Minister, DSS, testified that DSS had very experienced cost analysts on staff who did "should cost" analysis and looked at bidders' offers. (Transcript: cross-examination: p. 45-46). None of those people was called upon nor was Karl Morgenroth (DSS) located at London, Ontario, a short distance from KS located at Woodstock, Ontario.

[96] Instead, W.C. Ames, who was not a cost accountant, nor did he have any expertise with military contracts, nor did he have expertise in “should cost” analysis, was called upon by CCC and dispatched to KS’s premises.

Evidence as to William Ames’ August 30, 1984 visit to KS at Woodstock, Ontario

[97] W.C. Ames, a witness called by the Government Defendants, testified that his notes of his less than one-day attendance at KS on August 30, 1984 were complete and accurate (Ex. 3: p. 463). However, there is nothing in his notes about his advising KS of the US Army’s bid price verification request. W.C. Ames agreed that he knew it was very important to supply that information to a supplier and to record in his notes that the supplier had been so advised. W.C. Ames also testified that he met with William McNeilly, who offered W.C. Ames his costing notes which, Ames claims, he refused but asked that the notes be typed up and delivered to CCC at a later date.

[98] W.C. Ames also testified that on August 30, 1984, he met for an hour with K.G. Hooton, former sales manager at BSL.

[99] K.G. Hooton did not testify that W.C. Ames told him that CCC had received a price verification request. K.G. Hooton said he believed W.C. Ames was doing a routine check of the pricing. K.G. Hooton denies meeting with W.C. Ames on August 30, 1984 for an hour. William McNeilly, a witness for the plaintiffs, testified that he is “quite certain” that he did not meet with W.C. Ames on August 30, 1984 to verify KS’s bid price. William McNeilly testified that he certainly would have recalled such a meeting where, allegedly, he was advised of a bid price verification from the US Army

because that would have sent a signal to him that there might be a problem with the price. William McNeilly testified that he did not hear of any US Army bid price verification request until he met with counsel for the plaintiffs in connection with this litigation. There is no documentary evidence that W.C. Ames met with either William McNeilly or K.G. Hooton on August 30, 1984. The only KS person mentioned in W.C. Ames' notes is Georges Laporte, President of Walter. Mr. Laporte met Mr. Ames at the airport. (Ex. 3: p. 463).

[100] From the evidence, it is clear that W.C. Ames was not sent to KS to perform a "formal certification" nor a "should cost" analysis in regard to the bid price verification request. Indeed, on cross-examination, W.C. Ames admitted that he did not perform a "should cost" analysis. K. Morgenroth testified that it would take a team of people a week to perform a "should cost" analysis. W.C. Ames was at KS's Woodstock plant for less than one (1) day.

[101] Notwithstanding all of the above, in his notes, dated August 30, 1984, of his short visit to KS on August 30, 1984, W.C. Ames wrote that he "guaranteed" the KS bid price. (Ex. 3: p. 463).

[102] On August 31, 1984, without any further analysis, CCC sent a telex to the US Army "endorsing" and "verifying" KS's price as quoted in response to the bid price verification request.

[103] On August 31, 1984, the USG announced that CCC was the successful bidder and signed the “CCC Army Prime Contract” for a total price of US $45,286,452.00. (Statement of Claim: para. [63]: admitted; Ex. 4: p. 1-321).

[104] The Prime Contract was governed by US law and subjected CCC to US law (Ex. 50C: p. 224).

[105] On September 7, 1984, a typed copy of William McNeilly’s costing notes was delivered to CCC. W.C. Ames testified that the typed copy was prepared pursuant to his request of William McNeilly made on August 30, 1984. On cross-examination, W.C. Ames admitted that the typed document was signed by Georges Laporte, President of Walter and delivered to CCC by Mr. Laporte, not by Mr. McNeilly, as indicated on one copy of the document found in the Government Defendants’ productions. (Ex. 4: p. 323-329G).

[106] In his evidence, William McNeilly testified that he was never asked to prepare such a document, had not seen it and was not aware that Mr. Laporte had created it and sent it to CCC.

[107] On October 5, 1984, by telex, CCC awarded a “back to back subcontract” to KS in the same amount as the US CCC Army Prime Contract (US $45,286,452.00). The telex confirmed that Walter would complete KS’s obligations in the event of the latter’s default (Ex. 4: p. 400-417).

[108] By letter, dated November 14, 1984, Ernst & Whinney, management consultants, London, Ontario, sent to Mr. William C. Thomas, President of BSL, a draft copy of “acquisition opportunity: King Seagrave (1982) Inc.” KS was for sale. (Ex. 4: p. 424-453).

[109] On November 19, 1984, DSS learned that KS had laid off the production staff at KS’s Woodstock plant on November 16, 1984 due to “cash flow problems” (Ex. 4: p. 454).

[110] On November 24, 1984, W.C. Ames (DSS) prepared a file memorandum indicating DSS met with Georges Laporte, President of Walter and KS, to confirm KS’s financial problem. W.C. Ames stated that, in his opinion, KS was bankrupt (Ex. 4: p. 457).

[111] On November 29, 1984, Treasury Board approved the award of a DOT contract for Cdn. $17.3M to Walter for the manufacture of sixty-eight (68) crash trucks (Ex. 5: p. 19-20).

[112] On November 30, 1984, at CCC’s request, CCC and Walter entered into a written agreement whereby Walter agreed to perform all of KS’s obligations under the CCC/KS subcontract in the event of KS’s default.

[113] On November 30, 1984, W.C. Ames recorded, in a DSS file, a meeting at CCC with Georges Laporte. Mr. Laporte was advised by D.O. Roberts (DSS) that the

sixty-eight (68) crash truck DOT contract would not be signed until Mr. Laporte produced financial capability for KS/Walter (Ex. 4: p. 477-8).

[114] On November 30, 1984, William R. Schultz, Treasurer of BSL, met with William McNeilly and K.G. Hooton regarding a potential purchase of KS by BSL (Ex. 4: p. 460-465).

[115] On December 7, 1984, DSS sent a telex to Walter advising that the sixty-eight (68) crash truck contract would not issue to Walter until acceptable financial arrangements were provided (Ex. 4: p. 480).

[116] On December 7, 1984, A. Ilchenko, financial analyst at DSS, filed his "Financial Viability Evaluation of KS/Walter as of June 1984" in reply to the December 4, 1984 request from A. Sanderson (DSS) (Ex. 4: p. 481-2).

[117] On December 18, 1984, the National Bank of Canada appointed a receiver for KS and took possession of KS's accounts receivable and inventory but continued with "work in progress". The Receiver sold off production equipment; K.G. Hooton was laid off on December 21, 1984. William McNeilly continued to work for the Receiver until March 1985, assisting in the liquidation of KS. (Statement of Defence: para. [47] and evidence of William McNeilly, in chief).

[118] On December 21, 1984, C.L. (Pat) Stauffer of CCC wrote a memorandum to N.J. Clarke of CCC stating that Walter "cannot move out of Québec because of political reasons" (Ex. 4: p. 485).

[119] On January 3, 1985, DSS informed US Defence Logistics agency that KS was in receivership, that KS was attempting to re-finance through the Royal Bank of Canada and that KS's cash flow problems were expected to be resolved (Ex. 5: p. 1). Rumours of KS's insolvency reached the US Army. The US Army made inquiries of CCC/DSS as to the financial status of KS and the progress of the subcontract. W.C. Ames testified (May 14, 2002: a.m.) that he had been told by A. Sanderson (DSS) not to advise the US Army of KS's financial problems so that Georges Laporte could "buy time" to obtain new financing. W.C. Ames said that he did so, although he did not believe Georges Laporte would obtain the necessary financing. In his "Trip Report" ("11/1/85") of the meeting in St. Louis, Missouri on January 8, 1985, attended by the US Army, DSS and CCC, W.C. Ames recorded that General Edelmann, the person in charge of the US Army Fire Truck Program, rebuked CCC and DSS for hiding facts from the US Army and cautioned them not to do so again. (Ex. 5: p. 2-6).

[120] The handwriting of P.R. Smith, former ADM/DSS, belies his evidence at trial. At trial, he testified that he was not involved nor was he kept apprised of the MACE on a daily basis. His handwritten memo to Pierre Comeau, Director ICP/DSS, and to his assistant, states:

> Thanks for this update but I want you to personally keep me posted daily on developments. This is very hot re MOT, MIN and CCC. We need to have contingency plan available. (Ex. 5: p. 66)

[121] In his memorandum, dated January 24, 1985, Anil Mody, a DSS financial/cost analysis, advised A.F. (Sandy) Sanderson, A/Manager of Special and

Standard Vehicle Group, TEPB, of his visit to KS on January 22, 1984 where those present, amongst others, were: Georges Laporte, William McNeilly and Daniel Romanski, C.A., the Receiver of KS.

[122] The memorandum states, in part:

> Costing for trucks handled by inexperienced employees such as Engineer, President and Sales staff. (Ex. 5: p. 124)

[123] The Government Defendants admit that the word “engineer” refers to William McNeilly, “sales staff” refers to K.G. Hooton and “President” refers to Georges Laporte (Ex. 50B: p. 93).

[124] In his handwritten memorandum, dated January 29, 1985, W.C. Ames (DSS) recorded that he received a telephone call from C. Nelson of Troop Support Command (US Army) – TROSCOM. Mr. Nelson advised that he was referring the MACE to legal personnel for their recommendation. W.C. Ames records that, in his opinion, this “may possibly result in termination for default by US” (Ex. 5: p. 144)

[125] On February 15, 1985, David O. Roberts, Director of TEPB, met with Georges Laporte. Mr. Roberts’ memorandum to file appears as Ex. 5: p. 208-211. G. Laporte died before trial. Exhibit 28, a medical certificate, states that D.O. Roberts was not able to testify at this trial because he had suffered a stroke. In his memorandum, D.O. Roberts wrote: “McNeilly caused damage to KS”.

[126] The evidence is overwhelming that the costing of material and labour calculated by William McNeilly and used for the KS bid was significantly underestimated. The plaintiffs submit that the Government Defendants knew this from the US Army's Price Verification Request and/or from the Receiver of KS. The plaintiffs submit that Georges Laporte knew of the error and/or was advised by the Receiver. The Government Defendants never told William McNeilly that they had learned that he "had caused damage to KS". Indeed, William McNeilly testified that he never heard of the allegation against him of "causing damage" or "stabbing Laporte in the back" until he met plaintiffs' counsel in connection with this litigation. The plaintiffs submit that there is no substance to the Government Defendants interpretation of the "cause damage" issue when the defendants allege that it is referable to William McNeilly trying to get Aircraft Appliance and Equipment (AA & E) and BSL interested in purchasing KS. Why? Because, for one thing, KS first came to the attention of BSL when Ernst & Whinney, management consultants, wrote and asked BSL if it was interested in purchasing KS. As a result, W.R. Schultz, Vice-President (Finance) for BSL obtained financial information regarding KS from Georges Laporte when he, W.R. Schultz, went to Woodstock on November 30, 1984 to view the premises. At that time, he spoke to William McNeilly and K.G. Hooton.

[127] During the November 30, 1984 meeting, K.G. Hooton showed W.R. Schultz cash flows indicating that KS anticipated a Cdn. $10.3 M profit on the US Army MACE contract (Ex. 4: p. 460).

[128] On an airplane, William McNeilly sat beside the President of AA & E and, during conversation, William McNeilly advised that KS was for sale. AA & E made inquiries but, because of KS's debt load, neither BSL nor AA & E was interested in purchasing KS.

Mixed Signals

[129] Although DSS told Walter that it would not be awarded the DOT contract until Walter provided satisfactory financial assurances, on February 1, 1985, CCC called on Walter, by fax and letter, under the Walter guarantee of the KS subcontract, to proceed to design and manufacture US Army crash trucks required in the US Prime Contract (Ex. 5: p. 182-3).

[130] While saying "proceed" to Walter, CCC and DSS searched for a contractor to perform the CCC Prime Contract. CCC/DSS obtained Dunn & Bradstreet reports (Ex. 5: p. 47-62) and approached the following companies and asked each company if it had any interest in taking over KS's obligations under the MACE contract:

(1) AA & E, Bramalea Ontario

(2) Hampton Engineering/Westinghouse, Renfrew Ontario

(3) Aerotech, Winnipeg, Manitoba

(4) Pierre Thibault Inc., Province of Québec.

The examination for discovery of Mr. Fairfield has these questions and answers:

10561 Q. I just want to know in May of 1985 was any other company contacted by the government to discuss taking over the Army Program?

A. None to my knowledge.

MR. DICK: In May of 1985?

BY MR. TAYLOR:

10562: Q. In May of 1985.

A. Yes.

10563. Q. And was any Canadian company other than GM contacted in June of 1985 to take over the U.S. Army Program?

A. Aside from GM, no, there wasn't any others.

10564 Q. We know GM dropped out of the picture in June. Was any Canadian company – that's right?

A. That's right.

10565 Q. And was any other Canadian company contacted in July 1985 to take over the U.S. Army Program?

A. No, not to my knowledge.

10566 Q. And in August of 1985 was any other Canadian company contacted by the government to take over the Army Program?

A. Not to my knowledge.

10567 Q. In September of 1985 was there any other Canadian company contacted to take over the Army Program?

A. No to my knowledge, no.

[131] Only AA & E showed any interest, but it had left the scene by early March 1985. As for the DSS/CCC meeting with GM on June 18, 1985, more will be said later.

<u>BSL Enters the Scene</u>

[132] Between 1981 and 1985, BSL's President, W.C. Thomas, had sold off BSL's unprofitable and unrelated businesses in order to concentrate on BSL's core business: the manufacturer of truck bodies. In the autumn of 1984, BSL had Cdn. $3M cash in the bank, was financially stable and possessed substantial assets and available credit. In the autumn of 1984, after having spent three (3) years selling off unprofitable businesses, BSL was not interested in taking on KS's debt load.

[133] Early in February 1985, W.C. Thomas, BSL's President, learned that replacement contractors were being considered for the MACE contract; BSL's interest was rekindled. Messrs. Thomas and Schultz met at W.C. Thomas' farm with William McNeilly and K.G. Hooton to enquire about:

(1) the status of the MACE contract

(2) the overall market for crash/rescue trucks

(3) the possible employment (no commitments by BSL) of William McNeilly, who was still employed by the Receiver and K.G. Hooton, unemployed since December 21, 1984.

[134] BSL, unlike KS and Walter, had never made fire trucks, crash trucks, vehicles for the Canadian or U.S. military nor made a complete truck of any kind. In its small manufacturing plant in Waterloo, Ontario, BSL fabricated aluminum and used it to manufacture dump truck bodies and garbage truck bodies (Shu-Pak) in order to fill small contracts. BSL purchased all chassis from manufacturers. It had no production line; it

did not have the space, equipment nor work force that would permit it to manufacture its own chassis. Mr. W.C. Thomas testified that, at the suggestion of K.G. Hooton, he called W.C. Ames at DSS to inquire about the status of the MACE contract and was told by W.C. Ames that BSL could not do the MACE without William McNeilly “on board”. Mr. Thomas further testified that he also spoke to Mr. Sanderson and to D.O. Roberts of DSS/CCC and told them of BSL’s interest in the MACE contract and the prospect of BSL hiring William McNeilly. Mr. W.C. Thomas further testified that neither Mr. Sanderson nor Mr. D.O. Roberts ever mentioned any allegation that “McNeilly caused damage to KS”. W.C. Thomas testified, in chief and in cross-examination, that he would not have gone near the MACE contract if he had been told that “McNeilly caused damage to KS” (Ex. 5: p. 122-5, p. 208-11, p. 214).

[135] On February 20, 1985, W.C. Thomas and W.R. Schultz of BSL met with the Mayor, and other civic officials at the Woodstock City Hall for more than three (3) hours. Jim Gill of the London office of the Department of Regional and Industrial Expansion (DRIE) attended that meeting (Ex. 5: p. 219).

[136] At the suggestion of the DRIE official, on the same day, namely, February 20, 1985, BSL prepared and sent an “unsolicited written expression of interest” to CCC, DSS, the Prime Minister (Ex. 21), Federal Cabinet Ministers, the Premier of Ontario and other members of the Ontario Cabinet, asking that BSL be considered as a replacement contractor for the MACE. It may be that one or more Federal politicians and Federal civil servants had their “feathers ruffled” by this “pushy conduct” on the part of an “outsider” bidder. The expression of interest did not contain any proposed pricing. The attached

brochures, with a description of BSL's business, showed that BSL manufactured "truck bodies" and not trucks (Ex. 5: p. 219, p. 220-247a).

[137] Notwithstanding that CCC/DSS were out "scouting" for potential replacement contractors for the MACE, on March 5, 1985, R.V. Hession, Deputy Minister, DSS, replied, in part, to BSL's February 20, 1985 expression of interest:

> As you are aware the contract has been awarded to King Seagrave (1982) Inc. Walter Canada Inc. which shares a joint ownership with King Seagrave (1982) Inc., has a legal obligation to complete the contract and we have every indication that this can be accomplished.
>
> We therefore thank you for your interest but do not propose to seek alternative contractors at this time. (Ex. 5: p. 314).

BSL Decided to "Test the Waters"

[138] BSL decided to make a small investment and test the market regarding crash truck vehicles. On March 1, 1985, BSL hired K.G. Hooton as a salesman and a week later, when William McNeilly's employment with the Receiver ended, hired him as design engineer. BSL decided to make a prototype, based on the KS crash truck design, for display at the August 1985 U.S. Marine Corps Truck Show.

[139] At Questions 3170-76 of his examination for discovery, M. Fairfield admitted that CCC had been in default under the MACE from January 14, 1985.

[140] On March 1, 1985, W.C. Thomas, President of BSL, sent a telex to O.I. Matthews, Acting President CCC, stating that BSL had learned that DSS intended to award a U.S. $45M contract to a company whose assets were sold by liquidation on

February 27, 1985. The telex states that the contract could revert to U.S.A. and cost CDNG and its tax payers in excess of U.S. $10M. (Ex. 5: p. 299).

[141] On March 4, 1985, the USG advised CCC that it was considering termination of the MACE because of CCC's failure to perform, that CCC had ten (10) days to submit written information that the failure to perform arose out of causes beyond CCC's control and without fault or negligence on the part of CCC (Statement of Claim: para. [77] (admitted); Ex. 5: p. 315-316).

[142] In a March 4, 1985 letter from P.R. Smith, ADM/DSS to O.I. Matthews, Acting President of CCC, the writer speaks of delaying the DOT's other contract to Walter because of Walter's financial difficulties – it poses an "abnormal risk", but "alternate solutions could have the effect of forcing the US Army to terminate the contract for default and render CCC liable to pay US $14M (or more) reprocurement costs" (Ex. 5: p. 313). As stated earlier, on March 5, 1985, R.V. Hession wrote to W.C. Thomas and advised that Walter "has a legal obligation to complete the contract and we have every indication that this can be accomplished" (Ex. 5: p. 314).

[143] On March 6, 1985, O.I. Matthews sent a telex to W.C. Thomas with a similar message. (Ex. 5: p. 317). On March 8, 1985, H.J. Cloutier, CCC, sent a telex to Georges Laporte advising of a "show cause" notice and indicating that the MACE may be terminated "as the result of your continued default" (Ex. 5: p. 324-327).

[144] On March 12, 1985, by telephone, W.R. Schultz (BSL) spoke to Pierre Comeau (DSS) and complained that no one at CCC/DSS would give audience to BSL.

Pierre Comeau replied: “We should have contacted him, he would have given us the straight goods” (Ex. 4: p. 332-334C).

[145] As R.V. Hession, P.R. Smith and Karl Morgenroth testified, a “show cause” is a serious matter because it is the first step in canceling a contract. Mr. Morgenroth testified that a number of “show cause” notices were received at LAV, which was classified as a “Major Crown Undertaking”, i.e. involving more than $100M, regarding technical issues. Mr. Morgenroth testified that each was taken seriously and the complaint rectified. Mr. Smith testified that termination for default would be an embarrassment for the Government of Canada and jeopardize future relations with the USG (R.V. Hession: Transcript: p. 12-13; P.R. Smith: evidence on April 23, 2002 – April 24, 2002; K. Morgenroth, evidence on February 28, 2002).

Knowledge possessed by the CCC/DSS Personnel as to whether or not KS had underbid the MACE

[146] The Plaintiffs allege that in February, March and April 1985, CCC/DSS officials learned that KS had underbid the MACE.

[147] Based on the February 14, 1985 meeting held at the DSS boardroom between CCC and KS/Walter, a CDNG employee wrote up the memorandum which shows that CDNG learned:

(1) KS underbid MACE and “Laporte knows it”

(2) To a suggestion that Karl Thibault and KS/Walter could together do the MACE, Georges Laporte said to K. Thibault: “Don’t touch it, you could burn yourself”.

(3) Georges Laporte needs more money if he is going to complete the MACE

(4) CDNG, knowing that it will lose Cdn. $14M on cancellation, will put up the money needed. (Ex. 5: p. 283-292).

[148] The Government Defendants deny the authenticity and identity of the last mentioned document. However, in November 2001, the Government Defendants produced a different version of the same document with additional handwritten notes on it. At trial, none of the Government Defendants witnesses would admit to having attended “the meeting” or to know anything about the statements recorded on the handwritten notes.

[149] During the trial, counsel for the plaintiffs identified the author of the marginal notes on the memorandum as a former DSS employee, Harry Schep. In an agreed “Statement of Facts for Schep” (Ex. 212), Mr. Schep is identified as a “former employee of DSS with a title, in 1985, of “Manager, Financial Operations Review, Contractual Cost and Financial Review”. In Ex. 212, it is stated that Mr. Schep does not recall who gave him the memorandum (Ex. 5: p. 288-292) and asked him to conduct an assessment of Walter’s cash flow projection based on the possibility of Walter being awarded both the MACE and the DOT contracts. Ex. 212 states that Mr. Schep was “unable to verify any of the type written information in that document or the source of the statements set out in the document”. The plaintiffs submit that in February 1985, the

memorandum was in the possession of the Government Defendants and the contents were known to DSS employees because Mr. Schep was asked to give his opinion. Therefore, counsel for the plaintiffs submit that the Government Defendants, pursuant to the "doctrine of documents in possession", are deemed to have knowledge of the contents of the documents.

[150] In his re-examination, R.V. Hession, the Deputy Minister of DSS in 1985, testified that in early 1985, "there was a belief [DSS], the growing degree of certainty in this period, that there was a price problem" (Transcript: p. 87; cross-examination).

[151] In a February 1985 confidential memorandum to the Minister of DSS, Deputy Minister Hession said, in part:

> The Canadian Commercial Corporation is obliged to meet its commitments to the U.S. Government for the delivery of fire trucks to the U.S. Army. If the U.S. Government considers that it has sufficient justification to terminate its contract and award a new contract to the next lowest bidder, which is a U.S. manufacturer, the Canadian Government could be liable for cancellation charges which could amount to $14 million. (Ex. 5: p. 295)

[152] An aide-mémoire from the Government Defendants records a March 15, 1985 meeting between CCC/DSS (P.R. Smith ADM/DSS, Pierre Comeau, Director General of ICP/DSS, O.I. Matthews, Acting President CCC and Walter R. McIntyre, possibly the new President of Walter, and W.C. Jones, Director of Walter). The aide-mémoire lists "several problems" that were identified:

(a) MACE was too low by a minimum of US $7,000 per unit

(b) The original cost sheets to support KS's contract price had disappeared

(c) Only one half of KS's overhead was included in KS's bid

(d) Production costs were not included in the bid

(e) Production hours seemed low

(f) Material costs could not be verified

(g) There was no staffing plan

(h) Labour hours might be a problem

(i) McNeilly had not set up production for the MACE (Ex. 5: p. 341-2)

[153] R. V. Hession, Deputy DSS, said that he had been made aware of the problems by his staff (Transcript: March 7, 2002: p. 13). P.R. Smith, ADM/DSS, admitted during cross-examination that if the Deputy knew, it came through him, the ADM.

[154] In a CCC/DSS aide-mémoire, dated March 18, 1985, it states: "McIntyre wants to renegotiate the CCC contract, it is estimated that the bid price is under by US $7,000 per unit". (Ex. 5: p. 348).

[155] In another CCC/DSS memorandum, following the March 15 meeting, it is stated by Government Defendants that to complete MACE "the costs of a new McNeilly

design are unknown but they would probably be at least $10,000 higher than the KS bid since the Seagrave bid was developed in 1984" (Ex. 5: p. 463-67).

[156] W.C. Thomas, President of BSL and its Vice-President of Finance, W.R. Schultz, testified that they were never advised of any of these machinations between CCC, DSS and the KS/Walter prior to entering the CCC/BSL subcontract on October 3, 1985 nor did they see any of the documents prior to being shown documents by the plaintiffs' counsel in preparation for this trial.

[157] W.C. Thomas testified that if had he been told these facts, "warning bells" would have rung indicating a problem. If he had been told the contract was under priced, he would have "walked away" because he had just spent three (3) years getting BSL into a profitable position. In his examination in chief, William McNeilly testified that:

(1) he was never told by the Government Defendants about any of these facts

(2) he used his costing knowledge from KS to cost material and labour for BSL's bid – he had no reason to believe that the KS bid was low.

(3) He had no knowledge that there was a problem with KS's or BSL's bid until after the loss was discovered in early 1990.

[158] The evidence indicates that William McNeilly and his wife owned shares in Amertek (formerly BSL) and lost their entire investment.

[159] A rhetorical question may be posed: "If William McNeilly knew that the KS bid was low, why would he repeat the error at BSL, where he had an investment?"

[160] On March 20, 1985, R.B. McIntyre, President of Walter, wrote to P.R. Smith, ADM/DSS, seeking an increase in the price of each vehicle by US $4,000 (Ex. 5: p. 369).

[161] Internal Government memoranda show that with a US $4,000 increase, Walter would realize a 3.8% profit per vehicle and if the increase were US $7,000 per unit, Walter, an experienced commercial truck manufacturer, would realize a 10% per vehicle profit.

[162] Again, W.C. Thomas, President of BSL, testified that he was never told by CCC/DSS that Walter sought a US $4,000 per vehicle increase. If he had been told, he testified, it would tell him that KS underbid and he would have walked away. William McNeilly testified that the Government Defendants never told him about Walter seeking an increase in the cost per vehicle.

CCC agrees to give Walter a price increase

[163] The March 22, 1985 Minutes of a CCC Board of Directors meeting show that the Board agreed to give Walter a price increase on the MACE subcontract "with potentially additional contract costs to CCC of US $4,000 per vehicle". Conditions were to be attached to ensure potential loss was kept to a minimum. The Minutes also state:

> (ESB received a "show cause" notice why the client should not terminate for default and re-award the project to the next lowest (possibly U.S.) bidder. That would expose CCC to a potential loss of $10 to $14 million) (Ex. 5: p. 479).

[164] In his March 25, 1985 letter, O.I. Matthews asked P.R. Smith, ADM/DSS to obtain a formal agreement from Walter:

> …with a provision for cost overrun to a ceiling of US$4,000/vehicle; all costs are subject to DSS 1031 audit; no cost overrun above this ceiling is to be permitted until any profit within the existing U.S. contract has been applied to the costs; no profit will be permitted on the overrun costs accepted by CCC. (Ex. 5: p. 488-9)

In his examination and cross-examination, W.C. Thomas, President of BSL, testified that this amounted to a "cost reimburseable contract" where "you might lose your profit but your costs are going to be covered". W.C. Thomas said that under such an arrangement, the worst case scenario was that you may not make a profit on the contract, but your costs are covered.

[165] During his evidence, O.I. Matthews maintained that CCC's Board of Directors had granted a US $4,000 ceiling subject to DSS 1031 audit – nothing more. Mr. Matthews admitted that his March 25, 1985 letter was not happily worded.

[166] On March 26, 1985 (Ex. 5: p. 498) and again on March 29, 1985 (Ex. 6: p. 518), A.F. Sanderson A/Group Manager Special and Standard Vehicles Group, wrote a memorandum to D.O. Roberts, Director Transportation and Energy Products Branch, complaining that he (Sanderson) had been excluded from review management meetings regarding KS/Walter and the decisions and directions arising from those meetings.

[167] In his memorandum of April 10, 1985, A. Ilchenko, Manager of Financial Costs Group/DSS, asks: “Is it too late to contemplate costs reimburseable contracts for the DOT and CCC requirements?” (Ex. 6: p. 67)

[168] Paragraph 81 of the Statement of Claim (agreed) states: “With the price increase, Walter would be entitled to receive the sum of $46,734,452 USD from CCC for the performance of the Army Program (**“Walter Army Subcontract Price”**)”. That calculates out to US $131,863.12 per vehicle.

[169] Counsel for the Plaintiffs submit that the price increase approved is further evidence that CCC/DSS knew that KS’s bid was under priced. As R.V. Hession testified, CCC would have to be satisfied that a price increase was justified before it was granted (Transcript: Re-exam: p. 88).

[170] W.C. Thomas testified that the Government Defendants never told BSL what amount CCC was prepared to pay Walter nor that CCC had been prepared to permit Walter to claim reimbursement for legitimate cost overruns. W.C. Thomas testified that such an agreement would have interested him because it would have assured BSL that it would not lose money on the contract.

<u>K. Morgenroth visits BSL at Waterloo, Ontario and the invitation for an “unsolicited proposal” on the MACE</u>

[171] On March 22, 1985, on the same day that O.I. Matthews had the CCC Board of Directors approve a US $4,000 increase per MACE vehicle for Walter, Karl

Morgenroth, at the request of O.I. Matthews, visited BSL's facility at Waterloo, Ontario. It will be recalled that Karl Morgenroth was the Director of CCC's Light Armoured Vehicle (LAV) office at General Motors, Canada, London, Ontario. The LAV was a "Major Crown Project" which means that it had a value of more than $100 M. O.I. Matthews asked K. Morgenroth to find out if BSL was interested in the MACE contract and what it would take to transfer the contract to BSL. In his evidence, K. Morgenroth was adamant that he did not perform any "assessment" of BSL's capability to perform the MACE. At O.I. Matthews' request, K. Morgenroth asked BSL to submit an "unsolicited proposal" for the MACE subcontract because O.I. Matthews said CCC could not ask for proposals while there was still a contract in place with a supplier (Walter).

[172] K. Morgenroth testified that after his visit to BSL at Waterloo, Ontario, he concluded and reported to O.I. Matthews that:

(1) BSL was technically capable of designing the US Army crash trucks, but

(2) BSL was not capable of performing the contract.

K. Morgenroth volunteered to O.I. Matthews that if BSL were chosen as a replacement subcontractor, the LAV office at London, Ontario, could assist by meeting with BSL personnel to help to educate them about inspections, DD 250's, cost and control, scheduling, work breakdown, structure analysis and in obtaining a financial person to do overhead analysis. Mr. Morgenroth testified that he made the offer because he had worked with DSS's Transportation and Energy Products Branch (TEPB) and knew that its personnel did not have experience in military contracts and did not know about

integrated logistics. He said that he knew that if TEPB handled the project it would be a problem. Indeed, P.R. Smith ADM/DSS, testified that the MACE was the first military contract handled by TEPB. D.O. Roberts recommended that the LAV group give support and assistance.

[173] At the end of his re-examination Mr. Hession said: “Yes, the Mil Spec world is a unique world”. (Transcript: p. 92)

[174] O.I. Matthews did not respond to K. Morgenroth’s offer nor to D.O. Roberts recommendation. Instead, as Acting President of CCC, he decreed that K. Morgenroth was to have nothing further to do with BSL.

[175] BSL was never told that K. Morgenroth had determined that BSL was not capable of performing the MACE.

<u>What conclusions come about from the Government Defendants’:</u>

(a) Aide-Mémoires

(b) Status Reports

(c) Procurement Options

(d) Procurement Alternatives (“redacted” and “whole”) for the MACE contract and the DOT contracts for crash trucks (Ex. 5: p. 445-472)?

[176] These documents reveal that in March and April of 1985, CCC/DSS concluded:

1. BSL did not bid on MACE and it had no details of the pricing other than what was learned from William McNeilly.

2. BSL submitted a proposal using a different chassis, the chassis cost per unit would increase by US $30,000 to US $35,000.

3. BSL did not have personnel who were experienced in building chassis.

4. The cost of a new McNeilly designed vehicle manufactured by BSL was unknown but would probably be at least US $10,000 higher than the KS bid.

5. BSL built aluminum bodies for dump trucks and garbage trucks and had never built a truck, let alone a crash truck. Although William McNeilly had experience regarding fire trucks, it was doubtful whether BSL could build the crash truck and fulfill the MACE contract.

[177] Again, W.C. Thomas said that CCC/DSS told none of this to him before he signed the back to back contract on October 3, 1985. W.C. Thomas testified that had he known that a new McNeilly design would put the cost “at least US $10,000 higher than the KS bid price”, he and BSL would have walked away from the contract.

[178] In the aforementioned pages of Exhibit 5, CCC/DSS repeatedly conclude that BSL is “not recommended” for MACE. CCC’s/DSS’s “cover story” to BSL, a potential replacement contractor, was that there was a contract in place with Walter and there was every expectation that the contract would be fulfilled. While saying that, CCC and DSS were “beating the bushes” in search of replacement suppliers.

[179] It is interesting to note that although BSL had never expressed interest in the sixty-eight (68) vehicle DOT crash truck contract, the aide-mémoire adamantly concludes that BSL was “not recommended” for the DOT contract (Ex. 5: p. 463-467).

BSL’s Pricing Proposals – Exhibit 6: page 13-63

[180] On April 3, 1985, BSL submitted to CCC a solicited “unsolicited proposal” for the MACE (362 crash trucks) requested of BSL by O.I. Matthews per Karl Morgenroth at the time of the latter’s visit to BSL’s Waterloo, Ontario premises on March 20, 1985. The bid price was US $47,794,623.00 or US $132,029.34 per vehicle. The proposal was a firm price without any clause to allow for legitimate cost overruns. The direct material and labour portion of the proposal was prepared by William McNeilly, W.R. Schultz calculated the other costs and overhead; W.C. Thomas determined the final price. W.C. Thomas and W.R. Schultz testified that they believed that the price included all costs and a profit margin of 13.5%.

[181] CCC/DSS were aware that William McNeilly participated in the preparation of BSL’s proposal and, unless alerted, would repeat the same errors made in the KS proposal, which became the price of the Prime Contract. CCC/DSS was so concerned that BSL’s design would use the KS design that CCC/DSS asked for and obtained an indemnity agreement, dated April 11, 1985, from BSL for any claim made against CCC/DSS for design infringement (Ex. 6: p. 198).

[182] At the time of BSL’s proposal of April 3, 1985, CCC/DSS had not disclosed anything of what had taken place regarding the MACE, KS and Walter to the

proposed new subcontractor, BSL. Therefore, BSL had no reason to be concerned about the amount of the KS/CCC contract or the price set out in the BSL proposal.

CCC/DSS Introduce Walter to US Army (TROSCOM)

[183] On April 11, 1985, Pierre Comeau, Director General of ICP/DSS and H.J. Cloutier of CCC together with R. McIntyre, the Pro Tempore President of Walter, travelled to St. Louis, Missouri and introduced Walter as CCC's proposed replacement subcontractor on the MACE. CCC/DSS needed the US Government's consent to change from KS to Walter. This was in response to the show cause notice from the US Government (Ex. 5: p. 315), dated March 4, 1985. CCC/DSS did not tell the US Government:

(1) that Walter had not secured financing to allow it to perform the MACE and was in poor financial condition,

(2) that DSS was still refusing to sign the contract awarding to Walter the DOT crash truck contract because of Walter's precarious financial condition,

(3) that CCC/DSS were looking for other Canadian subcontractors to perform the MACE.

[184] Counsel for the plaintiffs submit that the Government Defendants, despite General Edelmann's warning and their promise not to allow any repetition, continued to hide relevant facts in their dealings with the US Army (Ex. 5: p. 2-6: Ex. 6: p. 218-219).

CCC Awards MACE to Walter

[185] On April 16, 1985, O.I. Matthews A/President of CCC, telephoned W.C. Thomas at BSL and told him that CCC had awarded the MACE to Walter (Ex. 6: p. 220). William McNeilly testified (February 19, 2002 in the p.m.) that with this second rejection, BSL abandoned all interest in MACE and decided to develop a prototype crash truck and attempt to market it in the U.S.A.

U.S. Army's Mini-Pumper Program

[186] In April 1985, the US Army conducted a procurement for "mini-pumpers", a military fire truck smaller than the MACE truck. DSS did not consider BSL as a possible supplier and said that it could not find a suitable Canadian subcontractor. W.C. Thomas of BSL testified that, if asked, BSL would have been interested (see: April 17, 1985 memorandum of D.O. Roberts to N. Clarke: Ex. 6: p.222-3).

Walter's Financial Problems Continued

[187] Aide-mémoires from the files of CCC and DSS in April and May 1985 show that Walter had trouble finding and keeping investors. R.L. McIntyre left as did his successor. Mr. McIntyre had sought a US $4800 increase per vehicle. (Ex. 6: p. 233-5, p. 247-49 and p. 254-7). The Statement of Claim, para. 90 (admitted) states: "In May 1985, CCC and DSS learned that USG was about to issue a second Show Cause Notice [sic] to CCC for the Army Program".

CCC's Potential Reprocurement Liability

[188] The aide-mémoires and notes produced from the Government Defendants' files and listed below, show that from January 1985 forward, senior officials at CCC/DSS knew that if CCC could not perform its obligations under the MACE Prime Contract, CCC would not only be terminated for default but would also have to pay reprocurement costs estimated at a minimum of US $10M/Cdn. $14M:

(i) Ex. 5: p. 144 – January 29, 1985

(ii) Ex. 5: p. 164-168 – January 31, 1985

(iii) Ex. 5: p. 207 – February 15, 1985

(iv) Ex. 5: p. 271-273 – February 22, 1985

(v) Ex. 5: p. 302-303 – March 4, 1985

(vi) Ex. 6: p. 233-235 – April 24, 1985

(vii) Ex. 6: p. 254-257 – May 24, 1985 (approximately)

(viii) Ex. 6: p. 356-357 – June 20, 1985

(ix) Ex. 6: p. 295-296 – August 1985

(x) Ex. 5: p. 295-296 – undated

[189] The figure "US $10M/Cdn. $14M or $15M" referred to as CCC's potential reprocurement liability is based on the difference between CCC's Prime MACE contract price and the bid price of the next highest bidder, Fire Truck Inc. (FTI), whose bid was

US $10M higher. This assumes that FTI was financially and technically capable of performing the MACE contract at the date of the reprocurement and was selected by the US Army as the reprocurement contractor.

[190] Prior to trial, utilizing US Freedom of Information requests, counsel for the plaintiffs obtained documents from the US Army which show that Ms. Cecilia Dei Santi, the US Army contracting officer for the MACE, on June 5, 1985 sought the opinion of her attorney advisor, Carol Rosenbaum, as to whether the US Army had grounds to terminate the US Army/CCC MACE contract. In her memorandum of June 21, 1985, Ms. Rosenbaum wrote: “Legally, grounds to terminate for default exist. You must decide if doing so is in the Government’s best interest. If you’re decision is affirmative, you should issue the default letter quickly to avoid any contention that the schedule has been waived”. (Ex. 28: Tab D).

CCC/DSS Invite BSL to come to a meeting in Hull, PQ about the MACE

[191] The Government Defendants, by way of a telephone call on May 27, 1985, to W.C. Thomas from Pierre Comeau, invited BSL to a meeting in Hull, Québec, scheduled for 10:00 a.m., the next day, May 28, 1985, to discuss, for the first time, BSL’s proposal of April 3, 1985 (Ex. 6: p. 13-63) and BSL’s possible performance of the MACE subcontract.

[192] Those attending the May 28, 1985 meeting:

(A) From CCC/DSS

(1) Pierre Comeau, Director General, Industrial and Commercial Products (ICP) DSS

(2) H.J. Cloutier, Deputy Director General (CCC)

(3) D.O. Roberts, the outgoing Director of Transportation and Energy Products Branch (TEPB – DSS)

(4) Réne Richard, the new Director of TEPB – DSS

(5) R.W. (Buck) Miller, Manager, Special and Standard Vehicle Group of TEPB at DSS

(B) From BSL

(1) W.C. Thomas, President of BSL

(2) W.R. Schultz, Vice-President of Finance, BSL

(3) William McNeilly, Design Engineer of BSL

(4) K.G. Hooton, Sales, BSL

(5) J. Legate, a consultant retained by BSL

Allegations of False Statements by CCC/DSL to BSL and their officers and employees

[193] At the May 28, 1985 meeting, Pierre Comeau (DSS) told the four (4) BSL representatives and its consultant: “your price is too high” and “the contract is profitable”.

[194] Pierre Comeau asked BSL to lower its price.

[195] W.C. Thomas and W.R. Schultz testified that they believed P. Comeau. W.C. Thomas testified that he had no reason to doubt Mr. Comeau because Mr. Comeau represented “my Government” and he, Thomas, had no reason to believe that anyone acting for or representing CCC/DSS would act in anything but an honest and trustworthy way toward BSL. Mr. Thomas and Mr. Schultz testified that the other CCC/DSS officials remained silent when P. Comeau made those statements. Moreover, W.R. Schultz was conscious of the fact that not too long before May 28, 1985, in a telephone conversation initiated by P. Comeau, Mr. Comeau had told W.R. Schultz that if BSL had contacted Mr. Comeau, he, Comeau, “would have given BSL the straight goods”.

[196] In answer to P. Comeau’s remarks, W.C. Thomas advised, to the surprise of Mr. Schultz, that he would consider lowering the price by US $2,000 per vehicle “an amount included in the bid to cover a commission owed by KS to Mr. Dan DeCoursin, a U.S. based sales agent”. W.C. Thomas said that BSL had no legal obligation to Mr. DeCoursin, and, the $2,000 commission per vehicle could be eliminated. This would reduce BSL’s potential profit by US $724,000.00.

[197] K.G. Hooton’s notes of that day (Ex. 6: p. 258) and W.R. Schultz’s notes (Ex. 6: p. 259) show, and W.C. Thomas so testified, that at 11:00 a.m. that day, P. Comeau, H.J. Cloutier, W.C. Thomas and J. Legate left the main meeting and went to meet Deputy Minister of DSS, R.V. Hession, in the Deputy’s boardroom. Mr. Thomas testified that at this 11:00 a.m. meeting, Mr. Pierre Comeau repeated the same

statements about price and profitability and told the Deputy DSS that BSL was going to look at a price reduction.

[198] On May 31, 1985, R.W. (Buck) Miller, DSS, was at BSL's Waterloo Ontario plant to compare technical differences between the BSL proposal and KS's original bid to determine what amendments, if any, would be required to the CCC/US Army contract should BSL become the new subcontractor. While at BSL, Mr. Miller received a telephone call from headquarters asking him to obtain written confirmation of BSL's reduction in price (Ex. 6: p. 286). On the same day, May 31, 1985, W.C. Thomas wrote to Pierre Comeau confirming the reduction of US $2,000 per vehicle (Ex. 6: p. 290). As a result, BSL's bid price was reduced from US $47,794,623.00 to US $47,070,623.00, an amount more than US $0.5M less than the amount CCC/DSS were prepared to pay to Walter.

[199] The plaintiffs allege that Pierre Comeau was present and was a key player at the March 15, 1985 meeting with Walter (Ex. 5: p. 341-342). At that meeting, it was claimed that the KS price was underbid by a minimum of US $7,000 per unit and at that time other serious problems were unveiled. P. Comeau and the other CCC/DSL personnel at the May 28, 1985 meeting knew of the February 14, 1985 meeting (Thibault). None of this, including the US Army price verification, was told to BSL. The plaintiffs allege that P. Comeau made statements on May 28, 1985 to BSL about the adequacy of the BSL bid price and the profitability of the bid price that P. Comeau knew were false or which P. Comeau made recklessly, not knowing whether they were true or

false. Either way, the plaintiffs allege that Mr. Comeau's words and actions on May 28, 1985 constitute the tort of deceit.

[200] Counsel for the plaintiffs pointed out that counsel for the defendants did not call any of the personnel of CCC/DSS who were present at the initial May 28, 1985 meeting. Pierre Comeau, H.J. Cloutier and R.W. (Buck) Miller were not called. The agreed Statement of Facts of Réne Richard (Exhibit 212) does not mention the meeting. The plaintiffs' counsel submit that an adverse inference should be drawn that the evidence of Messrs. Comeau, H.J. Cloutier, Miller and R. Richard would have been consistent with the unchallenged evidence called by the plaintiffs, namely:

(1) Evidence of W.R. Schultz and his notes (Ex. 6: p. 259)

(2) Evidence of W.C. Thomas

(3) The notes of K.G. Hooton (Ex. 6: p. 258)

(4) The renewed request by R.W. (Buck) Miller for a reduction in the price and his notes (Ex. 6: p. 286)

(5) The fact that a US $200 per vehicle reduction was in fact made by W.C. Thomas (Ex. 6: p. 290)

[201] On June 4, 1985, H.J. Cloutier, Deputy Director General of CCC, wrote to TROSCOM's contracting officer, Ms. Dei Santi, and reported that CCC was considering BSL as a subcontractor for Walter Canada Inc. Mr. Cloutier states, in part: "Until a short time ago, CCC believed that Walter would be able to carry on with the contract….",

"Belgium Standard has the necessary financial and technical capability to complete the contract" (Ex. 6: p. 304-306).

[202] Counsel for the plaintiffs assert that these statements of CCC were false because Messrs. Thomas, Schultz and McNeilly each testified that CCC/DSS had not performed a pre-award survey, nor a facility evaluation, nor any form of a technical evaluation of BSL. Nor was any "should cost" evaluation done by CCC/DSS on BSL 's proposal prior to "certification" as required by the Canadian Government's procedure which stipulates that a reprocurement be treated as a negotiated sole source contract. Moreover, counsel for the plaintiffs pointed out that K. Morgenroth, who visited BSL at the bequest of O.I. Matthews (CCC), testified that his conclusion was that BSL was not capable of performing the MACE subcontract. Counsel for the plaintiffs submit that CCC/DSS not only knowingly made false statements to BSL but CCC/DSS also knowingly continued to deceive the US Army.

[203] On June 7, 1985, the US Army, TROMSCOM (Ms. Dei Santi), sent a notice to CCC that the USG was "considering terminating said contract [MACE] for default". The notice gave CCC an opportunity to respond (show cause) within ten (10) days, in writing, setting out any facts to show that CCC's failure to perform arose out of causes beyond its control. (Ex. 6: p. 318-319).

[204] On June 12, 1985, P.R. Smith, ADM/DSS, wrote to Transport Canada and stated that Walter could not perform the sixty-eight (68) DOT crash truck contract and stated:

> At this time, Pierre Thibault is the only known fire truck manufacturer in Canada which we consider capable of assembling a Crash Rescue Vehicle for your Department. (Ex. 6: p. 325-326).

[205] On June 17, 1985, H.J. Cloutier (CCC) replied by letter, (Ex. 6: p. 340-342), to TROSCOM's show cause notice of termination (June 7, 1985). In the reply, he requests consent of the USG to substitute BSL as the third subcontractor. W.R. Schultz, Vice-President of Finance, BSL, testified that BSL never received a copy of this letter. Mr. H.J. Cloutier's letter described BSL as having been in the business of manufacturing "trucks for 30 years". Counsel for the plaintiffs allege that this was false because CCC/DSS knew that BSL had only manufactured "truck bodies" and not an entire "truck". Mr. Cloutier's letter advised the USG that BSL's proposal "had been examined extensively and CCC is convinced that this company has the technical and financial resources to complete the contract". Counsel for the plaintiffs submit that CCC/DSS were knowingly making false statements to USG because they knew that BSL did not have the technical capacity to complete the MACE because it had neither the facility nor the work force with which to perform the MACE (Ex. 6: p. 340-341).

[206] On June 18, 1985, the day after he had authored his letter to USG extolling the capabilities of BSL, H.J. Cloutier (CCC) and Réne Richard, TEPB/DSS attended upon General Motors of Canada to see if GM was interested in "taking over" the KS/Walter MACE subcontract. Ex. 6: p. 345-346 records the meeting. GM agreed to advise CCC as soon as possible – there is no further evidence on this topic. This excursion by CCC/DSS to GM was never disclosed to BSL.

[207] Counsel for the plaintiffs argue that the Government Defendants' "boxed in" position is concisely stated by P.R. Smith, Deputy/DSS, in his June 18, 1985 letter to O.I. Matthews, where he concludes:

> Although there is some risk in entering into contract with BSL, there is no other alternative at this late date as further delay would undoubtedly lead to termination by the US Army. (Ex. 6: p. 343).
>
> (See also: Ex. 50C: p. 601-602 – undertaking no. 393 and 394).

[208] Again, on June 18, 1985, K. Morgenroth of CCC/LAV program, wrote to W.C. Thomas offering assistance to BSL to train a resource person in accounting matters regarding US Army contracts if BSL obtains the MACE contract (Ex. 6: p. 350-351).

[209] In a second letter from K. Morgenroth to BSL offering assistance, dated July 4, 1985, (Ex. 6: p. 363), we find the handwriting of K.G. Hooton. W.R. Schultz testified that K.G. Hooton's notes show that BSL declined K. Morgenroth's assistance as a result of K.G. Hooton's conversations with DSS and DCASMA.

[210] On June 18, 1985, Réne Richard (DSS) sent a Notice of Termination of the CCC/KS/Walter subcontract for the MACE to Walter (Ex. 6: p. 352-353).

[211] Semble, the insolvency of KS/Walter was not sufficient in the eyes of CCC/DSS to excuse KS/Walter for their failure to perform the MACE subcontract.

[212] On June 18, 1985, O.I. Matthews, A/President of CCC, placed before CCC's Board of Directors DSS's recommendation that CCC proceed with BSL as the

new subcontractor on the MACE; it was accepted by the Board of Directors (Ex. 6: p. 356-357).

[213] On August 12, 1985, TROSCOM sent a letter to CCC enclosing a consent amendment to the CCC/USG MACE contract changing subcontractors from Walter to BSL (Ex. 6: p. 393-408; Ex. 28: Tab 1).

[214] On August 27, 1985, the USG and CCC executed an amendment to the US Army Prime Contract in which the US Army consented to CCC changing its subcontractor to BSL (Statement of Claim: para. [106] – agreed).

[215] On September 6, 1985, BSL issued a press release announcing that it had purchased the KS/Walter facility in Woodstock, Ontario and from that day forward all BSL's activities would take place at that location.

[216] On October 3, 1985, after negotiations (with each side having legal counsel), CCC/BSL entered into the MACE subcontract wherein BSL agreed to complete the MACE for US $47,181,413.00 (Ex. 6: p. 476-563 and Statement of Claim: para. [107] (agreed)).

[217] The US Army/CCC MACE contract, dated August 31, 1984, is found at Ex. 4: p. 1-321. The MACE CCC/BSL subcontract of October 3, 1985 incorporated into its provisions all of the US Army/CCC Prime Contract. This included the Quality Assurance Program specified in the Prime Contract by the US Army, known as Mil – I -48208A (Ex. 1: p. 148 and Ex. 6: p. 476-563).

[218] Counsel for the plaintiffs points out that on October 3, 1985, the ninety (90) day limit set out in BSL's April 3, 1985 proposal had gone by. In August 1985, USG had not yet consented to BSL replacing Walter when CCC/DSS asked for an extension on bid price. BSL asked for an increase of US $4500 per vehicle to cover anticipated increases in costs since April 3, 1985. CCC/DSS agreed provided they received written confirmation of price increases from suppliers. However, in so consenting, CCC/DSS did not tell BSL:

(a) They had information that the Prime Contract price was underbid by a minimum of US $4,000, US $7,000 or US $10,000 per vehicle

(b) CCC had been prepared to give Walter a US $4,000 unconditional increase plus a compensation for cost overruns.

[219] When BSL submitted claims for material increases with documentation from suppliers, A.F. Sanderson of DSS erroneously/falsely told BSL that the "material price increase" clause only covered "extraordinary price increases" and that the Economic Price Adjustment (EPA) would cover the April-August 1985 ordinary material increases. BSL resubmitted its claim. Again, A.F. Sanderson insisted that aluminum was a "major component" when it was not. All this reduced the US $4500 per vehicle claim for material increase to US $420 per vehicle producing only US $158,000 and reducing the MACE subcontract to US $47,181,413.00 or US $130,335.30 per truck.

When all the “dust settled”, BSL received nothing for ordinary material price increases between April and August 1985 (Ex. 6: p. 590-622).

[220] Counsel for the plaintiffs points out that on at least two (2) occasions before October 3, 1985, W.C. Thomas (BSL) asked CCC/DSS about William McNeilly. On February 15, 1985, W.C. Ames (DSS) told W.C. Thomas that BSL could not do the contract without William McNeilly, the vehicle’s designer. In July 1985, Réne Richard told W.C. Thomas the same thing. No one from CCC/DSS told BSL before October 3, 1985 of the information in their files about the problems that existed (and were being repeated) with William McNeilly’s costing of the crash trucks.

[221] Counsel for the plaintiffs points to the chart – Ex. 94 – which demonstrates that CCC/DSS had knowledge that the KS and BSL bids were low when compared to bids made on similar vehicles by Walter and US bidders prior to the CCC/BSL subcontract.

[222] Counsel for the plaintiffs submits that the Government Defendants cannot now rely on para. [73] of the Statement of Defence by arguing that BSL represented to the US Government and to CCC that it “had all of the necessary authority, skills, personnel, resources, facilities equipment design and technical data to meet all requirements of the US Government…..”, because, on October 3, 1985, the Government Defendants knew from K. Morgenroth’s memoranda and their own files, that such was not so. Counsel for the plaintiffs submit that the evidence contradicts the Government Defendants’ pleading that “the Crown defendants made known to

BSL/Amertek all material information, facts, events and risks within their knowledge about the BSL Army Subcontract and Amertek Navy Subcontract and the Amertek Navy FMS Subcontract in order to permit BSL/Amertek to make an informed decision as to whether to undertake those contracts". (Statement of Defence: para. [141]).

[223] On October 24, 1985, P.R. Smith ADM/DSS recommended to O.I. Matthews, A/President of CCC, a performance bond in the sum of US $5M for the period ending November 30, 1987 be purchased to cover the performance by BSL of the subcontract with CCC paying the premium of Cdn. $89,250.00. The performance bond's duration and premium were negotiated by BSL (Ex. 23 and Ex. 6: p. 571-574). There is no evidence as to why it was not renewed.

[224] On November 12, 1985, BSL changed its name to Amertek Inc. (Amertek).

DOT's 68 Crash Truck Contract (Ex. 95: April 14, 1986)

[225] Because of Walter's failure to fulfill the MACE subcontract, the DOT contract had not been signed with Walter. BSL and other manufacturers bid on the procurement. In spite of the earlier negative assessments of Amertek by DSS/CCC, on March 27, 1986, Amertek was awarded one-half (1/2) of the DOT contract, namely, 34 DOT crash trucks. Thibault, the Québec based manufacturer in the DOT Procurement Plan (supra), was also awarded a contract for 34 crash trucks. Thibault was unable to fulfill its contract and Amertek was awarded a contract for the other 34 crash trucks. Thibault went out of business.

[226] On March 11, 2002, during his evidence on re-examination, William McNeilly (Amertek) testified that BSL had been given a “hard time” by DOT because the First Article was not passing the required brake test. At this time, Thibault was still in the picture. William McNeilly testified that he set up the brake stopping tests to be conducted at the London, Ontario airport. He testified that when he arrived at the airport, he found out that DOT personnel had been there for two (2) hours. When William McNeilly entered the building, he found a DOT driver under the Amertek First Article vehicle making adjustments/sabotaging the brakes on the vehicle prior to the brake test. A DSS contracting officer, John Stacey, tried to act as a screen so that William McNeilly could not see what was happening. William McNeilly reported the incident. John Stacey was never seen again. Ex. 50A: p. 412, an answer to the Government Defendants’ undertaking No. 41, states: “John Stacey worked for the federal government from approximately 1975 to 1995. Prior to leaving the federal government, he was employed by the Department of Supply and Services as a Contract Management officer in Special Vehicles as an Engineer Procurement Officer in ‘Major Crown Projects’ ”. The answer makes no mention of the brake incident nor does it make any mention of any disciplinary action by Mr. Stacey’s employer. There was no cross-examination of Mr. McNeilly on this evidence and there was no evidence in any way countering Mr. McNeilly’s evidence on this topic. I have no reason to reject Mr. McNeilly’s evidence on this topic and I find it to be both reliable and creditable. This conduct was scandalous. Its gravity is intensified because it was carried out by Government of Canada employees with the concurrence, and likely at the instigation, of other Government of Canada employees. It is fortunate that no injuries arose out of this

conduct. It is incomprehensible how John Stacey could stay on the Government of Canada payroll for some nine (9) years after that episode at the London, Ontario airport. Amertek went on to build the 68 DOT trucks before Amertek commenced production of the US Army MACE vehicles. William McNeilly testified that no one ever tried to explain to him why Amertek's vehicle was being sabotaged by DSS employees.

The Design Phase and the Production Phase of MACE

> 113. In November 1986, the Army approved the First Article, thereby completing the Design Phase of the Army Program. Amertek then began the Production Phase of the Army Program which Amertek planned to complete by early 1990. (Statement of Claim: para. [113] – admitted).

US Navy Crash Truck Contract

[227] On August 28, 1989, the US Navy, based on Amertek's bid, granted a Prime Contract to CCC for 118 crash fire rescue vehicles of a design different from the US Army MACE contract. A colour photo of the U.S. Navy CRV is found at Ex. 20. Amertek was subjected to a thorough technical and financial assessment by CCC/DSS for the U.S. Navy contract. (Ex. 7: p. 75-90).

[228] On October 4, 1989, in its "Pre-Award Survey", the Ottawa office of TROSCOM stated to its St. Louis office:

> 3. Amertek's quality assurance capability is also satisfactory. The company's quality program meets the requirements of AQAP-4 (NATO equivalent of MIL-I-45208A) and is fully adequate for this solicitation". (Ex.7: page 262).

[229] The above report was based on a September 22, 1989 Pre-Award Survey conducted by V.L. Wallace, supervisor, Quality Assurance Representative (SQAR) of Canadian Forces Technical Services Detachment, London, Ontario. It reads, in part:

> Mr. George Litysnky, the Quality Assurance Manager, and his staff have maintained a high standard of performance which has resulted in this office going to reduced G.Q.A. activity in the procedure compliance and product verification fields. (Ex. 7: p. 264).

[230] On November 15, 1989, CCC awarded the US Navy subcontract to Amertek to manufacture the 118 US Navy crash trucks at a price of US $165,700.00 per truck. (Ex. 7: p. 265-276).

Amertek's Financial Problems Come to Light

[231] On February 8, 1989, a DSS memorandum from Michel Fairfield (DSS) was sent to H.A. Coons (DSS): (Ex. 7: p. 65-66). It indicates that CCC/DSS believed that the amount of the progress claims on the Army MACE contract were exceeding production. CCC/DSS did not share their opinion/finding with Amertek. CCC/DSS insisted that Amertek track costs for the US Navy contract on a per truck basis without giving any reason for the requirement. The February 8, 1989 memorandum states:

> "….Amertek is allowed to claim as progress payment up to 90% of the agreement price, regardless of how any costs incurred against the contract have to be claimed. In that respect, Amertek meets the spirit of the contract and is in line with CCC's old method of making progress payment, as provided for in the U.S. Defence Acquisition Regulations (DAR) forming part of the contract, without having to pay attention to how costs are to be allocated". (Ex. 7: p. 65)

[232] W.R. Schultz, Vice-President, Finance, BSL/Amertek, testified in examination in chief that before the US Army MACE contract got underway, his general accountant, Chuck Downs, had consulted accounting textbooks and found that the “cost percentage of completion” method was used for long-term contracts. The matter was discussed with Ernst & Whinney, Chartered Accountants and BSL’s auditors, who said it was a “most appropriate method” for that type of contract. BSL disclosed to the Government Defendants that this was the method of accounting it used. CCC/DSS never told BSL/Amertek that the system was ill suited to the contract. Indeed, CCC’s 1994-95 Annual Report shows that CCC was using the “percentage of completion” account method with progress payment contracts. CCC’s Annual Report of 1984-85 shows the same thing. (Ex. 11: p. 470 and p. 172)

[233] In late 1989, Amertek encountered financial difficulties. In the course of manufacturing the US Army crash trucks, Amertek had to outsource a number of items which it had initially intended to manufacture “in house”. The outsourcing took place because of time constraints, inadequately skilled staff and the lack of proper equipment. Amertek did not have a computer system in place for the US Army MACE contract and was not tracking the additional costs of outsourcing but relied on the “costed engineering bill of materials” which did not reflect the outsourcing.

[234] The evidence of W.R. Schultz and William McNeilly stated that “outsourcing” did not cause BSL’s loss on the contract, it merely “masked” the underlying problem that the bid price was too low. (See: Ex. 7: p. 579). In early 1990, after partially putting into place a computer system to track the cost of each vehicle and

following a physical inventory, Amertek, a public company, disclosed that it would lose money on the US Army MACE contract. In early 1990, Amertek had completed 320 of the 362 US Army MACE crash trucks. Each one of the 320 crash trucks had been finally accepted by the Quality Assurance Representative (QAR), TROSCOM's agent and "watchdog". Therefore, with the acceptance of each of the 320 crash trucks, there had been compliance with the terms of both the CCC/BSL subcontract and the USG/CCC Prime Contract.

[235] Copies of DD 250s were signed by various QARs over the course of the contract. Each form states above the signature of the QAR: "PQA acceptance of listed items has been made by me or under my supervision and they conform to contract, except noted herein or in supporting documents". (Ex. 7: p. 58-61)

[236] On February 1, 1990, after announcing its loss, Amertek approached CCC and DSS and asked for financial assistance, namely that the material price increase of US $4500 per vehicle be put into place thereby enabling Amertek to borrow Cdn. $2M to complete the US Army MACE (Ex. 7: p. 296-298). In its reply of February 2, 1990, CCC refused to reinstate the US $4500 material price increase and announced that it was suspending progress payments to Amertek (Ex. 7: p. 299-300).

[237] On February 7, 1990, Amertek had to suspend operations and lay off personnel until financing could be found. At that time, 320 crash trucks had been completed and accepted. Forty-two (42) crash trucks remained to be manufactured to complete the MACE contract.

[238] On February 8, 1990, shortly after the loss was announced, W.C. Thomas, President of Amertek, was dismissed from that company. Litigation between Mr. Thomas and Amertek ensued; the litigation was settled with each party paying his or its own costs. Mr. Thomas was unable to find alternate employment because of the adverse publicity. Mr. Thomas also lost his personal investment in Amertek when the value of Amertek's stock dropped.

[239] When the loss was announced, CCC/DSS suspected fraud and conducted an audit with the full co-operation of Amertek. The audit found no fraud. The audit, conducted in accordance with DSS costing memorandum 1031, concluded that Amertek's cost of the US Army MACE was US $6.9M more than the subcontract (Ex. 7: p. 320). The final audit, dated June 10, 1993, was conducted by Consulting and Audit Services Canada (Ex. 9: p. 293-322). It states that, using only audited costs without any amount for profit, the cost to complete the US Army MACE contract was US $54.5M or US $150,552.48 per vehicle. If a 10% profit were added, the amount of the contract increased to US $60M, approximating the bid price of Grumman Industries, one of the original bidders.

[240] On March 5, 1990, Amertek asked CCC for a loan guarantee (Ex. 7: p. 323).

[241] On March 7, 1990, CCC refused the loan guarantee (Ex. 7: p. 326-327). On March 7, 1990, Amertek announced it was making a proposal to its creditors which

is set out in the Report of the Trustee, dated May 9, 1990 (Ex. 7: p. 570-609). CCC participated in these proceedings. The proposal was accepted by the creditors.

The Quality Assurance Evidence

[242] The US Army/CCC MACE contract and the CCC/KS subcontract stipulated that the applicable Quality Assurance Program was Mil I 45208A (Mil I). It is equivalent to the Allied Quality Assurance Program (AQAP) used by NATO.

[243] A copy of Mil I 45208A is found at Ex. 1: p. 148. Mr. G.R. Bone testified that a worldwide QA program has been adopted: ISO 9000.

[244] Prior to production at Amertek of US Army MACE crash trucks, DND, as agent for the US Army, reviewed and approved Amertek's quality assurance program and inspection system entitled "Inspection System 201" as complying. In 1987, when the production of the crash trucks commenced at Amertek, DND assigned John Scott as the QAR to inspect the trucks as they were being manufactured to ensure that the product met the CCC/US Army Prime Contract and the CCC/Amertek subcontract Mil I QA standards. John Scott, who was very knowledgeable about fire trucks, had been a Level 4 QAR at London, Ontario where GM Canada was manufacturing the LAV for the US Marine Corps. Mr. Scott testified that upon his arrival at Amertek in November 1987, he found a manual of Amertek's QA system upon which Mr. Douglas Pineau, DND, had stamped "Approved". At the GM Canada production site at London, John Scott had inspected, supervised and approved the manufacture of 900-920 LAV vehicles for the US Marine Corps in accord with the Mil I 45208A QA of the US Marine Corps/CCC and

CCC/GM contracts. “Approval” was signified by Mr. Scott signing a DD 250 for each completed/approved vehicle. At Amertek, every day, John Scott inspected each production station and performed spot audits to ensure that all crash trucks fulfilled the contract’s QA as well as satisfying Underwriters’ Laboratory Canada off site testing required by the Government of Canada for all fire trucks.

[245] John Scott testified that the high quality of the “end product” was recognized by the USG when it presented an award to Amertek in 1988 and when DCASMA stated that Amertek did not require such rigorous inspection.

[246] As seen earlier, in September 1989, Amertek’s QA Inspection Systems were evaluated during the US Army MACE contract by DND as part of “Pre-Award Survey” requested by the US Navy. Ex. 7: p. 99-101 shows that Amertek’s QA/Inspection System was determined to be in compliance with Mil I.

[247] John Scott testified that during his time at Amertek – November 1987 to June 1990 – he signed DD 250 forms for some 250 US Army MACE trucks. During his absence, V.L. Wallace, his supervisor, signed about 50 DD 250s; two (2) other QAR’s signed the remaining DD 250s for some 20 vehicles. In July 1987, Colonel Kenneth C. Mitchell was appointed the Commanding Officer of the Canadian Forces Technical Services Agency (CFSTA) Area 3 with offices at 4000 Yonge St., Willowdale, Ontario. This was the division of Cdn. DND which carried out the QA on the MACE contracts. Colonel Mitchell held this post until he retired from the military in August 1991. One Gregory Bone started with DND/QA on May 14, 1973 after graduating from Seneca

College. On January 8, 1990, Mr. Bone was appointed the Detachment Commander, District 301, CFSTA, stationed at Waterloo, Ontario. He remained in that position until 1995 when he and three others were asked to look into the restructuring of DND; he left DND in July of 1996. Upon Mr. Bone taking up his duties in April 1990 at Waterloo, Ontario, John Scott requested, and was granted, a transfer from Amertek back to the LAV project in London, Ontario. Mr. Scott, on his return to London, Ontario was promoted back to Level 4 and he stayed at London until his retirement on October 7, 1994. Mr. Scott, 72 years of age at the time of giving his evidence, testified that he had met Mr. Bone for the first time in about 1984 at a DND writing course for the military. Mr. Scott testified that in the QA office in London he had mounted a photo/poster of a DeHavilland airplane. One day, Mr. Bone saw the photo and said to Mr. Scott: “That’s a collector’s item; I am one of the ones who put DeHavilland out of business because they would not comply with the contract as I, a QAR, saw it”. Mr. Bone denied this in his examination in chief. Mr. Scott testified that when Mr. Bone first walked in the door at Amertek in June of 1990, “I saw a disaster – Bone went ballistic – Bone went by the book – no matter what, Mr. Bone always said the same thing about Amertek’s QA: everything was totally unacceptable – he made it quite clear that he was going to tear the place apart – he nit picked his way through the shop at Amertek. I asked for the transfer because there was no way that I could work with Mr. Bone – he was on a witch-hunt. Mr. Bone destroyed everything that Amertek had put together”.

[248] On June 5-6, 1990, Mr. Bone first visited Amertek’s plant at Woodstock, Ontario. On June 29, 1990, Mr. Bone wrote to Michael R. Potter, the President/CEO of

Amertek from April 3, 1990 to November 1995. In the letter (Ex. 8: p. 32-34), Mr. Bone stated that after touring Amertek, he concluded that Amertek's QA system did not meet and never had met the contract requirement (Mil I). In late summer or early fall of 1990, Amertek learned that Mr. Bone's position was that: in Mr. Bone's interpretation of Mil I 45208A, Amertek's Inspection System 201 did not comply even though the system had been approved as compliant by DND on at least two (2) occasions, and as recently as September, 1989. Indeed, Mr. Bone stated that none of the last 42 trucks would be accepted until he, Mr. Bone, was of the opinion that Amertek was in compliance with Mil I. Mr. Potter testified that Mr. Bone wanted Amertek to retroactively show compliance with Mil I on the 320 crash trucks already delivered. There is no evidence that Mr. Bone's perceived deficiencies in Amertek's QA system resulted in any performance problems of any of the 320 crash trucks that had been accepted and delivered to the US Army before Mr. Bone's arrival on the scene, save, as Colonel Mitchell said: "The usual customer complaints".

[249] In 1991, the Westpoint Fire Chief commented on his department's Amertek vehicle: "Its one of the most versatile pieces of apparatus I've seen in my 30 years of firefighting" (Ex. 71).

[250] In his cross-examination, Mr. Bone claimed that:

(1) Before his first visit to Amertek on July 5-6, 1990, he did not review/read the Amertek file at CFSTA,

(2) It was only later in 1990 that he learned that the US Army had accepted more than 300 of the 362 crash trucks before he, Mr. Bone, ever visited the Amertek site or saw the file;

(3) That it was “possible but I don’t know if I knew” that when he, Mr. Bone, wrote to Mr. Potter on June 29, 1990 (Ex. 8: p. 32), he (Bone) knew that Amertek had been forced into a big lay off of employees because of losses discovered in January 1990.

Colonel Mitchell, John Gattinger, Gregory Bone and their QA Experiment

[251] During his April 3, 2002 evidence, Michael Potter, Amertek’s former President/CEO, in describing the changed QA imposed by Mr. Bone in June 1990, complained about how Mr. Bone had “shifted the goal posts” in the middle of the game. During the evidence of Colonel Mitchell and Mr. Bone, the substance and basis of Mr. Potter’s complaint came alive.

[252] Colonel Mitchell admitted that he was not an expert on QA matters and that he learned “on the job”.

[253] In his evidence, Colonel Mitchell explained that he understood that QAR’s had three (3) tasks:

(1) Physical inspection of the item being produced. This was the primary emphasis of DND QAR’s since WWII.

(2) Ensuring that the contractor’s QA program met the contract’s requirements.

(3) Ensure the contractor was following the QA procedures.

[254] Colonel Mitchell testified that as he made the rounds of the contractors, or as he said: “his parish”, he concluded that the QAR’s were skilled regarding “inspection” but not with regard to “procedure evaluation” and “contractor compliance”.

[255] Colonel Mitchell said that in discussion with John Gattinger, his second in command, as to how to cut costs, he set out to develop a “new methodology” for QAR’s – it was an “experiment” to see whether the expensive inspection role of the QAR could be shifted to a less costly method of auditing the contractor’s procedure, that is, follow a paper trail. Colonel Mitchell acknowledged that when the “experiment” was being designed, he had no personal knowledge of Amertek’s Inspection System 201, nor that DD 250’s had been signed by four (4) different DND QAR’s accepting some 300 crash vehicles, thus signifying that those crash vehicles conformed to Mil I.

[256] Colonel Mitchell testified that he retrained Mr. Bone as to how to do a quality, in process audit under the “new methodology”. Mr. Bone quickly adapted because, he testified, that he could lose his job “for not keeping current with the prevailing interpretation of Mil I 45208A”. On January 8, 1990, Mr. Bone became Detachment Commander of 3 CFSTA and proceeded to impose the experiment on Amertek. Amertek was never told about Colonel Mitchell deciding to “move the goal posts in the middle of the game”. (Ex. 8: p. 385-387; Ex. 148: p. 7 & 9)

<u>Amertek and Its New Investors</u>

[257] After Amertek's financial crisis was discovered, it approached CCC/DSS for financial assistance and was refused. The work force was laid off. To "keep the doors open", Amertek diverted funds from its Shu-Pak division to the US Army MACE contract. The plaintiffs, medical doctors, William Forder and Victor Mele, shareholders of Amertek, retained First Investors Capital Corporation to do a due diligence examination of Amertek's business and report to them. This was done by Mr. Pierre Velle-Zarb, First Investors Vice-President.

[258] On October 16-17, 1990, a meeting was held between the Amerkon personnel on one side and CCC/DSS and Mr. Bone on the other side. With both sides consenting, Mr. Velle-Zarb was present as an observer/listener on behalf of Drs. Forder and Mele. The object of the meeting was to find out what Amertek had to do regarding QA to have the remaining 42 US Army MACE crash trucks accepted by the QARs.

[259] At the mid-October 1990 meeting, Mr. Velle-Zarb asked whether Mr. Bone would continue to insist on full compliance with his interpretation of the Mil I regarding the 42 remaining vehicles. Mr. Velle-Zarb asked this question because his proposed investment plan for the two (2) doctors, which had been disclosed to CCC/DSS/DND, depended on Amertek's immediate start-up and completion of the US Army MACE contract before Amertek started the US Navy contract.

[260] The evidence of both Mr. Potter and Mr. Velle-Zarb is that Mr. Bone assured Mr. Velle-Zarb that he (Bone) would only require Amertek to be in full compliance with Mr. Bone's interpretation of Mil I for the US Navy contract. As for the

last 42 US Army MACE trucks, Mr. Potter and Mr. Velle-Zarb testified that it was agreed that Amertek could start up production and provide the QA documentation it had in its possession and that Mr. Bone would look at it and decide if there was a sufficient "confidence level".

[261] Amertek took this to be a change in Mr. Bone's previous position. In his memorandum of the meeting, Michel Fairfield of CCC/DSS wrote that "on the turn", Mr. Velle-Zarb said that he was prepared to recommend the investment in Amertek by his clients, Drs. Forder and Mele. (Ex. 8: p. 291).

[262] Mr. Velle-Zarb recommended the investment and Drs. Forder and Mele invested Cdn. $1.8M in Amertek through their investment company, Amerkon. Amertek's work force was recalled.

[263] It was the evidence of both Mr. Potter and Mr. Velle-Zarb that shortly after the two (2) medical doctors invested their Cdn. $1.8M, Mr. Bone refused to accept more crash trucks without full compliance with Mr. Bone's interpretation of Mil I or a waiver of compliance from the USG. Mr. Velle-Zarb testified that if Mr. Bone had announced "only my way" on October 16-17, 1990, he, Mr. Velle-Zarb would not have recommended that the two (2) medical doctors invest Cdn. $1.8M.

[264] Again, Amertek had to lay off its workers while it applied for a waiver from USG. Mr. Potter testified that Amertek reasoned that it was better to "go along" with Mr. Bone because he carried the "big stick" rather than complain about him. Moreover, Mr.

Potter said that Amertek still did not realize it was the subject of a DND/Mitchell/Gattinger/Bone QA experiment.

[265] The officers and directors of Amertek decided that “waiver” was the only route because they felt it was impossible to comply retroactively with Mr. Bone’s interpretation of the QA requirements of Mil I regarding the MACE contract.

[266] The revised “request for waiver”, dated January 18, 1991, is found as Ex. 68.

[267] Colonel Mitchell initially testified that “waiver was not something our command [CFTSD] dealt with”. Later, he admitted that the waiver must be submitted to USG through DND (Ex. 6: p. 580 at p. 582).

[268] In December 1990, Mr. John Kron, a director of Amertek, wrote letters (Ex. 152) to Colonel Mitchell with “cc” to Mr. Bone and others, complaining that Amertek could not deliver the last 43 trucks because “DND has changed the rules”. On March 28, 1991, Mr. Kron wrote to CCC complaining that DND’s paper processing had cost Amertek an estimated Cdn. $1.5M (Ex. 12: p. 112; Ex. 154). The “experimental methodology” was not disclosed and no compensation was received by Amertek.

[269] TROSCOM’s Quality Assurance Superintendent, Harold Ross, attended with others from TROSCOM at Amertek’s plant in Woodstock, Ontario on December 3-7, 1990 – Amertek, CCC, DND/301 CFTSD QA’s and CCC representatives were also

present. In his Trip Report for “Review of Configuration of the Maci Fire truck,” Mr. Ross wrote on December 31, 1990:

> Conclusion: Since there is only 43 vehicles left on this contract the contractor has deemed it not feasible to implement MIL-I-46208A at this time. Indications are that the contractor is making a sincere effort to be in compliance with MIL-I-45208A at the start of the Navy contract. The contractor plans on submitting a waiver on the discrepancies that the Canadian Department of Defence finds on the present inspection system.
>
> …….
>
> c. Recommendations: TROSCOM configuration control board should expedite the review of the waiver on the discrepant parts of Amertek’s inspection system when it arrives as indications are that some of the last 43 trucks are scheduled for Desert Shield. (Ex. 67: p. 4).

[270] On January 22, 1991, H.P. Sison wrote a letter to DCAMO and signed it “Quality Manager, London for Detachment Commander [Bone]” and said: “Please find enclosed QAR comments against the subject waiver for your appropriate actions with the controlling authority”. (Ex. 70)

[271] On February 21, 1991, TROSCOM granted a waiver to the specific requirements of Mil I. In granting the waiver, the US Army representative’s said, in part:

> 2. Technical Evaluation: it is considered that full implementation of mil-i-45208 at this time in the contract would accomplish nothing for the government. also some of these units may be required to support desert storm and they are sitting on the parking lot. it is therefore recommended that the basic waiver should be approved. (Ex. 9: p. 4).

[272] The President of Amertek, Michael Potter, testified that the investment of Cdn. $1.8M by Drs. Forder and Mele had been exhausted by Amertek’s forced

shutdown between November 1990 and March 1991 while the QA/inspection wrangle was resolved. This resulted in Amertek again being in a desperate financial position. In order to try to protect their original investment, the two (2) doctors invested further amounts in Amertek by way of Amerkon.

[273] Exhibit 99, Schedule I, is the report of the auditor, KPMG, on behalf of the plaintiffs. It estimates Amerkon's loss as a result of investing in Amertek at Cdn. $2.131M. The Defendants' auditor, Arthur Anderson, did not dispute KPMG's calculations.

[274] Amertek, after obtaining further funds from the doctors by way of Amerkon, resumed production and delivered the balance (43) of the US Army MACE trucks and then manufactured the 118 crash trucks for the US Navy.

Egyptian Air Force Crash Truck Contract

[275] On June 18, 1991, Amertek submitted a bid to manufacture 10 crash rescue trucks. Although the contract would be with the US Navy and be known as the US Navy (FMS), the crash vehicles were destined for the Egyptian Air Force. (Ex. 9: p. 12).

[276] Mr. Paul E. McKenna (CCC) did the financial analysis of the bid. On December 19, 1991, in his memorandum to file (Ex. 9: p. 128), Mr. McKenna recorded his initial conclusion that CCC should "flatly refuse" to certify Amertek's bid. However,

CCC endorsed the bid for the sole reason that endorsement reduced CCC's risk on the US Navy contract and it gave an incentive to any potential reprocurement contractor.

[277] On March 17, 1992, CCC endorsed Amertek's bid for the US Navy (FMS) contract.

[278] April 24, 1992 is the date of the US Navy (FMS)/CCC Prime Contract. The back to back CCC/Amertek contract for those CRVs, similar to the US Navy's CRVs, priced each vehicle at US $184,000.00; this quote was based on the actual cost to Amertek to manufacture the US Navy CRVs plus a profit of 25%.

Amertek's Request for Equitable Adjustment (REA)

[279] On September 1, 1992, CCC (R.C. Hollingsworth) sent a letter to the US Army confirming the amount of Amertek's REA on US Army MACE in the amount of US $17,992,576.71. (Ex. 205).

[280] On August 6, 1993, the US Army, in a letter to CCC (Fairfield), allowed Amertek's REA for the total amount of $35,266.76 (Ex. 9: p. 323-329).

[281] On January 21, 1994, CCC (Patriquin) sent a letter to the US Navy (Moss) certifying Amertek's REA claim for the US Navy Program. (Ex. 206)

CCC/Amertek Supplemental Agreement (Ex. 9: p. 225)

[282] On December 22, 1992, CCC/Amertek entered into a Supplemental Agreement because Amertek needed funds to complete the US Navy and the US Navy

(FMS) contracts. By the terms of the Supplemental Agreement, CCC was to pay directly to Amertek's subcontractors for the parts used by Amertek to build the remaining vehicles. On his cross-examination, Michel Fairfield (CCC/DSS) agreed: (1) that if CCC had not assisted Amertek, CCC would not have been able to perform its Prime Contracts with the US Navy and the US Navy (FMS) and (2) that it was in CCC's best interests to see the contracts performed. (Ex. 9: p. 255-261).

[283] Under the terms of the Supplemental Agreement, Amertek was obliged to fund REAs. It did so by way of loans from Chrislou Investment Ltd. (Chrislou), a corporation owned equally by the plaintiff, Dr. Victor Mele and his wife, Diane. The witnesses Michael Potter, W.R. Schultz and Dr. V. Mele testified that Amertek was obliged to repay the full amount of the money loaned by Chrislou to Amertek and repayment was not contingent upon what funds, if any, were received on the REAs. Dr. Mele testified that if it had been contingent, he would not have signed the November 27, 1992 loan agreement (Ex. 9: p. 211-219 and p. 123-125).

[284] CCC retained a US law firm, Akin Gump to look after Amertek's REAs. CCC's costs were charged to the December 22, 1992 Supplemental Agreement (Ex. 9: p. 225).

[285] Appeals were launched by the US law firm to the US Armed Services Board of Contract Appeals (ASBCA). Later, CCC (Patriquin), without the knowledge or approval of Amertek, settled the US Army REAs for US $375,000 and kept that amount as payment on account of money owed by Amertek to CCC. As for Amertek's REAs

against the US Navy, CCC abandoned the claim notwithstanding that the lawyers hired by CCC had offered a settlement to the US Navy of US $481,000 (Ex. 209).

US Navy/CCC Retrofit Agreement

[286] By the April 15, 1993 agreement between the US Navy and CCC (Ex. 72), CCC agreed to pay for components, parts and materials and to reimburse the US Navy for actual costs incurred in the Retrofit of US Navy's CRVs up to an amount of US $356,000. Michael Potter, President of Amertek, testified that the US Navy made unjustified complaints and CCC failed to consult Amertek before entering into the agreement with the US Navy. Amertek was not a party to the agreement, but CCC attempted to charge back the costs of the Retrofit Agreement to Amertek under the December 22, 1992 Supplemental Agreement. Mr. Potter testified that Amertek protested by his letter to CCC (Patriquin) to which there was no reply. (Ex. 73)

Amertek Ceases to do Business

[287] In July 1993, Amertek, according to the evidence of its Vice-President, Finance, W.R. Schultz, had completed the 362 CRVs for the US Army, the 118 CRVs for the US Navy and the 10 CRVs destined for the Egyptian Air Force. Although all the subcontracts had been completed, Amertek was in financial tatters. Amertek sold the Woodstock, Ontario property and closed shop. Amertek, as of the trial, still operated Shu-Pak Equipment Inc. on a scaled down level at a different location. The Shu-Pak Division never recovered the funds diverted from it to cover Amertek's US Army MACE expenses when Amertek's loss was discovered in early 1990.

New Personnel at CCC and DSS

[288] In January 1993, Ranald A. Quail, who worked for the Federal Government from the time of obtaining his Bachelor of Science in Civil Engineering in 1962, became the Deputy Minister of Public Works. In June 1993, as the result of amalgamation and reorganization, Mr. Quail became the Deputy Minister of PWGSC. In 1993, he became President and Chairman of the Board of CCC. He held those offices until April 2001 when he left to join a Task Force regarding the “Modernization of Personnel Matters and Human Resources”.

[289] In early August 1993, Douglas Patriquin, who holds a Ph.D. in Economics from the London School of Economics, was appointed Executive Vice-President and COO of CCC. In 1999, by Order-in-Council, Mr. Patriquin was appointed Chairman, President and Chief Executive Officer of CCC. He held those positions as of June 2002.

[290] Prior to 1993, D. Patriquin had nothing to do with Amertek. Upon his appointment in that year, Mr. Patriquin took a personal interest in Amertek.

[291] In his examination in chief, Mr. Quail said that his philosophy was: CCC was a commercial corporation as per the statute; I was President and Chairman of the Board; I left it to the COO, Douglas Patriquin, to run CCC on a daily basis; I reported to the sole shareholder, the Government of Canada; I was the Deputy Minister PWGSC, so I also reported to the Minister. Mr. Patriquin acknowledged during his examination in chief that CCC drafted letters to be signed by the Minister regarding CCC. Before any

letter was submitted to the Minister, it was reviewed for accuracy by D. Patriquin and then by R. Quail.

Amertek's Request to Minister of DSS for an Independent Review of CCC's Conduct regarding the US Army MACE Contract

[292] Dennis Joseph Mills, M.P. (Lib.), is the member of Parliament for the riding of Toronto Danforth. Mr. Mills was first elected in 1988 as a member of the Opposition and has been re-elected at three (3) subsequent general elections as a member of the Government. From 1980-1984, Mr. Mills was one (1) of a staff of nine (9) in the office of Prime Minister Trudeau. In 1984, Mr. Mills became a Senior Vice-President at Magna International where he remained until his 1988 election. In 1990, Mr. Mills met and became a friend of Dr. William Forder, Chief of Urology at Toronto East General Hospital. Mr. Mills also met Dr. Victor Mele, who had a medical practice on Danforth Avenue in Mr. Mills' riding. Doctors Forder and Mele were friends.

[293] Mr. Mills testified that in 1992, Drs. Forder and Mele told him about what happened to their investment, showed him brochures of the CRVs, told him that one or more CRVs had ended up at the White House, one or more at Camp David and forty-five (45) were flown to Kuwait to help extinguish the oil field fires during the Desert Storm campaign.

[294] Mr. Mills testified that while a member of the opposition, he approached the Honourable Douglas Lewis (P.C.), the political minister for Toronto, about Amertek's plight. He also spoke to the Honourable Paul Dick (P.C.), Minister of DSS, who

promised that he would “look into it”. Mr. Mills convened a meeting in his Ottawa west block office of CCC personnel and senior personnel from Amertek. Mr. Mills, in evidence, expressed the view that, from the government employees, he was getting the “MAD” treatment – “maximum administration delay” – “everyone was ragging the puck”.

[295] On September 19, 1993, Mr. Potter (Amertek), wrote to the Honourable Paul Dick and explained the history of the MACE contract, the cost overruns and that Amertek sought an ex gratia payment (Ex. 9: p. 344-351).

[296] After the election, Mr. Mills’ Liberal party formed the Government and he approached the new Minister of DSS, the Honourable David Dingwall, whom he had known since 1980, and explained Amertek’s situation. Mr. Mills testified that the Honourable D. Dingwall assured him that an analysis would be done. Mr. Mills’ December 13, 1993 letter to Minister Dingwall is found at Ex. 9: p. 375-9.

[297] On January 28, 1994, CCC (D. Patriquin) sent a letter to Deloitte & Touche Inc. (D & T), (P.A. Stehelin) enclosing terms of reference of the Amertek review and asked D & T to submit a review plan and a costing proposal. (Ex. 9: p. 411-413).

[298] February 15, 1994 is the date of the first draft of D & T’s Retainer Agreement (Ex. 9: p. 449-457) sent to CCC/Patriquin from D & T (Peter Strum).

[299] February 24, 1994 is the date of the Retainer Agreement for the Amertek Review signed by D & T and sent to CCC/Patriquin (Ex. 9: p. 469-473) – see also Ex. 9: p. 486-490. This document is marked “Final”.

[300] D & T sent a letter, dated March 11, 1994 to Amertek advising that CCC had appointed D & T to do the review (Ex. 13: p. 423-24).

[301] On March 11, 1994, Michael Potter, President of Amertek, sent a fax to Dr. W. Forder and John Kron, Chairman of the Board of Directors of Amertek. The fax stated, in part:

> I've received the attached from Deloitte Touche. The statement that they have been appointed by CCC is not as we had understood for an impartial audit.
>
> I've since spoken to Peter Strum, who tells me that their client is CCC – Doug Patriquin – reporting into the Deputy Minister – Ran Quail. Strum tells me "that's the way the system works in Ottawa". (Ex.13: p. 422).

[302] At one point, Amertek threatened to withdraw from the review that D & T was undertaking for the Minister of DSS because Amertek did not feel it was an independent review. In D & T's letter of March 30, 1994 to Amertek, Peter G. Strum, a partner at D & T, and a witness at this trial, wrote:

> Finally, we noted your concern that this study provide an independent review. Deloitte & Touche is Canada's oldest chartered accounting and management consulting firm whose reputation rests on its work and the integrity of its Partners. We are often called upon to conduct reviews, audits and inquiries of and by government at all levels for senior officials and Ministers. Our integrity and objectivity is valuable to us and we will protect our position vigorously. (Ex. 74: p. 2).

[303] Mr. Mills testified that he was convinced that the review would be "independent", "fully comprehensive" and "objective" and persuaded Amertek and its officers that they should co-operate with D & T.

[304] In his April 19, 1994 letter to Mr. Michael Potter (Amertek), the Honourable D.C. Dingwall said, in part:

> I understand that a number of issues related to these contracts have been of considerable concern to Amertek and its investors over the last several months.
>
> When these issues first emerged as concerns, my predecessor felt that it would be beneficial to carry out a review of the administration of the contracts by the Canadian Commercial Corporation. After I assumed this portfolio, and at the urging of Amertek and its representatives, I requested that such a review be undertaken. In my letter of March 8th to Dr. William Forder, one of your principal investors, I advised that the review had begun. It is being conducted by the consulting firm of Deloitte & Touche, whose final report will be made in confidence to me.
>
> I regret to learn, from your letter of March 25th, that Amertek decided not to continue to cooperate with the review, unless a second consulting firm was appointed. As I have every confidence that Deloitte & Touche will produce a balanced and objective review, I can see no benefit in appointing a second firm. (Ex. 9: page 521).

[305] In his June 2, 1994 letter to Mr. Potter, the Honourable D.C. Dingwall said, in part:

> As you are aware, the review is being conducted for me and the results will be given to me in confidence, as the Minister responsible for the Canadian Commercial Corporation. I am confident that Deloitte & Touche's approach will produce a fully comprehensive and objective report". (Ex. 9: p. 537).

[306] During his cross-examination, Mr. Quail agreed that no department of Government would want an "independent review" of its conduct.

[307] Dennis J. Mills, M.P., testified that D. Patriquin (CCC) came to his office in Ottawa with a copy of the D & T report, dated July 4, 1994 (Ex. 10: p. 2). Mr. Mills testified that Mr. Patriquin told him that CCC had supported Amertek and everything CCC had done was done in Amertek's best interests. Mr. Mills testified that he was almost in shock and told D. Patriquin "something here does not add up".

[308] Mr. Mills testified that he never accepted the D & T report because government and CCC are not in the business of giving out contracts that put people out of business (see also: Transcript of R.V. Hession: reply: p. 76: line 24-27).

[309] Notwithstanding all the assurances that there would be an "objective", "independent" and "fully comprehensive" review, the evidence discloses:

(1) D & T had been CCC's internal auditors and had done various work for CCC before doing this review. About 90% of the work of D & T's Ottawa office is for the Government of Canada. Between the date of this contract and 2001, D & T received 109 contracts from PWGSC, one department of the Federal government.

(2) Without the knowledge or involvement of Amertek, Douglas Patriquin, later promoted to be CCC's President: (a) with D & T, co-authored the terms of reference of the Amertek/CCC review and selected the phrase "commercially reasonable" as the standard of review; (b) instructed CCC/DSS and D & T that the review was not to be a "witch hunt", (c) that the review was to be "carefully structured and managed" and (d) submitted to him, D. Patriquin, and then to Ranald Quail, the then President of CCC, before the results were made available to the Minister (Ex. 9: p. 373-4);

(3) D. Patriquin insisted that Amertek not be given a copy of D & T's final report because Amertek was threatening to sue CCC;

(4) D. Patriquin limited the review of documents and persons to be interviewed;

(5) D. Patriquin indicated that the "main goals" of the review were:

(i) Provide our Minister confidence in what we do so that it can be used as a key to our future

(ii) Provide an "opportunity for us to learn any lessons", and

(iii) "Close off the Amertek issue" (Ex. 9: p. 503-5; March 14, 1994).

(6) D. Patriquin edited the final version of the D & T report before it was released.

[310] The plaintiffs submit that far from being an "independent", "objective" and "fully comprehensive" review, the D & T review was a farce, a "white wash", a side show. Counsel for the Plaintiffs submits that the D & T Report (Ex. 10: p. 2) was a production where Mr. Patriquin, with the knowledge and connivance of Mr. Quail, not only directed the show but also wrote the script. The Plaintiffs submit that it was all done for the purpose of circumventing a valid review, to do an end run on the Honourable D.C. Dingwall and to curry favour for CCC, its employees and for its future plans. I agree with those submissions of counsel for the Plaintiffs.

[311] The Plaintiffs argue that D & T was so eager to please its Minister that it fell into the error of stating in the report that CCC/DSS did perform a “pre-award survey of BSL”. On his examination for discovery on behalf of the Government Defendants, M. Fairfield said that they were “unable to determine” what D & T was talking about in that area. At trial, the evidence was that the Government Defendants had not performed a “pre-award survey” on BSL or KS or Walter. (Ex. 50C: p. 155; undertaking 628).

[312] The Plaintiffs also point out that D & T had a “fixed fee contract of $24,000” to perform the Amertek review. However, after D & T’s work was completed, it submitted a $74,000 account (Ex. 200) to CCC. Mr. Patriquin approved the payment of that account. It was more than 300% above the amount of the fixed contract (Ex. 9: p. 469-473).

John Collins and his Rebuttal of D & T Report and John Collins’ Access to Information Act (ATI) applications

[313] In September 1993, John Collins, a member of the Bar of Ontario since 1977, a member of the Bar of California since 1985 and qualified as a solicitor in England and Wales since 1990, was called by the late Dr. Forder about the “disaster” arising from the US Army MACE contract. Upon being retained as counsel by Amertek/Dr. Forder (and Mr. Collins is still part of the team of Plaintiffs’ counsel), Mr. Collins interviewed Dr. Forder in late September or early October 1993, interviewed those still left at Amertek and visited the Woodstock plant. Mr. Collins did this in an attempt to get the history of the MACE contract. In his examination-in-chief, Mr. Collins

testified that for him the big question was: “how could Amertek have gotten into this US Army MACE contract when it had no US Army contract experience?” And “How could it have passed the DSS “certification” test and the CCC “endorsement” test?”

[314] On June 23-24, 1994, Mr. Collins had two (2) telephone conversations with Peter Strum of D & T: the first was brief and the second lasted for 1.5 hours. Mr. Collins expressed the view that, in general, Mr. Strum did not appear knowledgeable about public contracts and, in particular, Mr. Strum did not appear knowledgeable about defence contracts. Mr. Collins shared with Mr. Strum the basic question: “How was Amertek ever allowed to get involved in the MACE contract – how did it get “certified” and “endorsed”?”

[315] After D & T released its “Final Briefing Document”, dated July 4, 1994, (Ex. 10: p. 1-62), Mr. Collins prepared a rebuttal (Ex. 10: p. 72-130) on behalf of Amertek.

[316] On February 24, 1995, Mr. Collins, with Mr. Potter (Amertek), met with Messrs. Patriquin, Hollingsworth and J.P. Cloutier (CCC) with the object of showing CCC the obvious errors in D & T’s report and where CCC went wrong.

[317] Mr. Collins testified that Mr. Patriquin became very angry, stood up and slammed his fist and said: “If there is one more word about a claim by Amertek against CCC/DSS, the meeting is over…. D & T had done a fair and detailed report and that’s it”. Neither CCC nor DSS admitted to errors by way of commission or omission. CCC/DSS refused Mr. Collins’ request when he asked to view the “pre-bid files”.

[318] Having run into a “brick wall”, commencing in 1995, Mr. Collins proceeded under the Access to Information Act (ATI), after obtaining the written consents of Amertek (Potter) and Walter Canada 1982 Inc. (Georges Laporte). Mr. Collins made numerous ATI requests of CCC, PWGSC and the Treasury Board of Canada. The travails, requests and several successful appeals to the Access to Information Commissioner by Mr. Collins regarding his ATI requests, are compiled in Ex. 104. Ending in July 1996, in a piece meal way, 4085 pages were released to him, many pages seriously redacted (censored) obscuring information pertinent to possible causes of action by the Plaintiffs against the Government Defendants. Mr. Collins then put the ATI pages in sequence. He then drafted the “Notice of Action”, dated October 31, 1996. The Statement of Claim is dated April 24, 1997.

[319] In his testimony, Mr. Collins observed that even after the Rules of Practice regarding production were operative in this lawsuit, the Government Defendants have not produced the unredacted copy of the redacted version released under the ATI Act (for example: Ex. 6: p. 308-313).

[320] The Plaintiffs take the position that it was only after receiving production of documents under the Rules of Practice that the Plaintiffs became aware of:

(1) the serious flaws in KS’s low bid price

(2) the negative assessments of BSL/Amertek and Mr. McNeilly by DSS/CCC

(3) the price increases offered to Walter Canada Inc.

Amertek's Second Proposal to Creditors

[321] In the autumn of 1996, all Amertek contracts had been completed, Amertek was not operating and had no money to pay the amount owing to CCC under the Supplementary Agreement of December 22, 1992 (Ex. 9: p. 255-261). Amertek had $5.1M in liabilities and no assets (Ex. 91B: p. 45).

[322] During the last days of November 1996, Amerkon's debt was assigned to David Tanner. At trial, Mr. Tanner described himself as "President of Amertek Inc. – Amerkon controls Amertek".

[323] On December 2, 1996, Amertek filed its second proposal to creditors (Ex. 10: p. 273).

[324] The background and chronology of the second proposal are set out in Ex. 93, para. [3] to [30] of the reasons of Killeen J. given in a subsequent motion referred to infra and reported [1998] 4 C.B.R. (4th) 23. It would serve no useful purpose to repeat those facts in these reasons.

[325] What is not mentioned in Ex. 93 is:

(1) After receipt of a copy of the proposal on December 6, 1996, on December 9, 1996, Paul E. McKenna, a senior official at CCC, sent an e-mail to Douglas Patriquin, then CCC's COO, J.P. Cloutier, CCC's in-house counsel and to others. At that point, Mr. McKenna thought that to carry a proposal the "yes"

vote had to be at least 75% of the dollar value of debt representing at least 50% of the creditors. The December 9, 1996 e-mail said, in part:

> Voting against the proposal as it stands, will see Amertek Inc. being deemed to have made an assignment in Bankruptcy retroactive to the date of the proposal, 2 December 1996. Amertek would be legally dead.
>
> As I see it here, this is our chance to sink the suckers in the bankruptcy. They are out on the plank, lets keep them walking. (Ex. 10: p. 312).

(2) On December 10, 1996, Mr. McKenna sent another e-mail to the same recipients. It reads, in part:

> Strategy update. With the new BIA the %-age of $s required to carry a proposal is reduced from 75% to 66 2/3% by more than 50% of the voting creditors. They also let me know that the general intention of Amerkon is to have the Amerkon Secured debt valued at a really low market value (say $1) and the remaining amount would then fall into the voting pool of unsecured debt ($3,105,314). Effectively they would then control about an estimated 60.8% of the $s in the voting pool. CCC's share would be reduced from 65% to 25.5% by this action. The remaining share would then be 13.7%. A quick scan of the more significant names and $s in Exhibit 4 reflect the following:
>
> DeCoursin - $32,500.00, Mele - $25,206.00, Forder - $25,749.00, Gardner Roberts - $67,827.00, Kron - $28,631.00, Potter $30,530.00, Velle-Zarb - $14,790.00, United Supply - $32,614.00, Worker's Comp - $195,032.00 for a total of $452,879.00 (8.9%)
>
> As long as they control 300K (5.9%) of the remaining voters they will probably succeed in their proposal.
>
> I am working on the figures for the proof of claim. We should meet today to discuss further. (Ex. 10: p. 313).

(3) The Statement of Claim contains the following paragraphs which are admitted by the Defendants in their Statement of Defence:

> 155. Prior to a meeting of Amertek's creditors, McKenna indicated to Amertek that CCC would vote against Amertek's Second Proposal unless Amertek and Amerkon executed a full release in favour of CCC and the CDNG with respect to their claims against CCC and the CDNG. Amertek and Amerkon refused to provide such release to CCC.
>
> 156. On December 13, 1996, a sufficient number of Amertek's creditors voted in favour of Amertek's Second Proposal. CCC was the only creditor which voted against Amertek's Second Proposal.

[326] The proposed mutual releases together with a covering fax from J.P. Cloutier, dated December 13, 1996, are found at Ex. 10: p. 315-319.

[327] On December 28, 1996, at London, Ontario, Killeen J. approved Amertek's December 2, 1996 proposal. No one from CCC appeared to oppose the application for approval. CCC did not appeal the order. Amertek discharged its obligations under the proposal. CCC received a cheque in the sum of $31,298.21 and cashed it.

Attempt by CCC to set aside the December 2, 1996 proposal and the December 28, 1996 order of Killeen J.

[328] In March 1998, fifteen (15) months after the meeting of creditors and the December 28, 1996 order of Killeen J., on the instructions of D. Patriquin, then CCC's COO, CCC brought a motion to set aside the Amertek proposal and the order approving it. Before me, Mr. Patriquin claimed that the purpose of the March 1998 motion was to

validate CCC's counterclaim. However, the Government Defendants' Motion Record (Ex. 91A) does not claim such relief. The motion was heard by Killeen J. on April 28, 1998. CCC alleged that the Chrislou claim was not valid and alleged fraud on the part of Amertek without presenting any evidence of fraud.

[329] On May 14, 1998, Killeen J. dismissed CCC's motion for the reasons set out in [1998] 4 C.B.R. (4th) 23 (Ex. 93). On June 7, 1998, Killeen J. awarded costs against CCC on a solicitor/client scale and said, in part: "The application strikes me as an after the fact and totally unwise attempt to set aside an order without material which had a semblance of justification for the relief sought".

VI. ISSUES

A. Doctrine of Documents in Possession

[330] The parties agree that documents which are or have been in the possession of a party, are generally admissible against that party to show knowledge of the contents of the document and a connection or a complicity in the transactions to which they relate. (Sopinka, Lederman and Bryant: The Law of Evidence in Canada (Toronto: Butterworths 1999) at page 1028, para. 18.55; Phipson on Evidence (London: Sweet and Maxwell 2000) at page 743.

[331] Counsel for the Government Defendants submitted that the doctrine should not apply in this case because there was no evidence that the disputed aide-mémoires were ever sent or received and that Messrs. Fairfield and Sanderson both

testified that such documents were “works in progress”. Moreover, there was no evidence whether or not the version produced was the “final version” and, thus, there is no way of knowing whether the document was in fact relied on by the Government Defendants.

[332] Counsel for the Plaintiffs submit the documents found on corporate premises are admissible against a corporation if knowledge of their existence can be attributable to a responsible officer, director or employee acting in a course of his/her duty. Knowledge of the existence of the documents need not be shown by direct evidence, but can be inferred. (Sopinka, op. cit.: para. 18.62; J. Douglas Ewart: Documentary Evidence in Canada (Toronto: Carswell, 1984) at page 235.

[333] Counsel for the Plaintiffs further submits that once relevance is shown, the document is admitted; the question of weight is, thereafter, a question for the trier of fact. (Ewart: op. cit.: page 233).

Conclusions

[334] The documents produced by the Government Defendants were in their possession. Whether dated, signed or stamped, the documents had to be prepared by someone in CCC/DSS/DND. The documents were in one or several different files. Various individuals of the Government Defendants, alone or with others, prepared or viewed or read and then acted on the documents. The evidence is that the aide-mémoires were intended for the Ministers, the Deputy Ministers and the Assistant Deputy Ministers of the Government Defendants and, even if proved to be in draft, the

contents were discussed with one or more of those officials. To me, the position of the Government Defendants is untenable; employees of the Government Defendants created the documents and had knowledge of their contents. R.V. Hession, a former Deputy DSS, testified that the contents of an aide-mémoire, whether signed or sent, would have been discussed with the intended recipient. Michel Fairfield, CCC/DSS, a witness called by the Government Defendants, testified that from the time he came on the scene in 1987 and onward, aide-mémoires were not signed but sent (with a covering memorandum) up the chain of command for each person to review the contents along the way. A.F. (Sandy) Sanderson testified that, at DSS, the practice was to reuse parts of aide-mémoires for a later aide-mémoire. He testified that what was repeated in a later document came from an earlier final aide-mémoire, not from an earlier draft, and that the information was checked for accuracy prior to reuse. O.I. Matthews, formerly A/President of CCC, testified that aide-mémoires would be reviewed by a number of people before finalization. Mr. Matthews also said that important documents would be filed and available to persons involved in the procurement. Counsel for the Plaintiffs asks rhetorically: “If the documents that have been produced are mere “drafts”, where are the final versions and why were they not produced?”

[335] In my opinion, because the Government Defendants chose to use undated, unsigned documents and have not produced the final version and then refused to acknowledge even the “draft” as “their document”, it becomes necessary for the Plaintiffs to rely on the doctrine of documents in possession.

[336] The Plaintiffs also allege that in many instances it was apparent that documents of the Government Defendants, material and relevant to the issues before this court: (1) have not been produced; (2) have been removed from files by someone in Government without authorization; (3) have been redacted; (4) have been recreated in a sanitized form; (5) have been lost; (6) have been destroyed; and (7) have been suppressed.

[337] In support of their allegations, counsel for the Plaintiffs point to:

(1) The evidence of A.F. Sanderson, DSS, who testified that memoranda relating to the alleged financial assessment of KS went missing from the file in the autumn of 1984, and that he asked W.C. Ames to look for the missing documents. W.C. Ames, on the other hand, denies that he was ever so asked. A.F. Sanderson has no explanation as to why he did not ask for a replacement copy of the allegedly missing financial assessment. In any event, there is no documentary evidence that the alleged financial assessment of KS was ever performed.

(2) A.F. Sanderson also testified that he instructed W.C. Ames, from that day forward, to number the pages of all documents in a file. Nevertheless, other documents created after that date were not produced to the Plaintiffs in this case.

(3) A.F. Sanderson testified that, commencing in the winter of 1985, a parallel set of meetings was held between senior members of CCC/DSS and KS/Walter from

which he, A.F. Sanderson, was excluded. The Government Defendants did not produce any notes or memoranda regarding those meetings.

(4) W.C. Ames testified that he completed a “facility evaluation” of KS prior to the KS subcontract award and placed a copy of the evaluation in the vendor file in Central Records and a copy on the contract file. W.C. Ames testified that the facility evaluation was still in DSS files in the autumn of 1985 when he left DSS to go to work at CCC.

[338] The Government Defendants did not produce to the Plaintiffs a pre-award financial survey of KS and there is no reference to such an assessment in any other document. William McNeilly is not aware of such an assessment.

[339] Dennis J. Mills, M.P., testified that when he sought access to the Government Defendants documents, including P.E. McKenna’s “suckers” e-mail, he was advised by personnel at the Department of Justice that express ministerial consent was required. Dennis J. Mills, M.P. testified that his requests of ministers were to no avail. Mr. Mills testified that the Minister contacted CCC after his request was made and before the Minister refused. P.E. McKenna testified that he created the sanitized version of the “suckers e-mail” (Ex. 14: p. 314) before he created the “original” (Ex. 10: p. 312). Mr. McKenna also claimed to have created the sanitized “bells ringing memo”, found at Ex. 8: p. 271, before the “original”, which is found at Ex. 8: p. 268. Because it runs counter to logic, I cannot accept Mr. McKenna’s evidence that the inflammatory language version, in each case, came second.

[340] Delving further into the area of documents, counsel for the Plaintiffs points out that several redacted documents were produced during and at the end of the Access to Information process. However, there were instances where the original of the redacted document was not produced by the Government Defendants under the Rules of Civil Procedure. Mr. McKenna's cross-examination reveals that J.P. Cloutier, CCC's in-house counsel, was involved in the ATI process. The Government Defendants did not call J.P. Cloutier as a witness, nor was any explanation provided for his absence.

[341] In written and oral argument, counsel for the Government Defendants stressed that the Government Defendants have produced thousands of documents in this litigation. Moreover, counsel for the Government Defendants submitted that at the time of trial, eighteen (18) years had gone by since the awarding of the MACE contract and it was surprising that more documents had not gone missing. Moreover, counsel for the Government Defendants submitted that the Plaintiffs are not without fault because they took 70 cubic yards of Amertek's documents to the Woodstock, Ontario landfill dump site when Amertek closed its doors. Counsel for the Plaintiffs points out that the evidence of W.R. Schultz, former Vice-President of Finance for Amertek, was that the destroyed records were production and accounting records and had no relevance to the records leading up to the October 3, 1985 BSL/CCC subcontract and the issues before the Court.

[342] At page 55-66 of the transcript of his March 7, 2002 evidence, R.V. Hession, a former Deputy Minister of DSS, testified that, although he was not aware as to what happened to DSS/Amertek files, he would be surprised:

(a) if DSS had difficulty locating 12 year old files, and

(b) if DSS “supplier files” had been destroyed because they would be required for sole source procurements, which form 50% of all Government of Canada procurements.

[343] In summary, the Government Defendants’ practices regarding documents in their possession, their handling, non-retention and possible destruction of other documents makes it necessary, and I so allow, for the Plaintiffs to rely on the documents in possession doctrine.

B. Adverse Inferences for Failure of Government Defendants to Call Material Witnesses and Produce Relevant Documents

[344] In *Kaytor v. Lions Driving Range* (1962), 40 W.W.R. 173, 176 (B.C.S.C.), Aikins J. said:

> It is, I think, well established that where a party fails to call a witness, and it is apparent from the evidence in the case that the witness would have been able to give evidence on a material issue, then the court may draw such inferences as the particular circumstances as the case warrant against the party failing to call the witness. This would apply, of course, only where the failure to call the witness is not satisfactorily explained.

[345] In *Vieczorek v. Piersma* (1987), 16 C.P.C. (2d) 62, 67 (Ont. C.A.), Cory J.A. said:

> It is perfectly appropriate for a jury to infer although they are not obliged to do so, that the failure to call material evidence which was

> particularly and uniquely available to the Vieczoreks was an indication that such evidence would not have been favourable to them.

[346] In my view, there were witnesses, with material evidence, who were not called by the Government Defendants:

> Pierre Comeau, Director General, International and Commercial Products (ICP) of DSS. Mr. Comeau told W.R. Schultz during a telephone conversation on March 12, 1985 (Ex. 5: p. 332-334C), that if BSL had contacted him (Comeau), he would have given BSL "the straight goods" about the MACE contract. Mr. Comeau orchestrated and presided at the May 28, 1985 Hull, P.Q. meeting with BSL personnel. Pierre Comeau (DSS), H.J. Cloutier (CCC), Réne Richard (DSS), D. Roberts (DSS) and R.W. (Buck) Miller (DSS) all attended the May 28, 1985 meeting. There is no explanation proffered by the Government Defendants for their failure to call Messrs. Comeau, H.J. Cloutier, R.W. Miller and J.P. Cloutier. In all the circumstances, I infer that the failure to call those witnesses, who had relevant, material evidence, is an indication that their evidence would not have been favourable to the Government Defendants. The evidence discloses that: (1) before trial, D. Roberts (DSS) suffered a stroke and was not able to testify, (2) Réne Richard (DSS) died during the course of the trial, but prior to his death provided an "Agreed Statement of Facts" (Ex. 211). Counsel for the Plaintiffs pointed out that nowhere in Ex. 211 are the May 28, 1985 meetings mentioned.

[347] Exhibit 57 sets out an agreement between counsel that the following deceased persons had knowledge of matters in issue in this action.

1. Dan DeCoursin - consultant

2. Georges Laporte – President of Walter and King Seagrave

3. Robert Hollingsworth – CCC

4. Cecilia Dei Santi – U.S. Army

5. Dr. William Forder - Defendant

6. Tom Coghlan - CCC

[348] In paragraph 247 of the Government Defendants' legal submissions, it is submitted that because the Plaintiffs allege fraud and bear the heavy onus that accompanies that allegation, there should be an adverse inference drawn against the Plaintiffs for not calling Messrs. P. Comeau and H.J. Cloutier. Reasoning of that type, is, at best, fallacious.

[349] In my view, the same adverse inference applies to the failure of the Government Defendants to produce documents such as the alleged financial and technical capability analysis of KS. The Government Defendants' failure to produce other documents and the unexplained disappearance of relevant documents calls into play an adverse inference.

[350] In Wigmore on Evidence, 3rd ed., Vol. II, pp. 162, the author states:

> The failure to bring before the tribunal some circumstance, document, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavourable to the party. These inferences, to be sure, cannot fairly be made except upon certain conditions; and they are also open always to explanation by circumstances which make some other hypothesis a more natural one than the party's fear of exposure. But the propriety of such an inference in general is not doubted.

C. Credibility and Reliability of Witnesses

[351] A trial judge, sitting without a jury, is both a judge of the law and the trier of fact. She/he encounters witnesses who cover the full range of credibility and reliability from truthfulness at one end of the gauge to the prevaricating liar at the other end of the gauge. In addition to calculating where the witness registers on the truthfulness scale, the trial judge/trier of fact must also assess the reliability factor of each witness. An honest witness may not be reliable.

[352] In making the honesty/reliability assessment, my bench mark is the statement of O'Halloran J.A. in *R. v. Pressley* (1948), 94 C.C.C. 29, 34 (B.C.C.A.):

> The Judge is not given a divine insight into the hearts and minds of the witnesses appearing before him. Justice does not descend automatically upon the best actor in the witness-box. The most satisfactory judicial test of truth lies in its harmony or lack of harmony with the preponderance of probabilities disclosed by the facts and circumstances in the conditions of the particular case.

[353] Although the reader may opine that these reasons spend an inordinate amount of time on “credibility”, it is my view, that, in this case, credibility and reliability form a fulcrum issue.

[354] In their oral and written submissions (paragraph 198-201) regarding the evidence, counsel for the Government Defendants question the credibility of the following witnesses called by the Plaintiffs:

(a) William Thomas. He is the former President of BSL/Amertek. His credibility is challenged because Mr. Thomas, during cross-examination, did not remember an eighteen (18) year old investment report and its contents that he had been questioned about two (2) weeks earlier during his examination in chief. It will be recalled that Mr. Thomas was discharged by the Board of Directors of Amertek on February 8, 1990, shortly after Amertek’s financial loss came to light. No doubt BSL/Amertek was an unhappy chapter in Mr. Thomas’ career and not a period of time nor a series of events that he would be eager to keep alive in his mind, especially considering Mr. Thomas’ financial losses at Amertek and his physical injuries suffered some time later in a skiing accident.

(b) W.R. Schultz, former Vice-President of Finance for BSL/Amertek. Counsel for the Government Defendants alleged that there are inconsistencies and contradictions between Messrs. Schultz and Thomas, revolving around the question of who first told Mr. Thomas that BSL “required” Mr. McNeilly, if BSL was going to perform the MACE contract. The timing and sequence as to whether it was Mr. Rollins, C.A. of Ernst &

Whinney, BSL's auditor (according to Schultz) or "Government employees" (according to Thomas), is inconsequential. What is important is that the Government Defendants' personnel told such a thing to Mr. Thomas and did so when Government Defendants' internal memoranda record that Amertek was not recommended even with Mr. William McNeilly. Mr. Schultz testified that Cdn. $3M was in BSL's bank account and he was charged by Mr. Thomas to seek out potential investment opportunities. Even if no "restrictions" were imposed by Mr. Thomas, there is no suggestion that Mr. Schultz was under pressure to gamble away the Cdn. $3M.

(c) David R.G. Tanner, now President of Amertek, agreed that he would benefit if the Plaintiffs are successful in this lawsuit. Counsel for the Government Defendants argue that the potential benefit that Mr. Tanner will receive should cast aspersions on his credibility. Mr. Tanner was the "point man" for Amertek's 1996 proposal to creditors and the restructuring of Amertek and Amerkon, but he was not on the scene when the KS/DSS/CCC and the BSL/Amertek/CCC/DSS contracts were in place. As for Ex. 94, created by Mr. Tanner, it simply sets out a history of prices of vehicles that the Government Defendants had experienced. The purpose of Ex. 94 was to demonstrate that the Government Defendants should have known better and seen trouble when they saw the amount of KS's financial bid on the MACE in comparison to the other bid prices.

(d) Karl Morgenroth. Although counsel for the Government Defendants do not list this witness under their "credibility list", during the course of argument, it was submitted that no weight should be given to the evidence of this witness because he was never qualified as an "expert". Mr. Morgenroth was born in 1936, was 66 years of age at the

time of the trial. At the age of 21 years, he earned a degree from GM Institute as an Industrial Engineer; he has been a Professional Engineer in Ontario since 1957. In 1961, he earned an M.B.A. from the University of Western Ontario. He worked at General Motors for 26 years until 1980. From 1980-1989, he worked for DSS and he worked for CCC from 1989 to 1995 as an engineer contract officer. In 1985, as a DSS contracting officer he was at the Light Armoured Vehicle (LAV) project at GM, London, Ontario when GM was building 2,500 LAV for the US Army/Marine Corps to full military specifications.

Mr. Morgenroth was knowledgeable, articulate, precise and gave credible, reliable evidence. He foresaw the impending disaster when he reported in March 1985 that BSL could build a vehicle but could not fulfill the contract. Mr. Morgenroth could foresee that BSL was not aware of what lay ahead for it in a Mil I contract. Mr. Morgenroth knew that the section of DSS to which the contract had been assigned, did not have the personnel to manage the contract. After seeing and hearing Mr. Morgenroth, it is my firm belief that if the BSL/CCC contract had been assigned to him at AMES, this whole debacle would never have happened because he would have assembled knowledgeable, skilled people and seen to it that the CCC/BSL subcontract was in an amount that displayed reality, an amount which covered costs, plus a reasonable profit margin. Instead, O.I. Matthews, and others at CCC/DSS, shut him out of the project. In my view, Mr. Morgenroth would have seen to it that the 362 CRVs were built on time and on budget. Mr. Morgenroth was a straight forward, no nonsense witness who should be

complemented for giving credible, reliable evidence which I found very helpful and illuminating.

(e) Peter John Scott. This witness was 71 years of age at the time of the trial. He had six years training as a motor vehicle technician in his native England. He repaired military fire trucks and military refueling trucks while he was in the R.A.F. from 1952-1957. In 1957, he joined the RCAF and came to Canada. While in the RCAF and the Canadian Forces from 1957-1982, the witness had the same type of employment. When he retired from the Canadian Forces, Mr. Scott was a supervisor and held the rank of Master Warrant Officer. The witness then went to work for DND at GM Canada as a Quality Assurance Inspector (QAR) and received training in the various military inspection requirements and tests. He inspected or supervised the inspection of some 900-920 LAVs at GM Canada, London, Ontario. He was promoted to a SQAR in 1985-1986. In 1987, Mr. Scott agreed to a lower classification and less salary and went to Amertek at Woodstock as a QAR. He did this so that he could once again work on his first love – fire trucks.

[355] During his two and a half years at Amertek, Mr. Scott recalls that he and Mr. Wallace “signed off” on DD 250s for nearly 300 MACE CRVs. Mr. Scott testified that after two and a half years, DCASMA (Ottawa) told him for the first time that the DD 250s were not being done correctly. The witness had it right when he remarked: “When things go wrong, everyone tries to cover his tail”. Mr. Scott said that he sought and obtained a transfer back to London, Ontario to the LAV project three (3) months after Mr. Gregory

Bone arrived on the scene as “QA District Commander”. In the words of Mr. Scott, Mr. Bone started a “witch hunt”. Mr. Scott retired on October 7, 1994 from DND.

[356] I found Mr. Scott to be a witness who knew fire trucks and CRVs. He could tear them apart and put them back together. He knew the truck business and he knew where to look and watch during the manufacturing process. His evidence about QA was honest, reliable and credible and came from someone who has “been there and done that”. Mr. Scott, the same as others, was bewildered by the fact that some 320 CRVs had been built, accepted, shipped and paid for by the US Army without any major QA problems before Messrs. Bone and Mitchell arrived on the scene. With their arrival, all of a sudden, Amertek’s whole QA program is alleged to be unacceptable and not in accord with the MACE contract and its Mil I specifications.

[357] Mr. Scott knew his job and his duties. He gave straight forward, honest and reliable evidence.

(f) John F. Collins. Mr. Collins was the first solicitor retained by the late Dr. Forder on this file. At the date of trial, he was still a solicitor for the Plaintiffs. Mr. Collins was the person who tenaciously pursued the ATI searches and appeals in Ottawa. Then, he took the product of his ATI searches and put the “jigsaw” puzzle together using his knowledge and expertise from his many years of acting for corporations in negotiating contracts with the Governments of U.S.A., Canada and Governments world wide. Counsel for the Government Defendants state that Mr. Collins’ evidence should not be given any weight because he was never qualified as an “expert”. Mr. Collins gave

evidence of his experience with the SPM and the DPSA and how Governments do business on military contracts. I do not recall Mr. Collins being asked any hypothetical questions. I found the evidence of Mr. Collins to be truthful, reliable and of much assistance.

[358] For the most part, the Plaintiffs' witnesses who gave evidence about the heart of this case were either former BSL/Amertek employees who lost their jobs when Amertek went out of business or are present or former Government employees. Whether one or the other, most had no interest in the outcome of this case. One example was the Plaintiffs' witness, William McNeilly, P. Eng., who, on two (2) occasions, travelled by motor vehicle in winter weather from Fort Wayne, Indiana, U.S.A., where he lives and works, to Toronto, Ontario, the site of the trial. When asked why he voluntarily took time off work and twice drove the 1600 km. round trip, he said that he did so because "it is the right thing to do".

[359] Having seen and heard the aforesaid witnesses, it is my assessment that each witness was honest, credible and provided reliable evidence. The evidence of each fits and blends with the overall mosaic of evidence which I do accept.

[360] Counsel for the Plaintiffs in their oral and written arguments, submit that several of the Government Defendants' witnesses, who testified about the bedrock issues in this case, have serious credibility problems:

(a) Peter R. Smith. Mr. Smith is a former A/Deputy Minister, DSS and now President of the Aerospace Association. Counsel for the Plaintiffs assert that Mr. Smith's evidence,

on a number of important points, contradicts the evidence of other Government Defendants' witnesses and documents from the Government Defendants' files. For example, Mr. Smith testified that he was not involved with the MACE contract on a daily basis and was not kept advised of its status. On cross-examination Mr. Smith was confronted with a January 22, 1985 status report (Ex. 5: p. 66-68), authored by Pierre Comeau, on which Mr. Smith had written: "Pierre, thanks for this update but I want you to personally keep me posted daily on developments. This is very hot re MOT, MIN and CCC. We need to have contingency plan available". Mr. Smith also admitted that it was critical for him as President of the Aerospace Association to maintain good relations with the Government of Canada and stay on the "good side" of Douglas Patriquin, now President of CCC.

[361] In my view, Mr. P.R. Smith's evidence has serious credibility and reliability gaps dealing with the role and actions of CCC/DSS with BSL/Amertek.

(b) Obed Ivan Matthews is a former acting President of CCC. Counsel for the Plaintiffs point out that Mr. Matthews testified that the Defence Production Act did not apply to CCC contracts, yet its applicability appears as a term in the CCC/Amertek contract. Mr. Matthews also testified in his examination in chief that CCC/DSS carried out a "pre-award survey" of KS requested by DCASMA after CCC "verified" the price and before the Prime Contract was awarded. Mr. Matthews testified that it was the survey which gave him "comfort" when the US Army asked for the bid price verification. On cross-examination, Mr. Matthews admitted that no such survey was ever requested and the time factor of twenty-four (24) hours involved would have made it an impossible task.

Moreover, no pre-award survey was ever produced by the Defendants at this trial.

The evidence of Mr. Matthews is, in my view, for the most part, unreliable. He left me with the distinct impression that, regarding the MACE contract, he had no idea what he was talking about regarding who was supposed to be doing what, where, when and why. Mr. Matthews made a wise decision when he asked Mr. Karl Morgenroth to visit BSL and provide an overview report. Mr. Morgenroth, a very knowledgeable and astute production engineer with a wealth of experience in the public and private sector, reported and advised that BSL could build the MACE CRV but could not, at that time, fulfill the MACE contract. Instead of accepting Mr. Morgenroth's advice, as well as Mr. Morgenroth's offer and suggestion for the LAV to render assistance in the event BSL was awarded the subcontract, Mr. Matthews ordered that Mr. Morgenroth was not to have anything to do with the MACE contract. A very low point in Mr. Matthews' evidence took place when he displayed the not unusual arrogance of a person whose ignorance has been laid bare: he referred to Mr. Morgenroth as a "car salesman". Mr. Morgenroth, in my view, has probably forgotten more about DPSA and Mil I contracts and how to get a product to market on time and within contract than Mr. Matthews will ever hope to know.

(c) A.F. Sanderson and W.C. Ames. These two Government Defendants' employees worked on the MACE contract for both CCC and DSS. As witnesses, they spent more than a little time contradicting one another.

(i) A.F. Sanderson testified that he asked Mr. Ames to investigate and find out who removed the alleged (never produced) A. Ilchenko financial analysis from the DSS/CCC contract file. W.C. Ames testified that he was never requested to do such an investigation by A.F. Sanderson or by anyone else.

(ii) A.F. Sanderson testified that in early 1985, D.O. Roberts removed Mr. Ames and others from dealing with the Walter and the MACE contract file. Mr. Ames testified that A.F. Sanderson had D.O. Roberts remove him (Ames) because he, Ames, was “non-cooperative”. W.C. Ames testified: (1) that he reported to A.F. Sanderson that KS was having financial problems; (2) that A.F. Sanderson told him (Ames) to “stall” in giving that information to U.S. Army in St. Louis and thereby give Georges Laporte, President of CSS and Walter, an opportunity to raise money. W.C. Ames’ Trip Report, dated January 8, 1985, shows that Mr. Ames was chastised at the St. Louis meeting by General Edelmann for not advising TROSCOM of KS’s financial difficulty. (Ex. 5: p. 2).

(iii) Mr. Ames testified that he and A.F. Sanderson, his superior, were at loggerheads about KS because A.F. Sanderson would not face the financial facts about KS and Walter.

(iv) Mr. Ames testified that A.F. Sanderson was a close personal friend of Georges Laporte, President of KS and Walter.

[362] Other evidence discloses that Mr. Laporte was a frequent visitor to the DSS offices in Hull, P.Q.

[363] One wonders how much earlier CCC/DSS would have been forced to face the “default facts” about KS/Walter, the sinking ship, if A.F. Sanderson had not instructed W.C. Ames to stall and, buy time for the benefit of his friend, Georges Laporte.

[364] In my view, W.C. Ames’ evidence about his long conversation with William McNeilly and about William McNeilly showing him handwritten notes (which were declined) during the W.C. Ames’ August 29-30, 1984 visit to BSL at Woodstock, Ontario, cannot be accepted as reliable or credible when his report (Ex. 3: p. 463) does not mention seeing or speaking with any person other than Georges Laporte, who met W.C. Ames on the latter’s arrival at the London, Ontario airport.

[365] All of this causes me to be more than a little circumspect about accepting the evidence of these two former employees of the Government Defendants when it conflicts with the evidence of a witness or witnesses called by the Plaintiffs.

(d) Kenneth George Hooton. Mr. Hooton, a former employee of BSL and Amertek, was called by counsel for the Government Defendants. Mr. Hooton now lives in Florida, U.S.A. His evidence about his immigration status, is, to say the least, puzzling. He has an “axe to grind” with Amertek over disputed commissions. His conduct as to whether he would or would not see and be interviewed by counsel for the Plaintiffs does not portray reliability and credibility. Mr. Hooton’s evidence that he believed that the KS price and/or the BSL price were too low and that he so advised people at BSL does not ring true. If William Thomas or William Schultz or William McNeilly had known or

believed that KS's price was too low, why would they repeat their folly and follow a course of financial suicide and destroy BSL? Mr. Hooton's evidence on his cross-examination about how Amertek purchased components for the MACE contract shows him as a witness who was prepared to give answers even though he spoke from a vacuum. Mr. Hooton's evidence has been demonstrated to be unreliable.

[366] All things considered, if and insofar as the evidence of William McNeilly conflicts with the evidence of A.F. Sanderson, W.C. Ames or K.G. Hooton, I accept the evidence of William McNeilly.

[367] Counsel for the Plaintiffs pointed out that (a) prior to trial, any witness of the Plaintiffs', who was contacted by the lawyers for the Government Defendants, made himself available to answer questions posed by counsel for the Government Defendants; (b) in contrast, when counsel for the Plaintiffs asked key witnesses of the Government Defendants for an opportunity to meet and discuss his/her anticipated evidence, all refused save for O.I. Matthews who met with counsel for the Plaintiffs but refused to sign an eight (8) page witness statement (Ex. 121).

D. Plaintiffs' Right to Choose Cause of Action/Remedy

[368] In *Canson Enterprises Ltd. et al. v. Boughton & Co.,* [1991] 3 S.C.R. 534, 565, LaForest J. said:

> The Appellants do not, however, seek damages at common law. Rather, they seek compensation in equity for breach of fiduciary duty. Where concurrent liability lies in tort and contract and in equity, the appellants may sue in whatever manner they find most advantageous.

E. Waiver of Tort

[369] The Plaintiffs rely on the doctrine of waiver of tort in favour of a restitutionary claim. Under this doctrine, a victim is permitted to elect to pursue the restitutionary claim to recover the benefits secured by the wrongful activity of the tortfeasor as an alternative to suing for the victim's claim for damages. "Waiver" is misleading – the victim need not elect to forego any remedy in tort as the price of pursuing the claim of restitution – the remedies are in the alternative and may be claimed together in one action, in the alternative. The successful victim/plaintiff is entitled to an award on the basis of the measure yielding the higher quantum.

[370] In *United Australia, Ltd. v. Barclays Bank Ltd.*, [1940] 4 All E.R. 20, 26 (H. of L.), Viscount Simon, L.C. said that deceit can be waived and went on to say:

> Where "waiving the tort" was possible, it was nothing more than a choice between possible remedies, derived from a time when it was not permitted to combine them or to pursue them in the alternative, and when there were procedural advantages in selecting the form of *assumpsit*.

[371] In "The Law of Restitution", Lord Goff and G. Jones, Fifth Edition, London: Sweet & Maxwell, 1998, at page 778:

> …a tortfeasor should be personally liable to make restitution for any benefit gained at the plaintiff's expense, whether that benefit be positive or negative. This makes good legal as well as economic sense.

[372] In my view, if the Plaintiffs succeed in proving the tort of deceit, they are entitled to waive the tort and recover in a restitutionary claim the value of the benefits obtained by the Government Defendants through their wrongful acts.

Tort of Deceit

[373] In *Derry v. Peek* (1889), 14 App. 337, 374, Lord Herschel said:

> I think the authorities establish the following propositions: First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false, has obviously no such honest belief. Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made.

[374] In “Remedies in Tort”; Lewis N. Klar et al.; Vol. I, Chap. 5 (Scarborough Carswell, 1987) at 5-11 and 5-14, the authors list the elements of the tort of deceit:

(a) the defendant made a false representation of fact to the plaintiff

(b) the defendant

(i) knew the representation was false;

(ii) had no belief in the truth of the representation; or

(iii) was reckless as to the truth of the representation

(c) the defendant intended that the plaintiff should act in reliance on the representation,

(d) the plaintiff did act on the representation

(e) the plaintiff suffered a loss by doing so.

[375] The representation of the fact can occur by words, or be written, or by conduct intended to induce the representee to believe the existence of a non-existent fact.

[376] The authors of “Remedies in Tort” (op. cit.) at 5-21: para. 20, state:

> § 20 A representation of fact may be inherent in a statement of opinion, and the existence of the opinion in the person stating it is a question of fact. Thus if the facts are not equally known to both sides, a statement of opinion by the one who knows the facts best involves very often a statement of a material fact, for he impliedly states that he knows facts which justify his opinion. Accordingly, statements of opinion which do not represent the real opinion of the representator are misrepresentations; and an opinion may be so grossly erroneous that the court will conclude it could not have been honestly held.

[377] In “Clerk & Lindsell on Torts”, 18th edition, (London: Sweet & Maxwell, 2000) at p. 801: para. 15-12, it is said:

> Half truths; partial disclosure fragmentary statements may be in terms true so far as they go, but if they suggest that which is false and are intended to do so, that will constitute an actionable fraud. Even though there may be no duty to disclose, a statement may be misleading if it is

> incomplete. As Lord Cairns stated in *Peek v. Gurney*: "there must . . . be some active misstatement of fact, or, in all events, such a partial and fragmentary statement of fact, as that the withholding of that which is not stated makes that which is stated absolutely false."

[378] Lord Steyn in *Smith New Court Securities Ltd. v. Scrimgeour Vickers (Asset Management) Ltd.,* [1997] A.C. 254, 274 said: "a cocktail of truth, falsity and evasion is a more powerful instrument of deception than undiluted falsehood".

[379] In *Sindhu Estate v. Bains*, [1996] B.C.J. No. 1246 (para. [31]) (B.C.C.A.): leave to appeal to S.C.C. dismissed: 1996 S.C.C.A. No. 403, the British Columbia Court of Appeal said:

> ¶ 31 The circumstances required for silence to be actionable misrepresentation are articulated in Spencer Bower & Turner, The Law of Actionable Misrepresentation, 3d ed. (London: Butterworths, 1974) at 101:
>
> A misrepresentation may be made by silence, when either the representee, or a third person in his presence, or to his knowledge, states something false, which indicates to the representor that the representee either is being, or will be, misled, unless the necessary correction be made. Silence, under such circumstances, is either a tacit adoption by the party of another's misrepresentation as his own, or a tacit confirmation of another's error as truth.

<u>The May 28, 1985 Meetings at DSS's Offices in Hull, P.Q.</u>

[380] On May 27, 1985, Pierre Comeau, Director General ICP of DSS telephoned W.C. Thomas, President of BSL at Waterloo, Ontario and invited him to attend a 10 a.m. meeting the next day (May 28, 1985) in Hull, P.Q. at the DSS offices, to discuss, for the first time, BSL's proposal of April 3, 1985 (Ex. 6: p. 13-63) and BSL's

possible performance of the MACE subcontract. P. Comeau was the person who, in a telephone conversation in February 1985, had told W.R. Schultz that it was too bad BSL had not contacted him (Comeau) because he, would have given BSL “the straight goods” about the MACE contract. At the May 28, 1985 meetings, besides P. Comeau, the Government Defendants had in attendance: Messrs. H.J. Cloutier, D.O. Roberts, Réne Richard, and R.W. (Buck) Miller. For BSL, those present were: Messrs. Thomas, Schultz, McNeilly and Hooton. J. Legate, a BSL consultant, was also present.

[381] At the May 28, 1985 general meeting, Pierre Comeau told the BSL personnel that: (a) the MACE contract was profitable and (b) BSL’s price, as set out in its April 3, 1985 proposal, was too high.

[382] In an attempt to obtain the US Army’s consent to substitute Amertek as the third subcontractor (in the place of Walter), CCC/DSS, without any technical evaluation, falsely assured the US Army that Amertek had the technical and financial resources to build the CRVs and complete the MACE contract. This was done while the internal memoranda of CCC/DSS showed the exact opposite. The USG gave its consent. This was fraud on the USG, a third party. It is relevant because without obtaining the consent of the USG for Amertek, the CCC/DSS would have had no one to manufacture the 362 crash trucks and CCC would have been liable under the default clause in the MACE Prime Contract. It is my conclusion, on all of the evidence, that these statements by P. Comeau at the two meetings on the morning of May 28, 1985 were false, and that he, the maker of the statement, knew they were false. All those present from DSS/CCC knew the statements they heard were false, yet said nothing. I

hold that the necessary elements of the tort of deceit have been established by the Plaintiffs. The Government Defendants' own internal memoranda show that the CCC/DSS personnel knew that the MACE contract price was too low and knew that William McNeilly made errors in preparing the KS bid price, which later became the MACE Prime Contract price.

[383] If those from CCC/DSS at the May 28, 1985 meetings did not know that the statements made by Mr. Comeau at the larger meeting, and later that morning repeated by him at the smaller meeting in Mr. Hession's office, were false, at a minimum, those present from DSS/CCC had no belief in the truth of the statements and were reckless as to whether or not the statements were true. Those present that day from CCC/DSS intended that BSL should act in reliance on the false representations. BSL was the Government Defendants' only hope; CCC/DSS needed BSL to build the CRVs or the MACE contract default clause would "kick in".

[384] W.C. Thomas said that he relied on what was said because he was dealing with "his government". W.C. Thomas testified that he believed Mr. Comeau because "Mr. Comeau was the Government" and had intimate knowledge about the MACE contract. "I relied upon it – it all seemed to fall into place. He knew all the background. I felt even better when Mr. Comeau stated that BSL's proposal was too high, especially when he repeated those words in the presence of the Deputy Minister Hession" – "it made me feel that we had a good price".

[385] BSL acted to its detriment by immediately reducing the bid price by US $2,000 per vehicle. There is no doubt BSL suffered grievous losses. Mr. Thomas testified that if he had known the truth, he would never have let BSL get involved in the MACE contract.

[386] I accept the evidence of Mr. Thomas about what took place on May 28, 1985.

G. Duty of Disclosure/Good Faith

[387] Generally, parties engaged in arms' length pre-contractual negotiations have no obligation to disclose information to each other.

[388] In *Martel Ltd. v. Canada,* [2000] 2 S.C.R. 860, 886 per Iacobucci and Major JJ.:

> 70 Fourth, to extend the tort of negligence into the conduct of commercial negotiations would introduce the courts to a significant regulatory function, scrutinizing the minutiae of pre-contractual conduct. It is undesirable to place further scrutiny upon commercial parties when other causes of action already provide remedies for many forms of conduct. Notably, the doctrines of undue influence, economic duress and unconscionability provide redress against bargains obtained as a result of improper negotiation. As well, negligent misrepresentation, fraud and the tort of deceit cover many aspects of negotiation which do not culminate in an agreement.
>
> 71 A concluding but not conclusive fifth consideration is the extent to which needless litigation should be discouraged. To extend negligence into the conduct of negotiations could encourage a multiplicity of lawsuits. Given the number of negotiations that do not culminate in agreement, the potential for increased litigation in place of allowing market forces to operate seems obvious.

> 72 For these reasons we are of the opinion that, in the circumstances of this case, any *prima facie* duty is significantly outweighed by the deleterious effects that would be occasioned through an extension of a duty of care into the conduct of negotiations. We conclude then that, as a general proposition, no duty of care arises in conducting negotiations. While there may well be a set of circumstances in which a duty of care may be found, it has not yet arisen.
>
> 73 As a final note, we recognize that Martel's claim resembles the assertion of a duty to bargain in good faith. The breach of such a duty was alleged in the Federal Court, but not before this Court. As noted by the courts below, a duty to bargain in good faith has not been recognized to date in Canadian law. These reasons are restricted to whether or not the tort of negligence should be extended to include negotiation. Whether or not negotiations are to be governed by a duty of good faith is a question for another time.

[389] The landlord, Martel, did not allege that the Government withheld any vital information during pre-contractual negotiations, information vital to the efficient performance of the contract nor that the non-disclosure had somehow mislead Martel.

[390] However, in the case of certain relationships or in certain circumstances, a duty of disclosure does arise – for example:

(a) Fiduciary relationships (solicitor-client),

(b) Uberimae fide; insurance contracts and

(c) Creditor/guarantor and

(d) Tenderer-bidder

[391] Professor S.M. Waddams in the 4th edition of his text, "The Law of Contracts", (Toronto: Canada Law Book, 1999), wrote at p. 313:

> 437. The question can be posed in various ways. Is there a duty to disclose material facts? Is there a duty of good faith in contractual negotiation? Can silence be a misrepresentation? All these questions amount to the same thing: can one knowingly take advantage of another's mistake?

[392] In Lac Minerals Ltd. v. International Corona Resources Ltd., [1989] 2 S.C.R. 574, 672, LaForest J. said:

> The institution of bargaining in good faith is one that is worthy of legal protection where that protection accords with the expectations of the parties.

[393] In *978011 Ontario Ltd. v. Cornell Engineering Co.* (2001), 53 O.R. (3d) 783, 795 (Ont. C.A.): leave to appeal to S.C.C. refused: [2001] S.C.C.A. No. 315, in giving the unanimous judgment of the Court, Weiler J.A. said:

> [32] . . . Generally, parties negotiating a contract expect that each will act entirely in the party's own interests. Absent a special relationship, the common law in Canada has yet to recognize that in the negotiation of a contract, there is a duty to have regard to the other person's interests, namely, to act in good faith: see *Bell v. Lever Brothers Ltd.,*[1932] A.C. 161, [1931] All E.R. Rep. 1 (H.L.), and more recently, *Martel Building Ltd. v. Canada*, [2000] 2 S.C.R. 860, 2000 S.C.C. 60 at para. 73. . . .
>
> [33] The law does, however, regulate contractual conduct between individuals through the imposition of three types of standards: unconscionability, good faith and the fiduciary standard. All three standards are points on a continuum in which the law acknowledges a limitation on the principle of self-reliance and imposes an obligation to respect the interests of the other. . . . .
>
> [34] The circumstances where the law requires more than self-interested dealing on the part of a party share certain characteristics. First, one party relies on the other for information necessary to make an informed choice and, second, the party in possession of the

> information has an opportunity, by withholding (or concealing) information, to bring about the choice made by the other party. See Finn, *supra*, at pp. 17-18 and Waddams, *The Law of Contracts*, 3d ed. (Toronto: Canada Law Book, 1993), at para. 438. If one party to a contract relies on the other for information, that reliance must be justified in the circumstances. Finn, *supra*, suggests at p. 20 that the following five factors are indicative of situations where reliance is justified:
>
> (1) A past course of dealing between the parties in which reliance for advice, etc., has been an accepted feature;
>
> (2) The explicit assumption by one party of advisory responsibilities;
>
> (3) The relative positions of the parties particularly in their access to information and in their understanding of the possible demands of the dealing;
>
> (4) The manner in which the parties were brought together, and the expectation that could create in the relying party; and
>
> (5) [W]hether "trust and confidence" knowingly [has] been reposed by one party in the other.
>
> [35] The presence of one of these elements alone will not necessarily suffice to justify the imposition of a duty in law on the other. Dependence, influence, vulnerability, trust and confidence are of importance only to the extent that they evidence a relationship suggesting an entitlement not to be self-reliant; see Finn, *supra*, at p. 47. While the relationship may be the foundation for the entitlement, in and of itself, the relationship does not create the entitlement. The entitlement arises either because one party has no ability to readily inform himself or herself by accessing important information or because one party has an inability to appreciate the significance of the information. That inability may be due to a cognitive disability or it may arise out of the circumstances created by the other party. To determine whether the entitlement is created, regard must be had to all the circumstances.

[394] R.V. Hession, a former Deputy Minister DSS, testified that, in 1985, he would have expected his staff, if they knew of a material risk involving price and they had given advice to CCC to engage with a foreign government in a contract at that

price, to disclose material risks involving price to the potential supplier. Mr. Hession further testified that it would be wrong not to disclose that information to the subcontractor/supplier because the subcontractor is being asked to deliver the goods on behalf of CCC and to take on the same risks as CCC in the form of a “back to back contract”. Therefore, there should be transparency in the information relating to material risks (Transcript of R.V. Hession, in chief: March 6, 2002, pp. 81-88: March 7, 2002 in cross-examination: p. 26, pp. 43-45 and p. 61).

[395] R.V. Hession testified that in the case of reprocurement, where there had been a history of concerns about the adequacy of the price, or there was knowledge of inadequate pricing, fairness would require disclosure of that information as well as any “should cost” analysis to the potential supplier because it is evidence of risk to CCC and also to the supplier.

[396] In Canada, government, subject to legislation and/or applicable Crown prerogative, is bound by private law principles of contract law and is liable for damages for breach of contract. See: *Bank of Montreal v. Attorney General of Quebec*, [1979] 1 S.C.R. 365, 573-574.

[397] Where the government is procuring or reprocuring goods and services and is in possession of information material to the contract to be performed, information about which the proposed contractor is unaware and unable to access, should the government be held to higher standards than ordinary commercial parties and should

the government be obliged to disclose that material information during pre-contractual negotiations?

[398] In *Rudolph Wolff & Co. v. The Queen* (1990), 69 D.L.R. (4th) 392, 397, the Supreme Court of Canada said:

> The Crown represents the State. It constitutes the means by which the federal aspect of our Canadian society functions. It must represent the interests of all members of Canadian society in court claims brought against the Crown in right of Canada. The interests and obligations of the Crown are vastly different from those of private litigants making claims against the Federal Government.

[399] In *Northern Territory of Australia v. Skywest Pty. Ltd.* (1987), 48 N.T.R. 20, 46, an Australian court emphasized the Government's duty to act fairly in its commercial activities:

> A government is not only a party to a contract; through its control of Parliament it is a lawmaker. In that capacity it has an interest in ensuring that people respect and observe the law, and to do so it must display by its actions some minimum respect for its own rules. For it is in the public interest that when a government contracts with an ordinary person, it deals fairly with that person and is seen to do so.

[400] The website of the Treasury Board of Canada Secretariat (March 6, 1999, modified to January 2001) states, in part:

> …government contracting shall be conducted in a manner that will: (a) stand the test of public scrutiny in matters of prudence and probity, facilitate access, encourage competition and reflect fairness in the spending of public funds.

[401] In *Bank of Montreal v. Hydro-Québec*, [1992] 2 S.C.R. 554, 602, the Supreme Court of Canada considered the duty of disclosure in the tendering process under the Quebec Civil Code. The trial judge had characterized the conduct of Hydro Québec as a “conspiracy of silence”. The Supreme Court of Canada restored, in part, the trial judgment. Gonthier J., in giving the unanimous judgment of a five judge court, said:

> Hydro-Québec knew that its design was erroneous. Nonetheless, it refused to admit this because the balance of power between the parties would have been radically altered, and it would probably have had to renegotiate the entire contract. It was this attitude on the part of Hydro-Québec, this refusal to yield to the claims of Laprise and Bail/Sotrim, when it knew that they were right and that it had an obligation to inform them, that so struck Martineau J. and that led him to describe the operation as a “conspiracy of silence”. While I have no wish to raise the ante on adjectives, I in fact find such an attitude to be shocking, particularly on the part of a major public body such as Hydro-Québec.

[402] For more than forty (40) years, in the U.S.A., pursuant to what has been termed as “the Doctrine of Superior Knowledge”, a government in pre-contractual negotiations for the purchase of goods or services has a duty to inform a contractor of information required for the successful performance of the contract.

[403] In *Snyder-Lynch Motors Inc. v. The United States* 292 F. 2d 907, 910 (1961), the plaintiff submitted a bid of US $911 per tank to rebuild the engine. The U.S. Government had considerable experience as a result of a similar contract with the firm of Bowen and McLaughlin. The U.S. Government told the plaintiff that its bid was too high and the plaintiff reduced its bid to US $605.61. A government negotiator later set

the price at US $800, a figure not based on actual cost. The US Government knew from its Bowen and McLaughlin experience that the price per tank substantially exceeded US $800 per unit. This information was not given to the plaintiff. The plaintiff incurred extra costs and claimed against the U.S. Government. In awarding a substantial part of the claim, the U.S. Court of Claims said:

> We think the Government was remiss in not making the information regarding the Bowen and McLaughlin experience available to the plaintiff. Based on this conclusion, the withholding of this information constituted a breach of contract and the plaintiff is entitled to recover the damages flowing therefrom.

[404] In *Helene Curtis Industries Inc. v. United States* 160 C.T.C.L. 437, 312 F. 2d 774 (1963), the contractor was unsuccessful in producing the disinfectant needed when it used a certain method of manufacturing of the chemical. The contractor later learned that the government agency knew of a successful method, but had not disclosed that information to the plaintiff. The Court of Claims stated at p. 444:

> [T]he circumstances here give rise to a duty to share information. The disinfectant was novel and had never been mass-produced; the Government had sponsored the research and knew much more about the product than the bidders did or could; it knew, in particular, that the main ingredient, chlormelamine, was a recent invention, uncertain in reaction, and requiring extreme care in handling; it also knew that the more costly process of grinding would be necessary to meet the requirements of the specification, but that in their understandable ignorance the bidders would consider simple mixing adequate; and the urgency for disinfectant was such that potential contractors could not expend much time learning about it before bidding. In this situation the Government, possessing vital information which it was aware the bidders needed but would not have, could not properly let them flounder on their own. Although it is not a fiduciary toward its contractors, the Government – where the balance of knowledge is so

> clearly on its side – can no more betray a contractor into a ruinous course of action by silence than by the written or spoken word.

[405] In *G.A.F. Corp. v. United States*, 932 F. 2d 947 (Fed. Cirt. 1991), Cert. denied, 112 Supreme Court, 965 (1992), the Court said at p. 949:

> To show a breach in the superior knowledge doctrine, a contractor claiming a breach by non-disclosure must produce specific evidence that (1) it undertook to perform without vital knowledge of a fact that affects performance costs or direction, (2) the government was aware the contractor had no knowledge of and had no reason to obtain such information, (3) any contract specification supplied misled the contractor, or did not put it on notice to inquire, and (4) the government failed to provide the relevant information.

[406] In *First Trenton National Bank v. United States*, 15 CCF, para. 83, 959 (Ct. Cl. 1970), the presiding Trial Commissioner in the United States Court of Claims wrote:

> It should be clear by now that when it enters into a contract the Government is obligated, as part of its implicit duty to help rather than hinder its performance, to provide the contractor with all the special knowledge in its possession which might aid it and thereby enhance prospects of performance. This is the necessary rationale to be drawn from such cases as *Helene Curtis Industries Inc. v. United States*…….It derives sustenance from the likelihood that full disclosure in almost every conceivable instance will promote and protect the interests of the Government and the contractor alike, and will often nip incipient litigation in the bud.

[407] In their text, “Federal Procurement Law”, 3rd edition, the George Washington University, 1980, page 146, Nash and Cibinic state:

> In the non-disclosure cases, the contractor may not receive relief if he is an experienced contractor who would ordinarily be charged with knowledge of the information of the type not furnished. Similarly, relief is denied if the information is reasonable and available elsewhere and the contractor can reasonably be expected to obtain the information….Where the information is available only with the Government, the contractor has not been granted access to the information, and he has no way of discovering the information, the Government will be responsible.

[408] To repeat, as set out above, the Treasury Board of Canada advertises to the world on its website that: "…government contracting shall be conducted in a matter that will: (a) stand the test of public scrutiny in matters of prudence and probity, facilitate access, encourage competition and reflect fairness in the spending of public funds".

[409] The Concise Oxford Dictionary defines "probity" as "uprightness, honesty". That being so, logic would prohibit the Government Defendants from lying in the weeds until the time arrived to lead the lambs to the slaughter.

[410] In this case, I find that:

(1) On August 27-28, 1984, the U.S. Army forwarded a bid pricing verification to DSS indicating KS's bid on the MACE contract was so low as to indicate an error had been made.

(2) CCC had been in default under the CCC US Army Prime Contract since January 14, 1985.

(3) On March 5, 1985, USG had served on CCC a show cause as to why the Prime Contract should not be terminated.

(4) Throughout February, March and April 1985, CCC and DSS officials learned that KS had underbid the MACE contract. The Government Defendants' internal memoranda show discussions about the underbid and the officials' fear that the US $10M default clause in the Prime Contract would come into operation.

(5) Georges Laporte, the President of KS and Walter, also knew that KS had underbid the MACE contract.

(6) Karl Morgenroth testified, and I accept his evidence, that, in his experience, when it is a performance specification contract like the MACE, if you have experienced contractors involved, you expect bid prices to vary by 10% plus or minus – that is, a 20% spread. However, if the spread exceeds that amount, you question whether the bid is on a sound basis. Here, KS was 23% lower than the next highest bidder, a difference of some US $10.25M. Mr. Morgenroth, in his evidence in chief and on cross-examination, stated that his concern would not be lessened if told that the manufacturer proposed to build his own chassis because the unit cost for a commercial chassis (i.e. purchased) is usually lower than building one "in-house". The Government Defendants' witness A.F. Sanderson, agreed that, in his experience, the "rule of thumb" spread on this type of contract is plus or minus 10%. The Plaintiffs' witness, Professor A.K. Rosenhan agreed that a variation of more than 10% in the bid price would suggest a problem with the bid. Moreover, the range of bids shown on Exhibit 94 would raise a "red flag" for him. Richard L.

Moorhouse, the Government Defendants' expert on US Government contracting, agreed that more than a 10% difference on the bid would be significant to him.

(7) CCC and DSS officials, as of their March 15, 1985 meeting, knew that KS's bid price was too low by a minimum of US $7,000 per vehicle (Ex. 5: p. 341-342).

(8) The Government Defendants' memorandum of March 18, 1985 (Ex. 5: p. 463-467) states at page 464: "The costs of a new McNeilly design manufactured by Belgium Standard are unknown but they would probably be at least $10,000 higher than the present King Seagrave bid".

(9) Karl Morgenroth told his superiors at CCC/DSS that his assessment was that BSL could build the MACE vehicle but could not fulfill the MACE contract because of the inadequacies listed. Internal memoranda in CCC/DSS files agree with Mr. Morgenroth's report.

(10) None of the above "vital information" was ever communicated by CCC/DSS to Messrs. Thomas, Schultz or McNeilly or anyone else at BSL prior to the date of the subcontract, October 5, 1985.

[411] It is my conclusion that the Government Defendants are liable to the Plaintiffs for breaching their implied contractual duty to provide to the Plaintiffs the "vital information" as defined earlier in these reasons.

[412] In *Laskin v. Bache & Co. Inc.* (1972), 23 D.L.R. (3d) 385, 392 (Ont. C.A.) Arnup J.A. said:

> The category of cases in which fiduciary duties and obligations arise from the circumstances of the case and the relationship of the parties is no more "closed" than the categories of negligence at common law.

[413] Twelve years later, in *Guerin v. The Queen,* [1984] 2 S.C.R. 335, 384, Dickson J. said that: "[t]he categories of fiduciary, like those of negligence, should not be considered closed".

[414] The Plaintiffs submit that, on the particular facts of this case, the relationship between BSL/Amertek and CCC/DSS had a fiduciary character which CCC/DSS breached and that CCC benefited from the breach.

[415] In *Frame v. Smith*, [1987] 2 S.C.R. 99, 136, Wilson J. (in dissent), said:

> Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:
>
> (1) The fiduciary has scope for the exercise of some discretion or power.
>
> (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
>
> (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

[416] The dissenting opinion of Wilson J. (supra) was subsequently quoted with approval by the Court in the decision of *Lac Minerals (supra)* at p. 598 where Sopinka J., dissenting in part, said:

> When the court is dealing with one of the traditional relationships, the characteristics or criteria for a fiduciary relationship are assumed to exist. In special circumstances, if they are shown to be absent, the relationship itself will not suffice. Conversely, when confronted with a relationship that does not fall within one of the traditional categories, it is essential that the Court consider: what are the essential ingredients of a fiduciary relationship and are they present? While no iron-clad formula supplies the answer to this question, certain common characteristics are so frequently present in relationships that have been held to be fiduciary that they serve as a rough and ready guide. I agree with the enumeration of these features made by Wilson J. in dissent in *Frame v. Smith*, [1987] 2 S.C.R. 99.

[417] After quoting the above mentioned portion of *Frame v. Smith*, Sopinka J. continued:

p. 599:

> It is possible for fiduciary relationships to be found although not all of these characteristics are present, nor will the presence of these ingredients invariably identify the existence of a fiduciary relationship.
>
> The one feature, however, which is considered to be indispensable to the existence of the relationship, and which is most relevant in this case, is that of dependency or vulnerability. In this regard, I agree with the statement of Dawson J. in *Hospital Products Ltd. v. United States Surgical Corp., supra,* at p. 488, that:
>
> There is, however, the notion underlying all the cases of fiduciary obligation that inherent in the nature of the relationship itself is a position of disadvantage or vulnerability on the part of one of the parties which causes him to place reliance upon the other and requires the protection of equity acting upon the conscience of that other…..

> The necessity for this basic ingredient in a fiduciary relationship is underscored in Professor Weinrib's statement, quoted in *Guerin, supra*, at p. 384 that:
>
> "…the hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other's discretion."

[418] In the case at bar, CCC had total discretionary power over BSL. Unless CCC agreed to do business with BSL, unless CCC agreed to "certify" and "endorse" BSL to USG, BSL would be locked out of the MACE contract by CCC, the gatekeeper. There can be no doubt that CCC can and did unilaterally exercise that discretion so as to affect BSL's legal and financial interests. CCC kept BSL "on a string" until CCC assured itself that there was no other subcontractor willing to get involved. BSL was particularly vulnerable because without CCC's blessing and without the vital information that CCC failed to supply to BSL, BSL was "at the mercy of the other's [CCC's] discretion".

[419] From February-March 1985, CCC knew that there was no subcontractor/supplier, other than BSL, interested in the MACE contract. From February-March 1985 until the signing of the October 3, 1985 CCC/BSL contract, CCC, although negotiating with BSL, CCC's internally generated memoranda state that BSL could not fulfill the contract and, through all this period, CCC/DSS held back vital information from BSL. This was not an arms' length commercial contract but it was a Crown corporation withholding material information and telling lies to a supplier, known by CCC to be a novice that trusted "its government to be acting in BSL's best interest".

[420] During the period of negotiating with BSL on a reprocurement basis, CCC knew that it was in a position of conflict of interest with BSL. CCC was locked into the price set out in the Prime Contract and knew that every dollar it agreed to pay to BSL/Amertek above the amount of the Prime Contract could not be collected from the USG, but would be borne by CCC.

[421] It is my conclusion that in the particular and unusual facts of the reprocurement relationship in which CCC/BSL/Amertek found themselves, the relationship had a fiduciary character.

[422] Being a fiduciary vis à vis BSL/Amertek, CCC had duties:

(a) not to profit from its position;

(b) to avoid a conflict between self interest and a duty owed to BSL, and

(c) to provide complete disclosure to BSL.

(*Canadian Aero Service v. O'Malley*, [1974] S.C.R. 592, 608-9).

[423] It is my conclusion, on the evidence before me, that CCC breached its fiduciary duties by putting its own self-interest ahead of the interests of BSL/Amertek and by failing to disclose material/vital information to BSL/Amertek prior to the CCC/BSL contract of October 3, 1985.

[424] As to the measure of recovery for a breach of fiduciary duty, in *Canadian Aero Service Limited v. O'Malley et al.* (*supra*) at p. 621-622, Laskin J., for the Court, said:

> …nor is it a condition of recovery of damages that Canaero establish what its profit would have been or what it has lost by failing to realize the corporate opportunity in question. It is entitled to compel the faithless fiduciaries to answer for their default according to their gain.

[425] In my view, the Plaintiffs are entitled to recover under the claim that, in all the circumstances, the Government Defendants breached its fiduciary duty owed to the Plaintiffs.

I. Experts – Their Role and Qualifications

[426] The issue arises: if CCC had been unable to provide another subcontractor to perform the MACE contract, what action, pursuant to the MACE contract, would the US Army have taken and what would have been the consequences, if any, for the Government Defendants?

[427] The Plaintiffs' counsel called Professor John Cibinic Jr. His curriculum vitae appears as Ex. 35. When he appeared at trial, Professor Cibinic was a Professor Emeritus of Law at George Washington University Law School in Washington, D.C. where he taught from 1963 to 1993; his specialty was government contracts. His students included hundreds of men and women who were members of the US Army and US Air Force. Prior to joining the law school faculty, Professor Cibinic was a

contract negotiator for the US Department of Navy. Later, he was also employed as a manager of contracts and counsel for a firm in the private sector engaged in government contracting.

[428] Professor Cibinic, together with his colleague, Professor Emeritus Ralph C. Nash Jr., have authored fifteen (15) major works listed on page 2-3 of Ex. 36. These texts are all dedicated to US Government contracts, are used for teaching and as desk books by lawyers and others engaged in Government contracting. Before and since obtaining emeritus status, Professor Cibinic has done consulting work with government agencies, industrial clients and law firms about government contract law, procedure and practice. He has testified before committees of the US Senate and House of Representatives. He has testified as an expert on a wide variety of Government contract issues. He has testified before the Court of Queen's Bench in the Province of Manitoba. He has served as a mediator and an arbitrator in government contract cases. He was eminently qualified to testify on the subject of U.S. Government contracts.

[429] Professor Cibinic was asked for his expert opinion in answering five (5) questions posed to him by counsel for the Plaintiffs.

[430] Prior to trial, Professor Cibinic prepared a report (Ex. 36) setting out his opinion to the questions posed.

[431] Prior to trial, Professor Cibinic prepared a supplemental report (Ex. 37) in response to the report of Richard L. Moorhouse (Ex. 151). In his supplemental report, Professor Cibinic also considers additional relevant documents, including those

furnished to the Plaintiffs by the US Army. At trial, the evidence of Professor Cibinic mirrored what is set out in Ex. 36 and Ex. 37.

[432] Counsel for the Government Defendants called as their expert regarding USG contracts, Mr. Richard L. Moorhouse. His curriculum vitae appears as Ex. 130. Prior to trial, Mr. Moorhouse prepared a report, Ex. 151, in response to Professor Cibinic's report (Ex. 36). At trial on May 21, 2002, Mr. Moorhouse was permitted to file a supplemental report, dated April 10, 2002.

[433] Mr. Moorhouse has been an attorney since 1982 and is a partner with the Washington, D.C. law firm of Reed, Smith LLP (government contracts and export compliance group). He practices government contract law and litigates before the US Court of Federal Claims and the General Accounting Office and other federal public contract boards. From 1982 to 1987, he served as a senior procurement law attorney advisor for the General Accounting Office.

[434] The questions asked of Professor Cibinic were:

(a) If CCC had not provided another subcontractor to perform the US Army contract [MACE], what action would have been taken by the US Army?

[435] In his evidence and at page 9 of Ex. 36, Professor Cibinic said: "It is my opinion that the Army, almost certainly, would have terminated the contract for default". "Termination is a right which the Government has when the contractor has failed to perform in accordance with contract requirements". Professor Cibinic went on to say

that the US Army contracting officer is required to follow the procedure set out in FAR 49.402: Absent excusable delay proven by the supplier, terminate for default when it is in the best interests of the USG. In the witness' view, the opinion of the US Army attorney advisor, Carol Rosenberg, advising that "grounds for termination appear to be firm" was legally sound because she had considered all the relevant factors set out in FAR 49.402 (f). (See Ex. 6: p. 318-319 and Ex. 28).

(b) If the US Army had terminated the contract for default and it still had need for the supplies, what action would it have taken?

[436] Professor Cibinic in his evidence at trial and in Ex. 36 and Ex. 37, stated that although it was in the discretion of the US contracting officer to "terminate for convenience" rather than for "default", the former prevents the US Army from obtaining excess reprocurement costs from the original supplier and requires the US Army to pay the terminated supplier for work done to date. R.V. Hession, former Deputy Minister DSS said that, in his experience, when dealing with DPSA contracts, there was no negotiated termination (March 7, 2002: p. 63-64). P.R. Smith, former A/Deputy Minister DSS, testified that if CCC defaulted it would be liable for "whatever the reprocurement costs were".

(c) Would the US Army's decision to reprocure be affected by the fact that CCC "guaranteed" performance of its obligations under the contract?

[437] Professor Cibinic in his evidence at trial and in his reports, Ex. 36 and Ex. 37, gave his opinion that if a need still existed for the vehicles, the contract officer would

follow FAR 49.402-6A, terminate for default and not for convenience. The witness was of the opinion that the decision would not be affected by any relationship between CCC and the US Army nor by CCC's guarantee. He reasoned that if the guarantee had such an effect, there would be no reason to include the default termination clause in the contract as a remedy for default. Another witness called by the Plaintiffs, Professor Alvin K. Rosenhan, confirmed in his evidence at trial and in his report, Ex. 54: p. 4, that, in his opinion, in that time frame, the US Army had a continuing need for the MACE type CRVs to replace aging vehicles and a program to put into place a single multi-purpose vehicle. Mr. Jackson Medley, a witness called by the Government Defendants, agreed that, in that time frame, the US Army had a continuing need for the MACE vehicle.

(d) What procedure would the US Army have followed in acquiring the supplies from another source? and

(e) If the reprocurement costs from another source exceeded the price of the CCC Prime Contract, what action would the US Army have taken?

[438] In his evidence at trial, as in Ex. 36 and Ex. 37, Professor Cibinic gave as his opinion that the US Army would have proceeded in accordance with FAR 49.402-6(c), purchased the specified goods from another contractor and would have charged the excess costs of reprocurement to the defaulting contractor when the reprocurement had been completed. As for "cutting a deal", R.V. Hession testified that in his experience, in case of sovereign governments, "there may be discussions on the

modalities for reprocurements but the cost obligations would stand". (Transcript: March 7, 2002: p. 17).

[439] Richard L. Moorhouse, the US attorney called by counsel for the Defendants to give opinion evidence regarding US Government contracts, defaults, terminations and reprocurements, stated that termination for default was not a probable result of CCC defaulting on the MACE contract. In Ex. 135, p. 1-2, Mr. Moorhouse states:

> "The subject Crash Rescue Vehicle ("CRV") contract between the Canadian Commercial Corporation ("CCC") and the United States Army, more likely than not, would not have been terminated for default, and that, even if such action had been taken, CCC had a significant opportunity to contest the termination for default successfully, in which case it would not have paid any reprocurement costs to the United States Government".

[440] Mr. Moorhouse gave three (3) reasons for his opinion:

Reason No. 1 – Mr. Moorhouse concluded that KS's insolvency was the result of the City of Winnipeg contract with KS. At trial, there was no such evidence. Mr. Moorhouse admitted that he knew nothing about that contract nor of its terms. Mr. Moorhouse's opinion was not supported by the evidence of other Government Defendants' witnesses. William Ames testified that he learned, by making telephone calls to KS suppliers in early October 1984, that KS was in financial trouble, was at least 120 days post due on its accounts and some suppliers of KS were prepared to deal with KS on a cash basis only. The December 7, 1984 financial viability evaluation of KS and Walter (as of June

30, 1984) by A. Ilchenko (Ex. 4: p. 481-82) substantiates the evidence of William Ames. Thus, KS's financial problems pre-dated the contract award in August 1984 and would have been apparent under reasonable due diligence. Mr. Moorhouse conceded in cross-examination that if CCC knew or should have known about KS's insolvency prior to the contract award, the delay would not have been excusable even under Mr. Moorhouse's theory of excusable delay.

[441] Counsel for the Plaintiffs submit that if CCC has no liability to USG as contended by Mr. Moorhouse, then as Professor Cibinic pointed out, the result of that statement is that CCC's subcontractor would be isolated from liability as well.

Reason No. 2 – Mr. Moorhouse stated that there were other potential alternatives for CCC if it had not put forward BSL. However, H.J. Cloutier, a Director General of CCC, in his June 17, 1985 letter to the US Army contract officer C. Dei Santi (Ex. 6: p. 340-341) stated that: "Their [BSL's] proposal has been examined extensively and CCC is convinced that this company has the technical and financial resources to complete the contract". On June 18, 1985, P.R. Smith, ADM of DSS, wrote to O.I. Matthews, Acting President of CCC, and stated, in part: "BSL is the only source we have that is considered capable of performing the contract…Although there is some risk you have in entering into contract with BSL, there is no other alternative at this late date as further delay would undoubtedly lead to termination by the US Army". (Ex. 6: p. 343-4). On June 18, 1985, H.J. Cloutier wrote a memorandum to the file (Ex. 6: p. 345) about his visit to General Motors of Canada to inquire whether GM was interested in the MACE contract. On cross-examination, when faced with the internal memorandum of

CCC/DSS, Mr. Moorhouse replied: “That does not ring true with me” (Transcript of R.L. Moorhouse: p. 147-148). On October 24, 1985, P.R. Smith, DSS, wrote to O.I. Matthews (CCC) and stated, in part: “Belgium Standard is the only company involved in this industry which has adequate funding to perform the contract”. (Ex. 6: p. 572).

Reason No. 3 – Given the bid pricing, if the contract had been reprocured, CCC would have had a good chance of challenging the reprocurement costs.

[442] In his original report, Ex. 131, Mr. Moorhouse claimed the DPSA had the force and effect of a “treaty” and it was his opinion that CCC would be successful in arguing that CCC could not be terminated by the US Army. However, in a response to a request to admit, the Government Defendants admitted that DPSA is not a “treaty”. Initially, the Government Defendants took the position that due to the relationship between U.S.A. and Canada, Canada had never been terminated for default. However, a computer search by counsel for the Plaintiffs reveals two (2) cases in the Armed Services Board of Contract Appeals (ASBCA), 20512 and 20067 where CCC had been terminated for default. (Ex. 1: p. 408-413).

[443] The following appears at the December 18, 2001 examination for discovery of Michel Fairfield at page 2332, Question 9620:

> By Mr. Taylor:
>
> Q. Are you going to be calling anyone from the US Government that the US Army wouldn’t have terminated CCC at the time?
>
> Mr. Dick: A. No.

[444] Insofar as Mr. Moorhouse and the Government Defendants assert that CCC had substantial grounds to argue that the KS/Walter default was “excusable” in the eyes of the USG, that theory is contradicted by CCC’s actions in terminating KS/Walter for default. K. Morgenroth, a former employee of Government Defendants and director of the LAV contract, testified that he was not aware of any understanding between the USG and CCC whereby CCC would be excused from reprocurement liability. He said CCC received no special treatment from TROSCOM and was treated like any other foreign national. Throughout the litigation, when the Plaintiffs sought production from CCC of its records relating to termination of contracts by USG, the Plaintiffs were met with a refusal and advised that such records were not kept and, in any event, would not be produced on the ground of “commercial confidentiality” (Ex. 40 and Ex. 42). To me, that is just a fancy way to stonewall.

[445] In my view, this is another instance where an adverse inference should be drawn against the Government Defendants for their failure to produce relevant documents.

[446] On March 7, 2002, the 53rd day of the trial, Mr. O.I. Matthews in his cross-examination, agreed that CCC had not discussed with BSL the fact that CCC had agreed to pay Walter an extra US $4,000 per vehicle because “it was not material”, “they were two different companies”. Counsel for the Plaintiffs objected to the anticipated use of the term “commercial confidentiality” by Mr. Matthews. Counsel for the Plaintiffs pointed out that the Government Defendants in paragraphs 59, 67, 100 and 141 of their Statement of Defence allege that they made full disclosure to the

Plaintiffs. Whatever the Government Defendants mean by “commercial confidentiality” is unknown and not pleaded as a defence. There was no cross-examination of R.V. Hession nor of Karl Morgenroth about that term, nothing about it in the SPM or any manual or directive that was produced at trial. During his evidence, P.R. Smith (DSS) stated that he did not tell BSL about KS’s bid problem because, as a matter of “commercial ethics”, commercial information about one supplier would not be disclosed to the other supplier.

[447] As far as I know, the topic did not resurface. I can say that “commercial confidentiality”, whatever the term may mean, has no application to this trial. In any event, in this case, the Government Defendants duty to disclose vital information takes precedence over any theory of “commercial confidentiality”.

[448] What opinion evidence should carry the day?

[449] Professor Cibinic is a renowned scholar, teacher, educator, writer in his chosen field of Government contracts and was an articulate, reliable, credible witness. He has “hands on” practical knowledge in that chosen field. He prepared his reports and gave his evidence in a very professional manner – “you ask for my expert opinion on the topic, here it is, let the chips falls where they may”. He has no links or ties to any of these litigants. He has experience as a professional witness and understands and appreciates what is expected by the Court of the professional witness. In my view, Mr. Moorhouse’s field and depth of learning are not as vast as Professor Cibinic’s. Moreover, it is troubling that Mr. Moorhouse has ties to the client who called him as a

professional witness. Since 1985, Mr. Moorhouse has been U.S. legal counsel to CCC in at least fourteen (14) U.S. cases and he testified that he saw CCC as a valuable client and a source for future work referrals. Mr. Moorhouse acknowledged that he had never before this case given testimony as an expert. Hopefully, it was only because this was his maiden voyage that Mr. Moorhouse strayed from the role and path of the expert witness and took on the role of the advocate when, on two occasions, he commented on the evidence of H.J. Cloutier by saying: “That does not ring true with me” (Transcript of evidence of witness, p. 147-148).

[450] In *Fellowes, McNeil v. Kansa General International Insurance Co.* (1998), 40 O.R. (3d) 456, 460 (O.C.G.D.) per E. Macdonald J.:

> Experts must not be permitted to become advocates. To do so would change or tamper with the essence of the role of the expert, which was developed to assist the court in matters which require a special knowledge or expertise beyond the knowledge of the court. . . .If I look to only two of the seven duties and responsibilities of the experts testifying in civil cases that are laid out in *The “Ikarian Reefer”*, [1993] 2 Lloyd’s Rep. 68 at p. 81, I have to conclude that this would not be a case for Mr. McInnis to assume the role of an expert. These duties are:
>
> (1) Expert evidence presented to the court should be, and should seen to be, the independent product of the experts uninfluenced as to the form or content by the exigencies of litigation.
>
> (2) An expert should provide independent assistance to the court by *objective, unbiased* opinion in relation to matters within his or her expertise. An expert witness should never assume the role of advocate.

[451] In *Interamerican Transport Systems Inc. v. Canadian Pacific Express & Transport Ltd.* (1995), O.J. No. 3644 (O.C.G.D.), Feldman J. said:

> ¶ 61 I also accept the submission of counsel that in weighing Mr. Gray's opinion evidence, the court must consider the fact that the defendant is a client of his from which he would like to receive more work. An expert witness is called to provide assistance to the court in understanding matters which are beyond the expertise of the trier of fact. Such a witness is not to be an advocate for one party, but an independent expert. Expert witnesses are of course paid a fee by the party calling them, which in itself may be considered to affect their independence. The court will examine the demeanor of an expert in the way the evidence is given, in particular whether the expert takes on the role of an advocate for one side, or remains objective, in weighing the evidence and attributing value to the opinion. If the expert does adopt the attitude of a neutral, then the fact that he is being paid or that the defendant is his client will cause little or no concern, but that will not be the case if he appears to lose his neutrality. In that case the value of his evidence can diminish significantly.

[452] In *Fenwick v. Parklane Nurseries Ltd.* (1996), 32 C.L.R. (2d) 25, 31, MacFarland J. said:

> [35] Courts traditionally afford expert witnesses a great deal of respect. This is so because these persons possess an expertise in a particular area of endeavour where lay persons require assistance. The hallmark of an expert witness is that he or she exercise an independent professional judgment in their assessment of the facts of a given case. Where there is any suggestion that a witness who is proffered as an expert has *not* that professional independence but has rather simply taken on the cause of the client who pays the bills, a court will be most reluctant to place great weight on the opinions of that expert.

[453] For the reasons set out above, it is my conclusion that the opinion evidence of Professor Cibinic is professional and reliable. I accept his opinions as to what the US Army would have done if CCC had not presented BSL as the third subcontractor/supplier and thereby staved off a default. I cannot accept the submissions

of counsel for the Government Defendants “that the court should feel comfortable in giving his [Mr. Moorhouse’s] evidence great weight”.

J. Collateral Contract and Disgorgement for Breach of Contract

[454] The Plaintiffs submit that in this case there was a collateral contract, a contract ancillary to the main subcontract between CCC and BSL. The question is: Was there any affirmation/warranty made by the Government Defendants prior to the main contract that was intended to be a warranty?

[455] In *Heilbut, Symons & Seal v. Buckleton*, [1911-13] All E.R. R.E.P. 83, 90 (H.L.), Lord Moulton said:

> He must show a warranty—i.e., a contract collateral to the main contract to take the shares, whereby the defendants in consideration of the plaintiff taking the shares promised that the company itself was a rubber company. The sole question in issue is whether there was any evidence that such a contract was made between the parties. It is evident, both on principle and on authority, that there may be a contract the consideration for which is the making of some other contract. “If you will make such and such a contract I will give you one hundred pounds,” is in every sense of the word a complete legal contract. It is collateral to the main contract, but each has an independent existence, and they do not differ in respect of their possessing to the full the character and status of a contract. But such collateral contracts must from their very nature be rare. The effect of a collateral contract such as that which I have instanced would be to increase the consideration of the main contract by £100, and the more natural and usual way of carrying this out would be by so modifying the main contract and not by executing a concurrent and collateral contract. Such collateral contracts, the sole effect of which is to vary or add to the terms of the principal contract, are, therefore, viewed with suspicion by the law. They must be proved strictly. Not only the terms of such contracts but the existence of an animus contrabendi on the part of all the parties to them must be clearly shown. Any laxity on these points would enable parties to escape from the full performance

> of the obligations of contracts unquestionably entered into by them and more especially would have the effect of lessening the authority of written contracts by making it possible to vary them by suggesting the existence of verbal collateral agreements relating to the same subject-matter.

[456] In *D. Bentley, A.T.C. v. Harold Smith*, [1965] 2 All E.R. 65, 67 (C.A.), Lord Denning M.R. (for the Court), said:

> Looking at the cases once more, as we have done so often, it seems to me that if a representation is made in the course of dealings for a contract for the very purpose of inducing the other party to act on it, and it actually induces him to act on it by entering into the contract, that is prima facie ground for inferring that the representation was intended as a warranty. It is not necessary to speak of it as being collateral. Suffice it that the representation was intended to be acted on and was in fact acted on. But the maker of the representation can rebut this inference if he can show that it really was an innocent misrepresentation, in that he was in fact innocent of fault in making it, and that it would not be reasonable in the circumstances for him to be bound by it.

[457] Earlier in these reasons, I have concluded that on May 28, 1985 at the CCC/BSL meetings convened by Pierre Comeau, he lied to the BSL representatives at the early and the later meeting that morning by stating: (1) that BSL's proposed price was too high and (2) that there was money (profit) in the MACE contract. When Mr. P. Comeau made those statements, Pierre Comeau and the others present from CCC/DSS knew the opposite to be true and that Mr. Comeau had lied about these matters. At that date, CCC had its back against the wall with no other potential suppliers in site. If CCC did not find a subcontractor acceptable to the USG that was capable of building the 362 MACE CRVs, CCC would face reprocurement costs of US $10M

minimum. This was a high stakes, “high noon” time. CCC desperately needed BSL to “bail them out”. Pierre Comeau’s false statements were intended to induce BSL to enter the CCC/BSL contract. They did. Without questioning what was stated by Mr. Comeau, “their government representative”, on the spot, W.C. Thomas agreed to lower the price per vehicle by US $2,000. The price reduction was confirmed in a letter, dated May 31, 1985, from W.C. Thomas to P. Comeau (Ex. 6: p. 290-291).

[458] It is my conclusion that the statements of P. Comeau on May 28, 1985, known by him and all those from CCC/DSS present, to be false, amounted to a warranty that induced BSL to enter into the contract.

[459] For many months prior to May 28, 1985, CCC/DSS had played Russian roulette with the MACE contract, and with KS and Walter by refusing to accept the reality of the financial insolvency of KS and Walter.

[460] In his article “Thinking about the State: Law Reform and the Crown in Canada”, (1987), 24 Osgoode Hall L.J. 379-404, David Cohen wrote at p. 398 that it may be dangerous to assume that “the bureaucracy is a benign entity simply fulfilling the wishes of its political or command masters. Other views are quite different. In these inactivist, independent bureaucracy shapes state policy and then actively implements that policy to achieve bureaucractically defined objects”.

[461] In his article, “A Theory of Administrative Law” (1990), 19 Journal of Legal Studies, 489 at 501, William Bishop wrote:

> The bureaucrat, often lacking any sharply defined or measurable goals, will make at least some decisions in his own interest, rather than in the interest of the public, as defined by law, that he has been hired to serve.

Remedy

[462] For breach of warranty or breach of contract, the normal remedy is compensatory damages in an amount of money that will, so far as possible, place the Plaintiff in the position the Plaintiff would have been if the contract had been performed.

[463] Here, the Plaintiffs submit that they are entitled, in the alternative, to claim profit secured by the party in breach of the contract.

[464] In *Attorney-General v. Blake*, [2000] H.L.J. No. 47, Lord Nicholls of Birkenhead, speaking for himself, Lord Goff and Lord Browne-Wilkinson said:

> ¶ 31 My conclusion is that there seems to be no reason, in principle, why the court must in all circumstances rule out an account of profits as a remedy for breach of contract. I prefer to avoid the unhappy expression 'restitutionary damages'. Remedies are the law's response to a wrong (or, more precisely, to a cause of action). When, exceptionally, a just response to a breach of contract so requires, the court should be able to grant the discretionary remedy of requiring a defendant to account to the plaintiff for the benefits he has received from his breach of contract. In the same way as a plaintiff's interest in performance of a contract may render it just and equitable for the court to make an order for specific performance or grant an injunction, so the plaintiff's interest in performance may make it just and equitable that the defendant should retain no benefit from his breach of contract.
>
> ¶ 33 The main argument against the availability of an account of profits as a remedy for breach of contract is that the circumstances where this remedy may be granted will be uncertain. This will have an unsettling effect on commercial contracts where certainty is important. I do not think these fears are well founded. I see no reason why, in

> practice, the availability of the remedy of an account of profits need disturb settled expectations in the commercial or consumer world. An account of profits will be appropriate only in exceptional circumstances. Normally the remedies of damages, specific performance and injunction, coupled with the characterization of some contractual obligations as fiduciary, will provide an adequate response to a breach of contract. It will be only in exceptional cases, where those remedies are inadequate, that any question of accounting for profits will arise. No fixed rules can be prescribed. The court will have regard to all the circumstances, including the subject matter of the contract, the purpose of the contractual provision which has been breached, the circumstances in which the breach occurred, the consequences of the breach and the circumstances in which relief is being sought. A useful general guide, although not exhaustive, is whether the plaintiff had a legitimate interest in preventing the defendant's profit-making activity and, hence, in depriving him of his profit.

Lord Steyn said:

> ¶ 49 Blake is a convicted traitor. From 1944 to 1961 he was a member of the intelligence services. In 1944 he was required to and did sign a contractual undertaking "not to divulge any official information gained by me as a result of my employment, either in the press or book form". This undertaking still binds Blake. In flagrant breach of the terms of the undertaking Blake published a book in September 1990 dealing in part with his period in the intelligence services.
>
> ¶52 My Lords, it has been held at first instance and in the Court of Appeal that Blake is not a fiduciary. This is not an issue before the House. But, as my noble and learned friend Lord Nicholls of Birkenhead has observed, the present case is closely analogous to that of fiduciaries: compare Reading v. Attorney General [1951] A.C. 507. If the information was still confidential, Blake would in my view have been liable as a fiduciary. That would be so despite the fact that he left the intelligence services many years ago. The distinctive feature of this case is, however, that Blake gave an undertaking not to divulge any information, confidential or otherwise, obtained by him during his work in the intelligence services. This obligation still applies to Blake. He was, therefore in regard to all information obtained by him in the intelligence services, confidential or not, in a very similar position to a fiduciary. The reason of the rule applying to fiduciaries applies to him. Secondly, I bear in mind that the enduring strength of the common law is that it has been developed on a case-by-case basis by judges for

> whom the attainment of practical justice was a major objective of their work. It is still one of the major moulding forces of judicial decision-making. These observations are almost banal: the public would be astonished if it was thought that judges did not conceive it as their prime duty to do practical justice whenever possible. A recent example of this process at work is White v. Jones [1995] 2 A.C. 207 where by a majority the House of Lords held that a solicitor who caused loss to a third party by negligence in the preparation of a will is liable in damages. Subordinating conceptual difficulties to the needs of practical justice a majority, and notably Lord Goff of Chieveley, at pp. 259G-260H, upheld the claim. For my part practical justice strongly militates in favour of granting an order for disgorgement of profits against Blake. The decision of the United States Supreme Court in Snepp v. United States (1980) 444 U.S. 507 is instructive. On very similar facts the Supreme Court imposed a constructive trust on the intelligence officer's profits. Our law is also mature enough to provide a remedy in such a case but does so by the route of the exceptional recognition of a claim for disgorgement of profits against the contract breaker. In my view therefore there is a valid claim vesting in the Attorney-General against Blake for disgorgement of his gain.

See also: *Esso Petroleum Co. Ltd. v. Niad*, [2001] E.W.J. No. 571-5 (H.C.J.) at [65] and [69].

[465] By lying to the BSL personnel on May 28, 1985, the CCC/DSS personnel attempted to buy themselves and the Government Defendants immunity from the consequences of the mishandling, over several months, of the MACE contract.

[466] It was an attempt by CCC/DSS personnel to dump their problems onto the unsuspecting personnel of BSL on the theory – "better them than us". In my view, it was shocking behaviour on the part of the Federal civil servants, behaviour that would cause the reasonably informed person to lose confidence in a Crown corporation and a department of the Federal Government. In *Blake*, the wrongdoer was long gone from

Government when the impugned book was published. Here, the wrongdoers were on the job and some remained for years; a few remain to this day.

[467] It is my view that the facts, as found, provide a basis and a justification for granting the remedy of disgorgement. Moreover, in this case, the remedy of damages is not possible because, in 1996, the Plaintiffs made a proposal to its creditors. The proposal was accepted and Amertek's debts were absolved in accordance with the proposal. The Plaintiffs shall have an order that they are entitled to disgorgement of the benefits acquired by CCC through its breach of the collateral contract with the Plaintiffs.

K. Unjust Enrichment

[468] Counsel for the Plaintiffs submit that their clients' claim has been established based on:

(iv) waiver of tort and/or

(v) breach of fiduciary obligation and/or

(vi) disgorgement for breach of contract

and, therefore, it is unnecessary to prove their claim on the basis of unjust enrichment. However, counsel for the Plaintiffs, out of an abundance of caution, submit that unjust enrichment has been proved in this case.

[469] In *Pettkus v. Becker*, [1980] 2 S.C.R. 834, 848, Dickson J. said:

> . . . there are three requirements to be satisfied before an unjust enrichment can be said to exist: an enrichment, corresponding deprivation and absence of any juristic reason for the enrichment. This approach, it seems to me, is supported by general principles of equity that have been fashioned by the courts for centuries…..

[470] In the American Law Institute, "Restatement of the Law of Restitution", 1937, s. 1: "A person who has been unjustly enriched at the expense of another is required to make restitution to the other".

[471] In *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762, McLachlin J. said:

p. 790:

> To date, the cases have recognized two types of benefit. The most common case involves the positive conferral of a benefit upon the defendant, for example the payment of money. But a benefit may also be 'negative' in a sense that the benefit conferred upon the defendant is that he or she was spared an expense which he or she would have been required to undertake, i.e., the discharge of a legal liability.

p. 795: …….

> An "incontrovertible benefit" is an unquestionable benefit, a benefit which is demonstrably apparent and not subject to debate and conjecture. Where the benefit is not clear and manifest, it would be wrong to make the defendant pay, since he or she might well have preferred to decline the benefit if given the choice.

p. 796: …….

> It is thus apparent that any relaxation on the traditional requirement of discharge of legal obligation which may be effected through the concept of "incontrovertible benefit" is limited to situations where it is clear on the facts (on a balance of probabilities) that had the plaintiff not paid, the defendant would have done so. Otherwise, the benefit is not incontrovertible.

[472] I find that the Plaintiffs have established, on a balance of probabilities, that:

(1) CCC was enriched or received a negative/saved expense – the benefit bestowed by Amertek was the release of CCC from its reprocurement liability to the USG. The Government Defendants obtained this immunity through their misconduct, deceit. The Government Defendants were saved an inevitable expense.

(2) The Plaintiff, Amertek, discharged the Government Defendants legal liability to USG. I accept Professor Cibinic's opinion that the US Army "almost certainly, would have terminated the contract for default" (Ex. 36: p. 9). I also accept the opinion of Professor Cibinic that after the termination for default, with a need for the CRVs still existing, the US Army "almost certainly, would have acquired the supplies from another source and would have charged any excess costs incurred to CCC" (Ex. 36: p. 15).

(3) CCC, but for Amertek's conferral of value on the USG, would have been subject to a reprocurement liability of US $19,767,000.00.

(4) There is no just juristic reason for the transfer of the benefit to CCC; the Government Defendants cannot rely on the subcontract as "juristic reason" justifying the enrichment because it was induced by fraud/deceit and the legal maxim *fraus omnia corrumpit* (fraud invalidates all) comes into play.

[473] I do not accept Mr. Moorhouse's evidence that CCC had any "special status" or had any "immunity" from termination for default and the ensuing reprocurement costs.

[474] In summary, I find that the Plaintiffs have proved that there has been unjust enrichment of CCC at the expense of Amertek. The Government Defendants are required to make restitution to Amertek.

L. Abuse of Process

[475] The tort of abuse of process is made out where a legal process, not itself without foundation, has been used for an extraneous purpose. Fleming, J.G.: "The Law of Torts", 9th ed. (Sydney: The Law Book Company 1998) at 687:

> ….The gist of this tort lies not in the wrongful procurement of legal process or the wrongful launching of criminal proceedings, but in the misuse of process, no matter how properly obtained, predominantly for any purpose other than that which it was designed to serve.

[476] In *Dimples Diapers Inc. v. Paperboard Industries Corp.* (1992), 15 C.B.R. (3d) 204, 219 (O.C.G.D.), Farley J. said:

> [41] ….The tort of abuse consists in the misuse of a legal process for any purpose other than that which it was designed to serve. It is immaterial in establishing abuse of process that the process was properly commenced or founded by the defendants and it does not matter that the process be concluded in the instigator's favour. The improper purpose is the gravamen of liability.

[477] In their text, Bankruptcy and Insolvency Law of Canada, 3rd, ed., Vol. I, (Toronto: Carswell, 1989) at p. 1-4, the authors, L.W. Houlden and G.B. Morawetz state:

> (b) The Act was passed to provide for the orderly and fair distribution of the property of a bankrupt among his creditors on a *pari passu* basis.

[478] On December 2, 1996, Amertek made a second proposal to creditors under the *Bankruptcy and Insolvency Act*. The proposal listed CCC as a creditor in the amount of Cdn. $1.3M.

[479] On December 9, 1996, Paul E. McKenna, a senior employee of CCC, after reviewing Amertek's proposal, sent an e-mail to Douglas Patriquin, CCC's President, J.P. Cloutier, CCC's in-house legal counsel and to others at CCC/DSS stating:

> Voting against the proposal as it stands, will see Amertek Inc. being deemed to have made an assignment in Bankruptcy retroactive to the date of the proposal, to December 1996. Amertek would be legally dead. As I see it here, this is our chance to sink the suckers in bankruptcy. They are out on the plank, let's keep them walking. (Ex. 10: p. 312). (See Statement of Claim, paras. 152 & 153 (admitted)).

[480] P.E. McKenna amended the creditor's claim of CCC by including the amount paid by CCC for the US Navy Retrofit program, a claim Amertek denied because it was unilaterally agreed to by CCC with the US Navy without any agreement from or by Amertek. The new total claim by CCC was Cdn. $1,705,403.48.

[481] Prior to the meeting of creditors on December 13, 1996, P.E. McKenna, on behalf of CCC, told Amertek that CCC would vote against Amertek's proposal unless both Amertek and Amerkon signed a full release in favour of CCC and CDNG with respect to this action. Amertek and Amerkon refused.

[482] I find from the "suckers e-mail" and P.E. McKenna's evidence on cross-examination that CCC's purpose in voting against Amertek's proposal was to render Amertek bankrupt, "legally dead", so that this lawsuit would end. I do not accept the evidence of Douglas Patriquin that CCC voted against the proposal because he and CCC could not, in good conscience, vote for a proposal that offered such a low recovery. If the proposal failed, the creditors, including CCC, would have received zero.

[483] The meeting of creditors was held on December 13, 1996. P.E. McKenna was present and was named an inspector on the instructions of D. Patriquin, P.E. McKenna, on behalf of CCC, voted against the proposal. All other creditors voted “for” the proposal and Amertek’s proposal succeeded.

[484] On December 28, 1996, Killeen J., at London, Ontario, approved Amertek’s proposal. No one from CCC attended to oppose the granting of the order. CCC did not appeal that order. Amertek discharged all its obligations under the proposal. CCC received and cashed a cheque, received from the Trustee, being CCC’s pro rata share, in the amount of $31,298.21.

[485] In March 1998, fifteen (15) months after the meeting of creditors and the order of Killeen J., on the instructions of D. Patriquin, counsel for CCC brought a motion before Killeen J. seeking an order setting aside the order of December 28, 1996. D. Patriquin claimed in his evidence that he authorized the motion “to validate the counterclaim”. However, the Notice of Motion filed on the motion (Ex. 91A) shows that such relief was not sought. The basis of the motion was a claim by CCC that the claim of Chrislou, a creditor, was invalid and that there was fraud on the part of Amertek. On May 14, 1998, Killeen J. dismissed CCC’s motion (Ex. 93). On June 7, 1998, Killeen J. awarded costs against CCC on a solicitor/client scale and said, in part: “The Application strikes me as an after the fact and totally unwise attempt to set aside an order without material which had a semblance of justification for the relief sought”.

[486] There is no doubt in my mind that in 1996, CCC, D. Patriquin, P.E. McKenna and many other people at CCC wanted to render Amertek “legally dead” by using the weight of the CCC vote at the meeting of creditors and kill the proposal. However, in my view, that did not amount to an abuse of process because CCC was a bona fide creditor, it had not initiated any proceedings against Amertek nor conspired with others about Amertek’s bankruptcy. CCC was presented with a proposal and was entitled to vote as it chose. To decide otherwise would be to dictate to CCC how it should vote on a proposal.

[487] In *Laser Works Computer Services Inc. (R.E.)*, [1998] N.S.J. No. 160, (N.S.C.A.), Freeman J.A. (for the Court) said at para. [18]:

> While creditors can certainly vote in their own best interest, they may not collude with a third party to place a debtor in bankruptcy for an improper purpose. Such activity lacks commercial morality and offends the integrity of the bankruptcy process.

[488] However, in my view, the motion brought before Killeen J. some fifteen (15) months after the acceptance by the creditors of the proposal does amount to an abuse of process. This move was initiated and authorized by Douglas Patriquin, a person with a Ph.D. in Economics. In the words of counsel for the Plaintiffs, as found in their written submissions, Mr. Patriquin was not a fan of Amertek:

> Furthermore, Mr. Patriquin, who exercised a pervasive control over every attempt by Amertek to obtain financial compensation first through the Ministerial review, then the Army and Navy ASBCA appeals, and lastly, relief through the proposal to its creditors, had as his unwavering purpose,

> the silencing or elimination of Amertek. (Plaintiffs' Statement of Legal Principles: Tab 8: p. 3).

[489] It is my conclusion that the motion brought by CCC in 1998 did amount to an abuse of process because it was based on an unsubstantiated allegation of fraud. The motion's only purpose was to use the BIA to terminate Amertek's existence and this lawsuit against CCC. The 1998 motion brought by CCC was born in abuse and has no claim to legitimacy.

M. Abuse of Public Power, Misfeasance in Public Office

[490] In *The Estate of Manish Odhavji et al. v. Woodhouse et al.* (2000), 52 O.R. (3d) 181, the majority of the Court of Appeal for Ontario said:

> [15] It is clear that the tort of misfeasance in public office has been recognized in Canada since *Roncarelli v. Duplessis*, [1959] S.C.R. 121, 16 D.L.R. (2d) 689, in which the Supreme Court was not required to consider the elements of the tort.

[491] In Three Rivers District Council v. Bank of England (No. 3), [2000] 3 All E.R. 1, 7 (H.L.), Lord Steyn said:

> The rationale of the tort is that in a legal system based on the rule of law executive or administrative power 'may be exercised only for the public good' and not for ulterior and improper purposes.

[492] In this case, the Plaintiffs allege that misfeasance in public office occurred when the Government Defendants breached their statutory duty under the CCC Act by

failing to "assist" BSL and/or Amertek and for the abuse of power under the Letter Agreement (DPSA). The Plaintiffs also allege that the QA issues and the Deloitte & Touche review fall under this heading.

[493] In *Odhavji* (supra), the majority said:

> [30] In the passage from the reasons of Day J. which I have quoted in para. 16, he found that Woodhouse and Gerrits breached *duties* imposed by s. 113(9) and s. 42 of the Act. It follows that he erred in equating the obligation of police officers to co-operate with an investigation conducted by the S.I.U. found in s. 113(9) of the Act with the exercise of an executive or administrative power. In doing so, he failed to recognize that the tort of misfeasance in public office responds only to the abusive exercise of legislative or administrative power. *Roncarelli* and *Francoeur* are but two of the many authorities which underscore that the defining feature of the tort of misfeasance in public office is the exercise of legislative or administrative powers by their recipients for purposes incompatible with those envisaged by the legislation under which they derive such powers. In short, in allegedly failing to co-operate with the S.I.U. investigation, Woodhouse and Gerrits did not misuse a public office through the abuse of a statutory or prerogative power.
>
> …….
>
> [26] …The defining element of the tort apparent from the case law as it developed was misfeasance in the exercise of the *powers* held by a public officer. The tort is constituted by a public officer doing, or failing to do, an act which is an abuse of the powers adherent to his or her office, and which results in damage to another. Thus, the central focus of the tort is a public officer who is invested with a power to act for the benefit of the public and who abuses the power by exceeding it, failing to exercise it, or, in some cases, purporting to exercise a power which he or she does not hold.

[494] In my view, the Plaintiffs cannot succeed on a claim under this heading because the CCC Act does not impose any duty upon CCC. The Act creates the

corporate entity CCC and grants it the powers of a corporation in order that it may perform its purposes. However, there is no statutory, regulatory or administrative duties conferred on CCC nor upon its officers.

[495] It is my view that this claim fails because, to quote from *Odhavji*:

> [24] In the language of the law Lords in *Three Rivers*, they were not the recipients of an executive or administrative power by which they were required to make decisions affecting members of the public. They were not in the position of a public official to whom a power is granted for a public purpose who exercised the power for his or her own private purposes.

N. *Res Judicata* and the Government Defendants' Counterclaim

[496] In its counterclaim, the Government Defendants pleaded

> 177. The Defendant, CCC, claims as against Amertek:
>
> (a) the sum of $1,705,403.48 (Cdn.) pursuant to the terms of the Supplemental Agreement including legal costs incurred in pursuing the ASBCA claims as of December 12, 1996;
>
> (b) the amount in Canadian currency sufficient to purchase the sum of $63,000.00 (U.S.), in accordance with section 121 of the *Courts of Justice Act*, for legal fees incurred on Amertek's behalf, after December 12, 1996, in pursuing the ASBCA claims;
>
> (c) prejudgment and postjudgment interests on the above amounts in accordance with the terms of the relevant agreements or, alternatively, in accordance with the provisions of the *Financial Administration Act*, R.S. F-10, or alternatively the *Courts of Justice Act*;
>
> (d) the cost of this Counterclaim on a solicitor and client scale;

[497] In their “Amended Reply and Defence to Counterclaim”, the Plaintiffs have pleaded:

> 15. In Amertek’s proposal to its creditors in December 1996, CCC filed a written proof of claim dated December 12, 1996 in the amount of $1,705,403.48 with Amertek’s Trustee in Bankruptcy, Ernst & Young Inc. of London, Ontario.
>
> 16. The amount claimed by CCC in paragraph 173(a) of the Crown defendants’ Amended Statement of Defence and Counterclaim was included in CCC’s proof of claim.
>
> 17. The amount claimed by CCC in paragraph 173(b) of the Crown defendants’ Amended Statement of Defence and Counterclaim was not included in CCC’s proof of claim.
>
> 18. An officer of CCC acted as an inspector with respect to Amertek’s proposal.
>
> 19. By Order dated December 30, 1996 Amertek’s proposal was approved by the Honourable Mr. Justice Killeen of what is now the Ontario Superior Court of Justice.
>
> 20. Following the Order of Mr. Justice Killeen the appropriate dividend was paid to each of Amertek’s creditors, including CCC, which dividend was accepted by CCC.
>
> 21. Accordingly, any and all claims that CCC may have possessed against Amertek related to the amounts described in paragraph 173 of the Crown defendants’ Amended Statement of Defence and Counterclaim were fully extinguished and released.
>
> 22. Alternatively, if CCC was allowed the setoff, as pleaded, CCC would be obtaining an unlawful and unfair preference over Amertek’s other creditors. In the further alternative, Amertek pleads that CCC’s improper conduct, as pleaded in the Amended Fresh Statement of Claim, disentitles CCC to the equitable remedy of setoff.

[498] The Government Defendants claimed $1,705,348.00 in their creditor's claim filed at the time of Amertek's proposal in December 1996. This figure included the disputed $400,000.00 for the US Navy Retrofit.

[499] On December 13, 1996, Amertek's proposal to its creditors was accepted following a vote of the creditors pursuant to the BIA. On December 28, 1996, Killeen J. approved the proposal. Amertek carried out all its duties and obligations under the proposal. CCC received and cashed its pro rata share cheque for $31,298.21. On May 14, 1998, Killeen J. refused to set aside his December 28, 1996 order. On June 7, 1998, Killeen J. awarded Amertek solicitor and client costs because the Government Defendants' motion alleging fraud was "without material which had a semblance of justification for the relief sought".

[500] In my view, the Plaintiffs have proved, on a balance of probabilities, "cause of action estoppel" with regard to the Government Defendants counterclaim.

[501] The earlier determination by Killeen J. is conclusive. CCC is attempting to raise, in this case, the same arguments it raised or could have raised at the time of Amertek's 1996 proposal. CCC's counterclaim in this action merged in CCC's 1996 approved proposal. Thereafter, it ceased to be a viable claim. It cannot be recycled.

[502] Even if the Government Defendants have an equitable relief claim regarding their counterclaim, which I do not find to be so, the Government Defendants have squandered those equitable rights by coming to Court without the prerequisite "clean hands".

[503] The counterclaim is dismissed.

O. Punitive Damages

[504] The Plaintiffs' Amended Fresh Amended Statement of Claim states:

(i) Amertek Inc. claims $100M of punitive damages

(ii) The remaining Plaintiffs, as a group, claim $2M of punitive damages.

[505] In discussing the availability of punitive damages in the United Kingdom, in *Rookes v. Barnard*, [1964] 1 All E.R. 367 (H.L.), Lord Devlin said:

> The first category is oppressive, arbitrary or unconstitutional action by the servants of the government. ….In the case of the government it is different, for the servants of the government are also the servants of the people and the use of their power must always be subordinate to their duty of service.

[506] In *Walker v. CFTO* (1987), 59 O.R. (2d) 102, 120, Robins J.A. said:

> Exemplary damages bear no relation to what the plaintiff ought to receive as compensation. They form a separate and distinct head of damage….Exemplary damages have been characterized as 'fictional, or judicial damages, designed to indicate the displeasure of the court, whether judge or jury, at the heinousness of the defendant's conduct' (Fridman, op. cit., p. 379). They are intended to serve the societal purpose of punishing the wrongdoer and deterring him and others from similar conduct in the future. For all practical purposes, they constitute a fine for conduct deemed worthy of punishment and as such provide a windfall for the plaintiff.

[507] In *Whiten v. Pilot Insurance Company,* [2002] 1 S.C.R. 595, Binnie J., for six (6) of the seven (7) judge court said:

> [36] Punitive damages are awarded against a defendant in exceptional cases for "malicious oppressive and high-handed" misconduct that "offends the court's sense of decency": Hill v. Church of Scientology of Toronto, [1995] 2 S.C.R. 1130 at para. 196. The test thus limits the award to misconduct that represents a marked departure from ordinary standards of decent behaviour. Because their objective is to punish the defendant rather than compensate a plaintiff (whose just compensation will already have been assessed), punitive damages straddle the frontier between civil law (compensation) and criminal law (punishment).
>
> . . . .
>
> [67] First, the attempt to limit punitive damages by "categories" does not work and was rightly rejected in Canada in Vorvis [1989] 1 S.C.R. 1085] supra, at pp. 1104-6. The control mechanism lies not in restricting the category of case but in rationally determining circumstances that warrant the addition of punishment to compensation in a civil action. It is in the nature of the remedy that punitive damages will largely be restricted to intentional torts, as in Hill, supra, or breach of fiduciary duty as in M. (K.) v. M. (H.), [1992] 3 S.C.R. 6, but Vorvis itself affirmed the availability of punitive damages in the exceptional case in contract.
>
> . . . .
>
> [74] Eighth, the governing rule for quantum is proportionality. The overall award, that is to say compensatory damages plus punitive damages plus any other punishment related to the same misconduct, should be rationally related to the objectives for which the punitive damages are awarded (retribution, deterrence and denunciation). Thus there is broad support for the "if, but only if" test formulated, as mentioned, in Rookes, supra, and affirmed here in Hill, supra.
>
> …….
>
> [81] Second, in Royal Bank of Canada v. W. Got & Associates Electric Ltd., [1999] 3 S.C.R. 408, at para. 26, this Court, referring to McIntyre J.'s holding in Vorvis, said "the circumstances that would justify punitive damages for breach of contract in the absence of actions also constituting a tort are rare" (emphasis added). Rare they

may be, but the clear message is that such cases do exist. The Court has thus confirmed that punitive damages can be awarded in the absence of an accompanying tort.

…….

[94] . . . (1) Punitive damages are very much the exception rather than the rule, (2) imposed only if there has been high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour. (3) Where they are awarded, punitive damages should be assessed in an amount reasonably proportionate to such factors as the harm caused, the degree of the misconduct, the relative vulnerability of the plaintiff and any advantage or profit gained by the defendant, (4) having regard to any other fines or penalties suffered by the defendant for the misconduct in question. (5) Punitive damages are generally given only where the misconduct would otherwise be unpunished or where other penalties are or are likely to be inadequate to achieve the objectives of retribution, deterrence and denunciation. (6) Their purpose is not to compensate the plaintiff, but (7) to give a defendant his or her just dessert (retribution), to deter the defendant and others from similar misconduct in the future (deterrence), and to mark the community's collective condemnation (denunciation) of what has happened. (8) Punitive damages are awarded only where compensatory damages, which to some extent are punitive, are insufficient to accomplish these objectives, and (9) they are given in an amount that is no greater than necessary to rationally accomplish their purpose. (10) While normally the state would be the recipient of any fine or penalty for misconduct, the plaintiff will keep punitive damages as a "windfall" in addition to compensatory damages. (11) Judges and juries in our system have usually found that moderate awards of punitive damages, which inevitably carry a stigma in the broader community, are generally sufficient.

…….

[96] The trial judge should keep in mind that the standard of appellate review applicable to punitive damages ultimately awarded, is that a reasonable jury, properly instructed, could have concluded that an award in that amount, and no less, was rationally required to punish the defendant's misconduct, as discussed below.

…….

[112] The more reprehensible the conduct, the higher the *rational* limits to the potential award. The need for denunciation is aggravated where, as in this case, the conduct is persisted in over a lengthy period of time (two years to trial) without any rational justification, and despite the defendant's awareness of the hardship it knew it was inflicting (indeed, the respondent anticipated that the greater the hardship to the appellant, the lower the settlement she would ultimately be forced to accept).

[113] The level of blameworthiness may be influenced by many factors, but some of the factors noted in a selection of Canadian cases include:

(1) whether the misconduct was planned and deliberate. . .

(2) the intent and motive of the defendant…

(3) whether the defendant persisted in the outrageous conduct over a lengthy period of time…

. . .

(5) the defendant's awareness that what he or she was doing was wrong…

(6) whether the defendant profited from its misconduct….

…….

[120] Deterrence is an important justification for punitive damages. It would play an even greater role in this case if there had been evidence that what happened on this file were typical of Pilot's conduct toward policyholders. There was no such evidence. The deterrence factor is still important, however, because the egregious misconduct of middle management was known at the time to top management, who took no corrective action.

…….

[123] …The key point is that punitive damages are awarded "if, but only if" all other penalties have been taken into account and found to be inadequate to accomplish the objectives of retribution, deterrence and denunciation.

[508] In the “Conclusion” portion of the “Plaintiffs’ Written Submissions” [evidence], comprising one hundred and twenty-seven (127) pages and submitted in June 2002, counsel for the Plaintiffs conclude in much the same vein as they did in their “Opening Statement”, submitted in February 2002. I reproduce the “Conclusion” (p. 125) from those June 20, 2002 written submissions because it succinctly sets out the words and the conduct of the Government Defendants which qualify the Plaintiffs for an award of punitive damages.

> Conclusion
>
> We submit that the evidence establishes the government defendants engaged in a long course of deception and wrongdoing towards the Plaintiffs and the US Government.
>
> This misconduct began in 1984 when the government defendants endorsed the bid of a Canadian subcontractor to the US Army contract when the government defendants knew the subcontractor was not financially capable. This caused the US Army to award a contract to CCC, which would otherwise have gone to an American company.
>
> CCC continued to mislead the US Army by hiding facts concerning King Seagrave’s insolvency and receivership from the US Army and in proposing Walter as a substitute subcontractor when the Canadian government wouldn’t award a much smaller contract for similar vehicles to Walter because of its poor financial position.
>
> The government defendants continued to deceive the US Government when it introduced Belgium Standard as its proposed third subcontractor and represented to the US Army that Belgium Standard was an experienced builder of trucks and was technically and financially capable of performing the contract.
>
> The government defendants also deceived Belgium Standard by their failure to disclose important information in their possession about:
>
> (a) the flawed contract price;
>
> (b) Mr. McNeilly’s role in preparing it;

(c) Amertek's lack of capability;

(d) the conclusions that Amertek was not recommended; and

(e) the government's agreement to pay a price increase to Walter.

This deception was compounded by the government defendants' misstatements to Amertek that the contract was profitable, that Amertek's bid price was too high and that Amertek couldn't do the contract without Mr. McNeilly.

These statements and failures to disclose relevant information led BSL to enter into a subcontract which it believed was profitable and which it believed it could perform on price and on time. This deceit enabled the government defendants to avoid a larger reprocurement liability to the US government.

When costs overruns on the contract were discovered by Amertek, the government defendants refused to respond to Amertek's reasonable requests for financial assistance and stopped payment of progress claims. Thereafter the government defendants deceived the doctors into investing over $2M to keep Amertek going so that Amertek could complete the CCC's obligations under the US Army contract and a subsequent contract for 118 trucks for the US Navy. CCC was still on the hook for reprocurement liability to the US government should either of these contracts be terminated for default.

The government defendants also deceived Amertek by failing to disclose its "experiment" in its QA methodology imposed on Amertek.

When a ministerial inquiry was struck to enquire into the conduct of CCC in connection with the US Army contract, the government defendants mislead Amertek regarding the lack of independence of Deloitte and CCC's role in reviewing and amending Deloitte's draft report. CCC subverted the enquiry. It was a white wash.

When Amertek was forced to make a second proposal to its creditors, the government defendants attempted twice to bankrupt Amertek in order to end this litigation.

One must ask why they went to such extraordinary lengths to destroy Amertek and render it legally dead if they had nothing to hide and had done nothing wrong.

In the face of such adversity, it is miraculous that Amertek has survived. Unfortunately, in the process, the only business that remains

> is the Shu-Pak refuse garbage truck body business which operates on a much diminished scale. Approximately 150 employees lost their jobs in this carnage.
>
> How many other Canadian companies have been destroyed by the government defendants and never had the where with all to put their stories before the Court?
>
> The government defendants have defended this action vigorously for almost six years and believe they have done nothing wrong. Indeed, their defence that they disclosed all material facts to BSL before the BSL/CCC subcontract was signed was plainly false as admitted by the government defendants on their examination for discovery and Matthews in his evidence.
>
> Deceiving Canadian companies, Canadian citizens, the US Government and this Court IS wrong.
>
> It is our respectful submission that no other Canadian company and its investors should be suckered and then preyed upon like the Plaintiffs as they were in this case by their own government.

[509] In this case, the deceit and lying of the civil servants and the Crown corporation employees began during the CCC/KS/Walter period. It came into full bloom at the May 28, 1985 meetings convened by Mr. Pierre Comeau. The lies of that day permeated and poisoned everything that took place thereafter between the Plaintiffs and the Government Defendants. The antipathy of the Government Defendants and their officers, servants, agents and employees towards the Plaintiffs was subliminal at first, but it burst onto the screen when the existence of this lawsuit became known to the Government Defendants.

[510] It is not often that one finds a spontaneous, contemporaneous, type written acknowledgement/blue print of the opponent. In my view, that is what the December 9, 1996 e-mail of Paul E. McKenna has provided. Lest we forget the e-mail

typed by Mr. McKenna of CCC and forwarded to, inter alia, J.P. Cloutier, in-house general counsel at CCC/DSS, the COO of CCC, Douglas Patriquin and Michel Fairfield of CCC, it states:

> Voting against the proposal as it stands, will see Amertek Inc. being deemed to have made an assignment in Bankruptcy retroactive to the date of the proposal, 2 December 1996. Amertek would be legally dead.
>
> As I see it here, this is our chance to sink the suckers in the bankruptcy. They are out on the plank, lets keep them walking. (Ex. 10: p. 312).

[511] It is interesting to note what Jean-Pierre, in-house counsel at CCC, said in his e-mail on December 9, 1996, some four and one half hours later: “Priority A for us to deal with this new development [Amertek’s proposal under BIA]. We can easily become the bad guys in this whole mess”. (Ex. 10: p. 314).

[512] This demonstrates to me that on December 9, 1996, at CCC, there was a deeply rooted anti-Amertek culture that permeated the management of CCC. Mr. J.P. Cloutier should have realized that CCC were the “bad guys” in this whole mess and had been for some years before December 9, 1996.

[513] Over the years, there has never been the slightest acknowledgement by CCC/DSS that they did not treat the Plaintiffs according to the “Golden Rule”. Indeed, counsel for the Government Defendants stated in their written “Legal Submissions” as follows:

> Although the Plaintiffs herein have raised numerous spurious allegations against the Crown Defendants, an examination of the evidence clearly demonstrates that there is no conduct which can

> properly be called “egregious”, “oppressive”, “high-handed”, “reprehensible” or any of the other vituperative adjectives the courts have utilized to express their outrage over a defendant’s misconduct. Instead, what the evidence shows is that the actions of the Crown Defendants were undertaken by public servants who were sincere and dedicated to the performance of their duties.
>
> (Legal Submissions of the Defendants p. 73; [208])

[514] If, in the eyes and the hearts of the Government Defendants, the actions chronicled in these reasons constitute “sincere and dedicated” performance of duties by public servants, the conduct which spawned this lawsuit will continue unabated unless the person at the helm changes or is changed.

[515] In *Whiten, supra,* Binnie J. said:

> [127] ….There is no doubt at all that evaluation of outrageous conduct in terms of dollars and cents is a difficult and imprecise task, but so is evaluating the worth of a cracked skull, a lost business opportunity or a shattered reputation. Yet all these things are done every day in the courts…

[516] In making an award of punitive damages, I am conscious that:

> [123] ….The key point is that punitive damages are awarded “if but only if” all other penalties have been taken into account and found to be inadequate to accomplish the objective of retribution, deterrence and denunciation.
>
> …….
>
> [112] The more reprehensible the conduct, the higher the *rational* limits to the potential award. The need for denunciation is aggravated where, as in this case, the conduct is persistent in over a lengthy period of time (2 years to trial) without any rational justification and despite the defendant’s awareness of the hardship it knew it was inflicting….

…….

> [107] ….The test is whether a reasonable jury, properly instructed, could have concluded that an award in that amount, and no less, was rationally required to punish the defendant's misconduct.

[517] In my view, the following award for punitive damages, and nothing less, is rationally required to punish the Defendants' misconduct:

(1) to Amertek: $500,000.

(2) to the remaining Plaintiffs: $100,000.

P. Compound Interest

[518] In their Amended Fresh Amended Statement of Claim, para. 1 & 2, the Plaintiffs claim "compound interest or, in the alternative, pre-judgment interest in accordance with the *Courts of Justice Act*, R.S.O. 1990, c. 43, as amended".

[519] In *Bank of America Canada v. Mutual Trust Co.*, [2002] 2 S.C.R. 601, Major J., for a unanimous full court, said:

> [52] The court's common law power to award damages flows from the application of contract law. In addition, ss. 128(4)(g) and 129(5) CJA, provide statutory authority to award compound pre-judgment and post-judgment interest according to this common law power. The court also has an equitable power to award compound interest, as has traditionally been done in cases of, inter alia, wrongful retention of funds and s. 129(5) CJA provides statutory authority to award compound post-judgment interest according to this equitable power.

……..

> [55] An award of compound pre- and post-judgment interest will generally be limited to breach of contract cases where there is evidence that the parties agreed, knew, or should have known, that the money which is the subject of the dispute would bear compound interest as damages. It may be awarded as consequential damages in other cases but there would be the usual requirement of proving that damage component.

[520] There is no evidence in this case that "the parties agreed, knew, or should have known, that the money which is the subject matter of the dispute would bear compound interest as damages".

[521] Accordingly, I do not allow compound pre-judgment interest or compound post-judgment interest. The Government Defendants shall pay simple pre-judgment interest and simple post-judgment interest.

VII. CCC's Reprocurement Liability

[522] Earlier in these reasons, I set out why I accept the expert opinion of Dr. John Cibinic Jr. in preference to that of R.L. Moorhouse that the US Army, if CCC had defaulted, would have acted in accordance with FAR 49.402-6(c). Professor Cibinic stated that the US Army would have purchased the still needed goods from another contractor and charged the excess costs of reprocurement to the defaulting contractor when the reprocurement contract was completed. Professor Rosenhan, a witness called by the Plaintiffs counsel, agreed that the goods were "still needed". So did Jackson Medley, a witness called by the Government Defendants.

[523] Further, I accept the opinion of Professor Cibinic that because of the urgent need for the crash trucks, there would have been no time for the US Army to elicit proposals from other interested bidders and would have pursued the remaining original bidders, each an American company, to determine if any company from that list was still interested in being the reprocurement supplier.

[524] The next company “up the price ladder” from Amertek, higher than Amertek by US $10,248,824, was F.T. I. However, the transcript of evidence of John Cumbie, taken December 12, 2001, shows that, as of June 1985, F.T.I. was in very poor financial circumstances and not financially capable of performing the MACE contract. Indeed, as of June 1985, F.T.I. was in liquidation with only two employees. (Ex. 49B: Part I: p. 13-16, p. 18-19).

[525] The next company “up the price ladder” from Amertek, higher than Amertek by US $18,531,780, was Grumann. There was no evidence whether Grumann would have been ready, willing and able to be the MACE reprocurement contractor. The transcript of evidence of John Zalesak, taken December 3, 2001, disclosed that, in 1992, certain assets of Grumann were acquired by Kovatch. (Ex. 48B). Professor Rosenhan described Grumann as new and fairly small in the fire truck business with no known experience with US military contracts. Professor Rosenhan also reported that shortly after 1985, Grumann got out of the fire truck business.

[526] The next company “up the price ladder” was Kovatch, higher than Amertek by US $22,112,046. The highest company on the “price ladder”, higher than Amertek by US $29,040,158, was E-1.

[527] Professor Rosenhan gave his opinion that, if he were choosing a reprocurement contractor, he would have chosen Kovatch or E-1. Both companies have survived and continue to be in the fire truck business. In 1985, Kovatch, an experienced military contractor, had just completed a contract for 1100 refueling trucks for US DOD. Kovatch had a cash surplus and was technically and financially capable of being the MACE reprocurement contractor.

[528] To me, Ex. 107 is significant. It is a letter, dated January 28, 2002, from the Department of Justice to the Plaintiffs’ counsel. It states, in part:

> I … confirm that we are prepared to agree that Kovatch Corporation was financially and technically capable of performing the US Army contract if called upon as a replacement contractor in 1995.
>
> We do so on the express understanding that you will not be calling Mr. McCombs of Emergency One to testify at the upcoming trial in this matter.

[529] The Government Defendants have admitted that costs can be significantly greater than the original bid price and that a contingency factor of 10% is normally added to a contract price in a reprocurement situation. (See: (1.) Examination for Discovery of Government Defendants (Michel Fairfield): page 1593; Q. 7030 to Q. 7036; (2.) Ex. 9: p. 219-225).

[530] In my view, the Fulford Doctrine, which would allow CCC to wait until the replacement was complete and then challenge the "default" and the "reprocurement costs", is not applicable because Amertek stepped into the breach and prevented a full fledged default of the Prime MACE from taking place.

[531] At trial, Ms. Valerie Steele, C.A., a senior Vice-President and partner with KPMG, chartered accountants, testified as an expert concerning KPMG reports: Ex. 99 (August 27, 2001), Ex. 100 (January 11, 2002), Ex. 102 (April 2, 2002) and its update, Ex. 103. Those reports show the actual amount of the reprocurement liability of CCC, the amount avoided by CCC when Amertek performed CCC's obligations under the Prime MACE contract. The reports show that the price escalation adjustment was taken into account (a year had passed since the original pricing proposals) and a 10% price increase. Counsel for the Government Defendants called Mr. Jim Muccilli, C.A. from Arthur Anderson, chartered accountants. Mr. Muccilli did not dispute the KPMG calculations in his evidence nor in his reports (Ex.159A, Ex. 159B) and Ex. 159C, his letter, dated May 29, 2002.

[532] Amertek's claim is set out in its "Amended Fresh Amended Statement of Claim" (dated February 7, 2002), as follows:

> 178. As a result of Amertek's successful proposals under the B Act and BI Act most of Amertek's damages have been extinguished. [Admitted]
>
> 179. However, through CCC and DSS's improper conduct and CCC's breach of the implied terms in the BSL Army Subcontract, CCC obtained a significant benefit by avoiding its Reprocurement Liability to the USG.

> 180. The benefit gained by CCC, therefore, is much greater than any damages which Amertek can prove.
>
> 181. As a result, Amertek claims payment from CCC of the amount of the benefit obtained by CCC through avoidance of the Reprocurement Liability.
>
> 182. If the Army Prime Contract had been terminated for CCC's default, CCC would have become liable to the USG for the Reprocurement Liability.
>
> 183. Amertek pleads that the Reprocurement Liability would have been incurred in 1985 promptly following the termination of the Army Prime Contract for CCC's default or, alternatively, approximately five years thereafter when the replacement Army prime contractor would have completed the Army Program for the USG.
>
> ……
>
> 1. Amertek Inc.'s ("Amertek") claim against the Canadian Commercial Corporation ("CCC") and the Attorney General of Canada ("AG") is for:
>
> (a) Payment of the amount of $100,000,000.00
>
> (b) Aggravated, exemplary and punitive damages of $100,000,000.00.

[533] Accepting Ex. 99, Ex. 103 and the evidence and calculations of Ms. Steele C.A., I find that, with Kovatch as the reprocurement contractor, CCC's reprocurement liability would have been US $19,767,000.00. Adding a 10% contingency takes CCC's net reprocurement liability to US $26,507,000.00 (Exhibit 99: Schedule D – August 27, 2001).

VIII. Conversion of US Dollars to Canadian Dollars

[534] During the course of oral submissions, counsel advised that rather than s. 121 of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43 being applicable, counsel

agreed, and I so order, that the appropriate “conversion date”, under s. 121(3) of the *Courts of Justice Act,* should be “October 1990”.

IX. Pre-Judgment Interest

[535] The Plaintiffs shall have pre-judgment interest (simple interest) on the sum of US $26,507,000.00 from the date on which Amertek’s cause of action arose, namely, October 3, 1985, the date of the subcontract between CCC and BSL.

[536] The rate of simple interest shall be the quarterly rate average.

[537] Section 128(4)(a) of the *Courts of Justice Act* prohibits the payment of pre-judgment interest on punitive damages.

X. The Claim of Amerkon, The Estate of Dr. William Forder and Dr. Victor Mele

[538] In paragraph 2 of the Amended Fresh Amended Statement of Claim, those Plaintiffs claim damages of Cdn. $6M and punitive damages of Cdn. $2M.

[539] After the October 16 & 17, 1990 meeting, attended by Pierre Velle-Zarb of First Investors Capital Corporation on behalf of Dr. Forder and Dr. Mele, with Gregory Bone (DND) and Michel Fairfield (CCC/DSS) in attendance for the Government Defendants, Mr. Velle-Zarb, based “on the turn” (Mr. Bone’s changed position regarding his interpretation of Mil I 45208A), recommended that the two medical doctors invest Cdn. $1.8M in Amertek. This was done through the Plaintiff, Amerkon (Ex. 8: p. 291-293).

[540] When Mr. Bone reneged, Amertek had to shut down and seek a waiver from the US Army. While the waiver application was being processed, the Cdn. $1.8M loan from Amerkon was consumed by Amertek's ongoing expenses. While awaiting the waiver, granted on February 21, 1991 (Ex. 9: p. 2-5), in order to fund the start-up and preserve their initial investment, the two doctors invested further amounts in Amertek via Amerkon.

[541] KPMG's report (Ex. 99: Schedule I) and Ms. Steele's evidence set out an estimate of Amerkon's losses as a result of its investment in Amertek. The amount is Cdn. $2.131M. The Government Defendants called Mr. Jim Muccilli, C.A. of the firm of Arthur Anderson to testify regarding Amerkon's losses; he filed Ex. 159A, Ex. 159B and Ex. 159C. None of those exhibits nor Mr. Muccilli's evidence dispute the KPMG calculations.

XI. Result

A. Amertek Inc.

[542] The Plaintiff, Amertek Inc., shall have judgment against Canadian Commercial Corporation and the Attorney General of Canada in the amount of US $26,507,000.00. The conversion date, as agreed by the parties, shall be "October 1990". The Plaintiff Amertek is entitled to pre-judgment simple interest on the amount of US $26.507M from the date that Amertek's cause of action arose, namely, October 3, 1985. The rate of the pre-judgment interest shall be the quarterly rate average.

[543] The Plaintiff, Amertek Inc. shall also have judgment for Cdn. $500,000 against the Government Defendants for punitive damages.

B. Amerkon Capital Corporation, Linda Forder Executor and Trustee under the Last Will and Testament of William Forder and Victor Mele

[544] These Plaintiffs shall have judgment against the Government Defendants in the sum of Cdn. $2,131,000.00. These Plaintiffs are entitled to pre-judgment simple interest on the sum of $2.131M from October 16, 1990. The rate of pre-judgment simple interest shall be the quarterly rate average as set out in the *Courts of Justice Act*.

[545] These Plaintiffs shall also have judgment against the Government Defendants for Cdn. $100,000 for punitive damages.

XII. Costs

[546] If counsel are unable to agree on the matter of costs within thirty (30) days of the release of these reasons, then:

1. Within sixty (60) days of the date of release of these reasons, counsel for the Plaintiffs shall prepare, serve and file a draft bill of costs together with their written submissions.

2. Within seventy-five (75) days of the date of release of these reasons, counsel for the Government Defendants have the right to submit and file written submissions in response to the draft bill of costs and the written submissions of counsel for the Plaintiffs.

3. If counsel for the Government Defendants file written submissions as envisaged in “2.” (above), counsel for the Plaintiffs shall be entitled to file a brief written reply within ninety (90) days of the date of release of these reasons.

4. Thereafter, counsel shall arrange, through the Registrar, a date for a “costs hearing” prior to the fixing of costs.

_____

O’Driscoll J.

Released:

COURT FILE NO.: 96-CU-113354
DATE: 20030807

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

AMERTEK INC., AMERKON CAPITAL CORPORATION, LINDA FORDER, Executor and Trustee Under the Last Will and Testament of William Forder, deceased, and VICTOR MELE
Plaintiffs

- and -

CANADIAN COMMERCIAL CORPORATION, ATTORNEY GENERAL OF CANADA, AND FIRST INVESTORS CAPITAL CORPORATION
Defendants

REASONS FOR JUDGMENT

O'Driscoll J.

Released: August 7, 2003