FILE NO. CI 92-05-00022
(DAUPHIN CENTRE)

COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

DONALD KARL McKINNON and MERVIN ERNEST SHINGLER,	)	ERIC B. IRWIN for the Plaintiffs
Plaintiffs,	)	
- and -	)	
THE RURAL MUNICIPALITY OF DAUPHIN,	)	MICHAEL G. FINLAYSON for the Defendant
Defendant.	)	
	)	JUDGMENT DELIVERED: JANUARY 16, 1996

CLEARWATER, J.

INTRODUCTION

In March 1991 the defendant advertised for tenders for a gravel crushing and hauling contract (approximately 35,000 cubic yards) to be performed between June 17, 1991 and July 15, 1991. On April 3, 1991, the plaintiffs tendered on the contract. On April 8, 1991, the "gravel committee" (three elected councillors) of the defendant met and considered all of the tenders received in response to the defendant's advertisement, determined that the plaintiffs' tender was the lowest tender or bid, and unanimously recommended acceptance of the plaintiffs' tender to the council of the defendant. On April 9, 1991 the council met and considered a motion made by the chairman of the "gravel committee" recommending acceptance of the

plaintiffs' tender, defeated this motion, and awarded the contract to the next highest bidder.

The plaintiffs sue for damages in excess of $100,000, under the following headings:

1) damages for breach of contract, being the plaintiffs' estimated loss of profit on the project of approximately $100,000;

2) as an alternative to their claim for damages for breach of contract (the loss of profit), damages for breach of a duty of procedural fairness owed by the defendant to the plaintiffs in the awarding of the contract;

3) in addition to damages for either breach of contract (loss of profit) or breach of a duty of procedural fairness, damages for defamation of the plaintiffs' business reputations.

THE CLAIMS RE BREACH OF CONTRACT AND (OR) BREACH OF A DUTY OF PROCEDURAL FAIRNESS

The gist of the plaintiffs' claims for damages for either breach of contract or breach of a duty of procedural fairness are inextricably linked to the plaintiffs' assertions that the defendant was obligated to accept their tender, either by a custom of the industry or by an express agreement, because it was the lowest tender. The claim for damages for defamation arises out of statements made by one or more of the councillors of the defendant during the

course of the April 9, 1991 council meeting. These statements were published in the local newspaper (The Dauphin Herald). The plaintiffs allege that the statements imply that they were unreliable, thus damaging their business reputation and adversely affecting their ability to obtain similar contract work then and in future years.

With respect to the claim for damages for breach of contract or damages for breach of a duty of procedural fairness, the defendant alleges:

(1) the defendant's advertisement requesting tenders specifically stated that the lowest or any tender would not necessarily be accepted;

(2) there was no agreement, either express or implied or by custom or usage, to the effect that the lowest tender would be accepted;

(3) the plaintiffs' tender was not, in fact, the lowest tender received by the defendant.

THE CLAIMS RE DEFAMATION

The plaintiffs claim damages for defamation (damage to their business reputation) for the following comments or statements made by certain councillors of the defendant in public at the April 9, 1991 council meeting, which said statements were reported in the April 10, 1991 edition of The Dauphin Herald (and reported accurately according to the evidence of the councillors in question, with the possible exception of one word):

"The RM awarded its gravel contract Tuesday to the second highest bidder, after much discussion and against the recommendation of the gravel committee.

'We went over our tenders for the gravel and we came up with a recommendation,' said committee chairman Councillor Barry Spencer.

'It's the lowest tender, but I have some very serious reservations,' he said.

Spencer was concerned because he did not get a chance to look at equipment belonging to Shingler and McKinnon. He said some would be rented, and other equipment was scattered around Manitoba and Saskatchewan.

He said he also heard rumors the company was not reliable.

'I like to see the fellow's equipment. We haven't been able to and won't before he moves in,' said Spencer.

The motion to accept Shingler and McKinnon's tender was defeated, voted against by all councillors except Spencer.

'I think we have good enough reasons to justify (defeating the tendering process), but we've got to make sure something is there,' said Councillor Tony Kutcher." (underlining supplied)

With respect to the claim for damages for defamation, the defendant alleges:

(1) the defendant, a municipal corporation, is not vicariously liable for any statements made by any of its elected councillors;

(2) the alleged defamatory statements were made on a privileged occasion, without malice, and while the councillor(s) in question had a duty to do so and to communicate to persons with an interest therein (to the general public), the defence of qualified privilege;

(3) any alleged defamatory statements were "fair comment" on matters of public importance, the defence of fair comment;

(4) the newspaper, The Dauphin Herald, reported the councillor's comments incompletely and out of context and the defendant is not responsible for the conduct of the newspaper;

(5) the plaintiffs' reputations as businessmen were not damaged in any way.

SUMMARY OF THE EVIDENCE

The plaintiffs ("McKinnon" and "Shingler") are both experienced businessmen who have lived and worked in small communities (St. Rose du Lac and Makinak) within 30 to 40 miles of Dauphin, for many years prior to submitting a tender for the defendant's 1991 gravel crushing and hauling contract. McKinnon had been involved in the construction business for over 25 years, with experience dating back to 1968 as a heavy equipment operator. He had owned Caterpillar tractors and had done custom farm clearing and other earth-moving work in the area over many years. He had not been directly involved in the gravel crushing or gravel hauling business before 1991 but he had owned a gravel crusher in the past and he had been in the business of

buying and selling construction equipment since approximately 1981. McKinnon was particularly adept at the repairing and refurbishing of used equipment and had been doing this for many years.

Shingler, like McKinnon, had lived and worked in a smaller community within 30 to 40 miles of Dauphin for many years. He had been in the trucking business for 9 to 10 years, doing contract hauling of cattle, gravel, grain, and other products. In March 1991, shortly before the events which are the subject matter of this action, Shingler owned one truck and several trailers and he also had several contract drivers who were pulling trailers for him. He did not have prior experience in the gravel crushing business but he had significant experience trucking gravel; for instance, he worked as a subcontractor for Bradley's Sand & Gravel for one season, hauling some 70,000 to 80,000 tons of gravel and (or) construction materials. He was personally acquainted with the Reeve of the defendant municipality, Arnold Bayduza. Shingler had satisfactorily performed services (contract hauling of flax between the Dauphin area and the Elm Creek - Winkler area) for Bayduza personally.

In mid to late March 1991, the defendant placed ads in The Dauphin Herald seeking sealed tenders on or before April 5, 1991 for the crushing and hauling of approximately 35,000 cubic yards of gravel in the Rural Municipality of Dauphin. The gravel was to be applied to the roads within the Municipality between June 17 and July 15. The ads specifically stated:

> "Lowest or any tender not necessarily accepted. For further information and tender forms, contact the undersigned." (The "undersigned" was the secretary treasurer.)

Since at least 1987 (Ex. 3), the defendant Municipality had several standing committees which assisted council as a whole in carrying out the work of the municipality. The "gravel committee" was responsible for the procurement of municipal gravel supplies, gravel specifications including the quality of crushing, and the review and recommendation of tenders. In March and April 1991 the gravel committee consisted of Councillors Spencer, Kutcher, and Armstrong, with Councillor Spencer as chairman. The gravel crushing and hauling contract was a significant project in this particular municipality, the municipality being the second largest municipality, in area, in Manitoba.

Although neither McKinnon nor Shingler owned a gravel crusher in the spring of 1991, they decided to get together (the legal structure of their relationship is immaterial to this action) and bid on the contract. McKinnon was knowledgeable and experienced in locating and purchasing used equipment and he was satisfied that the necessary equipment, including a crusher, was readily available. He determined that they needed a crusher, a back hoe, a loader, and at least three to four semi trailer trucks in order to complete the contract in the allotted time frame (between June 17 and July 15). McKinnon testified that he had been looking for a crusher and at that time he had a line on a crusher in Hague, Saskatchewan, about 350 miles from Dauphin. He thought he could buy this crusher for something in the area of $35,000. He testified that in 1991 the gravel crushing industry was in a slump and there was lots of equipment for sale in the United States and Canada (one at Powell Equipment and one at Teulon). He and Shingler needed at least another one or two trucks and those were readily available, either by purchase or by lease (subcontractors).

There are some differences between the evidence of the plaintiffs and the evidence of the representatives of the Municipality as to what was said at a meeting they had in March 1991, before the plaintiffs finalized and submitted their bid. McKinnon testified (and this is confirmed by Reeve Bayduza) that he and Shingler arranged to meet with the Reeve at a local coffee shop in Dauphin (Jim's Jug Store). McKinnon said that he initiated this meeting with the Reeve because he wanted to be sure that he and Shingler knew all of the conditions of the contract on which they would be bidding. Bayduza confirmed that the reason for the meeting, which had been initiated by the plaintiffs, was for the purpose of explaining to the plaintiffs the procedures to be followed and what was expected of them if they were accepted as the successful bidder. The Reeve recalled explaining to them, at least generally, what volume of gravel was required, the location or locations for the hauling, and the equipment that would be required.

By coincidence, Councillor Kutcher, a member of the gravel committee, happened to come into Jim's Jug Store and join the plaintiffs and the Reeve during this meeting. McKinnon testified that one of the plaintiffs' reasons for this meeting was to find out if the plaintiffs (as prospective bidders) had to meet any "hidden criteria". What he meant by that was whether or not there was any policy in existence whereby "local" contractors (residents of the defendant Municipality) got some sort of preference over contractors who resided outside the Municipality, when bids were considered. The defendant's evidence is that there was no "local preference" policy in existence with respect to this contract. McKinnon told the Reeve and Kutcher that they did not own a crusher at that time but they would have no problem in getting one if their bid was accepted.

After this meeting the plaintiffs went looking for equipment and prepared and submitted their bid.

In examination-in-chief McKinnon testified that during this meeting at Jim's Jug Store they asked the Reeve and Councillor Kutcher if the lowest bid or lowest price would get the contract. McKinnon testified that the Reeve (Bayduza) said words to the effect that it would, "if he had anything to do with it". McKinnon testified that Kutcher confirmed this advice from the Reeve. McKinnon also testified that from the time of the meeting at Jim's Jug Store in March 1991 until the tenders were opened and a higher bidder accepted (at the council meeting on April 9, 1991), the only contact between the plaintiffs and the defendant was a call from the Reeve to McKinnon during the day of the council meeting. The Reeve inquired, according to McKinnon, about the availability of more trucks. McKinnon said that he told the Reeve that more were available if necessary (in this telephone call on April 9, 1991) but they were intending to do the job with three or four trucks, if possible. McKinnon testified that no one on behalf of the defendant ever, at any time, asked the plaintiffs to submit a list of their equipment. The plaintiffs received no communications from the gravel committee who had the initial responsibility of opening and reviewing the tenders and making a recommendation to council. McKinnon also testified that sometime during the morning of April 9 he got a call from one of the local contractors in Dauphin who wanted to sell him a loader and some trucks and trailers as the caller had heard that the plaintiffs were low bidders.

It was later that day that Councillor Spencer phoned McKinnon and advised him that the plaintiffs did not get the contract although they were low bidders. McKinnon says that Spencer did not explicitly tell him why they did not

get the contract but simply explained that council decided to go with another bidder (Tordon). McKinnon testified that after talking to Spencer they didn't know what, if anything, they could do. When they saw the article that appeared in the Dauphin paper shortly after the April 9 council meeting, McKinnon testified that he and Shingler had to do something to "get our reputations back".

McKinnon also testified to the effect that in his experience, which at that time was not significant in terms of bidding on public contracts, a public body has to take the lowest tender unless there is a very good reason to reject it. The plaintiffs tried to meet with council shortly after the April 9 meeting to get an explanation, but council would not meet. They did meet with the Reeve at his farm shortly after the first newspaper article appeared. McKinnon testified that the Reeve expressed indignity at what council had done and, in essence, was sympathetic to them. McKinnon testified that the Reeve told them he would arrange a meeting with council to review the awarding of the tender, but when they met with the Reeve that day they were advised by him that council had already met on an earlier day and there would be no change in the award. No reasons were given as to why it had been suggested that the plaintiffs were "unreliable". The plaintiffs later attended a council meeting because articles were still being published in the Dauphin newspaper, but council refused to discuss the issue, giving the excuse that they had been forced to turn the matters over to their insurance company because of a demand letter that the plaintiffs' lawyer had sent.

On cross-examination McKinnon acknowledged:

1) Spencer was the chairman of the gravel committee at the time he made the alleged defamatory statements that were published in the paper and heard by those in attendance at the April 9 council meeting. Spencer's remarks were made during the course of the council meeting;

2) when the plaintiffs met with the Reeve and Councillor Kutcher in March at Jim's Jug Store, the plaintiffs knew that the question of the availability of equipment was important to the defendant;

3) on the issue of whether or not there was some agreement, either express or implied, to the effect that the lowest bidder would get the contract, McKinnon's evidence was, at best, equivocal. He testified in his examination-in-chief that when he and Shingler asked the Reeve and Kutcher if the lowest bidder would get the job (or words to that effect), the Reeve replied with words to the effect, "if he had anything to do with it", the lowest bidder would get the contract, and Kutcher confirmed this. McKinnon attempted to change this evidence on his cross-examination to suggest that the Reeve and Kutcher had, in effect, clearly promised them that the "lowest bidder would get the contract". When he did this, defendant's counsel cross-examined him on his evidence given at his examination for discovery in August 1993 (transcript, Ex. 25) and subsequently read in, as part of the defendant's case, the following evidence found at p. 14 of the transcript:

> "108 Q You didn't think that at that meeting at Jim's Jug Store that Ernie Bayduza was speaking for the municipality in saying that if you were the low bidder, you got the job? You knew that the municipality as whole, council as a whole, had to decide, did you?
>
> A. Yes."

I am satisfied, and so find, that neither the Reeve nor Kutcher (or anyone on behalf of the Municipality, prior to the counsel meeting on April 9, 1991) made any promise or representation which should or could amount to an agreement or contract to the effect that the lowest bidder would get the contract.

In examination-in-chief, when asked about the meeting in Jim's Jug Store in March with the plaintiffs and the Reeve, Kutcher stated that he told the plaintiffs that council usually accepts the lowest tender but not always and that the whole council would make the final decision.

Kutcher was on the gravel committee which opened the tenders on April 8. The committee decided that the plaintiffs were the low bidders and recommended the plaintiffs' bid to council at the meeting on April 9. When pressed on cross-examination, Kutcher gave an answer which seemed consistent with his general demeanour and approach to his responsibilities as a councillor and his career as a local politician; that is, in reference to what was said at the meeting at Jim's Jug Store about whether or not the lowest tender would get the bid (always or otherwise), Kutcher replied to the effect: "I never want to get myself cornered -- I always use these words -- we usually accept

lowest bid but not always and the whole council has to decide". Kutcher could not think of any specific instance where the defendant did not in fact accept the lowest tender on contracts, but he was "sure" there were some occasions. He did acknowledge that in the past the gravel contract had always gone to the lowest bidder. Kutcher said that it was up to the chairman of the gravel committee to check on equipment and that when he was chairman he used to do that. He himself did not check on the plaintiffs' equipment. On April 8, when the gravel committee decided to recommend the plaintiffs' bid, the committee had not done any investigation and the council meeting was the next day. Kutcher said he made one inquiry (this would have had to have been some time after the committee meeting on April 8 and before the vote on April 9) and he was told that McKinnon's financial position was good by someone who knew McKinnon. Kutcher first testified this occurred before the council meeting on April 9 but later testified it might have been after the meeting but during the time that the defendant was concerned about the plaintiffs' claims. Kutcher was of the view that on April 9 council was concerned because of the questions surrounding the equipment or lack thereof; he says that he shared Councillor Spencer's reservations on this point, after lunch, at the April 9 meeting. Kutcher felt that the importance of having adequate equipment and work forces to do the job was self-evident; it was not written down in any contract specifications and did not need to be. Kutcher acknowledged that when Spencer made the statement or comment about the plaintiffs' "reliability" it caused him some concern (yet Kutcher, for some unexplained reason, did not speak up and advise council that to his knowledge the plaintiffs, or at least McKinnon, were financially sound).

When Shingler gave evidence, he testified in his direct examination that at the meeting in March at Jim's Jug Store they (the plaintiffs)

had asked the Reeve and Kutcher if the lowest tender was always accepted and that Kutcher had responded to the effect that it was. McKinnon never went that far in his evidence and, as I stated previously, I am satisfied that no such definite representation was made by either the Reeve or Kutcher at that meeting (or at any time). The versions of Reeve and Kutcher (and McKinnon himself in his examination-in-chief and at his examination for discovery) are much more plausible, particularly in light of the express wording in the defendant's ad. Shingler did go on to testify that he recalled the Reeve saying something to the effect that "as far as I am concerned, things would be the same as in the past, that is, the lowest tender had always been accepted in the past. This latter acknowledgment is closer to the truth and does not constitute an express (or implied) agreement that the lowest tender would automatically be accepted.

The defendant led evidence from Cameron Stirling, a shareholder of C. & B. Stirling Enterprises Ltd., a corporation experienced in the gravel crushing and hauling business. Mr. Stirling had worked in this business for approximately 20 years and his father and brother had worked in the business before him in the Dauphin area. Mr. Stirling had done a lot of municipal contract work over the past 10 years or so and he was a credible witness. Mr. Stirling's evidence on those issues on which he testified (as to whether or not the lowest bidder would or should always get the contract and on the question of loss of profit) may be summarized as follows:

1) in his experience, if a municipal corporation did not have the protection of a bid bond in situations such as this, then the municipal council had the right to pick the bid that it felt was in the

best interests of the municipality and not necessarily the lowest bid;

2) when asked if there was a custom in the industry in that area that the lowest bid was always accepted if there was no bid bond, Mr. Stirling replied, "No, not always, we have been victims of local preference, I have quite often seen the low bid not get the contract";

3) on cross-examination on this topic, Stirling acknowledged that the only times that he had come across a situation where the lowest bidder did not get a municipal or public contract were those situations where there was a "local preference policy" in place; in his opinion, "all things being equal", the lowest tender should get the job;

4) Stirling testified as to one of his personal experiences in tendering in the Town of Swan River in 1992 on a paving contract. In that instance, three bids were submitted and the advertisement in question did state that the lowest bidder was not necessarily accepted. In that case, the town had a bid bond requirement and was therefore well protected. Stirling, being the lowest bidder but not the successful bidder in the first instance, was able to convince the Town of Swan River to change its initial award of the contract (to a higher bidder) by threatening suit through his solicitors. This evidence was interesting but not particularly germane to the fact situation before me.

Stirling did confirm the plaintiffs' evidence in one respect; in 1991 there was not much gravel crushing work available and, accordingly, equipment such as a crusher may not have been hard to locate and purchase. He also acknowledged that his personal and business reputation is important to him. It helped him to trade in the marketplace and would be important to any contractor.

On the question of the plaintiffs' claim for loss of profit, wherein the plaintiffs alleged that they had and would generally have a 50% profit margin in a bid such as this, Stirling testified that in his experience profit margins of 20% up to 25% were not only the best that he could do but were consistent with others in the industry and consistent with profit margin comparisons that he had looked at from time to time in a recognized industry publication put out by Dunn & Bradstreet.

Reeve Bayduza testified for the defendant. He acknowledged that the only investigation he personally did was one telephone call on April 9 to the plaintiff McKinnon. He acknowledged that the plaintiffs were never asked to submit an equipment list and were never told that the equipment had to be available on their property or at any specific site for inspection prior to submitting a bid or prior to the contract being awarded. He further acknowledged that council never set up any definite criteria or requirements concerning equipment or expertise, either before the bid or before the grant of the contract to the other bidder on April 9. Bayduza recalled being told during the meeting on April 9 by someone (either Councillor Spencer or otherwise) that Councillor Spencer had talked to a Mervin McKinnon, a relative of the plaintiff McKinnon, very briefly. Bayduza acknowledged that it was the responsibility of the gravel committee to

investigate tenders before recommending same for acceptance and he could not explain why the gravel committee would recommend (as it did) the plaintiffs' tender without doing any investigation (as it did not do).

Bayduza knew from the earlier meeting in March that the gravel crusher that the plaintiffs were considering purchasing was not immediately at hand; that is, it was out of the province and would have to be purchased. Bayduza could not specifically recall the content of the discussion when he phoned McKinnon on April 9 (the day of the meeting) and testified that he "probably" asked McKinnon about equipment in general and he had some recollection of talking about "trucks" with McKinnon.

Bayduza recalls Councillor Spencer using the words "not reliable" in reference to the plaintiffs during the course of the meeting, but he did not recall Councillor Spencer using the word "rumors", as reported in the local newspaper. Bayduza acknowledged that there was nothing preventing council from adjourning the meeting for a few days or even a week or so, so that a proper or better investigation of the plaintiffs could be conducted. He acknowledged that the defendant could have done this and that, in hindsight, it may have been fairer to do this. Bayduza acknowledged that although standing committees such as the gravel committee had been in place since at least 1987, neither the council nor the committees had ever prepared a policy manual as was contemplated in the minutes of a February 2, 1987 meeting of the "committee of the whole council" (Ex. 3).

Councillor Spencer, the chairman of the gravel committee, also testified for the defendant. The conduct of Spencer (and the other two members

of the gravel committee) is unusual. On April 8, the three-person gravel committee met and opened and considered all bids. They knew (or ought to have been told by Kutcher at this meeting if they did not know) that the plaintiffs, although being considered by the committee to be the low bidder, did not yet have all of the necessary equipment in place. Nevertheless, they unanimously agreed to recommend acceptance of the plaintiffs' bid. In fact, the next day (April 9), Spencer moved passage of a resolution at the council meeting to the effect that the plaintiffs' bid be accepted. Spencer voted in favour of his motion to accept the plaintiffs' tender, but when it was defeated he then subsequently spoke against the plaintiffs' bid at the council meeting. From what is reported in the paper and from the evidence of Reeve Bayduza, it is apparent that Spencer's speaking against the plaintiffs' bid, combined with Kutcher's failure to inform council of the plaintiffs' (or at least McKinnon's) financial ability, was instrumental in convincing the council as a whole to award the contract to the next highest bidder.

Spencer's investigation consisted of making a visit at the noon hour break during the council meeting on April 9 to a cousin of the plaintiff McKinnon who worked at a local Shell station or distribution centre in Dauphin. This person apparently told Spencer that he (the cousin) did not know that the plaintiff McKinnon was in the gravel crushing business. This is the extent of Spencer's discussion which he reported back to council. It does not seem particularly surprising that some relative of McKinnon's did not know that McKinnon was in the gravel crushing business; it was known to all concerned (or should have been as a result of the earlier meeting between the plaintiffs, Reeve Bayduza and Councillor Kutcher) that this was the first venture of the plaintiffs into this particular area of the construction business.

On the issue of the alleged defamatory statements, Spencer acknowledged in cross-examination that every part of the article published in The Dauphin Herald on April 10, 1991 (Ex. 18) conformed to his recollection of what he said at the council meeting on April 9, except for the word "rumors" where that word appears in the fifth paragraph of the left-hand column. Spencer acknowledged that he knew the reporter was present when he made those statements and he admitted making the statement which clearly suggested the plaintiffs were unreliable. Spencer testified that in using the words "not reliable" in reference to the plaintiffs, he was intending to say, or attempting to say, that he was concerned about the plaintiffs' ability to do the job on time because they did not have all of the necessary equipment on hand as at April 9, 1991. That is an interesting explanation, but in the context of the balance of his comments in the order in which they were reported (and he did not at any time suggest that they were not reported in the order in which he made them), the statement about unreliability would not, in my opinion, be readily understood by a reader of average intelligence to be a reference to an inability to do a particular job within a particular time frame because of a lack of equipment. The "lack of equipment" had clearly and, in my view, separately, been dealt with by Spencer in his earlier statement as recorded in paragraph 4 of the left hand column of Ex. 18. Councillor Kutcher testified that he was concerned when Spencer made the statement about the plaintiffs' lack of reliability.

The reported comments of Kutcher in the second column of Ex. 18, particularly in view of Kutcher's evidence to the effect that he made some investigation and was apparently told and was satisfied that the plaintiffs had the financial wherewithal to get the necessary equipment is, at the very least,

unusual and indicative of the complete lack of any proper investigation. Kutcher never denied the statement attributed to him in the paper as follows:

> " 'I think we have good enough reasons to justify (defeating the tendering process), but we've got to make sure something is there', said Councillor Tony Kutcher."

It is not hard to understand the surprise and the concern of the plaintiffs when these statements were published in the local newspaper the day after the council meeting (and apparently repeated in one or more subsequent editions of the newspaper). One can empathize with the plaintiffs' position but the law of defamation, as it applies to a situation such as this, recognizes some significant or difficult hurdles which a plaintiff must overcome.

THE LAW AND THE POSITIONS OF THE PARTIES

I. Breach of Contract (the obligation of the defendant to accept the lowest bid)

In support of the claim for damages for breach of contract the plaintiff relies on the decision of the British Columbia Court of Appeal in Chinook Aggregates Ltd. v. District of Abbotsford, [1990] 1 W.W.R. 624. In Chinook Aggregates the trial judge found, as a matter of fact, that although the defendant's advertisement for bids on a gravel crushing contract stated that the "lowest or any tender will not necessarily be accepted" it was an implied term of that relationship, based upon evidence of usage and custom in the construction industry, that the lowest qualified bid was entitled to acceptance. In Chinook Aggregates the defendant municipal corporation had an unstated "local preference policy"; that is, local contractors whose bids were within 10% of the

lowest bid would be preferred and given a contract. The defendant awarded the contract to a local contractor whose bid was within 10% of that of the plaintiff. The plaintiff was successful both at trial and on appeal in its claim for damages for breach of contract (based on the custom found by the trial judge to have been in existence).

Unlike in the Chinook Aggregates case, the evidence was clear in the case before me; there was no "local preference policy" in effect and there was no evidence that any "local preference" was given to the second highest bidder who was successful (although he was in fact a local contractor). Although the plaintiffs are not necessarily bound by a "demand" letter written by their solicitor to the defendant on April 19, 1991 (Ex. 28), I have to give some weight to the statements made by their solicitor when he stated in that letter:

> "My clients acknowledge that the Rural Municipality of Dauphin has no obligation to issue the tender to the lowest bidder. The Council does, however, have the obligation as a public body, to incorporate procedural fairness and the rules of natural justice into their deliberations."

Although I have reservations as to the approach taken by the trial court and appellate court in British Columbia in Chinook Aggregates, those reservations as hereinafter expressed are obiter to my decision. On the evidence before me the plaintiffs have not satisfied the onus of proving a custom or practice in the industry in the area in question (the Rural Municipality of Dauphin) or in the surrounding municipal areas, whereby the lowest bid or tender must be awarded the contract in a situation where no bid bond is required. The mere fact that the lowest bidder often, or even always, got the

award in the past is not, in my view, sufficient to constitute that practice a term, either express or implied, of the arrangement. Moreover, the evidence of the witness Stirling, who is very experienced in the industry in this region, was not supportive of there being any such custom in a situation where no bid bond was required by a municipal or public corporation.

Even if I were to have concluded that there was a practice or custom in the industry to the effect that the lowest qualified bidder was always accepted, I prefer the reasoning of the Ontario Court of Appeal in Acme Building and Construction Limited v. Corporation of the Town of Newcastle (1992), 2 C.L.R. (2d) 308 to the reasoning of the British Columbia courts. The Ontario Court of Appeal had occasion to consider the British Columbia decision in Chinook Aggregates in a somewhat similar fact situation and although the following comments are obiter, they are compelling and, in my view, preferable to the position of the British Columbia Court of Appeal (p. 309):

> "In our opinion, even if there was acceptable evidence of custom and usage known to all the tendering parties, it could not prevail over the express language of the tender documents which constituted an irrevocable bid once submitted, and a contract, when and if accepted ..."

The Ontario Court of Appeal went on to state, at p. 310:

> "With respect to accepting any given bid, the instructions to tenderers stated that the '[o]wner' shall have the right not to accept lowest or any other tender'. This gave the respondent the right to reject the lowest bid and accept another qualifying bid without giving any reasons. In this case, the council of the respondent chose to give reasons, and there is

> nothing in those reasons which indicates that the respondent acted improperly in making the decision which it was its contractual right to make." (underlining supplied)

Leave to appeal to the Supreme Court of Canada was refused in this Ontario case.

II. Breach of a duty of procedural fairness

In the case of Hughes Land Co Inc. v. Manitoba (Minister of Government Services) (1991), 76 Man.R. (2d) 64, the Manitoba Court of Appeal confirmed a decision of Kennedy, J. of this court on the question of procedural fairness when a public body (in that case the Provincial Government) was considering a bid or tender on a public contract which affected the private rights of citizens. The Court of Appeal adopted the reasons of Kennedy, J. reported in (1991), 72 Man.R. (2d) 81, where he considered a public tendering process and stated at p. 83:

> "There is without doubt the obligation on the part of the respondent to act fairly. ..."

I am satisfied that the defendant owed a duty of procedural fairness to the plaintiffs and to all bidders in considering the bids. This duty of procedural fairness includes allowing or affording the plaintiffs a reasonable right to be heard if they desire to be heard. However, the duty of procedural fairness must be considered in the context of the specific facts of any tendering situation such as this; in this instance, it was made clear to the plaintiffs and to all bidders that the lowest or any tender would not necessarily be accepted. The plaintiffs were specifically aware that the final decision, notwithstanding the

recommendation of the gravel committee, was up to council as a whole. The plaintiff McKinnon sat by the phone most of the day so that he could respond to any questions that might be put to him by phone. He sat by the phone because he knew council might be concerned by the fact that he and Shingler did not have enough equipment to do the job.

The council meeting was a public meeting and it was open to the plaintiffs to attend if they wished. They both knew that the bids were being considered that day and that in all likelihood a decision would be made. They both knew, or ought reasonably to have known, that there would likely be some question, if not concern, about the fact that they did not have any particular experience with this type of contract (the gravel crushing aspect at least) and that they did not have all of the necessary equipment in place (or even under contract at that point in time). I have no hesitation in finding that the gravel committee and the council as a whole was negligent in the manner in which it conducted (or perhaps it is better stated as being "not conducted") its investigation on April 9, 1991. The so-called "investigation" could not be stated to be fair to the plaintiffs, but this, in itself, is not a breach of the duty of "procedural fairness". In the final analysis, having regard to the terms of the advertisement upon which the bid was submitted, it was within the sole discretion of council to accept whatever bid it wished, provided it gave the same consideration to all bids. The fact that it accepted a higher bid may require the councillors to answer to the voters in the future; it does not, in this instance, constitute a breach of any duty owed to the plaintiffs.

If I have erred in my findings with respect to the plaintiffs' claims for damages for breach of contract (or, alternatively, breach of a duty of procedural

fairness which in my opinion, in this case, would result in the same damages, namely, loss of profit), I must consider the damage aspect of the plaintiffs' claim. As stated previously, on the question of damages I prefer and accept the evidence of the witness Stirling to that of the evidence of either of the plaintiffs on the question of loss of profit. Specifically, Mr. Stirling was and is a much more experienced contractor in this type of work. It is his opinion and analysis of this particular contract that the plaintiffs' bid would contain, at best, a 20% to 25% profit margin. He testified, and I accept his opinion, that this margin is reasonable, consistent with his experience in the industry generally and as published in the industry publications he mentioned in his evidence. The plaintiffs had also called their accountant, Mr. Dion, on the question of damages. Mr. Dion had prepared Ex. 23, being an estimate or projection of the plaintiffs' loss of profit. This estimate or prediction was based solely on numbers given to him by the plaintiffs. I prefer the opinion of Mr. Stirling on the questions of operating expenses, costs and margins. Although the assessment of damages based on an opinion of a reasonable profit margin in a contract such as this is somewhat arbitrary, nevertheless I am satisfied that Mr. Stirling's "range" of profit margin is reasonable and should be applied to this contract and to the bid submitted by the plaintiffs. Taking into account the plaintiffs' bid, together with the additional gravel hauling which became necessary during the course of the contract (an extra 690 yards ±), I am satisfied the plaintiffs' loss of profit would not exceed $50,000 and I assess this figure as their reasonable loss of profit on this project.

III. Defamation

In its Amended Statement of Defence the defendant pleaded that it (as a municipal corporation) could not be vicariously liable for statements made by any of its councillors [para. (b.1)]. At the conclusion of the plaintiffs' case, counsel for the defendant made a motion (but subsequently withdrew it) to have the plaintiffs' claim dismissed for the following reasons:

(a) this was a situation of qualified privilege (when the councillor spoke at the council meeting) and there was no evidence from which malice could be inferred or found;

(b) a municipal corporation cannot be liable for statements made by its individual councillors.

As this motion was abandoned by the defendant and the defendant elected to call evidence, I will deal with the issue of "qualified privilege" later in these reasons. With respect to paragraph (b.1) of the Amended Statement of Defence, this pleading and the defendant's submission seems directly contradictory to the current state of the law as found in Rogers' text entitled The Law of Canadian Municipal Corporations, 2nd ed., Vol. 2, p. 1426.9, para. 257.2:

> "A municipality is liable to one who has been injured in his business or reputation as the result of the publication by council of defamatory statements concerning him, in connection with some matter affecting the municipality and is also liable where the injury has resulted from a statement made by one of its officers or servants in the course of his duties and on its behalf. Slanderous resolutions adopted by council may be ordered to be expunged."

I am satisfied that in certain circumstances a municipal corporation is (and should be) liable for defamatory statements made by its elected representatives (providing the statements were made while acting in the course of their duties) as they were in this instance.

In the text Gatley on Libel and Slander, 8th ed. (1981), p. 3, the author commences his discussion of defamation with a reference to the dicta of Cave, J. in Scott v. Sampson (1882) 8 Q.B.D. 503:

> "The law recognises in every man a right to have the estimation in which he stands in the opinion of others unaffected by false statements to his discredit. ..."

At p. 5, in discussing the question, "What is defamatory?", he states:

> "There is no wholly satisfactory definition of a defamatory imputation. Any imputation which may tend to 'lower the plaintiff in the estimation of right-thinking members of society generally,' 'to cut him off from society,' or 'to expose him to hatred, contempt or ridicule,' is defamatory of him. An imputation may be defamatory whether or not it is believed by those to whom it is published. ..."

In discussing the law of defamation as it relates to a person's reputation and business, he goes on to state at p. 32:

> "Any imputation which may tend to injure a man's reputation in a business, employment, trade, profession, calling or office carried on or held by him is defamatory. To be actionable, words must impute to the plaintiff some quality which would be detrimental, or the absence of some quality which is essential, to the successful carrying on of his office,

> profession or trade. The mere fact that words tend to injure the plaintiff in the way of his office, profession or trade is insufficient. If they do not involve any reflection upon the personal character, or official, professional or trading reputation of the plaintiff, they are not defamatory."

In Halsbury's Laws of England (4th ed.), Vol. 28, the author states (at p. 23, para. 45):

> "The meaning of words for the purpose of the law of defamation is not a question of legal construction, since laymen will read into words an implication more freely than a lawyer. The meaning is that which the words would convey to ordinary persons."

He goes on in para. 45:

> "The court must not put a strained or unlikely construction upon the words. If they are capable of preparing a number of good interpretations, it is unreasonable to seize upon the only bad one to give the words a defamatory sense."

The statements or comments made by the councillors at the council meeting on April 9, 1991, and reported in The Dauphin Herald on April 10, 1991, are set forth earlier in these reasons. The plaintiffs allege that the statement made by Councillor Spencer to the effect that they were "not reliable" is defamatory, both in the context in which it was stated and given the plain ordinary meaning of these words. As stated earlier, Councillor Spencer admits making the statements attributed to him in the newspaper article (except perhaps for the use of the word "rumors" in the fifth paragraph in the first column of the article). He did not suggest that they were reported out of order, such that they

were taken or could be taken out of context. Councillor Spencer testified at trial that when he stated that the plaintiffs were "not reliable", he was intending to mean or infer that with the plaintiffs' equipment or lack of equipment he did not see how they could fulfill the contract in the time allowed. That may be what he was intending to mean but that is not what the words he used ("not reliable") in the way in which he used them do, in fact, mean.

Councillor Spencer and the other councillors had a right to be concerned as to whether the plaintiffs, or any bidder, had (or at least had access to) the necessary equipment to perform the contract within the time allowed. This concern is quite clearly expressed in the third, fourth, and sixth paragraphs of the publication as it is found in the April 10 edition of The Dauphin Herald (Ex. 18). However, when Councillor Spencer went on to add to his express concern over equipment the words to the effect that he had also heard that the plaintiffs were not reliable, he went too far, albeit unintentionally.

Fridman, in his text The Law of Torts in Canada (1990), Vol. 2, summarizes the applicable law at p. 142 as follows:

> "The fact that the defendant did not intend to defame the plaintiff, was unaware of his existence, did not believe what he said was defamatory of the plaintiff, or that what he said or did was defamatory of anyone, is immaterial at common law. The result of the series of English cases, which would appear to be valid and applicable in Canada, is that a defendant can be guilty of defamation if he makes a defamatory statement that is understood to refer to the plaintiff, even if he has no intention of defaming the plaintiff and did not realise that he was doing so. In England, this has been altered by the Defamation Act, which permits a defendant, under certain circumstances, to

> plead lack of intent or negligence in publishing something that defames the plaintiff. No equivalent legislation has been enacted in any common law province of Canada. ..."

On balance, I am satisfied that the statement made by Councillor Spencer, to the effect that the plaintiffs were "not reliable" was and is defamatory of the plaintiffs. By saying this as, when and how he did, Councillor Spencer imputed, at the very least, that these plaintiffs could not be trusted to do the job in question. Moreover, the use of the words "not reliable", given their plain ordinary meaning, imputes that the plaintiffs are not trustworthy, credible, responsible or honest. I accept Councillor Spencer's explanation that he may not have intended to imply or state this about the plaintiffs, but that is, unfortunately, what he did when he used such broad and inapplicable phraseology. He was not deliberate in what he said but he was negligent in saying it.

The main defence raised and argued by the defendant, and in my view the most problematical defence from the plaintiffs' point of view, is the defence of qualified privilege. Councillor Spencer's defamatory statement (and its effect) was, in my opinion, compounded by the failure of Councillor Kutcher to make public the fact that he had done some sort of investigation (as he says he did), whereby he learned that the plaintiffs had the financial wherewithal to do this job. Clearly however, Spencer's statement was made on an occasion of qualified privilege. The law permits, on grounds of public policy and convenience, persons to make defamatory and untrue statements about others in certain circumstances without incurring liability. In Gatley on Libel and Slander (supra), the author states at p. 185:

> "... On such occasions a man, stating what he believes to be the truth about another, is protected in so doing, provided he makes the statement honestly and without any indirect or improper motive. These occasions are called occasions of qualified privilege, for the protection which the law, on grounds of public policy, affords is not absolute but depends on the honesty of purpose with which the defamatory statement is made. ..."

I am satisfied that these statements were made on an occasion of qualified privilege. Councillor Spencer, and all councillors, had an obligation and duty to debate and discuss the relative merits and abilities of all bidders being considered for the contract in question. I am satisfied that the defendant has fulfilled the onus on it of establishing that these words were spoken during or on an occasion of qualified privilege (during the conduct of a public municipal council meeting).

There are limits to situations where the defence of qualified privilege will prevail. The most important limit which the plaintiffs say precludes the defendant from relying on the defence of qualified privilege in this case is that the plaintiff acted with "malice". The burden of establishing malice is on the plaintiff once the defendant has proved that the occasion is one of qualified privilege [Foran v. Richman (1975), 10 O.R. (2d) 634 (Ont. C.A.)].

The question of "malice" has been recently been considered by the Supreme Court of Canada in Botiuk v. Toronto Free Press Publications Ltd. et al. (1995) S.C.J. No. 69 (a decision of the Supreme Court of Canada, delivered September 21, 1995). The following dicta of Justice Cory, commencing at p. 59,

para. 96, summarizes the current state of the law on the issue of malice as follows:

> "A distinction in law exists between 'carelessness' with regard to the truth, which does not amount to actual malice, and 'recklessness', which does. In The Law of Defamation in Canada, supra, R. E. Brown refers to the distinction in this way (at pp. 16-29 to 16-30):
>
> > '... a defendant is not malicious merely because he relies solely on gossip and suspicion, or because he is irrational, impulsive, stupid, hasty, rash, improvident or credulous, foolish, unfair, pig-headed or obstinate, or because he was labouring under some misapprehension or imperfect recollection, although the presence of these factors may be some evidence of malice.'
>
> The author then puts forward the reasons of Lord Diplock in Horrocks v. Lowe, [1975] A.C. 135 (H.L.), as representative (though not definitively) of the Canadian position. In that case Lord Diplock wrote at p. 150:
>
> > '... what is required on the part of the defamer to entitle him to the protection of the privilege is positive believe in the truth of what he published or, as it is generally though tautologously termed, 'honest belief'. If he publishes untrue defamatory matter recklessly, without considering or caring whether it be true or not, he is in this, as in other branches of the law, treated as if he knew it to be false. But the indifference to the truth of what he publishes is not to be equated with carelessness, impulsiveness or irrationality in arriving at a positive belief that it is true ... But despite the

> imperfection of the mental process by which the belief is arrived at it may still be 'honest', that is, a positive belief that the conclusions they have reached are true. The law demands no more.' "

Mr. Justice Wright of this court in Cronk v. Cundall (1993), 87 Man.R. (2d) 141, discussed the defence of qualified privilege and the issue of malice and defined "malice" as follows (p. 149):

> "Qualified privilege can only be claimed if the communication was made in good faith and with an honest belief in its truth. Good faith and honest belief are presumed but proof of malice will rebut that presumption. The onus to prove malice is on the plaintiff. Malice means either a lack of good faith and honest belief in the truth of the material, or use of the privileged occasion for an improper purpose.
>
> An inference of malice may be drawn from the unnecessary violence or intemperance of the language used, or by the circumstances apart from the statement or statements, such as the nature and character of the relationship between the plaintiffs and the defendant, the mode and extent of the publication and the conduct of the defendant in publishing it.
>
> If the defendant is shown to have made the statements recklessly in the sense of being indifferent to the truth or falsity of what was said, that will normally result in a finding of lack of honest belief. But this should not be equated with carelessness, impulsiveness or irrationality on the part of the defendant in reaching this conclusion, if in the end he truly had that honest belief." (underlining supplied)

The law should be careful not to dampen a person's enthusiasm for and participation in local politics. There should be, and is, a wide latitude for

discussion and debate of issues properly before municipal councils. Neither Councillor Spencer nor anyone on council had any information whatsoever to suggest or imply that the plaintiffs, or either of them, were unreliable, untrustworthy, etc. Councillor Spencer could not have had an honest belief in the statement he made when he said that the plaintiffs were "not reliable". The investigation, such as it was, conducted by members of the gravel committee and (or) by any members of council into the background and abilities of the plaintiffs to perform the contract according to their bid was inadequate and negligent. In some circumstances the lack of honest belief can equate to or amount to malice. However, there was no evidence of any specific ill will or improper purpose or motive on the part of Councillor Spencer which led him to make the appropriate statement or comment.

Councillor Spencer was, in my opinion, an honest witness. I believe and accept his evidence when he testified that he did not intend to say anything about the plaintiffs other than as it relates to his concern about their lack of equipment and therefore the risk that they may not be able to do the work within the allotted time frame. In effect, when Councillor Spencer said that the plaintiffs were "not reliable" he misspoke himself. He was negligent but he was not malicious. His negligence does not amount to the degree of "recklessness" from which a court should infer malice.

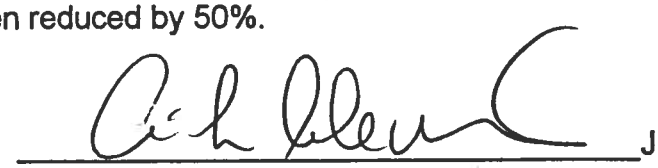
In the event that I am wrong on my conclusion that the defence of qualified privilege is to relieve the defendant from liability for the plaintiffs' damages as a result of the defamatory statement made by Councillor Spencer, I will assess those damages.

The evidence of the witness Stirling confirmed the obvious; a person's business reputation in a community is extremely important. Damage is presumed and I am satisfied that the plaintiffs' business reputation was diminished, at least for a period of time until plaintiffs were able to demonstrate (as they have now clearly done) their ability and their "reliability" to bid on, obtain and perform contracts of this nature.

I am not satisfied that there was permanent loss of business reputation. It is true that the plaintiffs were unable to obtain any other contracts of this type in 1991, but this is attributable as much to the fact that they had concentrated on their bid for the defendant's contract in the spring of 1991 and by April or May it was generally too late to bid on other similar contracts. The evidence is that there was not much of this type of work (gravel crushing and hauling) available in 1992. By 1993 the plaintiffs were bidding on and obtaining contracts in this particular industry. Taking all of the foregoing into account I would assess general damages for each plaintiff with respect to the defamation in the amount of $10,000.

Although I have concluded that the plaintiffs cannot succeed on any of the causes of action alleged in their Amended Statement of Claim, nevertheless I have no hesitation in finding that these plaintiffs were not dealt with in a manner in which any of the councillors of the defendant would like to have been dealt with if they were bidding on the contract in question. No reasonable investigation was conducted as to the background or ability of the plaintiffs to perform the work in question in the allotted time frame. No reasonable investigation was done to ascertain whether or not the plaintiffs had the financial ability to acquire the necessary equipment (which in fact they did).

The plaintiffs were defamed by the inadvertent comment or statement made by Councillor Spencer. Although the defence of qualified privilege has been found by me to absolve the defendant from legal liability in these particular circumstances, nevertheless it is difficult to understand why the defendant and its councillors have never apologized, both publicly and privately, to the plaintiffs with respect to those statements. The fact of an apology would not have been (and would not be) an admission of legal liability for damages in a situation of qualified privilege. Even if the defence of qualified privilege had not succeeded, the fact of an apology would have done much to mitigate the damage. In these circumstances, and notwithstanding the success of the defendant in this action, the defendant will have its costs reduced. The defendant's costs are to be taxed, on a Class II basis, and then reduced by 50%.



J.

SCHEDULE OF STATUTES, CASES AND TEXTS CONSIDERED

Statutes

- The Defamation Act, R.S.M. 1987, c. D20

Cases

(a) **Defamation**

- Botiuk v. Toronto Free Press Publications Ltd. et al., [1995] S.C.J. No. 69 (delivered September 21, 1995)
- Hill v. Church of Scientology of Toronto, Manning et al., [1995] S.C.J. No. 64
- Parlett v. Robinson, [1986] 5 W.W.R. 586 (B.C.C.A.)
- Stopforth v. Goyer (1979), 97 D.L.R. (3d) 369 (Ont. C.A.)
- Horrocks v. Lowe, [1974] 1 All ER 662 (H.L.)

(b) **Breach of contract or duty of procedural fairness**

- Acme Building & Construction Ltd. v. Newcastle (Town) (1992), 2 C.L.R. (2d) 308 (Ont. C.A.)
- Hughes Land Co. Inc. v. Manitoba (Minister of Government Services) (1991), 72 Man.R. (2d) 81 (Man. Q.B.); (1991), 72 Man.R. (2d) 215 (Man. Q.B.); (1991), 76 Man.R. (2d) 64 (Man. C.A.)
- Chinook Aggregates Ltd. v. District of Abbotsford, [1990] 1 W.W.R. 624
- Elgin Construction Co. v. Municipality of the Township of Russell, [1987] 24 C.L.R. 253 (Ont. S.C.)
- M.S.K. Financial Services Ltd. v. Alberta (Minister of Public Works, Supply and Services), [1987] 77 A.R. 362 (Alta. Q.B.)
- Calgary v. Northern Construction Company et al., [1986] 2 W.W.R. 426

- Transhelter Group Inc. v. Committee on Works and Operations, Winnipeg, City of et al. (1984), 28 Man.R. (2d) 137

- Her Majesty the Queen in Right of Ontario and the Water Resources Commission v. Ron Engineering & Construction (Eastern) Ltd., [1981] 1 S.C.R. 111

- Leo Lisi Ltd. v. Province of New Brunswick (1975), 11 N.B.R. (2d) 701

Text Books

Building Contracts, Tenders, Etc.

- Hudson's, Building and Engineering Contracts, 10th ed. (1970), p. 216

- Goldsmith, Canadian Building Contracts, 2nd ed., p. 18 - 23

- C.E.D. Western 3rd, Title 20 -- Building Contracts

Defamation

- Rogers, The Law of Canadian Municipal Corporations, 2nd ed.

- Brown, The Law of Defamation in Canada, 2nd ed.

- C.E.D. Western 3rd, Title -- Defamation

- Halsbury's Laws of England, 4th ed., vol. 28

- Gatley on Libel and Slander, 8th ed. (1981)

- Linden, Canadian Tort Law, 4th ed. (1988)

- Williams, The Law of Defamation in Canada (1976)

- Porter and Potts, Canadian Libel Practice (1986)

- Fridman, The Law of Torts in Canada (1990) Vol. 2