IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Nova Scotia Power Inc. v. AMCI Export Corporation, 2007 NSSC 139

Date: 20070514
Docket: SH 219171
Registry: Halifax

Between:

Nova Scotia Power Incorporated,
a body corporate

Plaintiff

v.

AMCI Export Corporation,
a body corporate

Defendant

Judge:	The Honourable Justice Glen G. McDougall
Heard:	April 25 and September 25, 2006, in Halifax, Nova Scotia
Counsel:	David Gordon Coles, Q.C., for the plaintiff Craig M. Garson, Q.C., for the defendant

By the Court:

[1] Nova Scotia Power Incorporated ("NSPI") has applied for summary judgment under **Civil Procedure Rule** 13. Rule 13 states:

> 13.01. After the close of pleadings, any party may apply to the court for judgment on the ground that:
>
> (a) there is no arguable issue to be tried with respect to the claim or any part thereof;
>
> (b) there is no arguable issue to be tried with respect to the defence or any part thereof; or

(c) the only arguable issue to be tried is as to the amount of any damages claimed.

BACKGROUND

[2] In its AMENDED STATEMENT OF CLAIM filed on February 8, 2005, NSPI alleges that AMCI Export Corporation ("AMCI") failed to supply coal under a Coal Supply Agreement dated August 3, 2001 (the "Agreement").

[3] According to the pleadings, NSPI alleges that pursuant to the Agreement it issued a confirmation letter dated March 14, 2003 (the "Confirmation Letter") which was accepted by AMCI.

[4] NSPI further alleges that pursuant to the Confirmation Letter, it purchased four separate call options for the purchase and delivery in 2004 of South American Low Sulphur A Coal in quarterly instalments of up to 100,000 Tonnes per quarter (the "Quarterly Options"). On March 21, 2003 NSPI paid a total of US $453,000.00 to AMCI for the purchase of the Quarterly Options. The deadline for exercising each of these Quarterly Options was as follows:

- Quarter 1 Option ("Q1 Option") by November 17, 2003
- Quarter 2 Option ("Q2 Option") by February 16, 2004
- Quarter 3 Option ("Q3 Option") by May 17, 2004
- Quarter 4 Option ("Q4 Option") by August 17, 2004

[5] In addition to the money paid for the right to exercise these Quarterly Options, NSPI also agreed to pay for any coal acquired under the Quarterly Options at a rate that was tied to its thermal generating capacity.

[6] For purposes of this application, NSPI is seeking summary judgment for AMCI's alleged failure to supply the requisite Tonnage under the Agreement for Quarters 2, 3 and 4. A separate application for summary judgment pertaining to Quarter 1 is scheduled to be heard by me on June 6, 2007. For now, I need not concern myself with the Q1 Option.

[7] NSPI in its pleadings states that it exercised the Q2 Option on or about February 11, 2004. It also alleges that it exercised both the Q3 Option and the Q4 Option on

or about March 8, 2004. In each case NSPI alleges that it exercised the option to purchase the entire 100,000 Tonnes per quarter provided for in the Confirmation Letter.

[8] In its SECOND AMENDED DEFENCE filed on August 3, 2005 (after the commencement of the hearing of this application but prior to its conclusion) AMCI pleaded several defences (some expressed as alternatives) which can be summarized as follows:

- that none of the four Quarterly Options were exercised by NSPI;
- that NSPI forfeited its right under Q2 Option because the loading of the vessel, M.V. Warsaw, was not completed in Quarter 2;
- that the loading of 41,365.01 Tonnes straddling Quarters 2 and 3 and delivered in Quarter 3 was part of the Q3 Option and as such NSPI did not have a 100,000 Tonne option to exercise in Quarter 3 since it had already purchased 43,365.01 Tonnes;
- that a Force Majeure situation occurred in Quarters 2, 3 and 4 which was beyond AMCI's control and as a result it was prevented from transporting coal;
- that NSPI failed in its obligation to provide sufficient ships to load coal at the Option Designated Load Port nominated by AMCI;
- that, if NSPI suffered any damages, which are not admitted but denied, it failed to mitigate its damages.

THE LAW

[9] **Civil Procedure Rule** 13.01(b) entitles a plaintiff to apply for summary judgment on the grounds that "there is no arguable issue to be tried with respect to the defence or any part thereof". In the case of **Selig** v. **Cooks Oil Co. Limited**, [2005] N.S.J. No. 69, 2005 NSCA 36, the Nova Scotia Court of Appeal, at paragraph 10, stated:

> ¶10 It is a two part test. First the applicant must show that there is no genuine issue of fact to be determined at trial. If the applicant passes that hurdle, then the respondent must establish, on the facts that are not in dispute, that his claim has a real chance of success.

[10] In the case of **MacNeil** v. **Bethune**, [2006] N.S.J. No. 62, 2006 NSCA 21, Docket CA 246849, the Honourable Justice Elizabeth Roscoe, writing for the panel of the Nova Scotia Court of Appeal, stated the following at paragraph 28:

> ¶28 Although he was listing relevant principles for a summary trial, not a summary judgment application, Green, J., as he then was, in Marco Ltd. v. Newfoundland Processing Ltd., [1995] N.J. No. 168 (T.D.), described the threshold common to both as:
>
> 76... 9. There will be a "genuine issue for trial" if the issue in question is not spurious and the issue relates to a material fact or point of law that is necessary to be decided to resolve the ultimate controversy between the parties. Obviously, there will not be a genuine issue for trial if the responding party can put forward no evidence that could constitute either a defence or a claim in law.

[11] At paragraphs 32 and 33, Roscoe, J.A., again citing with approval from Green, J.'s decision in Marco, *supra*, stated:

> ¶32 I have also found the comments of Green, J., as he then was, in Marco, supra, helpful in this regard:
>
> 76 ... 3. To bring himself or herself within the Rule the applying party must:
>
> (a) in a case where he or she has the ultimate burden of proof on the merits, put forward an evidentiary basis for the claim which, if considered alone, would prove each element of the cause of action; or
>
> (b) in a case where the other party has the burden of proof on the merits, put forward an evidentiary base establishing a defence to the claim as defined in the pleadings or tending to show that the other party's claim has no substance to it.
>
> 4. In either of the foregoing cases, the applying party's case must consist of an organized set of facts set out in a coherent way, either

> from primary sources or the best sources available, including admissions on interrogatories and discoveries, that constitute proof of a proper foundation of the claim or defence, as the case may be.
>
> ¶33 Of course, at the second step of the test, there is an evidential burden on the responding party to put its best foot forward or risk losing. I agree with the statement in Marco, supra:
>
> 76. ... 7. If the applying party satisfies the threshold test for the application of the rule by putting forward an evidentiary basis for his or her position, the responding party then has an evidentiary burden to demonstrate that there is a genuine issue for trial. This cannot be accomplished by showing an issue raised by the pleadings. The argument on a Rule 17A application takes place at a level below the pleadings within the forums of evidence and legal argument. The responding party must therefore "put his best foot forward" since failure to do so may lead the court to conclude that there is in fact no genuine issue for trial. The responding party should therefore set out in affidavits, or answers given on interrogatories or oral discoveries, an evidentiary foundation for his or her case so that the court can see that there is a genuine issue of fact or law that is joined and has to be resolved before the court can make an ultimate determination on the merits.

[12] It is clear from a review of these, along with a myriad number of other previously decided cases, that an application for summary judgment has two steps. First, the moving party must show that there is no genuine issue of material fact for trial and therefore summary judgment is a proper question for consideration. (See **MacNeil** v. **Bethune**, *supra*, at page 31).

[13] The burden then shifts to the respondent to prove facts which establish, if not the validity of its claim or defence, then at least a genuine issue for determination. (See **Somers Estate** v. **Maxwell** (1995), 107 Man. R. (2d) 200; [1996] M.J. No. 46 (Q.L.) (C.A.))

[14] The decision in the cases of **Dawson et al** v. **Rexcraft Storage and Warehouse Inc. et al**; **Pacific & Western Trust Co.** v. **Carroll**; **Household Realty Corp** v. **Carroll** (1998), 164 D.L.R. (4th) 257 (Ont. C.A.) includes a very informative discussion of the role of a motions judge faced with a motion for summary judgment under Rule 20.01(1) or (3) of the **Ontario Rules of Procedure** on the ground

provided by Rule 20.04(2), that there is no genuine issue for trial with respect to a claim or defence. The relevant Ontario Rules state:

> 20.04 (1) In response to affidavit material or other evidence supporting a motion for summary judgment, a responding party may not rest on the mere allegations or denials of the party's pleadings, but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue for trial.
>
> (2) Where the court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the court shall grant summary judgment accordingly.
>
> (3) Where the court is satisfied that the only genuine issue is the amount to which the moving party is entitled, the court may order a trial of that issue or grant judgment with a reference to determine the amount.

[15] The decision of the Ontario Court of Appeal was delivered by Charron, J.A., as she then was. I believe paragraphs 17 to 20 of her decision offer assistance in explaining not just the role of the motions judge but also the nature and purpose of a summary judgment application. They read as follows:

> [17] At the summary judgment stage, the court wants to see what evidence the parties have to put before the trial judge, or jury, if a trial is held. Although the onus is on the moving party to establish the absence of a genuine issue for trial, as rule 20.04(1) requires, there is an evidentiary burden on the responding party who may not rest on the allegations or denials in the party's pleadings, but must present by way of affidavit, or other evidence, specific facts showing that there is a genuine issue for trial. The motions judge is entitled to assume that the record contains all the evidence which the parties will present if there is a trial. See Rogers Cable TV Ltd. v. 373041 Ontario Ltd. (1994), 22 O.R. (3d) 25 (Gen. Div.), and the cases cited therein. Thus, in the malicious prosecution case, if D's evidence is that P was convicted and P cannot provide evidence to dispute this fact, the motions judge would conclude that D has established there is no genuine issue for trial, and dismiss the claim. This example represents the easy case. However, not every motion for summary judgment is that easy. [page268]
>
> [18] The caselaw and the experience of this court suggest that motions judges frequently encounter difficulty in the analytical exercise of determining whether the record demonstrates that there is no genuine issue in respect to a material fact which requires resolution by a trial judge or jury. In this regard, it is helpful to emphasize that the dispute must centre on a material fact, and that it must be genuine: Irving Ungerman Ltd. v. Galanis (1991), 4 O.R. (3d) 545, 83 D.L.R. (4th) 734 (C.A.);

Rogers Cable TV Ltd., supra; Royal Bank of Canada v. Feldman (1995), 23 O.R (3d) 798 (Gen. Div.), appeal quashed (1995), 27 O.R. (3d) 322 (C.A.); Blackburn v. Lapkin (1996), 28 O.R. (3d) 292, 134 D.L.R. (4th) 747 (Gen. Div.). In my view, the difficulty encountered by motions judges arises not so much because of any real problem in appreciating that the inquiry must focus on a genuine issue of material fact, but because of uncertainty concerning the role of a motions judge and that of a trial judge. Not infrequently, it is apparent from their reasons for judgment that some motions judges have come to regard a motion for summary judgment as an adequate substitute for a trial. In my view, this is incorrect and does not reflect the true purpose of Rule 20. This confusion of roles usually arises in the more difficult casesin which the parties have presented conflicting evidence relevant to a material fact. Each of the four cases cited above illustrates the more difficult type of motion, in which it is tempting for a motions judge to exceed his or her proper role.

[19] In Aguonie, this court discussed the role of a motions judge in determining whether a genuine issue exists with respect to a material fact. It is helpful to repeat what the court said at pp. 235-36:

> [32] . . . In ruling on a motion for summary judgment, the court will never assess credibility, weigh the evidence, or find the facts. Instead, the court's role is narrowly limited to assessing the threshold issue of whether a genuine issue exists as to material facts requiring a trial. Evaluating credibility, weighing evidence, and drawing factual inferences are all functions reserved for the trier of fact.
>
> . . . . .
>
> [35] In reviewing the evolution of Rule 20, Doherty J. [in Masciangelo v. Spensieri (1990), 1 C.P.C. (3d) 124 (Ont. H.C.J.)] made this significant observation at p. 129: "The case law which has developed under Rule 20 promotes an expansive use of the rule as a means of avoiding expensive litigation where it is possible to safely predict the result without a trial." Morden A.C.J.O. made a similar observation in the passage which I have quoted from his reasons in Ungerman, supra: "It must be clear that a trial is unnecessary." As I read these [page269] observations, it must be clear to the motions judge, where the motion is brought by the defendant, as in this appeal, that it is proper to deprive the plaintiffs of their right to a trial. Summary judgment, valuable as it is for striking through sham claims and defences which stand in the way to a direct approach to the truth of a case, was not intended to, nor can it, deprive a litigant of his or her right to a trial unless there is a clear demonstration that no

> genuine issue exists, material to the claim or defence, which is within the traditional province of a trial judge to resolve.
>
> [20] To what the court said in Aguonie, I would add this. Underlying Rule 20 is the premise that little purpose is achieved by having an unnecessary trial. Rule 20 is the mechanism adopted by the Rules of Civil Procedure for deciding cases where it has been demonstrated clearly that a trial is unnecessary and would serve no purpose. I recognize, however, that deciding when a trial is unnecessary and would serve no purpose is no mean task. However, in my respectful view, in determining this issue it is necessary that motions judges not lose sight of their narrow role, not assume the role of a trial judge and, before granting summary judgment, be satisfied that it is clear that a trial is unnecessary. This is not to say that the court is not to consider the evidence which constitutes the record. Indeed, to do so is central to determining the existence of a genuine issue in respect to material facts.

[16] The Aguonie case referred to in paragraph 19 is more properly cited as: **Aguonie** v. **Galion Solid Waste Material Inc.** (1998), 156 D.L.R. (4th) 222; 17 C.P.C. (4th) 219; 38 O.R. (3d) 161; 107 O.A.C. 114; 77 A.C.W.S. (3d) 520.

[17] With this as background the Court must first consider whether NSPI:

> .... has shown that there is no genuine issue of material fact requiring trial.

(Refer to **Guarantee Co. of North America** v. **Gordon Capital Corp**, [1999] 3 S.C.R. 423)

(A) Q2 Option

[18] NSPI initially conceded that the exercise of the Q2 Option was not in writing. AMCI denies that NSPI declared the Q2 Option despite an email message sent by Mr. Ernie Thrasher, President of AMCI, to Colin Thompson of NSPI, on May 10, 2004 which reads:

> Subject: RE: Q2 LS Nominations
>
> Colin:
>
> I apologize for the delayed reply. Thanks for your nomination of the M/V Alice Aldendorff for a May 15 - 25 laycan and a second vessel for a June 20 - 30 laycan. Since these vessels load approximately 39,000 MT per cargo, please confirm that NSPI will be lifting 78,000 MT of the 1000,000 MT **declared under the Q204 LS option.** (emphasis added). (Exhibit "C" attached to the affidavit of Mr. Mark Sidebottom of NSPI, deposed to on January 9, 2006 and filed in support of the application.)

[19] AMCI raises the requirement for notice in writing under clause 19.3 of the Agreement. (Attached as Exhibit "A" to the Mark Sidebottom affidavit.)

[20] Counsel for AMCI cross-examined the affiant, Mr. Mark Sidebottom, on his affidavit. Mr. Sidebottom confirmed that he had never seen anything in writing purporting to exercise the Q1 Option. However, he had just, that very morning, discovered a document that appeared to be written confirmation of the Q2 Option. The existence of the letter from Barrie W. Fiolek, Manager Solid Fuels at NSPI to Mr. Thrasher of AMCI was not known to anyone until Mr. Sidebottom happened upon a copy of it earlier that morning while doing a computer search. It was not raised by NSPI's counsel in the course of his submissions as there was no proof that it had actually been sent. A computer generated file activity report makes a reference to "Option Ltr to AMCI 040211, doc" and "Date Modified 2/11/2004 9:51 AM". The computer generated copy of the letter reads as follows:

> Dear Mr. Thrasher
>
> Re: NSPI Options for 100 K DWT Q2 2004.
>
> Please be informed that NSPI wishes to exercise its South American Low Sulphur "A" Coal Options in Q2 2004 for 100K DWT to supply its facilities in Nova Scotia. Price negotiated $US 1.24331 per MMBtu at the designated load port of Puerto Bolivar, Colombia.
>
> Please confirm receipt of this notice via return fax or e-mail.
>
> Please contact me if you have questions.

Sincerely,

Barrie W. Fiolek

Manager Solid Fuels

Cc. Mary Lambert

[21] As previously indicated there is no evidence that this letter was ever sent. There is, however, the email message of May 01, 2004 from Mr. Thrasher to Mr. Thomson which makes clear reference to:

> ... the 100,000 MT declared under the Q2 04 Option.

[22] In a subsequent letter from Mr. Thrasher to Mr. Thomson dated May 20, 2004 a further reference was made to the Q2 Option. The final paragraph of this letter reads:

> Meanwhile, as noted in my e-mail dated May 10 (copy below), please confirm that NSPI will be lifting 78,000 MT of the 100,000 MT **declared under the Q2 04 LS** Option. [Emphasis Added]

[23] This letter also makes reference to:

> ...the Force Majeure provision of our contract.

[24] It does not actually invoke the protection afforded the parties under clause 17 — Force Majeure. It simply refers to it in relation to the reduced rate of deliveries to the port of Palmarejo but goes on to say that:

> We currently have approximately 24,000 MT in stock at Palmarejo and are receiving deliveries at a reduced rate due to the highway closure.

It goes on to further state:

> Depending on the situation with the highway, we expect to have sufficient cargo available for the June 20 -30 laycan at Palmarejo. Therefore, please nominate the performing vessel to allow us to nominate the vessel to the port for approval.

[25] In its second amended defence, AMCI acknowledges loading 41,365.01 Tonnes of coal aboard the MV Warsaw. It alleges that since the loading was not completed in the second quarter of 2004 it should rightly be considered partial fulfilment of the Q3 Option requirement. AMCI alleges that NSPI forfeited any right it had to a Q2 Option cargo. Particulars of how NSPI forfeited its right to a Q2 Option cargo are not provided in the Second Amended Defence. Paragraph 8 advances a blanket defence alleging that NSPI:

> ...was concurrently obligated under the Agreement to provide sufficient ships to load of [sic] all of the South American Low Sulphur A Coal referred to herein at the Option Designated Load Port nominated by the Defendant. In breach of that obligation, the Plaintiff failed to provide sufficient ships to load the coal at the Designated Load Port nominated by the Defendant.

It goes on to allege:

> ...the Plaintiff, because of its own failure to provide ships to load the coal at the Option Designated Load Port...., has not sustained and could not have sustained any damages,....

[26] NSPI, through the affidavit evidence of Mark Sidebottom, and based on the admissions of AMCI's Ernie Thrasher on discovery as well as the documentary evidence in the form of e-mail messages from Mr. Thrasher to Mr. Thomson, has clearly demonstrated that the Q2 Option was indeed exercised and acknowledged as being exercised by AMCI's president. NSPI has succeeded in meeting the first part of the test for summary judgment.

[27] AMCI's efforts to refute NSPI's allegations, or to at least raise an arguable issue for, trial fail to meet the second part of the test. I will deal more fully with the Force Majeure argument when discussing the Q3 Option and Q4 Option but for purposes of the Q2 Option, AMCI has not offered any evidence to establish the existence of conditions that would constitute a Force Majeure situation nor has it advanced any evidence to show that it actually invoked the Force Majeure provision of the Agreement. There is simply an oblique reference to the provision in the May 20, 2004 letter from Mr. Thresher to Mr. Thomson referred to earlier. Neither this passing reference to the Force Majeure provision in the Agreement nor AMCI's own conduct in partially fulfilling its contractual obligations for Quarter 2 allow it to invoke the protection offered by this clause in the Agreement.

[28] As to NSPI's alleged failure to provide vessels to transport the coal, it was AMCI's failure to commit to laycans proposed by NSPI that caused NSPI to divert the M/V Alice Oldendorff in order to mitigate damages. AMCI is solely responsible for this failure to abide by its contractual commitments to NSPI. (See series of e-mails exchanged between Mr. Thrasher and Mr. Thomson at Exhibit "C" to the Sidebottom affidavit.)

[29] AMCI successfully loaded a total of 41,365.01 MT of coal commencing in Quarter 2 and completed very early in Quarter 3. It was a partial fulfilment of AMCI's second quarter obligations under the Agreement which called for a total of 100,000 MT. NSPI is entitled to summary judgment for the remaining (100,000 - 41,365.01) = 58,634.99 MT which AMCI failed to supply. A further hearing will have to be conducted in order to determine the total quantum of damages suffered by NSPI for this Quarter.

(B) Q3 Option and Q4 Option

[30] NSPI notified AMCI in writing on March 8, 2004 of its decision to exercise both the Q3 Option and the Q4 Option totalling 200,000 MT. On discovery Mr. Thrasher agreed that AMCI received notice of exercise of both options on this date which is well before the option exercise dates spelled out in the Confirmation Letter.

[31] AMCI's principal defence for its failure to fulfil its supply obligations is based on the Force Majeure clause of the Agreement. Clause 17 states:

> **17 FORCE MAJEURE**
>
> 17.1 Obligations of Seller and NSPI under this Agreement, other than the obligation to pay money, may be suspended in case of act of God, war, riot, fire, explosion, flood, strikes, slowdown, other labour dispute, act or order of civil or military authority, a new law or regulation, acts of the public enemy, major equipment failure, breakdown or unavailability of transportation, or any other cause beyond the control of either NSPI or the Seller, whether or not similar to the aforementioned examples and whether or not foreseeable, which prevents the production, delivery, use or receipt of Coal under the terms of this Agreement. NSPI or the Seller shall eliminate the disabling effects of force majeure as soon as and to the extent reasonably possible. Neither Party shall be required to avoid or settle strikes,

> slowdowns, or other labour disputes by acceding to any demands when at the sole discretion of that Party it would be unadvisable to do so. Make-up of shipments suspended due to Force Majeure shall be by mutual agreement only. Notice of Force Majeure must be prompt, in writing, and specify the nature and probable duration of the event.
>
> 17.2 If an occurrence of Force Majeure extends for a period of delay or more than sixty (60) consecutive calendar days, either Party may terminate this Agreement by notice to the other Party, and in such event, each Party shall pay the other any amounts payable hereunder in consideration of that Party's due performance hereof up to the date of such termination.

[32] AMCI first raised the issue of Force Majeure in an e-mail message from Ernie Thrasher to Colin Thompson on May 20, 2004. According to his affidavit, Mr. Thrasher

> ... did not initially believe this would be a force majeure situation. (Paragraph 22 of the Thrasher affidavit.)

He goes on to say:

> In my May 20, 2004 e-mail to Colin Thomson AMCI did not specify the probable duration of the event because we did not know. AMCI was reluctant to terminate its contract with NSPI, a contractual right AMCI had well before September 1, 2004 as the force majeure had extended for more than 60 consecutive days. (Paragraph 22 of the Thrasher affidavit.)

[33] At paragraph 23 of the Thrasher affidavit, Mr. Thrasher deposed the following:

> 23. By September 1, 2004 AMCI concluded that it would be unable to perform due to *force majeure* and gave notice to NSPI that it was exercising its contractual right to terminate the Agreement. Specifically, AMCI concluded that its obligations under its Agreement with NSPI had been suspended, initially as a result of an act of God and flooding, and subsequently as a result of both a breakdown and unavailability of transportation, which prevented AMCI from receiving and delivering coal under the terms of the Agreement and which occurrence of *force majeure* had extended for a period of more than sixty (6) consecutive calendar days.

[34] In addition to the affidavit of Ernie Thrasher, AMCI also filed an affidavit of Francisco Villazon, a native of Columbia, now living in Florida, USA. Mr. Villazon

acted as agent for AMCI in Columbia and Latin America from May, 1999 through November, 2000. In May, 2002 he became AMCI's Latin America Manager.

[35] Counsel for NSPI asked this Court not to consider certain portions of both the Villazon and the Thrasher affidavits. In particular, he identified certain paragraphs that failed to identify particular sources for the information proffered for the court's consideration. In other instances the affiant offers other information based on belief but without providing a basis for such belief. In addressing the concerns raised by counsel for NSPI, counsel for AMCI suggested that the court take into consideration the vast experience of the affiant, Mr. Thrasher, in the coal industry and, as a result, qualify him as an expert. I am not persuaded to accept such an invitation. Although there are portions of the affidavits that fail to meet the strict requirements of proper drafting as outlined in **Waverley (Village)** v. **Nova Scotia (Minister of Municipal Affairs)**, [1993] N.S.J. No. 151. N.S.S.C. (T.D.); 123 N.S.R. (2d) 46; 10 Admin. L.R. (2d) 267; 16 C.P.C. (3d) 64; 39 A.C.W.S. (3d) 932, I am not prepared to ignore them entirely. There is sufficient information provided based on first hand knowledge of the Region by Mr. Thrasher and, particularly, by Mr. Villazon, that, if believed, could establish the existence of Force Majeure.

[36] A summary judgment application is not the appropriate occasion to:

> ...assess credibility, weigh the evidence, or find the facts. Instead, the court's role is narrowly limited to assessing the threshold issue of whether a genuine issue exists as to material facts requiring a trial. Evaluating credibility, weighing evidence, and drawing factual inferences are all functions reserved for the trier of fact.

(See Aquonie, *supra.*)

[37] For me to grant summary judgment for the Q3 Option and the Q4 Option I would necessarily have to make factual findings which in many cases will require an assessment of credibility and a weighing of conflicting evidence on certain points. It would not be appropriate in these circumstances for me to do so.

[38] In the final analysis, summary judgment is granted to NSPI for the 58,634.99 MT shortfall in Quarter 2 (subject to a further hearing to determine the quantum of damages on assessment). The application for summary judgment for Quarter 3 and Quarter 4, however, is denied.

[39] I will leave it to counsel to try to reach agreement on costs. If efforts prove unsuccessful I will ask for written submissions within 45 days of the date of this decision.

[40] Counsel are also invited to contact the court to arrange for a hearing to assess damages for Quarter 2.

J.