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Jurisdiction	Canada
Tribunal	Superior Court of Justice of Ontario
Date of the decision	06 October 2003
Case no./docket no.	03-CV-23776 SR
Case name	*Diversitel Communications, Inc. v. Glacier Bay Inc.*

[…]

[1] The defendant moves for production of documents to support its defence of the plaintiff's claim for breach of contract, and in support of its counterclaim resulting from the plaintiff's unilateral termination of a contract for the sale of goods.

[2] The plaintiff brings a cross-motion for summary judgment under the Simplified Rules Procedures as set out in Rule 76 of the Rules of Civil Procedure.

[3] The plaintiff, *Diversitel Communications Inc.,* is a Canadian company with its head office in Ottawa. It carries on business in research and development of satellite and terrestrial communications, and in related equipment.

[4] The defendant, *Glacier Bay Inc.,* is an American Company with its head office in Oakland, California.

[5] On August 26, 2002, the plaintiff entered into a contract with the defendant for the supply of vacuum panel insulation. The plaintiff required delivery of the insulation to meet the terms of a pre-existing contract for the production, delivery and installation of six special power supply systems to the Canadian Department of National Defence (DND) in the High Arctic by July 30, 2003.

[6] As a term of its contract with the defendant, the plaintiff set out a specific schedule of delivery of the insulation by the defendant. The plaintiff paid the defendant $ 40,000 U.S. when it issued its purchase order on August 26, 2002. The defendant admits it breached the terms of its contract by failure to deliver on time, as a result of problems the defendant encountered with its principal supplier. The plaintiff eventually terminated the contract on November 1, 2002, and commenced this action for the return of its $ 40,000 U.S. In its defence, the defendant pleads that the plaintiff terminated the contract without appropriate justification, and counterclaims for damages for breach of contract and for loss of profits.

Motion for Production:

[7] The defendant initially sought disclosure of documents related to the plaintiff's contract with the DND, and all documents related to negotiations by the plaintiff with third parties, as well as the contract, purchase order, invoices, way bills and other related documents between the plaintiff and its actual supplier, Wacker Ceramics, selected by the plaintiff to replace the defendant's product. In the course of submissions, the

defendant focused on the need to obtain disclosure with respect to the plaintiff's dealings with third parties as a means by which to establish that the defendant's failure to deliver its product to the plaintiff did not amount to a fundamental breach justifying termination of the contract by the plaintiff. The defendant submitted that it is possible that the plaintiff may have gotten a better price from Wacker Ceramics which might well have motivated the plaintiff to end the contract, rather than the defendant's failure to strictly observe the delivery schedule. The defendant also suggested that, without knowing the details as to when Wacker Ceramics actually delivered its material to the plaintiff, as well as the dates of the plaintiff's production and delivery of the ultimate product to the DND, a Court would not be in the position to conclude whether time was of the essence.

[8] The plaintiff took no issue with respect to the defendant's submissions that the test with respect to disclosure is relevance, nor did it take issue with the defendant's presentation of the related case law. The plaintiff submits that a review of its dealings with the defendant leading up to the contract on August 26, 2002, and subsequent circumstances up to the date on which the contract was terminated on November 1, 2002, establish that the defendant's failure to deliver on schedule was a fundamental breach, justifying unilateral rescission of the contract, and entitling it to return of its money. The plaintiff adds that the details with respect to the plaintiff's subsequent negotiations and contractual arrangements with the alternate supplier, Wacker Ceramics, are of no relevance.

[9] In the event the affidavit evidence confirms that the defendant's conduct amounts to a fundamental breach of contract, the motion with respect to productions is moot, and therefore, the cross-motion must be addressed first.

Submissions of the Parties:

Plaintiff, Diversitel Communications Inc.:

[10] For the plaintiff, the affidavit evidence of John Strickland, President of Diversitel Communications Inc., sworn September 3 and September 18, 2003 is as follows:

I. On August 19, 2002, the plaintiff issued a request for quotation („RFQ") in Ottawa seeking bids from potential suppliers for the supply of vacuum panel insulation. The RFQ indicated requirements arose from „an existing contract", and referred to the need for the plaintiff to „meet our target dates". Bidders were required to specify delivery dates in their bid. In total, the RFQ makes six (6) references to time.

II. The plaintiff's contract with the DND required production, delivery and installation to be completed by July 30, 2003. John Strickland's supplementary affidavit of September 18, 2003 stipulates the contract with the DND was never amended.

III. Because of the shortness of the Arctic summer, there is a very tight window for delivery and installation of projects in the High Arctic. From prior discussions, the defendant's representatives were aware that the project for which the plaintiff sought their product was destined for the High Arctic, and that the plaintiff was under tight timelines.

IV. In response to the plaintiff's RFQ, the defendant submitted a bid on or about August 19, 2002. The defendant's bid provided that the first lot of material would be produced within seven weeks, with six more lots of material following every two weeks thereafter. The total price quoted was $ 144,900 U.S. Two thirds of the document deals with delivery and target deadlines.

V. The plaintiff e-mailed the defendant August 26, 2002 indicating it intended to issue a purchase order on the basis of the bid submitted by the defendant, subject to clarification and confirmation of production times and payment, with clarification right down to whether or not one of the weeks incorporated into the delivery schedule would include Christmas and New Years. It was only at this point that the plaintiff introduced terms of payment linked to the delivery of materials by the defendant.

VI. The defendant responded that it had to purchase 100% of its required input materials up front, that these materials represented over 50% of the price, and that they had to purchase the materials in one lot to receive volume discounts. The defendant confirmed at this point that 100% of the materials were to be delivered within four weeks of commencement. The defendant therefore asked for a 50% up front payment. Based on the defendant's stated need to purchase all materials up front for volume discounts, the plaintiff proposed to pay $ 40,000 U.S. with the issuance of its purchase order.

VII. On the second page of the purchase order right after the total price of the contract, the plaintiff set out the delivery schedule, which required the defendant to make shipment of the first lot of materials by October 18, 2002. The subsequent lots 2 to 7 were to follow on November 1, November 15, November 29, December 13, 2002, January 6 and January 20, 2003.

VIII. On Friday, October 4, 2002 after 3:00 p.m., the defendant e-mailed the plaintiff to advise there would be a delay in delivery. The defendant stated there would be an initial delay for delivery of the first lot of „possibly" about a month. The defendant advised that its principal supplier, Nanopore, had had many problems that were going to create a delay. The defendant added that if Nanopore could get its production equipment problems sorted out, the defendant might be able to pick up some of the time lost in subsequent production. The defendant added that Nanopore indicated it could make up lost time, but even the defendant was not counting on it at that point.

IX. On Monday, October 7, 2002 at 9:48 a.m., the plaintiff e-mailed the defendant requesting more details of the reason for the delay as soon as possible. The response from the defendant that same day was that nothing had been delivered by Nanopore as of that date.

X. Prompted by a further e-mail from the plaintiff to the defendant sent Wednesday, October 23, 2002 at 1:52 p.m., the defendant replied on Thursday, October 24, 2002 at 8:34 a.m., that still nothing had arrived from Nanopore. In the same e-mail, the defendant summarized the details of a conversation exchanged with the representatives of Nanopore in which the defendant was advised that Nanopore's new production equipment was still not working, and that the old equipment was broken down though they expected to have it going later on the same day. Nanopore

also advised that the ongoing production rate was, as of October 24, 2002, „unpredictable“. The defendant concluded its e-mail by adding that it could not even get material for its ongoing standard panels, let alone the specific panels required by the plaintiff’s contract with the DND.

XI. On Friday, October 25, 2002 at 5:00 p.m., the plaintiff e-mailed the defendant to note that the difficulties with Nanopore had created serious problems for all. In an attached letter of the same date, the plaintiff observed that the defendant had not received any satisfactory and credible explanation of the cause of Nanopore’s equipment failure, and that Nanopore was apparently unwilling to provide an explanation in a timely manner. Accordingly, the plaintiff assumed there would be further slippages in the shipment schedule. The plaintiff reiterated that strict adherence to the schedule was absolutely mandatory for all work in the Canadian High Arctic. The window of opportunity defined by the weather and availability of appropriate aircraft was noted to be so narrow that a delay of as little as four weeks was tantamount to a year’s delay, and the possibility of such a delay was unacceptable to the plaintiff and to the DND. Again, the plaintiff noted its contract with the DND required installation during the short Arctic summer of 2003. Thus, the plaintiff advised that it found it necessary to explore other techniques to construct the highly insulated enclosures required for its project. The plaintiff found alternative techniques that were feasible, and advised the defendant that it decided to pursue one of the options. In the final paragraph of the letter, the plaintiff confirmed with regret the necessity to terminate the contract with the defendant.

XII. Within hours of receiving the plaintiff’s letter, on Friday, October 25, 2002, the defendant responded in a most congenial manner that it was most unfortunate for all that the matter had proceeded as it had. The defendant inquired as to the option selected by the plaintiff for constructing the insulation and wondered whether the plaintiff might be interested in having the defendant order with an alternate supplier.

XIII. In the notes prepared by the plaintiff summarizing a telephone conversation with the defendant on the morning of Monday October 28, 2002, alternative approaches were discussed which were not ideal. The defendant proposed splitting production with Nanopore to potentially double the production rate. However, the plaintiff was alerted of uncertainties, such as whether or not Nanopore could get their production up and running. During the conversation, the defendant had revealed that it had been dealing with Nanopore for more than five years with no difficulties. However, when the plaintiff’s order for material was placed, the defendant was directed to an individual who had just been hired to run the production, and the order was placed on this individual’s first day on the job. In the same conversation, the plaintiff was advised by the defendant that Nanopore’s new machine could run no more than ten minutes before it gave up. The defendant’s representative was to fly over to Nanopore’s factory and get to the bottom of the problem. From the conversation with the defendant, the plaintiff concluded that the two highest persons in authority at Nanopore were completely unaware of the problems. The plaintiff ensured that the defendant understood that the plaintiff would need to be confident that Nanopore could solve the problems before proceeding further with Nanopore. However, the plaintiff stipulated it did not „have any warm fuzzies at all“.

XIV. Later on October 28, 2002, after conversing with the owner of Nanopore, the defendant e-mailed the plaintiff to advise that Nanopore's owner was now clear on the situation and would need to have the afternoon to investigate and determine whether the project could be brought back on schedule. The defendant promised to advise the plaintiff further that same day, and left it that, based on whatever information could be obtained, the plaintiff could then decide how it wanted to proceed.

XV. On Tuesday, October 29, 2002 at 8:04 a.m., the defendant e-mailed the plaintiff to advise that in the afternoon of October 28, Nanopore managed to have the new equipment on line „but only just". Consequently, Nanopore did not feel comfortable giving a firm production commitment based on the output of the machine. The defendant advised that Nanopore would be transferring their most experienced fellow in the company back to the plaintiff's project, and that Nanopore felt confident that with him back on the production line they could meet the stated production rate. The defendant concluded by noting that while he had confidence in Nanopore's owner and anticipated a different response now that he was made aware of the situation, the defendant could still not guarantee that the plaintiff's required production rate could be met. On the bottom of the defendant's e-mail, the plaintiff's notes indicate clearly that, based on this information the plaintiff did not have the necessary confidence that Nanopore could ensure production of the product, particularly when Nanopore failed at the outset to appoint the correct personnel and to allocate working equipment for the plaintiff's contract. The plaintiff's notes also observe that, while Nanopore might have been able to meet the production rate, it was six weeks behind and would likely remain behind.

XVI. On Friday, November 1, 2002, the plaintiff e-mailed the defendant with a detailed letter indicating that, after detailed consideration evaluating the additional information provided by the defendant, the plaintiff determined that it did not have sufficient confidence in Nanopore to continue with the contract. The letter indicated that, with the optimistic assumption that there would be no further delays, it followed that all shipments would remain behind schedule. The plaintiff observed in assessing Nanopore's assertion that it could meet the stated production rate, this seemed to depend entirely on the health and availability of one person with the appropriate skills, and uninterrupted operation of the equipment. The alternatives proposed by the defendant in a conversation on October 28, 2002 and summarized in its e-mail to the plaintiff on October 29, 2002 were reviewed once more and deemed to be inadequate.

XVII. The plaintiff ended the letter of November 1, 2002 by requesting a return of the $ 40,000.00 U.S. advanced to the defendant on August 26, 2002.

XVIII. In the exchange of supplementary affidavits, the plaintiff pointed out the defendant now admits the plaintiff had no contact with alternate suppliers until after October 25, 2002. The plaintiff noted that it is a complete fabrication to suggest that price was a factor in the plaintiff's subsequent decision to terminate the contract. The plaintiff added that even if it got a better price from Wacker Ceramics, this was after the defendant was already in breach of its contract with the plaintiff. The plaintiff was therefore required to pursue timely and alternate measures to save its own contract with the DND.

XIX. In response to the defendant's counterclaim, that the delivery schedule was not a fundamental requirement of the contract, but tied to the payment schedule by the defendant, the plaintiff's supplementary affidavit observed that the payment schedule proposed by the plaintiff was not tied to the delivery because the $ 40.000.00 U.S. was paid on the placement of the order, which was almost two months prior to the first shipment date.

XX. In response to the defendant's counterclaim that the $ 40,000.00 U.S. required by the defendant was not just for the insulation, but also for other costs, including equipment, labour and outside services and consulting, in its initial affidavit at paragraph 23, the plaintiff stated that it had previously contracted with the defendant to purchase vacuum panels for a small test chamber, and that the previous contract was entirely completed prior to August 2002. The claim for the return of the $ 40,000.00 U.S. arose entirely from the dealings described subsequent to the RFQ in August 2002. Thus, the expenses which the defendant may have incurred prior to August 2002 are said to be unrelated.

Defendant, Glacier Bay Inc.:

[11] For the defendant, the affidavit evidence of Kevin Alston, President of Glacier Bay Inc., sworn September 16, 2003, is as follows:

I. In the two years leading up to the contract between the parties, the defendant incurred both time and expense in relation to the design and manufacturing of the components required by the plaintiff to fulfill its contract with the DND.

II. The defendant seeks to support its counterclaim with the information in an e-mail sent on August 26, 2002 by the defendant to the plaintiff advising that the bulk of their costs would not coincide with the production schedule proposed by the plaintiff, due to the fact that materials were over 50% of the price, and had to be purchased up front in one lot to get volume discounts. The defendant advised that the reference to „materials" was a generic reference to the defendant's costs, and that based on price quoted for volume discount, the defendant would have significant outlays at the beginning of the project. As to the plaintiff's affidavit of September 3, 2003 at paragraph 11 where the plaintiff states that the defendant's need to purchase all materials up front had convinced the plaintiff to modify its proposal to pay $ 40,000.00 U.S. before delivery of the first lot of insulation, the defendant responded that the plaintiff thereby understood that the money requested was not entirely to be used for the purchase of product from its suppliers. Following receipt of the purchase order from the plaintiff, the defendant stated that it undertook substantial expenses related to design, special equipment, fabrication, supplies and employee costs. The defendant's affidavit is silent with respect to the allegations made at paragraph 23 of the plaintiff's affidavit of September 3, 2003 to the effect that the debts incurred by the defendant prior to August 2002, which formed no part of the RFQ, related to the purchase of vacuum panels for a small test chamber, which contract was entirely completed prior to the RFQ.

III. Communications between the defendant and representatives of Wacker Ceramics confirm the plaintiff's dealings with Wacker Ceramics did not occur until October

25, 2002, and after the plaintiff had first notified the defendant of its intention to terminate the contract.

IV. The defendant's e-mail communications with the plaintiff of October 28, 2002 are alleged to confirm that the plaintiff was advised that it would be possible to be back on schedule well before final shipments of products were required. The defendant's affidavit makes no mention of the subsequent e-mail of October 29, 2002.

V. The defendant alleged that Wacker's delivery of the product to the plaintiff, did not take place until at least several months after the last scheduled shipment date of the product, set out in the plaintiff's contract with the defendant, which had been set for January 20, 2003. It was thereby concluded by the defendant that Wacker's schedule for shipment of material could have been met or bettered by the defendant even without the assistance of Nanopore in the actual production. The defendant stated that the delays encountered in the defendant's contract with the plaintiff related to the initial shipments only, and not the final deliveries.

VI. The defendant questioned the plaintiff's alleged loss of confidence in the defendant and suspected other factors had motivated the plaintiff to terminate its contract with the defendant.

The Test for Summary Judgment under Rule 76:

[12] Rule 76.07 sets out the rules for summary judgment in Simplified Procedure cases. Rule 76.07(4) provides as follows:

> (4) Responding Party's Material
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> In response to affidavit material supporting the motion, the responding party may not rest on the mere allegations or denials of the party's pleadings, but is required to set out, in affidavit material, specific facts to show that judgment ought not to be granted.

[13] The test for summary judgment as set out in rule 76.07(9) provides:

> (9) Test for Summary Judgment
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> The presiding judge shall grant judgment on the motion unless, (a) he or she is unable to decide the issues in the action without cross-examination; or (b) it would be otherwise unjust to decide the issues on the motion.

[14] The parties agreed that, based on the most recent authorities, this Court has jurisdiction to make findings of fact and credibility in circumstances where there is a dispute between the parties as to the facts. While the defendant in its Factum referred to the decision of Campbell J. in *Steinberg v 1491446 Ontario Limited (c.o.b. The Art of Time)*, [2003] O.J. No. 2277 as support for the proposition that, in determining whether there is a genuine issue for trial a Court does not make determinations of credibility, nor does it make findings of fact based on the affidavit material and submissions on the hearing of this motion, the defendant took no serious issue with the competing decisions of this Court, in *Masini USA Inc. v Simsol Jewelry Wholesale Limited,* [2003] O.J. No. 576; *Mohamed v. State Farm Fire and Casualty Company,* [2001] O.J. No. 4478; *King v. Kenair Apartments Ltd.,* [2001] O.J. No. 1568, in which appeal by the defendant against

summary judgment granted to the plaintiff was dismissed by the Divisional Court in [2002] O.J. No. 506; and *Nad Business Solutions Inc. v. Inasec Inc.,* [2000] O.J. No. 15866.

[15] I accept and adopt the analysis of Spence J. in *Masini,* supra, where he refers to a decision of the Divisional Court in *Newcourt Credit Group Inc. v Hummel Pharmacy Ltd.* (1998), 38 O.R. (3d) 82 where that Court concluded Rule 76 establishes a lower threshold than that applied under Rule 20 motions for summary judgment. Under Rule 76 a Court „shall" grant summary judgment, unless unable to do so without cross-examination on the affidavits, or because there is some injustice in doing so.

[16] Justice Spence referred to this Court's decision in *Torstar Electronic Publishing Ltd. v Asian Television Network Inc.* (2002), 4 C.P.C. (5 th) 101 where Wilkins J. considers the Court of Appeal's endorsement in *Canadian Imperial Bank of Commerce v Wong,* [2000] O.J. No. 2547 to the effect that the test for summary judgment was not met under Rule 76 or Rule 20 based on the affidavit material filed in that case. In arriving at its decision, the Court of Appeal in *CIBC,* supra, noted the motions judge did not appear to have considered the terms of a loan agreement as relevant.

[17] [17] Spence J. noted the approach taken by the Court in *Torstar*, based on the Court of Appeal's endorsement in *CIBC*, is more restrictive than the approach taken by the Divisional Court in *Newcourt*, supra. However, Justice Spence also observed that the decision of the Court of Appeal in *McGill v Broadview Foundation* (2001), 6 C. (5 th) 109 did not favour the *Torstar* approach over the Newcourt approach. Spence J. referred to para. 4 of the *McGill*, supra, decision which reads as follows:

> .....
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> The purpose of rule 76.06 is to allow the parties to bring forward a relatively inexpensive application for summary judgment. Evidence to be considered includes the affidavits of the parties, any supporting material that can properly be placed before the court and the affidavits of witnesses. Summary judgment can only be granted when all of the evidence reviewed in total upon applying the principles of justice and fairness demonstrates a clear case wherein the motions judge may enter judgment. In circumstances where the case is not clear or where it dictates that justice and fairness would suggest otherwise, it is appropriate for the judge to refer the matter to trial.
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> .....

[18] I am in agreement with Spence J. that in order to give proper effect to the terms of rule 76.07, as expressed in *McGill v. Broadview Foundation*, it is proper for a Court on a summary judgment motion to make findings of fact and credibility based on reliable documentary or other supporting evidence, in order to determine whether there is a genuine issue, provided the Court is able to do so without cross-examination, and it would not be unjust to decide the issue on the motion.

[19] As noted above, the defendant in submissions did not take issue with the Court's jurisdiction to make findings of fact and credibility, but submitted that this Court should be reluctant to do so in the circumstances of this case without the benefit of further documentary evidence and without a trial.

Analysis of the Evidence:

[20] The affidavit evidence persuades me that the exchange of information between the parties commencing on at least August 19, 2002 with the issuance of the plaintiff's RFQ and leading up to the purchase order issued by the plaintiff to the defendant along with a draft for $ 40,000.00 U.S. on August 26, 2002, established the primacy of time of product delivery by the defendant. As the defendant observed it its initial affidavit of September 16, 2003, the plaintiff is a small company with limited financial resources and it was reasonable for the plaintiff to insist upon substantial adherence to the delivery of the defendant's products as a means to ensure the plaintiff could direct its own resources and personnel to complete production and assembly, delivery and installation of the six special power supply systems to the DND by July 30, 2003. Though the defendant would not admit that its failure to observe the delivery schedule amounted to a substantial or fundamental breach of the contract, it was conceded in argument that no one would suggest time was not important to the parties in the circumstances.

[21] I also have no difficulty in concluding that the plaintiff did not communicate with alternate suppliers until after the breach by the defendant to deliver the product according to schedule. That is when the plaintiff wrote to the defendant on October 25, 2002 that it had identified an alternate solution, and would therefore terminate the contract with the defendant.

[22] The plaintiff in good faith considered the defendant's overtures between October 25 and October 29 as to possible solutions to salvage the contract. Two of those proposals related to other products which the plaintiff found unsuitable, and the third proposal required laying store by Nanopore's newfound confidence in its project management and sudden faith that its new equipment could be trusted to ultimately guarantee the plaintiff's ability to complete and deliver the ultimate product by July 30, 2003.

[23] I find the affidavit evidence of the defendant minimized the final e-mail exchange between the parties on October 29, 2002 before the contract was ultimately terminated on November 1, 2002. On October 29, 2002, the defendant's e-mail revealed that on the afternoon of October 28, 2002, Nanopore finally did have their new high capacity equipment on line, „but only just". As a consequence, Nanopore did not provide a firm production commitment based on output from the machine. The defendant would not guarantee that Nanopore could meet the stated production rate required by the plaintiff.

[24] In the circumstances, I conclude the defendant's responding material on the motion falls short of the requirements set out in rule 76.07(4) where the defendant questioned the logic of the plaintiff in terminating the contract on November 1, 2002. The defendant assumed the plaintiff's selection of Wacker, as an alternate supplier, could somehow be construed as inadequate effort on the part of the plaintiff to overcome the defendant's production difficulties with Nanopore. Indeed, the defendant's motion for production is premised upon the hope that disclosure of documents between the plaintiff and Wacker Ceramics would help demonstrate that the plaintiff was not clearly on a „treadmill to disaster" vis à vis its obligations on the contract to the DND, when it „pulled the plug" on the defendant. The defendant therefore demanded disclosure of documents collateral to its own contract with the plaintiff, including the particulars of negotiations and the contract ultimately achieved with Wacker Ceramics, to somehow question the plaintiff's ultimate lack of confidence in the assurances the defendant attempted to give on October 29, 2002. In my view, the defendant's affidavit material thereby falls short

of the requirements under rule 76.07(4), and may be characterized as mere allegation or denial of the plaintiff's understandable lack of confidence in the defendant's assurances.

[25] The defendant's evidence with respect to its counterclaim for costs incurred for materials, including labour, equipment and consulting services, again falls short of the requirements of rule 76.07(4). The defendant denied that the plaintiff's initial payment advance of $ 40,000.00 U.S. to the defendant was in order to help the defendant meet its own expenses for products and materials. However, I note the entire contract price was for the sum of $ 144,900.00 U.S. and in an initial e-mail exchange with the plaintiff, the defendant advised that over 50% of its price was for materials that needed to be purchased in one lot to get the pricing or volume discounts available to the defendant. The plaintiff agreed to send $ 40,000.00 U.S. with its purchase order, and a subsequent payment of $ 32,450 U.S. with the first shipment of insulation from the defendant. These payments amounted to exactly half of the entire contract. This makes it plain that this level of payment was to ensure the defendant had the money it needed to buy the product it required at volume discounts from its own suppliers in order to fulfill obligations to the plaintiff. As noted above, the defendant's affidavit material also fails to address the plaintiff's assertions that costs incurred by the defendant were unrelated to the RFQ, but flowed from a previous contract with the defendant for a small test chamber. This would appear to be consistent with a review of at least one of the invoices appended to the defendant's affidavit material. These included an invoice dated August 27, 2002 from Atlas Welding Supply to the defendant, pertaining to an order submitted August 22, 2002, four days prior to the date on which the parties have agreed the contract came into effect. I also note that the defendant submits a claim for wages for a two-week period, which commences before the contract came into effect. Indeed, the payroll register documentation reflects expenses in the two-week period ending on August 21, 2002, as well the two-week period ending on September 4, 2002. I also observed that none of the invoices included in the expenses alleged by the defendant reflect that the costs were associated with any dealings pertaining specifically to the plaintiff.

The Law: International Sale of Goods Act:

[26] The plaintiff relies on the International Sale of Goods Contracts Convention Act, S.C. 1991, c. 13, which has been in effect in Ontario since 1992 because of the International Sale of Goods Act, R.S.O. 1990 c.I.10. These two acts brought into effect in Canada the United Nations Convention on Contracts for the International Sale of Goods and would apply to commercial parties resident in countries which are parties to the Convention: see *General Refractories Co. of Canada v Venturedyne, Ltd.,* [2002] O.J. No. 54; and *La San Giuseppe v Forti Moulding Ltd.,* [1999] O.J. No. 3352.

[27] Under the International Sale of Goods Act, supra, the plaintiff submits that a failure to deliver what was contracted for may constitute a fundamental breach of contract in accordance with article 25. The Act further provides that a seller must deliver by the date specified in the contract, pursuant to article 33. Article 49 provides that a buyer may declare the contract avoided in a case of fundamental breach thereby giving way to a claim for restitution, pursuant to article 81(2) in the schedule of the Act. The plaintiff submits that the International Sale of Goods Act may therefore establish a lower

threshold for the proof of fundamental breach than that required by the common law. I was given no authority, nor argument that persuades me this is so.

[28] The plaintiff submitted a bundle of case law on UNCITRAL texts which reflects how a number of European Courts have construed late delivery under article 33 as tantamount to fundamental breach of contract, pursuant to article 49 of the Act . In an unpublished decision released May 24, 1995 from Germany: Oberlandesgericht Celle, 20 U 76/94 the plaintiff, an Egyptian businessman, entered into a contract with the defendant, a German company trading in used printing machines for the sale of nine used printing machines that were to be shipped to Egypt. According to the contract, the plaintiff was obliged to pay a considerable part of the contract upfront, which he did. The defendant was obliged to send its product in two shipments, the first including six machines and the second, three machines. However, the first shipment delivered by the defendant contained only three machines. After having demanded shipment of the missing machines several times, the plaintiff declared the contract at an end and requested the return of its money. The Court concluded that the plaintiff had applied articles 33 and 49 among others under the Act, supra, and properly exercised the right to declare the contract avoided. Even though the Court concluded the additional delivery period of two weeks afforded by the plaintiff to the defendant was perhaps too short to save the contract, the Court concluded the total period and the actual declaration of avoidance was reasonable. Although this case is an instructive application of the various articles under the Act , supra , I am not satisfied the Act necessarily lowers the bar for proof of fundamental breach, as established under the common law.

Fundamental Breach Under the Common Law:

[29] The plaintiff submits that regardless of this Court's interpretation of the International Sale o f Goods Act , it has met the common law test in establishing a fundamental breach of contract. The plaintiff agrees with the defendant that the test to be met in order to establish a fundamental breach of contract is set in *Sail Labrador Ltd v Challenge One (The)*, [1999] 1 S.C.R. 265 . The defendant relied on this case as support for the proposition that generally speaking, time is of the essence in a contract only where the parties have expressed it to be so by direct stipulation in the contract, or where the circumstances require such a presumption. The defendant denies that either of these conditions apply in the present circumstances.

[30] The plaintiff correctly points out that the facts in *Sail Labrador Ltd. v Challenge One (The)*, supra, are clearly distinguishable from the ones in this case. In *Sail Labrador v Challenge One (The)*, supra, the Court concluded that the parties could not have intended that a single late payment among thirty-five payments made over a five-year term, caused by no fault of the appellant could bring about a fundamental breach of contract to charter a vessel, which the appellant had an option to purchase, subject to full performance of its obligation in the Charter Party Agreement. The conclusion of Court was fortified when it considered that the respondent did not insist on strict compliance with the method of payment as set out in the Agreement.

[31] As noted, the facts in our case are quite different. From the outset, the plaintiff established the primacy of the delivery schedule as the means by which it might ensure it could deliver upon its contract to DND. In *Sail Labrador Ltd. v Challenge One (The)*,

supra, Bastarache J., reviewed the English case law and the approach in equity to the issue of timeliness of performance of contracts and concluded that in order to determine whether there has been a fundamental breach of contract, a Court should first assess whether the parties have expressly made time of the essence of the contract through the incorporation of a „time of the essence“ clause. If they have not, a Court may still conclude that time is of the essence if the nature of the property involved, or the circumstances of the case call for such an interpretation.

[32] I am satisfied on the evidence adduced in the affidavits and supporting documents filed by the parties that, from the outset, the plaintiff required the defendant to observe the delivery schedule in good time so that the plaintiff could be assured to meet the terms of its own contract with DND. The defendant has admitted that no one would suggest that time was not important to these parties, and has acknowledged that it is open to this Court to conclude that the parties did make time of the essence by their communications and conduct leading up to the incorporation of the delivery schedule as part of the purchase order.

[33] Given the state of affairs, as expressed by the defendant on October 29, 2002, I agree with the plaintiff that it should not be required to „see how close it could get to the guillotine“ by relying upon the defendant and Nanopore in order to preserve its own contract with DND. I am satisfied the plaintiff was justified in having lost confidence in the defendant. Therefore, I conclude that the plaintiff reasonably terminated the contract on November 1, 2002.

Disposition:

[34] The primary issue in this case is whether the defendant fundamentally breached the contract thereby entitling the plaintiff to unilaterally avoid the contract and require return of its money.

[35] The record before me contains sufficient evidence on the basis of which the motion for summary judgment should succeed. However, the defendant submits that I should be reluctant to grant judgment in the absence of cross-examination, and without further documentary disclosure as proposed by the defendant’s motion. I disagree. In regard to the nature of the claim and the nature of the defense, I conclude that contracting parties, particularly those who may reside at different poles of the earth and operate under substantially different social, political and economic structures should not face unnecessary uncertainty by having to mount a „treadmill to disaster“ before termination of a contract is justified.

[36] In the circumstances, a judgment shall issue against the defendant in favour of the plaintiff in the amount of $ 40.000.00 U.S., with pre-judgment interest from August 26, 2002 and post- judgment interest pursuant to the Courts of Justice Act . In the result, a judgment shall also issue dismissing the counterclaim of the defendant and the motion of the defendant for further productions.

Costs:

[37] If the parties are unable to agree on costs within thirty (30) days of the release of this decision, the parties may deliver written submissions of no more than two pages in length (plus dockets and proof of disbursements) upon which this Court shall fix costs.

Toscano Roccamo J.