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FAX COVER LETTER

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TO: John Harrison

FAX NO. 587-3119

FROM: T. A. Cline

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This is an appeal from the judgment of Cavarzan J wherein he dismissed the appellant's action against both ^{appellants} defendants.

The appellant operates gravel pits. Gary Nichols is the president of the appellant. The respondent Town purchases aggregate from time to time. The respondents David Anderson and Frank Gelinas are senior employees of the Town involved in its purchase of aggregate. The essence of the appellant's accusations against the Town is that there is patronage purchasing and discrimination in respect of the purchase by the Town of aggregate for its projects.

Cavarzan J. very thoroughly reviewed the evidence and applicable law in his 46 page judgment. Mr. Anderson advised Mr. Nichols in the spring of 1993 that the Town had problems with the 1992 East Quarter Line Road and Delhi Arena projects which might be associated with the use of the appellant's products. In 1993 Mr. Anderson obtained a report from Associated Testing Services which confirmed Mr. Anderson's preference for quarry stone over pit materials for some uses by the Town. Mr. Anderson determined from Winston Oostenbrug of the Ministry of Transportation ("MTO") that there were concerns as to the quality of some of the appellant's pit materials. The MTO Aggregate Sources List ("ASL") published by the MTO (which identifies producers of aggregates with test results for their products) was obtained, showing that gravel pits #2 and #4 of the appellant were unacceptable for Granular A for MTO use.

In the fall of 1993 Mr. Anderson reported to the Town his concerns about the quality of aggregate used in the Delhi Arena project. Mr. Anderson proposed to the Town that it adopt a Quality Assurance Policy ("QAP"). The Town adopted the QAP, which incorporated continued use of Ontario Provincial Standard Specifications ("OPSS") and the requirement that suppliers be on either the Designated Sources List or the ASL. The QAP was in effect as of October 22, 1993.

The Town tendered contracts PW-94-002 and PW-94-031 in 1994 for the purchase of aggregates which were awarded to competitors of the appellant. In 1995 Mr. Anderson required a contractor on the Church Street Project to deliver Granular A from a supplier other than the appellant. However, in the spring of 1995 the Town purchased a supply of winter sand from the appellant but the appellant refused permission to the Town's designated trucking company to handle the sand.

Cavarzan J. found that Mr. Anderson's statements in respect of the appellant's products were not proved to be false and hence, the appellant's claim for injurious falsehood must be dismissed. As well, he found that Mr. Anderson acted throughout in good faith and without malice. He found that the evidence established, as shown by the Town's expert Mr. Katona, a geological engineer, that the problems were due at least in part to the poor quality of the appellant's Granular A product. He found that it was reasonable for Mr. Anderson to conclude that HL3CA and Class 5 stone chips from the appellant's pits #1, #2 and #4 were unacceptable. He found that the QAP was recommended to the Town by Mr. Anderson in good faith. Cavarzan J. found that the elements of the tort of unlawful interference with economic relations were not established. He found that there was no unlawful conduct on the part of the respondents in their dealings with the appellant nor that the appellant proved that there was any intent to injure or cause damage to the appellant.

Cavarzan J. rejected the allegations of breach of the Competition Act as unfounded and "entirely without substance."

Cavarzan J. found that the appellant failed to establish any agreement by Mr. Anderson with anyone so as to raise any possibility of a civil conspiracy.

The appellant alleges the Town owed a duty of care to the appellant in carrying out its own written policies of 1980 and 1994 concerning purchases and was negligent in this regard. Cavarzan J. held, correctly in our view, that the respondents owed no duty of care to the appellant arising from the Town's purchasing policy. As well, he was not satisfied that the evidence established the Town's "purchasing policy was ever breached in substance."

The appellant argues that the respondents treated the appellant unfairly by disqualifying it as a supplier by a directive from the Township's council given to the Town's staff in August, 1994. That directive stipulated that the Town would not purchase granular materials from the appellant. The Town had a basis for this decision because of its concerns as to the quality of the materials. The Town thereafter gave

a winter sand contract to the appellant. However, a dispute was then raised by the appellant as to the use by the Town of a haulage company for the sand under that contract. The appellant did not approve of the haulage company selected by the Town and refused to allow the haulage company to transport the sand which the appellant was to supply to the Town. The Township council then issued a second directive in August 1995 instructing the staff to not have any further business dealings with the appellant.

The issue of alleged unfair treatment of the appellant arising out of that disqualification was not pleaded in the statement of claim issued in July, 1994 nor was it addressed when the statement of claim was amended in September, 1995 nor when the statement of claim was further amended in the course of argument before the trial judge.

We note that the rules of pleading require a pleading of the alleged causes of action and the material facts upon which the party relies. That was not done.

Appellant's counsel argues that the directives in themselves arguably give rise to a discrete cause of action based upon a breach of a duty of fairness being owed by a public government in dealing with its solicitation of prospective suppliers. As stated, this issue was not raised in the pleadings as a discrete cause of action and was not so argued until this appeal. Assuming there is such a duty ~~of care~~ owed, we find that the evidentiary record clearly does not support the alleged breach of such duty in the circumstances of the case at hand. As well, no damages are proven in respect of this new alleged cause of action.

Appellant's counsel also properly argues that the directives (issued after the statement of claim) could be considered as evidence as proof of an alleged general course of unfair treatment of the appellant by the Town. That is, the directives were properly part of the relevant evidence to be considered in determining whether the causes of action raised by the appellant in its statement of claim, as amended, are sustainable. The directives were before the trial judge as part of the evidentiary record as was the evidence of the defendants as to the circumstances relating to the making of the directives. Cavarzan J. gave thorough and careful consideration to all the evidence. He found that the defendants acted in good faith throughout. He found that the defendants had justifiable concerns as to the quality of the appellant's aggregate materials. He found that there was a continuing deterioration in the relationship between the defendants and the appellant and his findings place the fault in this regard with the appellant.

Cavarzan J.'s analysis correctly identified the appellant's mistaken fundamental premise that haulage distance determines cost and cost dictates the choice of supplier as ignoring price factors based upon other factors such as a legitimate preference for quarry stone and bona fide concerns about field performance of aggregates in the appellant's gravel pits.

Cavarzan J. also found that the appellant had not proven its claimed damages.

In our view, the evidence supports Cavarzan J.'s conclusion that "the [appellant] seeks to decide for the Township not only who will transport its materials but also from whom it must purchase its materials." These are decisions to be made by the Town and its staff acting within the scope of their authority. Cavarzan J. concluded that Mr. Anderson "acted honourably throughout and in the best interests of the municipality he was hired to serve."

In our view, and we so find, the evidence supports Cavarzan J.'s findings of fact that there was no sustainable cause of action in law on the part of the appellant against any of the defendants.

In our view, and we so find, the evidence also supports the findings of Cavarzan J. that there is no basis in law for the damages claimed and that the evidence in all events falls short of establishing any of the losses claimed.

We find no error in law on the part of Cavarzan J. Accordingly, for the reasons given, we dismiss the appeal.

Cost to be on basis of land covered + gravel covered.