

Court File No.

ONTARIO COURT OF JUSTICE
(GENERAL DIVISION)

BETWEEN:

BEAR HEAD INDUSTRIES LTD. and
THYSSEN INDUSTRIE HENSCHEL AG

"P47(0)"

Plaintiffs

- and -

HER MAJESTY THE QUEEN IN RIGHT OF CANADA,
THE ATTORNEY GENERAL OF CANADA,
WILLIAM McKNIGHT and MARCEL MASSE

Defendants

STATEMENT OF CLAIM

TO THE DEFENDANTS

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiff.
The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the Plaintiff's lawyers or, where the Plaintiff does not have a lawyer, serve it on the Plaintiff, and file it, with proof of service, in this court office, WITHIN TWENTY DAYS after this Statement of Claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

IF YOU PAY THE PLAINTIFF(S) CLAIM, and \$1,000.00 for costs, within the time for serving and filing your Statement of Defence, you may move to have this proceeding dismissed by the Court. If you believe the amount claimed for costs is excessive, you may pay the Plaintiff(s) claim and \$100.00 for costs and have the costs assessed by the Court.

Date:

Issued by:

Local Registrar

Address of Court Office:

145 Queen Street West
Toronto, Ontario
M5H 2N7

TO:

CLAIM

1. The Plaintiffs claim:
 - (a) damages in the amount of \$100,000,000.00;
 - (b) a declaration that the decision of the Defendant Marcel Masse that a contract (the "Contract") to produce up to 229 Light Armored Vehicles ("LAV"s) be awarded to Diesel Division of General Motors ("DDGM") without tender is null and void and in violation of the Undertaking referred to herein;
 - (c) its costs of this action; and
 - (d) such further and other relief as to this Honourable Court seems just.

2. The Plaintiff Bear Head Industries Ltd. ("BHI") is a company incorporated under the laws of Nova Scotia, formed to engage in the business of the design, manufacture and servicing of military equipment in Canada. The Plaintiff BHI is a wholly-owned subsidiary of Thyssen Industrie AG ("Thyssen Industrie"), a German-based diversified international manufacturer, and carries on business in Ontario.

3. The Plaintiff, Thyssen Industrie AG Henschel ("Thyssen Henschel") is a German-based wholly-owned subsidiary of Thyssen Industrie, engaged in the business of the design, manufacture and servicing of military equipment.

4. The Defendant William McKnight ("McKnight") was Minister of National Defence between January, 1989 and April, 1991.
5. The Defendant Marcel Masse ("Masse") was Minister of National Defence between April, 1991 and January, 1993.
6. In or about 1984, Thyssen Industrie was approached by representatives of the Canadian government, as a potential investor in Canada. Between 1984 and 1988, Thyssen Industrie entered into negotiations with the governments of Canada and Nova Scotia, with a view to building a manufacturing plant at Bear Head Cove, Nova Scotia, and incorporated BHI in 1985. It was foreseen in these negotiations that BHI would manufacture LAVs for the Canadian military.
7. In or about 1987, the government of Canada, through its White Paper on Defence (the "White Paper"), announced its intention to procure new LAVs. This became known as the "LAV Procurement Program".
8. On or about September 27, 1988 the Plaintiff BHI entered into an Understanding in Principle (the "Understanding in Principle") with the Crown in Right of Canada (the "Federal Government"), as represented by the Minister of National Defence (Perrin Beatty), the Minister of Regional Industrial Expansion (Robert De Cotret) and the

Minister responsible for the Atlantic Canada Opportunities Agency (Gerald Merrithew).

9. It was a term of the Understanding in Principle that the Minister of National Defence would consider the participation of BHI in the LAV Procurement Program established pursuant to the White Paper. In addition to the Understanding in Principle, in discussions held in or about 1987 and 1988 it was represented orally to BHI by various Ministers and agents of the Federal Government that BHI would have the opportunity to compete for the planned LAV Procurement Program (the "LAV Representations"). These representations constituted a promise on behalf of Her Majesty The Queen in Right of Canada to BHI that was relied upon by BHI to its detriment, as set out below.

10. In or about April, 1989 the Federal Government cancelled the LAV Procurement Program. As a result of perceived changes in Canada's defence needs, the Federal Government began to consider instead a multi-purpose vehicle which would both replace the obsolete LAVs and fulfill other military functions.

11. This multi-purpose vehicle, known as the Multi-Role Combat Vehicle ("MRCV"), would come in three forms based on a common design: the Reconnaissance Combat Vehicle ("RCV"), the Infantry Combat Vehicle ("ICV"), and the Armoured Combat

Vehicle ("ACV"). It was foreseen that the MRCV would be acquired by the Department of National Defence in three phases, commencing with the RCV.

12. In or about 1989 to 1991, negotiations continued between the Federal Government and BHI, but with the focus shifting to manufacture of MRCVs by BHI. During this period the Department of National Defence released information regarding the Department's pending technical requirements to BHI and others in the industry. Based on this technical information, Thyssen Henschel developed a new model of armoured vehicle known as the TH-495.
13. On or about January 25, 1990 the Defendant McKnight expressly gave his undertaking in writing to BHI, on behalf of the Federal Government, that in the event the Canadian military decided to acquire MRCVs, BHI would be given an opportunity to participate in the tender for the contract to supply such vehicles (the "Undertaking"). The Undertaking was to remain valid for a period of five years. The Undertaking was both a legally binding contract between Her Majesty the Queen in Right of Canada and BHI, and a promise on behalf of Her Majesty the Queen in Right of Canada to BHI that was relied upon by BHI to its detriment, as set out below.
14. The Undertaking was based in part upon the Department of National Defence's assessment of the experience and technical competence of Thyssen Henschel as an

armoured vehicle developer and producer, and in part upon the design concept of the new TH-495 vehicle intended to satisfy the Department of National Defence's requirements as advised to industry.

15. It was an implied term of the Undertaking that the tender process would be conducted fairly and in good faith, and that subject to BHI satisfying the relevant specifications and design requirements, if BHI quoted the lowest contract price BHI would be awarded the contract.

16. It was also an implied term of the Undertaking that the Minister of National Defence would comply with the Federal Government's own Contracting Manual, a publicly-available manual produced and distributed by Treasury Board to guide those who have authority to enter into contracts on behalf of the Crown. In particular, articles 9.1.1 and 10.7.1 of the Contracting Manual provide as follows:

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| 9.1.1 | The objective of government procurement contracting is to acquire goods and services and to carry out constructing and leasing in a manner that results in best value or, if appropriate, the optimal balance of overall benefits to the Crown and Canadian people. |
| 10.7.1 | In accordance with the policy statement to reflect fairness in spending public funds, the method of procurement used for a particular acquisition must, within the limits of practicality, give all qualified firms an equal opportunity for access to government business. |

17. In return for and in reliance on the Undertaking and the LAV Representations, the Plaintiffs continued with discussions with a view to building manufacturing facilities at Bear Head, Nova Scotia. The Plaintiffs also incurred expenses, particulars of which will be given before trial. These expenses included costs associated with the development of the various configurations of the TH-495, and also costs associated with the administration and management of BHI.

18. Subsequent to the Undertaking, the Defendant Masse succeeded McKnight as Minister of National Defence. On or about September 17, 1991, Masse, in a policy statement on defence, publicly repeated the Department of National Defence's commitment to the MRCV program. Furthermore, on or about February 10, 1992 the Canadian Ambassador to Germany wrote to the German Staatssekretar des Bundesministerium der Verteidigung (Deputy Minister of Defence) reiterating that Canada would proceed with the MRCV program.

19. In or about March or April, 1992, Masse decided that Bell Helicopter Canada Ltd., of Mirabel, Quebec would be selected to provide up to 100 helicopters to the Department of National Defence (the "Bell Helicopter Contract"). This decision was made without calling for tenders.

20. In or about March or April, 1992, Masse decided further that the MRCV acquisition would be cancelled, and that the RCV phase would be replaced by the acquisition

of up to 229 reconnaissance-enhanced LAVs from DDGM. The selection of DDGM was also made without calling for tenders.

21. On or about April 7, 1992, on the same day as Masse announced the Bell Helicopter Contract, it was announced that DDGM had been selected to provide the reconnaissance-enhanced LAVs at an approximate cost of \$800 million for 229 vehicles.
22. The reconnaissance-enhanced LAVs are in substance equivalent to the RCV phase of the MRCV program, and the Defendant Masse breached the Undertaking in failing to provide the Plaintiff the opportunity to participate in a tender before selecting DDGM. Moreover, the cancellation of the MRCV program was a sham, for which the sole purpose was to avoid or circumvent the Undertaking.
23. In giving the Undertaking in return for the Plaintiff's continued participation in negotiations to build a manufacturing facility in Nova Scotia, and in return for the Plaintiffs' incurring expenses in contemplation of building such a facility and in contemplation of participating in the tender process, the Defendant, McKnight, contracted on behalf of Her Majesty the Queen in Right of Canada to be bound by the terms of the Undertaking. The Defendant, Her Majesty the Queen in Right of Canada, is therefore in breach of contract for failing to honour the terms of the Undertaking.

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24. In addition and in the alternative, the Undertaking and the earlier LAV Representations were intended to be relied upon, and were actually relied upon by the Plaintiffs to their detriment. The defendant, Her Majesty the Queen in Right of Canada is therefore estopped from breaching the terms of the Undertaking and the LAV Representations.

25. In the further alternative, the Defendant, Her Majesty the Queen in Right of Canada has been unjustly enriched by the expenses incurred by the Plaintiffs in reliance upon the Undertaking and the LAV Representations of Beatty, and the Plaintiffs claim restitution of these expenses.

26. Furthermore, the decision to award the Contract to DDGM without calling for tenders was based on improper considerations and was not in compliance with the *Government Contract Regulations*, SOR 87-402, s.6, nor the provisions of the *Contracting Manual*. In particular, the decision was made for the purpose of obtaining the political support of elected representatives from Ontario for the Bell Helicopter Contract, in light of the fact that one of Bell Helicopter's competitors, Eurocopter, was based in Fort Erie, Ontario.

27. In deciding to award the LAV Contract to DDGM, Masse therefore erred in law, exceeded his jurisdiction, and exercised his statutory authority in an improper manner.
28. In the alternative, the LAV Representations and McKnight's subsequent Undertaking that BHI would be permitted to participate in the tender process for the MRCV program were representations that the Defendants knew or ought to have known were false.
29. The Defendants had a duty to the Plaintiffs to exercise due care to ensure that their representations were accurate, and the Defendants breached this duty.
30. At all material times the Defendants McKnight and Masse were acting as Ministers and/or agents of the Crown, and the Defendant Her Majesty the Queen in Right of Canada is in law responsible for their actions.
31. In the alternative, the Defendants McKnight and Masse were acting outside the scope of their Ministerial authority and so are personally liable to the Plaintiffs for their actions.
32. At all material times, BHI was better able to meet the design and technical specifications set by the Department of National Defence than DDGM. Had BHI

been able to participate in a tender process for the Contract, BHI would likely have been awarded the Contract.

33. In particular, in the context of the RCV phase of the MRCV, the Department of National Defence required that RCVs be equipped with armour resistant against 14.5mm armour piercing ammunition and desired that they be equipped with armour resistant against 30mm armour piercing ammunition. This was regarded as essential by the Department of National Defence for the protection of Canadian troops in a combat situation. The TH-495 meets this requirement, while the LAVs manufactured by DDGM do not.
34. In addition, the Department of National Defence required that RCVs be transportable by Hercules aircraft. This was regarded as essential to the Canadian Forces' ability to transport and deploy its LAVs quickly and effectively in a situation calling for a rapid military response. Despite the much higher ballistic protection level of the TH-495 as compared to the DDGM LAVs, the TH-495 remains transportable by Hercules aircraft.
35. In addition, the unit price per vehicle under the Contract with DDGM is inflated and excessive, and the Plaintiff would in all likelihood have been able to submit a lower bid had there been a tender process. At an approximate cost of \$800 million for 229 vehicles, the unit price per vehicle is some \$3.5 million.

36. As a result of the actions of the Defendants, the Plaintiffs have suffered losses, which losses include expenses incurred in reliance on the actions and representations of the Defendants in the total amount of \$40 million and the profits BHI could reasonably have expected to realize had BHI been given the opportunity to participate in a tender for the Contract, in the total amount of \$60 million.
37. The Plaintiffs plead and rely on the provisions of the *Financial Administration Act*, R.S.C. 1985 c. F-11, and the *Government Contract Regulations*, SOR 87-402.
38. The Plaintiffs propose that this action be tried in Toronto.

August 20, 1993

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Solicitors for the Plaintiff

Court File No.

BEAR HEAD INDUSTRIES LTD. - and - HER MAJESTY THE QUEEN IN RIGHT OF CANADA, ET AL.

**ONTARIO COURT OF JUSTICE
(General Division)**

Proceedings Commenced at TORONTO

STATEMENT OF CLAIM

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