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Is It Possible to Stay out of Procurement Trouble?

Tuesday, June 8, 2010

**Is it possible to stay out of
PROCUREMENT TROUBLE?**

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- Judy Wilson
Partner, Blakes, Cassels & Graydon LLP
- Graham McLeod
Vice President of Project Legal Services, Infrastructure Ontario

Is it possible to stay out of PROCUREMENT TROUBLE?

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Presented by:
Judy Wilson, Partner
Blake, Cassels & Graydon LLP

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Vice President of Project Legal Services
Infrastructure Ontario

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Fifteen Practical and Straightforward Things Your Organization Can Do

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Basics in Procurement Law

1. Ensure that your organization has at least one lawyer with expertise in procurement. That individual (i) needs to have an understanding of the basics of procurement law, and (ii) needs to have reviewed/understand at least the key procurement law cases in Canada (at least the Supreme Court of Canada cases).
- Corporate counsel need to come to grips with the basic principle that procurement documents (Instructions to Tenderers and RFPs) may be contracts and, notwithstanding this, are often drafted by non-lawyers.
 - Private sector corporate counsel need to be aware of the fact that procurement is NOT just a public sector issue.
 - All of procurement law is fundamentally about the enforcement of the procurement contract and about basic principles of offer and acceptance.



Basics in Procurement Law – Key Cases

- Procurement law is generally judge-made law and, therefore, someone in the organization needs to have responsibility for tracking procurement case law.
- The following are the key cases that all corporate counsel (or someone in the legal department) should have a basic working knowledge of (all at the Supreme Court of Canada):
 - *Ron Engineering & Construction (Eastern) Ltd. v. Ontario*, [1981] 1 S.C.R. 111
 - *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619
 - *Martel Building Ltd. v. Canada*, [2000] 2 S.C.R. 860
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 - *Tercon Contractors Ltd. v. British Columbia* 2010 SCC 4



Binding and Non-Binding Procurement Processes

2. Understand when “Contract A” comes into existence, when it does not come into existence, and how to take control of this issue.

The existence of “Contract A” or a binding procurement contract depends on the language of the procurement documents. However, for the first time, the “hallmarks” of a binding procurement document were articulated by the SCC as follows:

- Are the bids irrevocable?
- Was there any bid security?
- What was the policy about amending bids?
- Were detailed evaluation criteria set out?
- Was a draft agreement attached?
- Was pricing subject to fixed provisions? Was it negotiable?
- Was there an obligation to accept a prescribed form of contract?
- Did bidders have to submit an offer/sign a proposal or bid form?

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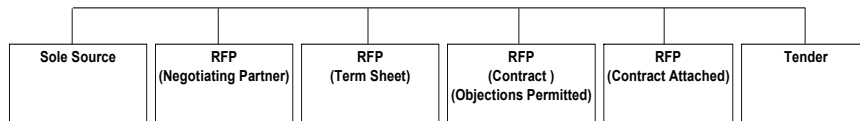
Corporate Procurement Rules

3. Establish reasonable internal procurement rules and follow them. Be very careful as to the requirements for competitive procurement.

- There is some evidence that internal/corporate procurement guidelines establish the reasonable expectations of bidders when any entity engages in competitive procurement.
- Ensure that the internal guidelines clearly distinguish between when competitive procurement is required and when it is not.
- Address issues of the “spectrum” competitive procurement in the procurement guidelines or corporate policy.
- Have a firm sense of whether binding/non-binding procurements will be used and in what circumstances.

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The Procurement Spectrum



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Compliance

4. If Contract A does come into existence, understand the basics of the concept of “compliance” in competitive procurement processes.
- The concept of “compliance” simply means that the “offer” that appears in the tender documents must be “accepted”, in full, by complying with all requirements of the procurement documents in order for the procurement contract (Contract A) to come into existence. If a bid is NOT compliant, the tendering authority risks being sued by the compliant bidders if it accepts a non-compliant bid.
 - This is important if your company is BOTH bidding and running a competitive procurement process.
 - The courts are serious about compliance and the obligation not to accept a non-compliant proposal.
 - This, in combination with the courts refusal to enforce the contract provision in Tercon makes careful decisions about compliance much more important.

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Compliance - continued

4. If Contract A does come into existence, understand the basics of the concept of “compliance” in competitive procurement processes. - continued
 - As principles of compliance entrench, tendering authorities must be more vigilant about permitting the correction of errors in tenders or proposals.
 - The concept of bid repair rises in importance in proportion to the strictness surrounding compliance.
 - In a competition between “freedom of contract” and public interest, tendering authorities should be concerned that “public interest” appears to be dominant in the case of competitive procurement processes.
 - Therefore, bidders should expect less flexibility in a tendering authority’s willingness to let a bidder amend its bid.

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Fairness

5. Do not underestimate the legal importance of conducting procurement processes “fairly” – whether or not Contract A comes into existence.
 - An obligation to act “fairly” is a concept being enforced by the courts by way of an “implied term”, even if intellectual gymnastics are required to do so (this is evident in Tercon).
 - What was originally thought to be a somewhat outrageous implied term (*Martel* and *MJB*) has become entrenched in attacks on tendering authorities.

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Fairness - continued

5. Do not underestimate the legal importance of conducting procurement processes “fairly” – whether or not Contract A comes into existence. - continued
- The introduction of a breach of fairness arising out of changes to the procurement documents that benefit the competitive position of one of the bidders is an issue to watch for the future.
 - SCC did allow for the possibility of clear language overriding the implied duty of fairness.
 - SCC expressed concern that the government in *Tercon* had acted in a manner which was an “affront to the integrity and business efficacy of the tendering process”.

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Adding Negotiation to a Competitive Procurement Process

6. Take care when adding negotiation to competitive procurement processes. It must be done very carefully, must be respectful of the ranking of the bidders and must be explicitly permitted in the procurement documents.
- Notwithstanding that the Supreme Court of Canada has said that negotiation and competition are mutually exclusive, *Tercon* seems to have established a new standard for negotiation.
 - In the past, the SCC has regarded competition as a replacement to traditional commercial negotiation.
 - In *Tercon*, the SCC appears to acknowledge that negotiations can take place, even in the presence of Contract A, if the “...negotiation was constrained and did not go to the fundamental details of either the procurement process or the ultimate contract.”

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Prequalification Processes

7. Take greater care in prequalification processes and the naming of the short-listed bidders.
- Tendering authorities/buyers must take much greater care in ensuring that the rules with respect to the prequalified parties are explicitly set out and followed.
 - This is a practice issue that is often not followed with precision.
 - *Tercon* will now prohibit a relaxed approach to the naming of these parties.

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Injunctions and Waivers of Liability

8. All procurement documents should have a liability provision and a well-defined cap on liability. Think carefully before a waiver of liability is used (because a waiver may be more difficult to defend).
- Lessons learned from *Tercon* is that waiver/cap clauses must be drafted carefully.
 - Unconscionable waiver clauses may be at significant risk in public procurement processes (and the courts have not yet spoken on waiver clauses in private sector procurements).
 - Consider waiver clauses that genuinely cap damages, for example, at the cost of preparing a bid or a defined amount.

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Good Procurement Practices vs. Managing Legal Risks

9. Understand that procurement risks are often more reputational than legal.

- It is likely that governments and quasi-government institutions will be held to a higher standard than pure legal principles in the expenditure of public funds than the private sector will be. It may be that reputational risk for the private sector may be following a similar path in procurement.
- Legal standards may not be sufficient to protect against reputational risks.
- *Tercon* seems to support the concept of holding public-sector entities to a very high standard in procurement; courts are silent on the standards that private sector entities will be held to.

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Commercially Confidential Meetings

10. If you wish to carry out a binding competitive procurement process for large or complex transactions, consider using the concept of the “commercially confidential meeting”.

- Contrary to the principle that all bidders get information at the same time.
- However, commercially very valuable, especially in complex procurements.
- Safeguards include making such meetings scheduled, equally accessible to all bidders, non-binding, subject to fairness review and subject to strict agenda.

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Bid Rigging

11. Understand what bid rigging is and watch for it.

- Getting increased attention from the Competition Bureau.
- Increasing concern among bidders.
- Tendering authority best defence is a clear set of rules and then watching for the common signs:
 - identical bids
 - certain suppliers who never bid on certain contracts
 - certain suppliers who are always high or low on contracts

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Bid Shopping

12. Train staff to avoid bid shopping. This may be a more significant procurement risk in the private sector than in the public sector.

- Often a problem that staff in the private sector intuitively think is simply “good negotiations”.
- Seems to be subject to a broader definition.
- Very difficult to avoid when negotiations are being carried out with multiple bidders.
- In some industries has been “common practice” but is still not acceptable to the courts.

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Training and Procurement Professionals

13. Do NOT assume that procurement professionals in your organization have any training or knowledge in procurement law.
- There are often surprising gaps in basic understanding of procurement law among procurement professionals – knowledge and training in procurement law principles is variable.
 - Basic procurement training is a must for organizations wishing to manage their procurement risk.

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Template Documents

14. The best organizations run procurement processes with a heavy reliance on template documents. However, template documents are only as good as the system that supports them.
- Divide all template documents into (i) those parts that are not amended except by a person/committee responsible for the official amendment of the template and (ii) those parts of the template that are designed to be amended project by project (purchase by purchase).
 - Have a workbook available that supports the template documents and their use.
 - Train staff in the use of template documents.

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Template Documents - continued

14. The best organizations run procurement processes with a heavy reliance on template documents. However, template documents are only as good as the system that supports them. - continued

- Have regular review sessions of the templates and invite input from the users.
- Do not circulate electronic copies of the template documents that are NOT designed to be amended on a project by project basis.
- Post the templates on internal procurement websites.
- USE PLAIN LANGUAGE in all procurement templates.
- Distinguish between binding and non-binding procurement documents.

The logo for Blakes Lawyers, featuring the name "Blakes" in a large, stylized, cursive script font, with the word "LAWYERS" in a smaller, plain, sans-serif font directly underneath it.

Frankenstein Monsters

15. Be on the look-out for the “Frankenstein Monster” procurement document. These are very common and enormously risky. These are procurement documents that “cut and paste” from a collection of recently used procurement documents and, inevitably, create documents that are ambiguous, legally inconsistent and, in the end, confusing to bidders (leading to poor competition or poor prices).

- The best way to avoid this is through the use of template documents and through “Frankenstein Monster” training.
- The most common mistake is that the document will contain BOTH hallmarks of a binding “Contract A” AND hallmarks of a non-binding procurement.

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Supreme Court of Canada

R. (Ont.) v. Ron Engineering, [1981] 1 S.C.R. 111

Date: 1981-01-27

Her Majesty The Queen in right of Ontario and the Water Resources Commission (*Defendants*)
Appellants;

and

Ron Engineering & Construction (Eastern) Ltd. (*Plaintiff*) *Respondent*.

1980: November 13; 1981: January 27.

Present: Martland, Dickson, Estey, McIntyre and Lamer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Contracts—Mistake—Tender on construction contract—Mistake in calculation of bid discovered by respondent after tenders opened—Appellants notified of mistake before tender accepted—Respondent declined to enter into agreement—Whether or not appellants entitled to consider deposit forfeited.

This appeal was from a decision of the Ontario Court of Appeal which reversed the trial judge and directed the return to the respondent contractor of \$150,000 paid by it to the appellant owner by way of a tender deposit at the time of filing of a bid in response to a call for tenders by the owner.

Pursuant to the rules applicable to the call for tenders, the contractor submitted his tender accompanied by a certified cheque for \$150,000 that was to be returned after the execution of the contract and the receipt of the performance bond and the payment bond. The bid submitted was discovered to be in error after the opening of tenders: an amount of \$750,058 had been omitted from the total sum tendered. The tender documents included the term that if a tender were withdrawn, or if the Commission did not receive the executed agreement within a certain time, the Commission could retain the deposit. Although the contractor requested by telex to withdraw its tender without penalty, it maintained in subsequent correspondence and in these proceedings that it had not withdrawn its tender but that, by reason of the notice of its error given to the owner prior to acceptance of the tender, the offer was not capable of being accepted. The owner, after receiving the contractor's notice of the mistake and in response to the contractor's position that the offer was not revoked, submitted the contract in prescribed form for the contractor's signature. When the contractor declined to enter the agreement, the owner, relying on the tender deposit term, decided to retain the deposit and proceeded to

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accept another tender. The contractor commenced this action to recover the tender deposit.

Held: The appeal should be allowed.

Nothing in the tender documentation supported the contractor's position that the owner had not complied with the terms set out in the documentation because the owner did not execute the construction document before proffering it to the contractor.

The revocability of the offer was to be determined in accordance with the "General Conditions" and "Information for Tenderers" and related documents. A unilateral contract, contract A, arose automatically upon the submission of a tender between the contractor and the owner whereby the tenderer could not withdraw the tender for a specified period of time, after which, if the tender had not been accepted, the deposit could be recovered by the tenderer. The principal term of contract A was the

irrevocability of the bid and the corollary term was the obligation in both parties to enter into a construction contract, contract B, upon the acceptance of the tender. The deposit was required to ensure the performance by the contractor-tenderer of its obligations under contract A. It is not correct to say that when a mistake was proven after the tenders were opened by the production of reasonable evidence, the person to whom the tender was made could neither accept the tender nor forfeit the deposit. The test was to be imposed when the tender was submitted, not at a later date, and at that time the rights of the parties under contract A crystallized, at least in circumstances where the tender was capable of acceptance in law.

There was no question of mistake on the part of either party before the moment when contract A came into existence. The tender, despite its being the product of a mistaken calculation, could be subject to the terms and conditions of contract A so as to invoke forfeiture of the deposit. There was no error in the sense that the contractor did not intend to submit the tender in its form and substance. Then, too, there was no principle in law under which the tender was rendered incapable of acceptance by the appellant. No mistake existed which impeded the coming into being of contract A. The effect of a mistake upon the formation, enforceability or interpretation of a subsequent construction contract need not be considered in this case.

The issue did not concern the law of mistake but the application of the forfeiture provisions contained in the

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tender documents. The deposit was recoverable by the contractor under certain conditions, none of which was met, and also was subject to forfeiture under another term of the contract, the conditions of which had been met. The omission by the owner to insert the number of weeks specified by the tender in the appropriate blank in the contract had no bearing on the rights of the parties to the appeal and did not stand in the way of the owner's asserting its right to retain the deposit.

McMaster University v. Wilchar Construction Ltd. et al., [1971] 3 O.R. 801, distinguished; *Belle River Community Arena Inc. v. W.J.C. Kaufmann Co. Ltd. et al.* (1978), 20 O.R. (2d) 447, considered.

APPEAL from a judgment of the Court of Appeal for Ontario¹, reversing the judgment of J. Holland J. Appeal allowed.

B. Johnston, Q.C., and M. Fleishman, for the defendants, appellants.

Hyman Soloway, Q.C., and J. Shields, for the plaintiff, respondent.

The judgment of the Court was delivered by

ESTEY J.—The Ontario Court of Appeal, reversing the trial judge, directed the return to the respondent-contractor (hereinafter referred to as the “contractor”) of \$150,000 paid by the contractor to the appellant-owner (hereinafter referred to as the “owner”) by way of a tender deposit at the time of filing a bid in response to a call for tenders by the owner.

¹ (1979), 24 O.R. (2d) 332; (1979), 98 D.L.R. (3d) 548.

Under the general conditions applicable to the call for tenders, the owner issued as part of the tender documentation, "Information for Tenderers", paragraph 13 of which, under the heading "Tender Deposit", stated in part:

Except as otherwise herein provided the tenderer guarantees that if his tender is withdrawn before the Commission shall have considered the tenders or before or after he has been notified that his tender has been recommended to the Commission for acceptance or that if the Commission does not for any reason receive within the period of seven days as stipulated and as required

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herein, the Agreement executed by the tenderer, the Performance Bond and the Payment Bond executed by the tenderer and the surety company and the other documents required herein, the Commission may retain the tender deposit for the use of the Commission and may accept any tender, advertise for new tenders, negotiate a contract or not accept any tender as the Commission may deem advisable.

Pursuant to the rules applicable to the call for tenders, the contractor submitted a tender for \$2,748,000 on or before 3:00 p.m., July 4, 1972. Accompanying the contractor's tender was a certified cheque in the amount of \$150,000 as required by the terms and conditions upon which tenders were called. The document already referred to, "Information for Tenderers", further provided with respect to the tender deposit:

After the execution of the Contract and the receipt by the Commission of the Performance Bond and the Payment Bond the tender deposit of the successful tenderer will be returned.

The contractor's employee who filed the tender, Hedges, remained for the opening of tenders. Upon learning that the contractor's tender was the lowest out of eight bids and that it was about \$632,000 lower than the next lowest bidder, she immediately reported to the president of the contractor, Vered. What ensued is set out by J. Holland J., the trial judge, in his judgment:

From her prior experience Hedges felt that there was something radically wrong and wondered if she had made an error... Hedges went to call Vered after the tender opening—and this would probably be sometime around 3.30 p.m. She says that as soon as she spoke to Vered he said: "We're low. I made a mistake". This statement was made before she reported on the tenders. She asked if there was anything she could do and was told by Vered "No—come back to Ottawa". She never returned to the Ministry office.

...

Following the opening of tenders the plaintiff forwarded a telex at approximately 4.12 p.m. on July 4, 1972. Exhibit 4, (page 27 of exhibit book) is the copy of this telex and reads as follows:

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Today we submitted our tender for the above project and unfortunately due to the rush of compiling our last figures we omitted to add to our total the sum for our own forces work

and general condition in the amount of 750,058.00 which actually should have been added to our lump sum tender amount for a total of 3,498,058.00 dollars.

Due to this unfortunate error we would appreciate being given the opportunity to show to you our estimate indicating the error and to hereby request to withdraw our tender and request an apology without being penalized.

The word “apology” obviously is difficult to understand but there is no doubt about the fact that this was the very word used by Vered as his own copy from his telex in his office contained the exact wording. In any event, this was a “request to withdraw the tender without penalty”.

In subsequent correspondence and throughout these proceedings the contractor has maintained the position that it has not withdrawn its tender but that by reason of the notice of its error, given to the owner prior to the acceptance of the tender, the offer thereafter was not capable in law of being accepted and that the contractor has the right to recover the \$150,000 deposit. The learned trial judge concluded with respect to the facts:

- (1) that the tender as filed was as intended to be filed,
- (2) that the procedure leading to the determination of the tender figure, and not the tender itself, was in error. This was the fault of the plaintiff alone,
- (3) there was no error on the face of the tender,
- (4) that the error was learned of after the filing and after the close of time for filing,
- (5) that the error was known to Vered prior to Hedges advising Vered of the results of the tender opening,
- (6) that the plaintiff was diligent in attempting to get in touch with someone to advise of the error and to request the right to withdraw without penalty,
- (7) that the budget prepared by Gore and Storrie Ltd. in the sum of \$2,744,700.00, was an accurate basis for completion by a conscientious contractor, such

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to include profit. I point out that there was no real attempt to discredit this budget figure.

It should be explained that the owner obtained an estimate by its consulting engineers of the cost of the water and sewage treatment plant for which work the tenders were being called. These engineers estimated that the cost of the job, including profit, would be \$2,744,700, some \$3,300 lower than the contractor's tender.

The owner, after the receipt of the notice from the contractor of the mistake in the tender, and no doubt responding to the position taken by the contractor that its offer was not revoked by it, submitted to the contractor for signature the construction contract in the form generally prescribed by the tender documents together with the other documents therein called for. The record does not include a blank form of the construction contract, but no issue arose as to the source of the form of contract sent to the contractor, and so it may be assumed said proffered contract complied with the tender documents. The

contractor declined to enter into the agreement for the declared reason that it had by mistake submitted a tender which was \$750,058 lower than the contractor intended the bid to be. The owner then took the position, relying upon the tender deposit term quoted above, that it was entitled to retain the tender deposit and proceed to accept the tender posted by the second lowest bidder. This action was then commenced by the contractor to recover the \$150,000 tender deposit. The owner counter-claimed for damages occasioned by the contractor's refusal "to carry out the terms of its tender" and the consequential necessity of accepting the tender of the second lowest bidder. The trial judge found the owner entitled to retain the tender deposit and dismissed the counterclaim.

The core of the submission by the contractor is simply that a mistake by a tenderer, be it patent or latent, renders the tender revocable or the deposit recoverable by the tenderer, notwithstanding the provisions of paragraph 13 quoted above, so long as notice is given to the owner of the mistake prior

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to the acceptance by the owner of the contractor's tender. There are subsidiary arguments advanced by the contractor to which I will later make reference.

We are not here concerned with a case where the mistake committed by the tendering contractor is apparent on the face of the tender. Rather the mistake here involved is one which requires an explanation outside of the tender documents themselves. The trial judge has so found and there is evidence in support of that finding. Nor do we have here a case where a trial court has found impropriety on the part of the contractor such as the attempted recall of an intended, legitimate bid once the contractor has become aware that it is the lowest bidder by a wide margin.

The Court of Appeal in reversing the trial court proceeded on the basis that the owner had not attempted "to signify its acceptance of the tender" but rather relied upon paragraph 13 of "Information for Tenderers" which I have quoted above. Relying on its decision in *Belle River Community Arena Inc. v. W.J.C. Kaufmann Co. Ltd. et al.*² decided by the Court of Appeal after the trial judgment herein had been handed down, the Court of Appeal concluded "that an offeree cannot accept an offer which he knows has been made by mistake and which affects a fundamental term of the contract". The court, speaking through Arnup J.A., continued:

In our view, the principles enunciated in that case ought to be applied in this case. The error in question has been found to be, as it obviously was, material and important. It was drawn to the attention of the Commission almost at once after the opening of tenders. Notwithstanding that,

² (1978), 20 O.R. (2d) 447.

the Commission proceeded as if the error had not been made and on the footing that it was entitled to treat the tender for what it said on its face.

and concluded:

As I said in the course of the argument, a commission or other owner calling for tenders is entitled to be sceptical when a bidder who is the low tenderer by a

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very substantial amount attempts to say, after the opening of tenders, that a mistake has been made. However, when that mistake is proven by the production of reasonable evidence, the person to whom the tender is made is not in a position to accept the tender or to seek to forfeit the bid deposit.

In the *Belle River* case, *supra*, the contractor purported to withdraw the tender before any action to accept was taken by the owner. In the course of reaching the conclusion that the contractor was entitled to recover his bid bond, Arnup J.A. in that case found that the owner was unable to accept the offer once he became aware that it contained a mistake which affected a fundamental term of the contract. At p. 452 the learned justice in appeal put it this way:

In substance, the purported offer, because of the mistake, is not the offer the offeror intended to make, and the offeree knows that.

The principle applies even if there is a provision binding the offeror to keep the offer open for acceptance for a given period.

and continuing on pp. 453-4:

In view of the conclusion I have reached as to the inability of the plaintiff to accept the tender, it does not matter, in my opinion, whether the purported tender could be withdrawn, or was in fact withdrawn, before the purported acceptance.

...

If Kaufmann's tender could be withdrawn before acceptance (as occurred in *Hamilton Bd. Ed.* case [[1960] O.R. 594]), then Kauffman's [sic] tender was so withdrawn, and no contract came into existence. If it could not be withdrawn for 60 days, it nevertheless could not be accepted, for the reason already stated, and hence no contract came into existence.

This judgment is the basis for that given by the Court of Appeal in these proceedings.

Before us the contractor took the position that, by reason of the fact that the owner did not execute the construction contract before proffering it to the contractor for signature, the owner had not thereby conformed with the quoted portion of paragraph 13. I find nothing in the "Information for Tenderers" or in any of the tender documents which in any way supports such a position. Indeed,

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the term of the last part of paragraph 13, which I have already set out above, read literally would require the tenderer to execute the agreement and associated documents and file them with the owner in order to avoid the retention by the owner of the tender deposit. Clearly on the documentary record the owner called upon the contractor to enter into the construction contract in the manner provided for in the tender documents and the construction contract did not come into being solely by reason of the contractor's refusal to execute the form of contract forwarded to the contractor by the owner.

The revocability of the offer must, in my view, be determined in accordance with the "General Conditions" and "Information for Tenderers" and the related documents upon which the tender was submitted. There is no question when one reviews the terms and conditions under which the tender was made that a contract arose upon the submission of a tender between the contractor and the owner whereby the tenderer could not withdraw the tender for a period of sixty days after the date of the opening of the tenders. Later in these reasons this initial contract is referred to as contract A to distinguish it from the construction contract itself which would arise on the acceptance of a tender, and which I refer to as contract B. Other terms and conditions of this unilateral contract which arose by the filing of a tender in response to the call therefor under the aforementioned terms and conditions, included the right to recover the tender deposit sixty days after the opening of tenders if the tender was not accepted by the owner. This contract is brought into being automatically upon the submission of a tender. The terms and conditions specified in the tender documents and which become part of the terms of contract A between the owner and the contractor included the following provision:

6. Withdrawal or Qualifying of Tenders

A tenderer who has already submitted a tender may submit a further tender at any time up to the official closing time. The last tender received shall supersede and invalidate all tenders previously submitted by that tenderer for this contract.

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A tenderer may withdraw or qualify his tender at any time up to the official closing time by submitting a letter bearing his signature and seal as in his tender to the Commission Secretary or his authorized representative in his office who will mark thereon the time and date of receipt and will place the letter in the tender box. No telegrams or telephone calls will be considered.

Paragraph 13, which I have quoted earlier, provides for the return of the tender deposit on the execution of the construction contract and then goes on to provide, and I repeat the applicable portion for emphasis:

Except as otherwise herein provided the tenderer guarantees that if his tender is withdrawn, or if the Commission does not for any reason receive within the period of seven days... the Agreement executed by the tenderer... the Commission may retain the tender deposit...

Paragraph 14 is also relevant:

The tenderer agrees that, if requested so to do by the Commission or anyone acting on its behalf within 90 days after the date of opening tenders, he will execute in triplicate and return to the Commission the Agreement in the form found [sic] herein within seven days after being so requested.

Here the contractor expressly avoided employing any terminology indicating a withdrawal of the tender, and indeed affirmatively asserted the position throughout that the offer had not been revoked. The owner did proffer a construction agreement and this agreement was not executed by the tenderer within the seven day period.

It is convenient at this point to dispose of a submission by the contractor that forfeiture of the deposit could occur only if the contractor failed to furnish the performance and payment bonds under paragraph 12 of the "Information for Tenderers", and since the contractor's obligation thereunder arose only upon the receipt of the construction contract executed by the owner, no right to forfeiture ever arose. Paragraph 12 deals only with the acceptance of a tender by the execution of the construction contract. The paragraph has no relation to payment or retention of deposit moneys. In short, the provision is concerned entirely with the second stage of the contracting procedure, the

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construction contract, a stage not here reached and with which we are not concerned.

We are then left with the bare submission on behalf of the contractor that while the offer was not withdrawn it was not capable of acceptance and that by reason thereof the contractor is entitled to a return of the deposit.

I share the view expressed by the Court of Appeal that integrity of the bidding system must be protected where under the law of contracts it is possible so to do. I further share the view expressed by that Court that there may be circumstances where a tender may not be accepted as for example where in law it does not constitute a tender, and hence the bid deposit might not be forfeited. That is so in my view, however, simply because contract A cannot come into being. It puts it another way to say that the purported tender does not in law amount to an acceptance of the call for tenders and hence the unilateral contract does not come into existence. Therefore, with the greatest of respect, I diverge from that Court where it is stated in the judgment below:

However, when that mistake is proven by the production of reasonable evidence, the person to whom the tender is made is not in a position to accept the tender or to seek to forfeit the bid deposit.

The test, in my respectful view, must be imposed at the time the tender is submitted and not at some later date after a demonstration by the tenderer of a calculation error. Contract A (being the contract arising forthwith upon the submission of the tender) comes into being forthwith and without further formality upon the submission of the tender. If the tenderer has committed an error in the calculation leading to the tender submitted with the tender deposit, and at least in those circumstances where at that moment the tender is capable of acceptance in law, the rights of the parties under contract A have thereupon crystallized. The tender deposit, designed to ensure the performance of the obligations of the tenderer under contract A, must therefore stand exposed to the risk of forfeiture upon the breach of those

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obligations by the tenderer. Where the conduct of the tenderer might indeed expose him to other claims in damages by the owner, the tender deposit might well be the lesser pain to be suffered by reason of the error in the preparation of the tender. This I will return to later.

Much argument was undertaken in this Court on the bearing of the law of mistake on the outcome of this appeal. In approaching the application of the principles of mistake it is imperative here to bear in mind that the only contract up to now in existence between the parties to this appeal is the contract arising on the submission of the tender whereunder the tender is irrevocable during the period of time stipulated in the contract. Contract B (the construction contract, the form of which is set out in the documents relating to the call for tenders) has not and did not come into existence. We are concerned therefore with the law of mistake, if at all, only in connection with contract A.

The tender submitted by the respondent brought contract A into life. This is sometimes described in law as a unilateral contract, that is to say a contract which results from an act made in response to an offer, as for example in the simplest terms, "I will pay you a dollar if you will cut my lawn". No obligation to cut the lawn exists in law and the obligation to pay the dollar comes into being upon the performance of the invited act. Here the call for tenders created no obligation in the respondent or in anyone else in or out of the construction world. When a member of the construction industry responds to the call for tenders, as the respondent has done here, that response takes the form of the submission of a tender, or a bid as it is sometimes called. The significance of the bid in law is that it at once becomes irrevocable if filed in conformity with the terms and conditions under which the call for

tenders was made and if such terms so provide. There is no disagreement between the parties here about the form and procedure in which the tender was submitted by the respondent and that it complied with the terms and conditions of the call for tenders. Consequently, contract A came into being. The principal term of contract A is the irrevocability of

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the bid, and the corollary term is the obligation in both parties to enter into a contract (contract B) upon the acceptance of the tender. Other terms include the qualified obligations of the owner to accept the lowest tender, and the degree of this obligation is controlled by the terms and conditions established in the call for tenders.

The role of the deposit under contract A is clear and simple. The deposit was required in order to ensure the performance by the contractor-tenderer of its obligations under contract A. The deposit was recoverable by the contractor under certain conditions, none of which were met; and also was subject to forfeiture under another term of the contract, the provisions of which in my view have been met.

There is no question of a mistake on the part of either party up to the moment in time when contract A came into existence. The employee of the respondent intended to submit the very tender submitted, including the price therein stipulated. Indeed, the President, in instructing the respondent's employee, intended the tender to be as submitted. However, the contractor submits that as the tender was the product of a mistake in calculation, it cannot form the basis of a construction contract since it is not capable of acceptance and hence it cannot be subject to the terms and conditions of contract A so as to cause a forfeiture thereunder of the deposit. The fallacy in this argument is twofold. Firstly, there was no mistake in the sense that the contractor did not intend to submit the tender as in form and substance it was. Secondly, there is no principle in law under which the tender was rendered incapable of acceptance by the appellant. For a mutual contract such as contract B to arise, there must of course be a meeting of the minds, a shared *animus contrahendi*, but when the contract in question is the product of other contractual arrangements, different considerations apply. However, as already stated, we never reach that problem here as the rights of the parties fall to be decided according to the tender arrangements, contract A. At the point when the tender was submitted the owner had not been told

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about the mistake in calculation. Unlike the case of *McMaster University v. Wilchar Construction Ltd. et al.*³ there was nothing on the face of the tender to reveal an error. There was no inference to be drawn by the quantum of the tender (bearing in mind the estimate by Gore and Storrie) that there had indeed been a miscalculation.

In the *McMaster University* case, *supra*, the trial judge, Thompson J., heard an action for breach of contract in refusing to proceed with the execution of a construction agreement, and the claim by the owner was for damages equal to the difference between the defendant's bid and the next lowest. The court dismissed the claim finding no obligation on the defendant to conclude a construction contract. Various references are made to the doctrine of mistake but the case appears to have turned upon the fact that the mistake was known to the offeree and therefore the offer could not be accepted and hence the formation of the contract could not occur. In that case the offer mistakenly omitted one page of the tender and the learned judge, at p. 804, stated:

It undoubtedly must have been apparent to Mr. Hedden [employee of the owner], if not to the entire tender committee, that this page was missing from the Wilchar [contractor] tender as delivered.

and again at p. 808:

To me this is patently a case where the offeree, for its own advantage, snapped at the offeror's offer well knowing that the offer as made was made by mistake.

The court was therefore, in that case, not so much concerned with mistake as with the inability of the parties to comply on the facts with the fundamental rules pertaining to the formation of contracts. There could be no *consensus ad idem* and hence construction contract B could not come into being. More important to the issue now before us, the document submitted by the contractor was on its face incomplete and could not in law amount to a

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tender as required by the conditions established in the call for tenders.

It was not seriously advanced that this was a case of patent error in the tender offer and I proceed on the basis that there was not a patent error present.

On the facts as found by the learned trial judge, no mistake existed which impeded or affected the coming into being of contract A. The 'mistake' occurred in the calculations leading to the figures that the contractor admittedly intended to submit in his tender. Therefore, the issue in my view concerns not

³ [1971] 3 O.R. 801.

the law of mistake but the application of the forfeiture provisions contained in the tender documents. The effect a mistake may have on the enforceability or interpretation of a contract subsequently arising is an entirely different question, and one not before us. Neither are we here concerned with a question as to whether a construction contract can arise between parties in the presence of a mutually known error in a tender be it, at least initially, either patent or latent.

It might be argued that by some abstract doctrine of law a tender which could not form the basis of a contract upon acceptance in the sense of contract B, could not operate as a tender to bring into being contract A. It is unnecessary to consider such a theory because it was not and could not be argued that the tender as actually submitted by the contractor herein was not in law capable of acceptance immediately upon its receipt by the owner, the appellant. There may well be, as I have indicated, a situation in the contemplation of the law where a form of tender was so lacking as not to amount in law to a tender in the sense of the terms and conditions established in the call for tenders, and it may well be that such a form of tender could not be 'snapped up' by the owner, as some cases have put it, and therefore it would not operate to trigger the birth of contract A. Such a situation might arise in the circumstances described in Fridman, *The Law of Contract*, at p. 81:

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An offer that is made in error, *e.g.*, as where the offeror intended to say \$200 a ton but wrote \$20 by mistake, may be an offer that cannot be validly accepted by the other party.

The rule in *Foster v. Mackinnon* (1869), L.R. 4 C.P. 704 (*vide* Cheshire and Fifoot, *Law of Contract*, 9th ed., 1976, pp. 239-40, for a discussion of the *non est factum* rule) might also preclude the creation of a contract based upon such an offer. We do not have to decide that question here.

Nor are we concerned with the position of the parties where an action is brought upon a refusal to form contract B as was the case in *McMaster, supra*. It is true that the appellant-owner here has made a counter-claim for damages resulting from the refusal of the respondent to enter into the construction contract but such counter-claim was dismissed and the appeal herein is concerned only with the claim made by the respondent for the return of the tender deposit.

Left to itself, therefore, the law of contract would result in a confirmation of a dismissal by the learned trial judge of the claim by the contractor for the return of the tender deposit. The terms of contract A, already set out, clearly indicate a contractual right in the owner to forfeit this money.

As the respondent has not raised the principle of the law of penalty as it applies to the retention of the deposit here by the appellant, it is not necessary to deal with that branch of the law.

The contractor has in this Court and in the courts below also founded its claim for the return of the tender deposit on the basis that when the owner submitted the construction agreement for execution by the contractor-tenderer, the proffered contract was not signed and left blank the space in the contract form for the completion of the work although the contractor's tender had specified ninety weeks.

It should be noted that in the prescribed form of tender the contractor could either insert the time for the completion of the works or, on failing to do

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so, would be deemed to agree with the construction schedule stipulated by the owner's engineer. J. Holland J. at trial stated with reference to this submission:

I have considered the fact that the time of completion was blank and have concluded that this was purely a clerical error and should not affect the rights and obligations of the parties. I approach this aspect of the case as if the documents as forwarded were in accordance with the tender and include the 90 week period. This is not such a situation as was considered by the Supreme Court of Canada in *Cole v. Sumner*, [1900] 30 S.C.R. 379 [sic], where the matter in dispute was whether there had been an offer and an acceptance of the offer which was made.

The Court of Appeal was not, of course, called upon to determine this point by reason of its disposition of the case.

It would be anomalous indeed if the march forward to a construction contract could be halted by a simple omission to insert in the appropriate blank in the contract the number of weeks already specified by the contractor in its tender. It would be a simple matter for the contractor, in executing the prescribed form after having fixed the contract price and all other terms which were directly dependent upon its tender, to complete the form in accordance with that tender where the proffered contract was inadequate. The contractor was not asked to sign a contract which diverged in any way from its tender but simply to sign a contract in accordance with the instructions to tenderers and in conformity with its own tender. When executing the proffered contract, the contractor was free to insert "ninety weeks" in the blank space in the contract form and indeed to make any other additions or alterations required to bring the contract into conformity with the contractor's tender. I cannot conclude therefore that this omission has any bearing upon the rights of the parties to this appeal and specifically that it stands in the way of the owner in its assertion of its right to retain the tender deposit.

For these reasons I would allow the appeal, set aside the order of the Court of Appeal, and restore

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the judgment of J. Holland J. at trial with costs, here and in all courts below, to the appellant.

Appeal allowed.

Solicitor for the defendants, respondents: H. Allan Leal, Toronto.

Solicitors for the plaintiff appellant: Soloway, Wright, Houston, Ottawa.

M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd., [1999] 1 S.C.R. 619

M.J.B. Enterprises Ltd.

Appellant

v.

**Defence Construction (1951) Limited and the said
Defence Construction (1951) Limited
carrying on business as
Defence Construction Canada and the said
Defence Construction Canada**

Respondent

Indexed as: M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.

File No.: 25975.

1998: November 6; 1999: April 22.

Present: Lamer C.J. and Cory, McLachlin, Iacobucci, Major, Bastarache and Binnie JJ.

on appeal from the court of appeal for alberta

Contracts –Tendering process -- Tender documents defining material to be included in valid tender -- Privilege clause providing that lowest or any tender would not necessarily be accepted -- Lowest bid accepted but that bid not in conformity with tender requirements -- Whether inclusion of a “privilege clause” in the tender documents allows the person calling for tenders to disregard the lowest bid in favour of any other tender, including a non-compliant one.

The respondent invited tenders and awarded the contract to the lowest tenderer of the four received notwithstanding the fact that the bid did not comply with the tender specifications. The tender documents included a “privilege clause” that stated that the lowest or any tender would not necessarily be accepted. The winning bid included a hand-written note outlining a schedule of final costs even though amendments to the tender documents required tenderers to submit only one price. The other tenderers complained that this note constituted a qualification that invalidated the tender. The respondent nevertheless determined that the note was merely a clarification and accepted the bid. The appellant, who had submitted the second lowest tender, brought an action for breach of contract claiming that the winning tender should have been disqualified and that its tender should have been accepted as the lowest valid bid.

The parties agreed on damages prior to trial, subject to the determination of liability. The trial judge found that the note was a qualification but held that, given the presence of the privilege clause, the respondent was under no obligation to award the contract to the appellant as the next lowest bidder. The Alberta Court of Appeal dismissed the appeal. At issue here is whether the inclusion of a “privilege clause” in the tender documents allows the respondent to disregard the lowest bid in favour of any other tender, including a non-compliant one.

Held: The appeal should be allowed.

The submission of a tender in response to an invitation to tender may give rise to contractual obligations (Contract A), quite apart from the obligations associated with the construction contract to be entered into upon the acceptance of a tender (Contract B), depending upon the intentions of the parties.

Contract A arose in this case. At a minimum, the respondent offered, in inviting tenders through a formal tendering process involving complex documentation and terms, to consider bids for Contract B. In submitting its tender, the appellant accepted this offer. The submission of the tender is good consideration for the respondent's promise, as the tender was a benefit to the respondent, prepared at a not insignificant cost to the appellant, and accompanied by the bid security.

The tender documents govern the terms, if any, of Contract A and they include no explicit term imposing an obligation to award Contract B to the lowest valid tender. Terms may be implied, however, (1) based on custom or usage, (2) as the legal incidents of a particular class or kind of contract, or (3) based on the presumed intention of the parties where the implied term must be necessary to give business efficacy to a contract or as otherwise meeting the "officious bystander" test as a term which the parties would say that they had obviously assumed. In the circumstances of the present case, it was appropriate to find an implied term according to the presumed intentions of the parties. This obligation was to accept only a compliant tender, although the respondent need not accept the lowest compliant tender.

A determination of the presumed intentions of the parties focuses on the intentions of the actual parties. A court, when dealing with terms implied in fact, must be careful not to slide into determining the intentions of reasonable parties. The implication of the term must have a certain degree of obviousness to it and may not be found if there is evidence of a contrary intention on the part of either party.

The Instructions to Tenderers and the Tender Form, which were the crucial documents for determining the terms and conditions of Contract A, revealed that the contractor (1) was to submit a compliant bid and (2) could not negotiate over the terms

of the tender documents. These documents also indicated that the invitation for tenders may be characterized as an offer to consider a tender if that tender is valid. An invalid tender would be one that, among other things, altered the Tender Form. For the respondent to accept a non-compliant bid would be contrary to the express indication in the Instructions to Tenderers and contrary to the entire tenor of the Tender Form which does not allow for any modification of the plans and specifications in the tender documents. The respondent did not invite negotiations over the terms of either Contract A or Contract B. The tendering process replaces negotiation with competition which entails certain risks for the appellant, such as the effort expended and cost incurred in preparing the bid, and the making of the bid security deposit. Exposure to such risks makes little sense if the respondent is allowed, in effect, to circumscribe this process and accept a non-compliant bid. It was reasonable, on the basis of the presumed intentions of the parties, to find an implied term that only a compliant bid would be accepted.

The privilege clause is only one term of Contract A and must be read in harmony with the rest of the tender documents. To do otherwise would undermine the rest of the agreement between the parties. This clause did not override the obligation to accept only compliant bids because, on the contrary, there is a compatibility between the privilege clause and this obligation. The decision to reject the “low” bid may in fact be governed by the consideration of factors that impact upon the ultimate cost of the project.

The accepted bid was conceded to be non-compliant. The respondent in awarding the contract to this bidder breached its obligation to the appellant and the other tenderers that it would accept only a compliant tender. Acting in good faith or thinking that one has interpreted the contract correctly are not valid defences to an action for breach of contract.

The general measure of damages for breach of contract is expectation damages. On a balance of probabilities, the record supports the appellant's contention that as a matter of fact it would have been awarded Contract B had the non-compliant bid been disqualified. The loss of Contract B, although caused by the breach of Contract A, is not too remote. Here, both parties knew that if the respondent awarded Contract B to a non-compliant bid then one of the tenderers who submitted a compliant bid would suffer the loss of Contract B and that this tenderer could be the appellant. The appellant is therefore entitled to damages in the amount of the profits it would have realized had it been awarded Contract B.

Cases Cited

Followed: *Cornwall Gravel Co. Ltd. v. Purolator Courier Ltd.* (1978), 83 D.L.R. (3d) 267, aff'd (1979), 115 D.L.R. (3d) 511, [1980] 2 S.C.R. 118; **considered:** *R. in Right of Ontario v. Ron Engineering & Construction (Eastern) Ltd.*, [1981] 1 S.C.R. 111; **referred to:** *Megatech Contracting Ltd. v. Carleton (Regional Municipality)* (1989), 34 C.L.R. 35; *Bate Equipment Ltd. v. Ellis-Don Ltd.* (1992), 132 A.R. 161, aff'd (1994), 157 A.R. 274, application for leave to appeal dismissed, [1995] 2 S.C.R. v; *Martselos Services Ltd. v. Arctic College*, [1994] 3 W.W.R. 73, application for leave to appeal dismissed, [1994] 3 S.C.R. viii; *Blackpool and Fylde Aero Club Ltd. v. Blackpool Borough Council*, [1990] 3 All E.R. 25; *Hughes Aircraft Systems International v. Airservices Australia* (1997), 146 A.L.R. 1; *Pratt Contractors Ltd. v. Palmerston North City Council*, [1995] 1 N.Z.L.R. 469; *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, [1987] 1 S.C.R. 711; *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701; *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986; *Cartwright & Crickmore, Ltd. v. MacInnes*, [1931] S.C.R. 425; *Acme Building & Construction Ltd. v. Newcastle (Town)* (1992), 2 C.L.R. (2d) 308; *Glenview Corp. v. Canada* (1990), 34

F.T.R. 292; *Chinook Aggregates Ltd. v. Abbotsford (Municipal District)* (1987), 28 C.L.R. 290, aff'd (1989), 35 C.L.R. 241; *Kencor Holdings Ltd. v. Saskatchewan*, [1991] 6 W.W.R. 717; *Fred Welsh Ltd. v. B.G.M. Construction Ltd.*, [1996] 10 W.W.R. 400; *George Wimpey Canada Ltd. v. Hamilton-Wentworth (Regional Municipality)* (1997), 34 C.L.R. (2d) 123; *Twin City Mechanical v. Bradsil (1967) Ltd.* (1996), 31 C.L.R. (2d) 210; *Thompson Bros. (Const.) Ltd. v. Wetaskiwin (City)* (1997), 34 C.L.R. (2d) 197; *Hadley v. Baxendale* (1854), 9 Ex. 341, 156 E.R. 145; *Riggins v. Alberta (Workers' Compensation Board)* (1992), 5 Alta. L.R. (3d) 66.

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APPEAL from a judgment of the Alberta Court of Appeal (1997), 196 A.R. 124, 141 W.A.C. 124, 33 C.L.R. (2d) 1, [1997] A.J.No. 238 (Q.L.), affirming a decision of the Court of Queen's Bench (1994), 164 A.R. 399, 18 C.L.R. (2d) 120, [1994] A.J. No. 993 (Q.L.), dismissing the appellant's claim. Appeal allowed.

W. Donald Goodfellow, Q.C., and Eugene Meehan, for the appellant.

Larry M. Huculak, for the respondent.

The judgment of the Court was delivered by

IACOBUCCI J. --

I. Introduction

1 The central issue in this appeal is whether the inclusion of a “privilege clause” in the tender documents allows the person calling for tenders (the “owner”) to disregard the lowest bid in favour of any other tender, including a non-compliant one. The leading Canadian case on the law of tenders is *R. in Right of Ontario v. Ron Engineering & Construction (Eastern) Ltd.*, [1981] 1 S.C.R. 111, which concerned the obligations of a contractor who submitted a bid in response to a call for tenders. This Court held that, upon the submission of this tender, a contract arose between the contractor and the owner in that case and imposed certain obligations upon the contractor. The contract, referred to as “Contract A”, was distinguished from the construction contract, “Contract B”, to be entered into if the tender was accepted. Contract A imposed certain obligations upon the contractor. The present appeal instead asks whether Contract A arose in this case and what obligations, if any, it imposes on the owner. It is the contention of M.J.B. Enterprises Ltd. (the “appellant”) that in the circumstances of this case Defence Construction (1951) Limited (the “respondent”) was obligated to accept the lowest valid tender. The respondent argues that the privilege clause precludes the finding of such an obligation.

II. Factual Background

2 The respondent invited tenders for the construction of a pump house, the installation of a water distribution system and the dismantling of a water tank on the Canadian Forces Base in Suffield, Alberta. Four tenders were received, including one from the appellant. The contract was awarded to Sorochan Enterprises Ltd. (“Sorochan”), the lowest tenderer, and the work was carried out. The appellant was the second lowest tenderer.

3 The respondent had issued detailed directions to tenderers in the 11 documents which, according to the Tender Form, comprised the tender documents. One of these documents was the Instructions to Tenderers, paragraph 13 of which stated: “The lowest or any tender shall not necessarily be accepted”. The parties have referred to this as the “privilege clause”. In addition, prior to the close of tenders, the respondent issued two amendments to the tender documents.

4 The original specifications in the tender documents contemplated that the tenderers would provide a lump sum price for the construction of the pump house and demolition of the water tank, but would submit a per lineal metre price for construction of the water system. There were three different types of material in which water pipe might be laid and with which the trenches for the pipes might be backfilled: Type 2 (essentially a large gravel fill), Type 3 (native backfill) or Type 4 (a lean slurry concrete). The site engineer would determine the type of material required at various parts of the distribution system. Since the lineal costs of these different fills varied widely, the specifications originally included a schedule of quantities which allowed the tenderers to submit their bids on a basis which would make the final cost contingent upon the amount of the different fills required, i.e., the tenderer could set out different

amounts per lineal metre for each of Types 2, 3 and 4 fill. However, the amendments to the tender documents deleted the schedule of quantities. The effect of this was to require the tenderers to submit only one price per lineal metre for the water distribution system regardless of the type of fill which would ultimately be designated by the engineer during construction. The appellant interpreted this to assign the risk of knowing how much of Type 2, Type 3, and Type 4 fill would be required to the successful contractor, as the contractor would receive the same cent unit price per lineal metre of measurement regardless of the actual costs incurred by the contractor.

5 The tender submitted by Sorochan included a handwritten note stating:

Please note:

Unit Prices per metre are based on native backfill (Type 3). If Type 2 material is required from top of pipe zone to bottom of sub-base, material for gravel or paved areas, add \$60.00 per metre.

Despite complaints by the appellant and other tenderers that this note constituted a qualification by Sorochan that invalidated its tender, the respondent determined the note was merely a clarification and accepted Sorochan's bid. The appellant brought an action for breach of contract, claiming that Sorochan's bid should have been disqualified and that its tender should have been accepted as the lowest valid bid.

6 Prior to trial, the parties agreed on damages of \$398, 121.27, subject to the determination of liability. However, there were two issues they did not agree on, the cost of a supervisor and the cost of Type 2 backfill that was included in the appellant's tender that, had the appellant been awarded the construction contract, would not have been required by the engineer. The amount in dispute totals \$251, 056.89.

7 The trial judge found that the note was a qualification but held that, given the presence of the privilege clause, the respondent was under no obligation to award the contract to the appellant as the next lowest bidder. The Alberta Court of Appeal dismissed the appeal.

III. The Courts Below

A. *Alberta Court of Queen's Bench* (1994), 164 A.R. 399

8 Rowbotham J. noted that the appellant sought damages for breach of Contract A as described by Estey J. in *Ron Engineering, supra*. However, relying on *Megatech Contracting Ltd. v. Carleton (Regional Municipality)* (1989), 34 C.L.R. 35 (Ont. H.C.), and *Bate Equipment Ltd. v. Ellis-Don Ltd.* (1992), 132 A.R. 161 (Q.B.), aff'd (1994), 157 A.R. 274 (C.A.), application for leave to appeal dismissed, [1995] 2 S.C.R. v, Rowbotham J. held that the submission of a tender does not create a contract and that therefore there could be no breach of contract in this case entitling the appellant to damages.

9 However, Rowbotham J. held that the note attached to Sorochan's tender was a qualification, rather than a clarification, that invalidated the tender. He observed that, since the tender accepted was not a valid tender, there may have been a "technical" breach of the obligation to treat all tenderers fairly. Consequently, Rowbotham J. stated that the other tenderers should be reimbursed for the expenses incurred in the preparation and submission of their tenders, although he made no formal order to this effect. He dismissed the action and declined to make any findings of fact regarding the issues in dispute with respect to damages.

10 Subsequently, Rowbotham J. dismissed an application for leave to reargue. However, during the hearing he acknowledged that he had made an error in holding that no Contract A had been formed upon the submission of the tender.

B. *Alberta Court of Appeal (1997)*, 196 A.R. 124

11 McClung J.A., for the court, held that an express term such as the privilege clause could not be overridden by a term implied by virtue of custom or industry usage to the effect that the lowest valid tender must be accepted: *Martselos Services Ltd. v. Arctic College*, [1994] 3 W.W.R. 73 (N.W.T.C.A.), application for leave to appeal dismissed, [1994] 3 S.C.R. viii, and other cases.

12 McClung J.A. held that the meaning of the privilege clause was not ambiguous, and was placed in the bidding process to protect the expenditure of public funds which are a common property resource of the people of Canada. Although the Alberta Guide to Construction Procedures provides that the construction contract should be awarded to the contractor submitting the lowest proper tender, those rules only apply where they are not inconsistent with the terms of the federal bidding package. In this case, “the privilege clause, section 13, is a complete answer to M.J.B.’s action” (p. 127).

13 The Court of Appeal therefore dismissed the appeal. However, it affirmed the trial judge’s recommendation that fairness dictates that the appellant be reimbursed for the provable costs of preparing its rejected tender, although these costs were not specifically pleaded.

IV. Issues

14 The major issue in this appeal comes down to the following: does the respondent's inclusion of a "privilege clause" in the tender documents at issue in this case allow the respondent to disregard the lowest bid in favour of any other tender, including a non-compliant one?

V. Analysis

A. *General Principles*

15 As I have already indicated, any discussion of contractual obligations and the law of tendering must begin with this Court's decision in *Ron Engineering, supra*. That case concerned whether the owner had to return the contractor's tender deposit, a sum of \$150,000. The terms and conditions attaching to the call for tenders had included the statement (at pp. 113-14) that:

Except as otherwise herein provided the tenderer guarantees that if his tender is withdrawn before the Commission shall have considered the tenders or before or after he has been notified that his tender has been recommended to the Commission for acceptance or that if the Commission does not for any reason receive within the period of seven days as stipulated and as required herein, the Agreement executed by the tenderer, the Performance Bond and the Payment Bond executed by the tenderer and the surety company and the other documents required herein, the Commission may retain the tender deposit for the use of the Commission and may accept any tender, advertise for new tenders, negotiate a contract or not accept any tender as the Commission may deem advisable.

Other terms and conditions included the ability to withdraw a tender, under seal, until the official closing (p. 120). In rushing to compile its tender, the contractor omitted to add its own labour costs to its bid, but only discovered its error after the close of the tender call. It was the lowest out of eight bids. The contractor did not seek to withdraw its tender, but instead maintained that because it gave notice of this error to the owner

prior to the acceptance of its tender by the owner that the owner could not, in law, accept its tender, and therefore had to return the contractor's \$150,000 deposit.

16 Estey J., for the Court, held that a contract arose upon the contractor's submission of the tender. This contract, which Estey J. termed "Contract A", was to be distinguished from the construction contract to be entered into upon the acceptance of one of the tenders, which Estey J. termed "Contract B". The terms of Contract A were governed by the terms and conditions of the tender call, which included that the contractor submit a deposit that could only be recovered under certain conditions. Estey J., at p. 119, stated:

The revocability of the offer must, in my view, be determined in accordance with the "General Conditions" and "Information for Tenderers" and the related documents upon which the tender was submitted. There is no question when one reviews the terms and conditions under which the tender was made that a contract arose upon the submission of a tender between the contractor and the owner whereby the tenderer could not withdraw the tender for a period of sixty days after the date of the opening of the tenders. Later in these reasons this initial contract is referred to as contract A to distinguish it from the construction contract itself which would arise on the acceptance of a tender, and which I refer to as contract B. Other terms and conditions of this unilateral contract which arose by the filing of a tender in response to the call therefor under the aforementioned terms and conditions, included the right to recover the tender deposit sixty days after the opening of tenders if the tender was not accepted by the owner. This contract is brought into being automatically upon the submission of a tender. [Emphasis added.]

As the tender call conditions were not met, the deposit was not recoverable by the contractor.

17 This Court therefore held that it is possible for a contract to arise upon the submission of a tender and that the terms of such a contract are specified in the tender documents. The submissions of the parties in the present appeal appear to suggest that *Ron Engineering* stands for the proposition that Contract A is always formed upon the

submission of a tender and that a term of this contract is the irrevocability of the tender; indeed, most lower courts have interpreted *Ron Engineering* in this manner. There are certainly many statements in *Ron Engineering* that support this view. However, other passages suggest that Estey J. did not hold that a bid is irrevocable in all tendering contexts and that his analysis was in fact rooted in the terms and conditions of the tender call at issue in that case. As he stated, at pp. 122-23:

The significance of the bid in law is that it at once becomes irrevocable if filed in conformity with the terms and conditions under which the call for tenders was made and if such terms so provide. There is no disagreement between the parties here about the form and procedure in which the tender was submitted by the respondent and that it complied with the terms and conditions of the call for tenders. Consequently, contract A came into being. The principal term of contract A is the irrevocability of the bid, and the corollary term is the obligation in both parties to enter into a contract (contract B) upon the acceptance of the tender. Other terms include the qualified obligations of the owner to accept the lowest tender, and the degree of this obligation is controlled by the terms and conditions established in the call for tenders. [Emphasis added.]

Therefore it is always possible that Contract A does not arise upon the submission of a tender, or that Contract A arises but the irrevocability of the tender is not one of its terms, all of this depending upon the terms and conditions of the tender call. To the extent that *Ron Engineering* suggests otherwise, I decline to follow it.

18 I also do not wish to be taken to endorse Estey J.'s characterization of Contract A as a unilateral contract in *Ron Engineering*. His analysis has been strongly criticized: see R. S. Nozick, Comment on *The Province of Ontario and the Water Resources Commission v. Ron Engineering and Construction (Eastern) Ltd.* (1982), 60 *Can. Bar Rev.* 345, at p. 350; J. Swan, Comment on *The Queen v. Ron Engineering & Construction (Eastern) Ltd.* (1981), 15 *U.B.C. L. Rev.* 447, at p. 455; G. H. L. Fridman, "Tendering Problems" (1987), 66 *Can. Bar Rev.* 582, at p. 591; J. Blom, "Mistaken Bids: The Queen in Right of Ontario v. Ron Engineering & Construction Eastern Ltd." (1981-

82), 6 *Can. Bus. L.J.* 80, at p. 91; S. M. Waddams, *The Law of Contracts* (3rd ed. 1993), at para. 159. However, each case turns on its facts and since the revocability of the tender is not at issue in the present appeal, I see no reason to revisit the analysis of the facts in *Ron Engineering*.

19 What is important, therefore, is that the submission of a tender in response to an invitation to tender may give rise to contractual obligations, quite apart from the obligations associated with the construction contract to be entered into upon the acceptance of a tender, depending upon whether the parties intend to initiate contractual relations by the submission of a bid. If such a contract arises, its terms are governed by the terms and conditions of the tender call.

20 I note that the jurisprudence in other common law jurisdictions supports the approach that, depending upon the intentions of the parties, an invitation to tender can give rise to contractual obligations upon the submission of a bid: see *Blackpool and Fylde Aero Club Ltd. v. Blackpool Borough Council*, [1990] 3 All E.R. 25 (C.A.); *Hughes Aircraft Systems International v. Airservices Australia* (1997), 146 A.L.R. 1 (F.C.); and *Pratt Contractors Ltd. v. Palmerston North City Council*, [1995] 1 N.Z.L.R. 469 (H.C.).

21 So this brings us to ask whether Contract A arose in this case and, if so, what were its terms?

B. *Contract A*

22 Both parties in the present appeal agree with the Contract A/Contract B analysis outlined in *Ron Engineering* and that the terms of Contract A, if any, are to be determined through an examination of the terms and conditions of the tender call. In

particular, they agree that Contract A arose, but disagree as to its terms. However, this agreement is influenced by an interpretation of *Ron Engineering* that I have rejected. Because of this, it is important to discuss whether Contract A arose in this case.

23 As I have already mentioned, whether or not Contract A arose depends upon whether the parties intended to initiate contractual relations by the submission of a bid in response to the invitation to tender. In the present case I am persuaded that this was the intention of the parties. At a minimum, the respondent offered, in inviting tenders through a formal tendering process involving complex documentation and terms, to consider bids for Contract B. In submitting its tender, the appellant accepted this offer. The submission of the tender is good consideration for the respondent's promise, as the tender was a benefit to the respondent, prepared at a not insignificant cost to the appellant, and accompanied by the Bid Security. The question to be answered next is the precise nature of the respondent's contractual obligations.

24 The main contention of the appellant is that the respondent was under an obligation to award Contract B to the lowest compliant tender. As the Sorochan bid was invalid, Contract B should have been awarded to the appellant. In this regard, the appellant makes two arguments: first, that it was an explicit term of Contract A that the construction contract be awarded to the lowest compliant bid and second, that even if such a term was not expressly incorporated into the tender package it was an implied term of Contract A.

1. Explicit Term of Contract A

25 With respect to the first argument, the appellant submitted that the notice to the construction industry of the call for tenders advised that the Federal Standard Rules

of Practice for Bid Depositories would apply and that these Federal Standard Rules incorporate local rules where these local rules are not in conflict with the Federal Standard Rules. The appellant argued that the respondent had confirmed that the Alberta Guide to Construction Procedures and the Canadian Construction Documents Committee Guide to Calling Bids and Awarding Contracts (CCDC 23) were part of the local rules, that they applied to the project in question, and that these local rules indicated that the contract should be awarded to the lowest proper tender.

26 I find this argument unpersuasive. The notice to the profession is ambiguous as to whether the Federal Standard Rules of Practice for Bid Depositories would apply to the general contractors or to the trade sub-contractors submitting their bids to the general contractors through the Alberta Construction Tendering System. This ambiguity is, to my mind, resolved by the Tender Form that tenderers were required to submit, which stated:

We certify that Tenders for trades named under (a) and (b) below were received through the Alberta Bid Depository Ltd., ... in accordance with the Standard Rules of Practice for Bid Depositories (Federal Government Projects) as required by this Tender.

The tender documents do not include the notice to the profession and do not make any other reference to the Standard Rules of Practice for Bid Depositories (Federal Government Projects). As it is the tender documents that govern the terms, if any, of Contract A, I do not take the Standard Rules of Practice for Bid Depositories (Federal Government Projects) to be binding upon the respondent with respect to the tenderers; they are binding upon the tenderers with respect to the sub-contractors. Thus I find that there is no explicit term in Contract A imposing an obligation to award contract B to the lowest valid tender.

2. Implied Term of Contract A

27 The second argument of the appellant is that there is an implied term in Contract A such that the lowest compliant bid must be accepted. The general principles for finding an implied contractual term were outlined by this Court in *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, [1987] 1 S.C.R. 711. Le Dain J., for the majority, held that terms may be implied in a contract: (1) based on custom or usage; (2) as the legal incidents of a particular class or kind of contract; or (3) based on the presumed intention of the parties where the implied term must be necessary “to give business efficacy to a contract or as otherwise meeting the ‘officious bystander’ test as a term which the parties would say, if questioned, that they had obviously assumed” (p. 775). See also *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, at para. 137, *per* McLachlin J., and *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, at p. 1008, *per* McLachlin J.

28 While in the case of a contract arising in the context of a standardized tendering process there may be substantial overlap involving custom or usage, the requirements of the tendering process, and the presumed intentions of the party, I conclude that, in the circumstances of the present case, it is appropriate to find an implied term according to the presumed intentions of the parties.

29 As mentioned, LeDain J. stated in *Canadian Pacific Hotels Ltd.*, *supra*, that a contractual term may be implied on the basis of presumed intentions of the parties where necessary to give business efficacy to the contract or where it meets the “officious bystander” test. It is unclear whether these are to be understood as two separate tests but I need not determine that here. What is important in both formulations is a focus on the intentions of the actual parties. A court, when dealing with terms implied in fact, must

be careful not to slide into determining the intentions of reasonable parties. This is why the implication of the term must have a certain degree of obviousness to it, and why, if there is evidence of a contrary intention, on the part of either party, an implied term may not be found on this basis. As G. H. L. Fridman states in *The Law of Contract in Canada* (3rd ed. 1994), at p. 476:

In determining the intention of the parties, attention must be paid to the express terms of the contract in order to see whether the suggested implication is necessary and fits in with what has clearly been agreed upon, and the precise nature of what, if anything, should be implied.

30 In this respect, I find it difficult to accept that the appellant, or any of the other contractors, would have submitted a tender unless it was understood by all involved that only a compliant tender would be accepted. However, I find no support for the proposition that, in the face of a privilege clause such as the one at issue in this case, the lowest compliant tender was to be accepted. A review of the tender documents, including the privilege clause, and the testimony of the respondent's witnesses at trial, indicates that, on the basis of the presumed intentions of the parties, it is reasonable to find an implied obligation to accept only a compliant tender. It is to a discussion of the tender documents, the effect of the privilege clause, and the testimony at trial to which I now turn.

(a) *Tender documents*

31 The tender documents contain, as already noted, paragraph 13, which states: "The lowest or any tender shall not necessarily be accepted". I will deal with the effect of this privilege clause after discussing the tender documents more generally, as it must be interpreted in its context.

32 In the present appeal, the tender documents are enumerated in the Tender Form and include:

- (a) Instructions to Tenderers – Form DCL 193 (R-7-90)
- (b) Tender – Form DCL 150
- (c) Articles of Agreement – Form DCL 24 (R-7-90)
- (d) Terms of Payment “B” – Form DCL 25 (R-7-90)
- (e) General Conditions “C” – Form DCL 32 (R-7-90)
- (f) Drawings, Specifications and Addenda thereto – Job No. C-S380-9304/4
- (g) Special Conditions and Instructions – File: SD16310
- (h) Labour Conditions 180 (Rev. 01/88) 7540-21-900-0766
- (j) Insurance Conditions “E” File: SD16310
- (k) Insurers Certificate of Insurance – DCL 232
- (l) Contract Security Conditions “F” – Form DCL 32-F (R-7-90)

Most of these documents detail the terms and conditions of the construction contract to be entered into, or Contract B. However, the Instructions to Tenderers and the Tender Form are the crucial documents for determining the terms and conditions of Contract A. The salient features of the parties’ agreement revealed by an examination of these documents are twofold: the contractor must submit a compliant bid and the contractor cannot negotiate over the terms of the tender documents.

33 The Instructions to Tenderers include important provisions outlining the conditions under which a tender may be found to be invalid. For example, paragraph 1(a) provides that tenders received after the specified closing time are invalid. Paragraph 2 provides that, *inter alia*, “[a]ll tenders must be submitted on Tender Form DCL 150(S)” and paragraph 7(b) requires that only the Tender Form and the bid security be submitted with the tender. Paragraph 4 states:

Any alterations in the printed part of the Tender Form DCL 150(S) or failure to provide the information requested therein, may render the tender invalid.

Paragraph 6(a) states:

Tenders must be based on the plans, specifications and tender documents provided. ... For a tender to be valid, the tendered price must be based on materials established as acceptable for the project prior to the tender closing date.

Paragraph 9 states that the tender is invalid unless accompanied by the required bid security.

34 The Tender Form, which, as stated above, is the only document required to be submitted along with the bid security, requires that the tenderer agree to the following statement:

We [name] having informed ourselves fully of the conditions relating to the work to be performed, having inspected the site and having carefully examined the plans and specifications and all the terms and covenants of the Tender documents (IT BEING UNDERSTOOD AND AGREED THAT FAILURE TO HAVE DONE SO WILL NOT RELIEVE US OF OUR OBLIGATION TO ENTER INTO A CONTRACT AND CARRY OUT THE WORK FOR THE CONSIDERATION SET OUT HEREAFTER) do tender and offer to perform the said work in strict accordance with the said documents and such further details, plans and instructions as may be supplied from time to time and to furnish to Her Majesty the Queen in Right of Canada, all materials, plant, machinery, tools, labour and things necessary for the construction or carrying out and proper completion of the said work for the following sums of lawful money of Canada....

This certificate underscores the significance of tenderers adhering to the terms and conditions as found in the tender documents. In other words, the certificate is further evidence of the necessity to ensure bids are compliant.

35 The Tender Form sets out additional circumstances that could render a bid invalid. It requires that the tenderer agree that an imbalance between unit and lump sum prices or between individual unit prices “would be considered cause to render our Tender invalid” (para. 3). The tenderer must certify that the sub-trades it lists in its Tender Form were received through the Alberta Bid Depository in accordance with the Standard Rules

of Practice for Bid Depositories (Federal Government Projects) and that failure to comply with these Rules of Practice may disqualify the tender (para. 8).

36 It is clear from the foregoing description of the Instructions to Tenderers and the Tender Form that the invitation for tenders may be characterized as an offer to consider a tender if that tender is valid. An invalid tender would be, as outlined in these documents, one that either was submitted too late, was not submitted on the required Tender Form, altered the Tender Form or did not provide the information requested, did not include the required bid security, had an imbalance in prices, did not comply with the Rules of Practice for sub-trades, or did not conform to the plans and specifications.

37 A tender, in addition to responding to an invitation for tenders, is also an offer to perform the work outlined in the plans and specifications for a particular price. The invitation for tenders is therefore an invitation for offers to enter into Contract B on the terms specified by the owner and for a price specified by the contractor. The goal for contractors is to make their bid as competitive as possible while still complying with the plans and specifications outlined in the tender documents.

38 In this regard, it is important to note that the respondent did not invite negotiations over the terms of either Contract A or Contract B. The only items to be added to the Tender Form by the tenderer, in addition to the tenderer's name and its prices are: GST registration number, the names of sub-contractors, its structural steel fabricator and erector, the number of days it will start work after notification of the contract award, signature, witness to signature and address, date, telephone and fax number. Furthermore, paragraph 12(b) of the Instructions to Tenderers provides:

Tenderers are advised that requests for suggested amendments to the tender documents should be received by the Manager, Tender Call Section, at least fourteen calendar days before the specified tender closing time.

This request indicates that any negotiations are to follow a special procedure, presumably so that if a suggested amendment is accepted, all tenderers may be notified so that they may also enter an alternate bid.

39 This interpretation is supported by the testimony at trial of Mr. Enders, Director of Contract Services for the respondent, regarding alternate bids:

A We follow industry practice. As long as there is a valid bid it can be accompanied by an alternate price and if it happens before tender close and it is judged that it – it's worthwhile entertaining, we would issue an amendment asking all bidders to price that alternative. If it happened afterwards we would award the contract and deal with the alternative after the fact.

Q Why don't you – after the tenders closed when you receive what you consider an alternate bid, why don't you then go to the contractors and say, Somebody submitted this. What's your price?

A Again that would put the low bidder at a disadvantage and it might be considered bid shopping.

40 Therefore, according to the Instructions to Tenderers and the Tender Form, a contractor submitting a tender must submit a valid tender and, in submitting its tender, is not at liberty to negotiate over the terms of the tender documents. Given this, it is reasonable to infer that the respondent would only consider valid tenders. For the respondent to accept a non-compliant bid would be contrary to the express indication in the Instructions to Tenderers that any negotiation of an amendment would have to take place according to the provisions of paragraph 12(b). It is also contrary to the entire tenor of the Tender Form, which was the only form required to be submitted in addition to the bid security, and which does not allow for any modification of the plans and specifications in the tender documents.

41 The rationale for the tendering process, as can be seen from these documents, is to replace negotiation with competition. This competition entails certain risks for the appellant. The appellant must expend effort and incur expense in preparing its tender in accordance with strict specifications and may nonetheless not be awarded Contract B. It must submit its bid security which, although it is returned if the tender is not accepted, is a significant amount of money to raise and have tied up for the period of time between the submission of the tender and the decision regarding Contract B. As Bingham L.J. stated in *Blackpool and Fylde Aero Club Ltd., supra*, at p. 30, with respect to a similar tendering process, this procedure is “heavily weighted in favour of the invitor”. It appears obvious to me that exposing oneself to such risks makes little sense if the respondent is allowed, in effect, to circumscribe this process and accept a non-compliant bid. Therefore I find it reasonable, on the basis of the presumed intentions of the parties, to find an implied term that only a compliant bid would be accepted.

42 Having found that there was an implied term in Contract A that the respondent was to accept only compliant bids, I must now deal with the argument that the privilege clause overrode this implied term.

(b) *Effect of the Privilege Clause*

43 Although the respondent has not disputed the trial judge’s finding that the Sorochan tender was non-compliant, the respondent argues that the privilege clause gave it the discretion to award the contract to anyone, including a non-compliant bid, or to not award the contract at all, subject only to a duty to treat all tenderers fairly. It argues that because it accepted the Sorochan tender with the good faith belief that it was a compliant bid, it did not breach its duty of fairness.

44 The words of the privilege clause are clear and unambiguous. As this Court stated in *Cartwright & Crickmore, Ltd. v. MacInnes*, [1931] S.C.R. 425, at p. 431, “there can be no recognized custom in opposition to an actual contract, and the special agreement of the parties must prevail”. However, the privilege clause is only one term of Contract A and must be read in harmony with the rest of the tender documents. To do otherwise would undermine the rest of the agreement between the parties.

45 I do not find that the privilege clause overrode the obligation to accept only compliant bids, because on the contrary, there is a compatibility between the privilege clause and this obligation. I believe that the comments of I. Goldsmith, in *Goldsmith on Canadian Building Contracts* (4th ed. (loose-leaf)), at p. 1-20, regarding the importance of discretion in accepting a tender are particularly helpful in elucidating this compatibility:

The purpose of the [tender] system is to provide competition, and thereby to reduce costs, although it by no means follows that the lowest tender will necessarily result in the cheapest job. Many a “low” bidder has found that his prices have been too low and has ended up in financial difficulties, which have inevitably resulted in additional costs to the owner, whose right to recover them from the defaulting contractor is usually academic. Accordingly, the prudent owner will consider not only the amount of the bid, but also the experience and capability of the contractor, and whether the bid is realistic in the circumstances of the case. In order to eliminate unrealistic tenders, some public authorities and corporate owners require tenderers to be prequalified.

In other words, the decision to reject the “low” bid may in fact be governed by the consideration of factors that impact upon the ultimate cost of the project.

46 Therefore even where, as in this case, almost nothing separates the tenderers except the different prices they submit, the rejection of the lowest bid would not imply

that a tender could be accepted on the basis of some undisclosed criterion. The discretion to accept not necessarily the lowest bid, retained by the owner through the privilege clause, is a discretion to take a more nuanced view of “cost” than the prices quoted in the tenders. In this respect, I agree with the result in *Acme Building & Construction Ltd. v. Newcastle (Town)* (1992), 2 C.L.R. (2d) 308 (Ont. C.A.). In that case, Contract B was awarded to the second lowest bidder because it would complete the project in a shorter period than the lowest bid, resulting in a large cost saving and less disruption to business, and all tendering contractors had been asked to stipulate a completion date in their bids. It may also be the case that the owner may include other criteria in the tender package that will be weighed in addition to cost. However, needing to consider “cost” in this manner does not require or indicate that there needs to be a discretion to accept a non-compliant bid.

47 The additional discretion not to award a contract is presumably important to cover unforeseen circumstances, which is not at issue in this appeal. For example, *Glenview Corp. v. Canada* (1990), 34 F.T.R. 292, concerned an invitation to tender whose specifications were found to be inadequate after the bids were submitted and opened by the Department of Public Works. Instead of awarding a contract on the basis of inadequate specifications, the department re-tendered on the basis of improved specifications. Nonetheless, this discretion is not affected by holding that, in so far as the respondent decides to accept a tender, it must accept a compliant tender.

48 Therefore, I conclude that the privilege clause is compatible with the obligation to accept only a compliant bid. As should be clear from this discussion, however, the privilege clause is incompatible with an obligation to accept only the lowest compliant bid. With respect to this latter proposition, the privilege clause must prevail.

49 The appellant disagrees with this conclusion and submits that the majority of Canadian jurisprudence supports the proposition that the person calling for tenders should award Contract B to the lowest valid tender despite the presence of a privilege clause like the one in issue in this appeal. To the extent that these decisions are incompatible with the analysis just outlined, I decline to follow them. Nonetheless, I have reviewed the cases submitted to this Court and find that they do not stand for the proposition that the lowest valid tender must be accepted. Those cases that in fact deal with the interpretation of the privilege clause in the context of a finding that Contract A arose between the parties are instead generally consistent with the analysis outlined above.

50 For example, a number of lower court decisions have held that an owner cannot rely on a privilege clause when it has not made express all the operative terms of the invitation to tender: see *Chinook Aggregates Ltd. v. Abbotsford (Municipal District)* (1987), 28 C.L.R. 290 (B.C. Co. Ct.), aff'd (1989), 35 C.L.R. 241 (B.C.C.A.); *Kencor Holdings Ltd. v. Saskatchewan*, [1991] 6 W.W.R. 717 (Sask. Q.B.); *Fred Welsh Ltd. v. B.G.M. Construction Ltd.*, [1996] 10 W.W.R. 400 (B.C.S.C.); *George Wimpey Canada Ltd. v. Hamilton-Wentworth (Regional Municipality)* (1997), 34 C.L.R. (2d) 123 (Ont. Ct. (Gen. Div.)); *Martselos Services Ltd.*, *supra*. Similarly, a privilege clause has been held not to allow bid shopping or procedures akin to bid shopping: see *Twin City Mechanical v. Bradsil (1967) Ltd.* (1996), 31 C.L.R. (2d) 210 (Ont. H.C.), and *Thompson Bros. (Const.) Ltd. v. Wetaskiwin (City)* (1997), 34 C.L.R. (2d) 197 (Alta. Q.B.).

(c) *Testimony at Trial*

51 Finally, I note that my conclusion regarding the intention of the parties supporting an obligation to accept only a compliant bid is supported by the trial testimony

of the respondent's own witnesses. The aforementioned Mr. Enders answered the following questions of the appellant's counsel:

Q What I'm suggesting to you, sir, is that when Defence Construction Canada put out the tender package, there were no undisclosed terms that Defence Construction Canada was going to follow in awarding the tender that were not included in the tender package. In other words, the tender package was all inclusive?

A That's correct.

Q And you would agree with me if I suggested to you that it would be improper to have undisclosed terms that the tenderers would not know about?

A That's correct.

...

Q My question quite simply is this, sir. If you, Defence Construction Canada, decided that the note on Sorochan's tender was a qualification, would you agree with me that Defence Construction would have rejected the Sorochan tender and not considered it?

A Had we concluded that it was a qualification, yes, and Sorochan would have continued to refuse to withdraw it, yes, we would have rejected it.

Therefore, at trial, the respondent's own witnesses revealed that it was always the respondent's intention to accept only compliant tenders, assessed in accordance with the terms disclosed in the tender package.

C. Breach of Contract A

52 Applying the foregoing analysis to the case at bar, I find that the respondent was under no contractual obligation to award the contract to the appellant, who the parties agree was the lowest compliant bid. However, this does not mean that Contract A was not breached.

53 Sorochan was only the lowest bidder because it failed to accept, and incorporate into its bid, the risk of knowing how much of Type 2, Type 3 and Type 4 fill would be

required. As the Court of Appeal outlined, this risk was assigned to the contractor. Therefore Sorochan's bid was based upon different specifications. Indeed, it is conceded that the Sorochan bid was non-compliant. Therefore, in awarding the contract to Sorochan, the respondent breached its obligation to the appellant and the other tenderers that it would accept only a compliant tender.

54 The respondent's argument of good faith in considering the Sorochan bid to be compliant is no defence to a claim for breach of contract: it amounts to an argument that, because it thought it had interpreted the contract properly, it cannot be in breach. Acting in good faith or thinking that one has interpreted the contract correctly are not valid defences to an action for breach of contract.

D. Damages

55 Given that Contract A was breached, the next question for the Court to determine is the question of damages. The general measure of damages for breach of contract is, of course, expectation damages. In the present appeal, we know that the respondent intended to award Contract B, as it in fact awarded this contract, albeit improperly, to Sorochan. Therefore, there is no uncertainty as to whether the respondent would have exercised its discretion not to award Contract B. Moreover, the award of the contract to Sorochan was made on the basis that it was the lowest bid. The question is whether the appellant can claim that, had Contract B not been awarded to Sorochan, it would have been awarded to the appellant for submitting the lowest valid bid.

56 In my opinion, on a balance of probabilities, the record supports the appellant's contention that, as a matter of fact, it would have been awarded Contract B had the

Sorochan bid been disqualified. The testimony of Mr. Enders on this point at Discovery on April 1, 1992 is as follows:

Q Would you agree with me, sir, that if you had arrived at the conclusion that the Sorochan Enterprises Limited tender, in fact, contained a qualification, would you agree with me that you would have ruled that tender as invalid?

A Had we determine that –

Q The note was a qualification.

A Yes. I think we would have disqualified them.

Q And by disqualify, that means that you disregard the tender and don't consider it in the deliberations as to who would receive the contract?

A That's correct.

Q And you then would have awarded the contract to the next lowest tenderer?

A Subject to verification.

Q And by this time and by verification, you are talking about who their site superintendent would be and whether their experience record was acceptable.

A I think in the case of M.J.B., that is right, because they are known to us, I think, so that the verification – but I would have had to look to see whether their trades named in the tender form bid through the bid depository.

Q I take [*sic*] you never came to the conclusion that there was anything wrong with the M.J.B. tender, other than the price wasn't the lowest?

A I – until I had finished dealing with Sorochan, I didn't think about the M.J.B. tender at all. I – our approach is we deal with the low bidder, if we award, we award. If we don't, we disqualify or whatever action needs to be taken before proceeding to deal with the second bidder.

Q I take it in preparation for this examination for discovery you have had a fair opportunity to review all the documentation regarding this project, especially the tender matters. Is that a fair statement?

A Yeah. That's right.

Q And has anything come to your attention to date, today, that the M.J.B. tender was improper or qualified or invalid?

A No.

Q And I take it that you had, in July of 1991, come to the conclusion that M.J.B. had worked for Defence Construction Canada before, so you were not concerned that they weren't a qualified contractor – by “qualified,” I mean a contractor qualified to do the work?

A I understand what you are saying.

Q But you would agree with me they were qualified to do the work?

A Yes, sir.

57 Even if the evidence supports that, on a balance of probabilities, Contract B would have been awarded to the appellant, it still must be determined whether the loss of Contract B, although caused by the breach of Contract A, is nonetheless too remote. The classical test regarding the remoteness of damages is that provided in *Hadley v. Baxendale* (1854), 9 Ex. 341, 156 E.R. 145, at p. 151, *per* Alderson B.:

Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it.

58 In this case, the respondent may be taken to know that if it decided to award Contract B and awarded it to a non-compliant bid, then one of the tenderers who submitted a compliant bid would suffer the loss of Contract B. In this context, it is sufficient that the respondent knew that this tenderer could be the appellant.

59 This finding is consistent with the decision of *Cornwall Gravel Co. Ltd. v. Purolator Courier Ltd.* (1978), 83 D.L.R. (3d) 267 (Ont. H.C.), *aff'd* (1979), 115 D.L.R. (3d) 511 (Ont. C.A.), and [1980] 2 S.C.R. 118. In that decision, Cornwall Gravel was awarded damages for breach of contract against Purolator owing to the late delivery of a tender prepared by the plaintiff. It was admitted that had the tender been delivered in time, Cornwall Gravel would have been awarded a contract for which it would have realized a profit of \$70,000. R. E. Holland J. held at p. 274 that since Purolator knew that it was delivering a tender which had to be delivered by a particular time, it “must have realized that if delivered late the tender would be worthless and a contract could well be lost” (emphasis added). The lost profits on the contract therefore fell within the rule laid out in

Hadley v. Baxendale. Appeal to this Court was dismissed from the bench, with Laskin C.J. stating at p. 118 that “[w]e are not persuaded that there was any error in the disposition made by the Courts below”. If the lost profits were reasonably foreseeable to the courier delivering the tender, then I believe that lost profits must be found to be reasonably foreseeable in the present instance.

60 The appellant is therefore entitled to damages in the amount of the profits it would have realized had it been awarded Contract B. Subject to the determination of liability, the parties have agreed to damages in the amount of \$398,121.27, with two further amounts in dispute. The first issue in dispute is whether the appellant is entitled to \$21,600.00 for the cost of a supervisor and the second issue is whether the appellant is entitled to \$229,456.89, being the amount of money that the appellant states that it included in its tender to purchase Type 2 backfill that, had it been awarded the construction contract, it would not have been required by the engineer to purchase and place. The respondent submits that the entire issue of damages should be referred back to the Court of Queen’s Bench of Alberta for assessment.

61 I would enforce the agreement of the parties and remit only the two issues in dispute to trial for assessment. In coming to this conclusion, I agree with the following statement by Major J.A., then of the Alberta Court of Appeal, in *Riggins v. Alberta (Workers’ Compensation Board)* (1992), 5 Alta. L.R. (3d) 66, at p. 77:

It is regrettable when agreements between counsel made to a trial judge later become clouded. The trial judge is entitled to rely on these agreements; such agreements are common and assist the trial process. Counsel’s understandings and agreements ought not to be given lightly because they are binding.

VI. Disposition

For the foregoing reasons, I would allow the appeal, set aside the judgment of the Court of Appeal, set aside the order of Rowbotham J. at trial, and substitute judgment for the appellant in the amount of \$398,121.27. The appellant shall have its costs here and in the courts below. The matter of the two remaining issues in dispute regarding damages, described above, is remanded to the Court of Queen's Bench of Alberta for determination.

Appeal allowed with costs.

Solicitor for the appellant: W. Donald Goodfellow, Calgary.

Solicitor for the respondent: The Department of Justice Canada, Edmonton.

Citations

Alta. Q.B.: (1994), 164 A.R. 399, 18
C.L.R. (2d) 120.

Alta. C.A.: (1997), 196 A.R. 124, 146
W.A.C. 372, 33 C.L.R. (2d) 1.

Références

B.R. Alb.: (1994), 164 A.R. 399, 18
C.L.R. (2d) 120.

C.A. Alb.: (1997), 196 A.R. 124, 146
W.A.C. 372, 33 C.L.R. (2d) 1.

Martel Building Ltd. v. Canada, [2000] 2 S.C.R. 860

Her Majesty The Queen

Appellant

v.

The Martel Building Ltd.

Respondent

Indexed as: Martel Building Ltd. v. Canada

Neutral citation: 2000 SCC 60.

File No.: 26893.

2000: February 17; 2000: November 30.

Present: McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie and Arbour JJ.

on appeal from the federal court of appeal

Torts – Negligence – Economic loss – Whether Canadian law recognizes duty of care on parties in commercial negotiations – Whether tort of negligence extends to damages for pure economic loss arising out of conduct of pre-contractual negotiations.

Torts – Negligence – Economic loss – Whether tender-calling authority owed duty of care to bidders in drafting tender specifications – Whether sphere of

recovery for pure economic loss should be extended to cover circumstances surrounding preparation of tender specifications.

Contracts — Tenders — Obligation to treat all bidders fairly — Whether tender-calling authority breached its implied contractual duty to treat all bidders fairly and equally — If so, whether bidder's loss caused by contractual breach.

The respondent leased most of a building to the appellant. Prior to the end of the lease, the respondent's CEO met a subordinate of the appellant's Chief of Leasing to discuss renewing the lease. The appellant instructed its Chief of Leasing to obtain a proposed rental rate even though it intended to commence a tender process but no action was taken. The Chief of Leasing did not contact the respondent when directed to report on the status of negotiations and, at monthly meetings, led the appellant to believe that a proposed lease rate was forthcoming but nobody informed the respondent of this expectation. The respondent's CEO twice contacted the appellant, resulting in a meeting which the CEO believed was to commence negotiations but in which the appellant maintains that it told the CEO that it would proceed to tender unless it received a very attractive offer. The CEO presented proposed rental rates that fell outside a range suggested by an appraisal commissioned by the appellant. The appellant set a date to complete negotiations and, when that date passed, began steps to approve a tender by preparing a report. The report first recommended a lease renewal but no final decision was made before a revised report recommended proceeding to tender due to declining market rental rates. Approval for a tender was obtained. The CEO heard rumours that a tender was to begin and telephoned the Chief of Leasing. The parties met the same day an expression of interest was advertised to solicit interest in the tender. The CEO said he left the meeting with an understanding that the appellant would recommend a lease renewal if he offered a rate of \$220 per square metre. Two days after the meeting, he

advised the Chief of Leasing that he could offer that rate; however, the appellant decided that remaining terms would have to be settled that day. The respondent could not respond that quickly. Its offer was rejected and tender documents were issued. Under the terms of the call for tenders the appellant was not obligated to accept the lowest bid. The respondent submitted the lowest of four bids. The appellant conducted a financial analysis of the bids to consider the total costs that would be incurred as a result of accepting any one tender and added to the respondent's bid approximately \$1,000,000 for fit-up costs and \$60,000 to cover the installation of a secured card access system. The tender was awarded to a competitor.

The Federal Court, Trial Division found that the appellant owed and breached a duty of care in its conduct of the negotiations but that the respondent had failed to prove that the appellant's negligence caused the respondent to lose the lease renewal. The Federal Court of Appeal acceded to the respondent's tort claim. The court held that a duty of care had been breached not only in the context of the negotiations, depriving the respondent of the opportunity to negotiate a renewal of the lease, but also in the context of the tender, depriving the respondent of both the opportunity to participate fairly in the tender process and of a reasonable expectation of being awarded the contract. The court concluded that a causal link clearly existed between the respondent's loss and the appellant's negligence.

Held: The appeal should be allowed.

Although the common law traditionally did not allow recovery of economic loss where a plaintiff had suffered neither physical harm nor property damage, the law now recognizes five categories of compensable economic loss. The respondent's allegation of negligence in the conduct of commercial negotiations does not fall within

these categories. That by itself, however, does not preclude the claim since the categories of economic loss are not closed. To enlarge the categories or identify a new head of economic loss it is useful to set out a framework that emphasizes policy considerations in any case. In determining whether to extend a duty of care in an area not previously categorized, the flexible two-stage analysis set out in *Anns* should be applied. Here, the relationship between the parties gave rise to a *prima facie* duty of care. Proximity is indicated by the pre-existing lease arrangement, the parties' communications, and evidence of genuine and mutual contracting intent. Even in the absence of any serious potential for indeterminate liability, however, there are a number of ancillary policy considerations that necessitate precluding the extension of the tort of negligence into commercial negotiations. First, the goal of commercial negotiations is often to realize a financial gain at the expense of the other party. Second, socially and economically useful conduct could be deterred by depriving a party of any advantageous bargaining position. It would defeat the essence of negotiation and hobble the marketplace to label a party's failure to disclose its bottom line, its motives or its final position as negligent. Third, tort law could become after-the-fact insurance against failures to act with due diligence or to hedge risk of failed negotiations through the pursuit of alternative strategies or opportunities. Fourth, the courts would assume a significant regulatory function — scrutinizing the minutia of pre-contractual conduct — when other causes of action provide alternative remedies. Fifth, needless litigation should be discouraged. In the circumstances of this case, any *prima facie* duty of care is outweighed by the deleterious effects that would be occasioned through an extension of a duty of care into the conduct of negotiations.

With respect to the tendering process, the preparation of tender documents and the subsequent evaluation of bids involve different considerations, and each event must, to a certain extent, be analysed separately. A call to tender is an offer to contract

whereas a binding contract may arise once a responsive bid is submitted for evaluation. Express obligations based on terms in tender documents and implied obligations based on custom, usage or the presumed intention of the parties may arise once a bid is submitted. The parties in this case intended to initiate contractual relations by the call for and submission of the tender and to include an implied term to treat all bids fairly and equally. A privilege clause reserving the right not to accept the lowest or any bids does not exclude the obligation to treat all bidders fairly. The tender documents must be examined to determine the extent of this obligation. Here, these documents conferred upon the appellant significant latitude in evaluating the tenders. No contractual breach can be found in relation to the addition of fit-up costs to the respondent's bid since the appellant was expressly entitled to add fit-up costs which it deemed necessary. Furthermore, fit-up costs were added to all bids, using the same standard or method of calculation. In this regard, the appellant complied with its implied contractual obligation to treat all bidders fairly and equally. There is no evidence of any colourable attempt to use fit-ups to achieve a desired result. The appellant could also add costs to the respondent's bid for a contiguous space specification because this was an express requirement in the tender document to which all bidders had to comply. The appellant did breach its duty to treat all bids fairly by adding the cost of a secured card system solely to the respondent's bid. Damages for this breach, however, are precluded for want of causation because this did not cause the respondent to lose a reasonable expectation of winning the tender. Even without this cost addition, the respondent's bid was significantly greater than the winning bid.

A tendering relationship is defined by contract and in this case the contract analysis subsumes any duty of care the respondent seeks to have recognized under tort law. While an action in tort may lie notwithstanding the existence of a contract, in assessing whether a tortious duty should be recognized where a contract defines the

rights and obligations of the parties, courts will look to the contract as informing any duty in tort law. Here, the tort claim by the respondent cannot succeed for the same reasons that the contractual claim failed. Nor did the appellant breach a duty of care in drafting the tender specifications by including a contiguous space requirement. The trial judge's findings do not support the respondent's claim that this requirement had been mistakenly added to the specifications. The respondent also conceded that the requirement was one with which all other bidders needed to comply. Further, absent the contiguous space requirement, the respondent's bid would still have been more expensive than the successful bid. Costs not attributable to this requirement made the respondent's bid uncompetitive. In any event, the appellant did not owe the respondent a duty of care in drafting the tender specifications. The respondent's claim that the tender specifications were prepared negligently alleges a duty in an area not previously recognized and the *Anns* two-step analysis indicates that the sphere of recovery for pure economic loss should not be extended to cover the circumstances surrounding the preparation of the tender specifications in this case. Assuming without deciding that sufficient proximity existed between the parties, any *prima facie* duty of care is negated by policy considerations. In particular, the integrity of the tender process would become questionable if, by reason of a past relationship with, or special knowledge of, a potential bidder, there could be an enforceable obligation to take the interests of that particular bidder into account. It is imperative that all bidders be treated on an equal footing.

Cases Cited

Applied: *Anns v. Merton London Borough Council*, [1978] A.C. 728;
referred to: *D'Amato v. Badger*, [1996] 2 S.C.R. 1071; *Rivtow Marine Ltd. v. Washington Iron Works*, [1974] S.C.R. 1189; *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021; *Cattle v. Stockton Waterworks Co.* (1875),

L.R. 10 Q.B. 453; *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.*, [1995] 1 S.C.R. 85; *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2; *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210; *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165; *B.D.C. Ltd. v. Hofstrand Farms Ltd.*, [1986] 1 S.C.R. 228; *Just v. British Columbia*, [1989] 2 S.C.R. 1228; *The Queen in Right of Ontario v. Ron Engineering & Construction (Eastern) Ltd.*, [1981] 1 S.C.R. 111; *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619; *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, [1987] 1 S.C.R. 711; *Best Cleaners and Contractors Ltd. v. The Queen*, [1985] 2 F.C. 293; *Chinook Aggregates Ltd. v. Abbotsford (Municipal District)* (1989), 35 C.L.R. 241; *Martselos Services Ltd. v. Arctic College* (1994), 111 D.L.R. (4th) 65, leave to appeal refused, [1994] 3 S.C.R. viii; *Northeast Marine Services Ltd. v. Atlantic Pilotage Authority*, [1995] 2 F.C. 132; *Tarmac Canada Inc. v. Hamilton-Wentworth (Regional Municipality)* (1999), 48 C.L.R. (2d) 236; *Vachon Construction Ltd. v. Cariboo (Regional District)* (1996), 136 D.L.R. (4th) 307; *Health Care Developers Inc. v. Newfoundland* (1996), 136 D.L.R. (4th) 609; *Murphy v. Alberton (Town)* (1993), 114 Nfld. & P.E.I.R. 34; *Kencor Holdings Ltd. v. Saskatchewan*, [1991] 6 W.W.R. 717; *Colautti Brothers Marble Tile & Carpet (1985) Inc. v. Windsor (City)* (1996), 36 M.P.L.R. (2d) 258; *Yorkton Flying Services Ltd. v. Saskatchewan (Minister of Natural Resources)*, [1995] 9 W.W.R. 184; *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147; *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87; *BC Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1993] 1 S.C.R. 12; *Twin City Mechanical v. Bradsil (1967) Ltd.* (1996), 31 C.L.R. (2d) 210, rev'd (1999), 43 C.L.R. (2d) 275; *Ken Toby Ltd. v. British Columbia Buildings Corp.* (1997), 34 B.C.L.R. (3d) 263, rev'd (1999), 62 B.C.L.R. (3d) 308.

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APPEAL from a judgment of the Federal Court of Appeal, [1998] 4 F.C. 300, 229 N.R. 187, 163 D.L.R. (4th) 504, [1998] F.C.J. No. 1031 (QL), setting aside a judgment of the Trial Division (1997), 129 F.T.R. 249, [1997] F.C.J. No. 483 (QL), dismissing the plaintiff’s action. Appeal allowed.

David Sgayias, Q.C., and F. B. Woyiwada, for the appellant.

James H. Smellie and M. Lynn Starchuk, for the respondent.

The judgment of the Court was delivered by

1 IACOBUCCI AND MAJOR JJ. — This appeal calls for an extension of the tort of negligence to include a duty of care on parties during negotiations, during the preparation of calls for tender and during the evaluation of bids submitted in response to such calls. In each instance the respondent sought damages for pure economic loss.

I. Factual Background

2 The respondent, The Martel Building Limited (“Martel”), is the owner of a building at 270 Albert Street in the City of Ottawa (“Martel Building”). The National Capital Region Division of the Department of Public Works (“Department”) leased most of the rentable space in the Martel Building under a 10-year lease with an expiration date of August 31, 1993. The lease contained an option for renewal.

3 The Department was responsible for contracting for space on behalf of government agencies such as the Atomic Energy Control Board (“AECB”), the principal physical tenant in this case.

4 The Department is divided into a number of branches with varying roles in the administration of its Public Works function. Here, two branches of the Department were involved: the Realty Services Branch and the Accommodation Branch. Two sections of the Accommodation Branch played a role. The Asset Management Section ascertained space requirements. The Investment Management Section (“Accommodation (IM)”) evaluated the options available to the Crown. The Realty Services Branch included a “Leasing” department that negotiated with landlords for the acquisition of space on behalf of the Crown and informed the Accommodation Branch of the conditions of the relevant rental market, in this case Ottawa.

5 For ease of reference, nothing will be lost in these reasons by referring to all the government divisions as the Department.

6 Prior to the expiration of the lease, Martel’s President and Chief Executive Officer, Mr. McMurray, arranged to meet with Mr. Séguin, the Chief of Leasing for the Department, to negotiate a renewal. In March of 1991, Mr. McMurray met with Mr. Bray, a subordinate of Mr. Séguin. He informed him of Martel’s desire to negotiate a

renewal of the lease and provided him with a copy of Martel's proposed "retrofit" of the Martel Building, which it hoped to complete in conjunction with a renewal of the lease to complement recent "fit-ups" completed by the tenant AECB. A "retrofit" is a renovation of the common areas of a building generally undertaken by the landlord. In contrast, a "fit-up" represents leasehold improvements undertaken by a tenant with respect to the space it usually occupies exclusively.

7 In May 1991, Mr. McMurray wrote to Mr. Séguin, reiterating the contents of the prior meeting with Mr. Bray. In June, Mr. Séguin reported to Mr. Ratcliffe, the Acting Director of Accommodation (IM), that Martel was interested in renegotiating its lease and inquired whether the Department would be interested in a renewal. Mr. Ratcliffe told him the Department intended to proceed with calling for tenders but at the same time requested Mr. Séguin to obtain a proposed rental rate from Martel.

8 Mr. Séguin delegated to Mr. Bray the responsibility of contacting Mr. McMurray. No action was taken. Nor did Mr. Séguin contact Mr. McMurray despite being directed by Department officials in October of 1991 to report on the status of negotiations with Martel.

9 In February of 1992, Mr. Séguin was to obtain a proposal from Martel based upon a defined lease term. Moreover, at the monthly meetings of the Department held between October of 1991 and April of 1992, Mr. Séguin led the Department to believe that a proposed rental rate was forthcoming from Martel. Neither Mr. Séguin nor anyone else from the Department informed Mr. McMurray of this expectation. In fact, the only step taken by Mr. Séguin during this period was to arrange that an appraisal report be prepared on the Martel Building by a private contractor.

10 Mr. McMurray made two attempts to contact the Department between May of 1991 and April of 1992 for the purpose of arranging a meeting to discuss a renewal. The first attempt on December 17, 1991, was fruitless, but a second attempt in the spring of 1992 resulted in a meeting being scheduled for April 15, 1992.

11 Different accounts were given at the trial on what happened at the April 15 meeting. The Department maintained that it informed Mr. McMurray that a decision had been made to proceed with the tender process unless Martel made a particularly attractive offer to the Department. Mr. McMurray's version, which the trial judge accepted, was that while he always understood tendering to be a possibility, he was told the meeting was the commencement of negotiations for a renewal of the lease. Consistent with his version of the meeting, Mr. McMurray presented the Department officials present, Messrs. Séguin and Mahar, with proposed rental rates. Mr. Séguin then informed Mr. McMurray that a private appraisal had been commissioned and that he would inform Martel when it had been completed.

12 As considerable lead time would be required to relocate the tenant AECB prior to the August 1993 expiry of the Martel lease, the Department set June 30, 1992 as the "drop-dead date" by which time negotiations with Martel would have to be completed, or the tendering process would start. The drop-dead date was extended later to October 2, 1992.

13 Between June and September of 1992, Mr. McMurray met with Mr. Mahar on several occasions to present proposed rental rates. These proposals did not fall within the market range suggested by the appraisal commissioned by the Department, which it was agreed did not include the costs of the proposed retrofit. The parties did not have

contact again until October 14, 1992, when Mr. McMurray, having heard that the tendering for space was to begin, telephoned Mr. Séguin.

14 It turned out that after the initial June 30, 1992 drop-dead date had passed, the Department began the initial steps required to proceed to tender for the AECB space. The Department required two approvals to tender and eventually to lease the space. The first, preliminary project approval (“PPA”), had to be obtained before the tender process began. The second, effective project approval (“EPA”), was sought after tenders had been received and evaluated. The authority to grant these approvals varies with the amount of space to be acquired and the value of the lease. In the AECB’s case, the authority to grant PPA rested with the Assistant Deputy Minister - Accommodation (“ADM”) and the authority to grant EPA rested with the Treasury Board.

15 The Department had an internal advisory structure geared toward preparing a recommendation for approval by the ADM. It was a time-consuming process. An Investment Analysis Report (“IAR”) analysed the various options for obtaining rental space and made a recommendation. The report then proceeded through a bureaucratic chain ultimately resulting in the Investment Management Board (“IMB”) of the Department making a recommendation to the ADM.

16 The IAR recommended renegotiating the Martel lease. It was considered by the Department in late September, but no decision was made. The Department considered a revised report on October 9 but, due to declining rental rates in Ottawa recommended that the matter proceed to tender. Within the Department, the IMB was not involved in the tender proposal. Approval for tendering was obtained from the ADM although the evidence did not establish on what date that occurred.

17 Amid rumours that the AECB space was proceeding to tender, Mr. McMurray telephoned Messrs. Mahar and Séguin again on October 14 and 15. As a result of these calls Mr. McMurray received a letter confirming that the tendering process was proceeding and stipulating that the Department would not accept any proposal from Martel subsequent to October 22.

18 The October 22 deadline was subsequently extended to October 27. The parties held a meeting on October 27, the same day on which an expression of interest advertisement for tender of the AECB space appeared in the Ottawa Citizen newspaper. Mr. McMurray said he left the meeting with the understanding that if he met a \$220/m² rental rate, the Department would recommend to the Treasury Board that the Martel lease be renewed.

19 Mr. McMurray advised Mr. Séguin by telephone on October 29 that Martel could meet the \$220/m² rental rate. On October 30 Martel submitted a written offer of a rate of \$249/m² plus an allowance, calculated by the Department to be an effective rate of \$219.39/m². On the same day the Department decided that the remaining terms of the Martel lease, including the full details of the proposed retrofit, would have to be settled that day otherwise tendering would proceed. Martel was unable to provide finalized retrofit plans by that afternoon. On November 26 a letter was sent advising Mr. McMurray that Martel's October 30 offer was rejected. Tender documents were issued the same day with a deadline for submitting bids of December 3, 1992.

20 Martel bid on the project. When the bids were opened, Martel's bid was the lowest of the tenders. Martel was not awarded the contract.

21 Under the terms of the call for tenders the Department was not obligated to accept the lowest or any bid. Moreover, the Department conducted a financial analysis of the bids to consider the total costs that would be incurred as a result of accepting any one tender. These costs included fit-up costs, contiguous space requirements, and a secured card access system. The Martel Building's fit-up costs were calculated to be approximately one million dollars. As well, the Department added \$60,000 to Martel's bid to cover the installation of a secured card access system. Based upon a net present value calculation, Martel's bid was higher than the second lowest initial bid of Standard Life. The tender was awarded to Standard Life.

II. Judicial History

1. *Federal Court, Trial Division (1997)*, 129 F.T.R. 249

22 Martel sued in contract and in tort. In contract, Martel claimed the appellant had breached an implied term to renew the lease arising out of either the lease itself or an agreement reached between the parties on or about October 30, 1992. Martel's claim in tort rested on the Department's alleged breach of a duty to negotiate in good faith and on its alleged negligent conduct of the negotiation and tender processes.

23 The trial judge dismissed the contract claim. She also declined to consider liability based on a duty to negotiate in good faith when she was sceptical that such a duty existed under Canadian law. She did not address negligence in the tendering process, but noted that "a somewhat arbitrary assessment of fit-up costs appears to have been added to the financial analysis of the plaintiff's bid" (para. 76).

24 In the context of negotiations, the trial judge concluded that the relationship between the parties was sufficiently proximate to give rise to a duty of care in negligence. She held it was reasonably foreseeable the Department's carelessness might cause damage to Martel. She further concluded that the Department was negligent in its conduct of the negotiations.

25 However, she concluded that Martel had not established causation as it failed to prove that the Department's negligence caused Martel to lose the 10-year renewal. She dismissed the plaintiff's action.

2. *Federal Court of Appeal*, [1998] 4 F.C. 300

26 The Federal Court of Appeal held that the trial judge was correct that a duty of care arose from the conduct of the negotiations and that it had been breached. It too declined to consider whether a duty to negotiate in good faith had emerged in Canadian law.

27 The Federal Court of Appeal also addressed negligence in the tendering process. It held that "[n]egligence in the tendering process was a matter before the Trial Judge which she failed to address" (para. 31). In this respect, it found that the call for tenders gave rise to an implied contractual obligation to treat all bidders fairly. In turn, this obligation placed the parties in sufficient proximity to give rise to a duty of care. It concluded that the Department had breached this duty through evaluating the bids according to undisclosed conditions which included the addition of fit-up costs, secured card access system costs and contiguous space requirements.

28 The court held that in the context of the negotiations, the Department's negligence deprived Martel of the opportunity to negotiate a renewal of the lease. In the context of the tender, the Department's negligence deprived Martel of both the opportunity to participate fairly in the tender process and a reasonable expectation of being awarded the contract.

29 The court disagreed with the trial judge on causation. It concluded that the Department's conduct was the principal, if not the only cause, of Martel losing the opportunity to negotiate and losing its reasonable expectation of being awarded the contract under a fair and proper tendering process.

30 The Federal Court of Appeal allowed the appeal with costs. It found the Department liable in negligence and ordered a continuance of the trial on the issue of damages.

III. Issues

31 This appeal raises two issues:

1. Given that one owes a duty of care not to harm those who might foreseeably suffer damage, does a duty of care exist to that same group with respect to negotiations? Does the tort of negligence extend to damages for pure economic loss arising out of the conduct of pre-contractual negotiations?
2. Did the Court of Appeal err in finding that the Department owed Martel a duty of care in the tendering process and that this duty was breached?

IV. Analysis

1. *Given that one owes a duty of care not to harm those who might foreseeably suffer damage, does a duty of care exist to that same group with respect to*

negotiations? Does the tort of negligence extend to damages for pure economic loss arising out of the conduct of pre-contractual negotiations?

32 A central issue in this appeal is the extent to which Canadian jurisprudence recognizes a duty of care on parties in negotiations. If a cause of action exists in this context, it is apparent that the damages claimed would be a purely economic loss.

33 The appellant submitted that to extend the tort of negligence into the conduct of commercial negotiations would be an unnecessary and unsound invasion of the marketplace. It argued that this case involves business risks inherent in commercial negotiation, risks which should be borne by parties and not be re-allocated through the imposition of a duty of care.

34 A breach of a duty of care in negotiations would, in this case, result in the loss of an opportunity to negotiate a lease renewal. This is a claim for damages not accompanied by physical injury or property damage. What is left is a claim for pure economic loss. See *D'Amato v. Badger*, [1996] 2 S.C.R. 1071, at para. 13.

35 As a cause of action, claims concerning the recovery of economic loss are identical to any other claim in negligence in that the plaintiff must establish a duty, a breach, damage and causation. Nevertheless, as a result of the common law's historical treatment of economic loss, the threshold question of whether or not to recognize a duty of care receives added scrutiny relative to other claims in negligence.

36 An historical review of the common law treatment of recovery for economic loss has been undertaken by this Court on several occasions. See *Rivtow Marine Ltd. v. Washington Iron Works*, [1974] S.C.R. 1189; *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021; and *D'Amato*, *supra*. Rather than re-

canvassing the jurisprudential genealogy reviewed in these cases, it is enough to say that the common law traditionally did not allow recovery of economic loss where a plaintiff had suffered neither physical harm nor property damage. See *Cattle v. Stockton Waterworks Co.* (1875), L.R. 10 Q.B. 453.

37 Over time, the traditional rule was reconsidered. In *Rivtow* and subsequent cases it has been recognized that in limited circumstances damages for economic loss absent physical or proprietary harm may be recovered. The circumstances in which such damages have been awarded to date are few. To a large extent, this caution derives from the same policy rationale that supported the traditional approach not to recognize the claim at all. First, economic interests are viewed as less compelling of protection than bodily security or proprietary interests. Second, an unbridled recognition of economic loss raises the spectre of indeterminate liability. Third, economic losses often arise in a commercial context, where they are often an inherent business risk best guarded against by the party on whom they fall through such means as insurance. Finally, allowing the recovery of economic loss through tort has been seen to encourage a multiplicity of inappropriate lawsuits. See *D'Amato, supra*, at para. 20, and A. M. Linden, *Canadian Tort Law* (6th ed. 1997), at pp. 405-6.

38 In an effort to identify and separate the types of cases that give rise to potentially compensable economic loss, La Forest J., in *Norsk, supra*, endorsed the following categories (at p. 1049):

1. The Independent Liability of Statutory Public Authorities;
2. Negligent Misrepresentation;
3. Negligent Performance of a Service;
4. Negligent Supply of Shoddy Goods or Structures;

5. Relational Economic Loss.

See B. Feldthusen, “Economic Loss in the Supreme Court of Canada: Yesterday and Tomorrow” (1990-91), 17 *Can. Bus. L.J.* 356, at pp. 357-58; *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.*, [1995] 1 S.C.R. 85, at para. 12; and *D’Amato, supra*, at para. 30.

39 The allegation of negligence in the conduct of negotiations does not fall within any of these classifications. Thus, Martel’s claim is novel when weighed against the prior jurisprudence of this Court. That by itself should not preclude the claim. The question is whether the numbered categories ought to be enlarged or some other method identified to include a new head of economic loss. To answer this question it is useful to set out a framework for the recognition of new categories such as that advanced by Martel.

40 In attempting to mould such a framework, it is noteworthy that this Court has looked beyond the traditional bar against recovery of pure economic loss in favour of a case-specific analysis that seeks to weigh the unique policy considerations which arise. See *Rivtow, supra*, at pp. 1211-12; *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2, at p. 33; *Norsk, supra*, at p. 1054, *per* La Forest J., and at p. 1155, *per* McLachlin J.; *Winnipeg Condominium, supra*, at para. 32; and *D’Amato, supra*, at paras. 31-34.

41 A presumptive exclusionary rule exists only within the narrow realm of contractual relational economic loss. This phrase is intended to define an economic loss suffered via a plaintiff’s contractual relationship with a third party to whom the defendant is already liable for property damage. Prior to *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210, it was undetermined whether

the recognition of contractual relational economic loss was to be approached incrementally on a case-by-case basis, as with the other categories of economic loss, or through recognized categorical exceptions to a narrow exclusionary rule. This debate arose out of the differing approaches expressed by McLachlin J. (as she then was) and La Forest J. in *Norsk*. The substance of these positions was reviewed in *D'Amato* and need not be repeated for the purpose of this appeal.

42 In *Bow Valley*, at para. 48, McLachlin J. resolved this debate, affirming that recovery for contractual relational economic loss is presumptively excluded, subject to categorical exceptions. However, the categories of recoverable loss are not closed and new ones may emerge as different cases arise. The majority in *Bow Valley* approved her reasons. See Iacobucci J. at para. 113:

I understand my colleague's discussion of this matter to mean that she has adopted the general exclusionary rule and categorical exceptions approach set forth by La Forest J. in *Norsk*. . . . She points out that both her reasons and those of La Forest J. in *Norsk* recognize that the categories of recoverable contractual relational economic loss are not closed.

43 It is important to distinguish between the *Bow Valley* majority's reference to the categories of contractual relational economic loss, which falls within the fifth category, and the other four categories of economic loss listed above. This distinction is relevant because contractual relational economic loss receives unique treatment within the broader scope of economic loss in general. In this connection, we reject the assertions of certain commentators who have suggested that the same approach applies to all five categories of economic loss following the *Bow Valley* decision: see E. A. Cherniak and E. How, "Policy and Predictability: Pure Economic Loss in the Supreme Court of Canada" (1999), 31 *Can. Bus. L.J.* 209, at p. 232, and I. N. D. Wallace, "Contractual Relational Loss in Canada" (1998), 114 *L.Q.R.* 370, at pp. 374-77.

44 Unlike the other areas of economic loss, contractual relational economic loss continues to operate under a presumption against recovery. The following categories of contractual relational economic loss are, to date, the sole exceptions to this presumption:

1. Where the claimant has a possessory or proprietary interest in the damaged property;
2. General average cases; and
3. Where the relationship between the claimant and the property owner constitutes a joint venture.

45 However, as noted above, these three categorical exceptions within contractual relational economic loss categories are not closed. The same is true for the five broader categories of economic loss: see *Norsk, supra*, at pp. 1150-53, *per* McLachlin J. As Professor Linden, *supra*, states, “further categories of economic loss cases will have to be identified beyond the five general ones of Professor Feldthusen” (p. 421). The reason for the broader five categories is merely to provide greater structure to a diverse range of factual situations by grouping together cases that raise similar policy concerns. These categories are merely analytical tools.

46 Canadian jurisprudence has consistently applied the flexible two-stage analysis of *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.), originally adopted in *Kamloops, supra*, in determining whether to extend a duty of care in a given case. The *Anns* approach has been applied in this manner to each of the first four categories of economic loss. See, for example, *Hercules Managements Ltd. v. Ernst &*

Young, [1997] 2 S.C.R. 165, at para. 19 (negligent misrepresentation); *Winnipeg Condominium, supra*, at para. 32 (negligent supply of shoddy goods or structures); and *B.D.C. Ltd. v. Hofstrand Farms Ltd.*, [1986] 1 S.C.R. 228 (negligent performance of a service). It is likely that any extension to the categorical exceptions of contractual relational economic loss also would be considered under the same analysis. See *Bow Valley, supra*, at paras. 52-56, *per* McLachlin J., and para. 113, *per* Iacobucci J.

47 The *Anns* approach is equally applicable when, as in this appeal, the claim alleges a duty of care in an area not previously categorized. The respondent's submission has to be considered within that framework.

48 This analysis begins with the oft-repeated question:

Was there a sufficiently close relationship between Martel and the Department so that, in the reasonable contemplation of the Department, carelessness on its part might cause damage to a party such as Martel with whom it negotiated?

49 See *Hercules Managements, supra*, at paras. 23-24, *per* La Forest J.:

... the term "proximity" itself is nothing more than a label expressing a result, judgment or conclusion; it does not, in and of itself, provide a principled basis on which to make a legal determination.

...

The label "proximity", as it was used by Lord Wilberforce in *Anns, supra*, was clearly intended to connote that the circumstances of the relationship inhering between the plaintiff and the defendant are of such a nature that the defendant may be said to be under an obligation to be mindful of the plaintiff's legitimate interests in conducting his or her affairs.

50 So as to infuse the term “proximity” with greater meaning, the courts take into account a variety of factors in ascertaining whether the relationship between two parties gives rise to a *prima facie* duty of care. See McLachlin J. in *Norsk*, *supra*, at p. 1153:

In determining whether liability should be extended to a new situation, courts will have regard to the factors traditionally relevant to proximity such as the relationship between the parties, physical propinquity, assumed or imposed obligations and close causal connection. And they will insist on sufficient special factors to avoid the imposition of indeterminate and unreasonable liability.

51 It may be foreseeable that carelessness on the part of one negotiating party may cause an opposite negotiating party economic loss. Generally, negotiation is undertaken with a view to obtaining mutual economic gain. Given the bilateral nature of most negotiations, such gains are sometimes obtained at the other party’s expense. Although negotiations often provide synergistic effects for all concerned, the prospect of causing deprivation by economic loss is implicit in the negotiating environment. The causal relationship in contractual negotiations is usually significant for a finding of proximity. In the circumstances of this appeal, the appellant’s pre-existing contractual arrangement with Martel is an impressive indicator of proximity.

52 Both the pre-existing lease arrangement and the communications between the appellant and respondent here are indicators of proximity. That does not mean that any exchange loosely viewed as a negotiation will necessarily give rise to a proximate relationship. The expression of interest does not automatically create proximity absent some evidence of genuine and mutual contracting intent. We are satisfied that the parties in this appeal evidenced such an intent. The communications between the appellant and

Martel disclose a readiness to arrive at an agreement despite the fact one was never reached.

53 We conclude that the circumstances of this case satisfy the first stage of *Anns* and raise a *prima facie* duty of care. Although the Department is a government actor, in its negotiations with Martel, it was exercising an operational rather than a policy function. As such, this finding of a *prima facie* duty of care is not precluded by the appellant claiming to have exercised a *bona fide* discretionary policy decision. See *Kamloops, supra*, at p. 35, and *Just v. British Columbia*, [1989] 2 S.C.R. 1228.

54 In the wake of a finding of proximity, the second question in *Anns* arises:

Are there any policy considerations that serve to negative or limit (a) the scope of the *prima facie* duty of care (b) the class of persons to whom it is owed or (c) the damages to which a breach of it may give rise?

55 Notwithstanding our finding of proximity above, there are compelling policy reasons to conclude that one commercial party should not have to be mindful of another commercial party's legitimate interests in an arm's length negotiation.

56 As noted by McLachlin J. in *Norsk, supra*, at pp. 1154-55:

While proximity is critical to establishing the right to recover pure economic loss in tort, it does not always indicate liability. It is a necessary but not necessarily sufficient condition of liability. Recognizing that proximity is itself concerned with policy, the approach adopted in *Kamloops* (paralleled by the second branch of *Anns*) requires the Court to consider the purposes served by permitting recovery as well as whether there are any residual policy considerations which call for a limitation on liability. This permits courts to reject liability for pure economic loss where indicated by policy reasons not taken into account in the proximity analysis.

57 The scope of indeterminate liability remains a significant concern underlying any analysis of whether to extend the sphere of recovery for economic loss. In this appeal, however, the inherent nature of negotiations in this case place definable limits on the ultimate extent of liability so that concerns of indeterminacy are not determinative in this appeal.

58 Here, the class of potential claimants is limited to those persons that the Department directly negotiated with. Although both La Forest and McLachlin JJ. rejected the “knowledge of the plaintiff” test in *Norsk* as noted in *Hercules Managements, supra*, at para. 37, knowledge of the plaintiff remains a policy factor that may militate against indeterminacy.

59 In addition, although the quantum of damages arising out of failed negotiations may be quite high, it is limited by the nature of the transaction being negotiated. As noted by the court below, Martel’s claim is clearly restricted to the loss of an opportunity to conclude a 10-year lease renewal. While there are serious difficulties in valuing a lost opportunity, the extent of the loss has definable limits.

60 However, simply addressing indeterminacy does not represent the sole hurdle to extending a duty of care. This conclusion has caused concern and has been commented on. See *Norsk, supra*, at pp. 1067-68, *per* La Forest J.; *Bow Valley, supra*, at para. 55, *per* McLachlin J., and B. Feldthusen, “Liability for Pure Economic Loss: Yes, But Why?” (1999), 28 *U. W. Austl. L. Rev.* 84, at p. 87.

61 In light of the diverse array of factual circumstances that can fall under the moniker of pure economic loss, unique policy considerations may infuse the analysis of any given case. Indeed, notwithstanding the fact that indeterminacy does not rear its

head sufficiently in this appeal, there are a number of ancillary policy considerations that necessitate precluding the extension of the tort of negligence into commercial negotiations. Even in the absence of any serious potential for indeterminate liability, these factors are sufficient to deny recovery notwithstanding the finding of proximity. What we have identified as ancillary policy considerations weighing against recovery are defined by the following five illustrations.

62 First, the very object of negotiation works against recovery. The primary goal of any economically rational actor engaged in commercial negotiation is to achieve the most advantageous financial bargain. As noted above, in the context of bilateral negotiation, such gains are realized at the expense of the other negotiating party. From an economic perspective, some authors describe negotiation as a zero-sum game involving a transference rather than loss of wealth: see Cherniak and How, *supra*, at p. 231; and B. Feldthusen, *Economic Negligence: The Recovery of Pure Economic Loss* (4th ed. 2000), at p. 14.

63 Perhaps following the traditional view that, at least in some circumstances, economic losses are less worthy of protection than physical or proprietary harm, it has been noted that the absence of net harm on a social scale is a factor weighing against the extension of liability for pure economic loss. That is to say, negotiation merely transfers wealth between parties. Although one party may suffer, another often gains. Thus, as an economic whole, society is not worse off: see Feldthusen, “Liability for Pure Economic Loss: Yes, But Why?”, *supra*, at p. 102:

...many pure economic losses are qualitatively different from physical damage. They represent not social loss, as occurs when property is damaged or destroyed, but private loss when wealth is transferred from one party to another with nothing being lost overall. The plaintiff’s loss will often be a

competitor's gain. To hold the defendant liable for transfer losses as if they were true losses will over-deter useful conduct.

64 Second, as Feldhusen notes in the above passage, to extend a duty of care to pre-contractual commercial negotiations could deter socially and economically useful conduct. The encouragement of economically efficient conduct can be a valid concern in favour of the extension of liability for pure economic loss. See *Winnipeg Condominium, supra*, at para. 37. Equally, in other circumstances, this goal may be a valid rationale against extending liability.

65 In essence, Martel claims that the appellant was negligent in not providing it with adequate information concerning the appellant's bargaining position or its readiness to conclude a renewal. The appellant's conduct in negotiating with Martel might be construed as "hard bargaining". The Department's agents displayed casual contempt towards Martel and its personnel as illustrated by broken appointments and general disregard of the minimal courtesy Martel could have reasonably expected. However indifferent the agents of the Department appear from the record, that by itself does not create a cause of action. Doubtless, the appellant's ability to assume such a position in relation to Martel was due to its dominant position in the Ottawa leasing market. The foregoing all point to the advantages enjoyed by the Crown, but do not point to liability.

66 In many if not most commercial negotiations, an advantageous bargaining position is derived from the industrious generation of information not possessed by the opposite party as opposed to its market position as here. Helpful information is often a by-product of one party expending resources on due diligence, research or other

information gathering activities. It is apparent that successful negotiating is the product of that kind of industry.

67 It would defeat the essence of negotiation and hobble the marketplace to extend a duty of care to the conduct of negotiations, and to label a party's failure to disclose its bottom line, its motives or its final position as negligent. Such a conclusion would of necessity force the disclosure of privately acquired information and the dissipation of any competitive advantage derived from it, all of which is incompatible with the activity of negotiating and bargaining.

68 Third, to impose a duty in the circumstances of this appeal could interject tort law as after-the-fact insurance against failures to act with due diligence or to hedge the risk of failed negotiations through the pursuit of alternative strategies or opportunities. This Court has previously expressed a reluctance to extend pure economic loss in this manner. See *D'Amato, supra*, at para. 51.

69 Notwithstanding Martel's hope that the negotiations would produce a favourable outcome, it could at any point have concluded that the Department was not serious or interested in concluding a renewal of the Martel Building lease, but simply delaying for an undisclosed reason and seeking other potential landlords. While Martel may have suffered from its innocence and optimism, at least some of the responsibility for the delays in communication evident in this appeal can be attributed to it. The retention of self-vigilance is a necessary ingredient of commerce.

70 Fourth, to extend the tort of negligence into the conduct of commercial negotiations would introduce the courts to a significant regulatory function, scrutinizing the minutiae of pre-contractual conduct. It is undesirable to place further scrutiny upon

commercial parties when other causes of action already provide remedies for many forms of conduct. Notably, the doctrines of undue influence, economic duress and unconscionability provide redress against bargains obtained as a result of improper negotiation. As well, negligent misrepresentation, fraud and the tort of deceit cover many aspects of negotiation which do not culminate in an agreement.

71 A concluding but not conclusive fifth consideration is the extent to which needless litigation should be discouraged. To extend negligence into the conduct of negotiations could encourage a multiplicity of lawsuits. Given the number of negotiations that do not culminate in agreement, the potential for increased litigation in place of allowing market forces to operate seems obvious.

72 For these reasons we are of the opinion that, in the circumstances of this case, any *prima facie* duty is significantly outweighed by the deleterious effects that would be occasioned through an extension of a duty of care into the conduct of negotiations. We conclude then that, as a general proposition, no duty of care arises in conducting negotiations. While there may well be a set of circumstances in which a duty of care may be found, it has not yet arisen.

73 As a final note, we recognize that Martel's claim resembles the assertion of a duty to bargain in good faith. The breach of such a duty was alleged in the Federal Court, but not before this Court. As noted by the courts below, a duty to bargain in good faith has not been recognized to date in Canadian law. These reasons are restricted to whether or not the tort of negligence should be extended to include negotiation. Whether or not negotiations are to be governed by a duty of good faith is a question for another time.

2. *Did the Court of Appeal err in finding that the Department owed Martel a duty of care in the tendering process and that this duty was breached?*

(a) Introduction

74 The second branch of this case deals with the tendering process which followed the unfruitful negotiations. Martel alleged that the Department was negligent in failing to exercise due care in preparing the tender documents, and in evaluating Martel's bid made in response to the call for tenders. As mentioned above, the trial judge did not address the Department's liability, if any, arising from the tendering process. However, Desjardins J.A., in the Federal Court of Appeal, addressed this issue and found that the Department owed Martel a duty of care in the tender process under tort principles. This duty imposed upon the Department the "obligation to ensure fair treatment in the tenders by avoiding such factors as undisclosed preferences and awards of contracts to non-conforming bidders" (para. 37). Desjardins J.A. explained that this duty arose out of an implied contractual obligation to treat all bidders fairly.

75 The Court of Appeal held that the Department had breached its duty to treat Martel's bid fairly. Desjardins J.A. based this conclusion on the trial judge's following findings: (1) that the contiguous space requirement had not been required initially by the AECB and had been negligently added to the tender specifications; (2) that "a somewhat arbitrary assessment of fit-up costs appear[ed] to have been added to the financial analysis of the plaintiff's bid" (paras. 37 F.C. and 76 F.T.R.); (3) that some of the costs arbitrarily assessed to Martel's tender were attributable to the contiguous space requirements; (4) that there had not been any mention of fit-up costs being required if the tenant stayed in the Martel building; and (5) that the costs of a secured card access system had been added to Martel's bid, and not to the Standard Life bid. Upon closer examination, it can be seen that the above findings related to both the preparation of the

tender documents and the evaluation of the bid. Findings (1) and (4) related to the preparation of the tender documents, while findings (2), (3) and (5) related to the subsequent evaluation of the bid.

76 With respect, we believe that the Court of Appeal erred by conflating the drafting (or preparation) of the tender documents and the tender evaluation issues. The preparation of tender documents and the subsequent evaluation of bids involve different considerations, and each event must, to a certain extent, be analysed separately. As will be explained below, once the bids were submitted in response to the invitation to tender, the so-called Contract A was formed which imposed contractual obligations, both express and implied, on the parties involved in the tender process. While the evaluation of bids directly relates to the performance of this contract, the preparation of the tender documents on the other hand involves events which occurred before this contract was formed. Thus, we believe that the Department's liability with respect to the manner in which the tender documents were drafted, and the way in which the bids were subsequently evaluated, must be addressed separately.

77 In this connection, we note that counsel for Martel argued before our Court that the Department's duty in tort did not relate to its ability to estimate fit-up costs or evaluate the bids, but rather to its alleged failure to use reasonable care and diligence in drafting the tender specifications. More specifically, Martel contends that the Department was negligent in including the contiguous space as a requirement in the tender documents. In this Court, Martel took a narrower approach on the evaluation issue than did the Court of Appeal. However, we have reviewed the evaluation issue as dealt with in the Court of Appeal.

78 But before doing so, we should briefly recall the general principles of the law of tenders to set the stage for discussing the alleged negligence in the preparation of the tender documents and any liability arising in the evaluation of the bids. We will also review how the law of contract applies to the tender process in this case, as we find it important to discuss the nature of the tender process and the duties which generally flow from it. A discussion of Martel’s negligence claim will then follow.

(b) The Tendering Process

(i) *General Principles of the Law of Tenders*

79 Any discussion of the duties or obligations arising from the tender process must begin with reference to *The Queen in Right of Ontario v. Ron Engineering & Construction (Eastern) Ltd.*, [1981] 1 S.C.R. 111. This case established that an invitation to tender may constitute an offer to contract which, upon the submission of a bid in response to the call for tenders, may become a binding contract. Estey J. explained that this contract, which he labelled “Contract A”, imposed certain obligations upon the contractor who had submitted a tender. He differentiated this contract from “Contract B”, the ultimate construction contract resulting from the award of one of the tenders.

80 In *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619, this Court confirmed that Contract A also imposes obligations on the owner. It further explained that *Ron Engineering* does not stand for the proposition that Contract A will always be formed, nor that the irrevocability of the tender will always be a term of such contract. Whether the tendering process creates a preliminary contract is

dependant upon the terms and conditions of the tender call. This Court stated as follows, at para. 19:

What is important, therefore, is that the submission of a tender in response to an invitation to tender may give rise to contractual obligations, quite apart from the obligations associated with the construction contract to be entered into upon the acceptance of a tender, depending upon whether the parties intend to initiate contractual relations by the submission of a bid. If such a contract arises, its terms are governed by the terms and conditions of the tender call.

81 The Court also held that, while the terms stipulated in tender documents created express obligations in the context of Contract A, this contract, like all contracts, could also include implied obligations. The inclusion of implied terms may be based on custom or usage, as the legal incidents of a particular class or kind of contract, or based on the presumed intention of the parties where it is necessary to give a contract business efficacy or where it meets the “officious bystander” test: *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, [1987] 1 S.C.R. 711, at p. 775; *M.J.B. Enterprises, supra*, at para. 27.

82 The tender documents involved in *M.J.B. Enterprises* included, as in the case at bar, a privilege clause stating that the lowest or any tender would not necessarily be accepted. The Court noted that in determining the intention of the parties, attention must be paid to the express terms of the contract. In light of the privilege clause, the Court rejected the proposition that the party who had instigated the tender call was required to accept the lowest compliant tender. The express language of the tender documents, which manifested a contrary intention, governed. However, an obligation to accept only compliant bids could be implied based on the presumed intention of the parties. This obligation was not incompatible with the privilege clause.

83 It is now well established that parties to a tender process may have reciprocal obligations arising from Contract A either expressly or impliedly. In the case at bar, Desjardins J.A. held that the appellant owed the respondent a duty of care in tort to treat all bidders fairly and equally. However, she explained that such duty arose out of a coextensive implied contractual obligation.

84 Various appellate courts have found the need to imply a contractual term into Contract A to treat all bidders fairly and equally. *Best Cleaners and Contractors Ltd. v. The Queen*, [1985] 2 F.C. 293 (C.A.), is often referred to as one of the earlier cases suggesting such a duty. Also, in *Chinook Aggregates Ltd. v. Abbotsford (Municipal District)* (1989), 35 C.L.R. 241, the British Columbia Court of Appeal unanimously held at p. 248 that the party calling for tenders was under a duty to “treat all bidders fairly and not to give any of them an unfair advantage over the others”. Legg J.A., speaking for the Court, concluded that the owner had breached this implied contractual obligation by adopting a policy of preferring local contractors whose bids were within 10 percent of the lowest bid in awarding the contract, when that preference was not revealed by, nor stated in, the tender documents. The tenderers were not notified of this policy to avoid alerting local contractors to the fact that they were afforded a preference. It was held that the privilege clause did not give the owner the right to attach an undisclosed condition to its offer.

85 The implied contractual duty of fair and equal treatment was also discussed in *Martselos Services Ltd. v. Arctic College* (1994), 111 D.L.R. (4th) 65 (N.W.T.C.A.), leave to appeal refused, [1994] 3 S.C.R. viii. The majority held that in order to protect the integrity of the bidding system, there should be “a duty to treat all bidders equally but still with due regard to the contractual terms incorporated into the tender call” (p. 71). See also: *Northeast Marine Services Ltd. v. Atlantic Pilotage Authority*, [1995] 2

F.C. 132 (C.A.); *Tarmac Canada Inc. v. Hamilton-Wentworth (Regional Municipality)* (1999), 48 C.L.R. (2d) 236 (Ont. C.A.); *Vachon Construction Ltd. v. Cariboo (Reginal District)* (1996), 136 D.L.R. (4th) 307 (B.C.C.A.); *Health Care Developers Inc. v. Newfoundland* (1996), 136 D.L.R. (4th) 609 (Nfld. C.A.). Many other lower courts have also recognized an implied contractual duty to treat all bidders fairly and equally: *Murphy v. Alberton (Town)* (1993), 114 Nfld. & P.E.I.R. 34 (P.E.I.S.C.T.D.); *Kencor Holdings Ltd. v. Saskatchewan*, [1991] 6 W.W.R. 717 (Sask. Q.B.); *Colautti Brothers Marble Tile & Carpet (1985) Inc. v. Windsor (City)* (1996), 36 M.P.L.R. (2d) 258 (Ont. Ct. (Gen. Div.)); *Yorkton Flying Services Ltd. v. Saskatchewan (Minister of Natural Resources)*, [1995] 9 W.W.R. 184 (Sask. Q.B.). It should be noted that to the extent that any of the foregoing cases may be interpreted as suggesting that the lowest bid must be accepted despite the presence of a privilege clause, or that the irrevocability of the tender must form part of Contract A, we reiterate that such approach has clearly been rejected by this Court: *M.J.B. Enterprises, supra*.

(ii) *Application of the Law of Tenders*

86 Pursuant to the foregoing, we are of the view that the parties in the case at bar intended to initiate contractual relations by the call for and submission of the tender. The Department offered to consider bids for the lease of the AECB space through a two-stage tender process. An expression of interest first appeared in the Ottawa Citizen newspaper on October 27, 1992. Then, on November 26, the Department couriered to four parties, including Martel, a formal invitation to submit a tender for the AECB space requirement, together with the Lease Tender Document package.

87 While the tender documents contained detailed terms and conditions pertaining to the ultimate leasing contract to be entered into, they also included terms

and conditions governing the relations of the parties under Contract A (see especially the Instructions to Offerors, the Statement of Requirements, and the Offer Form). The bidders were required to comply with the provisions, requirements and standards of the Lease Tender Document, as established by the Department (see clause 3.2 of the Instructions to Offerors). Tenderers were also instructed to include a security deposit with their sealed tender. In submitting a tender in response to the formal invitation, Martel accepted the Department's offer and agreed to comply with its requirements (see clauses 2.1 and 2.2.1 of the Offer Form). Following the analysis in *Ron Engineering* and *M.J.B. Enterprises*, Contract A clearly came into being in the circumstances of this case. Significantly, counsel do not dispute the emergence of Contract A.

88

In the circumstances of this case, we believe that implying a term to be fair and consistent in the assessment of the tender bids is justified based on the presumed intentions of the parties. Such implication is necessary to give business efficacy to the tendering process. As discussed above, this Court agreed to imply a term in *M.J.B. Enterprises* that only compliant bids would be accepted since it believed that it would make little sense to expose oneself to the risks associated with the tendering process if the tender calling authority was "allowed, in effect, to circumscribe this process and accept a non-compliant bid" (para. 41). Similarly, in light of the costs and effort associated with preparing and submitting a bid, we find it difficult to believe that the respondent in this case, or any of the other three tenderers, would have submitted a bid unless it was understood by those involved that all bidders would be treated fairly and equally. This implication has a certain degree of obviousness to it to the extent that the parties, if questioned, would clearly agree that this obligation had been assumed. Implying an obligation to treat all bidders fairly and equally is consistent with the goal of protecting and promoting the integrity of the bidding process, and benefits all participants involved. Without this implied term, tenderers, whose fate could be

predetermined by some undisclosed standards, would either incur significant expenses in preparing futile bids or ultimately avoid participating in the tender process.

89 A privilege clause reserving the right not to accept the lowest or any bids does not exclude the obligation to treat all bidders fairly. Nevertheless, the tender documents must be examined closely to determine the full extent of the obligation of fair and equal treatment. In order to respect the parties' intentions and reasonable expectations, such a duty must be defined with due consideration to the express contractual terms of the tender. A tendering authority has "the right to include stipulations and restrictions and to reserve privileges to itself in the tender documents" (*Colautti Brothers, supra*, at para. 6).

90 For ease of reference, we reproduce below the relevant clauses of the tender documents.

Instructions to Offerors

...

3. EVALUATION PROCESS

3.1 The evaluation of Offers received is an on-going process and the Lessee reserves the right to terminate any further consideration of any Offer at any time during the Acceptance Period.

...

3.4 In undertaking the financial analysis, the Lessee will discount all cash flows, including front-end costs, and incentives, as they happen over the original term of the Lease, (extensions are excluded). All cash flows are then depicted as a net present

value cost to the Crown fixed as of the commencement date of the Lease.

- (a) In completing the financial analysis, the Lessee will make certain estimates for this project, including, but not limited to, the following:

.1 fit-up costs (including but not limited to, all or part of the Unit Costs supplied for estimated quantities deemed necessary in the Lessee's opinion to fulfil the fit-up requirements);

.2 moving costs;

.3 signage;

.4 screens; and,

.5 consultants.

- (b) In addition to the above, in cases where the premises offered are currently under lease by the Lessee and it is estimated by the Lessee, in its sole opinion, that a temporary relocation of the occupants and/or furniture could become necessary to allow for the completion of all or any portion of the improvements to be made to the premises (this includes the improvements to be completed by both the Offeror and the Lessee), the Lessee may also make certain estimates of the additional costs expected to be incurred by the Lessee including, but not limited to, the following:

(aa) moving of furniture and equipment;

(bb) fit-up costs of temporary accommodation;

(cc) all rental costs of suitable temporary accommodation; and,

(dd) installation of telecommunications equipment.

- (c) For the purpose of the financial analysis, the following provisions will apply:

(i) all costs estimated by the Lessee shall be final;

(ii) the measurements quoted in the Offer will be utilized;

(iii) with respect to any allowance which is unclear, the Lessee's decision on how to apply the allowance in the analysis shall be final.

- 3.5 Notwithstanding 3.3 above, the Lessee reserves the unqualified right to do a comparative evaluation of all Offers received and evaluate them based on considerations which in the sole opinion of the Lessee would yield to the Lessee the best value. This evaluation may be on

such matters as, but not limited to, quality of space offered, the efficiency of the space offered, building design and access, and the level at which all requirements are met or achieved in comparison to the rental rate being requested.

4. ACCEPTANCE

- 4.1. The Lessee may accept any Offer whether it is the lowest or not or may reject any or all Offers. [Emphasis added.]

Moreover, the document referred to as “Statement of Requirements” outlined the type of space required:

5. SPACE

5.1 Category and amount of space required:

- (a) Basic office space: approximately but not less than 7,420 contiguous square metres. [Emphasis added.]

91 The express terms of the tender call clearly conferred upon the Department significant latitude in evaluating the tenders. Not only did the Lease Tender Document include the standard privilege clause, but it also outlined factors which could be considered by the Department in evaluating the tenders. Notably, the provisions of the Lease Tender Document explicitly left it up to the lessee to determine which fit-up costs were necessary (see clause 3.4(a).1), and indicated that the Department’s cost estimates would be final (see clause 3.4(c)(i)). The breadth of the Department’s discretion in analysing the bids is further highlighted by clause 3.5 of the Instructions to Offerors. This language is clear and unequivocal, and was included in the specifications which were sent to Martel.

92 While the Lease Tender Document affords the Department wide discretion, this discretion must nevertheless be qualified to the extent that all bidders must be treated equally and fairly. Neither the privilege clause nor the other terms of Contract A nullify

this duty. As explained above, such an implied contractual duty is necessary to promote and protect the integrity of the tender system.

93 In assessing the competing bids, the Department engaged in a financial analysis. In the courts below, questions were raised with respect to the costs added to the respondent's bid relating to fit-ups, the contiguous space requirement, and a secured card access system.

94 Admittedly, \$812,736 was added to the Martel bid for fit-up costs. However, as the Department pointed out, the Court of Appeal appears to have ignored that fit-up costs were also added to the other three bidders. In fact, \$2,362,231.20 was added to the Commonwealth Building bid, \$2,951,750.20 to the Constitution Square Tower II bid, and \$1,808,179.80 to the Standard Life bid. These figures were derived from the Unit Price Tables submitted by each tenderer as part of their bid, using a general scenario to fit-up a 900 square metre area. This resulted in an average cost per square metre of fitted-up space. A certain percentage was then added uniformly to the four rates to account for increased costs that the Department had experienced in the past when using this computation.

95 We cannot find any breach of Contract A related to the addition of fit-up costs. The Department was expressly entitled to add fit-up costs which it deemed necessary. Furthermore, fit-up costs were added to all bids, using the same standard or method of calculation. In this regard, the Department complied with its implied contractual obligation to treat all bidders fairly and equally. A duty to treat all bidders fairly in this context means treating all bids consistently, applying assumptions evenly. There is no evidence of any colourable attempt to use fit-ups to achieve a desired result. In light of the trial judge's finding that "it was fit-up costs . . . that made the plaintiff's

bid the second lowest rather than the lowest bid” (para. 57), the respondent’s claim is considerably weakened.

96 Martel also argued that, in evaluating its bid, the Department should have taken into account its recent expenditure of \$1.4 million to improve the AECB’s premises in the Martel Building. With respect, we disagree. Martel is essentially asking to be given special treatment based on its previous relationship with the Department. However, this would clearly give Martel an unfair advantage over the other bidders. It must be remembered that upon submitting a tender in response to the invitation to tender, the other three bidders also entered into Contracts A with the Department. Therefore, pursuant to the implied obligation of fair and equal treatment, the Department acted properly in disregarding any past or planned improvements of the Martel Building by not accounting for them in Martel’s bid.

97 With respect to the costs related to the contiguous space specification, it cannot be maintained that these costs should not have been added to Martel’s bid where such requirement was an express term of Contract A: Statement of Requirements, clause 5.1(a). In assessing Martel’s bid, the Department prepared two “scenarios” which illustrated the costs involved should the AECB remain in the Martel Building. The first scenario detailed the costs to be incurred should AECB be reorganized onto contiguous floors (Scenario A), while the second provided the figures to be added for non-contiguous space should the tenant remain *in situ* (Scenario B). At trial, when asked why Scenario A was ultimately chosen for the purpose of the calculation, Mr. Mahar explained that “Scenario A is what was required in the tender”. Mr. Mahar also testified that “Scenario A follows the letter of the tender document. We had asked for 7,420 usable square metres of contiguous space”.

98 Consistent with the principles canvassed above, we find that not only was the Department entitled to apply the contiguous space requirement to Martel’s bid, but the Department was also in fact required to adopt that scenario consistent with the Lease Tender Document. The contiguous space requirement was an express term of Contract A. To ignore that requirement would have resulted in a violation of that provision. Moreover, as all other bidders were expected to take into account and to comply with the contiguous space requirement in responding to the tender, the Department was bound, under its implied contractual duty to treat all bidders fairly and equally, to apply this specification to Martel. Martel could not be given any unfair advantage based on its previous relationship with the Department. Thus, in subjecting Martel to the explicit words of the tender document, the Department fulfilled its obligation to all parties.

99 As discussed above, we believe that in conducting its financial analysis, the Department did not breach any duty by adding costs for fit-ups and contiguous space to Martel’s bid. However, the addition of \$60,000 solely to Martel’s bid to account for a secured card system is problematic. At trial, Mr. Mahar explained that the costs for this option had been added to Martel’s figures because the “other three buildings that [they] were looking at had that capability”. However, the trial judge noted that “[t]his was not entirely true” since the Department “subsequently had to install systems in two of the Standard Life building elevators” (para. 60).

100 Given the clear provision included in the tender document which specified that the Department reserved to itself broad rights in evaluating the bids based on its own considerations, we do not find that the addition of such costs was problematic *per se*. However, the Department failed to add the secured card costs consistently to all bids. Consequently, the appellant breached its implied contractual duty to treat all bidders fairly and equally in this respect only.

101 However, counsel for the Department argued before our Court that the addition of the secured card system of \$60,000 is a non-issue since the difference between the successful bid and Martel's bid was over \$500,000. This leads us to the question of causation.

102 To be recoverable, a loss must be caused by the contractual breach in question. As noted above, the only breach of Contract A is limited to the addition of the security system costs to Martel's bid. However, we conclude that damages for this breach of Contract A are precluded for want of causation. We also find that the Department's breach did not cause Martel to lose a reasonable expectation of receiving Contract B. Even if the costs for a security system were deducted from Martel's bid (or also added to the Standard Life bid), the difference between the two bids would remain significant. While the trial judge noted that "it was fit-up costs . . . that made the plaintiff's bid the second lowest rather than the lowest" (para. 57 (emphasis added)), the fit-up costs, as explained above, were added fairly and consistently to all bidders. At the end of the day, we also believe that Martel lost Contract B because Standard Life made a better offer. In this respect, we note that Standard Life included compelling inducements in its bid which the Department discounted in evaluating that bid, as clause 3.4 of the Instructions to Offerors enabled the Department to do. In effect, Standard Life submitted a significant leasehold improvement allowance plus 18 months of free rent which considerably lowered its bid. While the tender document included a clause that the lowest or any bid would not necessarily be accepted, the Department properly exercised its discretion in awarding Contract B to Standard Life, whose bid in its opinion yielded the best value.

103 We conclude that Martel did not suffer any loss as a result of the conduct of the Department in the evaluation of the bids. The addition of the secured card access system costs by the Department to Martel's bid did not deprive Martel of an opportunity of being selected as the successful bidder.

104 In passing, we note that Desjardins J.A. also framed the loss in question as “the loss of opportunity to fairly participate in the tender” (para. 40). Assuming without deciding that the loss of opportunity to participate fairly is analytically different from, and independent of, the loss of a reasonable expectation of receiving the contract, it is arguable that the addition of the costs for the secured card system caused Martel to lose the opportunity to participate fairly (i.e., subject to equal treatment) in the tender. However, in the circumstances of this case, the addition of \$60,000 to Martel's bid is of such negligible significance that damages would be nominal and judgement on this limited item is not warranted. Accordingly, we would not make any finding of recovery on this point.

(c) General Negligence Claims

(i) *Evaluation of Tenders*

105 While the tendering relationship is one which is defined by contract, Martel bases its cause of action on tort law. As discussed above with respect to negotiations, recognizing a duty of care in the tendering process would represent an extension of the categories under which recovery for pure economic loss has been granted. As noted above, the Federal Court of Appeal acceded to Martel's tort claim and accepted that the Department owed Martel a tortious duty of care arising out of the implied contractual obligation to treat all bidders fairly. In relation to the evaluation of the tenders,

Desjardins J.A. held at para. 37 that the Department had breached its duty of care in tort to act fairly toward Martel based on the trial judge's findings of fact that "a somewhat arbitrary assessment of fit-up costs appear[ed] to have been added to the financial analysis of the plaintiff's bid"; that some of the costs arbitrarily assessed to Martel's tender were attributable to the contiguous space requirements; and that the cost of a secured card access system had been added to the Martel bid, and not to the Standard Life bid.

106 In our view, the enumeration of the alleged foregoing breaches clearly reveals that the contract analysis, as canvassed above, subsumes any duty of care that Martel seeks to have recognized under tort. In this connection, we acknowledge that it is well established that an action in tort may lie notwithstanding the existence of a contract. However, it is equally clear that in assessing whether a tortious duty should be recognized where a contract already defines the rights and obligations of the parties in a chosen relationship, courts will look to the contract as informing that duty. Nothing prevents reliance on a concurrent or alternative liability in tort if the contract does not limit or negative the right to sue in tort. Where concurrent liability in tort and contract exists a party may elect to bring an action in tort in place of an action for breach of contract: see *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147; *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87; *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1993] 1 S.C.R. 12.

107 However, in the circumstances of this case, regardless of whether there exists a coextensive duty in tort to treat tenderers fairly and equally in evaluating the bids, Martel's tort claim cannot succeed for the same reasons that a contractual claim would fail. The duty of care alleged in tort in the case at bar is the same as the duty which is implied as a term of Contract A; this is not a case where Martel is suing in tort to avail

itself of a more generous limitation period, or some other advantage offered only by tort law.

108 Finally, we note that Desjardins J.A. relied on two cases to support the view that a duty to treat all bidders fairly and equally has been recognized in the context of tort claims. However, we note that both cases have subsequently been reversed by appellate courts: *Twin City Mechanical v. Bradsil (1967) Ltd.* (1996), 31 C.L.R. (2d) 210 (Ont. Ct. (Gen. Div.)), rev'd (1999), 43 C.L.R. (2d) 275 (Ont. C.A.); *Ken Toby Ltd. v. British Columbia Buildings Corp.* (1997), 34 B.C.L.R. (3d) 263 (S.C.), rev'd (1999), 62 B.C.L.R. (3d) 308 (C.A.). In addition, reliance in tort was necessary because both cases involved situations where a subcontractor sought redress against the tender calling authority who had received bids from the general contractor. Since there was no privity of contract between the subcontractor and the owner, liability could only be founded in tort. In both cases, the appellate courts refrained from deciding whether or not a duty of care was owed in such situations, and preferred to limit their decisions to the fact that a breach could not be established. We believe that the issue of whether a duty of care can arise between a subcontractor and an owner must be left to a case in which it arises.

(ii) *Drafting of Tender Documents*

109 We now turn to the Department's alleged negligence in drafting the tender documents. Counsel for Martel focussed on this issue and argued that the requirement for contiguous space had been carelessly inserted into the tender specifications. Martel submitted that without this carelessly added term, no further fit-up assessment would have been necessary.

110 In the Court of Appeal, Desjardins J.A. found that the Department had been negligent in failing to exercise due care in preparing the tender documents. She stated, at para. 37, that:

[The trial judge] also found that some of the costs arbitrarily assessed to the [respondent]’s bid were attributable to the tender’s contiguous space requirements, which had not been required initially by AECEB and which, obviously, had been negligently added to the tender specifications by Mr. Mahar, resulting in a higher bid for the [respondent]. [Emphasis added.]

In Desjardins J.A.’s view, this further supported the conclusion that the Department had breached its duty to act fairly towards Martel. Our response is two-fold.

111 First, while Desjardins J.A.’s foregoing passage appears to suggest otherwise, the trial judge did not find that the contiguous space requirements had been negligently added to the tender specifications. This conclusion was reached only in the Federal Court of Appeal. That is not to say that the trial judge did not comment on the preparation of the tender documents. On the contrary, she noted that in the past, Mr. Mahar had only prepared one or two other expression of interest advertisements and that he had been working from a precedent which called for tenders on contiguous space. Reed J. added at para. 36: “if one were seeking *new* space for the AECEB, it would only make sense to require that the space be contiguous” (emphasis in original). We question whether Martel’s submission that the contiguous space requirement had been mistakenly added to the specifications can be supported by the trial judge’s findings. Martel conceded that contiguous space was a requirement with which all other bidders needed to comply. Therefore, it would be difficult to accept (though we make no finding on this issue) that this requirement was carelessly added in the tender specifications.

112 Second, contrary to Desjardins J.A.’s conclusion, the costs attributable to the contiguous space requirements did not “resul[t] in a higher bid for [Martel]” (para. 37).

On the contrary, as we noted above, the trial judge explicitly concluded that “it was fit-up costs over and above these [costs attributable to the tender’s contiguous space requirements] that made the plaintiff’s bid the second lowest rather than the lowest” (para. 57). Thus, as the Department points out, the short answer to this debate is that the inclusion of the contiguous space requirements and the fit-up costs associated thereto did not, at the end of the day, make Martel’s bid more expensive than the Standard Life bid. As mentioned above, in conducting its evaluation, the Department calculated fit-ups, both on the basis of contiguous space in the Martel Building, and on the basis of the AECB remaining *in situ*. Scenario B illustrates that the Department concluded that fit-up costs would still have been required even if the tenant remained *in situ* in the Martel Building. Absent the contiguous space requirement, Martel’s bid would still have been approximately \$300,000 more expensive than the successful bid.

113 In any event, we conclude that the Department did not owe Martel a duty of care in drafting the tender specifications. Martel’s claim that the tender specifications were prepared negligently alleges a duty in an area not previously recognized. To determine whether the sphere of recovery for pure economic loss should be extended to cover the circumstances surrounding the preparation of the tender specifications in this case, the *Anns* two-step analysis must be applied.

114 Assuming without deciding that sufficient proximity existed between the parties, any *prima facie* duty of care would be negated by policy considerations. Indeed, considerations unique to the tendering process nullify any duty of care sought by Martel. First and foremost, we agree with the Department that it would call into question the integrity of the tender process if, by reason of a past relationship with, or special knowledge of, a potential bidder, there could be an enforceable obligation to take the interests of that particular bidder into account. While Martel argues that a duty of care

would not entail taking into account the interests of a particular bidder, we note that all of its arguments relate to factors that are specific to its previous relationship with the Department.

115 In effect, all of Martel’s submissions on this point pertain to information it obtained during the course of its previous negotiations with the Department. During the course of its negotiations with the Department, there was no suggestion that further fit-ups would be required in the Martel building or that the AECEB, as tenant, desired contiguous space. Therefore, Martel alleges that the tender specifications “did not reflect the reality of the situation”. While Martel concedes that once the bids were opened the Department could not hold private conversations with any bidder, it nevertheless maintains that the Department should have advised it beforehand of the requirements that would be considered.

116 With respect, we do not find this line of argument very persuasive. Once the Department decided to proceed by way of tender, it was not required to take into account its past relationship with Martel. To recognize that the Department owed a duty to Martel would be inconsistent with the basic rationale of tendering. As explained in *M.J.B. Enterprises, supra*, this rationale seeks to replace negotiation with competition. In this respect, it is imperative that all bidders be treated on an equal footing, and that no bidder be provided differential treatment on the basis of some previous relationship with the party making the call for tenders. It would defeat the purpose of fair competition to allow one bidder to be given some advantage from its previous dealings. The submission of a tender bid requires a great deal of effort and expense. Parties should at the very least be confident that their initial bids will not be skewed by some underlying advantage in the drafting of the call for tenders conferred upon only one potential bidder.

117 A party calling for tenders has the discretion to set out its own specifications and requirements. This includes the discretion to change its mind with respect to the terms or preferences that were discussed in the course of non-committal negotiations. Tender requirements are not negotiable. To decide otherwise would in fact force the party making the call for tenders to continue in its negotiations with one potential bidder even after those negotiations have proven unfruitful.

118 The terms of the call may grant a great deal of discretion upon the tender calling authority in evaluating the bid, and tenderers must make various assumptions and estimations in submitting a tender. As such, inherent risks are involved in submitting a tender bid, risks of which Martel was aware. Martel cannot by reason of its previous relationship with the Department expect or require under general principles of negligence some special position when it comes to tendering. Absent negligent misrepresentation upon which Martel would have relied to its detriment in entering into Contract A, we believe that it would be contrary to the underlying principles of the tender regime to accept that the Department owed it a duty of care in drafting the tender documents.

119 Finally, recognizing a duty of care in such a context could have significant repercussions on the tendering process and create many uncertainties. In this case, contiguous space was explicitly required in the tender specifications. Martel is essentially asking this Court to import a common law duty of care in the drafting of the call for the express purpose of avoiding this contractual provision. Accepting Martel's argument would have the effect of providing an out for those people who do not submit compliant bids. Indeed, other unsuccessful, non-compliant bidders could attempt to sue in negligence and argue that various terms of Contract A "did not reflect the reality of the situation". We believe that this further consideration clearly illustrates why a duty

of care should not be imposed on the tender calling authority in drafting the tender documents.

V. Disposition

120 In our view, the Federal Court of Appeal erred in allowing the respondent's claim. Accordingly, the appeal is allowed, the judgment of the Court of Appeal is set aside with costs in this Court and the courts below, and the judgment of the Federal Court, Trial Division, is restored.

Appeal allowed with costs.

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Solicitors for the respondent: Osler, Hoskin & Harcourt, Ottawa.

Naylor Group Inc. v. Ellis-Don Construction Ltd., [2001] 2 S.C.R. 943, 2001 SCC 58

Ellis-Don Construction Ltd.

Appellant/Respondent on cross-appeal

v.

Naylor Group Inc.

Respondent/Appellant on cross-appeal

Indexed as: Naylor Group Inc. v. Ellis-Don Construction Ltd.

Neutral citation: 2001 SCC 58.

File No.: 27321.

2001: January 22; 2001: September 27.

Present: McLachlin C.J. and Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

on appeal from the court of appeal for ontario

Contracts – Bid depository system – Prime contractor awarded large construction contract as lowest bidder – Prime contractor’s bid incorporating subcontractor’s bid – Subcontractor’s workers not members of International Brotherhood of Electrical Workers (IBEW) – Prime contractor later refusing to enter into subcontract – Prime contractor subsequently contracting with IBEW subcontractor at same bid price – Legal obligations of prime contractors to

prospective subcontractors under rules of structured bid depository – Whether contract terms breached.

Contracts – Doctrine of frustration – Bid depository system – Prime contractor awarded large construction contract as lowest bidder – Prime contractor’s bid incorporating subcontractor’s bid – Subcontractor’s workers not members of International Brotherhood of Electrical Workers (IBEW) – Ontario Labour Relations Board (OLRB) deciding prime contractor must use only IBEW-affiliated subcontractors – Whether contract frustrated by OLRB decision.

Contracts – Remedies – Prime contractor awarded large construction contract as lowest bidder – Prime contractor’s bid incorporating subcontractor’s bid – Prime contractor later refusing to enter into subcontract – Manner of assessing damages for wrongful refusal to contract.

The Oakville-Trafalgar Memorial Hospital (“OTMH”) called for tenders for the construction of an addition and renovation of its hospital through the Toronto Bid Depository. Ellis-Don Construction Ltd., one of the largest construction firms in Ontario, approached Naylor Group Inc. in November 1991 to bid for the electrical work on the project. Naylor volunteered the important information that its workers were not affiliated with the International Brotherhood of Electrical Workers (“IBEW”). It was told there would be no objection on that account. Ellis-Don had been in a continuing if sporadic argument over bargaining rights with the IBEW for the previous 30 years. The dispute, in which the IBEW claimed to have been the exclusive bargaining agent for Ellis-Don electrical workers since 1962, came before the Ontario Labour Relations Board (“OLRB”) in 1990. The OLRB ruling was still under reserve in January 1991. Ellis-Don was aware, as Naylor was not, of the details

of the IBEW grievance and whether an adverse ruling would cause it serious difficulty on the OTMH job. Nevertheless, Ellis-Don “carried” Naylor’s low bid for the electrical work in its own tender for the prime contract and as a result was low bidder for the OTMH project. The OLRB decision was released in February 1992, confirming Ellis-Don’s collective bargaining commitment to use only electrical subcontractors whose employees were affiliated with the IBEW.

On May 6, 1992, OTMH awarded the prime contract to Ellis-Don. The prime contract contained an article under which Ellis-Don undertook to hire Naylor. Ellis-Don offered to subcontract the electrical work to Naylor at the bid price if Naylor would align itself with the IBEW. Naylor, which already had a union, declined. A week later Ellis-Don wrote to Naylor to say that, because of the OLRB decision, it was unable to enter into a subcontract agreement with the firm. It subsequently awarded the electrical subcontract to an IBEW subcontractor. Naylor sued for breach of contract and unjust enrichment. Its contractual claim was dismissed but the trial judge, out of an abundance of caution, assessed the damages that would have been awarded in contract, if the claim had succeeded, at \$730,286. He did allow a claim for unjust enrichment in the amount of \$14,560, which corresponded to the costs of preparing the bid. Naylor appealed and was awarded damages for breach of contract in the amount of \$182,500. Ellis-Don appeals from that decision on the issue of liability alone. Naylor cross-appeals on the issue of quantum of damages.

Held: The appeal should be dismissed and the cross-appeal allowed.

The various terms and conditions governing the Toronto Bid Depository, when read together, compel the conclusion that, when Ellis-Don chose to carry Naylor’s bid in its tender to OTMH, it committed itself to subcontract the electrical

work to Naylor in the absence of a reasonable objection. The prime contractor's protection lies in the contractual right to object. The subcontractor's protection lies in the concept of "reasonableness". What is "reasonable" depends on the facts of the case. Ellis-Don's only objection to Naylor was the fact it was not an IBEW subcontractor. In light of Ellis-Don's conduct, however, it was not "reasonable" of Ellis-Don to object to Naylor's union affiliation. Ellis-Don with full knowledge of that fact chose to carry Naylor instead of an IBEW affiliated subcontractor. It thereby won the prime contract. It was held by the OLRB to have previously promised the work to IBEW electricians. Ellis-Don could not simultaneously fulfill its obligation to Naylor and to the IBEW, but it had knowingly placed itself in a position of conflict. In the circumstances there was no unfairness in requiring Ellis-Don to compensate Naylor for its non-performance. It had gone out of its way to assure Naylor that its in-house union affiliation was no cause for concern and would be no basis for objection. It carried Naylor's bid in its tender for the prime contract, with full knowledge of both the IBEW proceedings before the OLRB and Naylor's non-IBEW union affiliation. It affirmed its agreement to use Naylor when it put forward Naylor's addendum price in its submission to OTMH, more than two weeks after it had received full notice of the OLRB ruling. It formally affirmed Naylor's expected role in the actual contract between OTMH and Ellis-Don, dated May 6, 1992. Its belated objection to Naylor, in light of this history, was unreasonable.

The doctrine of frustration is inapplicable. There has been no "supervening event" in the required sense. The OLRB decision recognized and affirmed Ellis-Don's pre-existing obligation to the IBEW. It created no new obligation. Accordingly, when Ellis-Don approached Naylor to do the OTMH work with non-IBEW workers, and subsequently carried the bid to OTMH, it was promising work that, so far as the OLRB and the IBEW were concerned, Ellis-Don had already

bargained away. The OLRB decision simply precipitated the claim in damages. Moreover, the parties specifically provided their own test to deal with supervening circumstances, i.e., if Ellis-Don had had good reason it could have “reasonably” objected to the awarding of the subcontract to Naylor. Where parties have made specific provision for supervening circumstances, the doctrine of frustration is inapplicable.

The normal measure of damages in the case of a wrongful refusal to contract in the building context is the contract price less the cost of executing or completing the work, i.e., the loss of profit. The Court of Appeal was entitled to substitute its own view of a proper award since the trial judge failed to consider relevant factors such as the unexpectedly severe site problems and made “a palpably incorrect” assessment of the damages. There was no reason to interfere with the assessment of the Court of Appeal in this respect. However, the evidence did not justify the Court of Appeal’s further reduction of Naylor’s loss of profit for unduly speculative contingencies related to possible action or inaction by the OLRB, and potential work-sharing arrangements between Naylor and IBEW subcontractors, and the cross-appeal, to that extent, was allowed. There was no need to examine the alternative ground of unjust enrichment relied upon by the trial judge.

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Inc., [1994] O.L.R.D. No. 4398 (QL); *Martel Building Ltd. v. Canada*, [2000] 2 S.C.R. 860, 2000 SCC 60; *M.J. Peddlesden Ltd. v. Liddell Construction Ltd.* (1981), 128 D.L.R. (3d) 360; *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, [1987] 1 S.C.R. 711; *Peter Kiewit Sons' Co. v. Eakins Construction Ltd.*, [1960] S.C.R. 361; *Davis Contractors Ltd. v. Fareham Urban District Council*, [1956] A.C. 696; *Hydro-Québec v. Churchill Falls (Labrador) Corp.*, [1988] 1 S.C.R. 1087; *McDermid v. Food-Vale Stores (1972) Ltd.* (1980), 14 Alta. L.R. (2d) 300; *O'Connell v. Harkema Express Lines Ltd.* (1982), 141 D.L.R. (3d) 291; *Petrogas Processing Ltd. v. Westcoast Transmission Co.* (1988), 59 Alta. L.R. (2d) 118; *Victoria Wood Development Corp. v. Ondrey* (1978), 92 D.L.R. (3d) 229; *Marathon-Delco Inc.*, [2000] O.L.R.D. No. 542 (QL); *Twin City Mechanical v. Bradsil (1967) Ltd.* (1996), 31 C.L.R. (2d) 210; *Lang v. Pollard*, [1957] S.C.R. 858; *Woelk v. Halvorson*, [1980] 2 S.C.R. 430; *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229; *Laurentide Motels Ltd. v. Beauport (City)*, [1989] 1 S.C.R. 705; *Widrig v. Strazer*, [1964] S.C.R. 376.

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APPEAL and CROSS-APPEAL from a judgment of the Ontario Court of Appeal (1999), 43 O.R. (3d) 325, 171 D.L.R. (4th) 243, 119 O.A.C. 182, 49 B.L.R. (2d) 45, 45 C.L.R. (2d) 42, [1999] O.J. No. 913 (QL), allowing the respondent's appeal from a judgment of the Ontario Court (General Division) (1996), 30 C.L.R. (2d) 195, [1996] O.J. No. 3247 (QL). Appeal dismissed and cross-appeal allowed.

Earl A. Cherniak, Q.C., Kirk F. Stevens and Sandra L. Coleman, for the appellant/respondent on cross-appeal.

Alan A. Farrer and Leah K. Bowness, for the respondent/appellant on cross-appeal.

The judgment of the Court was delivered by

1 BINNIE J. – This appeal raises the issue of a prime contractor's legal obligations (if any) to a prospective subcontractor whose bid it has incorporated in its own successful tender for a construction project under the rules of a structured bid depository. The appellant's Project Manager testified that a bid depository "is just a fancy name for somebody collecting prices". This, as will be seen, is something of an understatement.

2 The appellant, Ellis-Don Construction Ltd. ("Ellis-Don"), one of the largest construction firms in Ontario, acknowledges that it generally subcontracts with the trades "carried" in its own bid for a job, but says it has no legal obligation to do so. In this case, the respondent subcontractor, Naylor Group Inc. ("Naylor"), was

deemed unacceptable because its employees belonged to the wrong trade union. The respondent subcontractor replies that the appellant not only knew from the outset that the respondent's workers belonged to an in-house union (the "Employees Association of Naylor Group Incorporated"), but with full knowledge of that fact invited it to bid for the electrical work on a multi-million dollar project for renovations and additions to the Oakville-Trafalgar Memorial Hospital (the "owner" or "OTMH"). Worse, the appellant used the respondent's low bid to get the job, then "shopped" its bid elsewhere to get the work done at a very favourable price. All of this, says the respondent, undermined the integrity of the Bid Depository process and breached the terms of the tender contract.

3 The Ontario Court of Appeal rejected the appellant's arguments. It held that the terms of the contract governing this particular tender required the appellant to enter into the electrical subcontract with the respondent in the absence of reasonable cause not to do so. I think that on the facts of this particular tender arrangement, this conclusion is correct. The issue, then, is whether reasonable cause existed. The appellant had invited the respondent to participate with the assurance that there would be no objection at a later date to its union affiliation, and affirmed this position repeatedly thereafter. The appellant's eventual reversal of that position was unreasonable. It is in accordance with the tendering contract that it bear the commercial consequences. The appeal must therefore be dismissed.

4 The respondent subcontractor cross-appeals the award of damages. It says it was entitled to its loss of profit on the lost contract (which the trial judge assessed at \$730,286) and that this figure was inappropriately reduced by the Ontario Court of Appeal to \$182,500 because of alleged "contingencies" which were not established in the evidence. I think the respondent is partly correct in this respect. Accepting the

dollar figures generated by the courts below, but deleting one of the contingencies allowed by the Ontario Court of Appeal, I would allow the cross-appeal and give judgment for the respondent in the sum of \$365,143.

I. Facts

5 In 1991, OTMH called for tenders for the construction of an addition and renovation of its hospital through the Toronto Bid Depository.

1. *The Bid Depository System*

6 A bid depository is, in effect, a structured bidding process. The model used here was devised in the late 1950s by the construction industry with the participation of the Ontario government. It is designed to achieve fairness on building construction projects where the owner requires a lump-sum tender based on plans and specifications, and where a multitude of prime contractors, trade contractors and suppliers are expected to get involved in the tendering process. At the relevant time, it worked as follows.

7 The Bid Depository's staff was notified of a new project by an owner who wished to make use of their services. A date was fixed by which the pre-qualified subcontractors were to submit on a standard form document (for ease of comparison) a breakdown of their prices. Identical project documentation was made available to all interested bidders in each of the subtrades. Their tenders were sealed and delivered to the Bid Depository office by a specified date and time and deposited in a designated locked box. On the due date, the subtrade bid documents were made available to interested prime contractors who selected the subcontractors (not necessarily the

lowest bidder) they wanted to carry as part of their own bid to the owner. Prime contractor bids were required to be filed on a standard form on a fixed date (here, two days after the opening of the subtrade bids). The system offered conformity and comparability. The prime contractor bids were open for the owner's acceptance for a fixed period (here 90 days) and the subcontractor bids were open for acceptance by the prime contractor for a fixed period after the award of the prime contract (here 7 days). Each prime contractor was required to undertake "to place a Sub-Contract with one of the trade contractors who used the Bid Depository" (Rule 13(c) of the *Ontario Bid Depository Standard Rules and Procedures*, also known as the rules of the Toronto Bid Depository). These were not informal arrangements for the convenience of prime contractors (i.e., "just a fancy name for somebody collecting prices"). Each participant in the tendering process bound itself by contract to certain obligations and acquired thereby certain rights. The content of those rights and obligations is the subject matter of this litigation.

8 Thomas Hitchman, President of the respondent, explained it thus:

. . . the purpose of the bid depository is that the sub-trade contractors submit their price through the bid depository and then the general contractor has a time frame, in this case two days, to assemble his bid and in so doing he can use the numbers that come out of the various sub-trades that bid through the bid depository two days earlier.

Q. I gather in the process there are more than just electrical sub-contractors tendering, is that correct?

A. Yes.

9 The process is considered fair to all participants because all parties bid on identical information, and their bids are disclosed to the relevant parties at the same time. In particular, it assures subtrades that their bids will not be "shopped" by a

prime contractor to competing subcontractors to lever a price advantage. “Bid shopping” was defined by the trial judge as “the practice of soliciting a bid from a contractor, with whom one has no intention of dealing, and then disclosing or using that in an attempt to drive prices down amongst contractors with whom one does intend to deal” ((1996), 30 C.L.R. (2d) 195, at p. 200). The Court of Appeal thought it sufficient if the “shopping” was to get a bid “for the same value or less” ((1999), 43 O.R. (3d) 325, at p. 330, footnote 3).

2. The Bidding History in This Case

10 The owner notified the Toronto Bid Depository of the project and a timetable was established whereby the bids of interested trade subcontractors were required to be made by December 12, 1991. A preliminary procedure was established by the owner and its architect to “pre-qualify” acceptable subcontractors by reference to such factors as their competence, track record on other projects, and financial viability. It being in the interest of prime contractors to have as many qualified firms as possible competing for the subcontracts, the appellant approached the respondent in early November 1991 to bid on the job. The respondent volunteered the important information that its workers were not affiliated with the International Brotherhood of Electrical Workers (“IBEW”). It was told there would be no objection on that account. The then head of the respondent’s construction division, Mr. Colin Harkness, testified as follows:

A. Mr. Quinless [the appellant’s senior estimator] was inquiring whether or not we would, indeed, be bidding the job. I returned the call to Mr. Quinless and spoke to him personally. We had never worked with Ellis-Don. I wanted to advise him at that time of what our union situation was. I told him we were not affiliated with the I.B.E.W.

THE COURT: Hold on, please. Mm-hmm.

A. And in that conversation Mr. Quinless identified to me that Ellis-Don were not bound to work with contractors affiliated with the I.B.E.W. and they could work with anyone. I asked him if we were low bidder through the bid depository and met the bidding requirements, that is, our tender form etc. were correct, would they carry us. He identified that if we were low bidder they would carry us.

...

A. We have had requests from contractors in the past to quote jobs and they say you must be "union" and I usually call to clarify what that implies. Quite often general contractors have told me that we must be affiliated with the international union of electrical workers. We had never worked with Ellis-Don through Naylor and I wanted to clarify with them that we, indeed, could work with them.

Q. After that telephone conversation, what impression were you left with about the union issue?

A. I was under the impression there was no problem whatsoever from their side.

Q. And do you recall whether you communicated this conversation at some point to Mr. Hitchman?

A. I definitely did.

11 Mr. Quinless, in his testimony, confirmed the substance of that conversation, and added that prior to giving the assurances, he had "checked it out" with responsible people in the appellant organization, as mentioned below. (See para. 66 of these reasons.)

12 The fact is that the appellant had been in a continuing if sporadic argument over bargaining rights with the IBEW for the previous 30 years. The dispute, in which the IBEW claimed to have been the *exclusive* bargaining agent for electrical workers on the appellant's jobs since 1962, came to a head in an 18-day hearing before the Ontario Labour Relations Board ("OLRB") in 1990. The issues before the OLRB were whether the IBEW had validly obtained bargaining rights in 1962 and, if so, whether those rights had been subsequently abandoned. The OLRB ruling was still

under reserve in January 1991. The appellant was undoubtedly convinced of the correctness of its position before the OLRB, but it was aware, whereas the respondent was not, of the details of the IBEW grievance and whether or not an adverse ruling would cause it serious difficulty on the OTMH job.

13 The respondent tendered a price of \$5,539,000. Approximately six weeks of work and 118 pages of calculations went into preparation of the bid. The next lowest bid for the electrical work was from Comstock Canada (“Comstock”), an IBEW subcontractor, whose bid was \$411,000 higher than the respondent’s bid. Comstock also bid for the mechanical work.

14 The appellant carried the respondent’s low bid for the electrical work and Comstock’s bid for the mechanical work in its own tender for the prime contract. It was low bidder at \$38,135,900 for the OTMH project. The trial judge found as a fact that if the appellant had carried Comstock’s bid for the electrical work instead of the respondent’s bid, it would not have been low bidder overall and might on that account have lost the prime contract.

15 By January 1992 it was common knowledge in the industry that the appellant had submitted the lowest bid. Acting on the appellant’s assurances that its “in-house” union affiliation presented no problem, the respondent “assigned personnel to study drawings, set crew sizes and plan the phasing of the electrical work”. At no time did it receive any formal communication from the appellant that it would get the subcontract.

16 Nor had the appellant received confirmation of the prime contract from the owner. The hospital is partly funded by the Ontario government, and there ensued an

unexpected delay in obtaining a commitment of government funds. In February 1992, the owner, OTMH, asked the appellant to extend the date for acceptance of its tender for 60 days (i.e., until May 1992). The appellant, in turn, asked for similar extensions from the subcontractors it had carried in its tender, including the respondent. The respondent prudently requested from the appellant a letter confirming its intent to give it the subcontract for the electrical work, if its prime bid was accepted. The appellant declined, it said, “because it was Ellis-Don’s practice not to enter into letters of intent prior to the award of the prime contract”.

17 The OLRB decision was released on February 28, 1992 ([1992] O.L.R.D. No. 695 (QL)). The IBEW grievance was upheld. The OLRB decision confirmed the appellant’s collective bargaining commitment to use only electrical subcontractors whose employees were affiliated with the IBEW. The details of this dispute are set out at length in the decision of this Court upholding the OLRB decision: *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, [2001] 1 S.C.R. 221, 2001 SCC 4. The appellant acknowledged in pre-trial discovery that the OLRB decision had been received by its in-house Director of Legal and Labour Operations, Mr. Paul Richer, on that date or soon thereafter although apparently it was not communicated to their manager on the OTMH project, Mr. Bruno Antidormi, until about March 10, 1992.

18 In the meantime, the owner had incorporated various changes to its project into Bid Revision No. 1 (also known as Post Tender Addendum No. 1). Despite the OLRB ruling, the appellant asked the subtrades, *including the respondent*, to submit prices for the contract changes by March 12. The respondent quoted \$132,192 (bringing its total bid to \$5,671,192). This quote, too, was carried by the appellant in its tender to the owner on March 17, 1992, i.e., three weeks after the OLRB decision and seven days after the appellant’s *project* management had been made fully aware

of the contents of the decision, and had given themselves sufficient time to digest its impact.

19 When word reached the respondent from some of its suppliers that the appellant was seeking bids from competing electrical subcontractors, one of its managers, Mr. Colin Harkness, called the appellant's Project Manager to confront him with this information. Mr. Harkness recorded his version of the call on April 15, 1992 in a contemporaneous handwritten note:

Q. Perhaps you could read to the Court given that it is in your handwriting what this note says.

A. It says, "Informed by Bruno Antidormi during phone conversation that he is seeking other electrical prices but is unable to get anyone to do it at our price. Actual comments . . ." and this is in italics, ". . . I can't use Naylor on this project and I can't get anyone else to do it at your price."

20 The respondent concluded, quite understandably in the trial judge's view, that the appellant was now "shopping Naylor's bid" to rival firms.

21 On May 3, 1992, the President of the respondent wrote a letter to the owner, OTMH, complaining of the appellant's apparent double game. He obtained no satisfaction. On May 6, 1992, the owner awarded the prime contract, incorporating Bid Revision No. 1 (Post Tender Addendum No. 1), to the appellant, who at that time still had no other electrical subcontractor prepared to do the project at the respondent's price. In fact, the prime contract contained Article 10.2 under which the appellant ostensibly undertook to hire the respondent:

10.2 The Contractor agrees to employ those Subcontractors proposed by him in writing and accepted by the Owner at the signing of the Contract.

22 On May 5, 1992, the appellant offered to subcontract the electrical work to the respondent at the bid price if the respondent would align itself with the IBEW. The respondent, which already had a union, understandably saw this offer as a ploy by the appellant to download its union problems onto the respondent and its workforce. It declined.

23 On May 13, 1992, the appellant wrote to the respondent to say that because of the OLRB decision of February 28, 1992, “we regrettably will be unable to enter into a Subcontract Agreement with your firm for the electrical work”.

24 In July 1992, the appellant provided Guild Electric (an IBEW subcontractor) with a letter of intent to award the electrical subcontract for \$5,671,192, precisely the same amount as had been bid by the respondent. Guild Electric had been pre-qualified for the OTMH project, but had decided not to submit a bid. It was therefore an ineligible subcontractor under Rule 13(c) of the Bid Depository, which was treated by the appellant as of no further relevance. The final subcontract was subsequently signed with Guild Electric with a minor price difference which was conceded to be insignificant.

25 The respondent sued for breach of contract and unjust enrichment. Its contractual claim was dismissed but it was awarded damages for unjust enrichment at trial in the amount of \$14,560, an amount corresponding to the costs of preparing its bid. The respondent appealed and was awarded damages for breach of contract in the amount of \$182,500 plus pre-judgment interest and costs. The appellant appeals from

that decision on the issue of liability alone. The respondent cross-appeals on the issue of quantum of damages.

II. Judgments

1. *Ontario Court (General Division)* (1996), 30 C.L.R. (2d) 195

26 Langdon J. concluded that, under the tender process agreed to by the parties, the award of the prime contract to the appellant did not automatically trigger a subcontract between the appellant and the respondent for the electrical work. According to traditional rules of contract formulation, communication of acceptance was required, and the appellant had never communicated its acceptance to the respondent. In any event, if any such contract for the electrical work had come into existence, it was frustrated by the OLRB decision of February 28, 1992, which precluded the appellant from contracting with a non-IBEW electrical subcontractor. He concluded that, if he was in error on the issue of liability, he would have awarded the respondent's damages for breach of contract as the lost profit on the project, which he assessed at \$730,286.

27 The trial judge then allowed the respondent's claim for unjust enrichment. He analysed the work of the estimators in preparing the bid, and the costs of overhead relating to same, and gave judgment to the respondent for \$14,560.

2. *Court of Appeal for Ontario* (1999), 43 O.R. (3d) 325

28 Weiler J.A., for the Court, held that the prevention of bid shopping is one of the objectives of the Bid Depository. She concluded that the appellant had acted in an “unethical” manner in negotiating the respondent’s bid price with Guild Electric.

29 On the contract issue, she proceeded in accordance with the analysis of tendering procedures set out in *The Queen in Right of Ontario v. Ron Engineering & Construction (Eastern) Ltd.*, [1981] 1 S.C.R. 111. Those using the Bid Depository system mutually agree to be bound by its terms, so that upon submission of a bid by a subcontractor or of a tender by a prime contractor, this “signifies acceptance of all the terms of the Bid Depository System and constitutes a preliminary contract or contract A”. The rules stipulated that the respondent’s bid was irrevocable for a period of time. The bidding process is dependent upon subcontractors being bound by their bids once they have been incorporated into a prime contractor’s tender and the tender has become irrevocable: *Northern Construction Co. v. Gloge Heating & Plumbing Ltd.* (1986), 19 C.L.R. 281 (Alta. C.A.).

30 In exchange for binding itself to an irrevocable bid, the subcontractor also acquires rights under Contract A. It is not automatically entitled to the award of the subcontract for the electrical work (Contract B), but such an award must be made unless the appellant (or the owner) has a “reasonable objection” pursuant to Article 10 of the *General Conditions* of the standard form contract.

31 Weiler J.A. held that the appellant’s objection to the respondent was not reasonable because she found that: (a) Ellis-Don “shopped” Naylor’s bid; (b) Ellis-Don ought to have made efforts to remove the impediment to its objection by applying to the OLRB to clarify whether it could contract with Naylor; and (c) Ellis-Don should have allowed Naylor the opportunity to enter into an arrangement with an IBEW-

affiliated company to retain a share of the profit from the subcontract. In her view, the OLRB decision did not necessarily prohibit the appellant from employing the respondent. On the contrary, citing the OLRB decision in *Aluma Systems Canada Inc.*, [1994] O.L.R.D. No. 4398 (QL), she stated that “the OLRB is sensitive to the prejudice a prime contractor may suffer once it has submitted a tender by which it is bound. It appears that, in such instances, the union would be estopped from claiming any damages.” The appellant having failed to demonstrate that its objection was reasonable, it was held to have breached the terms of Contract A with the respondent.

32 Weiler J.A. accepted the trial judge’s estimate of the respondent’s loss of profit on the job (\$730,286). She then discounted this figure by 50 percent for job site contingencies, and the resulting figure by a further 50 percent to account for the contingency that the OLRB would not have allowed the contract to be awarded to Naylor or that Naylor may have had to enter into a sub-subcontract with another electrical subcontractor with IBEW affiliation. With these factors in mind, the court allowed the appeal and awarded the respondent damages of \$182,500.

III. Analysis

33 The prospect of a major construction job generally initiates a cascade of invitations to bid from the owner to prime contractors to the subcontractors to the suppliers and other participants. The invitations generate a corresponding flow of tenders upwards along the same food chain. The Bid Depository system promotes itself as designed to protect the reasonable expectations of all participants. It does this by establishing clear rules, fixed deadlines, simultaneous disclosure of bids, and an orderly contracting procedure. Those submitting bids incur the obligation to keep them open for acceptance for a fixed period of time. This of course ties up their

resources and, depending on the circumstances, may incur some financial risk. In exchange, the tendering parties are assured that they will be fairly dealt with according to the rules established under the particular tendering procedure.

34 For the last 20 years, the legal effect of tendering arrangements has been approached in accordance with the Contract A/Contract B analysis adopted in *Ron Engineering, supra, per Estey J.*, at p. 119:

There is no question when one reviews the terms and conditions under which the tender was made that a contract arose upon the submission of a tender between the contractor and the owner whereby the tenderer could not withdraw the tender for a period of sixty days after the date of the opening of the tenders. Later in these reasons this initial contract is referred to as contract A to distinguish it from the construction contract itself which would arise on the acceptance of a tender, and which I refer to as contract B.

35 Subsequently, in *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619, the Court allowed the appeal of an unsuccessful bidder against the award of a prime contract to an unqualified bidder, contrary to an implied term in Contract A. The Court took the opportunity on that occasion to affirm that Contract A does not automatically spring into existence upon the making of a tender, and if it does, its terms must be ascertained as with any other contract, and not be derived from some abstract legal paradigm. Iacobucci J. reinforced this point at para. 17:

. . . it is always possible that Contract A does not arise upon the submission of a tender, or that Contract A arises but the irrevocability of the tender is not one of its terms, all of this depending upon the terms and conditions of the tender call.

See also *Martel Building Ltd. v. Canada*, [2000] 2 S.C.R. 860, 2000 SCC 60, at para. 80.

36 Both *Ron Engineering, supra*, and *M.J.B. Enterprises* dealt with owners and prime contractors. The present appeal raises an issue at a lower level of the cascade. Nevertheless, as those decisions made clear, the Contract A/Contract B approach rests on ordinary principles of contract formation, and there is no reason in principle why the same approach should not apply at this lower level. The existence and content of Contract A will depend on the facts of the particular case. Accordingly, the prime contract having been awarded in this case to the appellant, the issue is whether the respondent had any contractual rights under its Contract A with the appellant either to the making of Contract B (the electrical subcontract) or to damages for the appellant's refusal to do so.

37 This appeal thus raises five issues:

1. Was a Contract A formed between the appellant and respondent with respect to this project and, if so, what were its terms?
2. Was the contract frustrated by reason of the OLRB decision of February 28, 1992?
3. If not, did the appellant breach the terms of Contract A?
4. If so, what are the damages?

5. In the alternative, is the respondent entitled to recover on the basis of unjust enrichment?

38 There lurked in the background to some of the respondent's submissions in this Court occasional allegations which seemed grounded in tort, including negligent misrepresentation. However, tort was neither pleaded nor argued in the courts below and tort law will play no role in the disposition of this appeal.

1. *Was There a Contract A and, if So, What Were the Terms?*

39 The respondent contended at trial that the appellant, upon winning the prime contract, became automatically obligated to it under the terms of Contract A to enter into the electrical subcontract, i.e., Contract B. The respondent relies in this respect on the decision of the British Columbia Supreme Court in *M.J. Peddlesden Ltd. v. Liddell Construction Ltd.* (1981), 128 D.L.R. (3d) 360.

40 It is possible that under a different set of bidding rules this *could* be the outcome, but there is nothing in the call for tender or related documents in this case to give rise to such a result. On the contrary, as pointed out by Weiler J.A. in the Ontario Court of Appeal, the tender documents clearly contemplate the possible substitution of a subcontractor that is different from the firm carried in the tender for the prime contract. Article 10.3 of the *General Conditions* that govern the tender provides that the owner may, on reasonable grounds, object to a subcontractor and, if so, the prime contractor is required to employ another subcontractor. Article 10.5 states that the prime contractor shall not be required to employ as a subcontractor a person or firm to whom he may reasonably object. These terms are incorporated into Contract A and are plainly inconsistent with the respondent's theory of a "deemed

Contract B”. In accordance with the usual principles of contract formation, communication of acceptance was required to make Contract B.

41 The tender documents are equally clear, however, that the prime contractor is not free under Contract A of contractual obligation to the subtrades it has carried in its own bid. The Bid Depository does not operate simply for the prime contractor’s convenience.

42 The *Ontario Bid Depository Standard Rules and Procedures* assure participants that it “provides for the sanctity of the bid during the tendering process”, and specifically assures a subcontractor that he or she is “[a]ble to bid Prime Contractors knowing his bid will not be ‘shopped’”. The mechanism by which this is achieved is by instructing prime contractors in Article 16.1 of the *Instructions to Bidders*:

16.1 Bidders shall submit with Bid Documents . . . names of the Subcontractors bidder proposes to perform work under the Contract, and to include in the Agreement he would sign with the Owner.

The attached printed form that is required of prime contractors to submit to the owner includes as Article 3 the term:

3. In the Stipulated Price the following Subcontractors are carried and they will perform the work indicated. . . . [Emphasis added.]

43 The appellant was therefore required to and did include as Article 3 of its tender for the prime contract:

3. In the Stipulated Price the following Subcontractors are carried and they will perform the work indicated: . . . Electrical . . . Naylor Group Incorporated. [Emphasis added.]

44 Further, as noted above, the final contract between the owner and the appellant, which was in a standard form stipulated pursuant to the Bid Depository rules, provided as Article 10.2 of the *General Conditions of the Stipulated Price Contract*:

10.2 The Contractor agrees to employ those Subcontractors proposed by him in writing and accepted by the Owner at the signing of the Contract.

45 Outside the framework of a bid depository or comparable scheme, such provisions might operate solely between the owner and the prime contractor, and be of no assistance to a stranger to their contract, such as an aspiring subcontractor. However, in this case, there was a structured Bid Depository, and these standard printed-form documents between the prime contractor and the owner constituted part of the Bid Depository regime as implemented, and formed the contractual basis on which the subcontractors tendered. Indeed, it was on this basis that the Bid Depository *could* assure them that their bids would not be “shopped”. The assurance of a subcontract to the carried subcontractor, subject to *reasonable* objection, was for subcontractors the most important term of Contract A.

46 This interpretation of Contract A is entirely consistent with the answers provided on discovery by the Vice-President of the appellant who actually signed the OTMH bid:

Question 91: Is it fair to say on the afternoon of December 10th, which was the closing of the sub-trade bids, you and Mr. Quinless decided you were going to use the Naylor Group for the electrical job.

COUNSEL: He indicated the word was “carrying” and not “using”.

THE DEPONENT: We would carry their price.

Then on 93, the question is:

Question 93: So if the hospital accepted your bid you would then turn around and award the electrical sub-contract to Naylor at the price indicated.

Answer: Subject to certain clarifications I can’t say that it would be an absolute given.

Question 94: You have mentioned “certain clarifications”. What do you mean by that?

Answer: We have a process where we will sit down with the sub-contractor and go through the job. We have to be assured that he is doing it in accordance with our schedule and he does have a complete scope of the work and certain things of that nature are in order. We would tender the job to the owner and based on the way the process is we are assuming that is the case.

The “certain clarifications” mentioned by the appellant’s witness would, if lacking, go to the issue of reasonable objection. No other conditions precedent were mentioned.

47 I therefore reject the dismissive expression of the appellant’s Project Manager that the Bid Depository was “just a fancy name for somebody collecting prices”. It was contrary to the rules of the Bid Depository that a subcontractor’s bid, once disclosed, would become merely a bargaining lever against other electrical subcontractors to obtain the same or a lower price.

48 The appellant complains that it did not “shop” the respondent’s bid, as the trial judge defined it, because at the time it solicited the bid it *did* intend to subcontract the work to the respondent if it turned out to be the low bidder, and it subsequently

used the respondent's price as "a budget" to get the work done, not as a lever to obtain a still lower price from other subcontractors. This, while plausible, misses the point. The question at this stage is not whether the appellant engaged in bid shopping as defined by the trial judge but whether the rules of the Bid Depository created an effective contractual barrier to the practice, which was a leading selling point to the industry. In my view, the documentation referred to above, read in light of the rules of the Toronto Bid Depository, were intended to and did bring into existence, upon tender, a Contract A which required the successful prime contractor to subcontract to the firms carried in the absence of a reasonable objection.

49 The appellant also complains that in effect the court here would be "implying" a term into Contract A without meeting the stringent requirements laid down in *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, [1987] 1 S.C.R. 711, and *Martel Building, supra*. In my view, however, the obligation to contract, subject to reasonable objection, arises directly out of the rules of the Bid Depository and related (and required) standard form documentation, and does not resort to an "implied" term.

50 Finally, the appellant warns that this conclusion "imposes highly dysfunctional constraints on the ability of prime contractors and owners to deal with unusual problems that may arise in the course of the tendering/bidding process". It seems to me the rules of the Bid Depository are *intended* to impose constraints. The prime contractor is protected by Article 10 of the *General Conditions of the Stipulated Price Contract* that would eliminate a subcontractor if the owner had "reasonable cause" to object (Article 10.3) or if the prime contractor itself "may reasonably object" (Article 10.5). The prime contractor's protection lies in the contractual right to object. The subcontractor's protection lies in the concept of "reasonableness". An unreasonable objection does not suffice. If other participants in the Bid Depository

system agree with the appellant that such a constraint is “dysfunctional”, the rules can always be amended.

51 I therefore agree with Weiler J.A. that the various terms and conditions governing the Toronto Bid Depository, when read together, compel the conclusion that, when the appellant chose to carry the respondent’s bid in its tender to the owner, it committed itself to subcontract the electrical work to the respondent in the absence of a reasonable objection. What is “reasonable” depends on the facts of the case.

2. *Was Contract A Frustrated by Reason of the OLRB Decision of February 28, 1992?*

52 The appellant says that even if it was bound by Contract A, whatever its terms, it was nevertheless relieved of any obligation by the supervening event of the OLRB decision dated February 28, 1992 which required it to use IBEW electricians on its projects. The respondent’s employees were members of a different union. Accordingly, it says, the possibility of a subcontract was out of the question.

53 Frustration occurs when a situation has arisen for which the parties made no provision in the contract and performance of the contract becomes “a thing radically different from that which was undertaken by the contract”: *Peter Kiewit Sons’ Co. v. Eakins Construction Ltd.*, [1960] S.C.R. 361, *per* Judson J., at p. 368, quoting *Davis Contractors Ltd. v. Fareham Urban District Council*, [1956] A.C. 696 (H.L.), at p. 729.

54 Earlier cases of “frustration” proceeded on an “implied term” theory. The court was to ask itself a hypothetical question: if the contracting parties, as reasonable

people, had contemplated the supervening event at the time of contracting, would they have agreed that it would put the contract to an end? The implied term theory is now largely rejected because of its reliance on fiction and imputation.

55 More recent case law, including *Peter Kiewit*, adopts a more candid approach. The court is asked to intervene, not to enforce some fictional intention imputed to the parties, but to relieve the parties of their bargain because a supervening event (the OLRB decision) has occurred without the fault of either party. For instance, in the present case, the supervening event would have had to alter the nature of the appellant's obligation to contract with the respondent to such an extent that to compel performance despite the new and changed circumstances would be to order the appellant to do something radically different from what the parties agreed to under the tendering contract: *Hydro-Québec v. Churchill Falls (Labrador) Corp.*, [1988] 1 S.C.R. 1087; *McDermid v. Food-Vale Stores (1972) Ltd.* (1980), 14 Alta. L.R. (2d) 300 (Q.B.); *O'Connell v. Harkema Express Lines Ltd.* (1982), 141 D.L.R. (3d) 291 (Ont. Co. Ct.), at p. 304; *Petrogas Processing Ltd. v. Westcoast Transmission Co.* (1988), 59 Alta. L.R. (2d) 118 (Q.B.); *Victoria Wood Development Corp. v. Ondrey* (1978), 92 D.L.R. (3d) 229 (Ont. C.A.), at p. 242; and G. H. L. Fridman, *The Law of Contract in Canada* (4th ed. 1999), at pp. 677-78.

56 While the second approach ("a radical change in the obligation") is to be preferred and is now the established test, the appellant's argument would fail under either view. There has been no "supervening event" in the sense required by either approach to the doctrine of frustration and in fact the OLRB ruling against the appellant was a foreseeable outcome.

57 With all due respect to the learned trial judge, who concluded that any contractual obligation arising under Contract A had been frustrated by the OLRB decision of February 28, 1992, the appellant is in no better position than someone who sells his house to two successive buyers. At issue was the right to do the electrical work. The IBEW said that in 1962 it was promised for its members the electrical work on the appellant's projects and the OLRB found that the appellant had largely observed this collective bargaining obligation over the next 30 years. The OLRB decision of February 28, 1992 recognized and affirmed the appellant's obligation to the IBEW. It did not create it. Accordingly, when the appellant approached the respondent to do the OTMH work with non-IBEW workers, and subsequently carried the bid to the owner, it was promising work that, so far as the IBEW was concerned, the appellant had already bargained away.

58 In my view, the OLRB decision no more qualified as a "supervening event" than would a court decision upholding the validity of the first of two inconsistent contracts for the sale of a house. The judicial decision, far from frustrating and putting to an end the second contract, simply lays the basis for a claim in damages by the second purchaser. The OLRB merely affirmed a pre-existing obligation voluntarily entered into by the appellant that was too late disclosed to the respondent.

59 There is another reason why the doctrine of frustration is inapplicable. Contract A left open the possibility that for some good reason the appellant might "reasonably object" to the awarding of the subcontract to the respondent. The owner and the appellant had satisfied themselves about the respondent's qualifications on the basis of information known to them at the time of carrying its bid in the tender for the prime contract. However, there might obviously have arisen subsequent events (e.g.,

loss of key personnel) or belatedly disclosed information (e.g., financial insolvency) that would render an objection reasonable. The parties to Contract A specifically provided their own test to deal with supervening circumstances by means of a flexible exit option based on reasonableness. As a matter of construction, there is no need here to consider court-imposed remedies based on the allegation of a radical change to the significance of the contractual obligation.

60 The legal issue raised on these facts is not the doctrine of frustration but whether, in light of its conduct under the rules of the Bid Depository, it was “reasonable” of the appellant to object to the respondent’s union affiliation.

3. *Did the Appellant Breach the Terms of Contract A?*

61 The appellant has throughout taken the position that its *only* objection to the respondent is the fact that it is not an IBEW subcontractor. In my view, its conduct throughout the OTMH project disentitled it from characterizing such an objection as “reasonable”.

62 This is not to understate the importance of the OLRB’s affirmation of IBEW bargaining rights. I do not agree, as will be seen, with the Court of Appeal’s optimism that the OLRB ruling could be abated or circumnavigated. (Neither, it seems does the OLRB itself: *Marathon-Delco Inc.*, [2000] O.L.R.D. No. 542 (QL).) The IBEW, having established the correctness of its position at much effort and expense, could be expected to insist on the fruits of victory. The respondent says that the appellant simply acted duplicitously and crassly. Depending on who got the electrical subcontract, it knew it was going to be sued by either the IBEW or the respondent. It apparently viewed a suit by the respondent as the softer option. This observation may

have a measure of truth, but the more important fact is that the OLRB ruling is backed up by a statutory enforcement scheme that the appellant is obliged to recognize as paramount. An employer is required by the Ontario *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sched. A (formerly *Labour Relations Act*, R.S.O. 1990, c. L.2), to comply with an OLRB order (s. 48(18)) which may be enforced in the same manner as an order of the Ontario Superior Court (s. 48(19)). A corporation that contravenes an order is guilty of an offence carrying a fine of not more than \$25,000 (s. 104(1)(b)) and each day of a continuing contravention is a separate offence (s. 104(2)). (References are to the present numbering of the relevant sections of the Act.)

63 The appellant's argument, with respect, sets up a straw man. The severity of the Act's provisions simply exposes the folly of the appellant's assurances and conduct at a time when the OLRB decision was looming. If the appellant had instead been subjected to a court order to sell its house to an earlier purchaser (to revive the analogy), disobedience to the order of specific performance would also bring dire consequences, but nevertheless the court order would not relieve the appellant from its obligation to pay damages to the disappointed second purchaser. And so it is with Contract A. The appellant chose to carry the respondent instead of its IBEW affiliated rival, Comstock, and thereby assured itself as low bidder of winning the prime contract. It was held by the OLRB to have previously promised the work to IBEW electricians. By reason of that earlier obligation, it was unable to fulfill its subsequent obligation under Contract A. It couldn't keep both sets of promises. It is perfectly fair that it compensate the respondent for its non-performance of Contract A.

64 The appellant's dilemma is not without its sympathetic aspects. The OLRB decision was pending for about a year. In the meantime the appellant, as a practical operator, had either to bid carrying IBEW subcontractors (perhaps

unnecessarily) and risk losing major projects, or bid carrying non-IBEW subcontractors (perhaps wrongly) and risk the subsequent wrath of the IBEW and, perhaps, the OLRB. The problem, in the end, is that it purported to solve its dilemma at the respondent's expense.

65 The appellant, with full knowledge of the IBEW situation, had gone out of its way to assure the respondent that its in-house union affiliation was no cause for concern and would be no basis for objection. It carried the respondent's bid in its tender for the prime contract in December 1991, with full knowledge both of the IBEW proceedings before the OLRB and the respondent's non-IBEW union affiliation. It affirmed its agreement to use the respondent when it put forward the respondent's addendum price in its submission to the owner on March 17, 1992, more than two weeks after its Director of Legal and Labour Operations had received full notice of the OLRB ruling and began to seek advice on its impact. It formally affirmed the respondent's expected role in the actual contract between the owner and the appellant dated May 6, 1992 because otherwise it would have been obliged to admit it was signing a multi-million dollar contract including major electrical work without anyone in sight who was prepared and IBEW-equipped to perform it at the respondent's price. The appellant was not prepared to give the electrical work to Comstock, which was already on the job as mechanical contractor, whose bid price had been \$411,000 higher than the respondent.

66 The evidence on these matters was clear and uncontradicted. The potential IBEW problem was flagged by the respondent itself at the initial contact in early November 1991. The "no problem" assurance was given after consultation within the appellant organization by Mr. Paul Quinless, who as the senior estimator had responsibility for bidding on the OTMH project. Mr. Quinless testified as follows:

A. . . . My first job would be to contact all the pre-qualified sub-contractors, all of the invited sub-contractors and basically invite them to bid on the job so a fax would be sent out, or a letter sent out inviting them to bid.

. . .

A. I had a specific question from Naylor asking, explaining the fact that they were non-union, or non I.B.E.W., that they had their own in-house union affiliation and the question was asked could we use them? I checked it out and my response to Naylor was that we could use them. [Emphasis added.]

67 This erroneous advice was not corrected until a month and a half *after* the adverse OLRB ruling. Indeed, the appellant's Project Manager on the OTMH job, Mr. Bruno Antidormi, acknowledged that the respondent was not even given the signal that IBEW storm clouds *might* be gathering on the horizon:

Q. You could have written to Naylor and said "We have had this hearing. We may lose the hearing. There could be a problem down the road."

A. Okay, a bit of good advice.

Q. But you didn't do that.

A. No, we didn't do that.

68 On March 17, 1992 – well after the appellant acknowledges receiving and considering the OLRB decision – it affirmed its selection of the respondent by approving and submitting Naylor's price in its response to Bid Revision No. 1 (Post Tender Addendum No. 1). The appellant's Project Manager so testified:

Q. This letter of March 17th is some 18 days or so after the Ontario Labour Relations Board decision was placed into the hands of Ellis-Don?

A. That is correct. I was aware of the [OLRB] decision at this point.

69 Even more remarkably, the appellant signed the prime contract dated May 6, 1992 – about two months after the appellant was fully aware of the OLRB decision – undertaking to the owner once again to use the respondent to do the electrical work. This was confirmed in testimony by Bruno Antidormi, the appellant’s Project Manager:

Q. . . . In that paragraph [2.2] in the [prime] contract which you signed, sir, says “The contractor . . .” which is yourself there, Ellis-Don. . .

A. Mm-hmm.

Q. “. . . agrees to employ those sub-contractors proposed in writing and accepted by the owner at the signing of the contract.” Do you agree with me?

A. I agree with you.

Q. Up until that date, May 6th, had you proposed in writing any other sub-contractor for electrical work other than Naylor?

A. On May 6th? No, we did not. . . .

70 I agree with the appellant that the OLRB ruling of February 28, 1992 put an end to the lawful ability to use the services of the respondent. In my view, however, the fact it lost its OLRB gamble is not sufficient to absolve it of the financial consequences to the respondent. Its belated objection to the respondent, in light of this history, was unreasonable.

71 The respondent takes a darker view of the appellant’s conduct. It contends that non-disclosure of the IBEW problem and the other matters referred to above were far from innocent. It insists that if the appellant had carried the lowest IBEW

subcontractor (Comstock) for the electrical work, it would not have been low bidder on the OTMH project. The respondent says its bid was “used” to obtain the prime contract and “used” again to secure a substitute electrical subcontract at the same price from Guild Electric, all of which it says was contrary to the rules of the Toronto Bid Depository. The appellant’s denial lacked much conviction:

Q. So, Mr. Antidormi, you went to them, knowing Naylor’s price, knowing their bid amount, told the full amount and said to Guild, “Do the job for this”.

A. Yes.

Q. To your way of thinking that is not “shopping” the Naylor price.

A. I didn’t tell them to match the price. I said this is what you can do the job for.

72 While both the trial judge and Weiler J.A. in the Ontario Court of Appeal found the appellant’s conduct in this respect distasteful, I think it is sufficient to dispose of the case on the narrow contractual ground that the appellant could only extricate itself from Contract A by demonstrating that, in all the circumstances, its objection was “reasonable”, and this it has failed to do.

4. *What Are the Respondent’s Damages for Breach of Contract A?*

73 The well-accepted principle is that the respondent should be put in as good a position, financially speaking, as it would have been in had the appellant performed its obligations under the tender contract. The normal measure of damages in the case of a wrongful refusal to contract in the building context is the contract price less the cost to the respondent of executing or completing the work, i.e., the loss of profit: *M.J.B. Enterprises Ltd., supra*, at p. 650; *Twin City Mechanical v. Bradsil (1967) Ltd.*

(1996) 31 C.L.R. (2d) 210 (Ont. Ct. (Gen. Div.)), at pp. 225-26; S. M. Waddams, *The Law of Damages* (3rd ed. 1997), at para. 5.890; H. McGregor, *McGregor on Damages* (16th ed. 1997), at para. 1154.

74 The appellant accepts these general propositions as correct and, in the event of liability being found against it, does not contest the Court of Appeal's assessment. It is the respondent who complains in its cross-appeal that this award is too low. Its claim for lost profit was \$1,769,412. This was a figure calculated by the President of the respondent, Mr. Hitchman, based on an average mark-up of 12.4 percent on the contract price plus addendum, grossed up to an average mark-up of 31.2 percent on the entire job because of Mr. Hitchman's demonstrated capacity to squeeze profit out of contract extras.

75 The trial judge concluded that Mr. Hitchman's projected profit of \$1,769,412 was overly optimistic, and held the respondent to a more realistic mark-up of 11.2 percent plus minor adjustments, producing a figure of \$730,286. In making what he called a "highly speculative assessment", he noted that Guild Electric had suffered a significant financial loss on the job.

76 The trial judge recognized that there had been unanticipated site problems including what he referred to as "[t]he disaster on the demolition/wireway". Guild Electric had allowed almost twice the time as the respondent for the "demolition/wireway" (between 300 and 400 hours), but in fact spent 3,000 hours investigating and altering the existing electrical conduits. The trial judge deducted \$100,000 from the respondent's claimed loss of profit on this account.

77 The trial judge concluded that the respondent was better placed than Guild Electric had been to turn a profit on the OTMH job because it was a tightly-managed local Oakville firm with previous hands-on work experience at OTMH, and had a labour rate advantage over its IBEW affiliated rivals.

78 He further found that the institutional construction market in Ontario went into a steep decline in 1992. “[T]he economic climate in this industry from 1992 to 1995”, he concluded, “was disastrous”. Accordingly, he ruled that the respondent was in no position to mitigate its damages with other work, and had not succeeded in doing so.

79 The Court of Appeal reduced the \$730,286 by 50 percent because it felt the trial judge had failed to take into account a number of relevant features of the unexpectedly adverse conditions on the job site. It then reduced the resulting figure of \$365,143 by a further 50 percent (i.e., to \$182,500) for the contingency that the OLRB (if asked) might not have allowed the award of the contract to Naylor, or that Naylor might have been required to enter into an unprofitable arrangement with an IBEW subcontractor to carry out the OTMH work.

80 It is common ground that the Court of Appeal was not entitled to substitute its own view of a proper award unless it could be shown that the trial judge had made an error of principle of law, or misapprehended the evidence (*Lang v. Pollard*, [1957] S.C.R. 858, at p. 862), or it could be shown there was no evidence on which the trial judge could have reached his or her conclusion (*Woelk v. Halvorson*, [1980] 2 S.C.R. 430, at p. 435), or the trial judge failed to consider relevant factors in the assessment of damages, or considered irrelevant factors, or otherwise, in the result, made “a palpably incorrect” or “wholly erroneous” assessment of the damages (*Andrews v.*

Grand & Toy Alberta Ltd., [1978] 2 S.C.R. 229, at p. 235; *Laurentide Motels Ltd. v. Beauport (City)*, [1989] 1 S.C.R. 705, at p. 810; *Widrig v. Strazer*, [1964] S.C.R. 376, at pp. 388-89; *Woelk, supra*, at pp. 435-37; *Waddams, supra*, at para. 13.420; and H. D. Pitch and R. M. Snyder, *Damages for Breach of Contract* (2nd ed. 1989) 15§5). Where one or more of these conditions are met, however, the appellate court is obliged to interfere.

81 I agree with Weiler J.A. that the trial judge failed to relate the unexpectedly severe site problems, which he found as facts to exist, to his rather summary treatment of lost profits. The severity of the site conditions raised highly relevant considerations that were not restricted to the “demolition wireway”. Guild Electric may not have been a local Oakville firm, but it was a large, successful and experienced electrical contractor which, unlike the respondent, had previously done major jobs of this size. While recognizing the disastrous site conditions, the trial judge preferred to rest his calculation on the respondent’s bidding practices and historical profit levels on other jobs rather than (apart from an imputed loss on the “demolition/wireway”) on the facts of this particular job.

82 I propose to deal separately with the two contingencies applied by the Court of Appeal.

(a) Unanticipated Job Site Conditions

83 The hospital no longer retained “as-built” drawings and immense time was wasted during construction trying to identify the source and purpose of various wiring installations before demolition could proceed. Moreover, as the hospital continued to

function during demolition and renovation of various parts, scheduling became a serious constraint, as the appellant's Mr. Antidormi explained:

A. . . . if we had a renovation in a sensitive area such as the operating rooms or the intensive care facilities, it has to be properly scheduled, given the day to day delicate functions at the Oakville Hospital, which does a lot of eye surgery, there is no vibration allowed, no noise, no fumes. . . .

84 Guild Electric had estimated a total labour cost of 46,000 hours for the project (working within the budget established by the respondent). It expended 66,000 hours. The trial judge found almost a 50 percent cost overrun (20,000 hours) in labour hours, only about half of which was paid for in "extras" by the owner.

85 While some of these factors were noted by the trial judge, they were not integrated into his calculation of loss of profit. They ought to have been. The correct principle is stated in 12 *Halsbury's Laws of England*. (4th ed. 1975), at p. 437:

1137. *Possibilities, probabilities and chances*. Whilst issues of fact relating to liability must be decided on the balance of probability, the law of damages is concerned with evaluating, in terms of money, future possibilities and chances. In assessing damages which depend on the court's view as to what will happen in the future, or would have happened in the future if something had not happened in the past, the court must make an estimate as to what are the chances that a particular thing will happen or would have happened and reflect those chances, whether they are more or less than even, in the amount of damages which it awards.

86 The site conditions and related performance problems persuaded Weiler J.A. to reduce the loss of profit to \$365,143 and, given the necessarily speculative nature of the exercise, we have been given no reason to interfere on this point.

(b) IBEW-Related Difficulties

87 Weiler J.A., having ruled that the appellant erred in refusing to contract with the respondent because the OLRB might have sanctioned a subcontract with the respondent, then reduced the respondent's damages to \$182,500 on the basis that the OLRB might *not* have done so. In that event, the respondent might have had to do some sort of deal with an IBEW subcontractor, which would have further squeezed the respondent's profit, she concluded.

88 I think this line of reasoning carries the "speculative" exercise too far. As the appellant points out, "[t]he options posited by the Court of Appeal were contrary to what the parties had accepted as common ground (i.e., that the O.L.R.B. decision meant Ellis-Don could not sub-contract with Naylor)" (factum, at para. 64). Section 161(4) of the *Labour Relations Act, 1995* (formerly s. 147(4)) provides that a collective agreement is binding on the parties when the union obtains bargaining rights and the Act does not provide for any exemptions from that result. As to a potential business arrangement between the respondent and another electrical subcontractor, the respondent itself wrote to the appellant on May 11, 1992 stating that it would be "impossible" for it to consider aligning itself with an IBEW affiliate. I agree with the appellant that there was no basis to expect any indulgence from the OLRB or the IBEW.

89 However, on the somewhat different view I take of this case, it was not necessary to establish liability for the respondent to show that the OLRB might have been persuaded to grant the appellant an indulgence. The unreasonableness of the appellant's objection relates to its own prior conduct and representations, not to speculation about the help the OLRB might have offered had the appellant sought its

assistance to award Contract B to the respondent. The fact the OLRB might have been of no help at all is equally irrelevant.

90 The award of the subcontract to the respondent would have created severe legal problems for the appellant, but the issue at this point is what impact, if any, those problems would have had on the profitability of the subcontract from the respondent's perspective. If the appellant wished to demonstrate that the respondent could never have turned a profit on a job site already promised to IBEW members (and that the hoped-for Contract B would thus have been a sure loser), or that the respondent's profit would have been reduced by labour disruption, or some other such theory, there ought to have been evidence in that regard. On the contrary, the appellant's witnesses did not suggest that labour problems awaited the respondent on the job site, and the respondent filed a convenient letter dated May 5, 1992 from its lawyers expressing optimism on this point:

If the I.B.E.W. pickets the construction project causing either a work slow down or stoppage of work by the various trades visiting the site, the general contractor can apply to the Ontario Labour Relations Board for a cease and desist order. The I.B.E.W. has signed a collective agreement with the Contractors Association thereby rendering any strike activity on their part illegal during the currency of that agreement. If the I.B.E.W. engages in picketing or other activity which causes an illegal strike by another trade, their picketing activity can be enjoined by the Ontario Labour Relations Board. It usually takes anywhere between 48 and 72 hours to proceed to a hearing before the Ontario Labour Relations Board and obtain a cease and desist order.

91 It seems to me the evidence did not justify the Court of Appeal's reduction of the respondent's loss of profit to \$182,500 for labour relations contingencies. The cross-appeal, to that extent, should be allowed, and the damage award increased to \$365,143.

5. *In the Alternative, Is the Respondent Entitled to Recover on the Basis of Unjust Enrichment?*

92 In light of the conclusion that the respondent is entitled to recover damages for breach of contract, there is no need to examine the alternative ground of unjust enrichment relied upon by the trial judge.

IV. Disposition

93 I would dismiss the appeal with costs to the respondent, and allow the cross-appeal with costs. Judgment will be entered for the respondent in the sum of \$365,143 plus pre-judgment interest and costs.

Appeal dismissed with costs and cross-appeal allowed with costs.

Solicitors for the appellant/respondent on cross-appeal: Lerner & Associates, London, Ontario.

Solicitors for the respondent/appellant on cross-appeal: Thomson, Rogers, Toronto.



SUPREME COURT OF CANADA

CITATION: Double N Earthmovers Ltd. v. Edmonton (City),
[2007] 1 S.C.R. 116, 2007 SCC 3

DATE: 20070125
DOCKET: 30915

BETWEEN:

Double N Earthmovers Ltd.
Appellant
and
City of Edmonton and Sureway Construction of Alberta Ltd.
Respondents

CORAM: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

JOINT REASONS FOR JUDGMENT: Abella and Rothstein JJ. (LeBel, Deschamps and Fish JJ.
(paras. 1 to 75) concurring)

DISSENTING REASONS: Charron J. (McLachlin C.J. and Bastarache and Binnie JJ.
(paras. 76 to 131) concurring)

Double N Earthmovers Ltd. v. Edmonton (City), [2007] 1 S.C.R. 116, 2007 SCC 3

Double N Earthmovers Ltd.

Appellant

v.

City of Edmonton and Sureway Construction of Alberta Ltd.

Respondents

Indexed as: Double N Earthmovers Ltd. v. Edmonton (City)

Neutral citation: 2007 SCC 3.

File No.: 30915.

2006: June 16; 2007: January 25.

Present: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

on appeal from the court of appeal for alberta

Contracts — Tenders — City's tender specifying maximum age of equipment to be used on project — Contract awarded to lower bidder whose equipment was not all 1980 or newer — City informed by rival bidder prior to awarding of contract that lower bidder did not comply with 1980 equipment requirement — Information not investigated by City — Whether City accepted non-compliant bid — Whether City had duty to investigate if equipment met tender specifications — Whether contract awarded on terms other than those set out in tender

documents — Whether City violated its duty to rival bidder by permitting successful bidder to supply pre-1980 equipment — Whether City’s pre-award negotiations with bidders amounted to “bid shopping”.

Edmonton’s call for tenders for the supply of equipment and operators stipulated that all equipment be 1980 or newer. The Conditions of Tender provided that the serial number and the City’s licence registration number were to be provided for every piece of equipment, that “failure to [comply] either in whole or in part may invalidate the bid” and that the “City reserves the right to reject any and all Tenders, and to waive any informality”. In its bid, Sureway Construction of Alberta Ltd. listed a 1980 unit as Item 1 and a “1977 or 1980 Rental Unit” as Item 2. The City awarded the contract (Contract B) to Sureway and insisted on compliance with the 1980 requirement. When Sureway subsequently indicated that it would be supplying a 1979 unit, the City did not pursue the matter further. Although Sureway eventually replaced this unit, some of the work was performed by pre-1980 equipment through the duration of the 30-month contract. Double N Earthmovers Ltd., a rival bidder, claimed that the City breached the duties owed to it under the bidding contract (Contract A) and sued for the profits it would have realized had it been awarded Contract B. Double N had informed the City that Sureway did not own 1980 or newer equipment before Contract B was awarded but the City did not investigate. It was conceded that Contract A arose between the City and Double N. The trial judge dismissed the action and the Court of Appeal upheld that decision.

Held (McLachlin C.J. and Bastarache, Binnie and Charron JJ. dissenting): The appeal should be dismissed.

Per LeBel, Deschamps, Fish, Abella and Rothstein JJ.: The City did not accept a non-compliant bid. Although Unit 1 was manufactured in 1979, Sureway promised on the face of its bid to supply a 1980 unit as Item 1, and this is what the City accepted when it issued its Purchase Order. Sureway was obliged under the terms of its bid to supply a 1980 unit and that obligation was enforceable by the City. With respect to Item 2, the Conditions of Tender made bidders aware that not every failure to comply with the tender requirements would invalidate a bid. The absence of licence and serial numbers for the 1980 rental unit in Sureway's bid was precisely the sort of informality which would not materially affect the price or performance of Contract B. Since the provision of licence and serial numbers was not an essential term of the tender documents in this case, they were capable of being waived by the City. The bidding process represents a commitment to comply with what is bid. The tender documents did not prevent the City from accepting a promise to provide rental equipment or equipment not previously registered with the City. Where an owner accepts only a compliant option offered by a bidder, as the City did in its Purchase Order, there is no breach of any obligation of fairness owed to other bidders. [35] [39] [41-43]

The City did not breach any duties owed to Double N by failing to investigate Sureway's bid. Since each bidder is legally obliged to comply if its bid is accepted, there is no reason why bidders would expect an owner to investigate whether a bidder will comply. There was also neither an express nor an implied obligation in the tender documents to investigate the equipment bid prior to the acceptance. To imply such a duty would overwhelm and ultimately frustrate the tender process by creating unwelcome uncertainties. All bids must receive equal treatment to protect the bidding process and, to that end, an owner must weigh bids on the basis of what is

actually in the bid and not on the basis of subsequently discovered information. Allegations raised by rival bidders do not compel owners to investigate the bids made by others. [49-54]

The City's pre-award negotiations did not amount to "bid shopping". The City was specifically entitled by its conditions of tender to negotiate with the lowest compliant bidder after its initial evaluation and its exercising this right was no breach of its Contract A with Double N. The relevant time in the specific condition was any time after the tenders had been opened and the context was the tendering period, not the period after acceptance. [59-60]

The City did not enter into a contract on terms other than on terms as set out in the bidding documents and accordingly did not violate any duties owed to Double N. At the moment the City communicated its acceptance of Sureway's bid to Sureway, a 1980 unit was what Sureway promised and was obliged to supply. Although Sureway was subsequently found to be deceitful with respect to Item 1, it was its intentions at the time its bid was accepted that were relevant. Further, since the City did not know of the deceit until after it had accepted Sureway's tender, there was no collusion between the City and Sureway to disregard tender terms. [65-67]

The City did not violate its duties owed to Double N under Contract A by permitting Sureway to supply equipment manufactured prior to 1980. The owner's obligation to unsuccessful bidders, and its implied obligation to treat bidders fairly, does not survive the creation of Contract B with the successful bidder. The conduct Double N complained of — the waiver by the City of the 1980 requirement — occurred after the award of Contract B. Where an owner undertakes a fair evaluation

and enters into Contract B on the terms set out in the tender documents, Contract A is fully performed and any obligations on the part of the owner to unsuccessful bidders have been fully discharged. Contract B is a distinct contract; the unsuccessful bidders are not privy to it. [69] [71]

Per McLachlin C.J. and Bastarache, Binnie and Charron JJ. (dissenting): The City breached its obligations to Double N to accept only a compliant bid and to treat all bidders fairly and equally. [126]

The requirement that all units bid be 1980 or newer was a material term of the tender. While there is much merit to the contention that an owner should be entitled to take a submitted bid at face value, the tender documents must be carefully reviewed and considered in their totality. Here, in addition to the year of the unit, the bidder had to provide the serial number and the City registration number for that unit. Given the circumstances of this case, it was not open to the City to ignore these specifications. The City's casual approach to Sureway's bid, particularly in light of the warning it received about the bid's likely non-compliance, was unfair to other bidders who provided accurate information in accordance with the tender specifications. The obligation to accept only a compliant bid would be meaningless if it did not include the duty to take reasonable steps to ensure that the bid is compliant. Checking the equipment particulars — particulars which the City itself called for — against its own records was one such reasonable step the City was obliged to take in evaluating the bids for compliance. Had it done so, it would have readily uncovered Sureway's deceit in respect of Unit 1. [111] [114] [116]

With respect to Unit 2, Sureway's bid was, at best, ambiguous. On its face, it offered to supply a particular 1977 unit or an unidentified 1980 rental unit. The absence of any information about the proposed 1980 rental unit concerned a material condition of the tender and was not a mere informality which the City had the right to waive. The City's right to insist on compliance could not turn what was on its face a non-compliant bid into a compliant one. The integrity of the bidding process is not protected by allowing a bidder to submit a bid that is either ambiguous or deliberately misleading but compliant on its face in some respects to get rid of the competition unfairly, and then hash it out with the owner after it has been awarded the contract. By failing to insist on compliance with an essential term of the tender, the City breached its duty under Contract A to treat all bidders fairly and equally. The City cannot escape this fundamental obligation by postponing the fulfilment of its duty under Contract A to a time after Contract B has been entered into and then argue that Contract A is at an end. A variation from the essential requirements of the tender call at the time of awarding Contract B is unfair to the other bidders who could have benefited from such variation earlier in the process. [120-125]

Cases Cited

By Abella and Rothstein JJ.

Applied: *The Queen in Right of Ontario v. Ron Engineering & Construction (Eastern) Ltd.*, [1981] 1 S.C.R. 111; *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619; *Martel Building Ltd. v. Canada*, [2000] 2 S.C.R. 860, 2000 SCC 60; *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, [1987] 1 S.C.R. 711; **referred to:** *Naylor Group Inc. v. Ellis-Don Construction Ltd.*, [2001]

2 S.C.R. 943, 2001 SCC 58; *Stanco Projects Ltd. v. British Columbia (Ministry of Water, Land and Air Protection)* (2004), 242 D.L.R. (4th) 720, 2004 BCSC 1038, aff'd (2006), 266 D.L.R. (4th) 20, 2006 BCCA 246.

By Charron J. (dissenting)

The Queen in Right of Ontario v. Ron Engineering & Construction (Eastern) Ltd., [1981] 1 S.C.R. 111; *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619; *Martel Building Ltd. v. Canada*, [2000] 2 S.C.R. 860, 2000 SCC 60; *British Columbia v. SCI Engineers & Constructors Inc.* (1993), 22 B.C.A.C. 89; *Silex Restorations Ltd. v. Strata Plan VR 2096* (2004), 35 B.C.L.R. (4th) 387, 2004 BCCA 376; *Graham Industrial Services Ltd. v. Greater Vancouver Water District* (2004), 25 B.C.L.R. (4th) 214, 2004 BCCA 5.

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Goldsmith, Immanuel, and Thomas G. Heintzman. *Goldsmith on Canadian Building Contracts*, 4th ed. Toronto: Thomson Carswell, 2006 (loose-leaf updated 2006, release 1).

APPEAL from a judgment of the Alberta Court of Appeal (McFadyen, Russell and Berger JJ.A.) (2005), 41 Alta. L.R. (4th) 205, 363 A.R. 201, 6 M.P.L.R. (4th) 25, [2005] 10 W.W.R. 1, [2005] A.J. No. 221 (QL), 2005 ABCA 104, affirming a decision of Marceau J. (1998), 57 Alta. L.R. (3d) 288, 213 A.R. 81, [1998] 6 W.W.R. 486, [1998] A.J. No. 51 (QL), 1998 ABQB 31. Appeal dismissed, McLachlin C.J. and Bastarache, Binnie and Charron JJ. dissenting.

Brian A. Crane, Q.C., and I. Samuel Kravinchuk, for the appellant.

Darrell Lopushinsky and David Woo, for the respondent the City of Edmonton.

Shauna Miller, Q.C., and Peter D. Banks, for the respondent Sureway Construction of Alberta Ltd.

The judgment of LeBel, Deschamps, Fish, Abella and Rothstein JJ. was delivered by

ABELLA AND ROTHSTEIN JJ. —

I. Overview

1 This appeal raises a number of issues relating to the “Contract A/Contract B” framework that has governed the tendering process in Canada since the decision of this Court in *The Queen in Right of Ontario v. Ron Engineering & Construction (Eastern) Ltd.*, [1981] 1 S.C.R. 111.

2 A call for tenders involves a party’s (often referred to as the “owner”) requesting the submission of bids to complete a particular project. Where the parties intend to initiate contractual relations, a submission in response to a call for tenders can lead to the formation of Contract A. The call for tenders is the offer by the owner to consider the bids it receives and to enter into the contract to complete the project where a bid is accepted. A bidder accepts that offer by submitting a bid that complies

with the requirements set out in the tender documents. The contractual rights and obligations of the parties to Contract A are governed by the express or implied terms of the tender documents.

3 A bid also constitutes an offer to enter into Contract B. This is the contract to complete the project for which bids were sought. Where a bid is accepted, the terms of the tender and bid documents become the terms and conditions of Contract B.

4 The dispute in this case arises out of circumstances that unfolded 20 years ago following a call for tenders issued by the City of Edmonton. The City sought bids on a 30-month contract to supply equipment and operators to move refuse at a waste disposal site. The tender documents issued by the City required that all equipment be 1980 or newer.

5 The City awarded the contract to Sureway Construction of Alberta Ltd., but permitted Sureway to supply equipment that was manufactured prior to 1980. As a result, Double N Earthmovers Ltd., a rival bidder, sued the City. It argued that the City breached the duties owed to Double N under Contract A in a number of ways and as a result, Double N is entitled to the profits it would have realized had it been awarded the contract.

6 Like the trial and appeal courts below, we find Double N's arguments unpersuasive.

II. Facts

7 In June 1986, the City issued a call for tenders on a 30-month contract to supply equipment and operators to move refuse at a landfill site. Four pieces of equipment were initially sought; however, ultimately the City only made an award of the contract in respect of the first three pieces of equipment.

8 The tender documents included a four-page Tender Form, dated June 9, 1986, and three pages of equipment requirements, which were referred to in the Tender Form as the “attached specifications”.

9 On the face of the Tender Form, a number of requirements were set out, which may be summarized as follows:

- (1) All units had to be 1980 or newer.
- (2) Items 1 and 2 had to be a “Caterpillar D8K/D8L and Dozer or equivalent”.
- (3) Item 3 had to be a “Caterpillar 627B Motor Scraper or equivalent”.
- (4) All equipment had to comply with attached specifications.
- (5) Only local City of Edmonton contractors would be considered.
- (6) A bid bond of \$100,000 was required.

10 The back of the Tender Form set out certain “Conditions of Tender”. The relevant conditions will be referred to later in the analysis.

11 In addition, the attached specifications set out various equipment requirements. The requirement that all equipment be 1980 or newer was repeated. The equipment requirements also required that bids include:

. . . all of the following for EACH and EVERY proposed unit:

- a. Make
- b. Model
- c. Serial Number
- d. Year of Manufacture
- e. City of Edmonton Registration License Number
- f. Cost Per Hour

12 Six bids were submitted. Bids were opened by the City on June 25, 1986. Each proposed an hourly rate for each piece of equipment described in the bid.

13 Sureway's bid for the first three items was as follows:

Item 1	a) Caterpillar [a bulldozer] b) D8K c) 77V11997 d) 1980 e) D0-0060	\$85.84/HR
Item 2	a) Caterpillar [a bulldozer] b) D8K c) 77V7369 d) 1977 or 1980 Rental Unit e) D0-261	\$85.84/HR
Item 3	a) Caterpillar [a motor scraper] b) 627B c) 15S1373 d) 1980 e) MS-030	\$124.12/HR

14 With respect to Item 1, although Sureway indicated its Caterpillar bulldozer had a manufacture year of 1980, the serial number and City of Edmonton licence registration number listed in fact corresponded with a Caterpillar bulldozer manufactured in 1979. With respect to Item 2, the serial number and City of Edmonton licence registration number listed in fact corresponded only to a Caterpillar bulldozer manufactured in 1977.

15 After bids were opened, the City assessed the total price of each bid by multiplying the estimated hours each piece of equipment would be used over the life of the contract by the rates set out in the bids. Using this methodology, the four lowest bids, from the lowest to the highest, were Kerna Construction Ltd., Twin City Equipment Ltd., Sureway, and Double N. Kerna was disqualified shortly after the bids were opened because it was not a City of Edmonton contractor.

16 On or about July 7, 1986, the City entered into separate negotiations with each of Double N, Sureway, and Twin City. As Twin City's bid was not accompanied by a bid bond, however, it too was disqualified shortly thereafter.

17 This left the bids of Sureway and Double N. Sureway's bid was lower.

18 Sureway was told by the City that it "would probably" get the contract if it could supply Item 3, the motor scraper, at the rate bid by Twin City. As a result, Sureway reduced its rate for Item 3.

19 In its meeting with the City, Double N also agreed to lower its bid; however, the evidence of a City official was that even with the revisions it had made, Double N's bid was higher than Sureway's.

20 Double N's principal believed that Sureway did not own any 1980 or newer equipment and told the City of his suspicions on July 7, 1986, and on several prior occasions. The response of City officials was that since Sureway had bid 1980 equipment, the City would be entitled to insist that Sureway supply 1980 equipment.

21 On August 18, 1986, the City Executive Committee approved awarding the contract to Sureway. A Purchase Order was issued to Sureway the same day. Work was to commence on September 1, 1986.

22 Sureway was required to register its equipment with the City prior to the September 1 start date so that the City could set up an account for Sureway. On August 28, Sureway's representatives attempted to register bulldozers manufactured in 1979 and 1977 as Items 1 and 2 of the contract.

23 As a result, City officials called a meeting with Sureway on August 29. The evidence showed that the City officials were angered that Sureway intended to register equipment manufactured prior to 1980. As the trial judge stated, the "reaction of [the City officials] recorded at the August 29th meeting is ample evidence that in the mind of those from the City . . . a contract had been entered into for 1980 units or newer" ((1998), 57 Alta. L.R. (3d) 288, 1998 ABQB 31, at para. 53).

24 At the August 29th meeting, the City insisted on compliance with the 1980 requirement and Sureway agreed that its equipment would be upgraded to 1980 equipment within 30 days. This was documented in memoranda prepared by City officials.

25 In a subsequent letter dated September 5, however, Sureway said that it had “explored all avenues”, and that it would be supplying the 1979 unit specified in its bid documents. The City did not pursue the matter further. As reflected in an internal memorandum dated September 9, City officials decided that “this file to be allowed to lie peacefully”.

26 A 1980 bulldozer was purchased by Sureway by October 1986. Nevertheless, some of the work was performed by pre-1980 equipment through the duration of the 30-month contract.

27 Double N sued the City for breach of contract. The City brought Sureway into the action by way of a third party notice.

28 At trial, Marceau J. dismissed Double N’s claim. He found that Sureway’s bid was compliant, and that Contract B came into being when the City accepted Sureway’s tender on August 18, 1986. He found no duty on the part of the City to investigate Sureway’s tender. Nor did he find that the City was in breach of Double N’s Contract A by deciding, after accepting Sureway’s bid, to let Sureway use equipment older than 1980. In the trial judge’s view, all the Contract A’s came to an end upon the valid formation of Contract B with Sureway, and the City could not be liable to Double N for its post-Contract B dealings with Sureway.

29 Double N appealed to the Court of Appeal of Alberta. Its appeal was dismissed unanimously: (2005), 41 Alta. L.R. (4th) 205, 2005 ABCA 104. Russell J.A., on behalf of the court, agreed with the trial judge that Sureway's bid was compliant on its face, and that an owner is not subject to a duty to investigate suspicions of potential non-compliance. Russell J.A. also rejected Double N's argument that the City's Contract A obligations with an unsuccessful bidder could survive the formation of Contract B with a compliant bidder.

III. Analysis

30 As was reiterated by this Court in *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619, and *Martel Building Ltd. v. Canada*, [2000] 2 S.C.R. 860, 2000 SCC 60, the express terms set out in the tender documents govern Contract A. However, Contract A may also contain certain implied terms if they meet the test for implied terms set out by this Court in *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, [1987] 1 S.C.R. 711: para. 27 of *M.J.B. Enterprises*. Implied terms can be based on the existence of any of: (1) custom; (2) the legal incidents of a particular class or kind of contract; or (3) the presumed intentions of the parties, where the term is necessary to give business efficacy to a contract.

31 In *M.J.B. Enterprises*, Iacobucci J. discussed the application of the third branch of that test to the tendering context:

What is important . . . is a focus on the intentions of the actual parties. A court, when dealing with terms implied in fact, must be careful not to slide into determining the intentions of reasonable parties. This is why the implication of the term must have a certain degree of obviousness to it,

and why, if there is evidence of a contrary intention, on the part of either party, an implied term may not be found on this basis. [Emphasis added; emphasis in original deleted; para. 29.]

Applying those principles, this Court in *M.J.B. Enterprises* recognized an implied term in Contract A that an owner will only accept a compliant bid.

32 In *Martel*, this Court recognized an additional implied obligation on the part of owners to treat all bids “fairly and equally”. This had the necessary “obviousness” to meet the threshold in *Canadian Pacific Hotels*, since contractors would not likely spend the requisite time and money on a bid without expecting that each bid would be treated fairly: *Martel*, at para. 88.

33 Sureway and the City concede that Double N submitted a bid that complied with the tender requirements, and thus Contract A arose between the City and Double N.

34 Before this Court, Double N asserted that the City breached the duties it owed to Double N under Contract A by:

- (1) accepting Sureway’s non-compliant bid;
- (2) failing to investigate Sureway’s bid;
- (3) engaging in impermissible “bid shopping”;

(4) awarding the contract to Sureway on terms other than those set out in the tender documents; and

(5) permitting Sureway to supply equipment manufactured prior to 1980.

A. *Did the City Accept a Non-Compliant Bid?*

35 In the courts below, Double N's argument concerning the compliance of Sureway's bid appears to have related solely to the representation by Sureway that the unit it tendered for Item 1 was manufactured in 1980 when in fact it was manufactured in 1979. On the face of its bid, Sureway promised to supply a 1980 Caterpillar D8K as Item 1. That is what the City accepted when it issued its Purchase Order. Sureway was obliged under the terms of its bid to supply a 1980 unit and that obligation was enforceable by the City. Double N cannot successfully argue that Item 1 of Sureway's bid was non-compliant.

36 In this Court, Double N's argument centred on Item 2 of Sureway's bid. With respect to Item 2, Sureway promised to provide a "1977 or 1980 Rental Unit". Double N interprets Sureway's bid as offering the City two alternatives, something which Double N appears to concede was not prohibited by the tender documents. Double N argues that the 1977 unit was not compliant on its face, but that the alternative 1980 unit was also not compliant because the bid did not contain the specifications for that machine that were required to be supplied for each proposed unit.

37 Sureway's offer of the "1980 Rental Unit" must be read in the full context of the particulars provided under Item 2. In doing so, it is apparent that the make, model and cost per hour listed by Sureway with respect to Item 2 applied to the 1980 rental unit. Thus, the 1980 rental unit was, on its face, promised to be a 1980 Caterpillar D8K, available at a cost of \$85.84 per hour. However, as Sureway's bid indicated that it would rent the unit if its bid was accepted, the serial number and City of Edmonton licence registration number listed with respect to Item 2 could not apply.

38 The tender documents required that serial numbers and City of Edmonton licence registration numbers be provided for each and every piece of equipment bid. Condition 17 of the Conditions of Tender provided:

Bidders are advised that all the instructions to Bidders and Conditions of Tender (as supplemented herein) must be strictly complied with and failure to do so either in whole or in part may invalidate the bid in question. [Emphasis added.]

39 Bidders accordingly were made aware that not every failure to comply with the tender requirements would invalidate a bid. Condition 17 must be read in harmony with Condition 7, which permitted the City to "waive any informality" in a tender:

The City reserves the right to reject any and all Tenders, and to waive any informality therein, to award by item or class. The lowest or any Tender may not necessarily be accepted.

40 In our view, the absence of licence and serial numbers for the rental unit are precisely the sort of informality Condition 7 was designed to address.

41 Generally, an informality would be something that did not materially affect the price or performance of Contract B. The absence of serial numbers and the licence registration numbers cannot be said to affect materially the price or performance of Contract B. In this case, it would have been obvious to bidders that the provision of licence and registration numbers was not an essential term of the tender documents, and were therefore capable of being waived by the City. This is because it would have been impossible for any bidder to supply a City of Edmonton licence registration number for Item 4, as the City had never previously registered that type of equipment in the past. Indeed, the evidence shows that City officials did not view the provision of licence and serial numbers as a material condition of the tender. A City official testified that the request for equipment particulars was included solely to enable him more conveniently to access information about the equipment and to proceed with registration, after a bid was accepted.

42 Double N's argument is that Sureway's bid in respect of the 1980 rental unit "amounts to nothing more than a representation that 'Sureway will comply'". But that is in the nature of the bidding process; it represents a commitment to comply with what is bid. We do not construe the tender documents as preventing the City from accepting a promise to provide rental equipment, or indeed, equipment that had not been previously registered with the City.

43 The City's Purchase Order constituted the City's acceptance. In the Purchase Order, the City specified the acceptance of three pieces of equipment and stated: "All above as per specifications previously submitted" and "All conditions of the tender specifications dated June 09, 1986 will apply." As one of the specifications of the Tender Form dated June 9, 1986 was that all equipment be 1980 or newer, in our

view, the Purchase Order can be construed as the City's acceptance of the 1980 rental unit offered in Item 2 of Sureway's bid. Where an owner accepts only a compliant option offered by a bidder, there is no breach of any obligation of fairness owed to other bidders.

44 Further, according to the express terms of the tender documents, the City had the right to accept parts of a bid. Condition 7, set out above, permitted the City to award by item or class. The Tender Form also contained notations that indicated that the City would not necessarily accept all units bid by a bidder:

Equipment items 1 and 2 and/or 4 must be provided by single contractor.

Preference may be given to contractor able to supply total equipment requested.

The City exercised its power to award by item or class in declining to make an award of Item 4. In our view, choosing the compliant 1980 rental unit offered by Sureway was also within the City's right to award by item or class.

45 For these reasons, we conclude that the City did not breach any duties owed to Double N in accepting Sureway's bid for Items 1, 2 and 3.

B. Did the City Have a Duty to Investigate Sureway's Bid?

46 Double N submits that the City had a duty to investigate whether the equipment Sureway bid in fact met the City's specifications. Double N argues that a check of the serial number provided for Item 1 against the serial numbers of units registered in the City's database would have revealed that the unit bid in respect of

Item 1 was in fact manufactured in 1979, not 1980. According to Double N, “[f]air and equal treatment requires that pertinent records on file with the City should be reviewed when evaluating the bids.” In addition, Double N argues that through its complaints, it had made the City aware of the need to investigate the equipment Sureway bid.

47 In support of the existence of a duty to investigate, Double N pointed to the City’s right to inspect equipment provided in the tender documents. Clause 11 of the Equipment Requirements provided:

Equipment Inspection: Tendered equipment will be subject to inspection . . . for compliance [with] safety standards, landfill usage, and compliance with the Hired Equipment Rental Agreement.

This clause, however, provides a right to inspect, but does not impose a duty to do so. Moreover, the type of inspection contemplated in this clause would not necessarily reveal the date of manufacture of a unit. Thus, this clause is of no assistance to Double N.

48 Double N also made reference to Condition 9 of the Conditions of Tender which provided:

The material delivered under this request for Tender shall remain the property of the successful Bidder until a physical inspection and actual usage of this material and/or service is made and thereafter accepted to the satisfaction of the City and must comply with the terms herein and be fully in accord with the specifications and of the highest quality. In the event the material and/or service supplied to the City is found to be defective or does not conform to specifications, the City reserves the right to cancel the order, or part thereof, upon written notice to the successful Bidder and return the product, or part thereof, to the successful Bidder at the successful Bidder’s expense. [Emphasis added.]

Again, conferring a right to inspect is not equivalent to imposing a duty to investigate. Moreover, Condition 9 is couched in terms of *cancelling* a purchase order. Thus, it implies that equipment bid would only be checked for compliance with the specifications *after* the contract was awarded.

49 As there was no express obligation to investigate the equipment bid prior to acceptance, the question is whether there is an implied term to do so.

50 We do not think there is an implied duty requiring an owner to investigate to see if bidders will really do what they promised in their tender. We agree with Russell J.A.'s observation on behalf of the Court of Appeal, that:

To impose a duty on owners to investigate whether a bidder will comply with the terms of its bid would overwhelm and ultimately frustrate the tender process by creating unwelcome uncertainties. [para. 36]

51 The notion that an owner is expected to investigate bids falls well short of the necessary "obviousness" to form part of the presumed intentions of the "actual parties": *M.J.B. Enterprises*, at para. 29 (emphasis deleted). There is no reason why the parties would expect an owner to investigate whether a bidder will comply, when each bidder is legally obliged to comply in the event its bid is accepted. Whether or not the bidder is, at the time of tender, capable of performing as promised is irrelevant in light of the bidder's legal obligation to do so once its bid is accepted.

52 The duty of "fairness and equality" was recognized in *Martel* in part because it was thought to be "consistent with the goal of protecting and promoting the integrity of the bidding process" (para. 88 (emphasis added)). Double N's focus

instead is with the integrity of the *bidders*. The bidding *process*, by contrast, is fully protected by an obligation that all bids receive equal treatment. The best way to make sure that all bids receive the same treatment is for an owner to weigh bids on the basis of what is actually in the bid, not to weigh them on the basis of subsequently discovered information.

53 Finally, contrary to Double N's suggestions, allegations raised by rival bidders do not compel owners to investigate the bids made by others. This would encourage unwarranted and unfair attacks by rival bidders and invite unequal treatment of bidders by owners. This would frustrate, rather than enhance, the integrity of the bidding process.

54 For these reasons, we conclude that the City did not breach any duties owed to Double N by failing to investigate Sureway's bid.

C. *Did the City Engage in Impermissible "Bid Shopping"?*

55 Double N says that the City's pre-award negotiations with Double N and with Sureway amounted to "bid shopping". In Double N's submission, these negotiations sufficiently flawed the tender process that it must be set aside. It makes the argument for the first time in this Court, leaving us without the assistance of prior judicial findings.

56 In *Naylor Group Inc. v. Ellis-Don Construction Ltd.*, [2001] 2 S.C.R. 943, 2001 SCC 58, at para. 9, the Court quoted a definition of bid shopping that described the practice as follows:

. . . “the practice of soliciting a bid from a contractor, with whom one has no intention of dealing, and then disclosing or using that in an attempt to drive prices down amongst contractors with whom one does intend to deal”

Other courts have described bid shopping somewhat more broadly, as “conduct where a tendering authority uses the bids submitted to it as a negotiating tool, whether expressly or in a more clandestine way, before the construction contract has been awarded”: see *Stanco Projects Ltd. v. British Columbia (Ministry of Water, Land and Air Protection)* (2004), 242 D.L.R. (4th) 720, 2004 BCSC 1038, at para. 100, aff’d (2006), 266 D.L.R. (4th) 20, 2006 BCCA 246.

57 In support of its argument that the tender documents prohibited what occurred, Double N referred to these words of Iacobucci J. in *M.J.B. Enterprises*: “The rationale for the tendering process, as can be seen from these documents, is to replace negotiation with competition” (para. 41). But *M.J.B. Enterprises* makes clear that the tender documents control the contractual obligations of the parties to a tender, and Iacobucci J.’s observations were based on the particular documents in that case.

58 In this case, by contrast, the documents clearly indicated that some measure of negotiation was anticipated. Condition 25 provided:

Changes in Tenders will not be permitted after the Tenders have been opened, unless negotiated with the lowest evaluated Tenderer.

59 “[L]owest evaluated tender” was not defined in the tender documents. However, it cannot, as Double N submitted orally, refer only to a tender that has been

accepted. Had that been the intention, it would have been a simple matter for the condition to expressly say so. On the contrary, the relevant time in Condition 25 is anytime “after the Tenders have been opened” and the context is the tendering period, not the period after acceptance. While negotiated changes may occur after acceptance, the condition certainly does not preclude negotiated changes before when obligations have not yet become binding, which is the more likely time when such negotiations would take place. In the absence of a definition, the meaning of the words “lowest evaluated tender”, read in conjunction with the implied requirement that the City only accept a compliant tender, refers to the tender’s offering compliant units at the lowest evaluated total price anytime after the evaluation.

60 Accordingly, pursuant to Condition 25, the City was specifically entitled to negotiate with Sureway, which was the lowest bidder offering compliant units after the City’s initial evaluation. It was no breach of the City’s Contract A with Double N for it to have exercised a right specifically conferred by Condition 25.

61 If the City can be criticized at all, it was not in its negotiations with Sureway, but rather with Double N. Since Double N was not the lowest evaluated tender, an argument can be made that the City ought not to have negotiated with Double N. However, since Double N has no basis for complaining about a breach that was to its benefit, this breach is of no assistance to Double N.

D. *Did the City Award the Contract to Sureway on Terms Other Than Those Set out in the Tender Documents?*

62 Double N argued that Sureway’s deceit in respect of Item 1 prevented Sureway and the City from forming Contract B on the day the City accepted Sureway’s

bid. It was not until the City decided to later permit Sureway to supply the 1979 unit that the parties came to a *consensus ad idem*. Thus, the contract the City awarded to Sureway was different from that tendered, constituting a breach of the City's Contract A obligations to Double N.

63 While Sureway's bid stated that the unit it offered in respect of Item 1 was a 1980 Caterpillar D8K, it was in fact a 1979 unit. The trial judge found that Sureway had intended to deceive the City into thinking it had a compliant bid and then attempt to get the City to permit Sureway, after its bid was accepted, to supply equipment manufactured prior to 1980.

64 As explained by Estey J. in *Ron Engineering*, the primary obligation of a bidder is to enter into Contract B on the terms tendered if the owner accepts the tender. The essence of this obligation is that the owner will be able to hold the contractor to the terms of the tender and its bid because those terms automatically form the terms of Contract B.

65 At the moment the City communicated its acceptance of Sureway's bid to Sureway, a 1980 Caterpillar D8K was what Sureway promised and was obliged to supply. Although the trial judge found that Sureway had been deceitful, it is Sureway's intentions at the time its bid was accepted that are relevant. As stated by I. Goldsmith and T. G. Heintzman in *Goldsmith on Canadian Building Contracts* (4th ed. (loose-leaf)), at p. 1-15: "Although it is the intention to be contractually bound that is the determining factor, the intention must not be a unilateral one, concealed from the other party. The relevant intention is that which the party in question by his actions

or words displays to the other, not some hidden intention which he may have concealed in the inner reaches of his mind.”

66 Importantly, the trial judge made a finding that the City was unaware of Sureway’s deceit until *after* it had accepted Sureway’s tender. In his words, “no one in the City knew as a matter of fact that [Sureway] had bid the 1979 unit until August 28 or 29, 1986 and that is after the contract had already been let to [Sureway]” (para. 27). There was, as a result, no collusion between the City and Sureway to disregard the tender terms.

67 For these reasons, we conclude that the City did not enter into a contract on terms other than as set out in its bidding documents and thus did not violate any duties owed to Double N.

E. *Did the City Violate Its Duties to Double N by Permitting Sureway to Supply Equipment Manufactured Prior to 1980?*

68 Double N argued in the alternative that if the City entered Contract B with Sureway on August 18, 1986, the City breached its duties owed to Double N under Contract A by permitting Sureway to supply equipment manufactured prior to 1980, thereby waiving a fundamental term of Contract B. What the City was obliged to do in the circumstances, Double N argued, was to require Sureway to perform as promised, and, failing that, to exercise its right under Condition 9 to cancel the contract with Sureway and either re-tender, abandon the contract or award the contract to Double N as the next lowest bidder.

69 This argument depends on whether the owner’s obligations under Contract A to unsuccessful bidders, and in particular its implied obligation to treat bidders fairly, survives the creation of Contract B with the successful bidder. In our view, it does not.

70 In *Ron Engineering*, Contract A gave effect to an express term of the tender documents, which stipulated that revocation of a bid would be subject to forfeiture of a bid deposit. That stipulation emerged from the need for the expectation of certainty among both owners and bidders — owners needed and expected the certainty created by irrevocable bids, backed by deposits. The reciprocal obligations of owners implied in *M.J.B. Enterprises* and *Martel* arose out the expectation of bidders that if they undertook the significant time and expense involved in preparing a bid, their bids would each receive fair and equal consideration by owners during the evaluation of bids and the award of Contract B.

71 The conduct Double N complains of (i.e. the waiver by the City of the 1980 requirement) is conduct which occurred *after* the award of Contract B. Where an owner undertakes a fair evaluation and enters into Contract B on the terms set out in the tender documents, Contract A is fully performed. Thus, any obligations on the part of the owner to unsuccessful bidders have been fully discharged. Contract B is a distinct contract to which the unsuccessful bidders are not privy. In *Ron Engineering*, Estey J. held that the “integrity of the bidding system must be protected where under the law of contracts it is possible so to do” (p. 121 (emphasis added)). The law of contract does not permit Double N to require the cancellation of a contract to which it is not privy in the name of preserving the integrity of a bidding process, which is by definition completed by the time an award of Contract B is made.

72 In the face of a failure to perform Contract B on the part of one of the parties, the other party has the contractual rights and remedies set out in the contract and at common law. Bidders may be held to perform as promised, or the owner may have the right to cancel the contract. It is this range of remedies that acts as a disincentive to submit deceitful bids as, absent collusion, bidders cannot predict how the owner will respond. Where an owner determines that it is in its best interests to waive a term of the contract, that is within its contractual rights unless the contract stipulates otherwise. In this case, Condition 9 conferred a *right* of cancellation upon the City where the successful bidder did not comply with the specifications. It did not *oblige* the City to cancel the contract.

73 Finally, we note that there are good policy reasons for rejecting Double N's position. The observation of Russell J.A., at para. 56, is particularly apt:

[P]arties to contract B might be subject to constant surveillance and scrutiny of other bidders, challenging any deviation from the original terms of contract A, thereby ultimately frustrating the tendering industry generally, and introducing an element of uncertainty to contract B.

IV. Conclusion

74 We conclude that Double N's bid received fair treatment throughout the bidding process. Sureway's bid offered units that were compliant on their face and open to acceptance by the City. The City was not aware of Sureway's deceit until after it had accepted Sureway's bid, nor did it collude with Sureway during the bidding process to perpetrate an unfairness against other bidders. Once the City accepted the offer of compliant units, Sureway's failure to supply as promised became a matter

between the City and Sureway alone. The City was entitled to deal with Sureway's obligations as it saw fit.

75 The appeal is dismissed with costs to the City only.

 The reasons of McLachlin C.J. and Bastarache, Binnie and Charron JJ. were delivered by

 CHARRON J. (dissenting) —

1. Overview

76 The City of Edmonton concedes that it was contractually bound to accept only a compliant bid and to treat all bidders equally and fairly. These implied terms are intended to ensure the integrity of the tendering process. On the facts of this case, however, the dismissal of the action and third party claim by the courts below not only results in Sureway Construction of Alberta Ltd.'s reaping the profits of its deceit, but also enables the City to escape entirely from its implied obligations. Far from preserving the integrity of the tendering process, this result seriously undermines it. I therefore respectfully disagree with the conclusion reached by my colleagues and the courts below and would allow the appeal.

77 I will state, in a nutshell, why I come to this conclusion. I will then review the pertinent facts and findings below in more detail.

78 It is undisputed that a material requirement of the City's tender call was that all equipment bid be 1980 or newer. Double N Earthmovers Ltd.'s bid was compliant on that and all other requirements. Sureway, the successful bidder, was found to have deliberately pretended to submit a compliant bid while all along planning to use 1977 and 1979 equipment. Sureway's deceit matters not, it is argued: the City's right to "insist on compliance" with the express terms of the bid following its acceptance coupled with the accompanying contractual risk to the bidder ensures the integrity of the process.

79 The City does not dispute that it has a duty to accept only a compliant bid. However, even when repeatedly warned by Double N, before acceptance, about Sureway's likely non-compliance with the age requirement — a matter that the trial judge found could have been easily verified by checking the specifications contained on the face of the bid against existing records — the City chose to do nothing, relying instead on its right to "insist on compliance" with this essential term following acceptance. Were it not for the City's "right" to take that attitude, which the trial judge accepted as determinative on this question, he would have found the City negligent in failing to check the accuracy of the specifications and, as such, in breach of its duty to take reasonable care to accept only a compliant bid.

80 Confining the evaluation of the tender to its *face*, it is argued, is necessary to give certainty to the process and promote the consistent and fair treatment of bidders. But this contention is undermined by the fact that the City took no steps to resolve an ambiguity which *was* apparent on the face of Sureway's tender documents. This ambiguity arose where Sureway offered a "1977 or 1980 Rental Unit" for Unit #2. Again, relying on the centrality of the requirement that all equipment be 1980 or

newer, the City takes the position that its unqualified acceptance of Sureway's Unit #2 bid can only be construed as an acceptance of the promise to supply a 1980 Rental Unit. Nor is there any unfairness, it is argued, when an owner accepts only a compliant option offered by a bidder where that option amounts to no more than a promise to comply given, again, the owner's right to "insist on compliance" with the terms of the tender.

81 The City further concedes that it had an obligation to treat all bidders equally and fairly. However, during the course of negotiations with the City following the close of tenders, when Double N sought permission to bid older equipment in order to lower the price of its bid, as it believed Sureway had done, the City refused, insisting on the 1980 age requirement as an *essential* term of the contract.

82 Following acceptance of Sureway's bid, when came the time for the City to exercise this right to "insist on compliance" upon which it had relied in fulfilment of its obligations under Contract A, it chose instead to waive the essential age requirement, claiming that all its obligations under Contract A were now at an end. Because Contract B now governed, it is argued, the parties have the right to amend its terms to suit their need after it is entered into. The City therefore permitted Sureway to perform the contract using its 1977 and 1979 equipment. It is submitted that Double N, not being a party to Contract B, has no right to complain.

83 In these circumstances, it is perhaps not surprising that the trial judge, in refusing to award the City its full costs at the end of the proceedings, reasoned as follows:

I am not granting costs beyond Column 6 because I have concluded that when the City of Edmonton allowed Sureway to bring the 1977 and 1979 machine to work on the landfill site, they convinced Double N they had breached their obligation to treat all bidders fairly.

((1998), 220 A.R. 73, 1998 ABQB 30, at para. 5)

Indeed, Double N had ample grounds on which to base this conviction. In failing to give effect to these grounds for complaint, the trial judge and the Court of Appeal engaged in circular reasoning. On the one hand, the courts below held that a bid can be regarded as compliant at the Contract A stage because the owner can always insist on compliance with the terms of the tender. On the other hand, they held that the owner does not need to insist on compliance with the terms of the tender at the Contract B stage of the process precisely because it accepted a compliant bid at the Contract A stage. With respect, this reasoning completely nullifies the protection afforded by the implied obligation to accept only a compliant bid.

84 I conclude that the City breached its obligation to accept only a compliant bid. Furthermore, I conclude that in the circumstances of this case, when it failed to insist on compliance with the age requirement in awarding Contract B to Sureway, the City breached its duty to treat all bidders equally and fairly. I also conclude that the City's breach of its obligations was effectively caused by Sureway's deceit and its deliberate attempt to induce the City to accept a tender for pre-1980 machinery. I would therefore allow the appeal and grant judgment in the action against the City and in the third party claim against Sureway in the amounts assessed by the trial judge with costs throughout.

85 I will now review the record in more detail to explain on what basis I have reached my conclusions.

2. The Evidence and Findings Below

86 In the summer of 1986, the City of Edmonton called for tenders for equipment and operators to move refuse in its Clover Bar landfill site. The City's tender was composed of a standard Tender Form, an Equipment Requirements form, and a Solid Wastes Branch Tender Specifications form. The closing date for the submission of bids was June 25, 1986.

87 The tender eventually called for two bulldozers, one of which was to be a back-up unit, and a scraper. Six bids were submitted, including bids from the appellant Double N and the respondent Sureway, plus bids by Kerna Construction Ltd. and Twin City Equipment Ltd.

88 The City made it clear from the outset that the equipment bid needed to meet certain requirements. In particular, the City's tender repeatedly indicated that all machines bid needed to be 1980 or newer. This requirement was included in capital letters on the first page of the Tender Form and was repeated again on the first page of the Equipment Requirements form. In addition, clause 12(a) of the Solid Wastes Branch Tender Specifications form informed bidders that preference would be given to "late model equipment in top mechanical condition. (1980 or newer)." In addition to the year of manufacture, the Equipment Requirements form called for a specification of the make, model, serial number, City of Edmonton registration licence number and the cost per hour. It also reserved to the City the right to inspect the equipment.

89 On June 25, 1986, Double N submitted a bid that was compliant in all relevant respects. The formation of Contract A between Double N and the City is not in dispute in this appeal.

90 On June 25, 1986, Sureway submitted its bid. It is this bid that is in issue in this appeal.

91 For Unit #1, Sureway bid a Caterpillar bulldozer, and listed it as having a year of manufacture of 1980, although it was in fact a 1979 machine. Sureway provided the other required specifications, including the serial number and City of Edmonton registration licence number. For Unit #2, Sureway bid a “1977 or 1980 Rental Unit” Caterpillar bulldozer or equivalent. While the cost listed by Sureway for Unit #2 was consistent with a 1980 Caterpillar bulldozer, the registration and serial numbers corresponded instead to the 1977 machine.

92 After the tender period ended, Ray Necula, President of Double N, contacted the City by phone. During the course of his conversation with Dan Danylak, the Supervisor of the City’s Hired Equipment Section, Necula learned which machines Sureway had bid. Based on his knowledge of the equipment owned by Sureway, Necula promptly informed Danylak that Sureway had not bid 1980 or newer equipment. Danylak accepted the information but did nothing about it. Necula concluded that Double N’s bid would be successful, since to his knowledge Double N’s bid was the lowest compliant bid.

93 Necula repeated this information about Sureway’s likely non-compliance in further communications with the City. Among other contacts with City officials,

he spoke to Jim Parlee, the City's Purchasing Officer, and informed him of the state of his knowledge. As the trial judge describes the contact: "Necula's strong suggestion to Parlee was that Parlee should have a look at the bid because Sureway was likely not bidding qualifying machines" ((1998), 57 Alta. L.R. (3d) 288, 1998 ABQB 31, at para. 24). Parlee was not very disturbed by the fact that Unit #1, the 1980 Caterpillar bulldozer, might turn out to be a 1979 because the City would be insisting on compliance with the age requirement that all machines be 1980 or newer. Similarly, Parlee's response with respect to Unit #2 was that the City could insist on the 1980 rental unit rather than the 1977 machine (A.R., at p. 23).

94 The trial judge accepted Necula's version of these contacts with City officials (para. 26). He also found that Necula's information about the age of the equipment was easily verifiable (para. 45) against records already in possession of the City and filed with Danylak's area of supervision (para. 11). However no verification was done, nor did the City exercise its right, contained in clause 11 of the Equipment Requirements form, to inspect the equipment.

95 Parlee summarized and ranked the bids according to their cost to the City. Three bids were eventually considered: Kerna's bid; a combined Sureway/Twin City bid; and Double N's bid. On July 3, 1986, W. Worton, the Manager of Solid Wastes Branch, wrote a memo in which he recommended that the combined Twin City/Sureway bid be accepted. This bid was composed of Sureway's bids for the #1 and #2 Units, and Twin City's bid for the Unit #3 scraper. The price of Twin City's scraper was listed on this combined bid at \$112.50/hr.

96 The trial judge found that between July 3 and July 7, 1986, there were conversations between Twin City, Sureway and the City. He further found that on or about July 6, 1986, Bruce Hagstrom, the principal of Sureway, had a face to face meeting with Bernard Simpson, Operations Director of the City's Solid Wastes Branch. In this meeting it was made apparent to Sureway that if it could provide a scraper at the rate Twin City had originally bid, it would probably be awarded the contract.

97 Necula testified that on July 7, 1986 he met with representatives from the City and asked whether, if Sureway was going to be allowed to bid 1980 or older equipment, he could bid 1980 or older equipment as well. Necula was told that Double N would not be allowed to bid older machines, and that the City would accept only the equipment specified by Double N in its initial bid. It was made clear to Necula that the age of the machines was *not negotiable*.

98 On July 7, 1986, Sureway sent a letter to the City confirming its "original intentions to the submitted proposal". In this letter Sureway confirmed that its original Unit #1 would now be used as the #2 back-up unit, that a new Unit #1 would be obtained, and that the Unit #3 scraper would be as previously quoted. The price of the scraper was listed in this letter at \$124.12/hr, a rate in excess of the City's acceptable rate for such equipment.

99 On July 15, 1986, G. E. Weese, General Manager of the Real Estate & Supply Services Department, wrote a memorandum to C. Armstrong, the City Manager, recommending that Sureway's bid be accepted. Kerna's bid was rejected on

the grounds that Kerna was not a City of Edmonton contractor, and Double N's bid was rejected because it was too high.

100 Weese's summary of Sureway's bid listed a rate of \$112.50/hr for the Unit #3 scraper. This was a change from the revised bid submitted by Sureway in its letter of July 7, 1986. Harold Stoveld, who had oversight of the tender process at the time, became concerned that there was nothing in writing from Sureway confirming the \$112.50/hr rate. He spoke with Hagstrom on August 8, 1986, and received a letter from Sureway dated August 11, 1986, confirming the lower price.

101 A purchase order awarding the contract to Sureway was issued by the City on August 18, 1986.

102 On August 28, 1986, Sureway attempted to register, as its #1 and #2 Units, a 1979 and 1977 machine, respectively. The City was not happy with this development and communicated its dissatisfaction to Sureway. In response Sureway undertook to supply only 1980 or newer units, but on September 5, 1986 wrote to inform the City that it was unable to do so, and would go forward with the 1979 machine.

103 On September 9, 1986, the City decided not to challenge Sureway on this point and let the matter "lie peacefully". The trial judge found that the City effectively waived the age requirement (para. 51). Although Sureway later provided a 1980 bulldozer as a back-up for the 1977 machine, the record shows that it used both the 1977 and 1979 machines during the course of the Clover Bar contract.

3. Analysis

104 This is the cautionary tale of a tendering process gone badly wrong. Although in some business contexts parties might decide to turn a blind eye to contractual inaccuracies and ambiguities, the tendering process is different. It is a process in which fairness and integrity are of paramount importance. Owners spend large amounts of money composing and issuing tenders, and bidders spend large amounts of money formulating and submitting bids.

105 As Estey J. said in *The Queen in Right of Ontario v. Ron Engineering & Construction (Eastern) Ltd.*, [1981] 1 S.C.R. 111, at p. 121, the “integrity of the bidding system must be protected where under the law of contracts it is possible so to do”. In order to protect the integrity of the tendering process, this Court has adopted a particular analysis of that process: *Ron Engineering; M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619; and *Martel Building Ltd. v. Canada*, [2000] 2 S.C.R. 860, 2000 SCC 60. This analysis is often referred to as the Contract A/Contract B analysis. According to this analysis, the tendering process is characterized by two contractual stages. At the first stage, the owner issues a tender, in response to which bidders submit bids. This creates a first contract — “Contract A” — between the owner and every compliant bidder. At the second stage, when the owner accepts a bid, a second contract — “Contract B” — is formed. This is the actual contract to supply the equipment or to perform the work that was the subject-matter of the tender. A bidder’s bid thus constitutes both an acceptance and an offer. It constitutes an acceptance of the owner’s offer to receive and consider tenders, and it simultaneously constitutes an offer to perform the tendered contract.

106 It is settled law that the terms of Contract A are set out in the tender documents and that, in addition, there may also be implied terms based on custom or usage or on the presumed intentions of the parties. An implied duty to accept only a compliant bid was recognized by this Court in *M.J.B. Enterprises*. Speaking for the Court, Iacobucci J. found that this implied term was necessary to give “business efficacy” to the tendering process, explaining as follows:

The rationale for the tendering process . . . is to replace negotiation with competition. This competition entails certain risks for the appellant. . . . It appears obvious to me that exposing oneself to such risks makes little sense if the respondent is allowed, in effect, to circumscribe this process and accept a non-compliant bid. Therefore I find it reasonable, on the basis of the presumed intentions of the parties, to find an implied term that only a compliant bid would be accepted. [para. 41]

107 Likewise, in *Martel*, this Court held that an owner also had a duty to treat all bidders fairly and equally. As Iacobucci and Major JJ. said, “[i]mplying an obligation to treat all bidders fairly and equally is consistent with the goal of protecting and promoting the integrity of the bidding process, and benefits all participants involved” (para. 88). Such implication, they noted, “is necessary to give business efficacy to the tendering process” (para. 88).

108 The parties agree that these two implied terms formed part of Contract A: the City was obliged to accept only a compliant bid — in other words, it was implied that the City would not enter into a Contract B on terms other than those contemplated in the tender call — and the City was also obliged to treat all bidders fairly and equally. The thread running through *Ron Engineering*, *M.J.B. Enterprises* and *Martel* is the importance of business efficacy and the integrity of the tendering process. In my view, it is through the lens of these concepts that this case must be viewed.

109 The test for compliance in the tendering process is “substantial” rather than strict. Estey J.’s remark in *Ron Engineering* that it would be “anomalous indeed if the march forward to a construction contract could be halted by a simple omission” (p. 127) is often cited in support of the substantial compliance test: for example, see *British Columbia v. SCI Engineers & Constructors Inc.* (1993), 22 B.C.A.C. 89. Although Estey J. made this remark in reference to the Contract B stage of the tendering process, there is no reason to doubt that these same considerations apply to the Contract A stage as well. It would make tendering unworkable if an owner and bidder were prevented from entering into Contract B based on an unchecked box.

110 Substantial compliance requires that all material conditions of a tender, determined on an objective standard, be complied with: *Silex Restorations Ltd. v. Strata Plan VR 2096* (2004), 35 B.C.L.R. (4th) 387, 2004 BCCA 376, at paras. 24 and 29; *Graham Industrial Services Ltd. v. Greater Vancouver Water District* (2004), 25 B.C.L.R. (4th) 214, 2004 BCCA 5, at para 15. A bid is substantially compliant if any departures from the tender call concern mere irregularities.

111 In the present case, it is not disputed that the requirement that all units bid be 1980 or newer was a material term of the tender. As noted earlier, this requirement was specified on the Tender Form, repeated again in the Equipment Requirements form, and referred to again in the Solid Wastes Branch Tender Specifications form. This was not an idle request. To the contrary, the City insisted on 1980 or newer equipment because in its experience older units tended to break down more frequently. The trial judge concluded that, in the view of the City, the age of the equipment was *essential* to the tender (para. 85). Consequently, a failure to bid 1980 or newer

equipment would result in a bid that was not substantially compliant with the City's tender request.

112 Unit #1 and Unit #2 were to be 1980 or newer Caterpillar bulldozers (or equivalent). What is at issue in this appeal, then, is Sureway's bid in respect of those two pieces of equipment.

3.1 *Sureway's Deceitful Bid for Unit #1*

113 For Unit #1 Sureway bid a Caterpillar bulldozer, listing it as having a year of manufacture of 1980 when in fact it was a 1979 piece of equipment. In their reasons, Abella and Rothstein JJ. note that, on its face, Sureway promised to supply a 1980 Caterpillar D8K and that is what the City accepted. As a result, Sureway was obliged to comply with this term, and that obligation was enforceable by the City. They conclude on that basis that it cannot be successfully argued that Sureway's bid with respect to Unit #1 is non-compliant. With respect, I disagree.

114 There is much merit to the contention that an owner should be entitled to take a submitted bid at face value. However, the tender documents must be carefully reviewed and considered in their totality. There was more than just the "1980 Caterpillar D8K" specification on the face of the tender. As it was required to do, Sureway provided the serial number and the City registration number for the bulldozer. The trial judge found that these specifications were readily verifiable — recall his finding that a check against records in the possession of the City and "filed with Danylak's area of supervision" (Danylak was the first City official to whom Necula

spoke) “would have revealed that the year of manufacture of [Unit #1] was 1979” (para. 11). The City did not check its records.

115 The City argues, and my colleagues accept (in their reasons in respect of Unit #2), that these additional specifications were mere informalities that it was at liberty to waive. However, the City did not waive these requirements with respect to Unit #1 — to the contrary, they were provided by Sureway. Rather, the City simply chose to ignore this part of the information on the face of the bid, even when urged by Necula to “have a look at the bid”. Necula was not asking the City to rely on extrinsic information not available on the face of the tender documents. In effect, he was simply putting the City’s nose to the face of the bid and asking that City officials read it attentively.

116 In my view, given the circumstances of this case, it was not open to the City to ignore these specifications. The City’s casual approach to Sureway’s bid, particularly in light of the warning it received about the bid’s likely non-compliance, was unfair to other bidders who provided accurate information in accordance with the tender specifications. The obligation to accept only a compliant bid would be meaningless if it did not include the duty to take reasonable steps to ensure that the bid is compliant. In my view, checking the equipment particulars — particulars which the City itself called for — against its own records was one such reasonable step the City was obliged to take in evaluating the bids for compliance. I agree with the trial judge’s conclusion that, if there was such a duty, the City was negligent in failing to check its own records. Had it done so, it would have readily uncovered Sureway’s deceit in respect of Unit #1.

117 The City further takes the position, and my colleagues accept, that the requirement for equipment particulars was included solely to enable it to more conveniently access information about the equipment and proceed with registration *after* a bid was accepted. In my respectful view, the obligation to accept only a compliant bid requires that reasonable steps be taken to evaluate the bid for compliance *before* acceptance.

118 A similar position is taken with respect to the City's right to inspect the equipment under Condition 9 of the Conditions of Tender. As Abella and Rothstein JJ. correctly note, Condition 9 is couched in terms of *cancelling* a purchase order. From this they conclude "that equipment bid would only be checked for compliance with the specifications *after* the contract was awarded" (para. 48). However, while I agree that Condition 9 gave the City a right to cancel the contract after it was awarded if it was discovered that the equipment bid was non-compliant, in my respectful view, this does not mean that the City had no obligation to take reasonable steps to ensure it was accepting only a compliant bid *prior* to acceptance. Indeed, the right to inspect and cancel reserved under Condition 9 is complementary to this obligation. The obligation to accept only a compliant bid requires that the City enter into a Contract B on terms contemplated in the tender call. The right to inspect and cancel for non-compliance, reserved to the City under Condition 9, further enabled the City to fulfill this obligation. In this case, had the City inspected the equipment, Sureway's deceit would have been discovered and, in order to fulfill its obligation to all Contract bidders, the City's only option would have been to cancel the purchase order. The City chose to do neither.

119 Russell J.A. on behalf of the Court of Appeal expressed concern about imposing any “duty . . . to investigate” on the owner, stating:

To impose a duty on owners to investigate whether a bidder will comply with the terms of its bid would overwhelm and ultimately frustrate the tender process by creating unwelcome uncertainties.

((2005), 41 Alta. L.R. (4th) 205, 2005 ABCA 104, at para. 36)

Abella and Rothstein JJ. agree with this observation, and I acknowledge that an owner does not have to launch an investigation to satisfy itself that a bidder *will in fact* do what it undertakes to do. Nor do I claim that an owner has a duty, in its evaluation of the bids, to search for additional information or to take action beyond that which it is empowered to take pursuant to the tender documents themselves. But this does not mean that the owner does not have an obligation to take reasonable steps to evaluate the terms of the bid to ensure that they conform with the tender call. Given the central importance of the nature of the equipment bid in this case, it is not surprising that the City specifically required that bidders provide details about the equipment bid that included not only the year of manufacture but also the serial number and city registration licence number. Since serial numbers and registration numbers can hardly be meaningful in and of themselves, an objective observer could only conclude that these specifications were intended to permit verification. It is also not surprising that the City reserved itself a right of inspection. These terms and conditions enabled the City to assure itself that the bid was compliant. By failing to take these reasonable steps to evaluate Sureway’s bid for Unit #1, the City breached its obligation to Double N under Contract A.

3.2 *Sureway’s Ambiguous Bid for Unit #2*

120 In its bid for Unit #2, Sureway specified a “1977 or 1980 Rental Unit”. As stated earlier, the cost per hour accorded with a 1980 machine but the registration and serial numbers corresponded to the 1977 machine. Therefore, on its face, Sureway’s bid offered to supply a particular 1977 Caterpillar D8K *or* an unidentified 1980 Caterpillar D8K rental unit. It can hardly be said that this bid was compliant with the City’s request. The City asked only for apples, and Sureway responded by saying that it would provide the City with oranges *or* with apples. At best, the bid was ambiguous. Since the ambiguity related to an essential term of the contract, this ambiguity cannot be said to be a mere irregularity.

121 Double N also argues that the addition of the words “or 1980 Rental Unit” amounted to a mere promise to comply and did not constitute a bid: see *Graham Industrial Services*, at para. 35. Abella and Rothstein JJ. reject this argument on the grounds that this is simply “in the nature of the bidding process; it represents a commitment to comply with what is bid” (para. 42). With respect, I disagree. Even if it were open to bidders to offer equipment not currently in their possession, there is a distinction between a bid that provides details of arrangements made to lease or acquire compliant equipment and a bid that provides nothing more than a bald assertion that it will comply. The absence of any information about the proposed 1980 rental unit concerned a material condition of the tender, and was not a mere informality which the City had the right to waive.

122 The City argues, and my colleagues agree, that the City’s Purchase Order constituted “the City’s acceptance of the 1980 rental unit offered in Item 2 of Sureway’s bid” (para. 43). This is because the Purchase Order explicitly stipulated

that “[a]ll conditions of the tender specifications dated June 09, 1986 will apply.” The City relies on its right to insist on compliance in support of its contention that it fulfilled its duty to accept only a compliant bid in respect of the rental unit. It is argued that the integrity of the tendering process is protected by putting the risk of having to comply with any misrepresentation on the deceptive bidder. I am unable to accept this position.

123 The right to insist on compliance cannot turn what is on its face a non-compliant bid into a compliant one. Furthermore, I fail to see how the integrity of the bidding process is protected by allowing a bidder to get rid of the competition unfairly and then hash it out with the owner after it has been awarded the contract. Approaching the tendering process in this manner encourages precisely the sort of duplicity seen in the present appeal. A bidder can submit a bid that is either ambiguous or deliberately misleading but compliant on its face in some respects, secure in the knowledge that if it is awarded Contract B, it will be in a strong position to renegotiate essential terms of the contract. And an owner can reason that it may be best not to resolve any ambiguity before awarding Contract B, since at that time all Contract A obligations towards other bidders will terminate and it can then enter into renegotiations with the successful bidder without fear of liability. This approach is not consistent with a fair and open process.

124 Moreover, when push came to shove, the City *did not* insist on compliance. Instead, the City acquiesced to Sureway’s demands and decided to let the matter “lie peacefully”. If what turned Sureway’s *prima facie* non-compliant bid into a compliant one was the City’s right to insist on compliance, then the City was duty-bound to do precisely that. In my respectful view, when it failed to insist on compliance with this

essential term of the tender, the City breached its duty under Contract A to treat all bidders fairly and equally. The City cannot escape this fundamental obligation by postponing the fulfilment of its duty under Contract A to a time after Contract B has been entered into and then argue that Contract A is at an end.

125 To hold the owner to the material terms of its tender call in awarding Contract B is a corollary to the duty to accept only a compliant bid and is necessary to ensure fairness throughout the process. A variation from the essential requirements of the tender call at the time of awarding Contract B is unfair to the other bidders who could have benefited from such variation earlier on in the process. This obligation does not mean that the parties have no freedom to negotiate on informal or non-material requirements at the time they enter into Contract B. Since variations of non-material terms could not have the effect of turning a non-compliant bid into a compliant one, other bidders would have no cause for complaint if such variations were made. Likewise, the parties are at liberty to amend the terms of Contract B after it has been entered into to address circumstances that may arise during the course of its performance. Since any of the bidders could be faced with changing circumstances that require an amendment to the contract, there could be no allegation of unfairness. However, where, as here, the City failed to take reasonable steps to evaluate the terms of the bid to ensure compliance, its waiver of the essential age requirement effectively turned a non-compliant bid into a compliant one and cannot be condoned.

126 For these reasons, I am of the view that the City breached its obligations to Double N to accept only a compliant bid and to treat all bidders fairly and equally. In light of this conclusion, I do not find it necessary to deal with Double N's contention that the City improperly engaged in bid shopping.

4. Damages

127 I adopt the trial judge's reasons with respect to damages. I accept that had Sureway's bid been disqualified as being non-compliant, Double N, as the lowest evaluated bidder, would have been awarded Contract B. For the purposes of ascertaining damages, I accept the trial judge's finding that Double N should be entitled to damages for loss of the profits of the contract based on an initial rate of \$88 an hour for Units #1 and #2 and \$112.50 an hour for Unit #3. I see no reason to disagree with his evaluation of the contingency that the City would have rejected all tenders and gone to new tenders at 25 percent.

128 In accordance with the determination of the trial judge, I would therefore award Double N damages equal to 75 percent of the lost profits of the contract, with costs throughout.

5. Third Party Liability

129 As the trial judge rightly concluded, the only way for the City to be liable to Double N "is if the year of manufacturing of the machine was so essential an element that to award the contract to Sureway for a 1979 [and/or 1977] machine would be a breach of a fundamental duty of fairness in the bidding process by the City" (para. 85). As he also remarked, if the City were found to have acted negligently in accepting Sureway's tender for a 1979 or 1977 machine, he would have concluded that "the cause of the breach of the City's duty to act fairly vis-à-vis Double N was the result of the deliberate attempt by Sureway to induce the City to accept a tender which

arguably was for a 1979 [and/or 1977] machine” (para. 86). He would then have found Sureway liable to reimburse the City for two-thirds of the damages together with costs.

130 On the question of third party liability, I agree with the framework proposed by the trial judge. Because I am of the view that the City did breach its obligations under its Contract A with Double N and that Sureway’s actions were instrumental in bringing about this result, I would find Sureway liable to reimburse the City for two-thirds of the damages together with costs.

6. Conclusion

131 I would therefore allow the appeal, set aside the judgments below and give judgment in the main action and the third party claim in accordance with these reasons.

Appeal dismissed, MCLACHLIN C.J. and BASTARACHE, BINNIE and CHARRON JJ. dissenting.

Solicitor for the appellant: I. Samuel Kravinchuk, Edmonton.

Solicitor for the respondent the City of Edmonton: City of Edmonton, Alberta.

Solicitors for the respondent Sureway Construction of Alberta Ltd.: Fraser Milner Casgrain, Edmonton.



SUPREME COURT OF CANADA

CITATION: Tercon Contractors Ltd. v. British Columbia
(Transportation and Highways), 2010 SCC 4

DATE: 20100212
DOCKET: 32460

BETWEEN:

Tercon Contractors Ltd.
Appellant
and
**Her Majesty The Queen in Right of the Province of British
Columbia, by her Ministry of Transportation and Highways**
Respondent
- and -
Attorney General of Ontario
Intervener

CORAM: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and
Cromwell JJ.

REASONS FOR JUDGMENT: Cromwell J. (LeBel, Deschamps, Fish and Charron JJ.
(paras. 1 to 80) concurring)

DISSENTING REASONS: Binnie J. (McLachlin C.J. and Abella and Rothstein JJ.
(paras. 81 to 142) concurring)

NOTE: This document is subject to editorial revision before its reproduction in final form in the
Canada Supreme Court Reports.

TERCON CONTRACTORS LTD. v. B.C.

Tercon Contractors Ltd.

Appellant

v.

**Her Majesty The Queen in Right of the Province of British
Columbia, by her Ministry of Transportation and Highways**

Respondent

and

Attorney General of Ontario

Intervener

Indexed as: Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)

Neutral citation: 2010 SCC 4.

File No.: 32460.

2009: March 23; 2010: February 12.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and
Cromwell JJ.

Contracts — Tendering contract — Breach of terms — Ineligible bidder — Exclusion of liability clause — Doctrine of fundamental breach — Province issuing tender call for construction of highway — Request for proposals restricting qualified bidders to six proponents — Province accepting bid from ineligible bidder — Exclusion clause protecting Province from liability arising from participation in tendering process — Whether Province breached terms of tendering contract in entertaining bid from ineligible bidder — If so, whether Province’s conduct fell within terms of exclusion clause — If so, whether court should nevertheless refuse to enforce the exclusion clause because of unconscionability or some other contravention of public policy.

The Province of British Columbia issued a request for expression of interest (“RFEI”) for the design and construction of a highway. Six teams responded with submissions including Tercon and Brentwood. A few months later, the Province informed the six proponents that it now intended to design the highway itself and issued a request for proposals (“RFP”) for its construction. The RFP set out a specifically defined project and contemplated that proposals would be evaluated according to specific criteria. Under its terms, only the six original proponents were eligible to submit a proposal; those received from any other party would not be considered. The RFP also included an exclusion of liability clause which provided: “Except as expressly and specifically permitted in these Instructions to Proponents, no Proponent shall have any claim for any compensation of any kind whatsoever, as a result of participating in this RFP, and by submitting a proposal each proponent shall be deemed to have agreed that it has no claim.” As it lacked expertise in drilling and blasting, Brentwood entered into a pre-bidding agreement with another construction

company (“EAC”), which was not a qualified bidder, to undertake the work as a joint venture. This arrangement allowed Brentwood to prepare a more competitive proposal. Ultimately, Brentwood submitted a bid in its own name with EAC listed as a “major member” of the team. Brentwood and Tercon were the two short-listed proponents and the Province selected Brentwood for the project. Tercon successfully brought an action in damages against the Province. The trial judge found that the Brentwood bid was, in fact, submitted by a joint venture of Brentwood and EAC and that the Province, which was aware of the situation, breached the express provisions of the tendering contract with Tercon by considering a bid from an ineligible bidder and by awarding it the work. She also held that, as a matter of construction, the exclusion clause did not bar recovery for the breaches she had found. The clause was ambiguous and she resolved this ambiguity in Tercon’s favour. She held that the Province’s breach was fundamental and that it was not fair or reasonable to enforce the exclusion clause in light of the Province’s breach. The Court of Appeal set aside the decision, holding that the exclusion clause was clear and unambiguous and barred compensation for all defaults.

Held (McLachlin C.J. and Binnie, Abella and Rothstein JJ. dissenting): The appeal should be allowed. The Court agreed on the appropriate framework of analysis but divided on the applicability of the exclusion clause to the facts.

Per McLachlin C.J. and **Binnie**, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.: With respect to the appropriate framework of analysis the doctrine of fundamental breach should be “laid to rest”. The following analysis should be applied when a plaintiff seeks to escape the effect of an exclusion clause or other contractual terms to which it had

previously agreed. The first issue is whether, as a matter of interpretation, the exclusion clause even applies to the circumstances established in evidence. This will depend on the court's interpretation of the intention of the parties as expressed in the contract. If the exclusion clause applies, the second issue is whether the exclusion clause was unconscionable and thus invalid at the time the contract was made. If the exclusion clause is held to be valid at the time of contract formation and applicable to the facts of the case, a third enquiry may be raised as to whether the court should nevertheless refuse to enforce the exclusion clause because of an overriding public policy. The burden of persuasion lies on the party seeking to avoid enforcement of the clause to demonstrate an abuse of the freedom of contract that outweighs the very strong public interest in their enforcement. Conduct approaching serious criminality or egregious fraud are but examples of well-accepted considerations of public policy that are substantially incontestable and may override the public policy of freedom to contract and disable the defendant from relying upon the exclusion clause. Despite agreement on the appropriate framework of analysis the court divided on the applicability of the exclusion clause to the facts of this case as set out below.

Per LeBel, Deschamps, Fish, Charron and **Cromwell JJ.**: The Province breached the express provisions of the tendering contract with Tercon by accepting a bid from a party who should not even have been permitted to participate in the tender process and by ultimately awarding the work to that ineligible bidder. This egregious conduct by the Province also breached the implied duty of fairness to bidders. The exclusion clause, which barred claims for compensation "as a result of participating" in the tendering process, did not, when properly interpreted, exclude Tercon's claim for damages. By considering a bid from an ineligible bidder, the Province not only acted in a way that breached the express and implied terms of the contract, it did so in a manner that was an affront

to the integrity and business efficacy of the tendering process.

Submitting a compliant bid in response to a tender call may give rise to "Contract A" between the bidder and the owner. Whether a Contract A arises and what its terms are depends on the express and implied terms and conditions of the tender call and the legal consequences of the parties' actual dealings in each case. Here, there is no basis to interfere with the trial judge's findings that there was an intent to create contractual obligations upon submission of a compliant bid and that only the six original proponents that qualified through the RFEI process were eligible to submit a response to the RFP. The tender documents and the required ministerial approval of the process stated expressly that the Province was contractually bound to accept bids only from eligible bidders. Contract A therefore could not arise by the submission of a bid from any other party. The trial judge found that the joint venture of Brentwood and EAC was not eligible to bid as they had not simply changed the composition of their team but, in effect, had created a new bidder. The Province fully understood this and would not consider a bid from or award the work to that joint venture. The trial judge did not err in finding that in fact, if not in form, Brentwood's bid was on behalf of a joint venture between itself and EAC. The joint venture provided Brentwood with a competitive advantage in the bidding process and was a material consideration in favour of the Brentwood bid during the Province's evaluation process. Moreover, the Province took active steps to obfuscate the reality of the true nature of the Brentwood bid. The bid by the joint venture constituted "material non-compliance" with the tendering contract and breached both the express eligibility provisions of the tender documents, and the implied duty to act fairly towards all bidders.

When the exclusion clause is interpreted in harmony with the rest of the RFP and in light

of the commercial context of the tendering process, it did not exclude a damages claim resulting from the Province unfairly permitting an ineligible bidder to participate in the tendering process. The closed list of bidders was the foundation of this RFP and the parties should, at the very least, be confident that their initial bids will not be skewed by some underlying advantage in the drafting of the call for tenders conferred only upon one potential bidder. The requirement that only compliant bids be considered and the implied obligation to treat bidders fairly are factors that contribute to the integrity and business efficacy of the tendering process. The parties did not intend, through the words found in this exclusion clause, to waive compensation for conduct, like that of the Province in this case, that strikes at the heart of the tendering process. Clear language would be necessary to exclude liability for breach of the implied obligation, particularly in the case of public procurement where transparency is essential. Furthermore, the restriction on eligibility of bidders was a key element of the alternative process approved by the Minister. When the statutory provisions which governed the tendering process in this case are considered, it seems unlikely that the parties intended through this exclusion clause to effectively gut a key aspect of the approved process. The text of the exclusion clause in the RFP addresses claims that result from “participating in this RFP”. Central to “participating in this RFP” was participating in a contest among those eligible to participate. A process involving other bidders — the process followed by the Province — is not the process called for by “this RFP” and being part of that other process is not in any meaningful sense “participating in this RFP”.

Per McLachlin C.J. and Binnie, Abella and Rothstein JJ. (dissenting): The Ministry’s conduct, while in breach of its contractual obligations, fell within the terms of the exclusion compensation clause. The clause is clear and unambiguous and no legal ground or rule of law

permits a court to override the freedom of the parties to contract with respect to this particular term, or to relieve Tercon against its operation in this case. A court has no discretion to refuse to enforce a valid and applicable contractual term unless the plaintiff can point to some paramount consideration of public policy sufficient to override the public interest in freedom of contract and defeat what would otherwise be the contractual rights of the parties. The public interest in the transparency and integrity of the government tendering process, while important, did not render unenforceable the terms of the contract Tercon agreed to.

Brentwood was a legitimate competitor in the RFP process and all bidders knew that the road contract would not be performed by the proponent alone and required a large “team” of different trades and personnel to perform. The issue was whether EAC would be on the job as a major sub-contractor or identified with Brentwood as a joint venture “proponent” with EAC. Tercon has legitimate reason to complain about the Ministry’s conduct, but its misconduct did not rise to the level where public policy would justify the court in depriving the Ministry of the protection of the exclusion of compensation clause freely agreed to by Tercon in the contract.

Contract A is based not on some abstract externally imposed rule of law but on the presumed (and occasionally implied) intent of the parties. At issue is the intention of the *actual* parties not what the court may project in hindsight would have been the intention of *reasonable* parties. Only in rare circumstances will a court relieve a party from the bargain it has made.

The exclusion clause did not run afoul of the statutory requirements. While the *Ministry of Highway and Transportation Act* favours “the integrity of the tendering process”, it nowhere

prohibits the parties from negotiating a “no claims” clause as part of their commercial agreement and cannot plausibly be interpreted to have that effect. Tercon — a sophisticated and experienced contractor — chose to bid on the project, including the risk posed by an exclusion of compensation clause, on the terms proposed by the Ministry. That was its prerogative and nothing in the “policy of the Act” barred the parties’ agreement on that point.

The trial judge found that Contract A was breached when the RFP process was not conducted by the Ministry with the degree of fairness and transparency that the terms of Contract A entitled Tercon to expect. The Ministry was at fault in its performance of the RFP, but the process did not thereby cease to be the RFP process in which Tercon had elected to participate.

The interpretation of the majority on this point is disagreed with. “Participating in this RFP” began with “submitting a proposal” for consideration. The RFP process consisted of more than the final selection of the winning bid and Tercon participated in it. Tercon’s bid was considered. To deny that such participation occurred on the ground that in the end the Ministry chose a Brentwood joint venture (an ineligible bidder) instead of Brentwood itself (an eligible bidder) would be to give the clause a strained and artificial interpretation in order, indirectly and obliquely, to avoid the impact of what may seem to the majority *ex post facto* to have been an unfair and unreasonable clause.

Moreover, the exclusion clause was not unconscionable. While the Ministry and Tercon do not exercise the same level of power and authority, Tercon is a major contractor and is well able to look after itself in a commercial context so there is no relevant imbalance of bargaining power.

Further, the clause is not as draconian as Tercon portrays it. Other remedies for breach of Contract A were available. The parties expected, even if they did not like it, that the “no claims” clause would operate even where the eligibility criteria in respect of the bid (including the bidder) were not complied with.

Finally, the Ministry’s misconduct did not rise to the level where public policy would justify the court in depriving the Ministry of the protection of the exclusion of compensation clause freely agreed to by Tercon in the contract.

Cases Cited

By Cromwell J.

Applied: *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619; *Martel Building Ltd. v. Canada*, 2000 SCC 60, [2000] 2 S.C.R. 860; **considered:** *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426; *Cahill (G. J.) & Co. (1979) Ltd. v. Newfoundland and Labrador (Minister of Municipal and Provincial Affairs)*, 2005 NLTD 129, 250 Nfld. & P.E.I.R. 145; *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423; *Fraser Jewellers (1982) Ltd. v. Dominion Electric Protection Co.* (1997), 34 O.R. (3d) 1; **referred to:** *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, [1987] 1 S.C.R. 711; *Double N Earthmovers Ltd. v. Edmonton (City)*, 2007 SCC 3, [2007] 1 S.C.R. 116; *Hillis Oil and Sales Ltd. v. Wynn’s Canada, Ltd.*, [1986] 1 S.C.R. 57.

By Binnie J. (dissenting)

Hunter Engineering Co. v. Syncrude Canada Ltd., [1989] 1 S.C.R. 426; *The Queen in Right of Ontario v. Ron Engineering & Construction (Eastern) Ltd.*, [1981] 1 S.C.R. 111; *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619; *Naylor Group Inc. v. Ellis-Don Construction Ltd.*, 2001 SCC 58, [2001] 2 S.C.R. 943; *Martel Building Ltd. v. Canada*, 2000 SCC 60, [2000] 2 S.C.R. 860; *Double N Earthmovers Ltd. v. Edmonton (City)*, 2007 SCC 3, [2007] 1 S.C.R. 116; *Tercon Contractors Ltd. v. British Columbia* (1993), 9 C.L.R. (2d) 197, aff'd [1994] B.C.J. No. 2658 (QL); *Karsales (Harrow) Ltd. v. Wallis*, [1956] 1 W.L.R. 936; *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423; *ABB Inc. v. Domtar Inc.*, 2007 SCC 50, [2007] 3 S.C.R. 461; *Re Millar Estate*, [1938] S.C.R. 1; *Plas-Tex Canada Ltd. v. Dow Chemical of Canada Ltd.*, 2004 ABCA 309, 245 D.L.R. (4th) 650.

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APPEAL from a judgment of the British Columbia Court of Appeal (Donald, Mackenzie and Lowry JJ.A.), 2007 BCCA 592, 73 B.C.L.R. (4th) 201, 40 B.L.R. (4th) 26, 289 D.L.R. (4th) 647, [2008] 2 W.W.R. 410, 249 B.C.A.C. 103, 414 W.A.C. 103, 66 C.L.R. (3d) 1, [2007] B.C.J. No. 2558 (QL), 2007 CarswellBC 2880, setting aside a decision of Dillon J., 2006 BCSC 499, 53 B.C.L.R. (4th) 138, [2006] 6 W.W.R. 275, 18 B.L.R. (4th) 88, 51 C.L.R. (3d) 227, [2006] B.C.J. No. 657 (QL), 2006 CarswellBC 730. Appeal allowed, McLachlin C.J. and Binnie, Abella and Rothstein JJ. dissenting.

Chris R. Armstrong, Brian G. McLean, William S. McLean and Marie-France Major,
for the appellant.

J. Edward Gouge, Q.C., Jonathan Eades and Kate Hamm, for the respondent.

Malliha Wilson and Lucy McSweeney, for the intervener the Attorney General of
Ontario.

The judgment of LeBel, Deschamps, Fish, Charron and Cromwell JJ. was delivered by

CROMWELL J. —

I. Introduction

[1] The Province accepted a bid from a bidder who was not eligible to participate in the tender and then took steps to ensure that this fact was not disclosed. The main question on appeal, as I see it, is whether the Province succeeded in excluding its liability for damages flowing from this conduct through an exclusion clause it inserted into the contract. I share the view of the trial judge that it did not.

[2] The appeal arises out of a tendering contract between the appellant, Tercon Contractors Ltd., who was the bidder, and the respondent, Her Majesty the Queen in Right of the Province of British Columbia, who issued the tender call. The case turns on the interpretation of provisions in the contract relating to eligibility to bid and exclusion of compensation resulting from participation in the tendering process.

[3] The trial judge found that the respondent (which I will refer to as the Province) breached the express provisions of the tendering contract with Tercon by accepting a bid from another party who was not eligible to bid and by ultimately awarding the work to that ineligible bidder. In short, a bid was accepted and the work awarded to a party who should not even have been permitted to participate in the tender process. The judge also found that this and related conduct by the Province breached the implied duty of fairness to bidders, holding that the Province had acted “egregiously” (2006 BCSC 499, 53 B.C.L.R (4th) 138, at para. 150). The judge then turned to the Province’s defence based on an exclusion clause that barred claims for compensation “as a result of participating ” in the tendering process. She held that this clause, properly interpreted, did not exclude Tercon’s claim for damages. In effect, she held that it was not within the contemplation of

the parties that this clause would bar a remedy in damages arising from the Province's unfair dealings with a party who was not entitled to participate in the tender in the first place.

[4] The Province appealed and the Court of Appeal reversed (2007 BCCA 592, 73 B.C.L.R. (4th) 201). Dealing only with the exclusion clause issue, it held that the clause was clear and unambiguous and barred compensation for all defaults.

[5] On Tercon's appeal to this Court, the questions for us are whether the successful bidder was eligible to participate in the request for proposals ("RFP") and, if not, whether Tercon's claim for damages is barred by the exclusion clause.

[6] In my respectful view, the trial judge reached the right result on both issues. The Province's attempts to persuade us that it did not breach the tendering contract are, in my view, wholly unsuccessful. The foundation of the tendering contract was that only six, pre-selected bidders would be permitted to participate in the bidding. As the trial judge held, the Province not only acted in a way that breached the express and implied terms of the contract by considering a bid from an ineligible bidder, it did so in a manner that was an affront to the integrity and business efficacy of the tendering process. One must not lose sight of the fact that the trial judge found that the Province acted egregiously by "ensuring that [the true bidder] was not disclosed" (para. 150) and that its breach "attacked the underlying premise of the [tendering] process" (para. 146), a process which was set out in detail in the contract and, in addition, had been given ministerial approval as required by statute.

[7] As for its reliance on the exclusion clause, the Province submits that the parties were free to agree to limitations of liability and did so. Consideration of this submission requires an interpretation of the words of the clause to which the parties agreed in the context of the contract as a whole. My view is that, properly interpreted, the exclusion clause does not protect the Province from Tercon's damage claim which arises from the Province's dealings with a party not even eligible to bid, let alone from its breach of the implied duty of fairness to bidders. In other words, the Province's liability did not arise from Tercon's participation in the process that the Province established, but from the Province's unfair dealings with a party who was not entitled to participate in that process.

[8] I would allow the appeal and restore the judgment of the trial judge.

II. Brief Overview of the Facts

[9] I will have to set out more factual detail as part of my analysis. For now, a very brief summary will suffice. In 2000, the Ministry of Transportation and Highways (the "Province") issued a request for expressions of interest ("RFEI") for designing and building a highway in northwestern British Columbia. Six teams made submissions, including Tercon and Brentwood Enterprises Ltd. Later that year, the Province informed the six proponents that it now intended to design the highway itself and would issue a RFP for its construction.

[10] The RFP was formally issued on January 15, 2001. Under its terms, only the six original proponents were eligible to submit a proposal. The RFP also included a clause excluding all claims

for damages “as a result of participating in this RFP” (s. 2:10).

[11] Unable to submit a competitive bid on its own, Brentwood teamed up with Emil Anderson Construction Co. (“EAC”), which was not a qualified bidder, and together they submitted a bid in Brentwood’s name. Brentwood and Tercon were the two short-listed proponents and the Ministry ultimately selected Brentwood as the preferred proponent.

[12] Tercon brought an action seeking damages, alleging that the Ministry had considered and accepted an ineligible bid and that but for that breach, it would have been awarded the contract. The trial judge agreed and awarded roughly \$3.5 million in damages and prejudgment interest. As noted, the Court of Appeal reversed and Tercon appeals by leave of the Court.

III. Issues

[13] The issues for decision are whether the trial judge erred in finding that:

1. the Province breached the tendering contract by entertaining a bid from an ineligible bidder.

2. the exclusion clause does not bar the appellant’s claim for damages for the breaches of the tendering contract found by the trial judge.

IV. Analysis

A. *Was the Brentwood Bid Ineligible?*

[14] The first issue is whether the Brentwood bid was from an eligible bidder. The judge found that the bid was in substance, although not in form, from a joint venture of Brentwood and EAC and that it was, therefore, an ineligible bid. The Province attacks this finding on three grounds:

(i) a joint venture is not a legal person and therefore the Province could not and did not contract with a joint venture;

(ii) it did not award the contract to EAC and EAC had no contractual responsibility to the Province for failure to perform the contract;

(iii) there was no term of the RFP that restricted the right of proponents to enter into joint venture agreements with others; this arrangement merely left Brentwood, the original proponent, in place and allowed it to enhance its ability to perform the work.

[15] While these were the Province's main points, its position became more wide-ranging during oral argument, at times suggesting that it had no contractual obligation to deal only with eligible bidders. It is therefore necessary to take a step back and look at that threshold point before turning to the Province's more focussed submissions.

1. The Province's Contractual Obligations in the Bidding Process

[16] The judge found, and it was uncontested at trial, that only the six original proponents that qualified through the RFEI process were eligible to submit a response to the RFP. This finding is not challenged on appeal, although there was a passing suggestion during oral argument that there was no contractual obligation of this sort at all. The trial judge also held, noting that this point was uncontested, that a joint venture between Brentwood and EAC was ineligible to bid. This is also not contested on appeal. These two findings are critical to the case and provide important background for an issue that is in dispute, namely whether the Brentwood bid was ineligible. It is, therefore, worth reviewing the relevant background in detail. I first briefly set out the legal framework and then turn to the trial judge's findings.

2. Legal Principles

[17] Submitting a compliant bid in response to a tender call *may* give rise to a contract — called Contract A — between the bidder and the owner, the express terms of which are found in the tender documents. The contract may also have implied terms according to the principles set out in *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, [1987] 1 S.C.R. 711; see also *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619, and *Martel Building Ltd. v. Canada*, 2000 SCC 60, [2000] 2 S.C.R. 860. The key word, however, is “may”. The Contract A - Contract B framework is one that arises, if at all, from the dealings between the parties. It is not an artificial construct imposed by the courts, but a description of the legal consequences of the parties' actual dealings. The Court emphasized in *M.J.B.* that whether Contract A arises and if it does, what its terms are, depend on the express and implied terms and conditions of the tender call in each case.

As Iacobucci J. put it, at para. 19:

What is important ... is that the submission of a tender in response to an invitation to tender may give rise to contractual obligations, quite apart from the obligations associated with the construction contract to be entered into upon the acceptance of a tender, depending upon whether the parties intend to initiate contractual relations by the submission of a bid. If such a contract arises, its terms are governed by the terms and conditions of the tender call [Emphasis added.]

3. The Trial Judge's Findings Concerning the Existence of Contract A

[18] The question of whether Tercon's submission of a compliant bid gave rise to contractual relations between it and the Province was contested by the Province at trial. The trial judge gave extensive reasons for finding against the Province on this issue. We are told that the Province did not pursue this point in the Court of Appeal but instead premised its submissions on the existence of Contract A. The Province took the same approach in its written submissions in this Court. However, during oral argument, there was some passing reference in response to questions that there was no Contract A. In light of the position taken by the Province on its appeal to the Court of Appeal and in its written submissions in this Court, it is now too late to revisit whether there were contractual duties between Tercon and the Province. Even if it were open to the Province to make this argument now, I can see no error in legal principle or any palpable and overriding error of fact in the trial judge's careful reasons on this point.

[19] The trial judge did not mechanically impose the Contract A - Contract B framework, but considered whether Contract A arose in light of her detailed analysis of the dealings between the parties. That was the right approach. She reviewed in detail the provisions of the RFP which

supported her conclusion that there was an intent to create contractual relations upon submission of a compliant bid. She noted, for example, that bids were to be irrevocable for 60 days and that security of \$50,000 had to be paid by all proponents and was to be increased to \$200,000 by the successful proponent. Any revisions to proposals prior to the closing date had to be in writing, properly executed and received before the closing time. The RFP also set out detailed evaluation criteria and specified that they were to be the only criteria to be used to evaluate proposals. A specific form of alliance agreement was attached. There were detailed provisions about pricing that were fixed and non-negotiable. A proponent was required to accept this form of contract substantially, and security was lost if an agreement was not executed. The Ministry reserved a right to cancel the RFP under s. 2.9 but in such event was obliged to reimburse proponents for costs incurred in preparing their bids up to \$15,000 each. Proponents had to submit a signed proposal form, which established that they offered to execute an agreement substantially in the form included in the RFP package. Further, they acknowledged that the security could be forfeited if they were selected as the preferred proponent and failed to enter into good faith discussions with the Ministry to reach an agreement and sign the alliance agreement.

[20] In summary, as the trial judge found, the RFP set out a specifically defined project, invited proposals from a closed and specific list of eligible proponents, and contemplated that proposals would be evaluated according to specific criteria. Negotiation of the alliance construction contract was required, but the negotiation was constrained and did not go to the fundamental details of either the procurement process or the ultimate contract.

[21] There is, therefore, no basis to interfere with the judge's finding that there was an intent

to create contractual obligations upon submission of a compliant bid. I add, however, that the tender call in this case did not give rise to the classic Contract A - Contract B framework in which the bidder submits an irrevocable bid and undertakes to enter into contract B on those terms if it is accepted. The alliance model process which was used here was more complicated than that and involved good faith negotiations for a contract B in the form set out in the tender documents. But in my view, this should not distract us from the main question here. We do not have to spell out all of the terms of Contract A, let alone of Contract B, so as to define all of the duties and obligations of both the bidders and the Province. The question here is much narrower: did contractual obligations arise as a result of Tercon's compliant bid and, if so, was it a term of that contract that the Province would only entertain bids from eligible bidders? The trial judge found offer, acceptance and consideration in the invitation to tender and Tercon's bid. There is no basis, in my respectful view, to challenge that finding even if it were open to the Province to try to do so at this late stage of the litigation.

4. The Trial Judge's Finding Concerning Eligibility

[22] It was not contested at trial that only the six original proponents that qualified through the RFEI process were eligible to bid. This point is not in issue on appeal; the question is what this eligibility requirement means. It will be helpful, therefore, to set out the background about this limited eligibility to bid in this tendering process.

[23] To begin, it is worth repeating that there is no doubt that the Province was contractually bound to accept bids only from eligible bidders. This duty may be implied even

absent express stipulation. For example, in *M.J.B.*, the Court found that an implied obligation to accept only compliant bids was necessary to give business efficacy to the tendering process, noting, at para. 41, that a bidder must expend effort and incur expense in preparing its bid and must submit bid security and that it is “obvious” that it makes “little sense” for the bidder to comply with these requirements if the owner “is allowed, in effect, to circumscribe this process and accept a non-compliant bid”. But again, whether such a duty should be implied in any given case will depend on the dealings between the parties. Here, however, there is no need to rely on implied terms. The obligation to consider only bids from eligible bidders was stated expressly in the tender documents and in the required ministerial approval of the process which they described.

[24] As noted, in early 2000, the Province issued a RFEI based on a design-build model; the contractor would both design and build the highway. The RFEI contemplated that a short list of three qualified contractors, or teams composed of contractors and consultants, would be nominated as proponents. Each was to provide a description of the legal structure of the team and to describe the role of each team member along with the extent of involvement of each team member as a percentage of the total scope of the project and an organization chart showing each team member’s role. Any change in team management or key positions required notice in writing to the Province which reserved the right to disqualify the proponent if the change materially and negatively affected the ability of the team to carry out the project.

[25] Expressions of interest (“EOI”) were received from six teams including Tercon

and Brentwood. The evaluation panel and independent review panel recommended a short list of three proponents with Tercon topping the evaluation. Brentwood was evaluated fifth and was not on the short list. Brentwood was known to lack expertise in drilling and blasting and so its EOI had included an outline of the key team members with that experience. EAC did not participate and had no role in the Brentwood submission. The results of this evaluation were not communicated and the process did not proceed because the Province decided to design the project itself and issue an RFP for an alliance model contract to construct the highway.

[26] It was clear from the outset that only those who had submitted proposals during the RFEI process would be eligible to submit proposals under the RFP. This was specified in the approval of the process by the Minister of Transportation and Highways (“Minister”) before the RFP was issued. It is worth pausing here to briefly look at the Minister’s role.

[27] Pursuant to s. 23 of the *Ministry of Transportation and Highways Act*, R.S.B.C. 1996, c. 311, the legislation in force at the relevant time, the Minister was required to invite public tenders for road construction unless he or she determined that another process would result in competitively established costs for the work. The section provided:

23 (1) The minister must invite tenders by public advertisement, or if that is impracticable, by public notice, for the construction and repair of all government buildings, highways and public works, except for the following:

...

(c) if the minister determines that an alternative contracting process will

result in competitively established costs for the performance of the work.

(2) The minister must cause all tenders received to be opened in public, at a time and place stated in the advertisement or notice.

(3) The prices must be made known at the time the tenders are opened.

(4) In all cases where the minister believes it is not expedient to let the work to the lowest bidder, the minister must report to and obtain the approval of the Lieutenant Governor in Council before passing by the lowest tender, except if delay would be injurious to the public interest.

...

[28] These provisions make clear that the work in this case had to be awarded by public tender, absent the Minister's approval of an alternative process, and had to be awarded to the lowest bidder, absent approval of the Lieutenant Governor in Council. As noted, ministerial approval was given for an alternative process under s. 23(1)(c). The Minister issued a notice that, pursuant to that section, he approved the process set out in an attached document and had determined it to be an alternative contracting process that would result in competitively established costs for the performance of the work. The attached document outlined in seven numbered paragraphs the process that had been approved.

[29] The document described the background of the public RFEI (which I have set out earlier), noting that *only those firms identified through the EOI process would be eligible to submit proposals for the work* and that they would receive invitations to do so. The Minister's approval in fact referred to the firms who had been short-listed from the RFEI process as being eligible. If this were taken to refer only to the three proponents identified by the evaluation process of the RFEI, Tercon would be included but Brentwood would not. However, no one has suggested that anything turns on this and it seems clear that ultimately all six of the RFEI proponents — including both Tercon and Brentwood — were intended

to be eligible. The ministerial approval then briefly set out the process. Proposals “by short listed firms” were to be evaluated “using the considerations set out in the RFP”.

[30] It is clear, therefore, that participation in the RFP process approved by the Minister was limited to those who had participated in the RFEI process.

[31] The Province’s factum implies that the Minister approved inclusion of the exclusion clause in the RFP. However, there is no evidence of this in the record before the Court. The Minister’s approval is before us. It is dated as having been prepared on August 23, 2000 and signed on October 19, 2000, and approves a process outlined in a two-page document attached to it. It says nothing about exclusion of the Province’s liability. The RFP, containing the exclusion clause in issue here, is dated January 15, 2001 and was sent out to eligible bidders under cover of a letter of the same date, some three months after the Minister’s approval.

[32] The RFP is a lengthy document, containing detailed instructions to proponents, required forms, a time schedule of the work, detailed provisions concerning contract pricing, a draft of the ultimate construction contract and many other things. Most relevant for our purposes are the terms of the instructions to proponents and in particular the eligibility requirements for bidders.

[33] The RFP reiterates in unequivocal terms that eligibility to bid was restricted as set out in the ministerial approval. It also underlines the significance of the identity of the

proponent. In s. 1.1, the RFP specifies that only the six teams involved in the RFEI would be eligible. The term “proponent”, which refers to a bidder, is defined in s. 8 as “a team that has become eligible to respond to the RFP as described in Section 1.1 of the Instructions to Proponents”. Section 2.8(a) of the RFP stipulates that *only* the six proponents qualified through the RFEI process were eligible and that *proposals received from any other party would not be considered*. In short, there were potentially only six participants and “Contract A” could not arise by the submission of a bid from any other party.

[34] The RFP also addressed material changes to the proponent, including changes in the proponent’s team members and its financial ability to undertake and complete the work. Section 2.8(b) of the RFP provided in part as follows:

If in the opinion of the Ministry a material change has occurred to the Proponent since its qualification under the RFEI, including if the composition of the Proponent’s team members has changed ... or if, for financial or other reasons, the Proponent’s ability to undertake and complete the Work has changed, then the Ministry may request the Proponent to submit further supporting information as the Ministry may request in support of the Proponent’s qualification to perform the Work. If in the sole discretion of the Ministry as a result of the changes the Proponent is not sufficiently qualified to perform the Work then the Ministry reserves the right to disqualify that Proponent and reject its Proposal.

[35] The proponent was to provide an organization chart outlining the proponent’s team members, structure and roles. If the team members were different from the RFEI process submission, an explanation was to be provided for the changes: s. 4.2(b)(i). A list of subcontractors and suppliers was also to be provided and the Ministry had to be notified of any changes: s. 4.2(e).

[36] The RFP provided proponents with a mechanism to determine whether they remained qualified to submit a proposal. If a proponent was concerned about its eligibility as a result of a material change, it could make a preliminary submission to the Ministry describing the nature of the changes and the Ministry would give a written decision as to whether the proponent was still qualified: s. 2.8(b).

[37] Brentwood tried to take advantage of this process. The trial judge thoroughly outlined this, at paras. 17-23 of her reasons. In brief, Brentwood lacked expertise in drilling and blasting and by the time the RFP was issued, it faced limited local bonding capacity due to commitments to other projects, a shorter construction period, the potential unavailability of subcontractors and limited equipment to perform the work. It in fact considered not bidding at all. Instead, however, it entered into a pre-bidding agreement with EAC that the work would be undertaken by a joint venture of Brentwood and EAC and that upon being awarded the work, they would enter into a joint venture agreement and would share 50-50 the costs, expenses, losses and gains. The trial judge noted that it was common in the industry for contractors to agree to a joint venture on the basis of a pre-bid agreement with the specifics of the joint venture to be worked out once the contract was awarded and that Brentwood and EAC acted consistently throughout in accordance with this industry standard.

[38] Brentwood sent the Province's project manager, Mr. Tasaka, a preliminary submission as provided for in s. 2.8(b) of the RFP, advising of a material change in its team's structure in that it wished to form a joint venture with EAC. This was done, the trial judge found, because Brentwood thought it would be disqualified if it submitted a proposal as a

joint venture without the Ministry's prior approval under this section of the RFP. The Province never responded in writing as it ought to have according to s. 2.8(b).

[39] It seems to have been assumed by everyone that a joint venture of Brentwood and EAC was not eligible because this change would not simply be a change in the composition of the bidder's team, but in effect a new bidder. Without reviewing in detail all of the evidence referred to by the trial judge, it is fair to say that although Brentwood ultimately submitted a proposal in its own name, the proposal in substance was from the Brentwood-EAC joint venture and was evaluated as such. As the trial judge concluded:

The substance of the proposal was as a joint venture and this must have been apparent to all. The [project evaluation panel] approved Brentwood/EAC as joint venturers as the preferred proponent. The [panel] was satisfied that Tercon had the capacity and commitment to do the job but preferred the joint venture submission of Brentwood/EAC. [para. 53].

[40] There was some suggestion by the Province during oral argument that the trial judge had wrongly imposed on it a duty to investigate Brentwood's bid, a duty rejected by the majority of the Court in *Double N Earthmovers Ltd. v. Edmonton (City)*, 2007 SCC 3, [2007] 1 S.C.R. 116. In my view, the trial judge did no such thing. As her detailed findings make clear, the Province: (1) fully understood that the Brentwood bid was in fact on behalf of a joint venture of Brentwood and EAC; (2) thought that a bid from that joint venture was not eligible; and (3) took active steps to obscure the reality of the situation. No investigation was required for the Province to know these things and the judge imposed no duty to engage in one.

5. The Province's Submissions

[41] I will address the Province's first two points together.

(i) a joint venture is not a legal person and therefore the Province could not and did not contract with a joint venture; and

(ii) it did not award the contract to EAC and EAC had no contractual responsibility to the Province for failure to perform the contract;

[42] I cannot accept these submissions. The issue is not, as these arguments assume, whether the Province contracted with a joint venture or whether EAC had contractual obligations to the Province. The issue is whether the Province considered an ineligible bid; the point of substance is whether the bid was from an eligible bidder.

[43] At trial there was no contest that a bid from a joint venture involving an ineligible bidder would be ineligible. The Province's position was that there was no need to look beyond the face of the bid to determine who was bidding: the proposal was in the name of Brentwood and therefore the bid was from a compliant bidder. Respectfully, I see no error in the trial judge's rejection of this position. There was a mountain of evidence to support the judge's conclusions that first, Brentwood's bid, in fact if not in form, was on behalf of a joint venture between itself and EAC; second, the Province knew this and took the position that it could not consider a bid from or award the work to that joint venture; third, the existence of the joint venture was a material consideration in favour of the Brentwood bid during the

evaluation process; and finally, that steps were taken by revising and drafting documentation to obfuscate the reality of the situation.

[44] Brentwood was one of the original RFEI proponents and was of course eligible to bid, subject to material changes in the composition of its team. EAC had not submitted a proposal during the RFEI process. It had been involved in advising the Ministry in relation to the project in 1998 and, in the fall of 2000, the Ministry had asked EAC to prepare an internal bid for comparison purposes (although EAC did not do so) as EAC was not entitled to bid on the Project.

[45] As noted earlier, after the RFP was issued, Brentwood and EAC entered into a pre-bidding agreement that provided that the work would be undertaken in the name of Brentwood-Anderson, a joint venture, that the work would be sponsored and managed by the joint venture and that upon being awarded the contract, the parties would enter into a joint venture agreement. Brentwood advised the Ministry in writing that it was forming a joint venture with EAC “to submit a more competitive price”; this fax was in effect a preliminary submission contemplated by s. 2.8(b) of the RFP and was written, as the trial judge found, because Brentwood assumed that it could be disqualified if it submitted a proposal as a joint venture unless prior arrangements had been made. The Province never responded in writing to this preliminary submission, as required by s. 2.8(b). There were, however, discussions with the Province’s project manager, Mr. Tasaka who, the trial judge found, understood that a joint venture from Brentwood and EAC would not be eligible. As the judge put it, the Province’s position appears to have been that the Brentwood/EAC proposal could proceed

as long as the submission was in the name of Brentwood.

[46] In the result, EAC was listed in the ultimate submission as a “major member” of the team. The legal relationship with EAC was not specified and EAC was listed as a subcontractor even though, as the trial judge found, their relationship bore no resemblance to a standard subcontractor agreement. The trial judge found as facts — and these findings are not challenged — that Brentwood and EAC always intended between themselves to form a joint venture and to formalize that arrangement once the contract was secured, and further, that the role of EAC was purposefully obfuscated in the bid to avoid an apparent conflict with s. 2.8(a) of the RFP.

[47] During the selection process, it became clear that the bid was in reality on behalf of a joint venture. The project evaluation panel (“PEP”) requested better information than provided in the bid about the structure of the business arrangements between Brentwood and EAC. Brentwood responded by disclosing the pre-bid agreement between them to form a 50/50 joint venture if successful. The PEP understood from this that Brentwood and EAC had a similar interest in the risk and reward under the contract and that this helped satisfy them that the “risk/reward” aspect of the alliance contract could be negotiated with them flexibly. The PEP clearly did not consider EAC to be a subcontractor although shown as such in the bid. In its step 6 report, the PEP consistently referred to the proponent as being a joint venture of Brentwood and EAC or as “Brentwood/EAC” and the trial judge found that it was on the basis that they were indeed a joint venture that PEP approved Brentwood/EAC as the preferred proponent. This step 6 report was ultimately revised to refer only to the Brentwood

team as the official proponent. The trial judge found as a fact that this revision was made because “it was apparent that a joint venture was not eligible to submit a proposal”(para. 56).

[48] The findings of the trial judge and the record make it clear that it was no mere question of form rather than a matter of substance whether the bidder was Brentwood with other team members or, as it in fact was, the Brentwood/EAC joint venture. As she noted, at para. 121 of her reasons, the whole purpose of the joint venture was to allow submission of a more competitive price than it would have been able to do as a proponent with a team as allowed under s. 2.8(b) of the RFP. The joint venture permitted a 50/50 sharing of risk and reward and co-management of the project while at the same time avoiding the restrictions on subcontracting in the tendering documents. As the judge put it, the bid by the joint venture constituted “material non-compliance” with the tendering contract: “[t]he joint venture with EAC allowed Brentwood to put forward a more competitive price than contemplated under the RFEI proposal. This went to the essence of the tendering process” (para 126).

[49] The Province suggests that the trial judge’s reasons allow form to triumph over substance. In my view, it is the Province’s position that better deserves that description. It had a bid which it knew to be on behalf of a joint venture, encouraged the bid to proceed and took steps to obfuscate the reality that it was on behalf of a joint venture. Permitting the bid to proceed in this way gave the joint venture a competitive advantage in the bidding process, and the record could not be clearer that the joint venture nature of the bid was one of its attractions during the selection process. The Province nonetheless submits that so long as only the name of Brentwood appears on the bid and ultimate contract B, all is well. If ever a

submission advocated placing form above substance, this is it.

[50] It is true that the Province had legal advice and did not proceed in defiance of it. However, the facts as found by the trial judge about this legal advice hardly advance the Province's position. The judge found that the Province's lawyer was not aware of the background relevant to the question of whether the Brentwood bid was eligible, never reviewed the proponent eligibility requirements in the RFP and was not asked to and did not direct his mind to the question of eligibility. As the trial judge put it, the lawyer "appears to have operated on the assumption that Brentwood had been irreversibly selected" (para. 70).

[51] The Brentwood/EAC joint venture having been selected as the preferred proponent, negotiations for the alliance contract ensued. The trial judge found that by this time, all agreed that a joint venture was not an eligible proponent and the Ministry was taking the position that the contract could not be in the name of the joint venture. Brentwood and EAC executed a revised pre-contract agreement that provided, notwithstanding the letter of intent from the Ministry addressed to Brentwood indicating that the legal relationship between them would be contractor/subcontractor, the contract would be performed and the profits shared equally between them. The work was to be managed by a committee with equal representation, the bond required by the owner was to be provided by both parties and EAC indemnified Brentwood against half of any loss or cost incurred as a result of performance of the work. According to schedule B4 of the RFP, all subcontracts were to be attached to the RFP but no contract between Brentwood and EAC was ever provided or attached to the proposal.

[52] The Province has identified no palpable and overriding error in these many findings of fact by the trial judge. I conclude, therefore, that we must approach the case on the basis of the judge's finding that the bid was in fact, if not in form, submitted by a joint venture of Brentwood and EAC, that the Ministry was well aware of this, that the existence of the joint venture was a material consideration in favour of the bid during the evaluation process and that by bidding as a joint venture, Brentwood was given a competitive advantage in the bidding process.

[53] I reject the Ministry's submissions that all that matters is the form and not the substance of the arrangement. In my view, the trial judge's finding that this bid was in fact on behalf of a joint venture is unassailable.

[54] I turn to the Province's third point:

(iii) there was no term of the RFP that restricted the right of proponents to enter into joint venture agreements with others; this arrangement merely left Brentwood, the original proponent in place and allowed it to enhance its ability to perform the work.

[55] This submission addresses the question of whether the joint venture was an eligible bidder. The Province submits that it is, arguing that s. 2.8(b) of the RFP shows that the RFP contemplated that each proponent would be supported by a team, that the composition of the team might change and that the Province under that section retained the

right to approve or reject changes in the team of any proponent. I cannot accept these submissions.

[56] Section 2.8 must be read as a whole and in light of the ministerial approval which I have described earlier. Section 2.8(a), consistent with that approval, stipulates that only the six proponents qualified through the RFEI process were eligible to submit responses and that proposals from any other party “shall not be considered”. The word “proponent” is defined in s. 8 as a team that has become eligible to respond to the RFP. The material change provisions in s. 2.8(b) should not be read as negating the express provisions of the RFP and the ministerial approval of the process. When read as a whole, the provisions about material change do not permit the addition of a new entity as occurred here. The process actually followed was not the one specified in the bidding contract and was not authorized by the statute because it was not the one approved by the Minister.

[57] Moreover, even if one were to conclude (and I would not) that this change from the Brentwood team that participated in the RFEI to the Brentwood/EAC joint venture by whom the bid was submitted could fall within the material change provisions of s. 2.8(b), the Province never gave a written decision to permit this change as required by that provision. As the trial judge noted, in fact the Province’s position was that such a bid would not be eligible and its agents took steps to obfuscate the true proponent in the relevant documentation.

[58] The trial judge also found that there was an implied obligation of good faith in

the contract and that the Province breached this obligation by failing to treat all bidders equally by changing the terms of eligibility to Brentwood's competitive advantage. This conclusion strongly reinforces the trial judge's decision about eligibility. Rather than repeating her detailed findings, I will simply quote her summary at para. 138:

The whole of [the Province's] conduct leaves me with no doubt that the [Province] breached the duty of fairness to [Tercon] by changing the terms of eligibility to Brentwood's competitive advantage. At best, [the Province] ignored significant information to its [i.e. Tercon's] detriment. At worst, the [Province] covered up its knowledge that the successful proponent was an ineligible joint venture. In the circumstances here, it is not open to the [Province] to say that a joint venture was only proposed. Nor can the [Province] say that it was unaware of the joint venture when it acted deliberately to structure contract B to include EAC as fully responsible within a separate contract with Brentwood, so minimizing the [Province's] risk that the contract would be unenforceable against EAC if arrangements did not work out. The [Province] was ... prepared to take the risk that unsuccessful bidders would sue: this risk did materialize.

[59] To conclude on this point, I find no fault with the trial judge's conclusion that the bid was in fact submitted on behalf of a joint venture of Brentwood and EAC which was an ineligible bidder under the terms of the RFP. This breached not only the express eligibility provisions of the tender documents, but also the implied duty to act fairly towards all bidders.

B. *The Exclusion Clause:*

1. Introduction

[60] As noted, the RFP includes an exclusion clause which reads as follows:

2.10 ... Except as expressly and specifically permitted in these Instructions to Proponents, no Proponent shall have any claim for compensation of any kind whatsoever, as a result of participating in this RFP, and by submitting a

Proposal each Proponent shall be deemed to have agreed that it has no claim.[Emphasis added.]

[61] The trial judge held that as a matter of construction, the clause did not bar recovery for the breaches she had found. The clause, in her view, was ambiguous and, applying the *contra proferentem* principle, she resolved the ambiguity in Tercon's favour. She also found that the Province's breach was fundamental and that it was not fair or reasonable to enforce the exclusion clause in light of the nature of the Province's breach. The Province contends that the judge erred both with respect to the construction of the clause and her application of the doctrine of fundamental breach.

[62] On the issue of fundamental breach in relation to exclusion clauses, my view is that the time has come to lay this doctrine to rest, as Dickson C.J. was inclined to do more than 20 years ago: *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426, at p. 462. I agree with the analytical approach that should be followed when tackling an issue relating to the applicability of an exclusion clause set out by my colleague Binnie J. However, I respectfully do not agree with him on the question of the proper interpretation of the clause in issue here. In my view, the clause does not exclude Tercon's claim for damages, and even if I am wrong about that, the clause is at best ambiguous and should be construed *contra proferentem* as the trial judge held. As a result of my conclusion on the interpretation issue, I do not have to go on to apply the rest of the analytical framework set out by Binnie J.

[63] In my view, the exclusion clause does not cover the Province's breaches in this

case. The RFP process put in place by the Province was premised on a closed list of bidders; a contest with an ineligible bidder was not part of the RFP process and was in fact expressly precluded by its terms. A “Contract A” could not arise as a result of submission of a bid from any other party. However, as a result of how the Province proceeded, the very premise of its own RFP process was missing, and the work was awarded to a party who could not be a participant in the RFP process. That is what Tercon is complaining about. Tercon’s claim is not barred by the exclusion clause because the clause only applies to claims arising “as a result of participating in [the] RFP”, not to claims resulting from the participation of other, ineligible parties. Moreover, the words of this exclusion clause, in my view, are not effective to limit liability for breach of the Province’s implied duty of fairness to bidders. I will explain my conclusion by turning first to a brief account of the key legal principles and then to the facts of the case.

2. Legal Principles

[64] The key principle of contractual interpretation here is that the words of one provision must not be read in isolation but should be considered in harmony with the rest of the contract and in light of its purposes and commercial context. The approach adopted by the Court in *M.J.B.* is instructive. The Court had to interpret a privilege clause, which is somewhat analogous to the exclusion clause in issue here. The privilege clause provided that the lowest or any tender would not necessarily be accepted, and the issue was whether this barred a claim based on breach of an implied term that the owner would accept only compliant bids. In interpreting the privilege clause, the Court looked at its text in light of the

contract as a whole, its purposes and commercial context. As Iacobucci J. said, at para. 44, “the privilege clause is only one term of Contract A and must be read in harmony with the rest of the tender documents. To do otherwise would undermine the rest of the agreement between the parties.”

[65] In a similar way, it is necessary in the present case to consider the exclusion clause in the RFP in light of its purposes and commercial context as well as of its overall terms. The question is whether the exclusion of compensation for claims resulting from “participating in this RFP”, properly interpreted, excludes liability for the Province having unfairly considered a bid from a bidder who was not supposed to have been participating in the RFP process at all.

3. Application to this Case

[66] Having regard to both the text of the clause in its broader context and to the purposes and commercial context of the RFP, my view is that this claim does not fall within the terms of the exclusion clause.

[67] To begin, it is helpful to recall that in interpreting tendering contracts, the Court has been careful to consider the special commercial context of tendering. Effective tendering ultimately depends on the integrity and business efficacy of the tendering process: see, e. g., *Martel*, at para. 88; *M.J.B.*, at para. 41; *Double N Earthmovers Ltd.*, at para. 106. As Iacobucci and Major JJ. put it in *Martel*, at para. 116, “it is imperative that all bidders be

treated on an equal footing ... Parties should at the very least be confident that their initial bids will not be skewed by some underlying advantage in the drafting of the call for tenders conferred upon only one potential bidder”.

[68] This factor is particularly weighty in the context of public procurement. In that context, in addition to the interests of the parties, there is the need for transparency for the public at large. This consideration is underlined by the statutory provisions which governed the tendering process in this case. Their purpose was to assure transparency and fairness in public tenders. As was said by Orsborn J. (as he then was) in *Cahill (G. J.) & Co. (1979) Ltd. v. Newfoundland and Labrador (Minister of Municipal and Provincial Affairs)*, 2005 NLTD 129, 250 Nfld. & P.E.I.R. 145, at para. 35:

The owner — in this case the government — is in control of the tendering process and may define the parameters for a compliant bid and a compliant bidder. The corollary to this, of course, is that once the owner — here the government — sets the rules, it must itself play by those rules in assessing the bids and awarding the main contract.

[69] One aspect that is generally seen as contributing to the integrity and business efficacy of the tendering process is the requirement that only compliant bids be considered. As noted earlier, such a requirement has often been implied because, as the Court said in *M.J.B.*, it makes little sense to think that a bidder would comply with the bidding process if the owner could circumscribe it by accepting a non-compliant bid. Respectfully, it seems to me to make even less sense to think that eligible bidders would participate in the RFP if the Province could avoid liability for ignoring an express term concerning eligibility to bid on which the entire RFP was premised and which was mandated by the statutorily approved

process.

[70] The closed list of bidders was the foundation of this RFP and there were important competitive advantages to a bidder who could side-step that limitation. Thus, it seems to me that both the integrity and the business efficacy of the tendering process support an interpretation that would allow the exclusion clause to operate compatibly with the eligibility limitations that were at the very root of the RFP.

[71] The same may be said with respect to the implied duty of fairness. As Iacobucci and Major JJ. wrote for the Court in *Martel*, at para. 88, “[i]mplying an obligation to treat all bidders fairly and equally is consistent with the goal of protecting and promoting the integrity of the bidding process.” It seems to me that clear language is necessary to exclude liability for breach of such a basic requirement of the tendering process, particularly in the case of public procurement.

[72] The proper interpretation of the exclusion clause should also take account of the statutory context which I have reviewed earlier. The restriction on eligibility of bidders was a key element of the alternative process approved by the Minister. It seems unlikely, therefore, that the parties intended through this exclusion clause to effectively gut a key aspect of the approved process. Of course, it is true that the exclusion clause does not bar all remedies, but only claims for compensation. However, the fact remains that as a practical matter, there are unlikely to be other, effective remedies for considering and accepting an ineligible bid and that barring compensation for a breach of that nature in practical terms

renders the ministerial approval process virtually meaningless. Whatever administrative law remedies may be available, they are not likely to be effective remedies for awarding a contract to an ineligible bidder. The Province did not submit that injunctive relief would have been an option, and I can, in any event, foresee many practical problems that need not detain us here in seeking such relief in these circumstances.

[73] The Province stresses Tercon's commercial sophistication, in effect arguing that it agreed to the exclusion clause and must accept the consequences. This line of argument, however, has two weaknesses. It assumes the answer to the real question before us which is: what does the exclusion clause mean? The consequences of agreeing to the exclusion clause depend on its construction. In addition, the Province's submission overlooks its own commercial sophistication and the fact that sophisticated parties can draft very clear exclusion and limitation clauses when they are minded to do so. Such clauses contrast starkly with the curious clause which the Province inserted into this RFP. The limitation of liability clause in *Hunter Engineering*, for example, provided that "[n]otwithstanding any other provision in this contract or any applicable statutory provisions neither the Seller nor the Buyer shall be liable to the other for special or consequential damages or damages for loss of use arising directly or indirectly from any breach of this contract, fundamental or otherwise ..." (p. 450).

The Court found this to be clear and unambiguous. The limitation clause in issue in *Guarantee Co. of North America v. Gordon Capital Corp.* [1999] 3 S.C.R. 423, provided that legal proceedings for the recovery of "any loss hereunder shall not be brought ... after the expiration of 24 months from the discovery of such loss" (para. 5). Once again, the Court found this language clear. The Ontario Court of Appeal similarly found the language of a

limitation of liability clause to be clear in *Fraser Jewellers (1982) Ltd. v. Dominion Electric Protection Co.* (1997), 34 O.R. (3d) 1. The clause provided in part that if the defendant “should be found liable for loss, damage or injury due to a failure of service or equipment in any respect, its liability shall be limited to a sum equal to 100% or the annual service charge or \$10,000, whichever is less, as the agreed upon damages and not as a penalty, as the exclusive remedy ...” (p. 4). These, and many other cases which might be referred to, demonstrate that sophisticated parties are capable of drafting clear and comprehensive limitation and exclusion provisions.

[74] I turn to the text of the clause which the Province inserted in its RFP. It addresses claims that result from “participating in this RFP”. As noted, the limitation on who could participate in this RFP was one of its premises. These words must, therefore, be read in light of the limit on who was eligible to participate in this RFP. As noted earlier, both the ministerial approval and the text of the RFP itself were unequivocal: only the six proponents qualified through the earlier RFEI process were eligible and *proposals received from any other party would not be considered*. Thus, central to “participating in this RFP” was participating in a contest among those eligible to participate. A process involving other bidders, as the trial judge found the process followed by the Province to be, is not the process called for by “this RFP” and being part of that other process is not in any meaningful sense “participating in this RFP”.

[75] The Province would have us interpret the phrase excluding compensation “as a result of participating in this RFP” to mean that compensation is excluded that results from

“submitting a Proposal”. However, that interpretation is not consistent with the wording of the clause as a whole. The clause concludes with the phrase that “by submitting a Proposal each Proponent shall be deemed to have agreed that it has no claim”. If the phrases “participating in this RFP” and “submitting a Proposal” were intended to mean the same thing, it is hard to understand why different words were used in the same short clause to express the same idea. The fact that the Minister had approved a closed list of participants strengthens the usual inference that the use of different words was deliberate so as not to exclude compensation for a departure from that basic eligibility requirement.

[76] This interpretation of the exclusion clause does not rob it of meaning, but makes it compatible with other provisions of the RFP. There is a parallel between this case and the Court’s decision in *M.J.B.* There, the Court found that there was compatibility between the privilege clause and the implied term to accept only compliant bids. Similarly, in this case, there is compatibility between the eligibility requirements of the RFP and the exclusion clause. Not any and every claim based on any and every deviation from the RFP provisions would escape the preclusive effect of the exclusion clause. It is only when the defect in the Province’s adherence to the RFP process is such that it is completely outside that process that the exclusion clause cannot have been intended to operate. What is important here, in my view, is that the RFP in its conception, in its express provisions and in the statutorily required approval it was given, was premised on limiting eligibility to the six proponents in the RFEI process. Competition among others was not at all contemplated and was not part of the RFP process; in fact, the RFP expressly excluded that possibility. In short, limiting eligibility of bidders to those who had responded to the RFEI was the foundation of the whole RFP. As

the judge found, acceptance of a bid from an ineligible bidder “ attacks the underlying premise of the process” established by the RFP: para. 146. Liability for such an attack is not excluded by a clause limiting compensation resulting from participation in this RFP.

[77] This interpretation is also supported by another provision of the RFP. Under s. 2.9, as mentioned earlier, the Province reserved to itself the right to unilaterally cancel the RFP and the right to propose a new RFP allowing additional bidders. If the exclusion clause were broad enough to exclude compensation for allowing ineligible bidders to participate, there seems to be little purpose in this reservation of the ability to cancel the RFP and issue a new one to a wider circle of bidders. It is also significant that the Province did not reserve to itself the right to accept a bid from an ineligible bidder or to unilaterally change the rules of eligibility. The RFP expressly did exactly the opposite. None of this, in my opinion, supports the view that the exclusion clause should be read as applying to the Province’s conduct in this case.

[78] To hold otherwise seems to me to be inconsistent with the text of the clause read in the context of the RFP as a whole and in light of its purposes and commercial context. In short, I cannot accept the contention that, by agreeing to exclude compensation for participating in this RFP process, the parties could have intended to exclude a damages claim resulting from the Province unfairly permitting a bidder to participate who was not eligible to do so. I cannot conclude that the provision was intended to gut the RFP’s eligibility requirements as to who may participate in it, or to render meaningless the Minister’s statutorily required approval of the alternative process where this was a key element. The

provision, as well, was not intended to allow the Province to escape a damages claim for applying different eligibility criteria, to the competitive disadvantage of other bidders and for taking steps designed to disguise the true state of affairs. I cannot conclude that the parties, through the words found in this exclusion clause, intended to waive compensation for conduct like that of the Province in this case that strikes at the heart of the integrity and business efficacy of the tendering process which it undertook.

[79] If I am wrong about my interpretation of the clause, I would hold, as did the trial judge, that its language is at least ambiguous. If, as the Province contends, the phrase “participating in this RFP” could reasonably mean “submitting a Proposal”, that phrase could also reasonably mean “competing against the other eligible participants”. Any ambiguity in the context of this contract requires that the clause be interpreted against the Province and in favour of Tercon under the principle *contra proferentem*: see, e.g. *Hillis Oil and Sales Ltd. v. Wynn’s Canada, Ltd.*, [1986] 1 S.C.R. 57, at pp. 68-69. Following this approach, the clause would not apply to bar Tercon’s damages claim.

V. Disposition

[80] I conclude that the judge did not err in finding that the Province breached the tendering contract or in finding that Tercon’s remedy in damages for that breach was not precluded by the exclusion clause in the contract. I would therefore allow the appeal, set aside the order of the Court of Appeal and restore the judgment of the trial judge. The parties advise that the question of costs has been resolved between them and that therefore no order

in relation to costs is required.

The reasons of McLachlin C.J. and Binnie, Abella and Rothstein JJ. were delivered by

BINNIE J. —

[81] The important legal issue raised by this appeal is whether, and in what circumstances, a court will deny a defendant contract breaker the benefit of an exclusion of liability clause to which the innocent party, not being under any sort of disability, has agreed. Traditionally, this has involved consideration of what is known as the doctrine of fundamental breach, a doctrine which Dickson C.J. in *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426, suggested should be laid to rest 21 years ago (p. 462).

[82] On this occasion we should again attempt to shut the coffin on the jargon associated with “fundamental breach”. Categorizing a contract breach as “fundamental” or “immense” or “colossal” is not particularly helpful. Rather, the principle is that a court has no discretion to refuse to enforce a valid and applicable contractual exclusion clause unless the plaintiff (here the appellant Tercon) can point to some paramount consideration of public policy sufficient to override the public interest in freedom of contract and defeat what would otherwise be the contractual rights of the parties. Tercon points to the public interest in the transparency and integrity of the government tendering process (in this case, for a highway construction contract) but in my view such a concern, while important, did not render

unenforceable the terms of the contract Tercon agreed to. There is nothing inherently unreasonable about exclusion clauses. Tercon is a large and sophisticated corporation. Unlike my colleague Justice Cromwell, I would hold that the respondent Ministry's conduct, while in breach of its contractual obligations, fell within the terms of the exclusion clause. In turn, there is no reason why the clause should not be enforced. I would dismiss the appeal.

I. Overview

[83] This appeal concerns a contract to build a \$35 million road in the remote Nass Valley of British Columbia (the "Kincolith project"). The respondent Ministry accepted a bid from Brentwood Enterprises Ltd. that did not comply with the terms of tender. Tercon, as the disappointed finalist in the bidding battle, seeks compensation equivalent to the profit it expected to earn had it been awarded the contract.

[84] Tercon alleged, and the trial judge found, that although the winning bid was submitted in the name of Brentwood (an eligible bidder) Brentwood in fact intended, with the Ministry's knowledge and encouragement, to do the work in a co-venture with an ineligible bidder, Emil Anderson Construction Co. ("EAC"). The respondent Ministry raised a number of defences including the fact that the formal contract was signed in the name of Brentwood alone. This defence was rejected in the courts below. The Ministry's substantial defence in this Court is that even if it failed to abide by the bidding rules, it is nonetheless protected by an exclusion of compensation clause set out clearly in the request for proposals ("RFP"). The clause provided that "no Proponent shall have any claim for compensation of any kind

whatsoever, as a result of participating in this RFP” and that “by submitting a Proposal each Proponent shall be deemed to have agreed that it has no claim” (s. 2.10 of the RFP).

[85] The appeal thus brings into conflict the public policy that favours a fair, open and transparent bid process, and the freedom of contract of sophisticated and experienced parties in a commercial environment to craft their own contractual relations. I agree with Tercon that the public interest favours an orderly and fair scheme for tendering in the construction industry, but there is also a public interest in leaving knowledgeable parties free to order their own commercial affairs. In my view, on the facts of this case, the Court should not rewrite — nor should the Court refuse to give effect to — the terms agreed to by the parties.

[86] I accept, as did the courts below, that the respondent Ministry breached the terms of its own RFP when it contracted with Brentwood, knowing the work would be carried out by a co-venture with Brentwood and EAC. The addition of EAC, a bigger contractor with greater financial resources than Brentwood, created a stronger competitor for Tercon than Brentwood alone. However, I also agree with the B.C. Court of Appeal that the exclusion of compensation clause is clear and unambiguous and that no legal ground or rule of law permits us to override the freedom of the parties to contract (or to decline to contract) with respect to this particular term, or to relieve Tercon against its operation in this case.

II. The Tendering Process

[87] For almost three decades the law governing a structured bidding process has been

dominated by the concept of Contract A/Contract B initially formulated in *The Queen in Right of Ontario v. Ron Engineering & Construction (Eastern) Ltd.*, [1981] 1 S.C.R. 111. The analysis advanced by Estey J. in that case was that the bidding process, as defined by the terms of the tender call, may create contractual relations (“Contract A”) prior in time and quite independently of the contract that is the actual subject matter of the bid (“Contract B”). Breach of Contract A may, depending on its terms, give rise to contractual remedies for non-performance even if Contract B is never entered into or, as in the present case, it is awarded to a competitor. The result of this legal construct is to provide unsuccessful bidders with a *contractual* remedy against an owner who departs from its own bidding rules. Contract A, however, arises (if at all) as a matter of interpretation. It is not imposed as a rule of law.

[88] In *Ron Engineering*, the result of Estey J.’s analysis was that as a matter of contractual interpretation, the Ontario government was allowed to retain a \$150,000 bid bond put up by Ron Engineering even though the government was told, a little over an hour after the bids were opened, that Ron Engineering had made a \$750,058 error in the calculation of its bid and wished to withdraw it. Estey J. held:

The contractor was not asked to sign a contract which diverged in any way from its tender but simply to sign a contract in accordance with the instructions to tenderers and in conformity with its own tender. [p. 127]

In other words, harsh as it may have seemed to Ron Engineering, the parties were held to their bargain. The Court was not prepared to substitute “fair and reasonable” terms for what the parties had actually agreed to.

[89] In *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619, Contract A included a “privilege” clause which stated that the owner was not obliged to accept the lowest or *any* tender. The Court implied a term, based on the presumed intention of the parties, that notwithstanding the privilege clause, only compliant bids were open to acceptance. While the owner was not obliged to accept the lowest compliant bid, the privilege clause did not, as a matter of contractual interpretation, give the owner “the privilege” of accepting a non-compliant bid. *M.J.B.* stops short of the issue in the present appeal because in that case, there was a breach of Contract A but no clause purporting to exclude liability on the part of the owner to pay compensation in the event of a Contract A violation.

[90] In *Naylor Group Inc. v. Ellis-Don Construction Ltd.*, 2001 SCC 58, [2001] 2 S.C.R. 943, the Court enforced the rules of the bid depository system against a contractor whose bid was based on what turned out to be a mistaken view of its collective bargaining status with the International Brotherhood of Electrical Workers. The Court again affirmed that “[t]he existence and content of Contract A will depend on the facts of the particular case” (para. 36). Ellis-Don sought relief from its bid on the basis of a labour board decision rendered subsequent to its bid that upheld, to its surprise, the bargaining rights of the union. This Court held that no relief was contemplated in the circumstances under Contract A and none was afforded, even though this was a costly result when viewed from the perspective of Ellis-Don.

[91] In *Martel Building Ltd. v. Canada*, 2000 SCC 60, [2000] 2 S.C.R. 860, citing

M.J.B., the Court implied a term in Contract A obligating the owner to be fair and consistent in the assessment of tender bids. On the facts, the disappointed bidder's claim of unfair treatment was rejected.

[92] Finally, in *Double N Earthmovers Ltd. v. Edmonton (City)*, 2007 SCC 3, [2007] 1 S.C.R. 116, the unsuccessful bidder claimed that Edmonton had accepted, in breach of Contract A, a competitor's non-compliant bid to provide heavy equipment of a certain age to move refuse at a waste disposal site. The Court refused to imply a term "requiring an owner to investigate to see if bidders will really do what they promised in their tender" (para. 50). Accepting the existence of a duty of "fairness and equality", the majority nevertheless held that "[t]he best way to make sure that all bids receive the same treatment is for an owner to weigh bids on the basis of what is actually in the bid, not to weigh them on the basis of subsequently discovered information" (para. 52). In other words, the majority's interpretation of the express terms of Contract A was enforced despite Double N Earthmovers' complaint of double dealing by the owner.

[93] On the whole, therefore, while *Ron Engineering* and its progeny have encouraged the establishment of a fair and transparent bidding process, Contract A continues to be based not on some abstract externally imposed rule of law but on the presumed (and occasionally implied) intent of the parties. Only in rare circumstances will the Court relieve a party from the bargain it has made.

[94] As to implied terms, *M.J.B.* emphasized (at para.29) that the focus is "the

intentions of the actual parties”. A court, when dealing with a claim to an implied term, “must be careful not to slide into determining the intentions of reasonable parties” (emphasis in original). Thus “if there is evidence of a contrary intention, on the part of either party, an implied term may not be found on this basis”.

[95] Tercon is a large and experienced contractor. As noted by Donald J.A. in the B.C. Court of Appeal, it had earlier “successfully recovered damages from the [Ministry] on a bidding default on a previous case” (2007 BCCA 592, 73 B.C.L.R. (4th) 201, at para. 15). See *Tercon Contractors Ltd. v. British Columbia* (1993) 9 C.L.R. (2d) 197 (B.C.S.C.) aff’d, [1994] BCJ No. 2658 (C.A.) (QL). Thus Tercon would have been more sensitive than most contractors to the risks posed by an exclusion of compensation clause. It nevertheless chose to bid on the project on the terms proposed by the Ministry.

III. Tercon’s Claim for Relief from the Exclusionary Clause it Agreed to

[96] In these circumstances, the first question is whether there is either a statutory legal obstacle to, or a principled legal argument against, the freedom of these parties to contract out of the obligation that would otherwise exist for the Ministry to pay compensation for a breach of Contract A. If not, the second question is whether there is any other barrier to the court’s enforcement of the exclusionary clause in the circumstances that occurred. On the first branch, Tercon relies on the *Ministry of Transportation and Highways Act*, R.S.B.C. 1996, c. 311 (“*Transportation Act*” or the “Act”). On the second branch, Tercon relies on the doctrine of fundamental breach.

A. *The Statutory Argument*

[97] Section 4 of the *Transportation Act* provides that before awarding a highway contract, “the minister must invite tenders in any manner that will make the invitation for tenders reasonably available to the public”, but then provides for several exceptions: “The minister need not invite tenders for a project ... if ... (c) the minister believes that an alternative contracting process will result in a competitively established cost for the project”. Here the required ministerial authorization was obtained for an “alternative process”. The reason is as follows. As noted by Cromwell J., the Ministry’s original idea was to use a “design-build” model where a single contractor would design and build the highway for a fixed price. The Ministry issued a request for expressions of interest (“RFEI”) which attracted six responses. One was from Tercon. Another was from Brentwood. EAC declined to bid because it did not think the “design-build” concept was appropriate for the job.

[98] On further reflection, the Ministry decided not to pursue the design-build approach. It decided to design the highway itself. The contract would be limited to construction, as EAC had earlier advocated. EAC was not allowed to bid despite the Ministry coming around to its point of view on the proper way to tender the project. The Ministry limited bidding on the new contest to the six respondents to the original RFEI, all of whom had been found capable of performing the contract. But to do so, it needed, and did obtain, the Minister’s s. 4 approval.

[99] A question arose during the hearing of the appeal as to whether the Minister actually approved an “alternative process” that not only restricted eligibility to the six participants in the RFEI process (an advantage to Tercon and the other five participants), but also contained the “no claims” clause excluding compensation for non-observance of its terms (no doubt considered a disadvantage). In its factum, the Ministry states:

In this case, the Minister approved an alternate process under [s. 4(2) of the B.C. *Transportation Act*]. That process was set out in the Instructions to Proponents, which included the No Claim Clause. Having been approved by the Minister, the package (including the No Claims Clause) complied with section 4 of the *Transportation Act*. [para. 70]

[100] Tercon argued at the hearing of this appeal that as a matter of *law*, Contract A could not have included the exclusion clause because

[t]he policy of the [*Transportation Act*] is to ensure that the Ministry is accountable; to preserve confidence in the integrity of the tendering process. To ensure that is so and that the Minister is accountable, the Ministry must be held liable for its breach of Contract A in considering and accepting a proposal from the joint venture. . . .

. . .

MADAM JUSTICE ABELLA: Can I just ask you one question. Is it your position, sir, that you can never have - - that a government can never have a no claims clause?

MR. McLEAN: Yes. Under this statute because of the policy of the statute. [Transcript, at pp. 26-27]

[101] While it is true that the Act favours “the integrity of the tendering process”, it nowhere prohibits the parties from negotiating a “no claims” clause as part of their

commercial agreement, and cannot plausibly be interpreted to have that effect.

[102] In the ordinary world of commerce, as Dickson C.J. commented in *Hunter*, “clauses limiting or excluding liability are negotiated as part of the general contract. As they do with all other contractual terms, the parties bargain for the consequences of deficient performance” (p. 461). Moreover, as Mr. Hall points out, “[t]here are many valid reasons for contracting parties to use exemption clauses, most notably to allocate risks” (G. R. Hall, *Canadian Contractual Interpretation Law* (2007), at p. 243). Tercon for example is a sophisticated and experienced contractor and if it decided that it was in its commercial interest to proceed with the bid despite the exclusion of compensation clause, that was its prerogative and nothing in the “policy of the Act” barred the parties’ agreement on that point.

[103] To the extent Tercon is now saying that as a matter of *fact* the Minister, in approving the RFP, did not specifically approve the exclusion clause, and that the contract was thus somehow *ultra vires* the Ministry, this is not an issue that was either pleaded or dealt with in the courts below. The details of the ministerial approval process were not developed in the evidence. It is not at all evident that s. 4 *required* the Minister to approve the actual terms of the RFP. It is an administrative law point that Tercon, if so advised, ought to have pursued at pre-trial discovery and in the trial evidence. We have not been directed to any exploration of the matter in the testimony and it is too late in the proceeding for Tercon to explore it now. Accordingly, I proceed on the basis that the exclusion clause did not run afoul of the statutory requirements.

B. *The Doctrine of the Fundamental Breach*

[104] The trial judge considered the applicability of the doctrine of fundamental breach. Tercon argued that the Ministry, by reason of its fundamental breach, had forfeited the protection of the exclusion of compensation clause.

[105] The leading case is *Hunter* which also dealt with an exclusion of liability clause. The appellants Hunter Engineering and Allis-Chalmers Canada Ltd. supplied gearboxes used to drive conveyor belts at Syncrude's tar sands operations in Northern Alberta. The gearboxes proved to be defective. At issue was a broad exclusion of warranty clause that limited time for suit and the level of recovery available against Allis-Chalmers (i.e. no recovery beyond the unit price of the defective products). Dickson C.J. observed: "In the face of the contractual provisions, Allis-Chalmers can only be found liable under the doctrine of fundamental breach" (p. 451).

[106] This doctrine was largely the creation of Lord Denning in the 1950s (see, e.g., *Karsales (Harrow) Ltd. v. Wallis*, [1956] 1 W.L.R. 936 (C.A.)). It was said to be a rule of law that operated independently of the intention of the parties in circumstances where the defendant had so egregiously breached the contract as to deny the plaintiff substantially the whole of its benefit. In such a case, according to the doctrine, the innocent party was excused from further performance but the defendant could still be held liable for the consequences of its "fundamental" breach even if the parties had excluded liability by clear and express

language. See generally S. M. Waddams, *The Law of Contracts* (5th ed. 2005), at para. 478; J. D. McCamus, *The Law of Contracts* (2005), at pp. 765 *et seq.*

[107] The five-judge *Hunter* Court was unanimous in the result and gave effect to the exclusion clause at issue. Dickson C.J. and Wilson J. both emphasized that there is nothing inherently unreasonable about exclusion clauses and that they should be applied unless there is a compelling reason not to give effect to the words selected by the parties. At that point, there was some divergence of opinion.

[108] Dickson C.J. (La Forest J. concurring) observed that the doctrine of fundamental breach had “spawned a host of difficulties” (p. 460), the most obvious being the difficulty in determining whether a particular breach is fundamental. The doctrine obliged the parties to engage in “games of characterization” (p. 460) which distracted from the real question of what agreement the parties themselves intended. Accordingly, in his view, the doctrine should be “laid to rest”. The situations in which the doctrine is invoked could be addressed more directly and effectively through the doctrine of “unconscionability”, as assessed at the time the contract was made:

It is preferable to interpret the terms of the contract, in an attempt to determine exactly what the parties agreed. If on its true construction the contract excludes liability for the kind of breach that occurred, the party in breach will generally be saved from liability. Only where the contract is unconscionable, as might arise from situations of unequal bargaining power between the parties, should the courts interfere with agreements the parties have freely concluded. [p. 462]

Dickson C.J. explained that “[t]he courts do not blindly enforce harsh or unconscionable

bargains” (p. 462), but “there is much to be gained by addressing directly the protection of the weak from over-reaching by the strong, rather than relying on the artificial legal doctrine of ‘fundamental breach’” (p. 462). To enforce an exclusion clause in such circumstances could tarnish the institutional integrity of the court. In that respect, it would be contrary to public policy. However, a *valid* exclusion clause would be enforced according to its terms.

[109] Wilson J. (L’Heureux-Dubé J. concurring) disagreed. In her view, the courts retain some residual discretion to refuse to enforce exclusion clauses in cases of fundamental breach where the doctrine of *pre-breach* unconscionability (favoured by Dickson C.J.) did not apply. Importantly, she rejected the imposition of a general standard of reasonableness in the judicial scrutiny of exclusion clauses, affirming that “the courts . . . are quite unsuited to assess the fairness or reasonableness of contractual provisions as the parties negotiated them” (p. 508). Wilson J. considered it more desirable to develop through the common law a *post-breach* analysis seeking a “balance between the obvious desirability of allowing the parties to make their own bargains ... and the obvious undesirability of having the courts used to enforce bargains in favour of parties who are totally repudiating such bargains themselves” (p. 510).

[110] Wilson J. contemplated a two-stage test, in which the threshold step is the identification of a fundamental breach where “the foundation of the contract has been undermined, where the very thing bargained for has not been provided” (p. 500). Having found a fundamental breach to exist, the exclusion clause would *not* automatically be set aside, but the court should go on to assess whether, having regard to the circumstances of the

breach, the party in fundamental breach should escape liability:

Exclusion clauses do not automatically lose their validity in the event of a fundamental breach by virtue of some hard and fast rule of law. They should be given their natural and true construction so that the meaning and effect of the exclusion clause the parties agreed to at the time the contract was entered into is fully understood and appreciated. But, in my view, the court must still decide, having ascertained the parties' intention at the time the contract was made, whether or not to give effect to it in the context of subsequent events such as a fundamental breach committed by the party seeking its enforcement through the courts. . . . [T]he question essentially is: in the circumstances that have happened should the court lend its aid to A to hold B to this clause? [Emphasis added; pp. 510-11.]

[111] Wilson J. reiterated that “as a general rule” courts should give effect to exclusion clauses *even in the case of fundamental breach* (p. 515). Nevertheless, a residual discretion to withhold enforcement exists:

Lord Wilberforce [in *Photo Production Ltd. v. Securicor Transport Ltd.*, [1980] A.C. 827 (H.L.)] may be right that parties of equal bargaining power should be left to live with their bargains regardless of subsequent events. I believe, however, that there is some virtue in a residual power residing in the court to withhold its assistance on policy grounds in appropriate circumstances. [Emphasis added; p. 517]

Wilson J. made it clear that such circumstances of disentitlement would be rare. She acknowledged that an exclusion clause might well be accepted with open eyes by a party “very anxious to get” the contract (p. 509). However, Wilson J. did not elaborate further on what such circumstances might be because she found in *Hunter* itself that no reason existed to refuse the defendant Allis-Chalmers the benefit of the exclusion clause.

[112] The fifth judge, McIntyre J., in a crisp two-paragraph judgment, agreed with the conclusion of Wilson J. in respect of the exclusion clause issue but found it “unnecessary to deal further with the concept of fundamental breach in this case” (p. 481).

[113] The law was left in this seemingly bifurcated state until *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423. In that case, the Court breathed some life into the dying doctrine of fundamental breach while nevertheless affirming (once again) that whether or not a “fundamental breach prevents the breaching party from continuing to rely on an exclusion clause is a matter of construction rather than a rule of law” (at para. 52). In other words, the question was whether the parties *intended* at the time of contract formation that the exclusion or limitation clause would apply “in circumstances of contractual breach, whether fundamental or otherwise” (para. 63). The Court thus emphasized that what was important was not the label (“fundamental or otherwise”) but the intent of the contracting parties when they made their bargain. “The only limitation placed upon enforcing the contract as written in the event of a fundamental breach”, the Court in *Guarantee Co.* continued,

would be to refuse to enforce an exclusion, of liability in circumstances where to do so would be unconscionable, according to Dickson C.J., or [note the disjunctive “or”] unfair, unreasonable or otherwise contrary to public policy, according to Wilson J. [Emphasis added; para. 52.]

(See also para. 64.)

What has given rise to some concern is not the reference to “public policy”, whose role in the enforcement of contracts has never been doubted, but to the more general ideas of “unfair”

and “unreasonable”, which seemingly confer on courts a very broad after-the-fact discretion.

[114] The Court’s subsequent observations in *ABB Inc. v. Domtar Inc.*, 2007 SCC 50, [2007] 3 S.C.R. 461, should be seen in that light. *Domtar* was a products liability case arising under the civil law of Quebec, but the Court observed with respect to the common law:

Once the existence of a fundamental breach has been established, the court must still analyse the limitation of liability clause in light of the general rules of contract interpretation. If the words can reasonably be interpreted in only one way, it will not be open to the court, even on grounds of equity or reasonableness, to declare the clause to be unenforceable since this would amount to rewriting the contract negotiated by the parties. [Emphasis added; para. 84.]

While the *Domtar* Court continued to refer to “fundamental breach”, it notably repudiated any judicial discretion to depart from the terms of a valid contract upon vague notions of “equity or reasonableness”. It did not, however, express any doubt about the residual category mentioned in *Guarantee Co.*, namely a refusal to enforce an exclusion clause on the grounds of public policy.

[115] I agree with Professor Waddams when he writes:

[I]t is surely inevitable that a court must reserve the ultimate power to decide when the values favouring enforceability are outweighed by values that society holds to be more important. [para. 557]

[116] While memorably described as an unruly horse, public policy is nevertheless fundamental to contract law, both to contractual formation and enforcement and (occasionally) to the court's relief *against* enforcement. As Duff C.J. observed:

It is the duty of the courts to give effect to contracts and testamentary dispositions according to the settled rules and principles of law, since we are under a reign of law; but there are cases in which rules of law cannot have their normal operation because the law itself recognizes some paramount consideration of public policy which over-rides the interest and what otherwise would be the rights and powers of the individual.

(*Re Millar Estate*, [1938] S.C.R. 1, at p. 4)

See generally B. Kain and D. T. Yoshida, "The Doctrine of Public Policy in Canadian Contract Law", in T. L. Archibald and R. S. Echlin, eds., *Annual Review of Civil Litigation*, 2007 (2007), 1.

[117] As Duff C.J. recognized, freedom of contract will often, but not always, trump other societal values. The residual power of a court to decline enforcement exists but, in the interest of certainty and stability of contractual relations, it will rarely be exercised. Duff C.J. adopted the view that public policy "should be invoked only in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds" (p. 7). While he was referring to public policy considerations pertaining to the nature of the *entire contract*, I accept that there may be well-accepted public policy considerations that relate directly to the nature of the *breach*, and thus trigger the court's narrow jurisdiction to give relief against an exclusion clause.

[118] There are cases where the exercise of what Professor Waddams calls the “ultimate power” to refuse to enforce a contract may be justified, even in the commercial context. Freedom of contract, like any freedom, may be abused. Take the case of the milk supplier who adulterates its baby formula with a toxic compound to increase its profitability at the cost of sick or dead babies. In China, such people were shot. In Canada, should the courts give effect to a contractual clause excluding civil liability in such a situation? I do not think so. Then there are the people, also fortunately resident elsewhere, who recklessly sold toxic cooking oil to unsuspecting consumers, creating a public health crisis of enormous magnitude. Should the courts enforce an exclusion clause to eliminate contractual liability for the resulting losses in such circumstances? The answer is no, but the contract breaker’s conduct need not rise to the level of criminality or fraud to justify a finding of abuse.

[119] A less extreme example in the commercial context is *Plas-Tex Canada Ltd. v. Dow Chemical of Canada Ltd.*, 2004 ABCA 309, 245 D.L.R. (4th) 650. The Alberta Court of Appeal refused to enforce an exclusion clause where the defendant Dow knowingly supplied defective plastic resin to a customer who used it to fabricate natural gas pipelines. Instead of disclosing its prior knowledge of the defect to the buyer, Dow chose to try to protect itself by relying upon limitation of liability clauses in its sales contracts. After some years, the pipelines began to degrade, with considerable damage to property and risk to human health from leaks and explosions. The court concluded that “a party to a contract will not be permitted to engage in unconscionable conduct secure in the knowledge that no liability can be imposed upon it because of an exclusionary clause” (para. 53). (See also *McCamus*, at p. 774, and *Hall*, at p. 243). What was demonstrated in *Plas-Tex* was that the

defendant Dow was so contemptuous of its contractual obligation and reckless as to the consequences of the breach as to forfeit the assistance of the court. The public policy that favours freedom of contract was outweighed by the public policy that seeks to curb its abuse.

[120] Conduct approaching serious criminality or egregious fraud are but examples of well-accepted and “substantially incontestable” considerations of public policy that may override the countervailing public policy that favours freedom of contract. Where this type of misconduct is reflected in the breach of contract, all of the circumstances should be examined very carefully by the court. Such misconduct may disable the defendant from hiding behind the exclusion clause. But a plaintiff who seeks to avoid the effect of an exclusion clause must identify the overriding public policy that it says outweighs the public interest in the enforcement of the contract. In the present case, for the reasons discussed below, I do not believe Tercon has identified a relevant public policy that fulfills this requirement.

[121] The present state of the law, in summary, requires a series of enquiries to be addressed when a plaintiff seeks to escape the effect of an exclusion clause or other contractual terms to which it had previously agreed.

[122] The first issue, of course, is whether as a matter of interpretation the exclusion clause even *applies* to the circumstances established in evidence. This will depend on the Court’s assessment of the intention of the parties as expressed in the contract. If the exclusion clause does not apply, there is obviously no need to proceed further with this

analysis. If the exclusion clause applies, the second issue is whether the exclusion clause was unconscionable at the time the contract was made, “as might arise from situations of unequal bargaining power between the parties” (*Hunter*, at p. 462). This second issue has to do with contract formation, not breach.

[123] If the exclusion clause is held to be valid and applicable, the Court may undertake a third enquiry, namely whether the Court should nevertheless refuse to enforce the valid exclusion clause because of the existence of an overriding public policy, proof of which lies on the party seeking to avoid enforcement of the clause, that outweighs the very strong public interest in the enforcement of contracts.

IV. Application to the Facts of this Case

[124] I proceed to deal with the issues in the sequence mentioned above.

A. *Did the Ministry Breach Contract A?*

[125] The trial judge found that the parties intended to create contractual relations at the bidding stage (i.e. Contract A): 2006 BCSC 499, 53 B.C.L.R. (4th) 138, at para. 88. I agree with that conclusion. If there were no intent to form Contract A, there would be no need to exclude liability for compensation in the event of its breach.

[126] The Ministry argued that Contract A was not breached. It was entitled to enter

into Contract B with Brentwood and it did so. There was no privity between the Ministry and EAC. The Ministry would have had no direct claim against EAC in the event of deficient performance. I accept as correct that Brentwood, having obtained Contract B, was in a position of considerable flexibility as to how and with whom it carried out the work. Nevertheless, it was open to the trial judge to conclude, as she did, that the RFP process was not conducted by the Ministry with the degree of fairness and transparency that the terms of Contract A entitled Tercon to expect. At the end of an unfair process, she found, Contract B was not awarded to Brentwood (the eligible bidder) but to what amounted to a joint venture consisting of Brentwood and EAC. I therefore proceed with the rest of the analysis on the basis that Contract A was breached.

B. What is the Proper Interpretation of the Exclusion of Compensation Clause and Did the Ministry's Conduct Fall Within its Terms?

[127] It is at this stage that I part company with my colleague Cromwell J. The exclusion clause is contained in the RFP and provides as follows:

2:10 . . .

Except as expressly and specifically permitted in these Instructions to Proponents, no Proponent shall have any claim for compensation of any kind whatsoever, as a result of participating in this RFP, and by submitting a Proposal each Proponent shall be deemed to have agreed that it has no claim.

In my view, “participating in this RFP” began with “submitting a Proposal” for consideration. The RFP process consisted of more than the final selection of the winning bid and Tercon

participated in it. Tercon's bid *was* considered. To deny that such participation occurred on the ground that in the end the Ministry chose a Brentwood joint venture (ineligible) instead of Brentwood itself (eligible) would, I believe, take the Court up the dead end identified by Wilson J. in *Hunter*:

. . . exclusion clauses, like all contractual provisions, should be given their natural and true construction. Great uncertainty and needless complications in the drafting of contracts will obviously result if courts give exclusion clauses strained and artificial interpretations in order, indirectly and obliquely, to avoid the impact of what seems to them *ex post facto* to have been an unfair and unreasonable clause. [p. 509]

Professor McCamus expresses a similar thought:

. . . the law concerning exculpatory clauses is likely to be more rather than less predictable if the underlying concern is openly recognized, as it is in *Hunter*, rather than suppressed and achieved indirectly through the subterfuge of strained interpretation of such terms. [p. 778]

[128] I accept the trial judge's view that the Ministry was at fault in its performance of the RFP, but the conclusion that the process thereby ceased to be the RFP process appears to me, with due respect to colleagues of a different view, to be a "strained and artificial interpretatio[n] in order, indirectly and obliquely, to avoid the impact of what seems to them *ex post facto* to have been an unfair and unreasonable clause".

[129] As a matter of interpretation, I agree with Donald J.A. speaking for the unanimous court below:

The [trial] judge said the word “participating” was ambiguous. With deference, I do not find it so. The sense it conveys is the contractor’s involvement in the RFP/contract A stage of the process. I fail to see how “participating” could bear any other meaning. [Emphasis added; para. 16.]

Accordingly, I conclude that on the face of it, the exclusion clause applies to the facts described in the evidence before us.

C. Was the Claim Excluding Compensation Unconscionable at the Time Contract A was Made?

[130] At this point, the focus turns to contract formation. Tercon advances two arguments: firstly, that it suffered from an inequality of bargaining power and secondly, (as mentioned) that the exclusion clause violates public policy as reflected in the *Transportation Act*.

(1) Unequal Bargaining Power

[131] In *Hunter*, Dickson C.J. stated, at p. 462: “Only where the contract is unconscionable, as might arise from situations of unequal bargaining power between the parties, should the courts interfere with agreements the parties have freely concluded.”

Applying that test to the case before him, he concluded:

I have no doubt that unconscionability is not an issue in this case. Both Allis-Chalmers and Syncrude are large and commercially sophisticated companies.

Both parties knew or should have known what they were doing and what they had bargained for when they entered into the contract. [p. 464]

While Tercon is not on the same level of power and authority as the Ministry, Tercon is a major contractor and is well able to look after itself in a commercial context. It need not bid if it doesn't like what is proposed. There was no relevant imbalance in bargaining power.

(2) Policy of the *Transportation Act*

[132] As mentioned earlier, Tercon cites and relies upon the policy of the Act which undoubtedly favours the transparency and integrity of the bidding process. I have already discussed my reasons for rejecting Tercon's argument that this "policy" operates as a bar to the ability of the parties to agree on such commonplace commercial terms as in the circumstances they think appropriate. In addition, the exclusion clause is not as draconian as Tercon portrays it. Other remedies for breach of Contract A (specific performance or injunctive relief, for example) were available.

[133] In this case, injunction relief *was* in fact a live possibility. Although Tercon was not briefed on the negotiations with other bidders, the trial judge found that Glenn Walsh, the owner of Tercon, "had seen representatives of EAC with Brentwood following [the Brentwood/EAC interviews with the Ministry and Bill Swain of Brentwood]", and when asked whether Tercon was going to sue, Walsh had said "no" without further comment. Had Tercon pushed for more information and sought an injunction (as a matter of private law, not public law), at that stage the exclusion clause would have had no application, but Tercon did

not do so. This is not to say that estoppel or waiver applies. Nor is it to say that injunctive relief would be readily available in many bidding situations (although if an injunction had been sought here, the unavailability of the alternative remedy of monetary damages might have assisted Tercon). It is merely to say that the exclusion clause is partial, not exhaustive.

[134] The Kincolith road project presented a serious construction challenge on a tight time frame and within a tight budget. Contract A did not involve a bid for a fixed price contract but for the right to negotiate the bid details once the winning proponent was selected. In such a fluid situation, *all* participants could expect difficulties in the contracting process. Members of the construction bar are nothing if not litigious. In the circumstances, the bidders might reasonably have accepted (however reluctantly) the Ministry's need for a bidding process that excluded compensation, and adjusted their bids accordingly. The taxpayers of British Columbia were not prepared to pay the contractor's profit twice over — once to Brentwood/EAC for actually building the road, and now to Tercon, even though in Tercon's case the "profit" would be gained without Tercon running the risks associated with the performance of Contract B. The Court should not be quick to declare such a clause, negotiated between savvy participants in the construction business, to be "contrary to the Act".

D. Assuming the Validity of the Exclusion Clause at the Time the Contract was Made, is There Any Overriding Public Policy That Would Justify the Court's Refusal to Enforce it?

[135] If the exclusion clause is not invalid from the outset, I do not believe the

Ministry's performance can be characterized as so aberrant as to forfeit the protection of the contractual exclusion clause on the basis of some overriding public policy. While there is a public interest in a fair and transparent tendering process, it cannot be ratcheted up to defeat the enforcement of Contract A in this case. There *was* an RFP process and Tercon participated in it.

[136] Assertions of ineligible bidders and ineligible bids are the bread and butter of construction litigation. If a claim to defeat the exclusion clause succeeds here on the basis that the owner selected a joint venture consisting of an eligible bidder with an ineligible bidder, so also by a parity of reasoning should an exclusion clause be set aside if the owner accepted a bid ineligible on other grounds. There would be little room left for the exclusion clause to operate. A more sensible and realistic view is that the parties here expected, even if they didn't like it, that the exclusion of compensation clause would operate even where the eligibility criteria in respect of the bid (including the bidder) were not complied with.

[137] While the Ministry's conduct was in breach of Contract A, that conduct was not so extreme as to engage some overriding and paramount public interest in curbing contractual abuse as in the *Plas-Tex* case. Brentwood was not an outsider to the RFP process. It was a legitimate competitor. All bidders knew that the road contract (i.e. Contract B) would not be performed by the proponent alone. The work required a large "team" of different trades and personnel to perform. The issue was whether EAC would be on the job as a major sub-contractor (to which Tercon could not have objected) or identified with Brentwood as a joint venture "proponent" with EAC. All bidders were made aware of a certain flexibility with

respect to the composition of any proponent's "team". Section 2.8(b) of the RFP provided that if "a material change has occurred to the Proponent since its qualification under the RFEI, including if the composition of the Proponent's team members has changed, . . . the Ministry may request [further information and] . . . reserves the right to disqualify that Proponent, and reject its Proposal". Equally, "[i]f a qualified Proponent is concerned that it has undergone a material change, the Proponent can, at its election, make a preliminary submission to the Ministry, in advance of the Closing Date, and before submitting a Proposal. . . . The Ministry will, within three working days of receipt of the preliminary submission give a written decision as to whether the Proponent is still qualified to submit a Proposal."

[138] The RFP issued on January 15, 2001. The Ministry was informed by Brentwood of a "proposed material change to our team's structure" in respect of a joint venture with EAC by fax dated January 24, 2001. From the Ministry's perspective, the change was desirable. EAC was a bigger company, had greater expertise in rock drilling and blasting (a major part of the contract) and a stronger balance sheet. EAC was identified in Brentwood's amended proposal as a sub-contractor. In the end, the Ministry did not approve the January 14, 2001 request, presumably because it doubted that a change in the "composition of the Proponent's team's members" could, according to the terms of the RFP, include a change in the Proponent itself.

[139] The Ministry did obtain legal advice and did not proceed in defiance of it. On March 29, 2001, the Ministry noted in an internal e-mail that a Ministry lawyer (identified in the e-mail) had come to the conclusion that the joint venture was not an eligible proponent

but advised that Contract B could lawfully be structured in a way so as to satisfy both Brentwood/EAC's concerns and avoid litigation from disappointed proponents.

[140] I do not wish to understate the difference between EAC as a sub-contractor and EAC as a joint-venturer. Nor do I discount the trial judge's condemnation of the Ministry's lack of fairness and transparency in making a contract B which on its face was at odds with what the trial judge found to be the true state of affairs. Tercon has legitimate reason to complain about the Ministry's conduct. I say only that based on the jurisprudence, the Ministry's misconduct did not rise to the level where public policy would justify the court in depriving the Ministry of the protection of the exclusion of compensation clause freely agreed to by Tercon in the contract.

[141] The construction industry in British Columbia is run by knowledgeable and sophisticated people who bid upon and enter government contracts with eyes wide open. No statute in British Columbia and no principle of the common law override their ability in this case to agree on a tendering process including a limitation or exclusion of remedies for breach of its rules. A contractor who does not think it is in its business interest to bid on the terms offered is free to decline to participate. As Donald J.A. pointed out, if enough contractors refuse to participate, the Ministry would be forced to change its approach. So long as contractors are willing to bid on such terms, I do not think it is the court's job to rescue them from the consequences of their decision to do so. Tercon's loss of anticipated profit is a paper loss. In my view, its claim is barred by the terms of the contract it agreed to.

V. Disposition

[142] I would dismiss the appeal without costs.

*Appeal allowed, MCLACHLIN C.J. and BINNIE, ABELLA and ROTHSTEIN JJ.
dissenting.*

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business is our signature

Profile

Judy Wilson is a commercial lawyer with over 20 years of experience dealing with commercial issues related to infrastructure (hospitals, water, wastewater, solid waste, energy, etc.) and public procurement of goods and services, as well as outsourcing. She is recognized in *Chambers Global: The World's Leading Lawyers for Business 2009* in the Projects: PPP & Infrastructure category.

Relevant Experience

Since joining Blakes, Judy has advised clients locally, nationally and internationally on the full spectrum of infrastructure and public procurement issues. She has extensive international and domestic experience in contracts to engage the private sector in the provision of traditional "government" services, including design-build, operations, and maintenance and facilities management of public sector facilities, as well as the provision of clinical services in the community-care sector.

Recent projects include:

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Professional Experience

Judy also taught part time in the Department of Law at Carleton University for approximately 12 years. Her areas of teaching experience include municipal law, contract law, business law, labour law and building contracts, and public tender systems.

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