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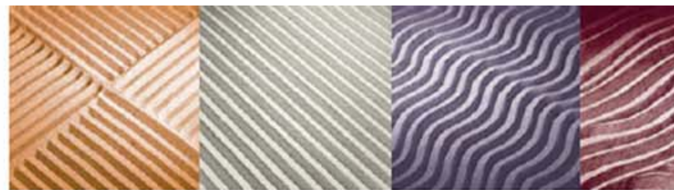

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CONSTRUCTION COMMUNIQUÉ

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PROCUREMENT & TENDERING LAW: THE SUPREME COURT OF CANADA DECLINES TO IMPROVE CERTAINTY IN RELATION TO EXCLUSION OF LIABILITY CLAUSES

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Creation of Contract "A"

Parties involved in procurement, whether in the construction industry or otherwise, will be familiar with the concept of "Contract A/Contract B". First established by the Supreme Court of Canada in *The Queen v. Ron Engineering*, [1981] 1 S.C.R. 111, this concept provides that in certain circumstances a given procurement process may give rise to a binding contractual relationship between the party initiating the process (who can be termed the "Owner") and each party who responds (who can be termed the "Bidders"). Not every procurement process will give rise to such a binding contract but where it does the call for tenders is viewed in law as an "offer" by the Owner to consider the bids its receives and to ultimately enter into a contract to complete the project in question where it accepts one of those bids. Bidders then "accept" this offer where they submit a bid that complies with the requirements set out in the tender documents. Where a Bidder does so, a contract arises, called "Contract A".

The terms and conditions of "Contract A" are important to both Owners and Bidders, since they will regulate the tendering process and impose duties on the parties. As a result, a question often arises in the area of tendering and procurement: what are the terms and conditions of "Contract A"? To answer this question, the parties must look at the tender documents themselves. In addition, a number of terms may be *implied* by the Courts, where such an implied term would not be contrary to a clear and express term found in the tender documents. For example, a term typically implied by the Courts is an obligation on the part of the Owner to accept the lowest bid. However, this implied term is often prevented from arising because Owners place express language to the contrary in their tender documents.

Two of the most frequently implied terms of Contract A are obligations on the part of the Owner to treat all bidders fairly, and to accept only bids that comply with the instructions to bidders contained in the tender documents. An interesting question arises in law as to whether Owners can prevent the breach of such implied terms from giving rise to liability by including in their tender documents broadly worded exclusion of liability clauses. This question arose in the case of *Tercon Contractors Ltd. v. British Columbia*, 2010 SCC 4, which involved six contractors who submitted bids to the Ministry of Transportation and Highways in relation to the construction of a stretch of highway. Tercon submitted the second lowest bid. The lowest bid was submitted by a joint venture comprised of two parties. However, only one of the two parties to the joint venture had been deemed during a prequalification process to be eligible to submit a bid. The Ministry

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made efforts to disguise the involvement of the non-eligible party in the lowest bid, and chose this low bid.

Tercon sought damages against the Ministry, alleging that it accepted a non-compliant/non-eligible bid in breach of Contract A, and breached its overall duty of fairness. The Ministry argued that it should be able to rely on an exclusion clause contained in the tender documents, which read as follows:

> 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.

Decisions of the Lower Courts

At trial, the judge held that this clause would not be enforced, because the Ministry had so fundamentally breached Contract A that none of its terms should be available to protect the Ministry. The trial judge further held that the exclusion clause was not drafted in such a way as to make it clear that it would apply in the specific circumstances now in question. Tercon was awarded over $3 Million in damages.

The Ministry appealed, and the Court of Appeal unanimously reversed the trial decision, holding that the exclusion clause offered a complete defence to the Ministry. It held that the exclusion clause was clear and unambiguous. The Court considered arguments that had been made by Tercon about the need to ensure fairness in Canadian tendering law. It stated:

> …the answer lies not in judicial intervention in commercial dealings like this but in the industry's response to all-encompassing exclusion clauses. If the major contractors refuse to bid on highway jobs because of the damage to the tendering process [that would be caused by such exclusion clauses], the Ministry's approach may change. Or, the industry may be prepared to accept that the Ministry wants to avoid suits for contract A violations, and the contractors will continue to bid in the hope that the Ministry acts in good faith.

In essence, the Court of Appeal was indicating that sophisticated businessmen involved in commercial projects should be left to decide for themselves whether they were prepared to do business with Owners who include clauses in tendering documents that might have the effect of permitting the Owner to breach Contract A without liability to bidders. Where a bidder is prepared to do so, then the bargain entered into freely should be enforced by the Courts, even where that bargain includes what might be viewed as harsh exclusion clauses protecting the Owner and leaving Bidders without recourse where they have suffered losses as a result of a breach by the Owner of Contract A. This approach by the Court of Appeal might be viewed as a decision that emphasizes the importance of freedom of contract and certainty of terms: parties are free to bargain as they choose, and it is important that they be able to be certain that the clear terms they bargain for will be enforced by the Courts.

Supreme Court Decision

Tercon appealed to the Supreme Court of Canada which, in a narrow split decision, reversed the decision of the Court of Appeal and held that the exclusion clause would not apply. The Supreme Court was unanimous that the first question will always be whether, as a matter of interpretation, the clause in question was intended to apply to the facts at issue. That is, was the clause meant to exclude liability in the circumstances that actually ensued? The majority of the Supreme Court held that the clause was *not* meant to apply to what in fact occurred in this case. In essence, the majority read the exclusion clause in question in a narrow and exacting manner, and held that a clause excluding compensation for claims resulting from "participating in this RFP" did *not* exclude claims for compensation arising where the Ministry unfairly considered a bid from a party who was not supposed to have been participating *at all*. In rendering this decision, the majority expressed concern for the integrity, fairness and transparency of the procurement process, particularly public procurement.

The minority of the Supreme Court of Canada acknowledged the importance of integrity in the tendering process, but also emphasized – as did the Court of Appeal – the importance of permitting parties the freedom to enter into contracts as they see fit, and the importance of providing to those parties the certainty that, once they enter into a bargain freely, the court will hold both sides to that bargain. The minority was of the view that the exclusion clause was clear and unambiguous, and there was no reason why Tercon should not be held to the clause that it agreed to. It observed that Tercon was a large and sophisticated contractor with prior experience in litigation involving Contract A. As a result, it would have known the risks posed by the exclusion clause in the tender documents, and yet it nonetheless chose to submit a bid and participate in the RFP process. If, as stated in the exclusion clause, there can be no compensation for losses arising from "participating in this RFP", then surely there can be no compensation for submitting a bid, which is simply part of "participating in this RFP". The minority cautioned against giving a strained, narrow and artificial interpretation to the clause, simply in order to avoid what, after the fact, might appear to be an unfair clause.

In short, the majority of the Supreme Court of Canada favoured a critical approach to exclusion clauses, in which they will be read strictly and narrowly, even where on first glance the clause appears to be broad, clear and unambiguous. In doing so, the majority appears to have signalled that the courts should continue to police tendering and procurement processes closely, and take a significant role in determining for itself on a case-by-case basis what is "fair" and what will preserve "integrity". On the other hand, the minority favoured an approach where commercial parties are to be left free to bargain for terms as they see fit, and where certainty of contract is important. The minority decision suggests that the courts should not play an integral role in policing the tendering process on a case-by-case basis, but should instead leave it to the parties to decide for themselves what terms they think are "fair", and then simply hold those parties to their agreement.

One might argue that the majority have declined to improve certainty in the law of tendering. Given the very narrow approach taken to interpreting the exclusion clause, one might argue that it will continue to be a very open question in any given case whether an exclusion clause will apply. Commercial parties involved in tendering and procurement may well continue, to some extent, to have an inability to know with any certainty whether the bargain they have struck will be enforced or overruled by the Court. Owners will no doubt continue to put variously worded exclusion clauses in their tender documents, trying to make them broad and clear, and Bidders will no doubt continue to submit bids. One might argue that both will continue to have uncertainty whether a court will apply the exclusion clause at the end of the day.

The central issue in *Tercon* may well come down to one very interesting question: is it more important for courts to be able to police "fairness" and "integrity" on a case-by-case basis, or is it more important for commercial parties to have certainty when entering into contracts? However you might answer this question, for now the Supreme Court appears to have favoured the former over the latter.

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