Reflections on the Evolution of Fairness in Public Procurement

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Editor's Note

It would be hard to imagine a more active area of interest in construction law than that of the law of public tendering. Within that body of law, the question of fairness predominates. On one hand one sees recognition in certain case law of the principle of party autonomy, while in other cases one sees courts reining back the parties from unfair conduct. We are proud to present our readers with the following contribution, which treats these issues in some detail. It is a tribute to the author's facility with this area of the law that he is able to seamlessly incorporate a quote from Oscar Wilde into an article on tendering.

The unfairness that concerns the author is not the obvious unfairness of a party not playing by the rules it has set. Unfairness has another aspect, where the rules themselves are the source of the perceived unfairness. Here we see a kind of tectonic collision between the principles of party autonomy and the rule of law and this is the area that interests the author. The article begins with three examples of uncertainty in the law: (1) a technical non-compliance not affecting price; (2) a re-tender on identical terms resulting in allegations of bid shopping; and (3) uncertainty arising from the bargained-for "adjustment" or "correction" of bid prices. In each case the point is made that in the real world the need for certainty and predictability is not being met. The reader might at this stage flip to the interesting and creative solution proposed by Christopher Wu in his guest article at the end of this volume.

This article traces the evolution of concepts of fairness from the seminal decision in *Ron Engineering* to the controversial 2007 decision of the Supreme Court of Canada in *Double N*. The concept of fairness is explored and discussed as a contractual term alongside standard privilege clauses; as a judicial device to deal with non-compliance; as an implied term of contract; and most interestingly, perhaps, as a tort duty. The law as it applies to public tenders is also contrasted with the law applying to public requests for proposals (RFPs).

In the final section the author brings these concepts together in the context of what is now a much litigated and active area of construction law: the application of judicial review to public tendering decisions. The author's

1 The author wishes to thank his colleagues Michael Swartz and Bruce Engell for their invaluable insights during the preparation of this article.

comments on this area represent some of the first published ideas on this aspect of this subject in Canada.

This article was submitted while *Tercon* was still under reserve in the Supreme Court of Canada. We were able to obtain a brief note updating this article just as it went to press. Please see the Author's Note at the end of this article.

Duncan Glaholt

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One should always play fairly when one has the winning cards. — Oscar Wilde

1. INTRODUCTION

Over a quarter of a century has passed since the Supreme Court of Canada decided *Ron Engineering*.[2] In the years since, a staggering number of related cases[3] has filled the law reports. Few months pass without another notable tendering case being released. The decisions come from across the country, from the lowest level of provincial court to the Supreme Court of Canada and nothing suggests that the growth in this area of the law will cease any time soon. On the contrary, for the reasons this article will explore, the pace of development may only quicken.

Those on the front lines of public procurement are most immediately affected by this dynamic area of law. On a daily basis, bidding contractors must grapple with complex and onerous tender documents, often requiring multiple detailed forms to be submitted over two-part bid closings, with the process governed by complicated rules and procedures. Owners, even with the assistance of trained experienced procurement staff, often face stressful and difficult decisions. They struggle to find their way through flawed bid submissions, budget overruns, changing circumstances, and political pressure to reach a decision about the "right" award to make — with the best answer likely being the one that will avoid a successful multi-million dollar lawsuit from an unhappy losing bidder. In this era of massive infrastructure stimulus spending and the large size of the projects going out to tender, the risks on both sides are very high, and even the slightest slip could be disastrous.

Far from representing a stable, clear set of rules that can be relied upon with confidence, which from the perspective of business efficacy[4] should be a paramount objective, we see that the present condition of the law of tender leaves anyone facing a difficult tender issue having to seek guidance and to discern meaning from confusing statements and seemingly conflicting principles spread throughout the relevant authorities. Simply put, this area of law is a minefield.

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2 *R. v. Ron Engineering & Construction (Eastern) Ltd.*, [1981] 1 S.C.R. 111.

3 A simple legal database search turns up almost 350 cases that refer to *Ron Engineering*.

4 An important value espoused by the minority of the Supreme Court of Canada in *Double N Earthmovers Ltd. v. Edmonton (City)*, [2007] 1 S.C.R. 116, discussed more fully in section 4(d) below.

How did things evolve to this point? Why *do* the "rules of the game" seem to be so uncertain? Why, when confronted with these issues, are they so hard to solve? How did we end up in this quagmire?

2. THE NATURE OF THE PROBLEM

Applying the Oscar Wilde quote at the outset of this paper, it is the owner[5] in the tender process who, at least in the first instance, sets the rules by which the hand is to be played out and in that unique sense has the winning cards. As a result, it is the *owner* who must play fairly.

Consider the obligations imposed on the house at a blackjack table in a casino. While the gamblers are each trying to maximize their own winnings (and doing so comes at a cost the others at the table, depending on the available cards), it is the dealer who must be seen to be scrupulously fair as the overall odds favour the casino.[6] The house rules chosen for the game may strongly affect the outcome. For example, whether the dealer must stand on "17" or has the option of "taking" will affect the odds, as will the number of decks used.

The primary source of confusion in the current state of the law of tender is the result of a fundamental tension between the competing notions of "freedom of contract" (the owner is free to make up whatever rules of the game the owner may choose) and "fairness" (the players involved in the game, i.e., the bidders, are treated equally and the outcome appears to be just).

To be clear, the heart of the problem is *not* where the rules are applied unequally to all bidders in a particular case. In fact, the cases involving unequal treatment tend to be the easy ones to understand and follow. When an owner has given one bidder a hidden advantage not enjoyed by others, it is easy to conclude that the owner was being unfair and should answer for such improper behaviour.

The real source of the current uncertainty in the law is when the court's view of what is a fair set of rules is not the set of rules that the owner, having exercised freedom of contract, has actually adopted and applied. We run into serious problems when the owner's *own rules* are thought not to be fair, in the sense of not being the *right rules* (in a normative sense) for the game at hand.

The cases suggest that whether or not the rules are considered fair seems to depend on whether they accord with some independent sense of what is considered fair play. For exampe, consider rule that says "red-haired gamblers will always win at this blackjack table". That the casino owner might be free to create such a rule, which is duly posted for all to see and is applied evenly and consistently, does not displace the feeling that there is just something wrong about the rule itself.

It is submitted that the tension between fairness and freedom of contract in this sense underlies many of the significant court decisions in this area of the law. Finding the balance between the two concepts is an exercise that courts must undertake on a regular basis; the resulting decisions are often inconsistent and in some instances irreconcilable. As we will see, some courts are quite prepared to uphold the

5 "Owner" is used throughout as any public tender calling authority.

6 A survey of a number of sources suggests a range of a 5–10% advantage for the dealer.

strict letter of the rules,[7] telling bidders "you knew full well what you were getting into, and nobody forced you to play." Others go to great lengths to avoid application of these rules, in order to prevent what would be an unfair (in the sense of *undesirable*) outcome.

On occasion, the presence of tensions in the tender process have been explicitly recognized by the courts. A refreshingly open and frank discussion of the competing interests in the process is found in the following passage from the case of *Fred Welsh Ltd. v. B.G.M. Construction Ltd.*,[8] which was dealing with a subcontractor's allegation of bid-shopping[9] by a general contractor:

> Though there has been some apparently conflicting authority regarding the *Ron Engineering* analysis, the courts agree on the need to create and monitor a legal framework which attempts to preserve the reasonable expectations of those involved in the bidding process. The court must attempt to protect the integrity of the bidding system in the context of the tension between the parties involved in the process. Owners and general contractors who invite bids generally desire to retain some flexibility in their final decision, striving to maintain control and discretion over their choice of contractor. General contractors, or subcontractors in this instance, are concerned that favouritism not be shown other tenderers and that arbitrary or capricious decisions not be made. Those submitting tenders are willing to accept some risk and bear the cost of preparing an unsuccessful bid, provided the "rules of the game" are clearly spelled out and define what actually happens. Those accepting tenders are willing to forsake ultimate discretion to attract quality, competitive bids.[10]

What this passage does not address, however, is what happens if the rules of the game are clearly spelled out, *but the rules themselves are unacceptable*, at least in the context of well-established tender process values like the "preservation the integrity of the bidding system." What if, for example, the rules of the game expressly provide for the right of the owner to be arbitrary or capricious?

3. EXAMPLES OF UNCERTAINTY

Before examining the development of this tension, and the reasons for the confusion and uncertainty in the legal landscape, it is perhaps useful to give a flavour of the kinds of challenges parties face with some concrete examples of the kinds of decisions routinely emerging from our courts in the area.

(a) The "Eye of the Beholder"

Imagine you are undertaking a renovation project to a health care facility. You decide to go to tender using the local bid depository system. Several bids are re-

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7 The term rules is meant here to refer to such provisions as "privilege clauses", "discretion clauses", "exclusion of liability clauses", and the like, which expressly reserve to owners the right to do things and behave in certain ways that may seem to be at odds with independent notions of fair play.

8 (1996), 27 C.L.R. (2d) 269 (B.C. S.C.).

9 See note 19, *infra*.

10 *Supra* note 4, at p. 284.

ceived in response to the tender call, with the lowest bid being significantly lower than the others. A review of the bids is undertaken and it is discovered that the lowest bidder had technically violated the rules of the bid depository, although taking into account the effect of the breach on price, the bid remained the lowest. A second violation by the low bidder was then identified, and the adjustment to the price that followed rendered the bid no longer the lowest. The bidder then explains that there is a misunderstanding about the second instance relating to misnaming of subtrades and that in fact everything is in order. Further investigation reveals other shortcomings with the bid, but the financial impact of each individually is quite minor. What do you do? In light of these flaws, do you award to the low bidder anyway, or reject that bid and award to the next lowest? What's the fairest thing to do?

That was the dilemma faced by the owner in *Chandos Construction Ltd. v. Alberta (Alberta Infrastructure)*.[11] In the end, the owner (the Minister of Infrastructure) decided to treat all of the issues with the low bid as "minor" and awarded the contract to the lowest bidder. The Minister was no doubt comforted by the language contained in the bid documents, which said:

> The Minister may accept or waive a minor and inconsequential irregularity, or where practicable to do so, the Minister may, as a condition of bid acceptance, request a Bidder to correct a minor and inconsequential irregularity with no change in bid price. . . . *The determination of what is, or is not, a minor and inconsequential irregularity*, the determination of whether to accept, waive, or require correction of an irregularity, and the final determination of the validity of a bid, *shall be at the Minister's sole discretion*.[12] [Emphasis added.]

The second lowest bidder, Chandos, sued the Minister, claiming that the low bid was non-compliant and should not have been accepted. Doing so, it was argued, was a breach of the owner's duty of fairness owed to Chandos.

The action proceeded as follows:

> (a) At the trial in 2004, the judge reviewed the applicable jurisprudence and the relevant tests and agreed with the Minister's decision, concluding that the problems with the low bid were indeed "minor and inconsequential" and that the bid was capable of acceptance. The action was dismissed.
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> (b) Chandos appealed, and in 2006 the Alberta Court of Appeal overturned the trial decision.[13] On the first violation of the bid depository rules (involving the failure to give advance notice of self-bidding for

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11 2004 ABQB 836; reversed (2006), 50 C.L.R. (3d) 1 (Alta. C.A.); reversed (2007), 66 C.L.R. (3d) 166 (Alta. C.A.).

12 See the discussion of such so-called "discretion clauses" below, at note 41 and following. Someone unfamiliar with the law of tender might be forgiven for believing, based on these express words, that it is in fact the Minister at the end of the day who gets to determine whether a problem with a bid amounts to a "minor and inconsequential irregularity", after all, that is what the words actually say. That is not however the way the law has developed.

13 (2006), 380 A.R. 152 (C.A.).

woodwork), the Court held that the Minster's remedy of adjusting the price to compensate for the violation was not permissible; this issue with the bid was therefore not "minor and inconsequential" (regardless of what the Minister may have thought) but instead was fatal. Damages were awarded to Chandos of almost $300,000.

(c) The Minister sought leave appeal to the Supreme Court of Canada[14] in 2007. Rather than granting or dismissing the application for leave, the Supreme Court remanded the case back to the Alberta Court of Appeal for reconsideration in light of the then recently released SCC decision in *Double N Earthmovers*.[15]

(d) The Court of Appeal reviewed the case and determined that the evidentiary record was insufficient to determine whether the correction to the bid, in terms of the substitution of the woodwork subcontractor, took place before or after the award of the contract. According to the Court's analysis of the *Double N* case, the question of timing was critical. The Court ordered a new trial, effectively sending the parties back to where they had started;

(e) Presumably facing the prospect of the time and expense of another trial, Chandos applied in 2008 for a reargument of the issues before the Court of Appeal, seeking to persuade the Court that another trial was not necessary. The Court dismissed the application, insisting that the evidence was needed to decide the issue.[16]

This sad tale illustrates two of the key principles governing tender cases. This first, whether the circumstances were fair tends to be in the eye of the beholder; what one court may consider the fair treatment of bidders may be considered by another to be wholly unfair. Any language in the tender documents that appears to either stand in the way of that conclusion or that may call for a different result will be treated and disposed of accordingly.

The second, the parties should be prepared for the long haul in a disputed tender situation. Tender cases are often hard fought and the litigation may last for years,[17] with the project in question having been long completed by the time the case reaches its conclusion. Nevertheless, who would ever expect to be in litigation for five years — all the way to the Supreme Court of Canada and back — over questions surrounding the naming of a woodwork subcontractor in a bid?

(b) The "Chicken or the Egg"

The competing opinions over whether a particular set of facts and circumstances should be considered as being fair to a bidder are not, of course, arbitrarily subjective; they are arrived at depending on the opinion the court hearing the matter

14 (2007), 412 A.R. 397 (note) (S.C.C.).

15 *Double N*, *supra* note 4, and discussed further in section 4(d) below.

16 2008 ABCA 14. The author is advised that the case was resolved before the second trial.

17 The events of *Double N*, *supra* note 4, took place more than 20 years before the S.C.C. rendered its decision.

holds on the broader question of whether fairness enjoys primacy over freedom of contract, or *vice versa*. The recent case of *Amber Contracting Ltd. v. Halifax (Regional Municipality)*[18] illustrates this point.

In *Amber Contracting*, the Region of Halifax had called for tenders for a sanitary pumping station. The three bid prices received all exceeded the approved budget for the project by a significant amount. The Region therefore elected to shelve the project for six months and then came back out to tender with exactly the same project. On the second tender, a fourth bidder submitted a price along with the original three, which beat out the others. The fourth bidder was awarded the contract.

The tender documents contained the words:

> The Owner specifically reserves the right to reject all tenders if none is considered to be satisfactory and, in that event, at its option, to call for additional tenders . . . The Owner reserves the right to cancel any request for tender at any time without recourse by the contractor. The Owner has the right to not award this work for any reason including choosing to complete the work with the Owner's own forces.

In the ensuing litigation, Amber Contracting, the second lowest bidder, complained that the Region effectively engaged in bid-shopping[19] by accepting the lower bid of the fourth bidder in the second tender. The trial judge agreed and considered the conduct of the Region in seeking to get a better price through a retender to have been unfair to Amber Contracting. Having concluded that the behaviour of the Region was a breach of its implied obligations to Amber Contracting, the Court would not let the Region hide behind the privilege language of the tender documents.

On appeal,[20] the majority of the Nova Scotia Court of Appeal overturned the trial decision. The majority viewed the trial judge's approach as backwards. Rather than looking at the privilege clause and then determining what was fair, the trial judge had determined what was fair (or unfair in this case) and *then* considered the privilege clause. Here, the privilege clause gave the Region the right to act as it did, so no breach of duty had occurred.

In dissent, Hamilton J. sided with the trial judge, taking the approach that what the Region did was indeed unfair (being correctly viewed as "bid-shopping"), and that the words of the privilege clause could not have meant to permit such conduct.

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18 (2008), 267 N.S.R. (2d) 44 (S.C.); reversed (2009), 84 C.L.R. (3d) 7 (N.S. C.A.).

19 In *Naylor Group Inc. v. Ellis-Don Construction Ltd.*, [2001] 2 S.C.R. 943, 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.

20 *Amber Contracting Ltd. v. Halifax (Regional Municipality)*, 2009 NSCA 103.

Looking at the straight tally of judges who considered the question in *Amber Contracting*,[21] two judges voted on the side of fairness and two judges voted on the side of freedom of contract. If you are a municipality trying to decide whether you can reshelve a project that came in over budget on the tender, and reissue the same project six months from now, would you be confident in proceeding with that plan with this case in your back pocket?

(c) "Do as I Say, Not as I Do"

Interpreting what these tender cases mean can be a risky exercise. For one municipality faced with a tender dilemma, relying on an earlier appellate court decision (or at least its interpretation of an appellate court decision) to figure out the proper course of action in seemingly identical factual circumstances proved to be disastrous.[22]

In 2005, the Town of Newmarket went to tender on a recreation facility. Bids were received from a number of general contractors, including Maystar General Contractors Inc. and Bondfield Construction Company. When the bid prices were read out, it seemed Maystar was low, and Bondfield was third lowest. Further review of the Bondfield bid showed that there was an apparent discrepancy in its bid price: the *base bid* quoted one price (in both words and figures) but the GST calculation and the total bid price did not accord with that base bid price. In fact, working backwards, the two latter numbers suggested that the base bid price before GST was intended to be approximately $500,000 higher than what was actually written.

Which was the correct price? The stated base bid price or an "adjusted" base bid price extrapolated from the total bid price and the GST? Given the uncertainty surrounding Bondfield's bid price, and based on the decision in *Vachon Construction Ltd. v. Cariboo (Regional District)*,[23] the Town was initially inclined to reject the Bondfield in favour of the Maystar bid, despite receiving correspondence from Bondfield after bid closing in which Bondfield insisted that the lower price was the correct one.

However, before the final decision on the award was made, the Ontario Court of Appeal case of *Bradscot (MCL) Ltd. v. Hamilton-Wentworth Catholic District School Board*[24] was brought to the Town's attention. In *Bradscot*, the lowest bidder (Bondfield again!) had submitted a tender where the bid form contained price discrepancies relating to the calculation of the GST and the total price. Despite the

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21 But not in the result, since the decision of majority in the appellate court, of course, becomes "the law".

22 *Maystar General Contractors Inc. v. Newmarket (Town)*, 2009 ONCA 675.

23 (1996), [1996] B.C.J. No. 1409, 1996 CarswellBC 1466 (C.A.), that a bid price that is vague should be disqualified, since an offer that is uncertain as to price is not capable of acceptance — a very contractual analysis. To make matters more complicated, the very thing the owner usually cannot do is ask for clarification of what was intended by the bidder.

24 (1999), 42 O.R. (3d) 723 (C.A.).

confusion in the prices, the Court of Appeal had held that the base bid price was nevertheless capable of acceptance.[25]

Despite any residual misgivings it may have had, the Town felt it was bound to follow *Bradscot* and awarded the contract to Bondfield at the stated base bid price. In the inevitable litigation brought by Maystar following the award, and to the Town's dismay, both the lower court judge and the Court of Appeal chose to *follow Vachon* and *distinguish Bradscot*. While finding the Town guilty of breaching its legal obligation to be fair to Maystar, the Court recognized the dilemma faced by the Town, and expressed some sympathy for its predicament:

> The Town was in a difficult situation. It wanted to accept the lowest bid for this project in the best interests of its citizens. The Bondfield bid on one reading could have been the lowest bid. *The **Bradscot** case appeared to be a very similar situation where the court allowed the owner to accept a bid that had a price discrepancy on its face. It no doubt believed it was acting in good faith*. However, the Supreme Court has made it clear in the cases it has decided that the integrity of the tender process is essential in order to foster a fair and orderly bidding process where contractors will expend the time, effort and expense to bid, knowing they will be treated fairly and equally. A public owner cannot undermine that process by purporting to accept a bid with an uncertain price, or to encourage contractors to believe that they can communicate with owners after the fact to clarify or explain inconsistencies in their bids.[26] [Emphasis added.]

Unfortunately, these words would presumably be little consolation for the Town (and its taxpayers), who then had to contend with Maystar's claim of over $3 million in damages on account of the "lost profits" Maystar suffered for not having been awarded the contract. Considering Maystar did not have to pick up a shovel to earn any of those profits, one might be excused for thinking Maystar's success in the action is equivalent to having won the jackpot.[27]

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25 One salient difference between the two situations may be that the result of each of the possible ways of calculating what Bondfield intended as its bid price in *Bradscot* was still lower than the next lowest bid price — the resolution of the uncertainty did affect who had submitted the lower bid. In the *Maystar* situation, the interpretation of Bondfield's bid price made *all* the difference, because Maystar's bid price fell in between the two possible Bondfield bid prices. On the one hand, this fact should not make any difference to the analysis, since price is either objectively uncertain or it is not. On the other hand, how the uncertainty was resolved in *Maystar* determined the winning bid and so the stakes in *Maystar* were much higher. For this reason, the uncertainty could not so easily be overlooked.

26 *Maystar*, *supra* note 22, at para. 38.

27 A discussion of the fascinating topic of damages in tender cases is outside the scope of this article. It suffices to say here that the uncertainty surrounding the obligations in the process as discussed in this article applies equally to the damages flowing from their breach. See, for example, the following statement recently made by the Nova Scotia Court of Appeal in *Borcherdt Concrete Products Ltd. v. Port Hawkesbury (Town)*, 2008 NSCA 17, 262 N.S.R. (2d) 163, at paras. 60 and 61:

> . . . The well accepted principle is that the [bidder] should be put in as good a position, financially speaking, as it would have been in had the [owner] performed its obligations under the tender contract. The nor-

These are, of course, but a small sampling of the kinds of decisions those involved in procurement must turn to for guidance when confronted with a bidding question. And can it be said that they provide any guidance at all?

4. "Fairness" as a Contractual Term[28]

(a) *Ron Engineering*

The root cause of the whole issue, of course, is the seminal decision of Estey J. in *Ron Engineering*.

That case addressed a very common problem: how do you hold a bidder to its bid price? The answer, as almost everyone knows by now, was to invent a binding contract between bidders who submit bids and the owner who calls for them — the so-called "Contract A". The Court described the concept in this way:

> The tender submitted by the respondent brought contract A into life . . . 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. . . . 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*.[29] [Emphasis added.]

At one level, this seems to be a neat contractual solution to a thorny contractual problem. A bidder who made a mistake in its bid could, under contract principles of offer and acceptance, withdraw its mistaken offer before acceptance by the owner. By advancing the contractual relationship to the tender call stage, by mak-

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> mal 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 . . . However, a breach of Contract A, as here, does not automatically lead to damages equivalent to the loss of profit. *Damage awards in the tendering context can fall along a spectrum ranging from nominal damages, through the cost of bid preparation, to an award of lost profit*. [Emphasis added.]

28 Fairness in the context of this article generally refers to the *process* of the tender, i.e., how bidders are treated. Although fairness is often tied with good faith, it is possible, of course, for an owner to behave unfairly but do so in good faith. Conversely, an owner may arrive at a result that is fair in terms of process but one which is motivated by bad faith. For a fuller discussion of the distinction, see the thorough and very insightful article by Peter Devonshire, "Contractual Obligations in the Pre-Award Phase of Public Tendering" (1998) 36 Osgoode Hall L.J. 203–244, written prior to the important Supreme Court of Canada cases discussed in this article.

29 *Ron Engineering*, *supra* note 2, at pp.122-123.

ing the submission of a bid be the acceptance of the terms of the bid process, including the term of irrevocability, the bidder is stuck with its mistaken price as long as the mistake itself was not obvious to everyone. Although this may seem harsh, the concern behind *Ron Engineering* was not about the innocently made mistake; the concern was over the potential strategic behaviour of bidders who had ulterior or strategic reasons to withdraw an otherwise valid bid before acceptance using a mistake as the excuse.

Even though fairness itself was not even mentioned in *Ron Engineering*, the motivation for creating the Contract A structure appears to have been the desire to protect the owner from the gamesmanship of bidders. In other words, it was thought to be unfair to owners to allow bidders to manipulate the process to their advantage.

This remarkable invention is truly Canadian. With one possible exception,[30] it appears the rest of the world has managed to continue procurement of projects without adopting this unique framework for bidding.

(b) Fairness and the Privilege Clause

The content of Contract A quickly became the focus of attention in the decisions that followed *Ron Engineering*. Before long the interplay between the express provisions of the tender documents and their applicability to the circumstances at hand became the primary issue in most cases.

Without doubt, at least until the turn of this last century, the majority of tender cases revolved around the privilege clause ("the lowest or any tender not necessarily accepted") and whether such a clause permitted owners to get away with certain conduct found to be objectionable. The question was often whether the privilege trumped, was trumped by, or simply stood alongside other express or implied duties.

When faced with a claim by a disgruntled bidder who had lost out on being awarded a contract, owners would pull out the privilege clause in defence of the claim, inevitably arguing that the clause should properly be read as: "as the owner, I am entitled to accept whichever bid I chose to accept." A bidder examining a set of tender documents and seeing a privilege clause would, presumably, also have no doubt about its meaning: "even though I may be the low bidder, I may not be chosen by the owner". And yet, in case after case, losing bidders (despite the privilege clause) brought court action when treated unfairly, and courts were charged with the task of reconciling this language with the circumstances of the tender in question.

Those circumstances, of course, often involved behaviour on the part of the owner that was indeed worthy of criticism; arguing that those words should not protect an owner from misconduct was often an easy sell. Consider, for example, the decision of the Ontario Court of Appeal in *George Wimpey Canada Ltd. v. Hamilton-Wentworth (Regional Municipality)*,[31] in which the municipal owner

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30 *Ron Engineering* apparently has found favour on the other side of the world in New Zealand. See Devonshire, *supra* note 28, at the text relating to note 52.

31 (1999), *(*sub nom. *Tarmac Canada Inc. v. Hamilton-Wentworth (Regional Municipality))* 48 C.L.R. (2d) 236 (Ont. C.A.).

chose the second lowest bidder over the lowest bidder, because the second lowest bidder was the local contractor. This criterion, which the Region used in the assessment of bids had not, however, been disclosed in the tender documents and so the owner was found to have been unfair[32] to the lowest bidder, in spite of the presence of the standard privilege clause. The promotion of the values of openness and transparency in the rules of a tender can clearly seen to be developing in these early "hidden preferences" cases; explicit language suggesting freedom on the owner's part to do as it pleases is considered incompatible with these values and is carefully circumvented.

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32 Following *Chinook Aggregates Ltd. v. Abbotsford (Municipal District)* (1989), 35 C.L.R. 241 (B.C. C.A.) decided a decade earlier. In that earlier case the municipality had invited bids on a gravel crushing contract by inserting an advertisement in a local newspaper. The advertisement and the instructions stated the standard privilege clause. Chinook submitted the lowest bid but the Town awarded the contract to a local Abbotsford contractor, whose bid was within 10% of Chinook's bid. Chinook was not a local contractor. Unbeknownst to the bidders, the municipality had adopted a policy of preferring bids from local contractors whose bids were within 10% of the lowest bid but had given no notice in its advertisement or in its instructions to potential bidders that it followed this policy.

The B.C. Court of Appeal found that the municipality had consciously made a decision prior to inviting tenders not to give notice of its local preference policy to bidders in its instructions to bidders. The municipality thought that if notice was given this might alert local contractors to the fact that they had a leg up and that the absence of notice would give it a price advantage. On the other hand, outside contractors such as the respondent believed that they were on an equal footing with all bidders. Had Chinook been aware that the municipality might apply a local preference in favour of local contractors up to 10% over the lowest bid, it would not have bid on the job because it would have been virtually impossible, in view of the competitive market, to bid 10% lower than the lowest bidder. The Court was not prepared to accept that the privilege clause gave the municipality the right to exercise a local preference when that local preference was not was not spelled out in the tender documents. The Court reasoned:

> . . . where the appellant [municipality] attaches a condition to its offer, as the appellant did in the case at bar, and that condition is unknown to the respondent [Chinook], the appellant cannot successfully contend that the privilege clause made clear to the respondent bidder, that it had entered into a contract on the express terms of the wording of that clause. There was no consensus between the parties that the wording of the privilege clause governed. It would be inequitable to allow the appellant to take the position that the privilege clause governed when the appellant had reserved to itself the right to prefer a local contractor whose bid was within ten per cent of the lowest bid. By adopting a policy of preferring local contractors whose bids were within ten per cent of the lowest bid, the appellant in effect incorporated an implied term without notice of that implied term to all bidders including the respondent. In so doing it was in breach of a duty to treat all bidders fairly and not to give any of them an unfair advantage over the others.

It is interesting to note that it was a very contractual analysism, the wrongful unilateral imposition by the owner of an implied term in Contract A, which provided the solution to the problem of unfair treatment.

If decisions are made based on rules that the bidders do not know about (such as in *Tarmac*), the resulting award will likely be viewed on an objective basis as arbitrary, and hence unfair. Intuitively, arbitrary decision-making seems antithetical to any competition. Why is this so? What is fundamentally wrong with the decision-maker picking whomever it likes as the winner?

A review of the authorities[33] suggests that where the cost and effort expended in preparing for the competition has no bearing on the outcome, and where the award is made on grounds other than merit, the significant investments made by the bidder are effectively wasted. The courts seem motivated to step in, in those circumstances, to protect bidders' expectations about the process and to provide a fair chance to gain a return on those upfront investments. The entitlement to have those expectations of fair treatment enforced is bought by the expenditures made.[34]

If the tender process can be viewed as a form of competition or game where the owner makes the rules, then the ante, or entrance fee, is the costs of bid preparation.

This notion was expressly recognized by the Supreme Court of Canada in *M.J.B. Enterprises*,[35] in which Iacobucci J. stated:

> The rationale for the tendering process ... is to replace negotiation with competition. This competition entails certain risks for the appellant [tendering a bid]. 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. [v. Blackpool Borough Council*, [1990] 3 All E.R. 25] at p. 30, with respect to a similar tendering process, this procedure is "heavily weighted in favour of the invitor".[36]

This case arose out of the selection by Defence Construction Canada of a "qualified" bid from the lowest bidder Sorochan for certain water works to be undertaken on a Canadian Forces base in Alberta. The plaintiff, M.J.B. Enterprises, the next lowest bidder, would have been given the contract had the contract not been awarded to Sorochan. M.J.B. Enterprises sued Defence Construction for damages for lost profits.

Leading up to the decision of the Supreme Court of Canada, *M.J.B. Enterprises* had been unsuccessful both at trial and on appeal on the basis that the privi-

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33 See, for example, the passage from *Fred Welsh*, *supra* note 8, and the discussion regarding *Mellco*, *infra* note 87 and following.

34 We repeatedly come back to the nagging question: if a bidder knowingly incurs expenses pursuing a bid in which the rules are clearly spelled out, but are highly objectionable, should the interests created by that expenditure nevertheless be protected? Does the bidder deserve to have the court intervene? How is that fair to the owner?

35 [1999] 1 S.C.R. 619.

36 *Ibid.*, at para. 41.

lege clause in question — the "the lowest or any tender not necessarily accepted" — provided a complete defence to the claim.[37]

The argument that the clause should be interpreted in light of the standard industry practice favouring award to the lowest conforming bid was soundly rejected by the Court of Appeal. McClung J.A., writing for the Court, held:

> In our view, there is nothing ambiguous about the phrase, "or any tender". It is a clause placed in the bidding process to protect the expenditure of public funds which are, of course, a common property resource belonging to all the people of Canada. *The privilege clause ... has always been a tool prescribed by government. If the privilege provision as here is regarded by the construction industry to be too oppressive, then contractors need not bid those government jobs*... It is the view of this panel that the privilege clause ... is a complete answer to M.J.B.'s action. There was no broken obligation by Defence Construction to accept the [M.J.B. Enterprises'] tender and this being so, no expenses incurred by M.J.B. Enterprises are recoverable.[38] [Emphasis added.]

The idea that the market should dictate the acceptability of such clauses is consistent with a view that freedom of contract should enjoy primacy over any other competing interests in the tender process. Here, the rule says that the owner does not have to chose any tender and therefore, no matter what the reason, no matter how arbitrary or unfair the grounds of decision making may be, the answer to any complaint about not being chosen lies in the wording itself. If a bidder doesn't like the rules, then the bidder shouldn't bid in the first place.

At the Supreme Court, this free market view was tossed aside in favour of a more balanced approach, which still imposes obligations on the owner in spite of the apparent meaning of the privilege clause. This was achieved by first implying an obligation to reject non-compliant bids (such as the Sorochan bid) and then allowing the privilege clause to apply to those bids that remain. In this way the two seemingly inconsistent provisions can stand together.

Iacobucci J. explained the reasoning as follows:

> ... 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

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37 *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.* (1997), 33 C.L.R. (2d) 1 (Alta. C.A.); additional reasons at 1997 CarswellAlta 724 (C.A.). Other early cases that held that the privilege clause operated to trump industry practice include *Martselos Services Ltd. v. Arctic College*, [1994] 3 W.W.R. 73 (N.W.T. C.A.); leave to appeal refused (1994), 17 C.L.R. (2d) 59n (S.C.C.); *Acme Building & Construction v. Newcastle (Town)* (1990), 38 C.L.R. 56 (Ont. Dist. Ct.); affirmed (1992), 1992 CarswellOnt 852 (C.A.); leave to appeal refused (1993), 63 O.A.C. 399 (note) (S.C.C.); *Elgin Construction Co. v. Russell (Township)* (1987), 24 C.L.R. 253 (Ont. H.C.); and *Power Agencies Co. v. Newfoundland Hospital & Nursing Home Association* (1991), 44 C.L.R. 255 (Nfld. S.C.).

38 *M.J.B. Enterprises (C. of A.)*, *supra* note 35, at paras. 8 and 9. Interestingly, the Court of Appeal also held that that fairness dictated that M.J.B. Enterprises should be reimbursed for the provable costs of preparing its rejected tender, although these costs were not specifically pleaded in the action. Given the absence of a breach of Contract A, no legal rationale was provided for why that result should flow.

> 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.
>
> 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.[39],[40]

The precondition for whether a term should be implied is therefore whether the parties to the tender would reasonably expect such a term, not whether such a term would be reasonable. If there is "evidence of contrary intention", presumably such as a clear, express clause stating the opposite proposition, then no term can be implied, no matter how much better (or more fair) the implied term might have made the process.

This principle has proven to be very problematic to implement in practice. This should be hardly surprising, given the discussion earlier, because it goes to the very crux of the tension between freedom of contract and fairness. Recall that the

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39 *M.J.B. Enterprises*, *supra* note 35, at paras. 29 and 30.

40 The *MJB Enterprises* case stands for a number of other important propositions:

> (a) Contract A does not automatically arise in every case. It depends on whether the parties intended to initiate contractual relations in the process;
>
> (b) Owners may take a more "nuanced view of costs" in evaluating bid prices than just the bid price alone (a discussion of which is outside the scope of this article); and
>
> (c) The appropriate remedy for breach of Contract A is expectation damages, i.e., lost profits.

According to *M.J.B. Enterprises*, the first question to ask in every procurement case is: "did the parties intend that Contract A arrives with its concomitant obligations?" It would seem to follow from the Court's analysis that no obligations arise between the parties *in the absence of* Contract A. As will be shown below, this conclusion is only half-right — some courts appear to agree with this logic and some do not.

term implied into the bidding process in *M.J.B. Enterprises* was that non-compliant bids should be rejected and only compliant bids should be considered; the tender documents in question contained no express term dealing with non-compliant bids, and so it was possible for the court in this instance to insert an *implied* term, which could reasonably be presumed to have been intended by the parties. In *M.J.B. Enterprises*, the Court was working with a blank slate.

Little imagination is needed to foresee where the law was heading off to next: what happens if an *express* term, which addresses non-compliant bids, is already contained in the tender documents?

(c) Fairness and Non-Compliance

As might be predicted, the court decisions answering that question have been all over the map. In fact, the non-compliance cases that followed on the heels of *M.J.B. Enterprises* over the last decade are some of the most difficult cases in this whole area of the law both to understand and to reconcile. Some courts have gone to great lengths to stem the rising tide of tenders containing explicit provisions waiving non-compliance by refusing to give them effect; other courts have recognized and endorsed such clauses.

No better illustration of the conundrum can be found than the pair of cases that emerged from the B.C. Court of Appeal in 2004.

In *Graham Industrial Services Ltd. v. Greater Vancouver Water District*,[41] the Court was dealing with a classic *Ron Engineering* scenario. The bidder, Graham Industrial, had submitted a bid that was $5 million less than any of the other bidders, on a $20 million project. Very quickly, Graham recognized it had made a serious error in its price and tried to withdraw its bid. The Water District refused, relying on the fact that no error was apparent on the face of the bid, and insisted that Graham Industrial either proceed with the contract or the bid bond would be called upon.

Graham Industrial then tried a second line of attack. The tender documents had called for both a trucking plan and an Environmental Protection Plan to be submitted with the bid, neither of which Graham Industrial had supplied as required. Graham Industrial argued that its own bid was therefore incapable of acceptance by the Water District, based on *its own* non-compliance. However, the Water District had included and sought to rely on the following discretion clause in its tender:

> If a tender contained a defect or fails in some way to comply with the requirements of the tender documents, which in the sole discretion of the corporation is not material, the corporation may waive the defect and accept the tender.

On the basis of these express words, the Water District claimed to be entitled to overlook the shortcomings of the Graham Industrial bid, and accept it anyway.

41 (2004), 25 B.C.L.R. (4th) 214 (C.A); leave to appeal refused (2004), [2004] S.C.C.A. No. 72, 2004 CarswellBC 1300 (S.C.C.).

Graham Industrial successfully applied for a declaration that it was not bound to enter into any contract with the Water District, given its own flawed bid.[42] On the Water District's appeal after losing the application, the higher court was clearly troubled with what the Water District was trying to do, as can be seen from this passage:

> In my view, giving the Discretion Clause the effect for which the Water District contends would allow the Water District and other owners to circumscribe the tendering process. The mandatory requirements of the instructions to the tenderers would be completely negated if the Water District had the right to exercise its discretion to waive any defect or non-compliance by deeming material omissions to be non-material ... [N]o bidder would participate in a tendering process in which the owner had the unreviewable, subjective right to deem patently non-compliant bids to be compliant bids. The effect of such a provision would return the construction industry to the pre-Ron Engineering days where negotiation on undisclosed terms, rather that competition on specified terms, governed the tendering process.[43] [Emphasis added.]

Given the fear that allowing owners the right to act upon clearly expressed discretion clauses would lead us all into the dark days that apparently existed before *Ron Engineering*, the Court in *Graham Industrial* was not about to let the Water District rely on the discretion clause to "snap up" the bid of the mistaken bidder.

The logic used by the Court to get around the discretion clause seems to be sound: if a bidder submits a materially non-compliant bid, then that bid is incapable of being accepted by the owner and therefore Contract A cannot arise between them. Since the discretion clause is only to be found in Contract A, and Contract A did not arise, the owner cannot rely on the clause to reach back and turn a non-compliant bid into a compliant one.

Leaving aside the tidy contractual way the Court found to get around the discretion clause, how can it justify ignoring the words themselves? The answer given, interestingly, is that to do so would promote certainty:

> The conclusion that the Discretion Clause cannot operate to bring a non-compliant bid into existence and thereby create Contract A does not introduce uncertainty into the tendering process. Rather, it enhances certainty. It ensures that the owner will only exercise its decision-making discretion in respect of bids that are materially compliant. It also ensures that all contractors can be confident that their bids will receive fair consideration and be

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42 Contrast this result with that in *Toronto Transit Commission v. Gottardo Construction Ltd.* (2005), [2005] O.J. No. 3689 (C.A.); additional reasons at (2005), 47 C.L.R. (3d) 167 (Ont. C.A.); leave to appeal refused (2006), 2006 CarswellOnt 2544 (S.C.C.), in which the Ontario Court of Appeal considered a bidder's intentional non-compliance in refusing to submit certain financial information to be in relation to its Contract A obligations following bid closing, rather than in respect of the bid submission itself. The bidder was therefore stuck with having to proceed with the contract (or forfeit its bid bond) even though its price contained an expensive error. *Quaere* whether the result is fair to the other bidders who did comply with their Contract A obligations.

43 *Graham Industrial*, *supra* note 41, at paras. 27 and 28.

> neither accepted nor rejected for arbitrary reasons. In these respects, I consider that my conclusion protects the integrity of the tendering process.[44]

Where the owner has clearly reserved the right to waive instances of non-compliance, one might believe that the best way of promoting certainty in the tender process is to *enforce* such clauses, particularly when bidders are in position to carefully read the tender documents before submitting their bids and understand and accept what the rules of the game are, and allow the owner to exercise those rights if necessary. Why should a bidder, who sees that non-compliance may be overlooked by the owner, not be bound by its bid if its bid submission happens to be non-compliant and the owner chooses to waive the flaw? As in *Ron Engineering*, certainty would be promoted by holding the bidder to its bid even if it is non-compliant.

On the contrary, according to *Graham Industrial*, certainty is instead to be promoted by *refusing* to let the owner exercise the rights explicitly reserved, and release non-compliant bidders without any obligation. If these discretion clauses are deemed to be ineffective in permitting the owner to do what the owner clearly says it has the right to do, no relief from the inherent uncertainty in the outcome of non-compliance cases can be gained through careful advance drafting. Owners are going to continue to face uncertainty surrounding the proper handling of non-compliance, given, as we have seen already, that whether a flaw in a bid is sufficiently serious to render the bid non-compliant is very much in the eye of the beholder.

What use is to be made of such clauses, then, if they are not to operate as intended by the owner? The Court in *Graham Industrial* posed the same question, and answered as follows:

> What meaning, then, is to be given to the Discretion Clause? In my view, the clause simply recognizes that the test for determining whether a tender is valid is one of substantial compliance rather than strict compliance. The clause allows the Water District to accept tenders with minor irregularities or non-material defects. This substantial compliance test is consistent with an objective analysis of whether Contract A has arisen . . .[45]

In other words, putting a discretion clause in the tender documents does not actually give the owner any discretion. Instead, the clause serves solely as a "flag" or "marker", indicating that "substantial compliance", rather than "strict compliance" is the appropriate standard for assessing non-compliance.[46] That assessment is essentially an objective one carried out by the court, not subject to the owner's

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44 *Ibid.*, at para. 29.

45 *Ibid.*, at para. 30. A detailed discussion of the tests for "substantial compliance" is outside the scope of this article.

46 See, for example, the very recent cases of *Cambridge Plumbing Systems Ltd. v. Strata Plan VR 1632* (2009), 79 C.L.R. (3d) 190 (B.C. S.C.) and *North America Construction (1993) Ltd. v. York (Regional Municipality)* (2009), 2009 CarswellOnt 5111 (S.C.J.); additional reasons at (2009), 2009 CarswellOnt 6773 (S.C.J.), which both set out the analysis to be undertaken in assessing non-compliance in detail, based on the principles in *Graham Industrial*.

own views of what would constitute compliance.[47] Imagine any other instance where a stated rule of a game (in this case, "the owner may waive non-compliance") is treated as essentially inoperative, but instead its very presence indicates that *another* rule (the applicable test is "substantial" rather than "strict" compliance) is to be applied. In any event, critical to the proper appreciation of this case is the fact that the Graham Industrial did not want to contract with the owner due to a horrendous error it had made in its pricing. It wanted out and the Court provided the exit by holding that the owner could not waive the flaws in the bid and force the contract on the objecting bidder because the waiver language itself appeared only in a non-existent Contract A. What happens if you have a willing but non-compliant bidder — one who is content to proceed with the contract? Can an owner waive non-compliance and accept the bid in that case?

Given the views expressed by the B.C. Court of Appeal, such a result would seem outside the realm of possibility. However, in *Kinetic Construction Ltd. v. Comox-Strathcona (Regional District)*,[48] the same court was given the opportunity to consider those very questions some nine months after *Graham Industrial*. The decision arrived at was surprising, to say the least.[49]

The owner, the Regional District, went to tender on a sewage treatment plant upgrade project. The tender documents issued by the Regional District contained the following Discretion Clause:

> 1. The Owner reserves the right in its absolute discretion to accept the Tender which it deems most advantageous to itself and the right to reject any or all Tenders, in each case without giving any notice. The lowest or any Tender will not necessarily be accepted. In no event will the Owner be responsible for the costs of preparation or submission of a Tender.
>
> 2. Tenders which contain qualifying conditions or otherwise fail to conform to the instructions to Tenderers may be disqualified or rejected. The Owner may, however, in its sole discretion, reject or retain for its consideration Tenderers, which are non-conforming because they do not contain the content or form required by the Instructions to Tenderers or for failure to comply with the process for submission set out in these Instructions to Tenderers.[50]

The Regional District had accepted a bid that failed to provide the requisite insurance and contained a qualification. The rival bidder Kinetic, who missed out on the contract, brought an action for damages.

Both the lower court and the Court of Appeal concluded that the clause giving the Regional District the right to waive non-compliance formed a part of Contract A with Kinetic. By submitting a bid, Kinetic was accepting that the Regional District could choose a non-compliant bid. When the Regional District did exactly

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47 According to *Cambridge*, *supra*, the owner's own treatment of the non-compliance in question may inform, but is not determinative, of the issue.

48 (2004), 33 B.C.L.R. (4th) 41 (C.A).

49 And reinforces the ongoing theme of this article that, given the ever-present tension between fairness and freedom of contract, the chance of real certainty developing in the law of tender is slim indeed.

50 *Kinetic Construction Ltd.*, *supra* note 48, at para. 2.

what the clause itself contemplated (by accepting the bid of the non-compliant bidder), the Regional District committed no breach of Contract A. In other words, the inclusion of the broad waiver of non-compliance clause was a complete defence to the Kinetic's action.[51]

On the surface, the two decisions of *Graham Industrial* and *Kinetic* are difficult to reconcile. How can the same court say that an owner cannot use a discretion clause to accept a non-compliant bid, and in the very next case say that the discretion clause may allow an owner to accept a non-compliant bid?

In the decision of *NAC Constructors Ltd. v. Alberta (Capital Region Wastewater Commission)*,[52] the Alberta court tried to resolve that dilemma by merely focusing on the specific wording of the clauses involved in each case:

> These cases can be reconciled if one concludes that the result is dependent upon a careful construction of the terms of the agreement reached between the parties and that the different results in *Kinetic* and *Graham* result from the differences in the wording of the two discretion clauses at issue and not in different approaches to their construction.[53]

With respect, the learned judge appears to be missing the real point of distinction. While the language in any case may have some bearing on the analysis, it is not the key. The reconciliation of the two cases becomes much easier by focusing on *how* the clause is being applied.

In *Graham Industrial*, the bidder's mistaken counter-offer was withdrawn before it was accepted, and, in accordance with basic contract law principles, the owner cannot accept a withdrawn offer; no Contract A therefore arose between the mistaken non-compliant bidder and the owner in *Graham Industrial*, and so in that sense the Discretion Clause did not exist. In *Kinetic*, the owner had accepted the counter-offer (i.e., the non-compliant bid) before it was withdrawn, forming a contract with the non-compliant bidder. However, what arose between the non-compliant bidder and the owner in *Kinetic* was *not* Contract A (nor, by extension Contract B) since the contract did not come about through acceptance of a responsive bid.

However, and this is the key, Contract A *did* arise between the owner and the compliant second bidder in *Kinetic*. That Contract A did contain the Discretion Clause, *which expressly provided the owner the right to accept a non-compliant bid*. As noted by the Court, the owner is not guilty of any breach of Contract A by doing so; the contract between the compliant bidder and the owner says the owner can do what the owner did.

What unfortunately seems to get lost in these difficult cases is that the relationships among the parties in the tender process is not necessarily symmetrical. Strange though the results may seem when placed side-by-side, the proper and

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51 What is the legal character of the non-compliant bid, if Contract A did not arise? The Court considered such a bid amounted to a counter-offer in law because the non-compliant bidder is really submitting a bid on a basis other than that called for in the tender documents.

52 (2005), [2005] A.J. No. 847, 2005 CarswellAlta 1265 (Q.B.); affirmed (2005), 2005 CarswellAlta 1726 (C.A.); leave to appeal refused (2007), 2007 CarswellAlta 115 (S.C.C.).

53 *Ibid.*, at para. 41.

careful analysis of the relationships between the owner, the compliant bidder, and the non-compliant bidder reveals that the same waiver clause will fail to work as a sword to force a contract award onto a non-compliant bidder, but will successfully shield an owner from a claim by compliant bidder when the award is made to a non-compliant bidder. Both outcomes are wholly consistent with contract principles, and yet the second nevertheless seems somehow wrong.[54]

In the *NAC* case, the Court, on a preliminary motion, was dealing with a situation where the accepted bid had been late and the owner was trying to rely on a broad discretion clause to accept the late bid.[55] Consistent with *Kinetic*, the Court accepted that it is open to an owner to include a broad discretion clause that would permit acceptance of non-compliant bids, provided it is very clear in its wording, since the owner must still be fair to all bidders. Bidders, knowing of the owner's stated intention, would then be in a position to decide whether or not to bid. Considering the late bid in that case, the Court held that the clause was not broad enough to cover waiving late delivery, and so the matter was ordered to proceed to trial.

These developments in the analysis of what is fair to bidders and what may "preserve the integrity of the bid process" raise interesting questions about future behaviour. As noted earlier, *Ron Engineering* was about the bidder who makes a mistake but, because the mistake was not obvious on the face of the bid submission, the bidder should nevertheless be held to its bid price; otherwise, the bidder may use a "mistake" as an excuse to withdraw or, worse, demand the right to adjust the bid price submitted. Essentially, *Ron Engineering* was concerned with preventing potential strategic behaviour on the part of bidders.

The approach taken in *Graham Industrial* means that bidders who have both made a mistake *and* are non-compliant in some material way get handed a free pass, allowing them to walk from their bids. To permit a different result, from the court's perspective, would "return the construction industry to the pre-*Ron Engineering* days."

Ironically, the opposite is arguably the case, the *Graham Industrial* case may itself send us back to pre-*Ron Engineering* days. By refusing to allow owners to overlook flaws in a bids submitted by bidders, the same kind of strategic behaviour feared by Estey J., which led to the creation of Contract A in the first place, may

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54 This is the terrific example of where *the rule itself* (i.e. the clear unambiguous right to waive any non-compliance) may be generally viewed by most courts as wholly unfair to the other bidders (see discussion above under "The Nature of the Problem") and therefore should not be interpreted so as to provide a defence for the owner against the claim of a compliant bidder. Refer to note 46, where both very recent cases cited employed the *Graham* analysis exclusively. For this reason the *Kinetic* approach does not seem to have found favour and may not evolve further. It is submitted that curtailing the efficacy of such discretion clauses at least as a defence would be a most unfortunate development — the *Kinetic* approach has the appeal of being both simple *and certain*. In this instance, freedom of contract appears to have lost out to overriding fairness concerns.

55 For a more recent example of the "late bid" case, see *Coco Coco Paving (1990) Inc. v. Ontario (Minister of Transportation)*, 2009 ONCA 503; additional reasons at (2009), 2009 CarswellOnt 3970 (C.A.).

begin to manifest itself. Clever bidders may insert qualifiers or omit requested information to keep their options open. If bidders find themselves low as a result of a mistake (or simply change their mind about wanting the contract), they can point to their own non-compliance as a way out, and the owner is helpless to do anything but watch.

How is that consistent with the principles of *Ron Engineering*?

(d) Fairness and *Double N Earthmovers*

Any discussion regarding the competing views about how the world of tendering law ought to work is not complete without considering *Double N*,[56] the decision of the Supreme Court of Canada released in 2007.

The City of Edmonton had called for tenders for the supply of equipment and operators to move garbage at a waste disposal site. The tender required that all equipment be made in 1980 or later. Sureway Construction, one of the bidders, misrepresented the age of its equipment on the equipment list, showing it to be newer than it actually was, in order to comply with the requirement. Double N Earthmovers Ltd., a second bidder, told the City about the misinformation on Sureway's bid, but the City did nothing to investigate the allegations and instead awarded the contract to Sureway. After the award, the City learned of that the age of the equipment had been mis-stated, but let Sureway perform the contract using the old equipment anyway. Double N sued, claiming that the City had breached the duties owed to it under Contract A. The trial judge dismissed the action and the Court of Appeal upheld that decision. In a narrow 5-4 split decision, the Supreme Court dismissed the appeal.

For purposes of this paper, what is remarkable about the Supreme Court's decision is how differently the divided Court analysed the nature of the problem. The contrast between the two approaches is striking.

The majority (led by Abella and Rothstein JJ.) took a contract law-based approach to the analysis. Harkening back to *Ron Engineering*, the majority viewed the bid submission itself to be only the relevant consideration. Assuming the bid was compliant on its face,[57] then the owner was perfectly entitled to rely on the commitments to perform the contract that the bid represented. No duty existed to investigate whether the bidder was telling the truth, because the bidder was already *bound* by Contract A to the truth. Once the award is properly made based on the bid documents alone, Contract A comes to an end. Any issue with non-performance of those commitments is confined to the next stage (Contract B); how the resolution of an issue unfolds between the owner and the successful contractor is no longer of any concern to the other bidders.[58]

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56 *Supra*, note 4.

57 Recall the critical importance of whether the mistake was apparent on the face of the bid in *Ron Engineering*.

58 Charron J., writing for the minority, criticized this logic as being circular: "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 ac-

To the extent fairness entered into the picture at all, it was only in a very narrow "process" sense:

> 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.[59]

The majority equates "fairness" with "equal treatment", without further normative content. The minority saw the case as being one of unfairness to the bidders (not strictly one of contract), but fairness considered in a broader, fair play sense. This is indicated by the passage that sets the stage for the discussion by Charron J.:

> 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.[60]

Again, we see reliance on what might be called the "investment rationale" coming into play — the notion that the parties to the tender process put a lot at stake in the process and are therefore entitled to fairness and integrity.[61]

Putting the minority's view of what transpired in the worst light, the City allowed a lying, non-compliant bidder to get away with stealing the contract from Double N. A simple check of equipment serial numbers by the City prior to the award would have revealed the deceit, and yet the City refused to lift a finger. To further compound the problem, upon learning of the true facts, the City let Sureway off the hook — in effect permitting "non-compliant performance" of the contract obligations — making the City complicit in the fraud. The minority was clearly outraged with both the behaviour of Sureway and the City, and the resulting unfairness on Double N and the other bidders.

Of particular interest is the conclusion by Charron J. that the obligation to accept only a compliant bid would be meaningless if it did not include the duty to

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cepted a compliant bid at the Contract A stage." *Supra*, note 14, at para. 93. However, it is submitted that, to the extent the bid must still appear to be compliant at the Contract A stage or face disqualification, the logic is not as circular as it may first seem.

59 *Supra* note 14, at para. 52.

60 *Ibid.*, at para. 104.

61 The reference in the passage to contract terms should not be taken to suggest that this was a contract-based approach. On the contrary, it was in part, it is submitted, the very fact that the rules of the tender in question expressly provided that the "City reserves the right to reject any and all Tenders, *and to waive any informality therein* . . . The lowest or any Tender may not necessarily be accepted" (emphasis added) that gave the minority such difficulty in trying to uphold their sense of fairness.

take reasonable steps to ensure that the bid *is* compliant.[62] Contrast this reasoning with that of the majority, who believed 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.[63]

The minority's concern about fairness is also reflected in the way they extended the duty that they would have placed upon the owner to insist upon "compliant performance" of Contract B. By letting the matter "lie peacefully" and not demand that the Sureway use the newer equipment, the City was — in a retrospective way, perhaps — being unfair to the original bidders. While the Contract A/Contact B regime may permit the owner to get past the problem, the minority felt that "deferred non-compliance" should nevertheless be prohibited, in the interests of fairness.

Given such a closely divided court, reflecting strongly opposing views on the rights and obligations of the parties in the tender process, the *Double N* case underscores how potentially fragile and likely short-lived any sense of certainty may be in this area of law. One can easily conceive of another case in the future, with only slightly different facts, where the balance (between the contract and fairness approaches) tips the other way, leading owners to find a whole new set of obligations imposed upon them.

(e) Fairness and *Tercon*

While *Double N* showed that the Supreme Court is currently divided on the question of whether contract principles or fairness principles should win the day (with the "contract school" appearing to have the upper hand), the current high water mark in terms of the primacy of freedom of contract over fairness is unquestionably the *Tercon* case.[64] As the matter is currently under consideration by the Supreme Court of Canada, the facts are worth reviewing in some detail.

In this case, B.C.'s Ministry of Transportation and Highways ("MTH") ran a proposal call process for the construction of a 25 kilometre stretch of highway. Tercon Contractors Ltd. ("Tercon") was one of the respondents. A Request for Expressions of Interest ("RFEI") process was run to screen candidates down to a short-list of three. Tercon was ranked first overall.

The Request for Proposal ("RFP") was issued to the six respondents involved in the RFEI. The RFEI clearly stated that only those six were eligible to submit responses to the RFP and any proposals received by any other proponent would not be considered. The RFP also required proponents to advise the MTH of any mate-

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62 *Supra* note 14, at para. 116. It is not enough to rely on the contractual promises represented by the bid; to be truly fair to the bidders, the owner must go the extra mile of satisfying itself that the content of the bid is *really* compliant.

63 *Ibid.*, at para. 50.

64 *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)* (2007), 73 B.C.L.R. (4th) 201 (C.A.); leave to appeal allowed (2008), 2008 CarswellBC 1458 (S.C.C.); reversing (2006), 53 B.C.L.R. (4th) 138 (S.C.). The appeal in the Supreme Court of Canada was argued in March 2009 and has not yet been released at the time of this writing.

rial changes to their composition or financial capability since the RFEI, and the MTH could consider whether to allow that proponent to continue with the process.

One of the original proponents was Brentwood Enterprises Ltd. ("Brentwood"). Brentwood was facing difficulty meeting the project requirements. To overcome these challenges, Brentwood joined forces with Emil Anderson Construction ("EAC") in a 50-50 joint venture, since EAC had the required expertise and could share the burden of bonding. Brentwood wrote to the MTH prior to the closing of the RFP to advise of the change and the MTH did not respond.

Brentwood's submitted price was about $3 million lower than Tercon's. At the conclusion of the evaluation process, the MTH selected Brentwood/EAC as the preferred proponent, but the final agreements were structured so that EAC was described as a "subcontractor" in light of the prohibition of awarding to non-prequalified entities.

Tercon sued the MTH for almost $3.3 million, representing the difference between the proposed revenues for the project and the estimated cost for performing the work, on the basis that in reality, the successful proponent was an ineligible candidate.

At trial, the MTH unsuccessfully argued that the process was a Request for Proposal and not a tender.[65] The Court surveyed a number of authorities that set out the *indicia* of a tender versus those of an RFP, and correspondingly whether or not Contract A came into existence. Although the document was described as an RFP and the respondents as "proponents", the Court concluded that the process really was a tender and Contract A had indeed arisen between the parties.

The MTH then tried to rely on the exclusion of liability clause in the RFP documents, 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.[66]

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65 See discussion of RFPs in section 5 below.

66 The problem with this type of clause may be more fundamental than merely a problem of unfairness. For example, if I have a contract with you under which I may have promised to perform obligations but the contract provides no remedy for you in the event of my breach, due to a broad exclusion of liability clause, can it be said that there is mutual consideration to support the contract? A "gratuitous promise" (i.e., unsupported by an exchange of consideration) is generally considered unenforceable. Is a promise that, by the terms of the contract itself, is unenforceable also therefore not gratuitous? Applied to tenders, can Contract A be really said to exist in such circumstances? These issues are discussed by Devonshire, *supra* note 28, at note 151.

Contrast this broad exclusion clause with the narrower limitation of liability clause in *Elite Bailiff Services Ltd. v. British Columbia*, 2003 BCCA 102, 223 D.L.R. (4th) 39, [2003] 4 W.W.R. 228, 30 B.L.R. (3d) 163, 10 B.C.L.R. (4th) 264, which provided:

> . . . [T]he proponent, by submitting a proposal, agrees that it will not claim damages in excess of an amount equivalent to the reasonable costs incurred by the proponent in preparing its proposal for matters relating to the agreement or in respect of the competi-

The MTH argued that this exclusion clause was a complete defence to Tercon's claim.

Siding with fairness at the expense of freedom of contract, the trial judge held that the wrong committed by the MTH in awarding the contract to an ineligible bidder was so egregious (amounting to a fundamental breach) that it was neither fair nor reasonable to enforce the exclusion clause. The MTH was left to argue over the appropriate level of damages.

On appeal, the Court agreed with the trial judge on all aspects of the decision except the effect exclusion of liability clause. It held that the words used in the clause were sufficiently clear and unambiguous that they covered the "wrong" in question. Even if the MTH's acceptance of the Brentwood/EAC proposal was a fundamental breach of its duty of fairness to Tercon, the clause exempted the MTH from liability. The Court said:

> The judge did not engage in a public policy analysis. However, the respondent seeks to support the judgment on the basis that, to the extent the clause excuses acceptance of non-compliant bids, the public interest in an orderly and fair scheme for tendering in the construction industry is thwarted. This is a valid point. *In my opinion, however, 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, 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.[67] [Emphasis added.]

It would be an understatement to say that the contrast between this *laissez-faire*, "let the market dictate what happens" philosophy expressed in *Tercon* and the sentiments in *Graham Industrial*[68] is remarkable; bear in mind that this is the same Court speaking in each case![69]

Would this free market approach of the B.C. Court of Appeal in *Tercon* extend to a hypothetical unfairness clause (which expressly purports to oust fairness itself

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> tive process, and the proponent, by submitting a proposal, waives any claim for loss of profits if no agreement is made with the proponent.

The Court had little difficulty holding that the clause was clear and enforceable. Courts generally have an easier time accepting limitations rather than exclusions in contract terms.

67 *Tercon*, *supra* note 64, at para. 19.

68 *Ibid.*, at note 40.

69 The free market approach represented by *Tercon* calls to mind the identical sentiments expressed by the Alberta Court of Appeal a decade earlier in the *M.J.B. Enterprises* case (see text at note 38 above), before that case was overturned by the Supreme Court. Whether the parallel will hold remains to be seen. Given the pattern established in *M.J.B. Enterprises*, one should not be surprised to see the Supreme Court finding a way around this clause, but the current contract focus of that court suggests it may stand up, but on a deeply divided basis.

from the tender process) inserted by an owner into tender documents?[70] If presented with such a clause in the future, a court may very well chose to adopt the views in *Tercon* and lay the problem of the unacceptability of such a clause at the feet of the bidders, rather than the owner.[71] How likely is that to happen?

(f) Fairness as an Implied Term

In order to answer the question just posed, further examination into the treatment by the courts of fairness principles is necessary. We will find that the parallels with the treatment of the non-compliance issue discussed earlier are close and the analytical problems encountered are similar.

Although the notion of fairness had been evolving for some time after *Ron Engineering*, it was really in the *Martel* case[72] where the Supreme Court of Canada firmly established that the entitlement to fair and equal treatment was a contractual term implied into Contract A.

Iacobucci and Major JJ., giving the judgment of the Court, stated:

> 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. . . . 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 . . . 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.[73]

The Court acknowledged the role of freedom of contract in determining the scope of the implied duty of fairness:

> 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*, [*Colautti Brothers Marble Tile & Carpet (1985) Inc. v. Windsor (City)* (1996), 36 M.P.L.R. (2d) 258] supra, at para. 6).[74] [Emphasis added.]

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70 See note 74 *infra* and the discussion that follows.

71 Provided *Tercon* is not overruled by the Supreme Court of Canada.

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

73 *Ibid.*, at para. 88.

74 *Ibid.*, at para. 89.

Note the important qualifier contained in the passage above: "such a duty must be defined with due consideration to the express contractual terms of the tender." In other words, the tender documents themselves set the parameters for the consideration of whether any questionable activity is unfair or not. This is a point that on occasion is forgotten,[75] but is essential.

It would logically follow from the proposition set out in *Martel* (i.e., that the obligation to be fair is an *implied* term of Contract A) that:

> (a) the duty of fairness can be expressly over-ridden by language in the tender documents; and
>
> (b) that in the absence of Contract A there exists no duty of free-standing fairness.

The first point has been acknowledged, if only in passing, as a possibility. In *Health Care Developers*,[76] the Court observed:

> *The privilege clauses raise the issue of whether one can contract out the application of fairness or good faith. The cases, consistent with freedom of contract, would appear to acknowledge that one can*. However, to contract out of good faith, and to agree that one can be as unreasonable as one wishes in the performance of a contract would require an opting out clause that is "precise, specific, not antithetical to the entire purpose or intent of the remainder of the contract and is not unconscionable or contrary to public policy." (See: Shannon Kathleen O'Byrne; Good Faith in Contractual Performance: Recent Developments (1995), 74 Canadian Bar Review 70 at 96.)[77] [Emphasis added.]

In an area in which absolutes are hardly the norm, it is not surprising that the Court would look at any language overriding the duty of fairness with great scrutiny and in light of public policy and other considerations. These provide the necessary escape hatch from an otherwise clearly expressed unfairness clause if the Court were to conclude that the owner simply should not be permitted to abuse bidders with impunity.

At this stage in the evolution of fairness, it may be difficult to conceive of a court actually bringing itself to accept that an owner can, through precise, specific language, reserve to itself the right to be unfair and then, upon the owner acting unfairly to one or more of the bidders, upholding the clause as a complete defence to a claim. That such a result may come to pass may be no more than a matter of time. As we have noted, certain jurisdictions are increasingly recognizing the efficacy of clauses that seem to go to the heart of fairness and the equal treatment of bidders.[78]

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75 Recall that in *Amber Contracting*, *supra* note 18, the majority of the Nova Scotia Court of Appeal criticized the lower court for having considered the fairness issue first, and then the language of the tender document, rather than the other way around.

76 *Health Care Developers Inc. v. Newfoundland* (1996), 29 C.L.R. (2d) 237 (N.S. C.A.).

77 *Ibid.*, at para. 46.

78 See the *NAC* case, *supra* note 52, in which the Alberta Court of Appeal cited *Health Care Developers*, apparently with approval, when discussing whether the ability to accept a late bid could ever be provided for by contract. The Court appeared to suggest it might be possible, given the right magic words.

As for the second proposition — whether fairness exists *outside* of Contract A — the consensus view appears, initially at least, to be well settled: it is not. The B.C. Court of Appeal in particular, through *Midwest Management* and *Powder Mountain*[79], has held firm that no free-standing duty of fairness exists in law where no Contract A has arisen.

In *Midwest Management*, the Court of Appeal expressly rejected the existence of any such duty, stating:

> Whether such an independent duty of fairness exists is a pure question of law. The learned trial judge said he knew of no "free-standing enforceable duty of fairness *simpliciter*". Counsel did not refer us to any authority where such a duty has been held to exist. Such a duty is quite inconsistent with an adversarial, competitive tendering process. To find such a duty would cause great uncertainty in this area of the law. In my respective view, the learned trial judge erred in law in holding that this claim might possibly succeed. As no such duty exists in law, the claim based on its alleged breach was bound to fail.[80]

Note that the Court considers an enforceable duty of fairness to be "quite inconsistent with an adversarial, competitive tendering process," and that such a duty would "cause great uncertainty." How is it then, one might legitimately ask, that according to *Martel* an enforceable duty of fairness is implied into the competitive tendering process in every case?[81]

The rationale for the distinction may be found in a valid concern over indeterminacy. As long as the duty to be fair is confined to Contract A as an implied term, it is owed only to the parties to the contract itself (i.e., the owner and each of the responsive bidders). If the fairness duty is free-standing, that is no longer reserved only for those who have entered into Contract A, then arguably even a non-compliant bidder, standing outside the circle, would potentially be entitled to receive the benefit of fair and equal treatment. How far would the duty extend, and to whom?

More recently, in *Coco Paving*,[82] involving the Ontario Ministry of Transportation's wrongful acceptance of a late bid to the detriment of the other bidders, the Ontario Court of Appeal appears to have adopted the same view of the existence of such a duty, stating:

> [4] . . . As recently observed by the British Columbia Court of Appeal in *Hub Excavating Ltd. v. Orca Estates Ltd.*, 2009 BCSC 167 (CanLII), 2009 BCSC 167, at paras. 39 and 40, "[t]here is no free-standing duty of fairness in the bidding process independent of [the] contractual duty [arising on the formation of Contract A.]"

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79 *Midwest Management (1987) Ltd. v. BC Gas Utility Ltd.* (2000), 5 C.L.R. (3d) 140, ¶13-14 (B.C. C.A.); *Powder Mountain Resorts Ltd. v. British Columbia*, [2001] 11 W.W.R. 488, ¶72 (B.C. C.A.). See also most recently *Hub Excavating Ltd. v. Orca Estates Ltd.*, 2009 BCCA 167, ¶39 and 40. Even the trial judge in *Tercon* agreed that there exists no "free-standing" duty of fairness (2006 BCSC 499; reversed (2008), 2007 CarswellBC 2880 (C.A.); leave to appeal allowed (2008), 2008 CarswellBC 1458, ¶195 (S.C.C.)).

80 (2000), 5 C.L.R. (3d) 140 at p. 145 (B.C. C.A.).

81 At least, as observed in note 78, *supra*, if not successfully excluded by contract.

82 *Supra* note 55.

> [5] Thus, as a matter of tendering law, MTO owed Coco no contractual duty of fairness unless Coco submitted a compliant bid or the tender documents otherwise explicitly provided to the contrary. In contrast, the MTO did owe contractual duties to the compliant bidders. These duties obliged the MTO to act fairly in relation to the Bot Group and all other compliant bidders.[83]

These cases clearly establish that the obligation of fairness owed by the owner to bidders is only imported into tender process as a contractual term of Contract A.[84] Fairness cannot survive on its own two feet. It would logically seem to follow therefore that *if no Contract A exists, there is no corresponding duty to be fair*.

If the cases illustrating the evolving nature of fairness are any indication, one should not expect that the story of fairness ends there. To draw a clear line between Contract A and non-Contract A situations, and place fairness obligations only on the Contract A side, would be certain. And we have seen that *uncertainty* is the hallmark of tender law. True to form, we will now see that fairness may in fact be alive and well *outside of Contract A* after all, in spite of the cases such as *Coco Paving* which appear not to conceive of such a possibility.

5. FAIRNESS IN REQUEST FOR PROPOSALS

As forms of procurement develop and evolve other than the traditional tender call, the legal principles discussed so far also have to adapt and evolve alongside.

The method of procurement usually called a Request for a Proposal[85] ("RFP") usually involves an owner calling for more than a simple submission of a price. Although generally still thought of as a form of competition, the structure may be less formal than a pure tender and often involves a significant component of negotiation.[86] Often the award is in reality not a contract but the right to negotiate with the owner for a contract.

For purposes of this discussion, the most salient feature of an RFP is that the Contract A does not arise between the parties in an RFP. In fact, evidence that the parties did not intend to enter into Contract A, including the statement in the procurement documents that the owner has no contractual obligations to the proponent until a contract is concluded, is critical to determining that the process under scrutiny is indeed an RFP.

Assuming that the RFP is held to be an RFP and not a tender, and given that there is no free-standing duty of fairness, it would seem to follow that the owner does not need to be fair duringan RFP process. As we have seen, the fairness obligation is contractual in nature; in an RFP there is no contract in which it can "reside" and it would follow that there is no corresponding duty to be fair. However, a few cases suggest that this compelling logic may in fact be incorrect. The reason

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83 *Ibid.*, at paras. 4 and 5.

84 Other sources of the obligation, in particular through the procurement provisions under the *Agreement on Internal Trade* are outside the scope of this article.

85 Although any number of other labels have been applied to such non-tender procurement processes.

86 A component that is generally, but not altogether, frowned upon in the tender process. For a more fulsome discussion of the indicia of an RFP, versus a tender, see the trial decision in *Tercon*, *supra* note 64.

for the confusion rests with the case of *Mellco Developments Ltd. v. Portage la Prairie (City)*,[87] a decision of the Manitoba Court of Appeal.[88]

Mellco was an appeal by the plaintiffs, Mellco Developments and Newton Enterprises (1983), from the dismissal at trial of their claims for loss of business opportunity and constructive trust. The City had requested proposals for the sale and development of certain lands. The stated intent of the City was to negotiate with the applicant that presented what the City considered to be the "most attractive" proposal. The City received only two proposals. The first was from the plaintiffs (in partnership with one another), and the other from a partnership between Lions Park Housing and Lions Club of Portage La Prairie (collectively "Lions").

In their proposal, Mellco and Newton had tried to comply with the requirements of the RFP. The proposal from the Lions, on the other hand, deviated from the requirements of the RFP in a number of respects. Nevertheless, the City evaluated the proposals and concluded that the Lions' proposal was the "most attractive".

In dismissing the action, the trial judge held that the City had good and valid reasons for wanting to use a RFP instead of a formal tender and that the City had fairly considered the plaintiffs' proposal. The Court of Appeal agreed with the trial judge and dismissed the appeal. The court held that the RFP was not intended to create a binding contractual relationship between the City and the bidders (i.e., no Contract A arose) as it was clear that subsequent discussions and negotiations were required before a contract could be concluded.

As one might expect, the Court held in relation to the allegations of non-compliance that in the absence of Contract A there was no implied term requiring the rejection of non-compliant bids. The surprise is that it found that there was a duty on the City to conduct itself fairly and act in good faith, notwithstanding that Contract A had not arisen.

Writing for the Court, Scott C.J.M. stated:

> Can a bidding process that is something less than one intended to involve the formation of Contracts A and B invoke the obligation of fair bargaining in good faith that is now firmly established in formal tendering cases?
>
> I agree with counsel for the plaintiffs that the question of the duty to negotiate in good faith with respect to bids (be they a tender or proposal), is a form of continuum. At one end are the formal tender cases invoking the principles of *Ron Engineering*. At the other end are cases where, for example, an owner requests a simple quote. There is obviously a lot of territory between these two extremes. The fact situation before us falls somewhere in between the two extremes . . .

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87 (2002), [2003] 1 W.W.R. 216 (Man. C.A.); leave to appeal refused (2003), 2003 CarswellMan 106 (S.C.C.).

88 At around the same time, in the Ontario case *Cable Assembly Systems Ltd. v. Dufferin-Peel Roman Catholic Separate School Board* (2002), 155 O.A.C. 139 (C.A.), the Court of Appeal treated the RFP in question very much like a tender, particularly in proceeding on the basis that the complaining proponent was entitled to fairness in the process as per *Martel*. No express consideration was given by that Court to the possibility of a fairness duty outside of Contract A.

> Within the continuum, in the instant case there was, in my opinion, an obligation on the part of the city to conduct itself fairly and in good faith. Without some fairness in the system proponents could incur significant expenses in preparing futile bids which could ultimately lead to a negation of the process. In circumstances such as those before us, there must be enough fairness and equality in the procedures to ensure its integrity and openness.[89]

Having concluded that a legal duty of fairness existed — even in the absence of Contract A — the Court managed to avoid the difficult task of articulating the nature of the duty, since no unfairness was actually found to have existed in the RFP process in question:

> As we have seen, the principles of fairness and good faith are not determined in a vacuum, but rather are implied based on the intentions and expectations of the parties. In a Ron Engineering type of tendering process, the requirement of good faith and fairness is a term that is implied into Contract A. But there is no Contract A in this case. It is merely a request for proposals opening up a process of negotiation. Even if the absence of a Contract A is not an obstacle to finding some duty of good faith and fairness, I am not at all persuaded that the plaintiffs were treated unfairly or that the city acted in bad faith.[90] [Emphasis added.]

That final double-negative passage almost gives the impression that the Court was not particularly enthusiastic about bringing such an independent duty into the world. The door was simply left open and the burden of figuring out what this new duty may be was handed off to another court in the future.[91]

In the subsequent Ontario case of *Buttcon Ltd. v. Toronto Electric Commissioners*,[92] the Court was asked to consider a similar issue in the context of an RFP for a design/build project. The case presented a golden opportunity for the Court to spell out the true nature of this newly evolving duty of fairness, assuming it exists outside of Contract A.

The action arose out of a request for proposal process run by the Toronto Electric Commissioners ("Toronto Hydro") in 1993. Four short-listed proponents submitted design/build proposals for a new service centre facility. The proposals ranged greatly in both design and price. Two of the proposals had a capital cost of just over $27 million, while the other two (including Buttcon's) were over $40 million. After carrying out the detailed evaluation of all proposals, Toronto Hydro selected the second lowest-priced proponent and proceeded to build the new service centre.

In the meantime, Buttcon and other members of its design team complained that the process had been fatally flawed and the result unfair. Buttcon argued Toronto Hydro had selected a non-compliant bidder and therefore breached its obligations to the other bidders. Had the successful proponent been properly disqualified,

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89 (2002), [2003] 1 W.W.R. 216 (Man. C.A.); leave to appeal refused (2003), 2003 CarswellMan 106, ¶81 (S.C.C.).

90 *Ibid.*, at para. 84.

91 Most unfortunately, leave to appeal to the Supreme Court of Canada was denied: (November 20, 2003), Doc. No. 30058, [2003] S.C.C.A. No. 502 (S.C.C.).

92 (2003), 65 O.R. (3d) 601 (S.C.J.).

Buttcon alleged it would have been awarded the contract instead. Buttcon sued for damages, claiming that Toronto Hydro's conduct had caused Buttcon to lose the opportunity to earn the anticipated profits.

The first issue the Court had to deal with was the nature of the request for proposal process. Was it like a tender, giving rise to Contract A? Recognizing the principle from *M.J.B. Enterprises* that the intentions of the parties determine whether or not Contract A arises, the Court concluded that the RFP in this case was "exactly that — a request for proposals and nothing more." The RFP was therefore a mere invitation to treat and Buttcon's complaint that there had been a breach of Contract A by Toronto Hydro in accepting a non-compliant bid therefore failed, since Contract A had not arisen on the facts.

However, for purposes of our discussion, it is important that the Court went on to consider whether a further legal duty fell on Toronto Hydro to be fair, outside of any implied contractual obligation arising under Contract A. It elected to adopt the *Mellco* approach and held that the owner *does* owe a duty to consider proposals fairly without favouring or giving an unfair advantage to one over another, even without Contract A having arisen.

Happily for Toronto Hydro (but sadly for the development of the law), the Court held that Toronto Hydro had in fact treated the four proposals in an equitable and fair manner, having reviewed and evaluated each proposal using the same criteria. Accordingly, it dismissed the action without having to elaborate further on what in law this interesting duty actually was.

In arriving at the conclusion that the owner had been fair, the court considered and then dismissed Buttcon's argument that the winning proposal had not complied with the stated requirements in the RFP in various ways. Unlike a traditional non-compliant bid analysis, like that found in *M.J.B. Enterprises*, this review of the allegations of non-compliance was carried out in the RFP setting as a fairness assessment, in which substantial prejudice seemed to be the measuring stick. In other words, even when Contract A does not arise, the owner's selection of a clearly non-compliant proposal might have still been considered unfair treatment of the other proponents.[93]

In both of these cases the owners were found, as a fact, to have behaved fairly towards the proponents. Neither judgment was obliged to articulate what "fairness" is in these circumstances and how any notion of fairness being imposed can be

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93 To illustrate the Court's concern, consider this simple example: If the owner asks in the RFP documents for a proposal for a new *retail building*, and then proceeds nevertheless to entertain a non-responsive proposal submitted by a proponent for an *office building*, the owner may be considered to have acted unfairly in relation to the responsive proponents. While non-compliance of the response (as in a tender case) is technically not the issue, since there is no Contract A, *the degree of non-responsiveness* accepted by the owner may nevertheless create "compensable" unfairness. What would the damages be in those circumstances? In *Buttcon*, in assessing damages as an alternative, the Court decided that the likelihood of award to Buttcon was so low that only proposal preparation costs were warranted rather than lost opportunity damages. Interestingly, the Court would have found that all plaintiffs, including the consultants, would have been entitled to damages. It is submitted that result would be unlikely in future similar cases, in light of *Design Services*, discussed below at note 94 and following.

reconciled with the authorities seemingly standing for the opposite proposition. About all that can be said is that there seems to be a reliance interest driving the Court towards imposing any fairness obligation. Both courts recognized that proponents spend time and money on preparing their submissions; this alone appears to entitle them to fair treatment.

Of course, the question of fairness outside of Contract A begs a number of questions and brings a whole new level of uncertainty to the procurement process: What, legally, is the nature of this "fairness duty", if not contractually based? What does a "breach of duty" lead to? What would be the proper measure of damages?

6. FAIRNESS AS A TORT DUTY

If fairness can exist outside of the contractual framework, as suggested by the RFP cases, then what form does it take? When considering the concept of duty, we find ourselves turning to tort law, which is the primary area of law dealing with civil duties and wrongs and their consequences outside of the law of contract.

Can a free-standing duty of fairness be found to exist in tort? If the most recent word on the subject from the Supreme Court on the question of extending tendering law into the realm of tort is any indication, the answer may very well be "no".

In 1998, Public Works and Government Services Canada ("PWGSC") conducted a proposal call process to select a design-builder who would be awarded the contract to design and construct a naval reserve building. One of the qualified proponents was Olympic Construction Limited, who submitted a proposal with the help of its team, which included an architect, a structural engineer, an electrical contractor, a structural contractor and a civil contractor. The proposal was submitted with Olympic as the sole proponent but everyone agreed that the other team members would get the work if Olympic won.

PWGSC decided to award the contract to another prequalified proponent. Olympic sued PWGSC for damages for the lost opportunity, on the basis that the winning proposal was non-compliant. The rest of Olympic's team joined in the action against PWGSC, each arguing that had Olympic properly been given the contract, they would each have been able to earn the expected profits on their own work.

Prior to the trial of the lawsuit, PWGSC settled Olympic's claim and Olympic discontinued its action. The other members of Olympic's team did not settle but rather chose to continue on to trial,[94] where they advanced two arguments against PWGSC.

The first argument was that PWGSC's acceptance of a non-compliant bid was a breach of Contract A and therefore PWGSC was liable to them for damages. The trial judge dismissed that argument, deciding that Contract A had arisen only between PWGSC and Olympic. Even though all of the members considered themselves to be part of one team, it had only been Olympic who had been put forward as the sole proponent. It was therefore only Olympic who faced disqualification if

94 *Design Services Ltd. v. Canada*, 2005 FC 890; reversed (2006), 2006 CarswellNat 3357 (F.C.A.); leave to appeal allowed (2007), 2007 CarswellNat 85 (S.C.C.); affirmed (2008), 2008 CarswellNat 1298 (S.C.C.).

the requirements of the RFP were not met and Olympic who was responsible for demonstrating a financial capability to perform the work.

The Court noted that it had been open to the team to form a joint venture and collectively submit a proposal as the proponent, but they had not done so. No joint venture could be implied after the fact, since there was no evidence that the members had agreed to share both profits and losses on the project.

Having lost on the Contract A issue, the team members moved to the second argument: PWGSC owed the team members a duty in tort law and PWGSC's acceptance of a non-compliant bid was a breach of that duty, entitling them to damages. The problem the plaintiffs faced is that the law of tort generally awards compensation only when plaintiffs have been injured or property has been damaged. There are very few exceptions where the law of tort will grant compensation in circumstances where only money has been lost.[95]

No existing category of tort applied to tendering that contained a duty (grounded in fairness) not to accept a non-compliant bid. This meant that the trial judge would have to create a whole new category. After analyzing the relationship between the team members and PWGSC, the trial judge concluded that the relationship was indeed close enough that PWGSC should be held to owe such a duty of care to the team members.

PWGSC appealed the decision to the Federal Court of Appeal.[96] The Court agreed with the trial judge on the contract issue but disagreed on the conclusion regarding tort law. In pointing to other unsuccessful appellate decisions, which refused to find liability on the part of the owner to subcontractors, the Court held that the relationship between the owner PWGSC and the team members other than Olympic was too indirect and distant to justify the imposition of a new legal obligation.

A further appeal to the Supreme Court was dismissed.[97] That Court agreed with the Federal Court of Appeal and declined to expand the categories of pure economic loss to include a duty of care between owners and subcontractors.

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95 In *Canadian National Railway v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021 at p. 1049; reconsideration refused (July 23, 1992), Doc. 21838 (S.C.C.), La Forest J. recognized five different categories of negligence claims for which a duty of care has been found with respect to pure economic losses:

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.

96 *Design Services Ltd. v. R.*, 2006 FCA 260, 272 D.L.R. (4th) 361; leave to appeal allowed (2007), 2007 CarswellNat 85 (S.C.C.); affirmed (2008), 2008 CarswellNat 1298 (S.C.C.).

97 *Design Services Ltd. v. R.*, [2008] 1 S.C.R. 737 (S.C.C.).

Of particular importance to Rothstein J., writing for the court, was the fact the subcontractors and consultants could have formed a joint venture and participated directly in Contract A:

> The fact that the appellants had the opportunity to form a joint venture, and thereby be parties to the "Contract A" made between PW and Olympic, is an overriding policy reason that tort liability should not be recognized in these circumstances. Allowing the appellants to sidestep the circumstances they participated in creating and make a claim in tort would be to ignore and circumvent the contractual rights and obligations that were, and were not, intended by PW, Olympic and the appellants. In essence, the appellants are attempting, after the fact, to substitute a claim in tort law for their inability to claim under "Contract A". After all, the obligations the appellants seek to enforce through tort exist only because of "Contract A" to which the appellants are not parties. In my view, the observation of Professor Lewis N. Klar (Tort Law (3rd ed. 2003), at p. 201) — that the ordering of commercial relationships is usually in the bailiwick of the law of contract — is particularly apt in this type of case. To conclude that an action in tort is appropriate when commercial parties have deliberately arranged their affairs in contract would be to allow for an unjustifiable encroachment of tort law into the realm of contract.[98]

Why should the fact that the subcontractors and consultants could have joined in on Contract A matter to the analysis? In effect, they were being penalized for not entering into a direct relationship with the owner, and yet the presence of any such an arrangement rarely exists in reality. The "ordering of commercial relationships" in the construction industry is instead a series or chain of contractual relationships, between owner and general contractors, general contractors and subcontractors, subcontractors and suppliers, and so on. This state of affairs had already been recognized, when the Supreme Court extended duties down the construction ladder, finding that those on the lower rungs are entitled to fair treatment in the tender process in the same way contractors at the top are.[99]

Furthermore, the kind of conduct carried out by the owner in *Design Services* — the acceptance of a non-compliant bid — clearly constitutes the kind of unfair behaviour that is routinely considered worthy of judicial redress.[100] The subcontractors and consultants would likely have expected to be treated fairly by the owner (even if indirectly) and were certainly affected by the owner's wrongful conduct as negatively as the general contractor was. Protection of their interests could have easily been achieved by extending the owner's duty to be fair to reach past Contract A to the other wronged parties; the circumstances were ideal for the Court to grant that extended protection. However, the Supreme Court of Canada does not seem to have any appetite for the creation of new category of recovery in tort at this time.[101]

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98 *Ibid.*, at para. 56.

99 See *Naylor*, *supra* note 19.

100 Witness *MJB Enterprises* and similar cases.

101 While the challenging question of how far down any duty in tort would or should extend (is it just to the first tier or everyone on the team) is a question that would give anyone thinking of creating a new category of tort pause, it is submitted that the appar-

In theory, the Court's refusal in *Design Services* to create a duty in tort to protect subcontractors and others from the owner's unfairness may lead, of course, to more and more bidders forming "consortia" to bid on projects, compromising subcontractors and suppliers in addition to general contractors. Realistically, such a reordering of commercial relationships is unworkable in the construction industry. The manner in which current tenders are called require competitive bidding at the subcontractor level, not team-building leading to a collective bid, and subcontractors will continue to remain out in the cold. The Court's reluctance to expand fairness duties through tort law suggests that the further evolution of fairness *outside of Contract A* may be only a historic curiosity.[102]

To continue with the metaphor of evolution, in order to know for sure whether there will be further development in this area we to need to find a missing link: an RFP case like *Mellco* (i.e., non-Contract A procurement) in which the owner is held to have acted unfairly, and which manages to make its way up to the Supreme Court of Canada for consideration. As long as questions of fairness are confined to true tender cases, the courts will continue to analyse the obligations and entitlements of the parties in Contract A terms. Only when the behaviour of an owner is examined under a non-tender setting will the courts be forced into deciding whether fairness truly has a life of its own or whether this line of development is indeed a dead end.[103]

7. FAIRNESS AND JUDICIAL REVIEW

Another potentially fertile ground for promoting the evolution of fairness in tendering law is, ironically, outside of the area of tendering law; it is in the area of judicial review.[104] In this form of court proceeding, the bidder does not seek damages from the owner for breach of Contract A (or in the case of an RFP, some other kind of breach) but rather asks the court to set aside the decision of award itself.

While the remedies of *certiori* (declaration of invalidity of the decision) and possibly *mandamus* (order to make a decision) are available through judicial re-

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ent strong contract-focused analysis of tender issues preferred by the current Supreme Court (as witnessed by the majority's approach in *Double N*, which interestingly was co-written by Rothstein J.) is clearly the primary motivating factor behind the decision not to extend fairness duties to subcontractors.

102 The subcontractor in *Force Construction Ltd. v. Nova Scotia (Attorney General)*, 2008 NSSC 327; additional reasons at (2009), 2009 CarswellNS 21 (S.C.); affirmed 2009 NSCA 96 suffered the same fate. The general contractor recovered damages for the breach by the owner of its Contract A obligations, but the subcontractor was met with *Design Services* and received nothing.

103 If such a tort duty were ever to be developed beyond its current inchoate state, a number of fascinating questions arise relating to limitations and exclusions of liability. Under Contract A, an owner may be successful in limiting or excluding liability by contract for both contractual and tortious wrongs. How would an owner, under an RFP, protect itself regarding liability, since, by definition, there is no Contract A between the parties? One can only imagine the interesting mechanisms or constructs owners may create to address this challenge. In the end, it may be better to run every procurement as a tender, so as to enjoy the benefits of contractual protections.

104 A detailed discussion of judicial review falls well beyond the scope of this article.

view, these are discretionary remedies which means, of course, that the court has to be persuaded to exercise them; the applicant is not automatically entitled to them as a matter of course even if wrongdoing in the sense of process unfairness has been shown.[105]

Generally speaking, a fundamental prerequisite to any application for judicial review in a tender context is that the owner in question must be a public, that is a governmental, body acting under some statutory power of decision-making. While a decision to award a contract through a tender is usually not strictly speaking a statutory decision itself, the general purpose behind awarding contracts is of course consistent with the exercise of government's statutory powers and functions. Nevertheless, courts traditionally considered tender awards to be solely a commercial matter governed by private law and not subject to judicial review.[106]

That all changed with the decision of the Supreme Court of Canada in *Shell Canada Products Ltd. v. Vancouver (City)*,[107] a case involving a challenge to a City Council resolution not to have business dealings with Shell Canada until Royal Dutch/Shell withdrew from South Africa and divested itself of its holdings.

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105 To illustrate the discretionary nature of these remedies, see the recent case of *Aecon Construction & Materials Ltd. v. Brampton (City)* (2009), 83 C.L.R. (3d) 144 (Ont. Div. Ct.) in which an unsuccessful bidder sought judicial review of a City Council decision awarding a road contract to another bidder. By the time the application was heard, the work under the awarded contract had already started. In dismissing the application, the court said:

> [The bidder] has raised serious issues of breach of procedural fairness and breach of natural justice by the City of Brampton in the tendering process and in the manner in which the ultimate contract was awarded to [the other bidder] . . . *Assuming, without deciding, that these issues are within our jurisdiction, there is still a difficult issue as to remedy* . . . It is exceedingly difficult, if not impossible, at this point to reconstitute the bidding process in a manner that is fair to all parties. [The other bidder] has already commenced work on the project. The wisdom of doing that can be questioned. However, halting that project now and awarding a contract for the balance of the work to another company creates all kinds of problems. The remedy sought by [the bidder] is extraordinary and discretionary. That discretion is appropriately exercised in favour of an applicant in a situation where damages would not be an adequate remedy. We are all of the view that damages would be an adequate remedy for [the bidder] in this situation. Indeed, it is the preferable remedy given that certiorari or mandamus would inevitably interfere with the rights of others completely outside this dispute. Any harm done to [the bidder] can be measured in monetary damages . . . We are of the view therefore that we should decline to grant the remedy sought here. [Emphasis added.]

The fundamental question of whether the Court had jurisdiction to the review the decision was therefore left to another day.

106 See, for example, *Ainsworth Electric Co. v. Exhibition Place* (1987), 58 O.R. (2d) 432 (Div. Ct.), and *St. Lawrence Cement Inc. v. Ontario (Minister of Transportation)* (1991), [1991] O.J. No. 438, 1991 CarswellOnt 148 (Gen. Div.).

107 [1994] 1 S.C.R. 231.

The Supreme Court split 5-4 in favour of finding, on a traditional analysis of municipal powers, that the discriminatory nature of the resolution was *ultra vires* the City's powers.

The minority concluded that it was within the City Council's right to discriminate in these circumstances. The decision, written by McLachlin J. (as she then was) took a new, fresh approach to the task of judicial review, finding, among other things, that purchasing decisions of municipalities should be subject to wide judicial scrutiny. The rationale for this conclusion was articulated in the following passages, which for our purposes is very illuminating and worth setting out in full:

> Against allowing judicial review of the purchasing power of governments is the argument that these are matters of private law. According to the private law of contract, each person, individual or corporate, has the right to contract with whom it chooses, and on the terms it chooses. The courts have not restricted this freedom of contract, but confine themselves to enforcement and interpretation of contracts. It has been said that a public body which seeks to procure goods or services is in the same position as any private individual or corporation which seeks to contract with another party. Vickers J. expressed this opinion in *Peter Kiewit Sons [Co. v. Richmond (City)* (1992), 11 M.P.L.R. (2d) 110], supra, where he held that the ordinary rules of private law apply to the public contracting process, and that judicial review does not lie for commercial decisions of public authorities. He explained (at p. 120) that "it would be inappropriate to allow both a public law and a private law remedy in situations involving government contracts where no particular procedure is prescribed by statute or regulation". Adding weight to the argument that government purchasing decisions should be immune from judicial review is the potential for excessive litigation, which may in turn result in significant inconvenience to the public through a disruption of the procurement process . . . In favour of allowing judicial review of the procurement or purchasing power of governments is the argument that while this principle is valid for private contracts, the public nature of municipalities renders it inapplicable to them. . . . The most important difference is the fact that municipalities undertake their commercial and contractual activities with the use of public funds. Another consideration justifying different treatment of public contracting is the fact that a municipality's exercise of its contracting power may have consequences for other interests not taken into account by the purely consensual relationship between the council and the contractor. For example, public concerns such as equality of access to government markets, integrity in the conduct of government business, and the promotion and maintenance of community values require that *the public procurement function be viewed as distinct from the purely private realm of contract law*. Finally, it must be remembered that municipalities, unlike private individuals, are statutory creations, and must always act within the legal bounds of the powers conferred upon them by statute . . . On balance, it is my view that the doctrine of immunity from judicial review of procurement powers should not apply to municipalities. If a municipality's power to spend public money is exercised for improper purposes or in an improper manner, the conduct of the municipality should be subject to judicial review.[108] [Emphasis added.]

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108 *Ibid.*, paras. 10 to 12.

While there is much that could be said about this passage, the most notable feature, for purposes of this article, is the complete lack of any reference by McLachlin J. to *Ron Engineering* or Contract A. How could a judge of the Supreme Court possibly discuss any significant issue of tender law without even mentioning *the* leading case? What happened to the idea that the tender process itself is a contract between the owner and bidders (as compared to the contract being awarded through the process), which sets up the entire framework of the tender process itself? And what happened to the idea that the contract binds both public and private owners, imposing both express and implied duties on them regarding how they should behave towards bidders?

At first blush, a court decision involving judicial review of a contract award, carried out without any regard to that well-established framework, seems like it might well be an aberration.[109, 110] However, as happens from time to time, the minority decision of the Supreme Court, rather than majority decision, has surprisingly managed to get traction in the judicial review decisions that followed, to the point where the fact that McLachlin J.'s view was a dissenting opinion appears to have been forgotten.

No better example of this phenomenon can be found than in the recent decision of the Ontario Divisional Court in *Bot Construction Ltd. v. Ontario (Ministry of Transportation)*.[111] The facts of the case are simple enough: the MTO went out to tender for a road widening and bridge construction project. Under a Directive issued by the provincial government, bidders were to identify the imported steel content in their bids and faced disqualification if the Canadian steel content was found to be inaccurate.

The lowest bidder, Thomas Cavanagh Construction, had not declared any amount for imported steel in its bid even though the *rolled* steel called for in the bridges was not available in Canada. Instead, Cavanagh proposed to use Canadian *welded* steel, which was less expensive. The MTO was nevertheless prepared to consider the Cavanagh bid as compliant and accept its tender.

The second lowest bidder, Bot Construction, complained, arguing that the Cavanagh bid was non-compliant and should have been disqualified. On those facts, we would expect to see the typical scenario unfold: the unsuccessful runner-up (Bot) would sue the tender-calling authority (the MTO) for damages for the lost opportunity of performing the contract, based on the breach of the implied contractual duty of fairness arising under Contract A.

However, Bot faced a serious impediment with this plan of action. The instructions to bidders, i.e. the form of Contract A that Bot had agreed to by virtue of submitting its bid, included a provision that waived the MTO's liability for any

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109 Recall that *M.J.B. Enterprises*, *Martel*, and *Double N* are all more recent decisions of the Supreme Court.

110 Compare this case to the recent case of *New Brunswick (Board of Management) v. Dunsmuir*, [2008] 1 S.C.R. 190, in which the Court appeared to reject a broader approach to judicial review rights in favour of a narrower one, holding that an employment contract should be dealt with as a contract and did not create an independent entitlement to procedural fairness.

111 (2009), [2009] O.J. No. 3590, 2009 CarswellOnt 7757 (Div. Ct.).

damages suffered by any bidder by reason of the MTO's acceptance or non-acceptance of any tender. Worse still, the MTO's qualification procedures allowed the MTO to exclude any contractors from bidding in response to MTO tender calls where the contractor is engaged in a legal proceeding.

It appears that Bot cleverly realized that it might be possible to do an end run around Contract A altogether, and the unhelpful waiver of liability clause in particular, by bringing a judicial review application for *certiorari*, rather than action for damages (which may have been doomed to failure). The Divisional Court accepted Bot's arguments[112] and quashed the MTO's decision, sending the tender back for re-evaluation "in accordance with the terms and conditions set out in the tender documents."

In approaching the problem, the Court had to decide whether the decision of the MTO was subject to judicial review. The Court decided that it was, based on the following policy grounds:

> We are also satisfied that the public law interests in this case are sufficient to require that judicial review be available. The tendering decision of the MTO has obvious broad public interest implications that extend beyond the interests of the contracting parties, not only with respect to the construction of public roads but also to the fairness and integrity of the process followed in the expenditure of significant public funds — totalling $2 billion in 2008 and about $60 million for this project. As noted in Shell, public concerns such as equality of access to government markets, integrity in the conduct of government business, and the promotion and maintenance of community values are relevant to government procurement powers. As well, the issues in the tendering process in this case have significant economic implications for both the steel industry in Canada and the road building industry in Ontario. The government is the only market for provincial road construction and it controls the pre-qualification of bidders and the economic opportunities for the road building industry. Clearly, the tendering of public highways in Ontario impacts not only the rights and interests of the industry bidders but also broader public interests.

Essentially, the Court reasoned that because this case involved a public tender, for public roads, using public funds, then judicial review should be available. Unfortunately, no matter how much one inflates the dollars involved or the size of the marketplace in question, those basic elements apply in almost every public procurement. If the Divisional Court were correct, that would mean that practically every purchasing decision made by municipal councils and government departments across the country would be exposed to the possibility of being judicially reviewed.

Not surprisingly, perhaps, the Court was quick to address this "slippery slope" concern:

> Not all government decisions will attract a duty of fairness: "[T]here must be some qualifying circumstance which triggers the applicability of the duty of fairness" (*Bezaire (Litigation Guardian of) v. Windsor Roman Catholic Separate School Board* (1992), 9 O.R. (3d) 737, ¶42). In *Bezaire* (at paras. 64–66), the guidelines and policies relating to school closures attracted the

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112 Bot was supported by the Ontario Road Builders Association, which intervened on the application.

> duty because they were premised on public consultation. Like the government guidelines in *Bezaire*, the Management Board Procurement Directive is published and its stated purposes and mandatory nature create a public expectation that the tendering process will be conducted fairly and transparently and will provide a level playing field to qualified vendors.[113]

In other words, what would attract the interest of a court in reviewing the decision made, and presumably exclude a broader category of public decisions, is the fact that there existed a published policy (i.e., the Directive) that created a public expectation of fairness. However, almost every public purchasing entity has some publicly-available procurement policy that makes statements about ensuring fairness and transparency in the tender process. Again, if this is the key trigger for engaging the court's interest, it suggests that every purchasing decision would be potentially subject to judicial review.

Based on these considerations, the Divisional Court concluded:

> For these reasons, we are satisfied that judicial review of the MTO Decision to award the Contract to Cavanagh is available in this case. The MTO exercised a statutory power of decision making that impacted on the rights and interests of bidders from the road building industry. This was not a purely commercial decision, governed only by private law. The decision raises public law issues with respect to fairness and transparency and the integrity of the public tendering process for public roads. Nor is this a case where the court should exercise its discretion to decline to judicially review the Decision because the effectiveness of the private law remedy for breach of contract is curtailed by the MTO. The government must act in accordance with statutory authority. While we do not consider the MTO's compliance with the internal Management Board administrative Directive as a limit imposed by statute or regulation, the Directive gives rise to and informs a duty of fairness that is reviewable by the Divisional Court on an application for certiorari.[114]

As with the *Shell* case, what is remarkable about this conclusion is the complete absence of any consideration of the *contractual framework* of tendering law, i.e., Contract A, and the fact that *Martel* held that fairness is an implied term of that contract.

With respect, this underscores the fundamental problem with using judicial review to deal with these types of cases. As we have seen, fairness in the tendering context is a function of applying both express and implied rules evenly to create a level playing field. However, those rules are part of the bargain made between owners issuing tenders and bidders agreeing to bid, and the rules themselves may change from tender to tender. Bidders are not compelled to agree to the rules; as the Court in *Tercon* recently noted, they can elect not to bid if the rules are unacceptable. They are, and remain, a contractual, or private law matter, between the parties involved in the tender.

Instead, the Court appears to be equating fairness here to a much broader sense of fair play without regard to the specific rules in question. Bot, we must remind ourselves, agreed to the waiver of liability as a term of Contract A and yet

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113 *Supra* note 11, at para. 32.

114 *Ibid.*, at para. 33.

the Court used that fact as a reason to invoke judicial review rather than hold Bot to its deal.

The content of fairness in this broad sense is problematic; the lines between tender fairness and public law fairness become easily blurred and confused. For example, the Court relied on *Assaly*,[115] which involved an unsuccessful bidder seeking a reconsideration of a lease award that had not been awarded based solely on price, as the bidder had expected it would be. In that case, the Court had said:

> If this were exclusively a matter of unfairness of result, I am not sure that it would be an appropriate case for judicial intervention. But, it appears to be, on the evidence before me, a matter of unfairness of procedure. A fair procedure requires that the party whose interests are to be affected by a decision be aware of the issue he must address in order to have a chance of succeeding.

This is the language of process or procedural fairness, which is a public law notion. It is an entitlement, for example to participate in a hearing before a decision is made. However, in tender law, there is no such entitlement. Bidders do not have the right to make submissions in advance of the decision; owners find themselves in trouble if they listened to bidders' complaints or explanations once the tender has closed and bids have been submitted.[116] As we have seen from *Ron Engineering* to *Double N*, fairness is best achieved by the owner applying the pre-set rules to the existing bids, as those bids appear on their face.

The Divisional Court did explore the issue of compliance, referring the *Graham Industrial* case and others, in relation to the Cavanagh bid. However, because the analysis was being conducted outside the framework of Contract A and instead was done in a broader public law sense, the issue was not, it is respectfully submitted, given the thorough treatment it would have been had the case proceeded as a breach of a Contract A case.

In some ways, it was likely this very shortcoming that led to the undoing of the case and to the decision being overturned. The MTO appealed the Divisional Court decision on a number of grounds, and the Court of Appeal very recently reversed the order quashing the decision.[117]

The standard of review for judicial review cases (being reasonableness) was the key. The Court of Appeal based its decision on the sole ground that the MTO's decision to award to Cavanagh was not unreasonable, meaning that it fell within "a range of possible, acceptable outcomes that are defensible in respect of the facts and law." Put another way, the fact that the MTO, in good faith, came to the conclusion that the Cavanagh bid met its requirements, was a reasonable conclusion. That objectively there existed support for this decision was good enough, even though, presumably, the decision itself may still have been *legally* wrong. It does not appear that the Court was holding that the Cavanagh bid was actually compli-

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115 *Thomas C. Assaly Corp. v. R.* (1990), 34 F.T.R. 156, ¶115 (T.D.).

116 See the concerns expressed by the Court of Appeal in *Maystar*, *supra* note 22, at para. 38, about owners encouraging contractors "to believe that they can communicate with owners after the fact to clarify or explain inconsistencies in their bids", a practice clearly frowned upon.

117 2009 ONCA 879.

ant; rather it was that the MTO was being reasonable in concluding that it was.[118] For purposes of judicial review, this was sufficient.

The Court was very clear on what it was *not* doing in this case:

> We emphasize that we come to this conclusion without expressing any view as to the availability of judicial review as a remedy with respect to the tendering process for government procurement contracts.[119]

We are left having to stay tuned for further developments in this line of cases.

8. CONCLUSION

The goal behind this survey of the law of tender was to examine the recent case law to determine why the law has evolved into such a state of uncertainty. In the course of our journey through the cases, we discovered that the root of the problem is the clash between concepts of fairness and notions of freedom of contract. In *Double N*, we saw that the Supreme Court of Canada itself can be divided on the question of which of these two principles is to be promoted, especially when the promotion of one is at the expense of the other. And we saw that even the critical question of whether fairness is confined to the contractual framework of tender law or whether it can enjoy a separate existence outside of that framework remains unanswered, with competing views on the point held by the courts across the country. While careful study of the most recent Supreme Court cases suggests that further development of fairness may begin to be reined in by contract terms, lower court decisions, such as found in the Divisional Court in *Bot*, illustrate that the application of the principles to specific fact scenarios remains uneven and confused.

Will the approach to fairness in tender law ever evolve to a higher plane, where predictable outcomes are the norm rather than the exception? For such a state to exist, our journey has suggested that one of two things must happen. One is that freedom of contract becomes solidly entrenched by the judiciary as *the* rule to be applied in all tender cases (as in *Tercon*). Using this approach, as long as the rules are evenly applied, the express provisions of the tender documents would reign supreme. Words would consistently be given their natural meaning, consequences would flow based on well-established principles of contract law, and courts would not second guess either the rules or the end result. While lip service is certainly given to such free market notions from time to time,[120] we have seen that most courts are still generally loath to let go of control over the process completely, and the likelihood of such a hard contract-based regime evolving on its own accord probably remains small.[121]

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118 Consider how the Town of Newmarket would have faired in a judicial review application in *Maystar*, given the Court of Appeal's sympathy for its position.

119 *Supra* note 117, at para. 19.

120 The British Columbia Court of Appeal in *Tercon* being the most recent clear example.

121 The Supreme Court of Canada's decision in *Tercon* will undoubtedly be influential in setting the direction of future development, regardless of the outcome of the appeal. If the exclusion of liability clause is upheld, then that could signal a permanent shift away from fairness in tenders developing a life of its own.

The only other alternative is to give up the contractual framework of tendering altogether and develop in its place clearly articulated and overarching fairness principles (grounded in reasonable expectations of the bidders and supported by the investment of time and expense made in preparing bids) that are applied to *every* procurement situation.[122] In the case, the governing rules would be themselves independent of and supersede any owner-made rules that would otherwise be in conflict. This would naturally mean the end to the *Ron Engineering*-Contract A analysis, which has burdened the law of tender for more than 25 years, and lead us into the more policy-oriented world of fairness such as we witnessed in *Mellco* and *Bot*.

Without one or the other approach clearly becoming the predominant means by which tender cases are to be resolved, we appear destined to remain forever adrift in a sea of uncertainty.

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122 Of course, such a set of clear rules is unlikely to be forthcoming from the courts themselves, for the very reasons explored in this article, leaving legislation as the only viable alternative. See the interesting example of the *Public Tender Act*, R.S.N.L. 1990, c. P-45, as amended, and *Public Tender Regulations, 1998*, N.L.R. 103/98, in which the legislature of Newfoundland and Labrador has dictated, at least to some extent, how public procurement (by government and various government agencies) is to be handled, including such details as the requirement for bid openings to be made publicly. The provisions covering Requests for Proposals is instructive:

> 9. Request for proposal — . . . [A] request for proposals . . . shall be carried out as provided for in this section . . . Each request for proposals shall clearly state the work or acquisition requirement, or the problem to be addressed by the proponent . . . *Each request for proposals shall express the criteria, in addition to price, to be used in evaluating proposals* ***and the methods to be used in weighing and evaluation of that criteria*** and no criterion shall be used that is not expressed in the request for proposals . . . Where a request for proposals is carried out, a government funded body may, in the course of an evaluation, request and consider additional information from a proponent . . . A government funded body may negotiate a detailed contract with the proponent whose proposal ranks highest following the evaluation process, but the resultant contract shall contain substantially the terms of the proposal and, where contract terms cannot be agreed upon, the government funded body may reject that proposal and negotiate with successive proponents in order of evaluation ranking. [Emphasis added.]

Contrast these statutory rules regarding RFPs with the opinion of the British Columbia Court of Appeal in *Elite Bailiff Services*, *supra* note 66, in which the Court held (at para. 27) that "where the criteria have been disclosed, the 'essential requirements of objective fairness and good faith' . . . do not require the disclosure of the exact weight (or number of points) to be allocated to the constituent parts of the criteria." This illustrates that any one set of statutory procurement rules may provide certainty, but at the expense of other conceptions of which rules are essential to ensure fairness.

Author's Note

The preceding paper was submitted prior to the release of the decision of the Supreme Court of Canada in *Tercon* in February of 2010.[123] In considering what the Supreme Court might decide, the paper observed that: (i) the parallel with *M.J.B. Enterprises* suggested that the Court would find a way around the exclusion clause in question; (ii) the trend in recent Supreme Court cases was towards a freedom of contract; and (iii) that the Court would likely be deeply divided in the result. The decision of the Supreme Court of Canada bears all three characteristics.

In a close 5-4 decision, the Supreme Court overturned the B.C. Court of Appeal and restored the trial judgment against MTH. Both the majority and minority agreed that MTH had breached its contractual obligations under Contract A to Tercon by accepting the proposal of Brentwood/EAC. However, while the minority agreed with the lower court that the exclusion clause clearly applied to the circumstances and operated to relieve the MTH from liability, the majority refused to interpret the clause in a way that would free the MTH from the consequences of its wrongdoing.

Before parting ways, the Court as a whole agreed that the "fundamental breach" doctrine used by the trial judge should be laid to rest. In its place a three-part test to determine whether an exclusion clause is enforceable should be applied:

> 1. Does the clause apply to the circumstances?
>
> 2. If so, was the exclusion clause "unconscionable" at the time the contract was made?
>
> 3. If not, should the court nevertheless refuse to enforce the clause because of the existence of an overriding public policy (the onus being on the party seeking to avoid enforcement) that outweighs "the very strong public interest in the enforcement of contracts"?

In considering the exclusion clause in question,[124] the majority[125] was clearly bothered by the harm the enforcement of such an exclusion clause would do to the principles of fairness and the integrity of the bid process. As in *M.J.B. Enterprises*, the majority therefore reached for and found an interpretation of the clause that went around the wording, by concluding that the parties could never have intended that the phrase "participating in this RFP" covered circumstances where other ineligible participants were also "participating". The parallel with *M.J.B. Enterprises* predicted in the paper was expressly identified by the majority:

> 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

123 *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, [2010] S.C.J. No. 4.

124 "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."

125 Written by Cromwell J. (with LeBel, Deschamps, Fish, and Charron JJ. concurring).

> term to accept only compliant bids. Similarly, in this case, there is compatibility between the eligibility requirements of the RFP and the exclusion clause.[126] [Emphasis added.]

The minority[127] accepted the reasoning of the court below and agreed that the words "no proponent shall have any claim for compensation . . . as a result of participating in this RFP . . ." conveyed the sense of the bidder's involvement in the RFP contract stage of the process. Echoing the themes explored in the paper, Binnie J. said:

> 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'.[128] [Emphasis added.]

As demonstrated in the article, uncertainty arises when contractual freedom produces clauses that a court finds offensive, in the sense that the clause itself is viewed to be completely unfair. Here, the minority explicitly recognized what tends to happen in those circumstances: an "*ex post facto*" interpretation that is "strained and artificial".

The majority suggested that more careful drafting of such a clause might save it in the future. However, the strong emphasis placed by the majority on "fairness" and "the integrity of the process" suggests that even the most well-drafted exclusion clause may still fall victim to the "public policy" arm of the new test.[129] Time will tell.

Unfortunately, in the meantime, it appears that the *Tercon* case has simply reinforced the unfortunate conclusion reached in the article — we will be living with uncertainty in the law of tender for some time to come.

Glenn Ackerley
March 2010

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126 At para. 76.

127 Written by Binnie J. (with McLachlin C.J., Abella, and Rothstein JJ. concurring).

128 At para. 128.

129 By contrast, the minority (at para. 135) appeared to have no difficulty with the exclusion clause surviving an attack under the third branch of the test:

> 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. [Emphasis added.]