BLACK SPOT or BIG CHILL
Consequences of *J. Cote v. Burnaby*
By Chris Armstrong and Michael Preston[1]

1. Introduction

The case of *J. Cote & Son Excavating Ltd v City of Burnaby*[2] raised a question: can government impose a bidding ban (a "Reprisal Policy") against contractors who have sued that government?

In Quebec, such Reprisal Policies are unconstitutional.[3] In contrast, the British Columbia Court of Appeal's decision in *J. Cote* held that Reprisal Policies are constitutional – most of the time. In December 2019, the Supreme Court of Canada declined to hear the J. Cote appeal, leaving the courts across the country divided.

In Canada, there are presently thirty-two municipalities who use Reprisal Policies. The effect of such policies is that contractors are deterred from enforcing their contractual rights against those municipalities because to do so means they will be "blacklisted".[4]

There is little case law on this issue. Perhaps it is because historically there were very few Reprisal Policies or perhaps, as one judge mentioned in the proceedings, contractors may not wish to bring a challenge because to do so "bites the hand that feeds them".[5]

It is too early to measure the impact of the *J. Cote* case, but the implications will be significant. Quebec decided the constitutional question one way, but on the other side the country B.C. says the opposite – what will the other provinces do? Looking at the real world effects in the industry, with the recent stamp of approval by the B.C. courts, will more municipalities and provincial governments adopt their own Reprisal Policies?

Full disclosure – we were counsel for the challenger J. Cote. We see the case as the first in a series. Future cases will need to decide two questions: What enabling statutory power is necessary for a municipality to interfere with the common law right of access to the courts without being *ultra vires* its jurisdiction? And, is there a future plaintiff contractor who has suffered the "undue hardship" the B.C. courts were looking for?

In this article we explore the *J. Cote* case and its implications. We start with past jurisprudence on the issue, then give an overview of the case, followed by the implications of the decision.

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[1] of McLean & Armstrong, LLP
[2] *J. Cote & Son Excavating Ltd. v. Burnaby (City)*, 2019 BCCA 168, aff'g (2018) BCSC 1491.
[3] *Cie de construction et de développement cris ltée c. Société de développement de la Baie James*, 2001 CanLII 20643 (Q.C.C.A.)
[4] The 1st affidavit of Jamie Cote, made on March 8th, 2017 to the Supreme Court of British Columbia.
[5] Trial Decision, *Supra*, note 1 at para. 54.

2. Jurisprudence

Prior to *J. Cote,* only the Quebec Court of Appeal had tackled the issue head-on. Other cases touched on the constitutional dimension of access to the courts, but then steered clear, focusing instead on the lens of the administrative powers given to municipalities to conduct their business.

Cox Bros v Big Lakes (Municipal District)

In the 1997 Alberta Court of Queen's Bench case of *Cox Bros. Contracting & Assoc. Ltd. v. Big Lakes (Municipal District)*[6] the municipality implemented a Reprisal Policy:

> No tenders quotations or supply of services shall be considered by any contractor or supplier of services who has initiated a litigation process with the municipality. No consideration will be given for a period of five years from the conclusion of the litigation.[7]

Cox Bros. brought an application for judicial review claiming the policy was discriminatory and specifically targeted them. The municipality countered stating there were a number of business reasons:

- it would be prudent to avoid doing business with parties that may be prone to litigation;
- the working relationship would be guarded and cautious in dealings with a party adverse in interest;
- there was a risk of breaching confidentiality of information when dealing on a daily basis with parties against whom the municipality is in litigation.[8]

The Alberta Court noted it had very limited authority to review decisions taken by a municipality and concluded it could not review this business decision.

In obiter, the court acknowledged that the policy discriminated against contractors who sue the municipality, but then noted that discrimination is authorized so long as it does not violate the *Canadian Charter of Rights and Freedoms*: [9]

> A municipality could not decide to not do business with a person because she was a woman, or for any other reason that is prohibited under the Charter. However, absent that kind of prohibited discrimination, a municipality is entitled to practice discrimination in its business decisions.[10]

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[6] *Cox Bros. Contracting & Assoc. Ltd. v. Big Lakes (Municipal District)* 1997 CarswellAlta 1164, 215 AR 126.
[7] *Ibid*., at para. 14.
[8] *Ibid*., at para 17
[9] *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.
[10] *Supra*, note 5, at para. 24.

Sound Contracting Ltd v City of Nanaimo

In *Sound Contracting Ltd v. City of Nanaimo*[11] the municipality reserved itself the privilege to reject tenders from contractors engaged in litigation against the city. This was not the automatic ban inherent in a Reprisal Policy, but one contractor's bid was rejected and it sued alleging the privilege clause was specifically targeted at it. The City's defence was that it was entitled to reserve the privilege to consider litigation status because the privilege was maintained for valid policy considerations in the conduct of municipal business.

The BC Supreme Court accepted that the litigation privilege was implemented for valid business purposes and was therefore *intra vires* the statutory municipal power to engage in any commercial, industrial or business undertaking.[12]

Sound Contracting #2 [13]

In 2001, the council for the City of Nanaimo passed a resolution re-wording the litigation privilege to reserve itself the "absolute" right to reject a tender submitted by contractor engaged in a legal action against the city.

A contractor closely associated to Sound Contracting Ltd. – the challenger in the earlier case – brought a petition. The petition argued that the council resolution should be set aside for a litany of reasons such as it was done in bad faith, offended the enabling municipal statute, was vague and was against public policy. Included in that list of 7 grounds, the petition mentioned the *Charter* as point number 4.

The B.C. Supreme Court held the earlier *Sound Contacting* decision was determinative and dismissed the petition. The Court did not address the new submission that this policy violated the *Charter*.

James Bay Development Corporation v Compagnie de Construction et de Développement Cris Ltée[14]

In the 2001 *James Bay* case, a Crown Corporation in Quebec had implemented a Reprisal Policy:

> Bidders who are the subject of court proceedings or who have brought court proceedings against the Corporation or who have received an insufficient settlement report from the James Bay Development Corporation are ineligible to submit a tender and if they do, the tender will be rejected.[15]

The Quebec Court of Appeal set out what it saw as the fundamental problem with a Reprisal Policy:

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[11] 2000 BCSC 1819.
[12] *Ibid*., at paras. 26-29.
[13] *Hancon Holdings Ltd. v. City of Nanaimo*, 2001 BCSC 1606.
[14] *Supra*, note 2.
[15] *Supra*, note 2 at para. 8.

> … it places the contractor in the situation of having to choose between exercising its fundamental right to have recourse to the courts to enforce its rights and the possibility of obtaining a coveted contract.[16]

The Court held this contravened the rule of law principle and was contrary to public order.[17] The rule of law was expressly mentioned in the preamble to the *Charter* and in *B.C.G.E.U.* The Supreme Court enshrined the right of access to the courts as a corollary right to the rule of law principle.[18]

The Supreme Court in *B.C.G.E.U.*

James Bay injected the right of access to the courts into the Reprisal Policy question. Flashing back to 1988, in *B.C.G.E.U.* the Supreme Court wrote:

> This case involves the fundamental right of every Canadian citizen to have unimpeded access to the courts and the authority of the courts to protect and defend that constitutional right.[19]

Chief Justice Dickson emphasized that access to the courts was imperative to the rule of law, pointing out that the courts could not independently maintain the rule of law if access was hindered, impeded or denied.[20] There, the interfering action was employees on strike picketing the courthouses, but the Court adopted the following passage:

> Any action that interferes with such access by any person or groups of persons will rally the court's powers to ensure the citizen of his or her day in court. Here, the action causing interference happens to be picketing. As we have already indicated, interference from whatever source falls into the same category.[21]

B.C.G.E.U. set the high-water mark, but the decision went largely dormant. It did not come up again in any substantive way until mentioned *in obiter* in the 2007 Supreme Court decision of *Christie v British Columbia (Attorney General)*.[22]

Christie v BC(AG)

B.C. had implemented a 7% tax on legal fees and the allegation was this imposed a barrier to low income individuals accessing justice. The issue was cleanly resolved by noting the tax in no way prevented access to the courts, it only prevented access to counsel – a very different right. Nonetheless, early in the written decision, the Court noted that the right of access to the courts elicited in *B.C.G.E.U.* could not be an absolute right. The court stated:

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[16] *Supra*, note 2 at para. 20.
[17] *Supra*, note 2 at para. 21.
[18] *Supra*, note 2 at para. 26.
[19] *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214 at para. 1.
[20] *Ibid*., at para. 24.
[21] *Ibid*., at para. 26.
[22] *British Columbia (Attorney General) v. Christie*, [2007] 1 S.C.R. 873, 2007 SCC 21.

> The right affirmed in *B.C.G.E.U.* is not absolute. The legislature has the power to pass laws in relation to the administration of justice in the province under s. 92(14) of the *Constitution Act, 1867*. This implies the power of the province to impose at least some conditions on how and when people have a right to access the courts. Therefore *B.C.G.E.U.* cannot stand for the proposition that every limit on access to the courts is automatically unconstitutional.[23]

In short, s. 92(14) required by necessary implication that the provinces be able to impose some conditions on the right of access to the courts; therefore the right could not be said to be absolute.

Trial Lawyers v BC(AG)

The right of access to the courts was next at issue in the 2014 Supreme Court case of *Trial Lawyers Association of British Columbia v BC(AG)*[24].

The Province had imposed hearings fees for each day of trial. There was an exemption for the impoverished, but the Court found this did not go far enough because low income individuals were not exempted.

Chief Justice McLachlin for the majority held the right of access to the courts was an unwritten constitutional principle implied from s. 96 of the *Constitution Act, 1867*.[25] The Chief Justice wrote:

> The historic task of the superior courts is to resolve disputes between individuals and decide questions of private and public law. Measures that prevent people from coming to the courts to have those issues resolved are at odds with this basic judicial function. The resolution of these disputes and resulting determination of issues of private and public law, viewed in the institutional context of the Canadian justice system, are central to what the superior courts do. Indeed, it is their very book of business. To prevent this business being done strikes at the core of the jurisdiction of the superior courts protected by s. 96 of the *Constitution Act, 1867*.[26]

On the other hand, s. 92(14) gave the Province the constitutional power to administer the courts as it saw fit; this by necessity implied the Province must have some leeway to infringe a person's right of access to the courts. Chief Justice McLachlin held the barrier created by hearing fees was permitted, but when those permitted hearing fees imposed "undue hardship" on a litigant there needed to be a constitutional exemption for that litigant.

Justice Cromwell writing a minority decision concurring in the result preferred to resolve the dispute on administrative grounds. There was a common law right of reasonable access to the

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[23] *Ibid*., at para. 17.
[24] 2014 SCC 59, [2014] 3 S.C.R. 31.
[25] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5.
[26] *Supra*, note 23 at para 32.

courts. The right could only be abrogated through express statutory language. Without such an enabling statute, government action would be *ultra vires* to the extent it was inconsistent with the common law right.[27] The hearing fees lacked such an express empowering statute.

Enter *J. Cote v Burnaby*

Two months after the *Trial Lawyers* decision was rendered, J. Cote commenced its constitutional challenge to the Burnaby Reprisal Policy. In an unexpected turn for a humble construction case, this meant the *J. Cote* challenge became a forum for addressing the new access to courts jurisprudential question:

- was *B.C.G.U.E.* still the authority for the general constitutional right of access to the courts and the new "undue hardship" test just an exception to the rule – carved out for the circumstances of the Province exercising its s. 92(14) court administration powers; or

- did *Trial Lawyers* change the general law, dramatically narrowing the right set out in *B.C.G.E.U.*

3. Overview of the *J. Cote* Case

J. Cote & Son Excavating Ltd. was a contractor specializing in municipal infrastructure. About seventeen percent of its work was through winning competitive bids with the City of Burnaby.

In 2013, a contract dispute arose between J. Cote and Burnaby. A 'concealed condition' had resulted in a collapsed wall that killed a worker. A referee heard the dispute and found in favour of J. Cote. Burnaby refused to follow the non-binding decision. J. Cote requested arbitration, but Burnaby refused. Left with no other avenue to resolve the dispute, J. Cote commenced an action in court.

Two months after J. Cote began the action, Burnaby added a Reprisal Policy to its invitations to tender. Burnaby would not accept bids from anyone who was engaged in a legal proceeding against the city:

> Tenders will not be accepted by the City of Burnaby (the "Owner") from any person, corporation, or other legal entity (the "Party") if the Party, or any officer or director of a corporate Party, is, or has been within a period of two years prior to the tender closing date, engaged either directly or indirectly through another corporation or legal entity in a legal proceeding initiated in any court against the Owner in relation to any contract with, or works or services provided to, the Owner; and any such Party is not eligible to submit a tender.

J. Cote was thereby banned from bidding on Burnaby projects because it had taken Burnaby to court.

[27] *Supra*, note 23 at paras. 70-73.

The summary trial judge found there was a constitutional right of access to the courts based on the rule of law and s. 96 of the *Constitution Act, 1867*. However, the Court adopted *Trial Lawyers* as the new test for all interference with access: a plaintiff had to prove the interference was causing it "undue hardship".[28] J. Cote's loss of work did not meet the test. The Court held the Reprisal Policy was valid and it was up to the individual contractor to bring their entire financial information before the court to show it should be granted an exemption because it would suffer "undue hardship".

The BC Court of Appeal agreed, stating:

> In my opinion, the majority in *Trial Lawyers* fully described the parameters of the right of access to the civil superior courts. Section 96 is the only path to a constitutional requirement of access to the civil courts. Section 96 only protects against a denial of access, which was reached in that case at the point where the hearing fees caused undue hardship. [underlining original]

What this amounts to is that in B.C., municipal governments can interfere with access to the courts in any way and for any reason they choose. The only limitation is that government interference does not apply to those persons who would suffer so much hardship they could no longer commence an action. Those persons can apply to the court for a special exemption.

Seeking leave to the Supreme Court, a key question was whether the intention of the *Trial Lawyers* decision was to narrow *B.C.G.E.U.* by saying any and all government interference with access to the courts was permissible so long as it did not create "undue hardship"? Or was *Trial Lawyers* intended to allow some interference out of necessity when the province was exercising its s. 92(14) power to administer the courts? The dismissal of the leave indicates it is the latter.

As a result of *J. Cote,* the current state of the law in B.C. is that a municipal government can adopt a Reprisal Policy to deter contractors from enforcing their legal rights. An individual contractor can get an exemption by going to court, disclosing its financial information, proving it would suffer "undue hardship", and thereby get a court order exempting it from the Reprisal Policy.

4. Implications of the *J. Cote* Decision

In an average year, thirty-nine billion dollars in public infrastructure projects are procured by the various levels of government in Canada.[29] The tendering practices of those governments therefore have a massive impact on the construction industry.

A recent survey of every province and territory – other than Quebec – found thirty-two municipal governments use Reprisal Policies.[30] The survey looked only for bans that automatically rejected bids. In other words, it did not count policies that accepted all bids and

[28] Trial Decision, *Supra*, note 1 at para. 2.
[29] Affidavit of Mary Van Buren, President of the Canadian Construction Association in support of an application for leave to appeal to the Supreme Court of Canada.
[30] *Ibid*.

then evaluated them in light of any litigation. Importantly, the Reprisal Policy bans applied regardless of the merits or outcome of the litigation; even if a court completely validated the contractor's claim, the ban still applied. The bans found in the survey lasted anywhere from 2 to 5 years.

Before *J. Cote*, the legality of these Reprisal Policies was a grey area. The *James Bay* decision was only reported in French, and while the reasoning was based on constitutional principles that apply throughout the country, it was viewed as largely isolated to the civil jurisdiction of Quebec.

The goal of the *J. Cote* case was to duplicate the *James Bay* decision, creating a mirrored precedent in an English, common law province. The rules would become consistent across the country. But rather than unify the country, it is now split.

There are now two appellate courts that have weighed in on the issue, and they arrived at opposite conclusions. The first and obvious question is what will the other provincial appellate courts do if confronted with the issue? We do know they will give more weight to the B.C. decision as it is more recent and from a fellow common law jurisdiction. The panel would have to have its own strong views on the issue to land onside with Quebec.

The more immediate question faced by the construction industry is – What will other municipalities, provincial and federal governments do in light of the new legal atmosphere created by *J. Cote*? Being given the green light to deter contractors from enforcing their legal rights is a tempting option that surely more municipal councils will adopt. On the other hand, open and fair tendering is a principal honoured by most municipalities as a proven means to deliver projects at a more efficient price. Indiscriminately limiting the bidding pool is contrary to the taxpayer's best interests.

In October 2012, Manitoba Finance Minister Cameron Friesen instructed public bodies in that province not to reject any bids on the basis of litigation.[31] It is worth noting that this was a province where a school board reserved itself the privilege to reject a bid from any contractor who was in a dispute with that school board or was in a dispute with any school board anywhere in the province or with the provincial government.[32] Hence, any contractor looking to enforce its rights against a school board or the provincial government had to weigh the downside of being shut out from work 'across the board'.

The implications of *J. Cote* are in early days. The law moves slowly; even government tendering practices seem, in comparison, like a jackrabbit. The on-the-ground response of government tendering practices will certainly be faster than the next step in the legal evolution. The municipalities – and the potentially seismic event of a move by a provincial or federal

[31] Manitoba no-go zone for reprisal or local preference clauses in public tenders: Friesen. Retrieved January 4, 2020, from http://www.mhca.mb.ca/wp-content/uploads/2014/08/MB-no-go-zone-for-reprisal-or-local-preference-clauses-in-public-tenders-Friesen.pdf.

[32] The 1st affidavit of Darrell Jack Meseyton, Vice-President and co-owner of E.F. Moon Construction Ltd., made on March 8th, 2017 to the Supreme Court of British Columbia.

government – is where the near-term action will be. Nevertheless, there are presently live legal questions that are waiting for the right circumstances to come before the courts.

5. New Questions that Require Judicial Resolution

While the action will be with industry, there is work to be done on the legal framework of Reprisal Policies.

Falling out of *J. Cote*, there are two questions in need of judicial direction:

- Administratively, what statutory authority is needed to empower the use of Reprisal Policies?

- Constitutionally, what must be proven to establish the "undue hardship" necessary in B.C.?

The earlier *Sound Contracting* cases found that administratively, municipalities were empowered to include litigation status as one factor in evaluating the best bids. The statutory enabling language they could point to was the power to administer their business affairs.

What those cases did not address were Reprisal Policies (automatic bans) and naturally they could not address the point made by Justice Cromwell thirteen years later in *Trial Lawyers*: there is a common law right of reasonable access to the civil courts and any abrogation of that right by a government requires enabling express statutory language. Without that express language, the municipal conduct is *ultra vires*.

The question is for any existing Reprisal Policy – Is an automatic ban an "unreasonable" interference with the common law right of access? In other words, is the detrimental effect on access proportionate to the benefits of the ban? If shown to be unreasonable, what express statutory language can the municipality point to as allowing such interference?

With the constitutional challenge settled in B.C., the next issue becomes the mixed fact-law question of what constitutes "undue hardship" for a contractor. For an individual facing hearing fees, the threshold is when that individual can no longer pay rent or buy groceries because of the hearing fees. How does that translate to the B.C. courts' framework in *J. Cote*?

We know from the facts of *J. Cote* that a contractor losing seventeen percent of its traditional business is not enough. What will it take? Is it enough for the contractor to lose fifty percent of its traditional business? Seventy-five percent? This avenue is not quite the same thing as in *Trial Lawyers* because in that case the Court was looking not at lost income but at overall assets the individual possessed.

The question remains: what will it take for a commercial entity to show "undue hardship"? It is likely the contractor must show it cannot meet its needs. Suffering financial hardship alone is not enough; the contractor must show the hardship crosses the line into "undue". What the B.C. courts may be looking for is an example where the contractor cannot commence the action

because the consequences of the Reprisal Policy are so severe the contractor would be forced to terminate staff or default on debts and risk bankruptcy.

Getting an answer to the "undue hardship" question will require a plaintiff who is financially vulnerable and therefore needs to bring a petition before commencing an action. The petition would have the court inform the prospective plaintiff whether it will or will not be subject to the Reprisal Policy if it were to bring the action. This fictional plaintiff contractor must be willing to 'bite the hand that feeds it' – not for the faint of heart.

A final question not answered by *J. Cote* is whether a contractor who sues and is blacklisted by the Reprisal Policy has as a head of damages its lost opportunity costs.

Because of these lingering questions, we see *J. Cote* not as the end of the road, but one of a series that began with *James Bay*. There is much more to come before the framework is fleshed out.

6. Conclusion

In the *J. Cote* decision, the B.C. courts narrowed the historical test for access to the courts. The view from the bench is the law has evolved – *B.C.G.E.U.* is outmoded. Interference, impediment or impairment to access will no longer rally the powers of the court. Such interference is now valid so long as there is an exemption for those persons who are effectively denied access.

J. Cote is also part of the trend in general tendering law – owners are increasingly immune. *Martel*[33] created broad owner privileges. *Tercon*[34] created exclusion of all owner liability. *J. Cote* created a deterrence against the enforcement of contract rights and obligations. Whatever happened to *Ron Engineering*[35] and fairness?

Accessing the courts is already difficult. Reprisal Policies add a new barrier that makes it even more challenging for a small class of citizens – contractors – to view courts as a viable means of enforcing their legal rights. Any contractor bidding on government projects know that good relationships with governments is important. Now they are crucial. The question is, how will contractors prosper in an environment where a Reprisal Policy has, from a practical perspective, removed the option of accessing justice? Such an unbalanced playing field can only lead to a place far away from fair and equitable government procurement.

J. Cote is a green light that signals other municipalities across the country to implement Reprisal Policies. The result will be a chill on contractors' willingness to enforce their rights. Those who do sue to enforce their rights will be presented with the black spot of blacklisting. The big chill or black spot – not an enviable choice. Stay tuned.

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[33] *Martel Building Ltd. v. Canada*, [2000] 2 S.C.R. 860.
[34] *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69.
[35] *R. (Ont.) v. Ron Engineering*, [1981] 1 S.C.R. 111.