SCC File. 32460

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE BRITISH COLUMBIA COURT OF APPEAL)

B E T W E E N:

TERCON CONTRACTORS LTD.

Appellant

- and -

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA, BY HER MINISTRY OF TRANSPORTATION AND HIGHWAYS

Respondent

- and -

THE ATTORNEY GENERAL FOR ONTARIO

Intervener

FACTUM OF THE INTERVENER THE ATTORNEY GENERAL FOR ONTARIO

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW AND FACTS

1. The Attorney General for Ontario ("Ontario") was granted leave to intervene in the present appeal by order of the Honourable Justice Ian Binnie, dated January 16, 2009. The order stipulated that Ontario was to only address the questions of law, and not take a position as to whether, on the facts, the appeal should be granted or dismissed. Accordingly, Ontario takes no position on the facts of the appeal.

2. The current state of Canadian jurisprudence suggests that purchasers are not permitted to exclude liability for breaches of the duty of fairness owed to compliant bidders in Contract A through the use of sweeping exclusion clauses. Ontario submits that the duty of fairness is a core component of the competitive bidding process. It offers reciprocity and certainty for bidders and purchasers, and transparency for the public at large. Allowing a broadly worded clause to exclude claims for breaches of the duty of fairness could undermine the overall integrity of the bidding process.

3. This does not mean, however, that the integrity of the bidding process is in conflict with the doctrine of freedom of contract. Ontario views the procurement system as having "two lanes" ultimately leading to the formation of a performance contract – competition and negotiation. Each of these lanes has different rules, strengths and weaknesses, and should be kept conceptually distinct. Competitive processes offer greater certainty for bidders and purchasers through the reciprocal obligations and balance arising from the formation of a notional process contract (Contract A). Negotiated processes offer greater flexibility, enjoying the full freedom of contract and are governed by the general principles of commercial negotiations.

4. Purchasers have the freedom to choose which process is best suited to procuring the types of goods and services they require. Purchasers may run a competitive bidding process, taking advantage of its predictability. In electing to do so, however, a purchaser necessarily owes a duty of fairness to all compliant bidders responding to the tender call. If a purchaser seeks greater flexibility, it is free to negotiate the terms of its contracts with prospective vendors. Such negotiated contracts may include the exclusion of some or all

of the purchaser's liability. Since there is no contractual relationship preceding the performance contract, purchasers do not owe a duty of fairness or good faith to vendors with whom they are negotiating.

5. Ontario submits that this appeal arises from the conflation by the court below of the rules governing these "two lanes". The result sacrifices the reciprocity, certainty and fairness of tendering law for the full flexibility of the doctrine of freedom of contract. Given the availability of negotiation as an alternative to competition, it is Ontario's position that this result is unnecessary. Both purchasers and bidders benefit from the rules governing these two lanes of procurement remaining distinct.

PART II – POSITION ON THE QUESTIONS

6. Ontario takes the following positions on the first three questions on appeal. Ontario takes no position with respect to the fourth question.

7. Ontario's position with respect to the appellant's first question is that the type of sweeping exclusion clause at issue in this case has generally not been permitted by the courts to exclude liability for breaches of the duty of fairness. These types of clauses are intended to provide purchasers with some flexibility to respond to changing circumstances and unforeseen events, but only for legitimate reasons.

8. With respect to the second question, Ontario observes that permitting purchasers to exclude liability for breaches of the duty of fairness may compromise the enforceability of the reciprocal obligations owed by purchasers and bidders, thereby undermining the business efficacy and integrity of the competitive bidding process.

9. With respect to the third question, Ontario wishes to clarify that the duties of fairness and good faith do not apply to pre-contractual relationships or negotiations. Outside of the competitive bidding process, all parties are subject to the same guidelines for commercial dealings, which do not include any freestanding duties of fairness or good faith.

PART III – ARGUMENT

A. The History and Objectives of Tendering Law

10. Tendering law is a highly specialized area of contract law. Over almost thirty years, this Honourable Court has developed jurisprudence tailored to address the short-comings of traditional contract law when applied to the bidding process. The Honourable Justice John C. Major illustrated the dilemma this Court initially faced:

> The traditional doctrine of contract failed to provide fairness in the tendering process. The party making a call for bids could not be confident that the bids would remain open and not be unilaterally withdrawn before acceptance. The bidders, in turn, were equally uncertain that their bids would be considered and evaluated fairly, or that the owner would award the contract to any of them. ...These concerns threatened to undermine the tendering process, which was designed to foster fair competition among bidders. ...It was apparent that conventional contract law would have to be adapted to meet the needs of the tendering process.

> **Hon. Justice John C. Major, "*The Law of Tendering: A View from the Supreme Court of Canada*" (Paper presented to the Leading Edge: CBA National Construction Law Conference, May 2002), Ottawa: Canadian Bar Association, 2002 at 4 [Intervener BA, Tab 1] ["Justice Major"]**

11. This Court addressed these concerns in *Ontario v. Ron Engineering*, recognizing that when a purchaser puts out a call for tenders, and a bidder submits a compliant bid, a notional Contract A arises. Several obligations come with this contract. The bidder cannot withdraw its bid for a period specified by the purchaser, or else it forfeits its bid deposit. The bidder is also bound to enter into the performance contract, or Contract B, if its bid is accepted. Contract A is not a unilateral contract. As consideration, the bidder receives a chance to compete for Contract B, and the purchaser's implied promise the bid will be considered.

> ***M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619 at paras. 18 and 23 [Appellant BA, Vol. I, Tab 26] ["*M.J.B.*"];**
> ***Ontario v. Ron Engineering & Construction (Eastern) Ltd.*, [1981] 1 S.C.R. 111 at 121-123 [Appellant BA, Vol. I, Tab 35] ["*Ron Engineering*"];**
> **Paul Sandori & William M. Pigott, *Bidding and Tendering: What is the Law?*, 3rd ed. (Markham: Butterworths, 2004) at 13 and 17 [Intervener BA, Tab 2] ["Sandori and Pigott"]**

12. This Court in *Ron Engineering* also recognized that purchasers owed a corresponding "qualified" obligation to accept the lowest bid. The Ontario Court of Appeal subsequently elaborated on this reciprocal obligation, attempting to promote balance and

fairness for bidders along with certainty for purchasers. This Court ultimately confirmed these principles in *M.J.B.* and *Martel*. It is now settled law that Contract A requires that a purchaser only award Contract B to a compliant bidder, and precludes acceptance of a non-compliant bid. A purchaser also has a duty to treat all compliant bids fairly and equally.

> ***Ron Engineering, supra*** **at 123 [Appellant BA, Vol. I, Tab 35];**
> ***Tarmac Canada Inc. v. Hamilton-Wentworth (Regional Municipality)*** **(1999), 48 C.L.R. (2d) 236 (Ont. C.A.) at paras. 8-9 [Appellant BA, Vol. I, Tab 42] ["*Tarmac*"];**
> ***M.J.B., supra*** **at paras. 45 and 48 [Appellant BA, Vol. I, Tab 26];**
> ***Martel Building Ltd. v. Canada,*** **[2000] 2 S.C.R. 860 at paras. 83-85 and 88-89 [Intervener BA, Tab 3] ["*Martel*"]**

B. Privilege Clauses

13. Much of tendering jurisprudence has centred on a purchaser's ability to reserve to itself certain rights when preparing the terms of the tender call. "Privileges clauses" have allowed purchasers to qualify their obligations to bidders, and to specify which rights they intend to reserve when considering their bids. "Exclusion clauses", like the one at issue in this case, are a species of privilege clause. Also known as "limitation of liability" clauses, these operate to specifically exclude remedies for breach of contract. Ontario submits that the intended effect and scope of exclusion clauses in the tendering system must be considered in the context of the aims of tendering law referenced above – certainty, fairness and reciprocity.

(i) Legitimate Use and Scope of Privilege Clauses

14. Although privilege clauses of various kinds are commonly used in tendering documents, courts have tended to interpret them very restrictively. That does not mean, however, that they have no meaning or utility. Courts have described the circumstances where a privilege clause may be used by a purchaser to back out of a tender call:

> It permits the owner to reject the low bid in the case of some "force majeure", or if it decides not to proceed with the project because the bids are above budget, or changed circumstances negate the viability of the project or adversely affect the low bidder's qualifications assumed in the pre-qualification standards. It would also permit rejection based on pre-published policy.

In other words, such clauses are intended to provide some flexibility to purchasers in unforeseen circumstances, reserving a measure of discretion to make decisions for a range of legitimate reasons.

> ***George Wimpey Canada Ltd. v. Hamilton-Wentworth (Regional Municipality)* (1997), 34 C.L.R. (2d) 123 (Ont. Gen. Div.) at para. 30 [Intervener BA, Tab 4] ["*Wimpey*"] aff'd under a different name: *Tarmac, supra*;**
> ***Continental Steel Ltd. v. Mierau Contractors Ltd.*, 2007 BCCA 292 (C.A.) at para. 26, [Intervener BA, Tab 5]**

15. This Court has held that the discretion afforded by a privilege clause must be exercised fairly. If a purchaser wishes to award a contract to a bidder other than the lowest compliant one, or to reject all bids, "it should have a defensible commercial reason for doing so". The presence of a privilege clause does not vacate this requirement, nor does it allow a purchaser to act unfairly or arbitrarily.

> ***Martel, supra* at paras. 88-89 and 92 [Intervener BA, Tab 3];**
> ***M.J.B., supra* at paras. 45-46 [Appellant BA, Vol. I, Tab 26];**
> **Robert C. Worthington, *The Public Purchasing Handbook* (Markham: Butterworths, 2004) at 390-391 [Intervener BA, Tab 6] ["Worthington"]**

16. There are a range of circumstances in which Canadian courts have allowed purchasers to rely on privilege clauses. For example, a purchaser may reject all bids and reissue the tender call because its budget was exceeded by all of them. A privilege clause may also relieve the purchaser of the obligation to accept the lowest bidder, where better value may be obtained by accepting a higher bid. Alternately, where a purchaser wishes to emphasize more subjective factors such as the level of originality, innovation or creativity of a particular proposal, it might legitimately exercise its discretion under the clause. There must always, however, be a valid, defensible reason for doing so.

> ***Cable Assembly Systems Ltd. v. Dufferin-Peel Roman Catholic School Board* (2002), C.L.R. (3d) 163 (Ont. C.A.) at paras. 8-10 and 16 [Intervener BA, Tab 7];**
> ***M.J.B., supra* at 46-47 [Appellant BA, Vol. I, Tab 26];**
> **Justice Major, *supra* at 9 [Intervener BA, Tab 1]**

(ii) The Limitations of Privilege Clauses

17. In *M.J.B.*, this Court found that a privilege clause could not permit a purchaser to accept a non-compliant bid. Both before and since that decision, many purchasers have attempted to rely on privilege clauses in litigation to resist liability for such a breach. With the exception of the decision on appeal, none have succeeded.

> ***Martel, supra* at para. 92, [Intervener BA, Tab 3];**
> ***M.J.B., supra* at para. 45 [BA, Vol. I, Tab 26];**
> ***NAC Constructors Ltd. v. Alberta Capital Region Wastewater Commission* (2005), 380 A.R. 318 (C.A.) at paras. 5-6 [Intervener BA, Tab 8] ["*NAC Constructors*"];**

Worthington, *supra* at 389-390 [Intervener BA, Tab 6]

18. Ontario submits that, on examining this range of decisions, it appears that courts have interpreted privilege clauses to permit only those reasonable actions by a purchaser that do not run contrary to the duty of fairness. Privilege clauses, of all kinds, should therefore be reasonable in their scope and precise in their wording. According to Robert C. Worthington, all-encompassing clauses that exclude all liability, like the one in this case, essentially amount to "overwhelming unfairness". As such, they invite courts to restrict their application, or invalidate them altogether.

***Martel, supra* at paras. 89 and 92 [Intervener BA, Tab 3];**
***Wimpey, supra* at para. 28 [Intervener BA, Tab 4];**
Worthington, *supra* at 391 [Intervener BA, Tab 6]

19. The Honourable Justice John C. Major has expressed the following views about purchaser attempting to use privilege clauses to opt out of the duty of fairness:

> Some may argue that this "contracting out" of obligations under Contract A is permissible under the doctrine of freedom of contract. ...However, the Supreme Court has prevented owners from using privilege clauses to wholly circumvent the Contract A obligations imposed by *Ron Engineering*. ...While the courts have been generally supportive of an owner's decision to refuse to enter into any contract at all, they are more critical of an owner's decision to award the contract to a certain bidder based on highly subjective criteria, or to a non-compliant bidder. Once the owner decides to award the contract, it must decide among the bidders fairly.

Justice Major, *supra* at 9 [Intervener BA, Tab 1]

(iii) Jurisprudence Applicable to Exclusion Clauses

20. The jurisprudence reviewed above has been concerned with the ability of purchasers to rely on privilege clauses to avoid duty of fairness obligations. Ontario submits that it would be inconsistent with this jurisprudence to allow the exclusion clause to achieve what precisely worded privilege clauses could not. Strictly speaking, such clauses do not exclude the duty of fairness, or dispense with its requirements in the bidding process. Instead, as asserted by the respondent on appeal, they deny a bidder a remedy for explicit breaches of the duty of fairness. Ontario submits that to accept such an approach would allow purchasing institutions to do through the back door what could not be achieved through the front door.

21. A purchaser who elects to conduct a competitive bidding process instead of negotiation still has the flexibility to draft the terms of the tender documents. While it may be open to a purchaser to override certain aspects of the duty of fairness with specific and precisely worded clauses, such clauses, however, must not be contrary to public policy or antithetical to the entire intent of the contract:

> The owner - in this case the government - is in control of the tendering process and may define the parameters for a compliant bid and a compliant bidder. The corollary to this, of course, is that once the owner - here government - sets the rules, it must itself play by those rules...
>
> ***G.J. Cahill & Company (1979) Ltd. v. Newfoundland and Labrador (Minister of Municipal and Provincial Affairs)* (2005), 250 Nfld. & P.E.I.R. 145 (Nfld. S.C. (T.D.)) at para. 35 [Intervener BA, Tab 9];**
> ***NAC Constructors, supra* at para. 6 [Intervener BA, Tab 8]**

22. The duty not to accept non-compliant bids is a central term – or rule – of Contract A. In *M.J.B.*, this Court found that implying the duty not to accept non-compliant bids in Contract A was necessary to give business efficacy to the competitive bidding system. This judicial approach is consistent with the central objective of competitive bidding lane – replacing negotiation with competition to reduce costs. The overall effectiveness of competitive bidding hinges on these reciprocal obligations owed by purchasers and bidders. It makes little sense for a bidder to bear the time, expense and risk of preparing a compliant bid, if a purchaser may freely accept a non-compliant one. It makes even less sense if that bidder is denied any remedy under any circumstances. Without the promise that bids will be treated fairly, or that there are remedies available when they are treated unfairly, bidders will be deterred from participating in the bidding process.

> ***Martel, supra* at para. 92 [Intervener BA, Tab 3];**
> ***M.J.B., supra* at paras. 27-30 [Appellant BA, Vol. I, Tab 26];**
> **Justice Major, *supra* at 18 [Intervener BA, Tab 1]**

23. The court below has suggested that these considerations should be left to the market. Ontario submits that such an approach ignores the traditional role of the courts as the protector of the integrity of the bidding system, shaping the parameters of the tendering process. By addressing the deficiencies in traditional contract law, this Honourable Court has taken an active role in promoting the certainty and fairness of the bidding system.

***Martel, supra* at para. 88 [Intervner BA, Tab 3];**
***M.J.B., supra* at paras. 27-30 [Appellant BA, Vol. I, Tab 26]**

24. If purchasers exclude their duty to accept only compliant bids, or to treat bidders fairly, the consideration flowing to the bidder is effectively eliminated. Such an outcome puts into issue the fairness of a purchaser's ability to retain bid deposits, or to compel performance from a bidder. Ontario submits that without reciprocity, the enforceability of Contract A by purchasers as against bidders is called into question.

C. Alternatives to Contract A – The Negotiation "Lane"

25. This appeal raises the issue of the extent to which purchasers can obtain flexibility, and exercise the freedom of contract within the competitive bidding process. Worthington has described the frustration of purchasers with the rigidity of Contract A:

> To this day, there are still owners who disagree with what they see as an intrusion into their private choices. These owners want the freedom to do as they choose, but what they do not realize is that they have that already in law. It is called sole source or direct award contracting. Talk to one bidder only, negotiate a deal if you can with one bidder only, be legally bound only if you and that bidder can agree and have no legal obligations at all if you do not agree. No pesky legal encumbrances (other than a duty to be honest in what you say) will bedevil you.

Purchasers have options available to them, and should carefully consider which one would be most appropriate before beginning a procurement process. Where a purchaser determines that it cannot obtain the best value through a competitive process, or requires more flexibility, it can elect to negotiate a contract directly.

Worthington, *supra* at 123 [Intervener BA, Tab 6]

26. The reasons for which a purchaser may seek greater flexibility than is available under the Contract A process may include budgetary constraints, the nature of the goods or services required, or the indeterminate nature of a project. In such cases, the negotiation lane is available. The purchaser may choose to enter into negotiations with one vendor, or may issue a broad invitation, soliciting non-binding proposals and then short-listing prospective vendors. Purchasers may also employ negotiation as a last resort, after a tender call fails to produce a result which meets its needs.

***Buttcon Ltd. v. Toronto Electric Commissioners* (2003), 65 O.R. (3d) 601 (S.C.J.) at paras. 4-7 and 49-50 [Intervener BA, Tab 10] ["*Buttcon Ltd.*"];**

Worthington, *supra* at 124 [Intervener BA, Tab 6]

27. In response to the appellant's third question, Ontario wishes to clarify that the duty of fairness and good faith does not extend to the pre-contractual stage or to negotiations. The duty of fairness and good faith owed by purchasers in a competitive bidding process is entirely contingent on the formation of Contract A. Ontario submits that this is not fairness in the abstract, but rather fairness as defined according to the rules of the tender. Such fairness arises as an implied term of the contract formed after the submission of a compliant bid. Therefore, in the absence of a competitive bidding process, a purchaser does not owe a duty of fairness to a potential vendor. As the trial judge correctly observed, there is no freestanding duty of fairness.

***Midwest Management (1987) Ltd. (c.o.b. Midwest/Monad-A Joint Venture) v. British Columbia Gas Utility Ltd.* (2000), 82 B.C.L.R. (3d) 79 (C.A.) at paras. 11-14 [Intervener BA, Tab 11] ["*Midwest Management*"];**
***Powder Mountain Resorts Ltd. v. British Columbia* (2001), 94 B.C.L.R. (3d) 14 (C.A.) at para. 72 [Intervener BA, Tab 12];**
***Mellco Developments Ltd. v. Portage La Prairie (City)* (2002), 222 D.L.R. (4th) 67 (Man. C.A.), at paras. 84-88 [Appellant BA Vol. I, Tab 30];**
Paul Emanuelli, *Government Procurement*, 2d ed. (Markham: Butterworths, 2008) at 88 and 98-99, [Intervener BA, Tab 13] ["Emanuelli"];
Worthington, *supra* at 129-132 [Intervener BA, Tab 6]

28. Ontario also takes issue with the appellant's emphasis on a duty of good faith owed by governments generally. This Court in *Martel* declined to recognize any general duty to negotiate or bargain in good faith. Parties to a negotiation are adverse in interest. Applying a doctrine of fairness and good faith on governments in particular would undermine their competitiveness in this adversarial process. Ontario submits that governments, in their use of taxpayer dollars, should not be placed at a disadvantage in their pre-contractual commercial dealings and should be able to negotiate in a manner that places them on equal footing with their private counterparts.

***Martel, supra* at paras. 62-73 [Intervener BA, Tab 3];**
Emanuelli, *supra* at 89-91 and 98-99 [Intervener BA, Tab 13]

29. The absence of the duties of fairness and good faith in the negotiation lane does not mean, however, that purchasers can act with impunity. Outside of the competitive bidding process, vendors in negotiations retain common law remedies, specifically where

a purchaser has acted fraudulently or dishonestly. Given these avenues of recourse, it is not necessary to import the fairness duties of Contract A into negotiated processes.

> ***Martel, supra*** **at para. 70 [Intervener BA, Tab 3];**
> ***Midwest Management, supra*** **at paras. 12-13 [Intervener BA, Tab 11];**
> ***Buttcon Ltd., supra*** **at paras. 49-51 [Intervener BA, Tab 10];**
> **Emanuelli, *supra* at 91 and 99 [Intervener BA, Tab 13]**

D. Conclusion

30. Ontario submits that Canadian jurisprudence to date has not gone so far as to allow purchasers to exclude all liability for breaches of the duty of fairness. For this Court to interpret a broad exclusion clause to permit them to do so could undermine the reciprocal obligations between purchasers and bidders under Contract A. Such an outcome would have consequences from both a legal and policy standpoint. Not only would the enforceability of Contract A itself be called into question, but the competitive bidding process could be undermined. Purchasers still have flexibility and the full freedom of contract available to them when they elect to negotiate directly with vendors. Given the availability of common law remedies to vendors in negotiations, it is unnecessary to import any Contract A duty of fairness into that process. Such a "two lane" approach preserves the certainty of competitive bidding, and the flexibility of negotiation.

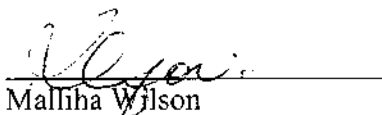
PART IV – COSTS

31. Ontario does not seek costs.

PART V – POSITION ON DISPOSITION

32. Ontario takes no position on the disposition of the appeal. Ontario requests leave of this Court to present oral argument.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 23rd day of February, 2009.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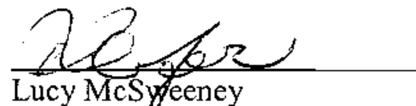
Lucy McSweeney

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15. Paul Emanuelli, *Government Procurement*, 2d ed. (Markham: Butterworths, 2008) 27, 28, 29

16. Paul Sandori & William M. Pigott, *Bidding and Tendering: What is Law?*, 3d ed., (Markham: Butterworths, 2004)..............................11

17. Robert C. Worthington, *The Public Purchasing Handbook* (Markham: Butterworths, 2004)..15, 17, 18, 25, 26, 27