BROWNLEE LLP
Barristers & Solicitors

CONSTRUCTIVE THINKING

A Brownlee LLP Construction Law Team Quarterly Newsletter

IS THE PRIVILEGE CLAUSE ALL GONE BECAUSE OF *TERCON*?

When the Supreme Court of Canada rendered it decision in the *Ron Engineering* case almost 30 years ago, competitive tendering law was revolutionized. The Court held that the principles of contract law applied to the submission of a bid in response to an owner's tender call, and thus, the concept of "Contact A/Contract B" was born. The Court also held that the terms of Contract "A", as found in the instructions to bidders, were to be interpreted in accordance with the principles of contact law. Almost 20 years after *Ron Engineering*, the Supreme Court of Canada, in the *MJB* case, held that along with the express terms of Contract "A", there were also implied terms that governed the tendering process. Since the decisions in *Ron Engineering* and *MJB*, much of the tendering caselaw has focused on the interplay between the express and implied contractual terms. Though caselaw has made it clear that an express term in a tender document will always trump an implied obligation, there has been much caselaw dealing with the extent of an owner's express privilege clause in light of the implied obligation to treat all bidders fairly and equally and in light of the obligation to maintain the integrity of the tendering process. The most recent decision of the Supreme Court of Canada in the *Tercon* case suggests that this conflict is still very much alive.

In *Tercon*, the province of British Columbia had issued a request for expressions of interest ("RFEOI") in respect of the design and construction of a highway. After receiving a number of responses, the Province short listed six (6) eligible firms. The Province then decided to design the highway itself and simply have the six (6) firms submit proposals in response to a request for proposals ("RFP") for the construction work only. The RFP included very specific contractual terms, design criteria, financial security requirements, and completion dates. All of these terms were non-negotiable—in contrast to the negotiation element which is a hallmark of the RFP procurement process. One of the express terms of the RFP was an exclusion of liability clause which stated as follows:

> *"Except as expressly and specifically permitted in these Instructions to Proponents, no Proponent shall have any claim for any compensation of any kind whatsoever, as a result of participating in this RFP, and by submitting a Proposal each Proponent shall be deemed to have agreed that it has no claim."*

In this Issue:

May 2010

Lawyer Profile

Paul V. Stocco, LL.B., is a partner with Brownlee LLP in the Edmonton office.

Paul received his Bachelor of Laws degree from Osgoode Hall Law School in 1989. He became a member of the Law Society of Upper Canada in 1991 and later, the Alberta Bar in 2000. Paul's areas of practice include Commercial Litigation, Construction Litigation and Wills and Estates Litigation. From 2001 to 2003, Paul was the Chair of the Construction Law Subsection of the Canadian Bar Association (Alberta North). He is also a Member of Rotary International, and a member of the Ad Hoc Committee for Insurance, Alberta Construction Association as well as a past member of the Board of Directors of the Edmonton Brain Injury and Relearning Society. Paul has lectured on various topics of interest to the construction industry, and to municipalities. Paul is the Editor of Brownlee LLP's *Constructive Thinking* Newsletter.

One of the six firms, namely Brentwood Enterprises Ltd. ("Brentwood"), lacked the expertise necessary to perform the work. Therefore, it entered into a joint venture with another firm that, though possessing the experience, was not one of the short listed firms. However the RFP did not allow proposals from a joint venture. When the Province eventually selected the Brentwood joint venture proposal over the proposal submitted by Tercon Contactors Ltd. ("Tercon"), who was one of the short listed firms, Tercon brought an action for damages against the Province alleging that the Province had violated tendering law by awarding the contract for the work to the ineligible Brentwood joint venture.

Tercon was successful at trial on a number of grounds. Firstly, Tercon was able to prove that the Province's RFP was so poorly drafted that the Province's procurement process was, in essence, a tender rather than an RFP. Accordingly, the trial judge applied tendering law principles to the RFP procurement. Secondly, the trial judge found that the Province had breached the implied duty to treat all bidders fairly and equally when the Province accepted the ineligible Brentwood joint venture proposal. Lastly, Tercon was able to prove that it suffered damages in the amount of $3.5 million as a result of the Province's breach. The Province appealed the trial decision. On appeal, the British Columbia Court of Appeal held that the exclusion of liability clause, as noted above, was clear and unambiguous and as such, any claim that Tercon had for breach of tendering law was excluded.

Tercon then appealed to the Supreme Court of Canada. The Supreme Court had to decide two (2) issues, namely, whether the Province had received and accepted an ineligible bid from Brentwood, and if so, whether the exclusion clause barred any recovery by Tercon.

…Tercon was successful at trial on a number of grounds. Firstly, Tercon was able to prove that the Province's RFP was so poorly drafted that the Province's procurement process was, in essence, a tender rather than an RFP. Accordingly, the trial judge applied tendering law principles to the RFP procurement. Secondly, the trial judge found that the Province had breached the implied duty to treat all bidders fairly and equally when the Province accepted the ineligible Brentwood joint venture proposal.

In a 5-4 split decision, the majority of the justices of the Supreme Court found in favour of Tercon on a number of grounds. Firstly, the majority held that the wording of the Province's procurement process was designed to create contractual relations (aka Contract A) even though the procurement was labeled an RFP. Secondly, the wording of the RFP made it clear that only certain short-listed firms were eligible to submit a proposal. Thirdly, given that the Brentwood joint venture was not eligible, the Province's acceptance of the Brentwood joint venture proposal breached the implied duty of fairness. Fourthly, the exclusion clause was not effective in this instance. The majority held that the exclusion clause, which had to be interpreted in harmony with the balance of the other terms in the procurement documents and the overall commercial purpose of

the procurement process, did not apply to the circumstance where the Province accepted an ineligible proposal. The majority held that the integrity of the process had to be preserved, and the Province could not intentionally breach its obligations and then rely on the exclusion clause. Lastly, when interpreting an exclusion clause generally, the majority held that categorizing the seriousness of a breach was irrelevant. In other words, whether the breach was fundamental, or not, was no longer the key consideration in determining the applicability and enforceability of an exclusion clause. Rather, the majority of the Supreme Court agreed with the minority's three point test for interpreting exclusion clauses, namely:

1. Does the clause, as a matter of interpretation, even apply to the breach at issue—which will depend on a Court's assessment of the intentions of the parties at the time they entered into the contract that contains the exclusion clause;
2. If the exclusion clause applies, was the exclusion clause unconscionable at the time the parties entered into the contract i.e. was there unequal bargaining power at the time the parties entered into the contract; and
3. If the clause is valid and applicable, are there residual public policy reasons for a Court to refuse to enforce the exclusion clause.

In other words, both the majority and the minority agreed that when interpreting an exclusion clause, the determination of whether the party, who seeks enforcement of the clause, committed a fundamental breach is irrelevant. The entire Court agreed that the concept of fundamental breach should be laid to rest.

By contrast to the decision of the majority, the minority of the justices of the Supreme Court found that the exclusion clause was clear and unambiguous and that it applied to the circumstances at hand. The minority found that the wording of the clause clearly applied to the alleged breach by the Province, and that the parties to the RFP procurement process should be held to the terms that they agreed to. In other words, the minority found that Tercon knew, and accepted, the terms of the Province's procurement process when Tercon submitted a proposal in response to the RFP. If Tercon felt that the terms were too onerous,

… In other words, both the majority and the minority agreed that when interpreting an exclusion clause, the determination of whether the party, who seeks enforcement of the clause, committed a fundamental breach is irrelevant... The concept of fundamental breach should be laid to rest.

or unfair, then Tercon could have refused to submit a proposal. Clearly, the minority strongly favoured the freedom of contract approach. The minority found that although the Province's actions in accepting the ineligible joint venture proposal were objectionable, there were no compelling public policy reasons to refuse to enforce the exclusion clause.

The result in the *Tercon* case clearly turned on the interpretation of the wording of the exclusion clause. The exclusion clause at issue in *Tercon* was analogous to an owner's privilege clause which permits an owner to accept or reject any and all bids. Even though the majority of the Supreme Court did not give force and effect to the exclusion clause, the majority stopped short of saying that exclusion clauses generally could never be enforced in the tendering context. On the contrary, the majority stated that an exclusion clause must be read in harmony with the balance of the procurement documents. Moreover, the majority and the minority agreed on a three (3) step test for the enforcement of an exclusion clause in any contract—whether it is the contract that is created upon the submission of a tender in response to an owner's tender call or whether it is a contract negotiated in a commercial context. This suggests that a properly worded exclusion clause, or a properly worded privilege clause, that in effect, allows an owner to breach tendering law (i.e. by awarding a tender to a non-compliant bidder), and allows an owner to avoid any liability for doing so, might be upheld by the Court. As the minority of the Supreme Court suggested, the construction industry is run by knowledgeable and sophisticated people who bid upon and enter into contracts with "their eyes wide open". No legal principle overrides a person's ability to enter into a tendering process that includes a limitation or exclusion of liability clause like the one at issue in *Tercon*. Ultimately, the industry will regulate itself. Owners may be forced to water down (or eliminate) such exclusion clauses if bidders refuse to submit bids. Whether the decision in *Tercon* signals the end of the battle between owners, who seek to enforce broadly worded privilege clauses, and bidders, who seek to resist such clauses, is unclear. That answer may only become clear when we look back at the *Tercon* decision 20 or 30 years from now.

– By Paul V. Stocco
Brownlee LLP Partner

BROWNLEE LLP
Barristers & Solicitors

IMPORTANT NOTICE:

Please be advised that all Brownlee LLP publications will be sent electronically effective December 31st 2010. If you are currently receiving any of our Law Bulletins and/or would like to receive additional or alternate bulletins please note that you can subscribe through our website using the following link:

www.brownleelaw.com

Our Team:

Brownlee LLP has been providing legal services for over 70 years. In addition to the lawyers practicing on our Construction Team, there are a number of lawyers at our firm whose practices include Municipal Litigation and Corporate Commercial Litigation.

For more information regarding the articles in this newsletter, or on other legal issues, please feel free to contact the following members of the Construction Team at our toll-free lines or their direct lines listed below.

Edmonton Office

Havelock B. Madill, Q.C.	780-497-4898	hmadill@brownleelaw.com
Ronald R. Nelson	780-497-4851	rnelson@brownleelaw.com
Thomas D. Marriott	780-497-4868	tmarriott@brownleelaw.com
Daniel R. Peskett	780-497-4875	dpeskett@brownleelaw.com
Paul V. Stocco	780-497-4884	pstocco@brownleelaw.com
Michael T. Coombs	780-497-4833	mcoombs@brownleelaw.com
David S. Jarrett	780-497-4836	djarrett@brownleelawcom
Kristjana E. Kellgren	780-497-4890	kkellgren@brownleelaw.com

Calgary Office

Dennis K. Yasui, Q.C.	403-260-5304	dyasui@brownleelaw.com
V. Philippe (Phil) Lalonde	403-232-1465	plalonde@brownleelaw.com

The contents of this publication are intended to provide general information. Readers should not rely on the contents herein to the exclusion of independent advice as each case is unique and will depend on the particular circumstances.

Calgary

Suite 2000 Watermark Tower
530 – 8th Avenue SW
Calgary, AB T2P 3S8
fax 403.232.8408
phone 403.232.8300
toll free 1.800.661.9069

visit our website:

Edmonton

Suite 2200 Commerce Place
10155 – 102 Street NW
Edmonton, AB T5J 4G8
fax 780.424.3254
phone 780.497.4800
toll free 1.800.661.9069

www.brownleelaw.com