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Business as usual
Tercon Contractors Ltd. v. The Province of BC - Supreme Court of Canada
The three lines of defence

February 22, 2010

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1. Overview

The *Tercon* case is another landmark decision of the Supreme Court of Canada on bidding and tendering. The case reinforces the principles established by previous Supreme Court of Canada bidding and tendering cases, and provides another specific application of those principles. The case clarifies that there is nothing inherently unreasonable about exclusion clauses, and recognizes that a court has no discretion to refuse to enforce a contractual exclusion clause unless there is a paramount consideration of public policy. In *Tercon*, the court does not apply any paramount consideration of public policy, but instead applies the exclusion clause as it interprets it – with four of the nine judges holding that the exclusion clause, properly interpreted, absolved the Province from liability and five of the nine judges holding that it did not.

2. Exclusion clauses are valid. The jargon associated with "fundamental breach" is dead. There is nothing inherently unreasonable about exclusion clauses

The exclusion clause in the RFP in *Tercon* stated:

> 2.10 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.

The trial judge swept aside this exclusion clause, with the following reasoning:

> A party should not be allowed to commit a fundamental breach sure in the knowledge that no liability can attend to it and the court should not be used to enforce a bargain that a party has repudiated … In the circumstances here, it is neither fair nor reasonable to enforce the exclusion clause. Although both parties are sophisticated, it could not have been contemplated that there would be no recourse if the Ministry accepted a non-compliant bid … These circumstances do not lead this court to give aid to the defendant by holding the plaintiff to this clause.

At that time, I wrote:

> To me, this is fictional reasoning. I would say "actually, yes, it was contemplated that there would be no recourse – that's why the owner put this clause in the document. There it is, in black and white, for all to see. Tercon is a sophisticated party, and agreed to it." How can the court award damages against the owner for a supposed breach of the contract on the basis that the owner repudiated the contract by relying on an express provision of it (i.e. the exclusion clause)? Basically, the court is saying *"we don't care what you put in your documents, if you transgress our sense of fairness, we will ignore it"*. My perspective is that because it was laid out in black and white, it's fair. But, because the courts are willing to engage in this fictional reasoning, well, that's the law. That doesn't reduce litigation – it fosters litigation. Tercon, having been successful against the Ministry in a similar (but much clearer, in my

> opinion) landmark case a decade or so earlier [see *Tercon Contractors Ltd. v. BC* (1993), 9 CLR (2d) 197], wasn't shy about testing the waters again.

So I was pleased to read in *Tercon* the following passage by Justice Binnie:

> The important legal issue raised by this appeal is whether, and in what circumstances, a court will deny a defendant contract breaker the benefit of an exclusion of liability clause to which the innocent party, not being under any sort of disability, has agreed. Traditionally, this has involved consideration of what is known as the doctrine of fundamental breach, a doctrine which Dickson C.J. in *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426, suggested should be laid to rest 21 years ago (p. 462).
>
> On this occasion we should again attempt to shut the coffin on the jargon associated with "fundamental breach". Categorizing a contract breach as "fundamental" or "immense" or "colossal" is not particularly helpful**.** Rather, the principle is that a court has no discretion to refuse to enforce a valid and applicable contractual exclusion clause unless the plaintiff (here the appellant Tercon) can point to some paramount consideration of public policy sufficient to override the public interest in freedom of contract and defeat what would otherwise be the contractual rights of the parties. Tercon points to the public interest in the transparency and integrity of the government tendering process (in this case, for a highway construction contract) but in my view such a concern, while important, did not render unenforceable the terms of the contract Tercon agreed to. There is nothing inherently unreasonable about exclusion clauses.

Justice Binnie wrote the judgment for the four dissenting judges, but all nine judges accepted this analysis. Justice Cromwell, writing for the other five judges, stated:

> I agree with the analytical approach that should be followed when tackling an issue relating to the applicability of an exclusion clause set out by my colleague Binnie J. However, I respectfully do not agree with him on the question of the proper interpretation of the clause in issue here. In my view, the clause does not exclude Tercon's claim for damages ....

The judgment for the five judges then goes on to analyze the exclusion clause. Their direct analysis of the text of the clause was brief:

> I turn to the text of the clause which the Province inserted in its RFP. It addresses claims that result from "participating in this RFP". As noted, the limitation on who could participate in this RFP was one of its premises. These words must, therefore, be read in light of the limit on who was eligible to participate in this RFP. As noted earlier, both the ministerial approval and the text of the RFP itself were unequivocal: only the six proponents qualified through the earlier RFEI process were eligible and proposals received from any other party would not be considered. Thus, central to "participating in this RFP" was participating in a contest among those eligible to participate. A process involving other bidders, as the trial judge found the process followed by the Province to be, is not the process called for by "this RFP" and being part of that other process is not in any meaningful sense "participating in this RFP".

They conclude that the exclusion clause therefore did not apply. According to the reasoning of the five judges, a more clearly drafted exclusion clause would have prevailed. The other four judges thought the wording was already clear enough.

In the result, Tercon wins the case, and the Province has to pay approximately $3.5mil.

3. The Court held that the Province acted "egregiously" – what role did that play, in the reasoning?

First, I want to make a point - please bear with me. Please read the clause below (which is from my selection of boilerplate contract clauses – not from the *Tercon* case), and decide what you think it means:

> Facsimile/Electronic Transmission and Counterparts
>
> This Agreement may be executed in any number of counterparts, with the same effect as if all the parties had signed the same document. This Agreement may be executed by a party and delivered by facsimile or by email in pdf format and if so executed and delivered this Agreement will be for all purposes effective as if the parties had delivered and executed the original Agreement.

Now, let's all agree that whatever you think this clause means has nothing to do with whether Barack Obama won the Presidential election, or whether the Toronto Maple Leafs will ever win another Stanley Cup, or how many gold medals Canada wins at the 2010 Olympics. And let's also agree (and this is my point) that the meaning of these words has nothing to do with whether one or the other party to the contract acts egregiously.

In *Tercon*, the five majority judges did not find any overriding public policy that outweighed the public interest in "freedom to contract". But they appear to have been strongly influenced by their determination that the Province had acted egregiously. Justice Cromwell states:

> … the Province not only acted in a way that breached the express and implied terms of the contract by considering a bid from an ineligible bidder, it did so in a manner that was an affront to the integrity and business efficacy of the tendering process. One must not lose sight of the fact that the trial judge found that the Province acted egregiously by "ensuring that [the true bidder] was not disclosed" (para. 150) and that its breach "attacke[d] the underlying premise of the [tendering] process" (para. 146) …
>
> I cannot conclude that the parties, through the words found in this exclusion clause, intended to waive compensation for conduct like that of the Province in this case that strikes at the heart of the integrity and business efficacy of the tendering process which it undertook.

In contrast, this is what Justice Binnie had to say:

> … the principle is that a court has no discretion to refuse to enforce a valid and applicable contractual exclusion clause unless the plaintiff (here the appellant Tercon) can point to some paramount consideration of public policy sufficient to override the public interest in freedom of contract and defeat what would otherwise be the contractual rights of the parties. Tercon points to the public interest in the transparency and integrity of the government tendering process (in this case, for a highway construction contract) but in my view such a concern, while important, did not render unenforceable the terms of the contract Tercon agreed to. There is nothing inherently unreasonable about exclusion clauses. Tercon is a large and sophisticated corporation. Unlike my colleague Justice Cromwell, I would hold that the respondent Ministry's conduct, while in breach of its contractual obligations, fell within the terms of the exclusion clause. In turn, there is no reason why the clause should not be enforced. I would dismiss the appeal.
>
> … a plaintiff who seeks to avoid the effect of an exclusion clause must identify the overriding public policy that it says outweighs the public interest in the enforcement of the contract. In the present case, for the reasons discussed below, I do not believe Tercon has identified a relevant public policy that fulfills this requirement.

I can accept the reasoning and analysis of the five judges to a degree. I do not find the analysis of the text compelling, and I am wary that the rest of the reasoning may amount to saying *"we really do not like your behavior, and so we are going to make it right in the way we interpret the words in the contract"*. To me, the words say what they say, independent of the subsequent behavior.

It would be naïve to think that judges are not influenced by their general perceptions of fairness. That is a valid and important gloss on the governing principles. In my opinion the governing principles – i.e. the legal framework – should have more structure than *"we are going to make it right in the way we interpret the contract if we don't like your subsequent behavior"*.

4. Lord Denning and *Old Peter Beswick*

There is a well known contract law case, decided in 1967, that every first year law student is required to read. In this case Lord Denning of the House of Lords (who, incidentally, is referred to in *Tercon* as the founder of the doctrine of fundamental breach) starts off with the words *"Old Peter Beswick was a coal merchant."* From that opening line, you can pretty much tell where the sympathies of the court lay. In *Tercon*, the sympathies of the five judges clearly sided with Tercon, and the opening lines are:

> The Province accepted a bid from a bidder who was not eligible to participate in the tender and then took steps to ensure that this fact was not disclosed. The main question on appeal, as I see it, is whether the Province succeeded in excluding its liability for damages flowing from this conduct through an exclusion clause it inserted into the contract.

With the issue framed in this way, it is not surprising that the court interpreted the exclusion clause so that the Province did not succeed.

5. What exactly was the egregious conduct in *Tercon*? Keep in mind that your actions might be viewed through a different lens down the road

Let me try to summarize the Province's conduct, from the Province's perspective. Brentwood was identified as the eligible bidder. Brentwood asked the Province if Brentwood could submit a bid as a joint venture with Emil Anderson Construction. The Province consulted with its lawyer. The Province's lawyer advised that the joint venture would not be an eligible proponent, but if Brentwood submitted the bid, with Emil Anderson Construction as a subcontractor, then the bid would be eligible. The bid was submitted in the name of Brentwood. The contract that was prepared was in the name of Brentwood. But the court ultimately found that the bid was in substance, although not in form, from the joint venture and that it was therefore an ineligible bid.

You might think: *"whoa – there, but for the grace of God, go I"*.

Then, there is the matter of the cover up – i.e. that the Province *"took steps to ensure that this fact [that the bid was in substance, although not in form, from the joint venture] was not disclosed"*. This was the egregious conduct and "an affront to the integrity and business efficacy of the tendering process".

In another big case, *Opron Construction Co. v. Province of Alberta* [1994] A.J. No. 224, the court held the Province of Alberta guilty of fraud and deceit because the Province had "at least a lack of honest belief or recklessness (which is sufficient to establish fraud)" in that among other things, bidders were not told that gravel deposits were "erratic, segmented and pocketed".

Another big case - *BG Checo v. BC Hydro* [1993] 1 S.C.R. 12, concerned a tender for the erection of a transmission tower and installation of two 24 kilometre sections of transmission line. Two BG Checo employees flew by helicopter over the area and saw that the right of way was strewn with logs. The formal contract terms stipulated that the removal of the strewn logs would be "done by others". BC Hydro knew that the removal of the strewn logs would not be done in time. BG Checo claimed fraud. The fraud claim succeeded at trial. At the BC Court of Appeal and Supreme Court of Canada, BG Checo still won, but based on the less culpable ground of negligent misstatement.

The point to take here is: it might be easy to get caught up in your enthusiasm to keep costs down, but appreciate that you are susceptible to a court looking over your shoulder, years later, and, perhaps to your surprise, concluding that you acted "egregiously" or were guilty of fraud and deceit or negligent misstatement. In my experience, no employer is going to ask you to do such things. You might think you are acting reasonably – even righteously - but keep in mind that your actions might be viewed through a different lens down the road.

6. The public interest in freedom of contract

The reasons of Justice Binnie refer to "the public interest in freedom of contract". There is a public interest in the certainty that comes with freedom of contract. It is refreshing to see this recognised. Against this, there is a sentiment championed by Lord Denning as follows (in *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] QB 284):

> None of you nowadays will remember the trouble we had - when I was called to the Bar - with exemption clauses. They were printed in small print on the back of tickets and order forms and invoices. They were contained in catalogues or timetables. They were held to be binding on any person who took them without objection. No one ever did object. He never read them or knew what was in them. No matter how unreasonable they were, he was bound. All this was done in the name of "freedom of contract." But the freedom was all on the side of the big concern which had the use of the printing press. No freedom for the little man who took the ticket or order form or invoice. The big concern said, "Take it or leave it." The little man had no option but to take it. The big concern could and did exempt itself from liability in its own interest without regard to the little man. It got away with it time after time. When the courts said to the big concern, "You must put it in clear words," the big concern had no hesitation in doing so. It knew well that the little man would never read the exemption clauses or understand them.

Tercon is hardly the "little guy" pictured by Lord Denning. There are special rules that apply for "adhesion contracts" (such as your SkyTrain ticket) as described by Lord Denning. In *Tercon* there is no "adhesion contract". Tercon is a sophisticated party. As Justice Binnie reasoned:

> The construction industry in British Columbia is run by knowledgeable and sophisticated people who bid upon and enter government contracts with eyes wide open. No statute in British Columbia and no principle of the common law override their ability in this case to agree on a tendering process including a limitation or exclusion of remedies for breach of its rules. A contractor who does not think it is in its business interest to bid on the terms offered is free to decline to participate. As Donald J.A. pointed out, if enough contractors refuse to participate, the Ministry would be forced to change its approach. So long as contractors are willing to bid on such terms, I do not think it is the court's job to rescue them from the consequences of their decision to do so. Tercon's loss of anticipated profit is a paper loss. In my view, its claim is barred by the terms of the contract it agreed to.

7. What I take from the *Tercon* case

What should we take from the *Tercon* case? I suggest the following:

- Don't act egregiously (obviously), and don't think that an exclusion clause will save you if you do.

- Since bidding and tendering is inherently risky, you still need to build in flexibility language (which might include exclusion clauses and other limits of liability) so that, if you act reasonably, hopefully you can rely on such clauses to limit liability and dissuade potential claimants from suing you. Often, a snow white issuer of a tender or RFP is in the position where if it awards to bidder A it could be successfully sued by bidder B, and at the same time if it were to instead award to bidder B, it could be successfully sued by bidder A. You have to manage this risk.

- You can expect that the *Tercon*-type of exclusion clause will be a focal point or lightning rod for scrutiny and criticism, so you might decide to pass on it, at least for a while. This is largely a policy decision to be made on a case by case basis.

8. A "sufficiently associated" clause would have obviated the problem and saved ten years of litigation

Appreciate that the issue would never have come to the table if another clause had been included, such as:

> "9.2.7 If any pre-qualification or similar process has occurred in connection with the Invitation to Tender, and a bid is submitted by an entity (including a joint venture or partnership) that was not the pre-qualified or selected entity, then despite any contrary statement or indication in connection with the pre-qualification or similar process, the Owner may nevertheless accept the bid if the entity that submitted the bid (including a partnership or joint venture) is, in the determination of the Owner, related to or sufficiently associated with the pre-qualified or selected entity."

The essence of the *Tercon* case is that the Province awarded the contract to an ineligible bidder. This clause (which I starting incorporating into my RFP and tender packages many years ago, after a client encountered a similar problem which fortunately did not go to court) would have made the bidder eligible and would thereby have obviated the issue and saved ten years of litigation.

9. But the language can become cumbersome

You might think "if we have to include clauses that cover every eventuality, then the language can become cumbersome". That is a valid perspective. I have practiced law for thirty years now, and twenty of those years have been in the construction field. Every time I have encountered one of these kinds of cases, I have adapted my tendering language to give flexibility. You can fit what is needed into one and a half pages. I figure one and a half pages is much better than ten years of litigation (as occurred in *Tercon*). Even if your case doesn't become as big a case as *Tercon*, the prospect or potential for years of litigation, with the uncertainty of the outcome, and the angst, legal costs and redirection of otherwise productive resources (i.e. people in your organization who are drawn into examinations for discovery, production of litigation records, attending at court, and instructing your litigation lawyers, etc.), are more that ample reasons to accommodate the one and a half pages, I would say. But it is up to each organization to decide this.

10. "no contract A" is alive and well

The court clearly endorsed that an RFP or tender can negate the creation of any "contract A". The court stated:

> Submitting a compliant bid in response to a tender call *may* give rise to a contract — called Contract A — between the bidder and the owner, the express terms of which are found in the tender documents. … The key word, however, is "may". The Contract A - Contract B framework is one that arises, if at all, from the dealings between the parties. It is not an artificial construct imposed by the courts, but a description of the legal consequences of the parties' actual dealings. The Court emphasized in M.J.B. that whether Contract A arises and if it does, what its terms are, depend on the express and implied terms and conditions of the tender call in each case.
>
> … What is important ... is that the submission of a tender in response to an invitation to tender may give rise to contractual obligations, quite apart from the obligations associated with the construction contract to be entered into upon the acceptance of a tender, depending upon whether the parties intend to initiate contractual relations by the submission of a bid. If such a contract arises, its terms are governed by the terms and conditions of the tender call [Emphasis added.]

If you choose to contract out of "The Contract A – Contract B framework", you can.

In *Tercon*, the Province did not negate the "The Contract A – Contract B framework". On this point, all the Supreme Court of Canada judges agreed with the trial judge:

> The trial judge did not mechanically impose the Contract A - Contract B framework, but considered whether Contract A arose in light of her detailed analysis of the dealings between the parties. That was the right approach. She reviewed in detail the provisions of the RFP which supported her conclusion that there was an intent to create contractual relations upon submission of a compliant bid. She noted, for example, that bids were to be irrevocable for 60 days and that security of $50,000 had to be paid by all proponents and was to be increased to $200,000 by the successful proponent. Any revisions to proposals prior to the closing date had to be in writing, properly executed and received before the closing time. The RFP also set out detailed evaluation criteria and specified that they were to be the only criteria to be used to evaluate proposals. A specific form of alliance agreement was attached. There were detailed provisions about pricing that were fixed and non-negotiable. A proponent was required to accept this form of contract substantially, and security was lost if an agreement was not executed. The Ministry reserved a right to cancel the RFP under s. 2.9 but in such event was obliged to reimburse proponents for costs incurred in preparing their bids up to $15,000 each. Proponents had to submit a signed proposal form, which established that they offered to execute an agreement substantially in the form included in the RFP package. Further, they acknowledged that the security could be forfeited if they were selected as the preferred proponent and failed to enter into good faith discussions with the Ministry to reach an agreement and sign the alliance agreement. In summary, as the trial judge found, the RFP set out a specifically defined project, invited proposals from a closed and specific list of eligible proponents, and contemplated that proposals would be evaluated according to specific criteria. Negotiation of the alliance construction contract was required, but the negotiation was constrained and did not go to the fundamental details of either the procurement process or the ultimate contract.

If the Province had unequivocally set out "there is no contract A, and instead, when you submit your proposal that constitutes an offer made to us which we can accept or reject", then that would have governed - no Contract A would have resulted.

11. <u>On a highways project, the Province is statutorily required to go with the lowest bidder, or an alternative process approved by the Minister – what role did that play, in the reasoning?</u>

To my knowledge, in BC, highways projects are the only projects (leaving aside federal government tendering and procurement) that have a statutorily imposed "lowest bidder or an alternative process approved by the Minister" mandate. It is clear that in *Tercon* the Minister's approval for an alternative process was obtained. The Province argued the Minister approved the exclusion clause. The five judges held that there was no evidence of this in the record before the Court, and that the proper interpretation of the exclusion clause should "take account of the statutory context" – i.e. that the Minister's approval did not extend to the exclusion clause and that therefore the exclusion clause should not operate. The four dissenting judges state:

> In the ordinary world of commerce … clauses limiting or excluding liability are negotiated as part of the general contract. As they do with all other contractual terms, the parties bargain for the consequences of deficient performance. … [there] are many valid reasons for contracting parties to use exemption clauses, most notably to allocate risks. … Tercon for example is a sophisticated and experienced contractor and if it decided that it was in its commercial interest to proceed with the bid despite the exclusion of compensation clause, that was its prerogative and nothing in the "policy of the Act" barred the parties' agreement on that point. To the extent Tercon is now saying that as a matter of fact the Minister, in approving the RFP, did not specifically approve the exclusion clause, and that the contract was thus somehow ultra vires the Ministry, this is not an issue that was either pleaded or dealt with in the courts below. The details of the ministerial approval process were not developed in the evidence. It is not at all evident that s. 4 required the Minister to approve the actual terms of the RFP. It is an administrative law point that Tercon, if so advised, ought to have pursued at pre-trial discovery and in the trial evidence. We have not been directed to any exploration of the matter in the testimony and it is too late in the proceeding for Tercon to explore it now. Accordingly, I proceed on the basis that the exclusion clause did not run afoul of the statutory requirements.

Either the clause was or was not offside the statutory requirement. The words mean what they say – the statutory requirement does not change their meaning. When the five judges write that the proper interpretation of the exclusion clause should "take account of the statutory context", what I hear is "*Old Peter Beswick was a coal merchant.*"

To recap: in *Tercon*, for the five judges, the statutory requirement affected the interpretation of the exclusion clause, and the other four judges disagreed. Regardless, a statutory requirement is not ordinarily a factor in BC (outside of highways projects and federal government tendering and procurement).

12. Three lines of defence for organizations engaged in issuing tenders and RFPs

For many years, I have advocated a contracting and tendering approach that is based on three lines of defence, for tenders and RFP's:

- Your first line of defence against a successful lawsuit is to have acted in a reasonable and fair manner. A reality of life is that if a judge does not like what you did because it offends the judge's sense of fairness, then there is always a legal principle or finding of fact that can be drawn upon to make the owner liable. So act as fairly as you can, as if angels were watching over your shoulder. If this were a seminar instead of a brief article, I would elaborate on all the good reasons to be fair and reasonable. Not the least of them is that we who act for procurement organizations and owners perceive ourselves to be agents of good, not evil, engaged in the necessary work of procuring goods, services and construction at reasonable cost from valued suppliers and partners. Another important reason is to avoid and minimize the immense drain of litigation.

- Your second line of defence is being clear – stipulate expressly what your requirements are, and which are mandatory or not mandatory. And – this is key – keep the mandatory ones to a minimum. Think of it this way – which of the requirements are so essential to the owner that the owner would be willing to say *"if I receive an otherwise crackerjack, outstanding bid that I really want to accept, failure to comply with this requirement would be so grave and egregious that I will, in advance, eliminate any ability I would have to legally accept that bid"*. You are better off to express almost everything as being "desirable, but not mandatory", and give yourself the flexibility to waive the requirement, or not, according to what is in the owner's best interest after you've seen all the bids.

- Third – incorporate "flexibility language" in your documents. By this I mean strident provisions to the effect that the owner can do whatever the owner wishes to do, in the owner's best interests, and so long as the owner has been fair and clear, the owner will not have other liability. When it comes to "building in flexibility", I observe that a lot of tendering packages underestimate the vigour with which the courts will brush aside "flexibility language". You have to match that vigour with ardent and specific language (which is a broader topic, for another day).

Conclusion

In *Tercon*, five of the highest and most revered legal minds in the land swiveled in their chairs towards the four other highest and most revered legal minds in the land, and disagreed. I think that the reasoning of the four is more sound and sustainable, and I am encouraged in that view in that the Chief Justice of the Supreme Court of Canada, the esteemed Beverley McLachlin, was among the four. I agree with her.

In the end, the interpretation given to the specific clause in question does not change the law. In my opinion the change in the law that comes from *Tercon* is that, possibly, at long last, we have "shut the coffin on the jargon associated with fundamental breach".

Taking into account the three levels of court, how many judges held in favour of Tercon, and how many held in favour of the Province? Answer:

> *Decided for Tercon - refused to enforce the exclusivity clause or held it did not apply:*
> - BC Supreme Court - 1 (Dillon)
> - BC Court of Appeal - 0
> - Supreme Court of Canada - 5 (Cromwell with LeBel, Deschamps, Fish and Charron)
> Total = 6
>
> *Decided for the Province – enforced and applied the exclusivity clause:*
> - BC Supreme Court - 0
> - BC Court of Appeal - 3 (Donald, McKenzie, Lowry)
> - Supreme Court of Canada - 4 (Binnie with McLachlin, Abella and Rothstein)
> Total = 7

How would a court decide the next case? Answer: indeterminate.

In 2007, when the last Supreme Court of Canada decision was handed down, I wrote:

> **IT'S FOGGY OUT THERE, SO DRESS FOR IT**
>
> The Supreme Court of Canada has issued another 'bidding and tendering' decision, *Double N Earthmovers Ltd. v. Edmonton (City)*, 2007 SCC 3. The reasoning in the case is rational and sensible. At the same time, going in – that is, standing on the courthouse steps – it would be hard to predict whether the outcome would be in favour of the owner (which it was) or the disgruntled bidder (who lost) based on prior decisions of the Supreme Court of Canada, including the celebrated case of *MJB Enterprises* decided in 1999. You would have to shake your head if you tried to predict the outcome of some of these cases.

It's business as usual, going forward, I figure – with a few clarifications and specific points to keep in mind.

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