

Top Court Rules in *Tercon*

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The Supreme Court of Canada recently released its long-awaited ruling in *Tercon Contractors Ltd. v. British Columbia (Transp. and Highways)*, 2010 SCC 4 (S.C.C. Feb. 12, 2010). The outcome leaves lawyers with two main messages: Be fair in applying your own tendering and bidding rules, and don't expect exclusion clauses to protect you if you aren't.

The background to *Tercon* revolved around a $35 million contract to build a highway in the interior of British Columbia (now the 29-kilometre Nisga'a Highway). The Province issued a request for expression of interest (RFEI) for the highway design and construction. Six groups responded, including Tercon and Brentwood. A few months later, the Province informed the six proponents that it now intended to design the highway itself, and issued a request for proposals (RFP) for the construction. The RFP set out a specifically-defined project and contemplated that proposals would be evaluated according to specific criteria: only the six original proponents were eligible to submit a proposal; those received from any other party would not be considered. The RFP also included an exclusion of liability clause which provided: "Except as expressly and specifically permitted in these Instructions to Proponents, no Proponent shall have any claim for any compensation of any kind whatsoever, as a result of participating in this RFP, and by submitting a proposal each proponent shall be deemed to have agreed that it has no claim." Because it lacked expertise in drilling and blasting, Brentwood entered into a pre-bidding agreement with another construction company, EAC, which was not a qualified bidder, to undertake the work as a joint venture. This arrangement allowed Brentwood to prepare a more competitive proposal. Ultimately, Brentwood submitted a bid in its own name, with EAC listed as a "major member" of the team. Brentwood and Tercon were the two short-listed proponents. After the Province selected Brentwood, Tercon successfully brought an action in damages against the Province. The trial judge found that the Brentwood bid was, in fact, submitted by a joint venture of Brentwood and EAC, and that the Province, which was aware of the situation, breached the express provisions of the tendering contract with Tercon by considering a bid from an ineligible bidder and by awarding it the work. She also held that, as a matter of construction, the exclusion clause did not bar recovery for the breaches she had found. The clause was ambiguous and she resolved this ambiguity in Tercon's favour. She held that the Province's breach was fundamental, and that it was not fair or reasonable to enforce the exclusion clause in light of the Province's breach. The B.C. Court of Appeal set aside the decision, holding that the exclusion clause was clear and unambiguous, and barred compensation for all defaults.

The Supreme Court of Canada allowed Tercon's appeal. The majority agreed on the appropriate framework of analysis, but the Court divided on the applicability of the exclusion clause to the facts. The justices agreed, however, that the doctrine of fundamental breach should be "laid to rest," and the following analysis used when a plaintiff sought to escape the effect of an exclusion clause or other contractual terms to which it had previously agreed: First, as a matter of interpretation, did the exclusion clause even apply to the circumstances established in evidence? (The answer to this would depend on the court's interpretation of the intention of the parties, as expressed in the contract.) If so, the second issue was whether the exclusion clause was unconscionable and, thus, invalid at the time the contract was entered into. If the exclusion clause survived review at this point and was applicable to the facts, the third enquiry was whether the court should, nevertheless, refuse to enforce the clause because of overriding public policy concerns. The burden of persuasion fell on the party seeking to avoid enforcement of the clause to demonstrate an abuse of the freedom of contract that outweighed a very strong public interest in contractual enforcement. Conduct approaching serious criminality or egregious fraud were two examples of well-accepted considerations of public policy that were substantially incontestable and might serve to override the public policy of freedom to contract, and disable the defendant from relying upon the exclusion clause.

As often proves to be the case, the devil is in the details – despite agreement on the appropriate framework of analysis, the Court divided on the applicability of the exclusion clause to the facts. Five justices concluded that the Province did breach the contract with Tercon by accepting the bid from a party who should not even have been permitted to participate in the tender process, and by awarding the work to that ineligible bidder. This egregious conduct by the Province also breached the implied duty of fairness to bidders. The exclusion clause, did not, when properly interpreted, exclude Tercon's claim for damages. The parties did not intend, through the words found in the exclusion clause, to waive compensation for conduct like that of the Province, that struck at the heart

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of the tendering process. Central to "participating in this RFP" was participating in a contest among those eligible to participate. The process actually followed by the Province, involving non-eligible bidders, was not the process called for by "this RFP," and being part of that other process was not, in any meaningful sense, "participating in this RFP."

The dissenting four justices felt that the Province's conduct, while in breach of its contractual obligations, still fell within the terms of the exclusion compensation clause. The clause was clear and unambiguous, and no legal ground or rule of law permitted a court to override the freedom of the parties to contract with respect to this particular term, or to relieve Tercon against its operation here. The misconduct did not rise to the level where public policy would justify the court in depriving the Ministry of the protection of the exclusion of compensation clause freely agreed to by Tercon in the contract.

Glenn Walsh, the chairman of Tercon at the time the lawsuit was filed, was quoted as saying: "We were poorly treated, and the [C]ourt has agreed there was some underhandedness by the ministry…. I think it's unfortunate, though, that the [C]ourt went on to accept the validity of the exclusion clauses." (Jeff Gray, *Highway case may pave way for lawsuits*, Globe and Mail, Feb. 23, 2010.) ML

Ordinances

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of police power, a local ordinance or statute specifically charges an abutting landowner with a duty to maintain and repair sidewalks, and imposes liability, with respect to third parties, for damages and injuries resulting from a breach of that duty,[12] as was the case in San Jose.

The bottom line is that, if your municipality is considering cutting its tree maintenance budget, these cases show that it is important to cover all your bases. Make sure to check your existing ordinance on tree maintenance and see what adjacent landowners are responsible for. If your ordinance says something like "property owners of a lot fronting or adjacent to a street are required to maintain and replace trees along such street," this only imposes a duty on the landowner, not liability for damages to a third party who has been injured by the tree. With just the statement above, the costs for removing or maintaining a tree could be charged to the landowner, but it will not relieve the city of its duty to exercise reasonable diligence.[13] In addition, it is crucial that your city provide adequate (or better yet, ample) notice to landowner on their new/renewed responsibilities and liabilities.

1. Tracy Seipel & Denis C. Theriault, *San Jose family grieves for toddler, but law says falling tree was homeowners' responsibility*, www.mercurynews.com, Jan. 25, 2010, at http://www.mercurynews.com/top-stories/ci_14266915.
2. An informal online poll conducted by the local newspaper, asking if the City or the property owner should bear liability, almost 1200 out of 1300 voters said the City should be liable. *See* http://forums.mercurynews.com/poll/who-should-be-responsible-for-maintaining-park-strip-trees-in-san-jose.
3. *But see*, Heckert v. Patrick, 473 N.E.2d 1204 (Ohio 1984), which stated that "an owner having knowledge, actual or constructive, of a patently defective condition of a tree which may result in injury to a traveler must exercise reasonable care to prevent harm to a person lawfully using the highway from the falling of such tree or its branches."
4. Hensley v. Montgomery County, 334 A.2d. 542 (Md. 1975); *see also* May v. George, 910 N.E.2d 818 (Ind. Ct. App. 2009).
5. 670 P.2d 1121 (Cal. 1983).
6. *Id.* at 1124.
7. 554 N.E.2d 945 (Ohio Ct. App. 1988).
8. *Id.* at 948.
76 Mo. App. 46 (Mo. App. 1898).
10. Id.
11. San Jose, Cal., Code § 13.28.190 (2009).
12. See Gangemi v. City of New York, 827 N.Y.S.2d 498 (N.Y. Gen. Term 2006).
13. See, e.g., Woods v. City of Palatka, 63 So.2d 636 (Fla. 1953). ML

Cases

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laws that are in place to either promote transparency, or the other interests served by the legislation. *Doe v. Reed*, 586 F.3d 671 (9th Cir. 2009), *cert. granted*, 2010 WL 144074 (U.S. Jan. 15, 2010) (No. 09-559). ML

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