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BULLETIN

SUPREME COURT OF CANADA REFUSES TO HEAR APPEAL IN TENDER REPRISAL CLAUSE CASE

Today, the Supreme Court of Canada dismissed the contractor's application for leave to appeal in *J. Cote & Son Excavating Ltd. v. Burnaby (City)*, 2019 BCCA 168, bringing an end to the contractor's challenge to the City of Burnaby's tendering "reprisal clause".

In 2013, one of J. Cote's employees was killed on a construction job for the City of Burnaby. J. Cote sued the City, and a few months later the City added a clause to its tender documents which made ineligible any bidder who had been involved in litigation against the City in the previous two years. The clause read:

> "[10] 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 brought court proceedings against the City seeking a declaration that the "reprisal clause" was constitutionally invalid on three bases: it unjustifiably infringed the constitutionally protected right of reasonable access to the courts contrary to the *Canadian Charter of Rights and Freedoms*; it prevented access to the courts in a manner inconsistent with section 96 of the *Constitution Act, 1867* and the rule of law; and it was contrary to public policy. The BC Supreme Court dismissed J. Cote's action.

J. Cote appealed the rulings on the *Charter* and the *Constitution Act*, abandoning its position that the clause was against public policy. The Court of Appeal confirmed that the *Charter* does not provide a general right of access to the civil courts. The Court of Appeal also confirmed that the right of access to the courts under the *Constitution Act, 1867* can only be infringed by a rule imposed by law, and rejected the appellant's submissions that the City's policy of not doing business with contractors involved in litigation against the City could be characterized as law. The Court of Appeal also held that the impugned term did not represent a barrier to the courts as in the cases relied upon by J. Cote in argument. Indeed, J. Cote accessed the courts when it sued the City relating to the death of its employee. Lastly, the Court of Appeal held that contract law, and by extension the freedom to choose with whom to contract, is governed by the private law principles of freedom of contract and commercial certainty, and absent a contractual term that offends public policy constitutional review is not appropriate. The appeal was consequently dismissed.

With the Supreme Court of Canada dismissing J. Cote's leave to appeal today, it appears that local governments may deem contractors who have a history of litigation with the local government as ineligible to bid on work. While this returns a tool to the procurement tool box of local governments, the clause may reduce the number of bids received in response to an invitation to tender. For this reason, consideration of litigation history at the evaluation stage, rather than at the outset, of a procurement as part of the local government's assessment of the overall value of a bid may be a better approach.

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