BC EXCAVATOR'S COURT CASE TAKES A DIG AT MUNICIPAL PROCUREMENT POLICIES UNDERMINED BY THE CFTA & CETA

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Is the use of reprisal clauses (also called litigation exclusion provisions) in municipal procurement policies and tender documents about to hit rock bottom? In December 2017, what may become the first case in a Canadian common law jurisdiction to determine whether a reprisal clause is unenforceable on constitutional or public policy grounds was given the green light to proceed by the British Columbia Supreme Court.[1] A 2001 decision of the Quebec Court of Appeal has already found that a reprisal clause contravened the principle of the rule of law and was contrary to public order.[2] Regardless of the outcome of the ongoing BC case, most municipal reprisal clauses appear to be incompatible with new procurement obligations imposed on Canadian municipalities by the *Canadian Free Trade Agreement* ("**CFTA**") and the *Comprehensive Economic and Trade Agreement* ("**CETA**") between Canada and the European Union.

A brief primer on reprisal clauses

Reprisal clauses exclude, or permit the exclusion of, suppliers from bidding on or being awarded municipal procurement projects if the supplier is, or was recently, engaged in litigation with the municipality. Historically, these clauses are rooted in the procurement of construction services,[3] but they apply broadly to all suppliers of goods and services to municipalities that employ such clauses.

Reprisal clauses come in all shapes and sizes and are typically codified in a municipality's procurement policy or purchasing by-law. Some examples include:

The City of Burlington

By-law number 19-2014, the city's corporate reference for business practices related to procurement and other commercial activities by the city:

40.0 Litigation and Bidders

a. *The City shall not consider any Bids submitted by a Bidder that is in Active or Pending Litigation against the City.*
b. *Potential Bidders who are involved with the City in Litigation matters can represent a compromised*

effort and a higher likelihood of future problems and liability. For these reasons such Vendors will be disqualified.

The City of London (Ontario)

Procurement of Goods and Services Policy:

19.6 Exclusion of Bidders in Litigation and disputes or appeals of contract awards

a. The City may, in its absolute sole discretion, reject a bid submitted if the bidder, or any officer or Managing Director of the bidder is or has been engaged, either directly or indirectly through another Corporation or personally, in a legal action against the City, its elected or appointed officers and employees in relation to:

i. any other contract or services; or,
ii. any matter arising from the City's exercise of its powers, duties, or functions; or,
iii. a dispute and/or an appeal of contract awards as per section 2.9

b. *In determining whether or not to reject a bid under this clause, the City will consider whether the litigation is likely to affect the bidder's ability to work with the City, its consultants and representatives, and whether the City's experience with the bidder indicates that the City is likely to incur increased staff and legal costs in the administration of the contract if it is awarded to the bidder.*

The City of Ottawa

Purchasing By-law:

47. LITIGATION EXCLUSION PROVISION

1) The City, acting through the City Treasurer in consultation with the City Clerk and Solicitor, may in its absolute discretion after considering the criteria outlined in subsection (2), reject a quotation, tender, or proposal submitted by a bidder if the City is engaged in legal action against the bidder, or, if the bidder or any officer or director of the bidder is engaged, either directly or indirectly through a corporation or personally, in a legal action against the City, its elected representatives, appointed officers, or employees, in relation to:

a. any other related contract or services; or 36

b. any matter arising from the City's exercise of its powers, duties, or functions.
(2014-443)

2) In determining whether or not to reject a quotation, tender or proposal under this clause, the City Treasurer and the City Clerk and Solicitor will consider;

a. whether the litigation is likely to adversely affect the bidder's ability to work with the City, its consultants and representatives; or,

b. whether the City's experience with the bidder indicates that the City is likely to incur increased staff and legal costs in the administration of the contract if it is awarded to the bidder; or,

c. whether the bidder has been convicted of a criminal act against the City or one of its local boards or corporations; or,

d. whether the bidder has failed to satisfy an outstanding debt to the City or one of its local boards or corporations; or,

e. there are reasonable grounds to believe it would not be in the best interests of the City to enter into a contract with the bidder.

3) Supply Branch is to advise Council by way of a memorandum when the City Treasurer intends to exercise his or her discretion to reject a quotation, tender, or proposal in accordance with subsection (1). (2014-443).

The City of Toronto

Toronto Municipal Code, Chapter 195, Purchasing:

§ 195-13.13. Suppliers in debt or in litigation with the City.

A. The Treasurer, in their absolute discretion, may disqualify suppliers, or their affiliated persons, who are indebted to the City or engaged in ongoing litigation for damages related to a contract awarded by the City.

B. In determining whether to disqualify a supplier or their affiliated persons under this Article, the Treasurer may consider the following non-exclusive factors, in consultation with the City Solicitor:

1) The supplier's history of making frivolous or vexatious claims, exaggerated damages claims, or other litigious conduct that has or may result in unnecessary additional administrative costs to the City or other public bodies;

2) The outcome of any prior or interim litigation, including whether legal costs have been awarded against the supplier or the City;

3) The prospect of setting off supplier debt against future contract payments;

4) Where the supplier is the only qualified supplier or in cases of an emergency;

5) The overall risk in relation to the total cost of the proposed contract;

6) Subrogated insurance claims brought in the name of the supplier, but not initiated by the supplier; or,

7) Claims by or against the City that in total value are less than $100,000.

C. This Article does not apply to bid disputes by suppliers or their right to seek other corrective measures against the City under any administrative or judicial review procedure related to procurement.

The Canadian construction industry has been particularly critical of the use of reprisal clauses, calling them "a form of intimidation", and a possible infringement of the *Canadian Charter of Rights and Freedoms* (the "**Charter**").[4] Such clauses put suppliers in the difficult position of weighing whether to exercise their right to involve municipalities in legitimate legal action against the possibility of lost future contracting opportunities with a key source of business.

Municipalities, for their part, defend the use of such clauses claiming important business reasons exist why a municipality would not want to enter into contractual arrangements with parties who are pursuing or have pursued litigation against the municipality.[5]

Historical treatment by Canadian courts

Litigation over the legality of reprisal clauses has been relatively rare in Canada, perhaps because suppliers have been reluctant to challenge such clauses in court for fear of being barred from obtaining municipal contracts by the very clause they sought to invalidate. What is more, Canadian courts have generally upheld the right of municipalities to include reprisal clauses in their procurement policies, provided the clause was adopted for legitimate business purposes.

Cox Bros. Contracting & Assoc. Ltd. v. Big Lakes (Municipal District)[6]

In 1997, a contractor brought an application for judicial review to quash a resolution of the Municipal District of Big Lakes Alberta as being discriminatory. The municipality had passed a policy that stated, in part:

- "No tenders quotations or supply of services shall be considered by any contractor or supplier of services who has initiated a litigation process with the municipality. No consideration will be given for a period of five years from the conclusion of the litigation."

Cox Bros. had previously sued Big Lakes in 1995 in connection with a road re-gravelling tender process. In 1996, when the municipality passed the policy containing the reprisal clause, Cox Bros. were informed that the municipality would refuse to accept Cox Bros. bids for municipal contracts.

Cox Bros. argued the municipality's policy was discriminatory and passed specifically to punish Cox Bros. However, presented with evidence that the municipality had adopted the policy for business purposes, including:

- it would be prudent to avoid doing business with parties which may be prone to litigation;
- the municipality would be guarded and cautious in dealings with a party adverse in interest; and
- there was a risk of breaching confidentiality when dealing on a daily basis with parties against whom the municipality is in litigation,[7]

The court concluded it could not review a business decision of a municipality, taken for business reasons, and the application was dismissed. In doing so, the court relied on the Supreme Court of Canada's decision in Shell Canada Products Ltd. v. Vancouver (City), which held that courts can review municipal purchasing decisions to determine if they were made for a municipal purpose.[8]

The British Columbia Supreme Court came to a similar conclusion in two separate, but related, cases against the City of Nanaimo.[9]

Sound Contracting Ltd. v. Nanaimo (City)

In 1994, the council of the City of Nanaimo passed revisions to the City's tendering policy that excluded bids from companies with current or pending legal action either by or against the City relating to work of a similar nature. The motion to revise the tendering policy noted:

• "At the present time, there are no restrictions on who can bid on public tenders as submitted by the City. Staff are of the opinion that for solid business reasons, the City should not be entertaining bids from companies or firms that have an active law suit against the City for similar work. Staff, from experience, believe that there will be a saving to the City in administrative, legal and personnel costs if a company, at the time of tendering, is engaged in an active lawsuit with the City in relation to similar work, will not have its bid considered for new work and that the tender documents give notice of this policy."[10]

The City removed the reprisal clause from its tendering policy the following year and adopted a prior poor performance exclusion clause instead. The council resolution explained "[t]he purpose of the change is to ensure the City has the flexibility it requires to award contracts that are deemed to be the most advantageous to City taxpayers, while at the same time avoiding a blanket policy concerning litigation in progress that could be considered to be unduly harsh."[11]

Despite the change in policy, the plaintiff sued the City of Nanaimo for damages stemming from construction contracts the City refused to enter into with the plaintiff in 1995 because Sound Contracting had three active lawsuits against the City when the policy was passed in 1994.

Relying in part on the decisions in *Cox Bros., Shell Contracting*, and *Nanaimo (City) v. Rascal Trucking Ltd.*,[12] the court in *Sound Contracting* found the City of Nanaimo had implemented the reprisal clause "for valid commercial or business purposes"[13] such that the City's 1994 resolution was *intra vires*. Accordingly, the

plaintiff's action was dismissed.

Hancon Holdings Ltd. v. Nanaimo (City)

In 2001, the City of Nanaimo further revised its purchasing policy and tender documents to include the following provision:

- The Owner may, in its absolute discretion reject a Tender submitted by Tenderer if the Tenderer, or any officer or director of the Tenderer is or has been engaged either directly or indirectly through another corporation in a legal action against the Owner, its elected or appointed officers and employees in relation to:

(a) any other contract for works or services; or

(b) any matter arising from the Owner's exercise of its powers, duties, or functions under the *Local Government Act* or another enactment within five years of the date of this Call for Tenders.

In determining whether to reject a tender under this clause, the Owner will consider whether the litigation is likely to affect the Tenderer's ability to work with the owner, its consultants and representatives and whether

The Owner's experience with the Tenderer indicates that the Owner is likely to incur increased staff and legal costs in the administration of this contract if it is awarded to the Tenderer.[14]

The owner of Hancon Holdings Ltd., which owned Sound Contracting Ltd. (the plaintiff in the previous case), attempted another attack on Nanaimo's tendering policy by filing a petition for an order quashing the resolution amending the tendering policy.

Among the grounds advanced for setting aside the resolution, Hancon argued the resolution was *ultra vires* the powers of the city, adopted for improper purposes and/or in bad faith, amounted to a discriminatory and personal attack on Hancon, and offended the Canadian Charter of Rights.[15]

Adopting a similar determination regarding the clause as the court in *Sound Contracting*—that Nanaimo's purchasing policy and tender documents had been adopted for "valid business reasons and included in that business rationale was the high costs to the taxpayers involved in defending against legal actions particularly brought by the petitioner"—the court dismissed Hancon's petition.[16] Although the court briefly considered and ultimately dismissed the allegations of bad faith and discrimination, the decision did not address the allegation the council resolution offended the Charter.[17]

If the court had taken up the Charter argument, perhaps the outcome would have been similar to a decision of the Quebec Court of Appeal that had been released just two months before the hearing in Hancon Holdings.

Cie de construction & développement Cris ltée c. Société de développement de la Bai James

In 2001, the Quebec Court of Appeal dismissed a government agency's appeal of a motion granting declaratory judgment to a group of Quebec contractors who challenged the validity of a reprisal clause included in a road maintenance tender.[18]

The reprisal clause in question permitted the Société de développement de la Bai James (the "**SDBJ**") to reject tenders from suppliers who brought litigation against the SDBJ or who were otherwise involved in litigation with the SDBJ, including, the court surmised, litigation the SDBJ had commenced against suppliers.

The court found that the reprisal clause either places the supplier in the situation of choosing between its fundamental right to have recourse to the court to have its rights upheld and obtaining the coveted contract, or it denies the supplier the right to obtain a contract if the purchasing organization, rightly or wrongly, is suing the supplier.[19] Writing for the panel, Justice Thibault found the motion judge had good reason to invalidate the reprisal clause in these circumstances, because it contravened the principle of the rule of law and contravened public order.[20]

The Quebec Court of Appeal's decision cites the Supreme Court of Canada's decision in *British Columbia Government Employees' Union v. Attorney General of British Columbia and Attorney General of Canada* ("**B.C.G.E.U., Re**"),[21] a case that involved an injunction to restrain picketing in front of the Vancouver courthouse. Justice Thibault wrote that in *B.C.G.E.U.*, Re the Supreme Court enshrined the right of access to the courts as a corollary of the principle of the rule of law:

- "[...] it would be inconceivable that Parliament and the provinces should described in such detail the rights and freedoms guaranteed by the Charter and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court. [...] There cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice."[22]

The case of *J. Cote*,[23] which has been given the green light to proceed in British Columbia, advances the same argument.

J. Cote & Son Excavating Ltd. v. City of Burnaby

J. Cote & Son Excavating Ltd. ("**Cote**"), a construction firm specializing in excavation for road construction and utilities work, entered into a sewer construction contract with the City of Burnaby in 2012. A dispute arose between the two parties in relation to a workplace accident that killed one of Cote's employees and in 2013 Cote filed an action against the City.[24]

The City of Burnaby added a reprisal clause to its tender documents in 2014 that read:

- "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."[25]

After Cote discovered the reprisal clause in the City's tender documents, he believed that he was effectively "blacklisted" by the City. Feeling that he did not have anything to lose in challenging the clause, Cote sued the City in 2014 alleging the reprisal clause was of no force and effect because it unjustifiably infringes the Constitutionally protected rule of law and right of reasonable access to the courts and is contrary to public policy.[26]

The City of Burnaby removed the reprisal clause from its tender documents in 2017 and subsequently sought to have the case dismissed, arguing the issues raised in the case are moot. Cote argued that he was seeking *Charter* damages for the infringement of the constitutionally protected "rule of law", being the right of reasonable access to the courts, which the Supreme Court of Canada recognized in *B.C.G.E.U.*, Re.[27]In December 2017, the court ordered that the constitutional and Charter issues raised in Cote's claim were not moot. Further, the court exercised its discretion to allow the moot issue of public policy raised in the claim to proceed to a determination.[28]

Although suppliers of goods and services to municipalities, and municipalities themselves, will undoubtedly follow the denouement of *J. Cote* with interest, whether the BC Supreme Court reaches similar conclusions to those of the Quebec Court of Appeal in *Cie construction* may have limited impact on current municipal procurement policies. The reason for this is the coming into force of the CFTA and CETA, which impose new conditions on municipal procurement activity across Canada. Reprisal clauses widely used today appear to be incompatible with express rules about setting conditions for participation in covered procurements and Canadian municipalities will be forced to amend their purchasing policies and tender documents accordingly, or risk being found in breach of the CFTA and/or CETA.

Conditions for participation under the CFTA & CETA

Article 507 of the CFTA and Article 19.7 of CETA are effectively identical and restrict municipalities, and other entities subject to the agreements, in the type of conditions that can be placed on participation in a procurement. Both the CFTA and CETA require such conditions to be limited to those that are essential to

ensure a potential supplier is capable of undertaking the procurement:

- Article 507: Conditions for Participation

1. A procuring entity shall limit any conditions for participation in a procurement to those that are essential to ensure that a supplier has the legal and financial capacities, and the commercial and technical abilities, to undertake the relevant procurement.

2. In establishing the conditions for participation, a procuring entity:

a. shall not impose a condition that, in order for a supplier to participate in a procurement, the supplier has previously been awarded one or more contracts by a procuring entity of a Party;

b. may require relevant prior experience if essential to meet the requirements of the procurement; and

c. shall not require prior experience in the territory of the Party to be a condition of the procurement.

3. In assessing whether a supplier satisfies the conditions for participation, a procuring entity shall:

a. evaluate the financial capacity and the commercial and technical abilities of a supplier on the basis of that supplier's business activities both inside and outside the territory of the Party of the procuring entity and

b. base its evaluation on the conditions that the procuring entity has specified in advance in its tender notices or tender documentation.

4. If there is supporting evidence, a Party, including its procuring entities, may exclude a supplier on grounds such as:

a. bankruptcy or insolvency;

b. false declarations;

c. significant or persistent deficiencies in performance of any substantive requirement or obligation under a prior contract or contracts;

d. final judgments in respect of serious crimes or other serious offences;

e. professional misconduct or acts or omissions that adversely reflect on the commercial integrity of the supplier; or

f. failure to pay taxes. [emphasis added]

When a municipality relies on a reprisal clause to reject a bid for consideration, the municipality inappropriately

imposes a condition for participation in that procurement that is not connected to the supplier's legal or financial capacity or commercial or technical ability to undertake the procurement. If the procurement in question is subject to CETA and/or the CFTA, the rejected supplier could challenge the decision of the municipality through the dispute resolution process every municipality is mandated to provide under Article 518 of the CFTA and Article 19.17 of CETA.

A reprise of the reprisal clause?

While the coming into force of the CFTA and CETA will require municipalities across Canada to re-evaluate their use of reprisal clauses, it remains to be seen if supplier litigation against a procuring entity will disappear from the assessment of supplier bids in procurement processes entirely.

Neither the CFTA nor CETA prevent municipalities from including subjective evaluation criteria in their procurement processes that take into consideration whether a prospective supplier is involved in litigation with the municipality. Provided the tender documents clearly disclose such a criterion will be evaluated, it can presumably form part of the decision to award a contract to a particular supplier.

Another possibility is the creation of a CFTA/CETA compliant "litigation exclusion" clause, which might assess the impact of any litigation involving the supplier on the financial capacity of that supplier to undertake a procurement. Such a clause would be substantially watered down from the clauses found in municipal procurement policies and by-laws today.

Given the wording of the specific reprisal clause at issue in *J. Cote*, a decision from the BC Supreme Court may not shed any light on the constitutionality of procurement policies or bid evaluation criteria that include a CFTA/CETA compliant assessment of supplier litigation activity. Nonetheless, the typical reprisal clause employed by municipalities today has been severely undermined by coming into force of the CFTA and CETA. As part of a broader review of procurement policy compliance with new trade agreement obligations, municipalities across Canada should be taking steps to amend or remove such clauses. Otherwise, municipalities run the risk of having procurement processes derailed by supplier challenges.

by Timothy Cullen

[1] J. Cote & Son Excavating Ltd. v. City of Burnaby, 2017 BCSC 2323 [J. Cote].
[2] Cie de construction & développement Cris ltée c. Société de développement de la Bai James, [2001] RJQ 1726, 2001 CarswellQue 1727 [Cie de construction].
[3] See Sound Contracting Ltd. v. Nanaimo (City), 2000 BCSC 1819 at para 3 [Sound Contracting].
[4] The Edmonton Specifier, Exclusion Clauses a 'Form of Intimidation': CCA, November 2016 at p. 8.
[5] See for example Cox Bros. Contracting & Assoc. Ltd. v. Big Lakes (Municipal District) (1997), 215 A.R. 126, 1997

CarswellAlta 1164, 1 M.P.L.R. (3d) 82 at para 17 [Cox Bros.]; Hancon Holdings Ltd. v. Nanaimo (City), 2001 BCSC 1606 at para 10 [Hancon Holdings]; and Sound Contracting, supra note 3 at paras 3 and 28.
[6] (1997), 215 A.R. 126, 1997 CarswellAlta 1164, 1 M.P.L.R. (3d) 82.
[7] Ibid at para 17.
[8] [1994] 1 SCR 231, 1994 CarswellBC 115.
[9] Sound Contracting, supra note 3 and Hancon Holdings, supra note 5.
[10] Sound Contracting, supra note 3 at para 3.
[11] Ibid at para 14.
[12] 2000 SCC 13.
[13] *Sound Contracting, supra* note 3 at para 29.
[14] *Hancon Holdings, supra* note 5 at para 1. Despite the many changes to the City of Nanaimo's purchasing policy over the years, the City maintains a very similar reprisal provision in its purchasing policy to this day.
[15] *Ibid*. at para 2.
[16] *Ibid*. at paras 10 and 15.
[17] *Ibid*. at paras 11-14.
[18] *Cie de construction, supra* note 2.
[19] *Ibid* at para 20.
[20] *Ibid*. at para 21.
[21] [1988] 2 SCR 214.
[22] *Cie de construction, supra note* 2 at para 26, citing *B.C.G.E.U. Re, supra* note 21 at paras 30-31.
[23] *Supra* note 1.
[24] *Ibid.* at paras 5-6.
[25] *Ibid.* at para 7.
[26] *Ibid*. at paras 8-12.
[27] *Ibid*. at paras 14-31.
[28] *Ibid*. at para 56.

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.