

BRIEFING NOTE

J. Cote & Son Excavating Ltd . v City of Burnaby: SCC refuses leave to appeal.

The Supreme Court of Canada has dismissed a contractor's application for leave to appeal a decision of the BC Court of Appeal that upheld the use of a "reprisal clause" in the City of Burnaby's tendering documents.

BACKGROUND

J. Cote & Son Excavating Ltd. is a road construction and utilities contractor. In 2012, a retaining wall collapsed and killed one of its employees, leading to a legal dispute with the City of Burnaby. In 2014, the City of Burnaby added a "reprisal clause" to its form of invitation to tender on municipal works. This excluded bids from contractors who were involved in legal proceedings against Burnaby in the two years prior to the tender closing date. J. Cote & Son Excavating Ltd. challenged the reprisal clause as unconstitutional. Following a summary trial, the BC Supreme Court refused to declare that the reprisal clause was off no force and effect. J. Cote & Son Excavating Ltd. appealed.

THE BC COURT OF APPEAL DECISION

The main issue before the BC Court of Appeal was whether the reprisal clause infringed a constitutional right of access to the civil superior courts. J. Cote & Son Excavating Ltd. argued that the BC Supreme Court was incorrect in concluding:

1. That the reprisal clause did not violate the rule of law;
2. That the reprisal clause did not deny access to the civil superior courts contrary to s. 96 of the *Constitution Act, 1867*;
3. That the reprisal clause did not infringe rights of access to the civil superior courts under the *Canadian Charter of Rights and Freedoms*; and
4. That the reprisal clause was not contrary to rights of access to the civil superior courts under the common law.

The BC Court of Appeal rejected the first argument on the basis that any rule of law concerns relating to access to justice are addressed under s. 96 of the *Constitution Act, 1867*. The rule of law does not create an independent, stand-alone right of access to the civil courts.

In rejecting the second argument, the court held that s. 96 of the *Constitution Act* does not protect the right to bid on public tenders. The court drew a distinction between a clause in tender documents and a clause imposed by a law of general

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application resulting from the Provincial or Federal government's exercise of legislative competence. Only the latter would ordinarily engage s. 96. The court further noted that while constitutional review is an appropriate tool for scrutinizing legislation, which is imposed on the public, contracts are voluntary agreements between the parties and are predominantly governed by private law principles.

In rejecting the third argument, the court held that the *Charter* does not provide a general, free-standing right to access the courts.

Finally, in its rejection of the fourth argument, the court held that the right of access under the common law cannot be more expansive than the right of access under s. 96 of the *Constitution Act*, and that s. 96 is the only path to a constitutional requirement of access to the civil superior courts.

IMPLICATIONS:

The Supreme Court of Canada's refusal to grant leave adds a little more force to the BCCA decision, such that Municipalities may continue to enjoy freedom of contracting in the tendering stage, although restrictions such as reprisal clauses must still conform to the "*organizing principle of good faith*" (per *Bhasin v Hrynew*).

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