SUPREME COURT OF CANADA REFUSES TO RECOGNIZE A NEW DUTY OF CARE IN TENDERING PROCESS

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Supreme Court of Canada refuses to recognize a new duty of care in the tendering process

In the recent case *Design Services Ltd. v. Canada*, 2008 SCC 22 the Supreme Court of Canada considered a critical issue in the law of tendering: Does an owner owe a duty of care in tort to the subcontractors, architects and consultants of an unsuccessful bidder? The Court unanimously concluded that it did not.

This case involved a contract for the construction of a naval reserve building in St. John's, Newfoundland and Labrador. Olympic Construction Ltd. assembled a team of subcontractors, consultants and an architect. It bid on the project but its tender was not chosen. It sued the owner claiming that the owner improperly accepted a non compliant tender and that its tender should have been chosen instead. Olympic's subcontractors, consultants and architect also joined the litigation. The bidder settled with the owner. However, the other parties pressed on with the litigation.

The trial judge held that although there was no contract between the owner and these other parties, the owner owed a duty of care in tort. The Federal Court of Appeal reversed this decision concluding that the owner was not liable in either contract or tort to these other parties. The unsuccessful subcontractors, consultants and architect appealed to the Supreme Court of Canada.

This is a novel issue in the law of tendering. Traditionally, the law of tendering is governed by the Contract A/Contract B analysis set out in *Ontario v. Ron Engineering & Construction (Eastern) Ltd.*, [1981] 1 S.C.R. 111. This involves two distinct contracts *i.e.*, Contract A and Contract B. Contract A is the tendering contract. Contract B is the substantive construction contract. Contract A will form between the owner and each tenderer which submitted a compliant bid. There may be many Contract A's if numerous compliant tenders are submitted. Generally, subcontractors, architects, consultants, etc. are not parties to the contract with the owner. As such, the traditional contract principles do not apply. However, it was unclear if a tort duty applied to them.[1]

In *Design Services Ltd. v. Canada* the issue was squarely raised. The analysis involved two questions: (1) Does the claim fall within a recognized duty of care? (2) If not, should a new duty of care be recognized?

The Court identified the appellants' claim as one for pure economic loss. The case law currently recognizes five different categories of negligence claims for which a duty of care in tort has been found with respect to pure economic loss:

1. the independent liability of statutory public authorities;
2. negligent misrepresentation;
3. negligent performance of a service;
4. negligent supply of shoddy goods or structures;

[1] In the earlier case of *Martel Building Ltd. v. Canada*, 2000 SCC 60 the Supreme Court of Canada declined to address this issue stating "[w]e believe that the issue of whether a duty of care can arise between a subcontractor and an owner must be left to a case in which it arises."

5. relational economic loss (*i.e.*, economic loss related to damage to property).

The claim did not fall within any of these existing categories. Therefore, the Court had to proceed to the next question, considering whether a new duty of care ought to be recognized. The test for determining whether a new duty of care should be recognized is the two stage *Anns* test. According to the *Anns* test, the first stage is determining if a *prima facie* duty of care exists. This involves examining the relationship between the parties and determining if it is of sufficient closeness or proximity to justify imposition of a duty. If so, the analysis proceeds to the second stage which determines whether there are any policy considerations which ought to limit the scope of that duty.

On the first stage of the *Anns* test, the Supreme Court concluded that a *prima facie* duty of care did not exist. Although the owner conceded that it was reasonably foreseeable that awarding the contract to a non compliant bidder would result in financial losses to the subcontractors, other factors were also relevant in determining if there was a *prima facie* duty. In particular, in this case the appellants had the opportunity to form a joint venture and thereby become parties to the Contract A between the owner and Olympic. However, they did not. The Court observed that the subcontractors and the other parties had the ability to protect themselves. The Court concluded "[t]ort law should not be used as an after-the-fact insurer."[2] The appellants failed to satisfy the first stage of the *Anns* test justifying a finding of a *prima facie* duty of care.

Since no *prima facie* duty of care at the first stage of the *Anns* test was justified, it was unnecessary for the Court to continue to the second stage of the *Anns* test to consider residual policy concerns that could negate the creation of a new duty of care. Nevertheless, the Court commented on a significant policy concern of indeterminate liability, warning:

> The recognition of a duty of care of an owner to subcontractors in a tendering process could lead to what Cardozo C.J. of the Court of Appeals of New York coined as "liability in an indeterminate amount for an indeterminate time to an indeterminate class" (*Ultramares Corp. v. Touche*, 174 N.E. 441 (1931), at p. 444).[3]

The Court concluded that even if a *prima facie* duty of care had been found at the first stage of the *Anns* test, it would have been negated at the second stage because of indeterminate liability concerns. The Court dismissed the appeal.

This is a welcome decision in this area of law. It sets much needed parameters on the tendering process. It introduces certainty into the process with clearly defined boundaries. In cases such as this the owner does not owe a duty of care in tort to the subcontractors, architects, consultants and other parties down the supply chain. Refusing to introduce a new duty of care in tort ensures that owners are not exposed to indeterminate liability. The case does suggest, however, that if a bid is submitted as a joint venture, Contract A could be formed creating contractual privity between the owner and other parties directly involved in the joint venture. This would engage the Contract A/Contract B principles traditionally applied in the tendering context. By means of

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[2] *Design Services Ltd.* at para. 57

[3] *Ibid.* at para. 60

this decision, the Supreme Court has introduced greater stability, predictability and certainty into the tendering process.

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