

SUBCONTRACTOR'S CLAIMS AGAINST OWNERS DISALLOWED

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Courts have often stated that the categories of negligence are never closed and, over the years, the Supreme Court of Canada (SCC) has expanded the tort liability exposure of contractors, design consultants and others in the construction industry. However, no Canadian jurisprudence has as yet recognized a duty of care between an owner and subcontractors. A recent SCC decision, *Design Services Ltd. v. Canada*, might have but, in the end, did not.

In this case, the Court examined the issue of whether an owner in a tendering process owes a duty of care to subcontractors. Ultimately, the Court denied the right of subcontractors to bypass general contractors and sue owners directly over irregularities in the tendering process. Consequently, owners may sleep more easily knowing that they are not facing an expanded pool of potential plaintiffs in the form of subcontractors.

Traditionally, the right of a subcontractor to sue in a tendering process has been based on privity of contract. In this context, a general contractor has the right to sue the owner for tendering irregularities pursuant to the bid contract. In turn, a named subcontractor, if it is incorporated into the main tender, has rights against the general contractor and is entitled to its subcontract if the general contractor is awarded the contract. A named subcontractor can also sue the general contractor if, after the contract award, the general contractor fails to award the subcontract contemplated in the tender.

In another relatively recent decision, *Martel Building Ltd. v. Canada*, the SCC said that, since there was no privity of contract between the subcontractor and the owner in that case, liability could only be founded in tort. The Court decided that the issue of whether a duty of care can arise between a subcontractor and an owner should be left to a case in which it arises; this became the issue in *Design Services* which involved a tendering process initiated by Public Works and Government Services Canada (PWGSC) for the construction of a naval reserve building in St. John's, Newfoundland. PWGSC decided to use a "design-build" tendering process but somehow awarded the contract to a non-compliant bidder. As a result, the prime bidder, Olympic Construction Ltd., and its subcontractors sued PWGSC. Olympic reached a settlement from which the subcontractors were excluded so they continued litigation against PWGSC. It is important to note that no partnership or

joint venture was entered into between Olympic and the subcontractors during the tendering process.

At trial, the Federal Court of Canada held that the subcontractors were not primary parties to the tender process and therefore there was no contractual privity between them and PWGSC. However, the Court found that the requirements of the design-build tender process, which included pre-qualification of the bidders, gave the subcontractors sufficient standing in the tendering process to create a duty of care. The Court stated that it was reasonably foreseeable in the circumstances of this case that, because PWGSC issued the contract to a noncompliant bidder, there were financial losses to the subcontractors. Accordingly, the Court awarded damages to the subcontractors.

On appeal, the Federal Court of Appeal found that PWGSC owed no duties to the subcontractors under contract or tort law and therefore was not liable to those subcontractors. It overturned the trial decision. In turn, the SCC dismissed the further appeal by the subcontractors. Essentially, the Court rejected the concept that subcontractors could advance a claim against an owner under any existing or new tort-based duties of care.

At the trial level, the trial judge seems to have said that a joint venture — or a relationship analogous to a joint venture — was in and of itself a category that recognized proximity between the owner and member in the joint venture. But the SCC found that this claim does not fit within the preexisting category of relational economic loss because there was no property damage suffered by Olympic in the tendering process.

The SCC then considered whether it should recognize a new duty of care. In the circumstances of this case, the tender documents permitted the submission of joint-venture bids. If the subcontractors had entered into a contract with Olympic to submit a joint-venture bid, they would have been entitled to bring a contractual claim against the owner pursuant to the bid contract. However, since the bidding team, in the tender process, chose to organize itself in a prime contractor/subcontractor arrangement, the SCC found that there was an overriding policy reason that tort liability should not be recognized in these circumstances.

The Court stated that allowing a claim in tort would ignore and circumvent the contractual rights and obligations that were intended by PWGSC, Olympic and the subcontractors; in essence, that would substitute a claim in tort law for the inability of the subcontractors to claim under the bid contract. “To conclude that an action in tort is appropriate when commercial parties have deliberately arranged their affairs in contract,” it declared, “would be to allow for an unjustifiable encroachment of tort law into the realm of contract.” Based on its finding of no duty of care, the SCC did not have to consider the issue of indeterminate liability but it provided some interesting

comments in any event. It held that, in the context of construction contracts, the indeterminacy of the class of plaintiffs can be readily seen. Even where subcontractors are named and known by an owner, those subcontractors will have employees and suppliers, and perhaps their own subcontractors, who may also suffer economic loss. So even if the Court had found a duty of care was owed, it would have been negated because of concerns of indeterminate liability.

In summary, the *Design Services* decision preserves the concept of contractual privity and effectively limits the number of potential plaintiffs in the tendering process. Subcontractors cannot succeed in claims against owners unless there are circumstances that create a contractual relationship or proximity exists to create a duty of care. This outcome is a positive result for owners who can take comfort in not being faced with potential liability exposure to subcontractors and others below them in the tendering process.