2020 J. Can. C. Construction Law. 37

Journal of the Canadian College of Construction Lawyers
2020

Municipal Power to Discriminate: The Impact of *Shell Canada Products v. Vancouver (City)* on Public Procurement

Steve Berezowskyj, Benjamin Clarke [a1]

Editor's Note

The authors have provided a very useful and concise update on a municipalities or other government procurement entity's right to discriminate against certain contractors who attempt to participate in public tenders.

As the authors illustrate, and unfortunately for the affected contractors, the courts have generally upheld the right to restrict participation in a tender process or reject a bid even if it is the lowest, provided that the municipality can demonstrate a legitimate business case for doing so.

The paper does hold out hope that courts will critically consider restrictive tendering practises that prejudice a contractor where a case can be made that there has been deficiencies in the fairness of the tendering process.

One thing seems clear from the current state of the case law as outlined by the authors: notwithstanding the uphill battle, given the potentially very serious financial distress that can be caused to a contractor as a result of being shut out of government bidding opportunities, especially in smaller markets, challenges will continue to be made with the hope that the facts of the particular case will be sufficient to attract the courts interest and intervention.

1. INTRODUCTION

A project that completes late, runs over budget or ends up in protracted litigation will not be viewed as a success by the owner. As a consequence, the owner will likely avoid engaging the same team of consultants and contractors for its next project or any future project. No one would fault the owner for making this decision. In fact, it may well be considered imprudent for the owner to do otherwise. But what if the owner is a municipality?

Municipalities often represent a significant portion of the total construction market in a particular region. The projects that they ***38** undertake are funded with public money. This creates an expectation if not an obligation that its business dealings will be transparent and fair. Must then a municipality make opportunities on its publicly-funded projects open and available to the entire construction community or can it exclude a particular consultant or contractor from bidding because of a perceived problem or dispute on a past project?

Contractors who are shut out of these opportunities have raised a variety of arguments to challenge the policy and decisions of municipalities. Perhaps surprisingly, the Courts have consistently recognized that municipalities can discriminate against contractors, like any private business can, provided that it has done so for a valid business reason such as poor performance or disputes on a past project. This paper explores the scope of a municipality's power to discriminate and the potential avenues through which an affected contractor may challenge the exercise of that power.

2. MUNICIPAL POWER TO DISCRIMINATE FOR BUSINESS PURPOSES

As creatures of statute, municipalities are capable of exercising only those powers which are conferred upon them by the provincial legislature. [1] The question then becomes; when is a municipality authorized to discriminate against what it perceives to be a litigious contractor, and what, if any, limits apply to the exercise of that power?

The Supreme Court of Canada addressed this question in *Shell Canada Products Ltd. v. Vancouver (City).* [2] In *Shell,* the Court considered whether the City of Vancouver had the authority to pass resolutions which prevented a petroleum company from doing business with the City and from operating within city limits. The policy prevented Shell from submitting bids for municipal contracts to supply petroleum products and from doing any retail business within municipal boundaries. The recitals to the resolutions confirmed that the City had passed the resolutions to demonstrate its strong disapproval of the apartheid regime in South Africa and to pressure Shell into ceasing its commercial activities in South Africa. Shell argued that the resolutions exceeded the scope of the City's legislative powers, were discriminatory and breached the *Vancouver Charter,* S.B.C. 1953 c. 55.

The Court determined that the purpose of the resolutions was to affect matters beyond the boundaries of the City without any identifiable ***39** benefit to its inhabitants. That purpose, the Court concluded, was neither expressly nor impliedly authorized by the *Vancouver Charter* and was unrelated to the carrying into effect of the intent and purpose of the *Vancouver Charter*. On that basis, the resolutions fell outside the scope of legislative power granted to the City.

Although this finding was sufficient to quash the resolutions, the Court went on to address the discriminatory nature of the resolutions. Writing for the majority, Mr. Justice Sopinka said at paragraph 106:

> "[The provisions of the *Vancouver Charter*] authorize the municipality to engage in business undertakings, to acquire property, real and personal, required for the purposes of the City, to provide for good rule and government, and to do all such things as are incidental or conducive to the specified powers. Obviously in carrying on the business of the City or acquiring property from suppliers or vendors, the City must make choices that can be said to discriminate. Discrimination for commercial or business reasons is a power that is incidental to the powers to carry on business or acquire property. These activities could not be carried on without this power."

While the Court did recognize that a municipality had the power to discriminate for business and commercial purposes, it must do so only for a legitimate municipal purpose. In this case, the Court held that discriminating to create political pressure on a foreign state did not further the necessary municipal purpose and therefore was not authorized.

Although the discriminatory resolutions in *Shell, supra* were struck down, the commentary in the Supreme Court of Canada's decision concerning a municipality's right to discriminate have been used to justify municipal procurement policy, bylaws and award decisions that purport to disqualify or disadvantage contractors involved in disputes with the municipality. Contractors have adopted three primary approaches to challenge these municipal policies and decisions it perceives to have been unfairly discriminatory.

First, a contractor might argue that a discriminatory procurement policy or practice bylaw exceeds the scope of the power granted to a municipality and is therefore *ultra vires*, as was successfully argued in *Shell.*

Second, contractors have argued that a decision to bar contractors involved in litigation with the municipality from bidding on public ***40** projects breaches that contractor's constitutionally-protected right to access to the Courts.

Third, contractors who are disqualified or unsuccessful in procurements because of their historical dealings have challenged the award due to a lack of procedural fairness in the procurement process.

2.1 Scope of Municipal Powers

One of the earlier challenges to a municipality's power to discriminate against litigious contractors was raised in *Cox Bros. Contracting Assn. Ltd. v. Big Lakes (Municipal District)*.[3] The Municipal District had adopted a policy that it would not consider tenders from contractors who had initiated litigation against it. The policy applied retroactively, and so it captured Cox Bros., a contractor who had previously commenced litigation against the Municipal District. At the time of the enactment of the policy, Cox Bros. was the only contractor who was barred from tendering for municipal projects and the policy did not require that the affected contractor be notified of its existence prior to the submission of a tender.

The Alberta Court of Queen's Bench was not prepared to interfere with the discretion of the Municipal District to make such a policy, unless the policy was found to exceed its municipal powers. Madam Justice Veit said at paragraph 4 of her decision:

> [4] Courts should not, ordinarily, review a municipality's exercise of statutory power by passing policy resolutions. Courts must respect the exercise of power by a democratically elected municipal authority. In particular, a court has no jurisdiction to substitute its view for that of elected officials of the municipality. A court's role in this area is very limited; it can only look to see if the municipality stayed within, or exceeded its powers.

The question for the Court then was whether or not the decision to bar a specific contractor from bidding on municipal contracts because of previous litigation was made for a valid business purpose. The Court determined that it was. Madam Justice Veit concluded at paragraph 28 of her decision:

> [28] A municipality is entitled to make business decisions in the same way that business people make decisions, including decisions to deal, or not to deal, with certain contractors or suppliers, so long as there is no breach of the Charter and so ***41** long as the decision is made for a municipal, ie business reasons ...

Having found that the decision to bar litigious contractors from bidding on municipal contracts fell within the scope of municipal power and was made for a valid business purpose, Justice Veit dismissed Cox Bros' application for judicial review of the policy.

Years later, the Court considered a similar challenge in *Sound Contracting Ltd. v. Nanaimo (City)*.[4] In *Sound,* the City of Nanaimo had passed a resolution and made an amendment to its standard form tendering documents to include the following language:

> ARTICLE 18: TENDER REJECTION
>
> The Owner reserves the right to reject any tenders of a company that is, or whose principals are, at the time of tendering, engaged in a lawsuit against the City of Nanaimo in relation to work similar to that being tendered.

At the time that the resolution was passed, Sound Contracting was involved in three active lawsuits against the City. As a result of the resolution, the City rejected a low tender submitted by Ballenas Engineering Ltd. a contractor controlled by the principal of Sound Contracting, Mr. Heringa. Ballenas Engineering challenged the rejection of its bid.

The City defended its policy and the decision to reject the bid by relying on *Shell, supra,* and *Cox Bros, supra*, arguing that it had the authority to reject bids from Sound Contracting and Mr. Heringa for business purposes. The Court agreed and found that the City was empowered by ss. 19(3), 287 of the *Municipal Act,* R.S. 290, to discriminate in furtherance of legitimate business and industrial undertakings and that the City enacted the resolutions pursuant to that power.

A year later, Mr. Heringa commenced another action against the City of Nanaimo to challenge a similar discriminatory policy. In *Hancon Holdings Ltd. v. Nanaimo (City)* [5] another company controlled by Mr. Heringa challenged the City's right to pass a resolution barring Hancon and its subsidiaries, including Sound Contracting Ltd., from bidding on municipal contracts due to their involvement in litigation against the City. [6]

***42** Once again, the Court referred to the principles set out in *Shell,* namely, that municipalities are entitled to discriminate for business and municipal purposes, and that the Court should not wade into a review of municipal decision making in the absence of a "clear demonstration that the municipal decision was beyond its powers." [7] The Court found that the resolution was enacted for a valid municipal purpose, which was to limit the City's, and the taxpayers', potential exposure to costly litigation. Accordingly, Hancon's petition was dismissed.

2.2 Constitutional Challenge

In light of the Court's consistent recognition of a municipality's right to discriminate for business purposes, unhappy contractors have been forced to consider alternative bases for challenging their disqualification from municipal tendering processes. Recently, a contractor argued that tender clauses that disqualify a contractor from bidding if they have sued a municipality are unconstitutional because they infringe on a contractor's ability to access the Courts.

The British Columbia Court of Appeal considered a constitutional challenge to discriminatory municipal tender requirements in *J. Cote Son Excavating Ltd. v. Burnaby (City).* [8] In *J. Cote,* the dispute arose out of a clause that was added to the City's invitation to tender materials that effectively excluded contractors involved in litigation against the City from bidding on its projects. The clause in the tender documents stated:

> 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.

Due to the retroactive application of the clause, J. Cote was disqualified from bidding as a result of outstanding litigation that it had commenced prior to the City including the clause in its standard documents. J. Cote was understandably concerned about the clause because it had previously received 25% of its work from the City. The contractor argued that the discriminatory clause had the effect of discouraging ***43** contractors from pursuing litigation and thereby limited their access the Courts as a means of protecting their interests and rights. This, the contractor argued, was contrary to the rule of law, breached constitutional protection for the Courts grounded in section 96 of the *Constitution Act, 1867* and infringed rights protected under the *Charter*. [9]

The Court of Appeal first decided that the rule of law, while recognized as an "unwritten constitutional principle" could not be relied on by J. Cote as an independent basis for pursuing its challenge of the clause. Following the decisions in *British Columbia v. Imperial Tobacco Canada Ltd.;* [10] *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)* [11] and *Cambie Surgeries Corporation v. British Columbia (Attorney General),* [12] the Court held that J. Cote's access to justice

arguments must be addressed and considered through an analysis of section 96 of the *Constitution Act, 1867*, which provision has been interpreted to "guarantee the core jurisdiction of provincial superior courts". [13]

The Court of Appeal then held that section 96 of the *Constitution Act, 1867* was not engaged because the clause in the tender documents was not a law of general application. Any impact that the clause may have had or hardship it was alleged to have caused, the Court reasoned, applied to "a small number of corporations bidding on public works contracts." [14] The Court said at paragraph 62:

> Section 96 of the *Constitution Act, 1867* does not protect the ability or right to bid on public tenders. As the Attorney General points out, many contractual provisions, such as mandatory arbitration clauses, exclusion clauses, limitation of liability clauses and settlement release clauses are designed to discourage parties from accessing the courts. An absolute right would have significant ramifications, as an array of statutes and contractual clauses of the government that hinder or impede access to the courts to some degree would be rendered unconstitutional. Indeed, even the seven percent tax in *Christie* would have been unconstitutional were the appellant's argument to succeed. But the Supreme Court of Canada ***44** found that the tax did not deny access to the courts, so it was not unconstitutional.

Finally, the Court of Appeal held that the *Charter* does not expressly identify and therefore cannot be interpreted to guarantee a right of access to the Courts that could be relied on by J. Cote to ground the remedy it sought.

Ultimately then, the Court of Appeal concluded that the discriminatory clause in the City's tender documents that disqualified contractors involved in litigation with the City from bidding on its projects did not infringe a constitutionally-protected right of access to the Courts. Leave to appeal from this decision to the Supreme Court of Canada was refused. [15] As a result, this appellate decision from British Columbia would appear to leave very little room for a contractor to argue in the future that a municipality's discriminatory procurement policies or provisions in its tender documents are unconstitutional.

3. DUTY OF PROCEDURAL FAIRNESS

Administrative decisions of a municipality that affect the rights, privileges or interests of others must comply with the duty of procedural fairness. This general rule applies broadly to a municipality's business decisions including its decision to accept and reject tenders. [16] The duty of fairness has also been found to apply to decisions made to bar a contractor from participating in municipal procurements. [17]

While there appears to be general recognition by the Courts that a duty of procedural fairness is owed by a public body to a bidding contractor, there is variability in the Court's definition of the nature and scope of that duty. The duty is to be assessed in light of the surrounding circumstances, which may include a consideration of any applicable privilege clauses or industry practices. For this reason, the municipality's duty of procedural fairness has been described as flexible and variable. [18]

In *Baker v. Canada (Minister of Citizenship Immigration),* [19] Madam Justice L'Heureux-Dubé set out the following non-exhaustive list of often cited factors for use in determining the content of the duty of procedural fairness: [20]

> ***45** 1. the nature of the decision being made and the process followed in making it;

> 2. the statutory scheme and the terms of the statute pursuant to which the body operates;
>
> 3. the importance of the decision to those affected by it;
>
> 4. the legitimate expectations of the individual affected by the decision;
>
> 5. the choice of procedure made by the decision maker itself, particularly when the governing statute provides the decision maker with the discretion to choose its own procedures.

At paragraph 28 of *Baker, supra,* Madam Justice L'Heureux-Dubé summarized the purpose of the duty of procedural fairness as follows:

> The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision.

These principles have been applied to the process undertaken and decisions taken in municipal procurements. In *Murray Purcha Son Ltd. v. Barriere (District)* [21] the Court of Appeal held that that particular attention should be paid to the legitimate expectations of the responding contractors which can be based on representations made in the procurement documents. [22] Where the procurement documents set out a procedure for the submission and evaluation of tenders, it is reasonable to assume, the Court held, that the responding contractors will have a legitimate expectation that the procedure will be followed. [23]

Where a public body fails to comply with its stated decision making procedure or relies on an inherently flawed procedure with unlawful or hidden requirements, it may compromise the tendering process and expose itself to liability for failing to discharge its duty of procedural fairness. [24] In certain circumstances, this could form the basis to challenge the discriminatory decision of a municipality which has evaluated a contractor poorly or disqualified them altogether because of ***46** historical litigation with the municipality or perceived poor performance on a previous project.

Many of the early cases arising out of discriminatory practice in a municipal procurement did not consider the duty of procedural fairness. Recall that in *Cox Bros, supra,* the municipality had adopted a policy that it would not consider tenders from contractors with whom it was involved in litigation. In addition, the municipality was not required to notify contractors of their disqualification. More recent decisions indicate that the policy in *Cox Bros.* may not have withstood a challenge brought today based on the duty of fairness.

A municipal policy to disqualify bids from contractors engaged in litigation with the municipality was considered in *Interpaving Limited v. City of Greater Sudbury.* [25] In that case, the City had passed a bylaw that allowed it to exclude a bidder from eligibility to submit bids if it was or had been involved in litigation with the City. The bylaw also required the City, in arriving at a determination, to consider whether the circumstances relating to the disqualification were likely to affect the bidder's ability to perform or to increase staff time and legal costs on the part of the City.

In the course of reviewing bids on a road paving project, the City determined that Interpaving ought to be excluded from eligibility because it had commenced litigation, breached safety bylaws and performed poorly on other projects. This led the City to write to Interpaving to advise that it was barred from bidding on its contracts for a period of four years. After sending the letter, City representatives met with Interpaving and invited it to request a formal reconsideration of the disqualification. The City received submissions but then confirmed its earlier decision to disqualify the contractor from bidding on its project. Interpaving challenged the disqualification by arguing that it was denied procedural fairness.

The Court recognized the City's entitlement to discriminate for business and municipal purposes as is outlined in *Shell*. It also considered the potential for disqualifications to restrict competition for contracts and the significant financial impact to Interpaving. Given the importance of the disqualification decision to Interpaving, the Court found that fairness entitled it to notice of the City's intention to disqualify with reasons and an opportunity to respond. In this case, the Court held that the City's initial failure to provide notice of its intention to ban Interpaving was a breach of its duty of procedural fairness.

***47** The Court went on to consider whether the City's subsequent receipt of submissions and reconsideration of its decision cured the initial problems with the disqualification process. The question for the Court became whether the City's reconsideration was a "fresh consideration of the events." The factors that were relevant to this analysis were; the nature of the matters addressed at the reconsideration; whether Interpaving was provided with the opportunity to raise all of the matters that it considered relevant to the previous decision; and the nature of the evidence before the City's decision makers. The Court determined that the reconsideration did cure the earlier procedural defects because Interpaving was afforded the opportunity to present arguments and evidence to defend itself.

A similar bidding disqualification by a City was challenged on procedural grounds in *Queensway Excavating Landscaping Ltd v. Toronto (City).* [26] In that case, a three judge panel of the Ontario Superior Court of Justice reviewed a decision of the City to bar Queensway from bidding on City projects as a result of alleged breaches of municipal "fair wage" bylaws. The City's decision was taken pursuant to a policy authorizing the City to penalize contractors who violated the City's "fair wage" scheme by imposing fines or, in the case of multiple violations, ban the contractor from bidding on municipal contracts for a period of two years.

Two investigations conducted by the City's Fair Wage Office determined that Queensway had underpaid its employees in 2016 and again in 2017-2018. This led the FWO to advise Queensway that it would be recommending to the City that Queensway be disqualified from bidding on municipal contracts for a period of two years. After receiving information and submissions from Queensway, the FWO prepared a report outlining its investigation and recommending that Queensway be barred from participating in public tenders for two years. A copy of the report was provided to Queensway.

After receiving the FWO report, Queensway was given an opportunity to make submissions to the City. At the conclusion of this meeting, the City adopted the FWO's recommendation and disqualified Queensway from bidding on City projects.

Notwithstanding the process that was undertaken, the Court overturned the City's decision to disqualify Queensway due to a lack of procedural fairness. Given the potentially severe financial impact of the decision, the Court said that Queensway was entitled to formal notice that it was ***48** being investigated for its alleged breaches of the policy. Also, Queensway was entitled to further disclosure of materials and complaints in the possession of the FWO and given an opportunity to confront the allegations against it prior to the FWO's decision that it breached the policy.

These two decisions demonstrate the importance of following a fair process when a municipality is making a decision that impacts the financial interests of contractors. There is some irony in the fact that municipal policies that were adopted in part to reduce administrative time and legal costs resulted in exactly that. From the contractor's perspective, the relatively high standard to which the municipalities were held may provide a basis for challenging decisions resulting from discriminatory bylaws or policies.

4. CONCLUSION

As public bodies, municipalities must act in the best interest of its citizens. Doing so may justify discriminating against consultants or contractors who it believes have added to the cost of a project through poor performance or by pursuing unjustified litigation. This discretion to discriminate however can leave a contractor vulnerable to financially punitive municipal policies that may or may not be justified in the circumstances.

The Courts have recognized that municipalities can enact bylaws or implement policies that discriminate for "valid business purposes". The Courts have also found that declining to do business with a particular contractor who is perceived to have performed poorly or is seen by the municipality as being "litigious" is a valid business purpose that justifies discrimination. In such cases, the Courts have deferred to a municipality's exercise of its discretion and it would seem will intervene only in clear cases of bad faith, acting for an improper purpose or a lack of procedural fairness. [27]

The Supreme Court of Canada's refusal to hear an appeal from *J. Cote* makes it difficult for a contractor to challenge discriminatory municipal procurement policy on the grounds that a tender clause may have the effect of limiting its access to the Courts. Challenging the fairness of the process leading to the disqualification may be the most viable avenue currently available to a contractor looking to challenge a discriminatory municipal procurement policy or decision. However, a decision based on a bylaw or policy that disqualifies contractors simply due to litigation ***49** requires less process and thus may be more difficult to challenge for a lack of fairness.

Based on the current state of the law, contractors must recognize that a decision to pursue litigation against a municipal body carries with it some risk of being disqualified or disadvantaged in future procurement opportunities.

Footnotes

a1 Singleton Urquhart Reynolds Vogel LLP.

1 *R. v. Greenbaum*, [1993] 1 S.C.R. 674 at para. 22.

2 [1994] 1 S.C.R. 231 ["*Shell*"].

3 (1997), 215 A.R. 126 (Q.B.) [*"Cox Bros."*].

4 2000 BCSC 1819 ["*Sound*"].

5 2001 BCSC 1606 ["*Hancon*"].

6 It should be noted that the resolution passed in *Hancon* was similar but not identical to that at issue in *Sound, supra* note 4.

7 *Hancon Holdings Ltd. v. Nanaimo (City)*, 2001 BCSC 1606 ["*Hancon*"] at para. 8; citing *Shell, supra* at para. 19 per McLachlin J. dissenting on other grounds.

8 2019 BCCA 168, leave to appeal refused 2019 CarswellBC 3699 (S.C.C.).

9 *Ibid.,* at para. 13.

10 2005 SCC 49.

11 2017 BCCA 324, leave to appeal refused 2018 CarswellBC 2029 (S.C.C.).

12 2017 BCSC 1493, affirmed 2018 BCCA 385, leave to appeal refused 2019 CarswellBC 1208 (S.C.C.).

13 *Ibid.,* at para. 32.

14 *Ibid.,* at para. 60.

15 Leave to appeal refused [2019] S.C.C.A. No. 291 (LexisNexis).

16 *Murray Purcha Son Ltd. v. Barriere (District)*, 2019 BCCA 4 ["*Murray Purcha*"].

17 *Interpaving Limited v. City of Greater Sudbury*, 2018 ONSC 3005 (Div. Ct.).

18 *Baker v. Canada (Minister of Citizenship Immigration)* 1999 SCC 699 at paras. 21-22.

19 1999 SCC 699.

20 *Ibid.,* at paras. 23-28.

21 2019 BCCA 4.

22 *Murray Purcha Son Ltd. v. Barriere (District)*, 2019 BCCA 4 at para. 41.

23 *Murray Purcha, supra* at para. 46.

24 Paul Emanuelli, *Government Procurement,* 4th ed. (Toronto: LexisNexis Canada, 2017) at 112.

25 2018 ONSC 3005 (Div. Ct.).

26 2019 ONSC 5860 (Div. Ct.) ["*Queensway*"].

27 *Shell, supra,* at para. 25 per McLachlin J. dissenting on other grounds.

2020 JCCCL 37