SEPTEMBER 2010

Blaney McMurtry
BARRISTERS & SOLICITORS LLP

Blaneys on Building

This newsletter is designed to highlight new issues of importance to the development and construction industry. We hope you will find it interesting, and welcome your comments.

Feel free to contact any of the lawyers who wrote or are quoted in these articles for more information, or call the heads of our Real Estate or Architectural/ Construction/Engineering Services Groups:

Andrew Heal
Chair, ACES Group
416.593.3934
aheal@blaney.com

Brett Tkatch
Chair, Real Estate Group
416.593.3969
btkatch@blaney.com

"Property owners in designated Mixed Use Areas should review [Official Plan Amendment No. 94] as it will have an impact on (re)development rights."

UPDATES ON CITY OF TORONTO PLANNING INITIATIVES

Tammy Evans and Marc Kemerer

At its meeting of 25-27 August 2010, City of Toronto Council approved the following significant planning initiatives:

The City's Comprehensive Zoning By-law 1156-2010 (the "By-law"):

After a number of revisions to address specific sites and to exempt yet more whole areas (notably industrial areas and schools/university sites) the By-law remains in a fractured state of completion - interestingly now being touted by some as the "Swiss cheese by-law". The By-law continues to be plagued with mapping issues and issues with the new definitions/standards for gross floor area, parking and loading, etc. In an attempt to resolve the confusion over the status of existing permissions obtained though the minor variance process, Council did add the following provision to the By-law: "All minor variances in effect prior to the enactment of this by-law shall continue to apply and remain in force". It remains unclear however how successful this "protection" will be on implementation, particularly since Council also requested that the Chief Planner come back with proposed amendments to protect against "non-compliance with the By-law". As we have advised previously, all landowners are strongly encouraged to review the wording and mapping for the proposed by-law that may apply to their particular site to ensure that development rights currently enjoyed are not lost. The deadline for filing appeals of the By-law to the Ontario Municipal Board (OMB) is **30 September 2010**.

Official Plan Amendment No. 94 (By-law 1033-2010):

OPA 94 will require that the impacts of reduction or elimination of existing commercial space in *Mixed Use Areas* (areas containing a broad range of commercial, residential and institutional uses) be considered through any rezoning process. In an effort to protect local retail options, the end result of this policy is that any new development may be required to replace/retain existing commercial space. Property owners in designated Mixed Use Areas should review this policy as it will have an impact on (re)development rights. The deadline for filing appeals of OPA 94 to the OMB is also **30 September 2010**.

Percent for Public Art Programs:

The Percent for Public Art Program Guidelines have been used by City staff since 2006, primarily though section 37 agreements, but also through minor variance and subdivision approvals. City staff have required that developers dedicate one percent of the total building cost to public art, either in the form of an installation *in situ* or toward the City's general budget for public art. By formally adopting these public art guidelines,

BLANEYS ON BUILDING

"...a local appeal body established by City Council could significantly change the way in which such appeals are heard..."

Tammy Evans is a commercial real estate partner at Blaney McMurtry with significant experience in all aspects of condominium development.

Tammy may be reached directly at 416.593.2986 or tevans@blaney.com.

Marc Kemerer is a municipal partner at Blaney McMurtry, with significant experience in all aspects of municipal planning and development.

Marc may be reached directly at 416.593.2975 or mkemerer@blaney.com.

Council will entrench what was previously a voluntary practice on the part of developers. Council further requested that the Chief Planner review the City's Public Art policies as part of the upcoming City Official Plan review "with a view to making them a mandatory feature of all significant development public and private, including multiple residential buildings".

Additional Site Plan Control Powers By-law (By-law 1034-2010):

In granting the City the power to regulate matters of exterior and sustainable design, the Site Plan Control by-law tracks the City's Official Plan Amendment No. 66 (s 41 of the *Planning Act* allows the adoption of such additional site plan powers only if the municipality has official plan policies in place to permit this). By way of background, OPA 66 was adopted by Toronto City Council at its meeting of 27 and 28 January 2009, appealed to the OMB and then approved by the OMB pursuant to a settlement between the City and the appellants. This by-law enables the City to require drawings showing exterior materials, façades, doors and roofs. Coloured elevation drawings to a scale of 1:50 are required for development applications submitted after 1 November 2010 involving five storeys or more. The sustainable design elements tie directly into Tier 1 of the Toronto Green Standard adopted by City Council in October of 2009 (discussed in the June 2010 issue of Blaneys on Building).

Building Permit Applications

Council adopted changes to Toronto Municipal Code 363, Building Construction and Demolition, to address incoming changes to the building regulatory regime through Bill 124 with respect to determining whether a building permit application is (in)complete. As of 1 January 2011, Chief Building Officials are required to determine whether an application is (in)complete within 2 business days of filing of such application with the municipality. The City will now move from the current voluntary system of determining compliance (known as PAL) to requiring that applicants for a building permit obtain a zoning certificate prior to submitting a complete building permit application. Such a certificate will set out whether the application meets all required applicable law approvals. The current fee structure is also be amended under this new program.

At that same meeting, Toronto City Council also considered the following matters:

Establishing a local Appeal Body for Committee of Adjustment:

Pursuant to section 8.1 of the *Planning Act*, a municipality may establish an appeal body to hear appeals from the Committee of Adjustment. In their report on this matter, staff recommended that City Council endorse the establishment of an appeal board for minor variance and consent applications subject to City Staff providing a detailed cost recovery analysis. Council received the report for information. Of note, a local appeal body established by City Council could significantly change the way in which such appeals are heard, as these currently proceed to the Ontario Municipal Board. We will be tracking the progress of this initiative.

Heritage Conservation Districts (HCDs):
Council directed that staff report back on a series of policies and terms of reference for designating Heritage Conservation Districts pursuant to the *Ontario Heritage Act* (OHA) after community consultations have been undertaken

BLANEYS ON BUILDING

"Beware the standard limitation-of-liability clauses written into the procurement process to protect against claims from suppliers who claim unfair treatment."

Andrew J. Heal is a Blaneys partner. He chairs the firm's Architectural/Construction/Engineering Services Group (ACES) and is a member of the Ontario Bar Association's construction section executive.

Andrew may be reached directly at 416.593.3934 or aheal@blaney.com.

on the draft policies. The new policies and standards are intended to provide consistency and clarity to the process of studying and designating HCDs by establishing a series of comprehensive requirements that go beyond the minimum requirements of the OHA.

On other planning related matters:

Units Targeted to Households with Children

At its meeting of 16 June 2010, the City of Toronto Planning and Growth Management Committee referred the proposed Official Plan Amendment to Encourage the Development of Units for Households with Children back to the City's Chief Planner. This will delay consideration of the policy until well into 2011, which is good news for the residential development industry as this proposal as drafted does not correspond well with existing or near future market demand.

HST on Planning Applications

Blaney McMurtry LLP has recently canvassed municipalities in the greater GTA area to determine which municipalities charge the new Harmonized Sales Tax (HST) for planning application fees as of July 1, 2010. As suspected, there is inconsistency in response and application across the GTA. Municipalities who have responded that they will charge the new HST for planning applications fees include King, Newmarket, Markham, East Gwillimbury, Clarington and Kitchener. Within the City of Toronto there is no uniform approach - Scarborough Community Planning charges the HST, whereas the other districts within the City of Toronto do not. For the full list and further information on this matter please contact us. ■

SUPREME COURT ISSUES CAUTION TO GOVERNMENTS USING PROTECTIVE CLAUSES IN TENDERING PROCESS

Andrew J. Heal

The Supreme Court of Canada has issued the following caution to tendering authorities:

Beware the standard limitation-of-liability clauses written into the procurement process to protect against claims from suppliers who claim unfair treatment.

The court's warning comes in its recently-published 5-4 decision in *Tercon Contractors Limited vs. British Columbia.*

In the *Tercon* case, BC's Ministry of Transportation and Highways initially called for expressions of interest for the design and construction of a portion of a provincial highway. As it became clear later, one joint venture proponent, EAC, had been involved in advising the Province on the project very early in its life, and the Province had asked EAC to prepare a bid for comparison purposes. However, EAC had declined. During the request for expressions of interest (RFEI) process, six others, including Tercon, the appellant, came forward.

The Province decided instead, some many months later, to design the highway itself and asked for requests for proposals (RFP), but limited its circulation of this RFP to "those firms identified through the RFEI process as eligible to submit proposals for the work".

Brentwood, one of the five other bidders, joint ventured and won the bid. It turned out that

BLANEYS ON BUILDING

"The Supreme Court split in a close 5-4 decision allowing Tercon's appeal; not enforcing the limitation of liability clause, and restoring a trial judgment against the Province for lost profits in excess of $3 million."

Brentwood had formed a joint venture with EAC. This was known to the Province but not to the other bidders.

Tercon, the second lowest bidder, sued on the basis that EAC had not been "identified through the RFEI process" and won at trial. It lost at the B.C. Court of Appeal, however, because of an exclusion-of-liability clause that it had agreed to in the tender documents. Tercon then appealed to the Supreme Court of Canada, arguing the exclusion clause did not apply.

The Supreme Court split in a close 5-4 decision allowing Tercon's appeal; not enforcing the limitation of liability clause, and restoring a trial judgment against the Province for lost profits in excess of $3 million. The RFP had a term that said "proposals received from any other party would not be considered".

In *Tercon*, both the majority and the minority decisions laid the ailing doctrine of fundamental breach to rest and set out a new three-part test for determining whether or not an exclusion clause applies. (The doctrine held that if a breach of contract is so egregious as to be characterized as "fundamental", the contract essentially is voided. The test was to determine whether the breach was "fundamental" or went to the "root of the contract". If so, the exclusion clause could not apply. The court said this is no longer the analysis that should be undertaken and set out the new test.)

Of significance is the close call made between the majority and the minority decisions as to whether the exclusion clause applied in the circumstances. The clause provided:

> "2.10…Except as expressly and specifically permitted in these Instructions to Proponents, no Proponent shall have any claim for compensation of any kind whatsoever, as a result of participating in this RFP, and by submitting a Proposal, each Proponent shall be deemed to have agreed that it has no claim".

In my view, the entire case turns on the legal issue identified by Justice Binnie, namely, whether, and in what circumstances, a court will deny a defendant contract breaker the benefit of an exclusion-of-liability clause to which the innocent party, not being under any sort of disability, has agreed.

In a short paragraph, Justice Binnie for the minority summed up his view of the case.

> "There is nothing inherently unreasonable about exclusion clauses. Tercon is a large and sophisticated corporation. Unlike my colleague Justice Cromwell, I would hold that the respondent Ministry's conduct, while in breach of its contractual obligations, fell within the terms of the exclusion clause. In turn, there is no reason why the clause should not be enforced."

Commercial parties ought to find some comfort in the strong language of the primacy of contract, both in the majority and minority decision which echo in a broad thematic way, the primacy of contract the Supreme Court of Canada has recently applied in *CNR v. Royal and Sun Alliance* and in *Design Services* 2008 , both arising in the construction context.

In my view, the minority's analysis ought to be preferred when determining whether or not to enforce an exclusion clause.

BLANEYS ON BUILDING

"The majority agreed with the trial judge that the Province behaved in an 'egregious' way when it allowed the tender to be awarded to the party who should 'not have even been permitted to participate in the tender process' to begin with."

1. The first issue is whether, as a matter of interpretation, the exclusion clause even *applies* to the circumstances established in evidence. This depends on an assessment of the intention of the parties as expressed in the contract.
2. The second issue is whether the exclusion clause was unconscionable at the time the contract was made "as might arise from situations of unequal bargaining power between the parties" (citing from the Supreme Court's 1989 decision in *Hunter Engineering Co. v. Syncrude Canada Ltd.*)
3. The third issue is whether the court should nevertheless refuse to enforce the valid exclusion clause because of the existence of an overriding public policy, proof of which lies on the party seeking to avoid enforcement of the clause, *and* because that public policy otherwise outweighs the "very strong public interest in the enforcement of contracts".

An example of where an exclusion of liability clause would be unenforceable (as the minority decision notes), is in the Alberta Court of Appeal 2004 decision in *Plas-Tex Canada Ltd. v. Dow Chemical.*

In this case, the defendant, Dow Chemical, had knowingly supplied defective plastic resin to a customer who fabricated natural gas pipelines. Instead of disclosing prior knowledge of the defect, Dow chose to protect itself by a limitation of liability clause. After some years, the pipelines began to degrade with considerable damage and risks to human health from leaks and explosions.

In language endorsed by Justice Binnie, "a party to a contract will not be permitted to engage in unconscionable conduct secure in the knowledge that no liability can be imposed upon it because of an exclusionary clause" (citing the *Plas-Tex* decision).

Where a party is so contemptuous of its contractual obligation and reckless as to the consequences of its breaches so as to forfeit the assistance of the court, the public policy that favours freedom of contract is outweighed by the public policy that seeks to curb its abuse.

In citing this example as the high watermark for the enforcement of exclusion clauses, the minority departs from the majority. The majority agreed with the trial judge that the Province behaved in an "egregious" way when it allowed the tender to be awarded to the party who should "not have even been permitted to participate in the tender process" to begin with.

For the minority, this was simply a breach of contract caught by the exclusion-of-liability clause.

It is hard to know what language could be sufficient to immunize the tender calling authority where an ineligible bidder is involved.

For the majority, the unique statutory framework of BC's *Ministry of Transportation and Highways Act,* which mandated a statutory process for highway repairs, gave life to a policy of "protecting the integrity of the bidding process".

For the majority, the RFP process was put in place by the Province premised on a closed list of bidders. The contest with an ineligible bidder was not part of the RFP process. It was, in fact, expressly precluded by the RFP's terms.

"To preclude such claims, the Province would have had to reserve to itself 'the right to accept a bid from an ineligible bidder or to unilaterally change the rules of eligibility'."

Consequently, Tercon's claim was not barred by the exclusion clause because that clause only applied, in the majority view, to claims arising "as a result of participating in [the] RFP," and *not* to "claims resulting from the participation of other ineligible parties".

To preclude such claims, the Province would have had to reserve to itself "the right to accept a bid from an ineligible bidder or to unilaterally change the rules of eligibility".

It was not enough that there may have been administrative law remedies to complain about the Province's award of the tender to the Brentwood/EAC joint venture.

For the majority, enforcing the exclusion clause would have struck at the very heart of the integrity and business efficacy of the tendering process which the Province itself undertook.

The minority would have applied the third element of Justice Binnie's test requiring Tercon, as the party seeking to avoid the application of the exclusion clause, to demonstrate an overriding public policy outweighing the public interest in the enforcement of contracts. In the end, for the minority, Tercon had not identified a relevant public policy that fulfilled this requirement. Paraphrasing Justice Binnie at paragraphs 126, 127 and 128:

> "The trial judge found that Contract A was breached when the RFP process was not conducted by the Ministry with the degree of fairness and transparency that the terms of Contract A entitled Tercon to expect. The Ministry was at fault in its performance of the RFP, but the process did not thereby cease to be the RFP process in which Tercon had elected to participate.
>
> "The interpretation of the majority on this point is disagreed with. 'Participating in this RFP' began with 'submitting a proposal' for consideration. The RFP process consisted of more than the final selection of the winning bid and Tercon participated in it. Tercon's bid was considered. To deny that such participation occurred on the ground that in the end the Ministry chose a Brentwood joint venture (an ineligible bidder) instead of Brentwood itself (an eligible bidder) would be to give the clause a strained and artificial interpretation in order, indirectly and obliquely, to avoid the impact of what may seem to the majority *ex post facto* to have been an unfair and unreasonable clause."

For the minority, this case did not rise to the high watermark of an abuse of the freedom to contract. For the majority, it did.

A difficulty arises with an after-the-fact post-breach analysis of the parties' pre-breach intention as expressed in their contract language. However, the majority does offer a cautious approach. It finds that the exclusionary phrase, "participating in this RFP," could reasonably mean "submitting a proposal" (and thereby precluding Tercon's claim). It also finds, however, that the exclusionary phrase could also reasonably mean "competing against the other *eligible* [emphasis added] participants".

For the majority, *contra proferentem*, the rule of contract interpretation which provides that an ambiguous term in a contract will be construed against the party that insisted on its inclusion, resulted in this ambiguity being resolved against the Province.

Again, it is hard to justify reading any ambiguity into this clause.

BLANEYS ON BUILDING

The majority's intrusive reading of the parties' prior bargain may come back later to haunt the court in other interpretive disputes in commercial contracts.

It remains to be seen whether this decision in the context of the public procurement process and the peculiar statutory overlay of rules and duties will be expanded into the private sector. I suspect not.

Conclusion

All of this means in practice that it may be difficult for lawyers to make pre-breach predictions as to whether a particular exclusion clause will be enforced after the fact.

It is equally clear that it would be dangerous for any tender-awarding authority, in the face of the *Tercon* decision, to award a contract to an *arguably* ineligible bidder. Perhaps the result may be a greater number of cancelled tenders to avoid this risk. Presumably had that occurred, Tercon's claim would have been limited to the tender mandated $15,000 limitation on wasted bid costs. ■

Construction is one Canada's biggest, most dynamic and most important industrial sectors and Blaney McMurtry's ACES (Architectural/Construction/Engineering Services) practice group is one of this firm's most active. Supplier liens against construction projects are a regrettable but inevitable reality and are of high interest and importance to all sector participants.

Architectural/Construction/ Engineering Services ("ACES") Group Seminar

On **Tuesday November 9, 2010** (8.00am to 11:00am), Blaney McMurtry will host its annual Construction Law Update Seminar: **Building for Tomorrow**.

Lawyers from Blaney McMurtry's ACES Group will cover a wide range of topics covering the development and construction industry. Question and answer sessions will follow the presentations and there will be an opportunity to speak directly with our lawyers. This is a great opportunity to hear leading experts speak about current issues in construction law!

If you are interested in attending, please contact Chris Jones at (416) 593-1221 ext.3030 or cjones@blaney.com by November 4, 2010 as space is limited.

EXPECT THE BEST

Blaney McMurtry
BARRISTERS & SOLICITORS LLP

2 Queen St. East, Suite 1500
Toronto, Canada M5C 3G5
416.593.1221 TEL
416.593.5437 FAX
www.blaney.com

Blaneys on Building is a publication of the Real Estate and ACES Groups of Blaney McMurtry LLP. The information contained in this newsletter is intended to provide information and comment, in a general fashion, about recent cases and related practice points of interest. The information and views expressed are not intended to provide legal advice. For specific legal advice, please contact us.

We welcome your comments. Address changes, mailing instructions or requests for additional copies should be directed to Chris Jones at 416 593.7221 ext. 3030 or by email to cjones@blaney.com. Legal questions should be addressed to the specified author.