

## RECENT CONSTRUCTION CASES EVERY CONTRACTOR SHOULD BE AWARE OF

### 1. *Naylor Group v. Ellis-Don*, [2001] S.C.J. No. 56 (S.C.C.).

Recently, the Supreme Court of Canada had an opportunity to consider and apply the tendering principles established in *Ron Engineering* to a case involving a subcontract tender.

In the *Naylor Group v. Ellis-Don Construction*, Naylor was an electrical subcontractor who submitted a bid through the Toronto Bid Depository. Naylor's bid had been carried by Ellis-Don in its bid to the owner. Ellis-Don was ultimately selected by the owner as the prime contractor for the project. The fact that Ellis-Don had carried Naylor's electrical bid was significant because the Trial Judge found that Ellis-Don would not have been the overall low bidder had it not carried Naylor's electrical bid price.

Before submitting its bid through the Bid Depository, Naylor had advised Ellis-Don that its workers were not affiliated with the International Brotherhood of Electrical Workers ("IBEW"). Ellis-Don was, at the time, involved in an Ontario Labour Relations Board ("OLRB") dispute involving the IBEW, but informed Naylor that this would not be a problem. However, after the submission of tenders and before the prime contract was awarded to Ellis-Don, the OLRB ruled that Ellis-Don was required to use only electrical subcontractors whose employees were affiliated with the IBEW. Ellis-Don in turn, advised Naylor of this and offered to subcontract the electrical work to Naylor only if it would align itself with the IBEW, which Naylor declined. Ellis-Don then awarded the electrical work to another subcontractor, which resulted in Naylor's action for breach of contract.

The case afforded the Supreme Court of Canada the opportunity to consider and apply the principles of *Ron Engineering* to subcontract relations. In dismissing Ellis-Don's appeal and awarding Naylor damages for its loss of profits, the Court held that the Contract A/Contract B model for tendering applied to subcontracts, stating:

"Both *Ron Engineering*, supra, and *M.J.B. Enterprises* dealt with owners and prime contractors. The present appeal raises an issue at a lower level of the cascade. Nevertheless, as those decisions made clear, the Contract A/Contract B approach rests on ordinary principles of contract formation, and there is no reason in principle why the same approach

should not apply at this lower level. The existence and content of Contract A will depend on the facts of the particular case.”

The court also rejected the Trial Judge’s finding that any contract between Ellis-Don and Naylor had been frustrated by the OLRB’s decision, which effectively precluded Ellis-Don from contracting with a non IBEW electrical subcontractor. On this point, the Court found that there had been no supervening event and that the OLRB decision merely affirmed Ellis-Don’s pre-existing obligation to the IBEW.

There were several other factual findings that were important to the Court’s conclusion, not the least of which was the Court’s finding that Ellis-Don had breached the rules of the Bid Depository and had “shopped” Naylor’s bid to get an alternate electrical bid for the same value or less. The Court emphasized the significance of the Bid Depository, stating:

“Those using the Bid Depository system mutually agree to be bound by its terms, so that upon submission of a bid by a subcontractor or of a tender by a prime contractor, this “signifies acceptance of all the terms of the Bid Depository System and constitutes a preliminary contract or Contract A”.

On the issue of damages, it may be recalled that in *M.J.B. Enterprises*, the Court held that a contractor was entitled to damages in the amount of the profits it would have realized had it been awarded Contract B, but was not required to delve into a more detailed analysis of such damages, since the parties had agreed to the quantum of the damages. The Supreme Court of Canada in the *Naylor* case decided to reduce Naylor’s loss of profits to take into consideration jobsite related problems that would have reduced Naylor’s profits on the job. However, the Supreme Court of Canada rejected the earlier Court’s decision to further reduce Naylor’s loss of profits due to the OLRB contingencies, finding that this was too speculative and was not supported by the evidence, stating:

“If the appellant wished to demonstrate that the respondent could never have turned a profit on a job site already promised to IBEW members (and that the hoped for Contract B would thus have been a sure loser), or that the respondent’s profit would have been reduced by labour disruption, or some other such theory, there ought to have been evidence in that regard.”

The *Naylor* case makes it clear that a general contractor is legal bound to hire the sub-contractor whose price it carried in its tender submission if that general contractor is successful in its bid. Time will tell if these same principles apply where the original bids are rejected and post tender addenda are issued.

**2. *Paul D'Aoust Construction Ltd. v. Markel Insurance Co. of Canada*, [2001] S.C.J. No. 78 (Supreme Court of Canada).**

In this case the plaintiff was acting as Construction Manager for the owner School Board. A performance bond was required. The Surety and the Principal both executed a performance bond, but the Principal did not deliver it. The owner paid a progress draw (which included payment of the Performance Bond premium) because the Construction Manager mistakenly believed the Performance Bond had been delivered. The Principal defaulted and the Construction Manager, as agent for the owner, claimed under the Bond. The Ontario Court of Appeal held that delivery of the Bond was a precondition to its effectiveness.

The Supreme Court of Canada affirmed the Ontario Court of Appeal decision. The Supreme Court found that a performance bond is a deed which must be delivered to be valid and effective in accordance with longstanding common law rules. The Bond in this case had not been properly delivered and the Court determined that there was no valid reason to overturn the basic principle that a bond must be delivered to be effective. The Court based its decision on the fact that parties to a transaction have the right to be certain what their rights and obligations are under a contract so that they can govern themselves accordingly.

While there is a benefit to clear and certain rules, and the decision is clearly correct in law, one can't help but feel sorry for the Construction Manager, as the cost of the mistake was substantial in relation to the nature of the oversight.

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