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Thomas Heintzman specializes is counsel at McCarthy Tétrault in Toronto. His practice specializes in litigation, arbitration and mediation relating to corporate disputes, shareholder's rights, securities law, broadcasting/telecommunications and class actions.

He has been counsel in many important actions, arbitrations, and appeals before all levels of courts in many Canadian provinces as well as the Supreme Court of Canada.

Thomas Heintzman is the author of Goldsmith & Heintzman on Building Contracts, 4<sup>th</sup> Edition which provides an analysis of the law of contracts as it applies to building contracts in Canada.

Goldsmith & Heintzman on Building Contracts has been cited in 183 judicial decisions including the two leading Supreme Court of Canada decisions on the law of tendering:

*M.J.B. Enterprises Ltd. v. Defence Construction (1951)*, [1999] 1 S.C.R. 619 and

*Double N Earthmovers Ltd. v. Edmonton (City)*, 2007 SCC3, [2007] 1 S.C.R. 116-2007-01-25 Supreme Court of Canada

## **Can A Condition In An Invitation To Tender Be Illegal?**

### **Construction Law – Tenders – Illegality**

Can a condition in an invitation to tender a construction contract be illegal? This is a question upon which construction law is largely silent. But the Court of Appeal of Quebec has held that a condition of tender may be unlawful. This is not a recent decision, but it is not well known outside Quebec. The importance of the issue of illegality makes it a suitable subject for this blog.

In *Société de développement de la Baie James v. Compagnie de construction et de développement Cris Ltée*, the contractors contested standing terms which James Bay Development Society inserted into its invitations to tender. Those terms (sub-sections 3.1 and 3.3) excluded any bid from a contractor who had commenced proceedings against, or was the defendant in proceedings commenced by, James Bay Development Society. The Court of Appeal held that this condition was illegal as being contrary to public order.

The Court of Appeal held that Section 3.3 was contrary to the principle of the rule of law. That principle is now incorporated into the *Canadian Charter of Rights and Freedoms*. A principle element of the rule of law is access to the courts. While the law of contract is based upon the liberty to enter into any contract that the parties may agree to, there are limits to that liberty, and one limit, in Quebec, is public order. Any contractual provision which contravenes political public order is an absolute nullity. While the parties can agree in their contract to waive certain rights, they cannot do so with respect to matters which are oppressive to the extent of being contrary to public order.

In addition, the Court of Appeal noted that sub-section 3.1 of the standing terms permitted the Bay James Development Society to accept, in its discretion, a non-compliant bid. However, the provincial law governing the tenders stipulated that a non-conforming bid was required to be automatically rejected. Accordingly, the Court of Appeal held that, on this additional ground, sub-section 3.1 of the standing terms was invalid.

This decision is a reminder of the need to review the terms of any invitation to tender from an overall standpoint, including its legality. In the case of any governmental body, the *Charter of Rights and Freedoms*, and other statutes, regulations or bylaws applicable to that body, may be relevant. Those considerations, and the *James Bay* decision, may not be applicable if the owner issuing the invitation to tender is not a public body. But there may be other conditions of legality which apply to the tender.

See Goldsmith and Heintzman on *Canadian Building Contracts* (4<sup>th</sup> ed.), Chapter 1, Section 2(d).

#### **Construction Law – Tenders - Illegality:**

*Société de développement de la Baie James v. Compagnie de construction et de développement Cris Ltée*, (2001), 16 C.L.R. (3d) 26 (Que. C.A.)

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