COURT OF APPEAL OF YUKON

Citation: *Mega Reporting Inc. v. Yukon (Government of)*, 2018 YKCA 10

Date: 20180619
Docket: 17-YU821

Between:

Mega Reporting Inc.

Respondent
(Plaintiff)

And

Government of Yukon

Appellant
(Defendant)

Before: The Honourable Chief Justice Bauman
The Honourable Madam Justice Cooper
The Honourable Mr. Justice Fitch

On appeal from: An order of the Supreme Court of Yukon, dated November 16, 2017 (*Mega Reporting Inc. v. Yukon (Government of)*, 2017 YKSC 69, Whitehorse Registry 14-A0059).

Counsel for the Appellant:	I.H. Fraser
Counsel for the Respondent:	M. Wallace
Place and Date of Hearing:	Whitehorse, Yukon May 10, 2018
Place and Date of Judgment:	Vancouver, British Columbia June 19, 2018

Written Reasons by:
The Honourable Chief Justice Bauman

Concurred in by:
The Honourable Madam Justice Cooper
The Honourable Mr. Justice Fitch

Summary:

The Government of Yukon conducted a Request for Proposals for a contract to provide court reporting and transcription services. The losing bidder alleged that Yukon failed to properly conduct the RFP consistent with certain procurement principles and claimed damages for breach of contract. The trial judge held that Yukon had breached certain duties of fairness in the RFP, and a waiver of liability clause was not applicable to the claim because public policy justified not enforcing it. Yukon appealed and challenged the judge's conclusion that public policy justified not enforcing the clause. Held: appeal allowed. The trial judge erred by not considering that the public policy must be substantially incontestable to justify not enforcing a waiver of liability clause. While there may be a public policy interest in ensuring fair procurement to encourage more competition in bidding and maximize value for public money, it is not substantially incontestable that such an interest should override the ability of Yukon to protect itself from liability. The bidder was a sophisticated commercial party who was aware of the clause, and if Yukon is not getting value for money it can change the clause, or the public can hold the government accountable at the ballot box.

Reasons for Judgment of the Honourable Chief Justice Bauman:

Overview

[1] The Government of Yukon ("Yukon") appeals from the order of Justice Bielby, pronounced 16 November 2017, after a summary trial, awarding Mega Reporting Inc. ("Mega") $335,844.93 plus interest for breach of contract arising from a Request for Proposals ("RFP") process to award a contract for court reporting and transcription services. Yukon argues that the judge erred by failing to apply a waiver of liability clause to bar the claim on the grounds of public policy and concluding that Yukon's *Contracting and Procurement Directive* imposed statutory duties on the RFP process.

Facts

[2] In 2013, Yukon sought to reduce costs on court reporting services by replacing live court reporters with a digital recording system, and then transcribing those recordings later as needed.

[3] On 20 January 2013, Yukon issued an RFP seeking bids for a one-year contract for court transcription services.

[4] The RFP was to be conducted in two stages. An evaluation committee was to first examine each bidder's experience and performance through a technical evaluation. Once a bidder was deemed to meet the required minimum technical criteria, the evaluation committee then moved on to assess the bid's price, though Yukon was not obliged to accept the lowest price. Each bidder therefore submitted two separate sealed envelopes, one containing information on their experience, the other containing the price. If the committee did not conclude that the bidder met the minimum technical criteria, the second envelope was not to be opened.

[5] The bidding process was governed by both the Yukon *Contracting and Procurement Regulation*, Y.O.I.C. 2013/19, and the *Contracting and Procurement Directive*, as the RFP explicitly provided that the process was subject to them. The *Directive* sets out various principles for public procurement, including commitments to fairness, openness, transparency, and accountability. Section 2 of the *Directive* reads as follows:

> **Principles**
>
> 2. The following principles apply to procurement by Government of Yukon:
>
> (a) Fairness: to observe procedural policies as expressly laid out in this Directive free of bias, personal interest and conflict of interest.
>
> (b) Openness and transparency: to create the maximum number of competitive procurement opportunities, and to be transparent in the way business is conducted.
>
> (c) Fiscal responsibility: to justify contracting and procurement decisions and actions to a relevant authority or publicly as appropriate in the circumstances.
>
> (d) Competition: to open procurement opportunities to the maximum number of respondents.
>
> (e) Value for money: to focus on efficiency, economy and effectiveness to obtain the maximum benefits with the resources available.
>
> (f) Accountability: to be willing and able to account for the way contracting and procurement activities have been conducted.

[6] These principles are also reiterated in a covering letter from the Deputy Minister for Highways and Public Works as part of a consolidated publication of the *Regulation* and the *Directive*.

[7] The RFP also included a clause purporting to waive Yukon's liability for any costs associated with unfairness in the RFP process, other than for costs of preparing a bid or those awarded pursuant to a Bid Challenge Process as described in the *Regulation* and *Directive.*

[8] Yukon received two bids, one of which was from Mega. The evaluation committee met once to review the two bids. The committee concluded that Mega's proposal did not meet the minimum technical requirements and did not open the envelope containing Mega's price. The committee therefore awarded a one-year contract, with option to renew for up to two additional years to the other bidder at a price of $191,347.25 per year. Mega's submitted price was $176,684.60 per year.

[9] The other bidder eventually had their contract extended for the additional two years.

[10] The evaluation committee did not make any contemporaneous record of the decision-making process regarding Mega's proposal. The only record of discussions or reasons for rejecting the bid were handwritten notes by Mark Daniels, a member of the committee, that he made on Mega's proposal documents.

[11] The evaluation committee adopted a methodology whereby a bid would receive less than 50% of the total available points in a category if it did not meet the minimum requirements set out in the RFP. A bid would receive 50% of the total points if it met the minimum requirements exactly. And a bid would receive more than 50% of the total points only if it exceeded the minimum requirements.

[12] Several weeks after the other bidder was awarded the contract, representatives of Mega met with Yukon officials to receive feedback on why Mega's bid was not successful. For the purposes of the meeting, Mr. Daniels prepared a document that ostensibly indicated the points that had been awarded to Mega's

proposal. However, this document did not reflect the actual evaluation, and was merely based on Mr. Daniel's memory augmented by his handwritten notes. This document indicated that Mega was given a score of 150/300 for Qualifications and Experience, and a score of 215/500 for Approach/Methodology. Mega received less than 50% for the latter category because of its failure to provide satisfactory responses to certain subcomponents.

[13] Mr. Daniel's notes did not indicate the actual score given to Mega or how the proposal was scored. One of the handwritten notes was "no letters of reference" indicating that Mega had not submitted letters of reference in its bid materials. The RFP did not expressly require letters of reference and only stated that bidders must submit "three references for work similar in scope to that described in this RFP". Mega did submit names and contact information of three references.

[14] On 20 April 2015, Mega filed a statement of claim against Yukon alleging breach of its duty to fairly review its proposal.

Decision Under Appeal

[15] Justice Bielby began her reasons by reviewing the factual background, observing that it was largely not in dispute. The judge observed that while the *Directive* was not itself a regulation, it was issued pursuant to statute, and that Yukon represented the duties in the *Directive* as statutory given that they were presented in a consolidated document with the *Regulation*. The judge therefore held that she would interpret the *Directive* as a statute, which was reinforced by the fact that the RFP indicated that the process was subject to both the *Directive* and the *Regulation.*

[16] The judge then held that Yukon failed to meet its duties of fairness, accountability, and transparency in the way it evaluated Mega's bid, both at common law and under the *Directive*. She concluded that the evaluation committee acted unfairly in marking Mega down for failing to provide letters of reference, and that the process for awarding points was not described in the RFP. The judge also found that

the committee's failure to keep a record of its decision prevented Yukon from refuting concerns with the decision-making process. The judge declined to draw the inference that Yukon fairly and properly evaluated the proposal from the fact that Yukon did evaluate the proposal, because Yukon was in total and sole control of the creation of the evidentiary record.

[17] The judge then went on to conclude that the waiver clause in the RFP did not bar Mega's claim. She applied the three-prong test from *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4 [*Tercon*], and held that the third prong applied, i.e., that public policy reasons justified refusing to enforce the waiver. The judge relied on various cases which established that public policy generally prevented a government from avoiding duties owed under statutes for the public benefit, at least where the statute did not permit the government to contract out of those duties. The fair procurement principles in the *Directive* established duties that could not be avoided by contracting out of them. While the Bid Challenge Process was available, it did not offset the public policy concerns for unfair tendering, as it would not have provided the remedies sought in the litigation, particularly recovery for damages. Nor did the RFP disclose the deadline for launching a challenge.

[18] The judge held that the text of the waiver in the RFP spoke so directly to the principles in the *Directive*, that it was impossible to conclude that the waiver was not intended at annulling the effect of the legislation. To give effect to the waiver would allow Yukon to represent to the public that it engages in fair procurement, without suffering any consequences for failing to do so.

[19] The judge therefore held that Yukon breached its duty of fairness in evaluating Mega's proposal and awarded Mega damages of $335,844.93 after deducting for various contingencies.

Submissions

[20] Yukon submits that the judge erred in holding that it would be contrary to public policy to allow the waiver of liability clause in the RFP to bar Mega's claim. Specifically, Yukon submits that the authorities relied upon by the judge do not support the principle that it is contrary to public policy for the government to rely on an exclusion clause to avoid liability for breach of a statutory duty, at least outside the context of human rights legislation or universal compulsory motor vehicle insurance regimes. Yukon also argues that the judge failed to put any significance on the alternative avenue for bidders to gain relief through the Bid Challenge Process. To the extent that the judge relied upon the fact that the RFP did not disclose the timelines for making a complaint, the exclusion clause explicitly referenced the *Directive* which sets out the deadline.

[21] With respect to the other requirements to enforce the exclusion clause as outlined in *Tercon*, Yukon submits that Mega never argued that the waiver was unconscionable, and the language of the clause is sufficiently explicit to justify interpreting it to apply to the claim at bar.

[22] Yukon further submits that even if public policy justifies not enforcing an exclusion clause that is inconsistent with a statutory duty, the judge erred by concluding that the principles in the *Directive* amounted to statutory duties. The *Directive* is a publication of the Management Board, a Cabinet committee, issued pursuant to s. 4 of the *Financial Administration Act*, S.Y. 2002, c. 87 [*FAA*]. However, the *FAA* expressly states that such directives are not to be considered regulations with the meaning of the *Regulations Act*, S.Y. 2002, c. 195, s. 1. To turn the *Directive* into a statutory duty is to ignore the clear intention of the Yukon Legislative Assembly to prevent Management Board directives from having statutory effect, whatever impact it might have as a direction to government officials.

[23] Mega submits that it is inconsistent with the protection of the public interest, namely the interest in ensuring procurement is transparent and that the public receives value for money, to allow Yukon to privately contract out of the protections

under the *Regulation* and *Directive*. The judge's decision was simply that the exclusion clause should not apply where to do so would "gut" the procurement principles in the *Directive* and the integrity of the tendering process, consistent with the result reached in *Tercon*.

[24] Mega also submits that the trial judge properly determined that the procurement principles in the *Directive* were statutory in nature. Yukon represented them as such in a cover letter to the *Directive* and by distributing the *Directive* with the *Regulation*. The *Directive* is also captured under the definition of "enactment" in the *Interpretation Act*, R.S.Y. 2002, c. 125, s. 1. Even if the *Directive* is not statutory in nature, it was binding upon the RFP at issue, and Yukon failed to meet its duties of fairness under it.

Analysis

[25] I would allow the appeal. With respect, the judge erred in concluding that it was against public policy to apply the exclusion of liability clause.

[26] In *Tercon*, Justice Binnie (at paras. 122–123) set out a three-prong test for determining whether to apply an exclusion clause, and while he was writing in dissent, the majority (at para. 62) expressly agreed with this framework and it has been applied since: see *Roy v. 1216393 Ontario Inc.*, 2011 BCCA 500; *Niedermeyer v. Charlton*, 2014 BCCA 165. Following that framework, a court must consider three issues to determine whether the clause may be enforced:

1. Whether as a matter of interpretation the exclusion clause even applies to the circumstances based on the intention of the parties;
2. Whether the clause was unconscionable at the time the contract was made; and
3. Whether the Court should nevertheless refuse to enforce the valid clause because of the existence of an overriding public policy that outweighs the very strong public interest in the enforcement of contracts, the proof of which lies on the party seeking to avoid enforcement.

[27] At issue in *Tercon* was whether an exclusion clause in an RFP to build a highway served to bar a claim for damages for breach of contract after the Province accepted an ineligible bid. Under the terms of the RFP only six proponents were eligible to submit a proposal, as they had participated in a request for expressions of interest ("RFEI") issued earlier. One of those proponents ended up partnering with another firm that was not part of the original RFEI process and was therefore ineligible to bid. The Province awarded the highway contract to that partnership. Tercon brought a claim alleging breach of the tendering contract, or Contract A, on the basis that the Province considered and awarded the contract to an ineligible bid. The trial judge in that case also found that the Province knew at the time that the bid was in substance from an ineligible bidder. The Province sought to rely upon an exclusion clause that barred any claim for damages "as a result of participating in this RFP."

[28] The majority in *Tercon* found that the clause did not apply as a matter of interpretation, because the phrase "as a result of participating in this RFP" implied that the exclusion of liability clause would only apply in a process limited to the eligible bidders contemplated in the RFP. Since the process was ultimately not limited to eligible bidders, the exclusion clause did not apply. As a consequence, the majority did not address whether public policy concerns might justify refusing to enforce the clause, though acknowledged that the clause may be applicable to other types of deviations from the RFP terms (at para. 76).

[29] However, the dissenting judgment of Binnie J. discussed at some length the circumstances in which public policy concerns may override an otherwise enforceable contractual term:

> [117] As Duff C.J. recognized, freedom of contract will often, but not always, trump other societal values. The residual power of a court to decline enforcement exists but, in the interest of certainty and stability of contractual relations, it will rarely be exercised. Duff C.J. adopted the view that public policy "should be invoked only in clear cases, in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds" (p. 7). While he was referring to public policy considerations pertaining to the nature of the *entire contract*, I accept that there may be well-accepted public policy considerations that relate

directly to the nature of the *breach*, and thus trigger the court's narrow jurisdiction to give relief against an exclusion clause.

[118] There are cases where the exercise of what Professor Waddams calls the "ultimate power" to refuse to enforce a contract may be justified, even in the commercial context. Freedom of contract, like any freedom, may be abused. Take the case of the milk supplier who adulterates its baby formula with a toxic compound to increase its profitability at the cost of sick or dead babies. In China, such people were shot. In Canada, should the courts give effect to a contractual clause excluding civil liability in such a situation? I do not think so. Then there are the people, also fortunately resident elsewhere, who recklessly sold toxic cooking oil to unsuspecting consumers, creating a public health crisis of enormous magnitude. Should the courts enforce an exclusion clause to eliminate contractual liability for the resulting losses in such circumstances? The answer is no, but the contract breaker's conduct need not rise to the level of criminality or fraud to justify a finding of abuse.

[119] A less extreme example in the commercial context is *Plas-Tex Canada Ltd. v. Dow Chemical of Canada Ltd.*, 2004 ABCA 309, 245 D.L.R. (4th) 650. The Alberta Court of Appeal refused to enforce an exclusion clause where the defendant Dow knowingly supplied defective plastic resin to a customer who used it to fabricate natural gas pipelines. Instead of disclosing its prior knowledge of the defect to the buyer, Dow chose to try to protect itself by relying upon limitation of liability clauses in its sales contracts. After some years, the pipelines began to degrade, with considerable damage to property and risk to human health from leaks and explosions. The court concluded that "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" (para. 53). (See also McCamus, at p. 774, and Hall, at p. 243.) What was demonstrated in *Plas-Tex* was that the defendant Dow was so contemptuous of its contractual obligation and reckless as to the consequences of the breach as to forfeit the assistance of the court. The public policy that favours freedom of contract was outweighed by the public policy that seeks to curb its abuse.

[120] Conduct approaching serious criminality or egregious fraud are but examples of well-accepted and "substantially incontestable" considerations of public policy that may override the countervailing public policy that favours freedom of contract. Where this type of misconduct is reflected in the breach of contract, all of the circumstances should be examined very carefully by the court. Such misconduct may disable the defendant from hiding behind the exclusion clause. But a plaintiff who seeks to avoid the effect of an exclusion clause must identify the overriding public policy that it says outweighs the public interest in the enforcement of the contract. In the present case, for the reasons discussed below, I do not believe Tercon has identified a relevant public policy that fulfills this requirement.

[Italicized emphasis in original. Underline emphasis added.]

[30] Justice Binnie went on to conclude that there was no substantially incontestable public policy rationale for not enforcing the clause in that case:

> [135] If the exclusion clause is not invalid from the outset, I do not believe the Ministry's performance can be characterized as so aberrant as to forfeit the protection of the contractual exclusion clause on the basis of some overriding public policy. While there is a public interest in a fair and transparent tendering process, it cannot be ratcheted up to defeat the enforcement of Contract A in this case. There *was* an RFP process and Tercon participated in it.
>
> [136] Assertions of ineligible bidders and ineligible bids are the bread and butter of construction litigation. If a claim to defeat the exclusion clause succeeds here on the basis that the owner selected a joint venture consisting of an eligible bidder with an ineligible bidder, so also by a parity of reasoning should an exclusion clause be set aside if the owner accepted a bid ineligible on other grounds. There would be little room left for the exclusion clause to operate. A more sensible and realistic view is that the parties here expected, even if they didn't like it, that the exclusion of compensation clause would operate even where the eligibility criteria in respect of the bid (including the bidder) were not complied with.
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> ...
>
> [140] I do not wish to understate the difference between EAC as a sub-contractor and EAC as a joint-venturer. Nor do I discount the trial judge's condemnation of the Ministry's lack of fairness and transparency in making a Contract B which on its face was at odds with what the trial judge found to be the true state of affairs. Tercon has legitimate reason to complain about the Ministry's conduct. I say only that based on the jurisprudence, the Ministry's misconduct did not rise to the level where public policy would justify the court in depriving the Ministry of the protection of the exclusion of compensation clause freely agreed to by Tercon in the contract.
>
> [141] The construction industry in British Columbia is run by knowledgeable and sophisticated people who bid upon and enter government contracts with eyes wide open. No statute in British Columbia and no principle of the common law override their ability in this case to agree on a tendering process including a limitation or exclusion of remedies for breach of its rules. A contractor who does not think it is in its business interest to bid on the terms offered is free to decline to participate. As Donald J.A. pointed out, if enough contractors refuse to participate, the Ministry would be forced to change its approach. So long as contractors are willing to bid on such terms, I do not think it is the court's job to rescue them from the consequences of their decision to do so. Tercon's loss of anticipated profit is a paper loss. In my view, its claim is barred by the terms of the contract it agreed to.
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> [Italicized emphasis in original. Underline emphasis added.]

[31] In *Niedermeyer*, the British Columbia Court of Appeal observed that "the examples given in *Tercon* illuminate the high threshold a party must meet in order to defeat an otherwise valid exclusion clause" (at para. 77).

[32] With respect, the judge erred in law by not considering the high threshold necessary to establish that public policy outweighs the interests in enforcement. The judge held that "[t]hough the public has a strong interest in maintaining the right to contract freely, in this case, this interest is offset by a similar public interest in ensuring a fair, accountable, open and transparent bid process" (at para. 40). The judge appears to have merely considered whether one policy interest outweighs the other, without once referencing the test set out by Chief Justice Duff in *In Re Estate of Charles Millar, Deceased*, [1938] S.C.R. 1 at 7, cited above by Binnie J. in *Tercon*, and considering whether "the harm to the public is substantially incontestable". In my view, the public policy interest which Mega points to in this case does not meet that high threshold.

[33] In cases where public policy has been held to prevent enforcement of an otherwise valid term, the concern has been to uphold protections that are primarily for the benefit of the non-breaching party. In *Ontario Human Rights Commission v. Etobicoke*, [1982] 1 S.C.R. 202, the Supreme Court of Canada held that an employer could not rely upon a mandatory retirement clause in a collective agreement to force the retirement of a firefighter at age 60 in contravention of provisions of *The Ontario Human Rights Code*, R.S.O 1970, c. 318, respecting age discrimination. The Court held that the clause should be unenforceable because "*The Ontario Human Rights Code* has been enacted by the Legislature of the Province of Ontario for the benefit of the community at large and of its individual members and clearly falls within that category of enactment which may not be waived or varied by private contract" (at 214).

[34] Similarly in *Niedermeyer*, the Court of Appeal concluded that to enforce an exclusion clause that waived liability for injuries sustained in a motor vehicle accident despite the legislature adopting a universal compulsory insurance scheme,

would allow the very harm that the legislature was trying to prevent, namely that victims of motor vehicle accidents would go uncompensated:

> [104] A universal automobile insurance scheme was, in the Commission's view, necessary to effectively compensate those injured, but it would also ensure that the necessary financial support did not come from other government programs; rather, it would come from other drivers via insurance premiums. See also, *Knutsen* at 717. These multi-faceted public policy interests, which continue to animate the scheme, add weight to its importance.
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> [105] Of course, there were those who objected to a universal compulsory scheme. The Commissioners considered submissions from those opposed to compulsory insurance and identified restricting the freedom of choice as one of the principal objections. The Commission addressed this saying at 568:
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> > [S]ome compulsions and restrictions on individual freedoms are necessary to protect, preserve, and permit a free society to prosper. In the field of insurance, in its broadest meaning, we find compulsion in workmen's compensation, unemployment insurance, hospital insurance, and automobile coverage for minors.
>
> For the Commission, restricting freedom of choice, which in this context implicates freedom of contract, was clearly justifiable on policy grounds. The fact that the legislature adopted the Commission's recommendation suggests that it did as well.
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> ...
>
> [107] ... Such a strongly expressed public policy as is found in this legislative scheme is inconsistent with the notion that individuals may contract out of the legislation. In my view, this public policy does outweigh the strong interest in freedom of contract. Permitting individuals to contract out of the scheme through a release of liability clause would undermine the social contract that the government has made with those who use its roads.
>
> [108] The appellant points to some examples of the mischief to which such releases might lead. One could think of many such examples. Could sporting organizations transporting their members escape liability in the case of a negligent driver by asking passengers to sign a release prior to boarding? Could a taxi driver? That damages for a motor vehicle accident would be non-compensable, where a compulsory universal insurance scheme operates, is precisely the type of harm that is described by Binnie J. in *Tercon* as "substantially incontestable" and should lead to a finding that enforcement of the contract is contrary to public policy.
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> [Emphasis added.]

[35] However, in the case at bar, the obligations to conduct a bidding process fairly and transparently are as much for the benefit of those tendering, and the public at large, as they are for bidders like Mega. The government does not adopt statutes

or regulations on tendering solely out of concern to protect vulnerable bidders, but also to provide clear guidance so that parties can effectively bid and the process can be sufficiently competitive, ensuring that taxpayers receive value for their money. Yet the government, one of the parties whose interests the procurement principles are ostensibly supposed to advance, and who in fact adopted them in the first place, has come to the conclusion that the public policy interest motivating those principles should not override their ability to protect themselves from liability. Why should the Court step in now and tell that party that they misunderstand their interests or that they are improperly weighing the impact that enforcement of the exclusion clause will have on the competitiveness and efficiency of future RFPs? Surely that cannot be a "substantially incontestable" public policy consideration in the circumstances.

[36] While Mega's interests also factor into the rationale behind the procurement principles, as Binnie J. observed in *Tercon*, "[a] contractor who does not think it is in its business interest to bid on the terms offered is free to decline to participate ... So long as contractors are willing to bid on such terms, I do not think it is the court's job to rescue them from the consequences of their decision to do so" (at para. 141).

[37] While it is true that in *Tercon* the majority did not enforce the clause, they did so by interpreting the clause to not apply to the breach at issue. It is one thing to take into account statutory obligations when determining the most harmonious interpretation of a clause, but another entirely to override an otherwise clear, specific, valid exclusion clause on the basis of those obligations. In my view, the decision in *Health Care Developers v. Newfoundland* (1996), 136 D.L.R. (4th) 609 (N.F.), which the judge relied upon, is similarly distinguishable on those grounds. There the Supreme Court of Newfoundland and Labrador (Appeal Division) dealt with whether to imply a term into a contract that would impose duties of fairness that otherwise limited the scope of a provision which allowed the government to award a project to other than the preferred bidder. The Court expressly declined to say that the Crown was unable to contract out of obligations of fairness (at 628).

[38] I would also note that unlike in *Tercon*, there is no finding that Yukon knowingly acted in breach of its procurement principles or otherwise in bad faith towards Mega. While staff may have failed to follow best practices, even in a significant way, that is all that is alleged.

[39] To the extent that the public at large has an interest in a fair and transparent process, they have recourse through the ballot box if they believe the territorial government is not getting value for money. Again there is no evidence that the staff who evaluated the bid were in any kind of conflict of interest or that Yukon engaged in any fraudulent practices in awarding the contract.

[40] Therefore, in my view, no overriding public policy that is "substantially incontestable" outweighs the strong interests in enforcement of the clause.

[41] Returning to the other two prongs of the test set out in *Tercon*, the language of the clause is sufficiently clear that the only reasonable interpretation in my view is that it applies to protect Yukon in the event that it breaches any statutory duties it might have regarding fairness in procurement.

[42] Before this Court, Mega advanced a similar argument that was made in *Tercon*, namely that the RFP was so fundamentally flawed that the errors committed by Yukon did not come within the ambit of the clause, and that the clause should not be so interpreted as to completely "gut" the policy. However, I would consider the language of the exclusion clause at issue in *Tercon* to be decidedly more ambiguous than the one at bar.

[43] Justice Cromwell, writing for the majority in *Tercon*, reproduced the clause in his reasons and observed that the trial judge in that case held that the clause was ambiguous and resolved the ambiguity in favour of the plaintiff:

> [60] As noted, the RFP includes an exclusion clause which reads as follows:
>
> **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. [Emphasis added.]
>
> [61] The trial judge held that as a matter of construction, the clause did not bar recovery for the breaches she had found. The clause, in her view, was ambiguous and, applying the *contra proferentem* principle, she resolved the ambiguity in Tercon's favour.

[44] The majority also stressed that the clause should be interpreted as not to apply to exclude damages for failing to award the project to a qualified bidder because it was not so clear and ambiguous as in other cases:

> [73] The Province stresses Tercon's commercial sophistication, in effect arguing that it agreed to the exclusion clause and must accept the consequences. This line of argument, however, has two weaknesses. It assumes the answer to the real question before us which is: what does the exclusion clause mean? The consequences of agreeing to the exclusion clause depend on its construction. In addition, the Province's submission overlooks its own commercial sophistication and the fact that sophisticated parties can draft very clear exclusion and limitation clauses when they are minded to do so. Such clauses contrast starkly with the curious clause which the Province inserted into this RFP. The limitation of liability clause in *Hunter*, for example, provided that "[n]otwithstanding any other provision in this contract or any applicable statutory provisions neither the Seller nor the Buyer shall be liable to the other for special or consequential damages or damages for loss of use arising directly or indirectly from any breach of this contract, fundamental or otherwise" (p. 450). The Court found this to be clear and unambiguous. The limitation clause in issue in *Guarantee Co. of North America v. Gordon Capital Corp.,* [1999] 3 S.C.R. 423, provided that legal proceedings for the recovery of "any loss hereunder shall not be brought . . . after the expiration of 24 months from the discovery of such loss" (para. 5). Once again, the Court found this language clear. The Ontario Court of Appeal similarly found the language of a limitation of liability clause to be clear in *Fraser Jewellers (1982) Ltd. v. Dominion Electric Protection Co.* (1997), 34 O.R. (3d) 1. The clause provided in part that if the defendant "should be found liable for loss, damage or injury due to a failure of service or equipment in any respect, its liability shall be limited to a sum equal to 100% of the annual service charge or $10,000.00, whichever is less, as the agreed upon damages and not as a penalty, as the exclusive remedy" (p. 4). These, and many other cases which might be referred to, demonstrate that sophisticated parties are capable of drafting clear and comprehensive limitation and exclusion provisions.
>
> [Emphasis added.]

[45] By contrast, the clause at issue in this case reads as follows:

> Except for a claim for costs of preparation of its Proposal or other costs awarded in a proceeding under the Bid Challenge Process as described in the Government of Yukon Contracting Regulations and Contracting and Procurement Directive, each proponent, by submitting a Proposal, irrevocably waives any claim, action, or proceeding against the Government of Yukon including without limitation any judicial review or injunction application or against any of Government of Yukon's employees, advisors or representatives for damages, expenses or costs including costs of Proposal preparation, loss of profits, loss of opportunity or any consequential loss for any reason including: any actual or alleged unfairness on the part of the Government of Yukon at any stage of the Request for Proposal process; if the Government of Yukon does not award or execute a contract; or, if the Government of Yukon is subsequently determined to have accepted a noncompliant Proposal or otherwise breached or fundamentally breached the terms of this Instructions to Proponents.
>
> [Emphasis added.]

[46] In my view, this is much less ambiguous than the clause in *Tercon*. Here, the clause does not apply solely to any proponent "participating in this RFP", which the Court held in *Tercon* to mean where the contract is awarded through a process limited only to eligible bidders. Instead it applies to any proponent who merely submits a proposal, which does not imply that it is limited only to cases where the contract is awarded in a certain way.

[47] Moreover, the clause waives damages for loss "for any reason", including any loss arising from "any actual or alleged unfairness on the part of the Government of Yukon at any stage of the Request for Proposal process", or if Yukon "otherwise breached" the terms of the Instructions to Proponents. This is much closer to the language of the clause in *Hunter Engineering Co. v. Syncrude Canada Ltd.,* [1989] 1 S.C.R. 426 at 450 [*Hunter*], quoted in the passage above from *Tercon*, which applied notwithstanding "any applicable statutory provisions" and covered "special or consequential damages or damages for loss of use arising directly or indirectly from any breach of this contract, fundamental or otherwise". As noted by the Court in *Tercon*, the clause in *Hunter* was found to be sufficiently clear and unambiguous to exclude liability under an implied statutory warranty.

[48] Finally, as stated above, the trial judge in *Tercon* interpreted the clause in favour of the plaintiff and as not being intended to apply to the situation in that case. The majority upheld that finding. Whereas here, the judge found:

> [39] The wording of the waiver contained in the RFP speaks so directly to the promises contained in the Directive that it is not possible to conclude that it was not aimed directly at annulling the effect of the legislation.
>
> [Emphasis added.]

[49] Since the Supreme Court of Canada's decision in *Sattva Capital Corp. v. Creston Moly Corp.,* 2014 SCC 53 at para. 50, issues of contractual interpretation are now firmly questions of mixed fact and law and cannot be set aside except in the case of palpable and overriding error. I would not consider that the judge made a palpable and overriding error by interpreting the clause as "aimed directly at annulling the effect of the legislation." The text is certainly capable of supporting that interpretation.

[50] Taking the judge's reasons as a whole, she was concerned not with whether the clause was ambiguous or did not apply in some way, but whether it was contrary to a principle of public policy that the government could perhaps blatantly contract out of duties imposed by statute. It was in fact her interpretation of the clause that appears to have motivated her view that to enforce it "would allow Yukon to say one thing and then to do the opposite with impunity" (at para. 40).

[51] As I have indicated, I have considered the public policy concerns within the framework mandated by *Tercon*, which the judge failed in my view to do, and concluded that they are not "substantially incontestable", but I would not disturb the finding that the clause was intended to exclude liability for breaches of the duties of fairness contained in the *Directive*.

[52] As to the second prong, Yukon notes that Mega did not challenge the clause as unconscionable at the court below, and it is not open to this Court to set it aside on those grounds now.

[53] Given my conclusion on the first ground of appeal, it is unnecessary to address the second.

Conclusion

[54] In sum, I would allow the appeal, set aside the award of damages, and dismiss the claim, with costs to Yukon. Although Yukon certainly failed to observe best practices in the conduct of the RFP, in my view there is no “substantially incontestable” public policy rationale that justifies overriding a clear and specific exclusion clause. Mega is a sophisticated commercial party that participated in the RFP despite awareness of the clause, and Yukon is well placed to adapt its RFP process if in fact enforcement of the exclusion clause reduces the willingness of bidders to participate in future RFPs. The policy interests at play do not warrant this Court overriding the clear and valid agreement apportioning liability between the parties.

_____
The Honourable Chief Justice Bauman

I agree:

_____
The Honourable Madam Justice Cooper

I agree:

_____
The Honourable Mr. Justice Fitch