

## The Ontario Court of Appeal Wades in on Law of Tenders

In the recent decision of *Rankin Construction Inc. v. Ontario*, the Ontario Court of Appeal clarified and provided some commentary on the complex law of tendering in construction projects. In the action, the Ministry of Transportation ("MTO") concluded that the lowest bid for a contract, deposited by Rankin Construction Inc. did not comply with the terms of the invitation to tender. The MTO therefore awarded the contract to the second lowest bidder. Rankin Construction sued the MTO for lost profits because of the MTO's alleged failure to accept the Appellant's tender. Rankin Construction Inc.'s action was dismissed. An appeal was heard at the Court of Appeal.

The decision in the Court of Appeal covers various issues relating to the law of tendering but in our view the critical issue is the interpretation of the exculpatory clause contained within the instructions to bidders. That clause stated as follows:

"The Ministry shall not be liable for any costs, expenses, loss or damage incurred, sustained or suffered by any bidder prior, or subsequent to, or by reason of the acceptance or the non-acceptance by the Ministry of any tender, or by reason of any delay in acceptance of a tender, except as provided in the tender documents."

The Court found that this clause is a complete defence to the claim of Rankin Construction Ltd. The Court found that the exculpatory clause is "a commercial response to the increased litigation faced by owners arising out of the acceptance, and corresponding non-acceptance, of bids."

The Court also found "The relevant commercial context also includes that bidders are sophisticated parties and are free to choose not to submit a tender in the face of a broad exculpatory clause in the tender documents. And if, faced with such a clause, desirable bidders do not respond to requests for tenders, market forces will drive the owner to modify the terms of its tender to stimulate competitive tenders."

The Court further commented that, "It is possible that there may be circumstances where the conduct of the owner in the bid process is so aberrant that it would justify a court's refusal to enforce an exculpatory provision in the tender documents on public policy grounds."

In other words, the Court of Appeal ruled that there would have to be extreme circumstances where such an exculpatory clause would not be enforced by the Courts. Therefore, we can conclude, based on this decision, that this type of clause, in almost all circumstances, will provide a complete bar to actions by unhappy bidders.

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#### [a cautionary note](#)

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