Martel Building Ltd. v. Canada, [2000] 2 S.C.R. 860

Supreme Court Reports

Supreme Court of Canada
Present: McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie and Arbour JJ.
2000: February 17 / 2000: November 30.
File No.: 26893

[2000] 2 S.C.R. 860 | [2000] 2 R.C.S. 860 | [2000] S.C.J. No. 60 | [2000] A.C.S. no 60 | 2000 SCC 60

Her Majesty The Queen, appellant; v. The Martel Building Ltd., respondent.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL (120 paras.)

Case Summary

Torts — Negligence — Economic loss — Whether Canadian law recognizes duty of care on parties in commercial negotiations — Whether tort of negligence extends to damages for pure economic loss arising out of conduct of pre-contractual negotiations.

Torts — Negligence — Economic loss — Whether tender-calling authority owed duty of care to bidders in drafting tender specifications — Whether sphere of recovery for pure economic loss should be extended to cover circumstances surrounding preparation of tender specifications.

Contracts — Tenders — Obligation to treat all bidders fairly — Whether tender-calling authority breached its implied contractual duty to treat all bidders fairly and equally — If so, whether bidder's loss caused by contractual breach.

The respondent leased most of a building to the appellant. Prior to the end of the lease, the respondent's CEO met a subordinate of the appellant's Chief of Leasing to discuss renewing the lease. The appellant instructed its Chief of Leasing to obtain a proposed rental rate even though it intended to commence a tender process but no action was taken. The Chief of Leasing did not contact the respondent when directed to report on the status of negotiations and, at monthly meetings, led the appellant to believe that a proposed [page861] lease rate was forthcoming but nobody informed the respondent of this expectation. The respondent's CEO twice contacted the appellant, resulting in a meeting which the CEO believed was to commence negotiations but in which the appellant maintains that it told the CEO that it would proceed to tender unless it received a very attractive offer. The CEO presented proposed rental rates that fell outside a range suggested by an appraisal commissioned by the appellant. The appellant set a date to complete negotiations and, when that date passed, began steps to approve a tender by preparing a report. The report first recommended a lease renewal but no final decision was made before a revised report recommended proceeding to tender due to declining market rental rates. Approval for a tender was obtained. The CEO heard rumours that a tender was to begin and telephoned the Chief of Leasing. The parties met the same day an expression of interest was advertised to solicit interest in the tender. The CEO said he left the meeting with an understanding that the appellant would recommend a lease renewal if he offered a rate of $220 per square metre. Two days after the meeting, he advised the Chief of Leasing that he could offer that rate; however, the appellant decided that remaining

terms would have to be settled that day. The respondent could not respond that quickly. Its offer was rejected and tender documents were issued. Under the terms of the call for tenders the appellant was not obligated to accept the lowest bid. The respondent submitted the lowest of four bids. The appellant conducted a financial analysis of the bids to consider the total costs that would be incurred as a result of accepting any one tender and added to the respondent's bid approximately $1,000,000 for fit-up costs and $60,000 to cover the installation of a secured card access system. The tender was awarded to a competitor.

The Federal Court, Trial Division found that the appellant owed and breached a duty of care in its conduct of the negotiations but that the respondent had failed to prove that the appellant's negligence caused the respondent to lose the lease renewal. The Federal Court [page862] of Appeal acceded to the respondent's tort claim. The court held that a duty of care had been breached not only in the context of the negotiations, depriving the respondent of the opportunity to negotiate a renewal of the lease, but also in the context of the tender, depriving the respondent of both the opportunity to participate fairly in the tender process and of a reasonable expectation of being awarded the contract. The court concluded that a causal link clearly existed between the respondent's loss and the appellant's negligence.

Held : The appeal should be allowed.

Although the common law traditionally did not allow recovery of economic loss where a plaintiff had suffered neither physical harm nor property damage, the law now recognizes five categories of compensable economic loss. The respondent's allegation of negligence in the conduct of commercial negotiations does not fall within these categories. That by itself, however, does not preclude the claim since the categories of economic loss are not closed. To enlarge the categories or identify a new head of economic loss it is useful to set out a framework that emphasizes policy considerations in any case. In determining whether to extend a duty of care in an area not previously categorized, the flexible two-stage analysis set out in Anns should be applied. Here, the relationship between the parties gave rise to a prima facie duty of care. Proximity is indicated by the pre-existing lease arrangement, the parties' communications, and evidence of genuine and mutual contracting intent. Even in the absence of any serious potential for indeterminate liability, however, there are a number of ancillary policy considerations that necessitate precluding the extension of the tort of negligence into commercial negotiations. First, the goal of commercial negotiations is often to realize a financial gain at the expense of the other party. Second, socially and economically useful conduct could be deterred by depriving a party of any advantageous bargaining position. It would defeat the essence of negotiation and hobble the marketplace to label a party's failure to disclose its bottom line, its motives or its final position as negligent. Third, tort law could become after-the-fact insurance against failures to act with due diligence or to hedge risk of failed negotiations through the pursuit of alternative strategies or opportunities. Fourth, the courts would assume a significant regulatory function -- scrutinizing the minutia of pre-contractual conduct -- when other causes of action provide alternative remedies. Fifth, needless litigation should be discouraged. [page863] In the circumstances of this case, any prima facie duty of care is outweighed by the deleterious effects that would be occasioned through an extension of a duty of care into the conduct of negotiations.

With respect to the tendering process, the preparation of tender documents and the subsequent evaluation of bids involve different considerations, and each event must, to a certain extent, be analysed separately. A call to tender is an offer to contract whereas a binding contract may arise once a responsive bid is submitted for evaluation. Express obligations based on terms in tender documents and implied obligations based on custom, usage or the presumed intention of the parties may arise once a bid is submitted. The parties in this case intended to initiate contractual relations by the call for and submission of the tender and to include an implied term to treat all bids fairly and equally. A privilege clause reserving the right not to accept the lowest or any bids does not exclude the obligation to treat all bidders fairly. The tender documents must be examined to determine the extent of this obligation. Here, these documents conferred upon the appellant significant latitude in evaluating the tenders. No contractual breach can be found in relation to the addition of fit-up costs to the respondent's bid since the appellant was expressly entitled to add fit-up costs which it deemed necessary. Furthermore, fit-up costs were added to all bids, using the same standard or method of calculation. In this

regard, the appellant complied with its implied contractual obligation to treat all bidders fairly and equally. There is no evidence of any colourable attempt to use fit-ups to achieve a desired result. The appellant could also add costs to the respondent's bid for a contiguous space specification because this was an express requirement in the tender document to which all bidders had to comply. The appellant did breach its duty to treat all bids fairly by adding the cost of a secured card system solely to the respondent's bid. Damages for this breach, however, are precluded for want of causation because this did not cause the respondent to lose a reasonable expectation of winning the tender. Even without this cost addition, the [page864] respondent's bid was significantly greater than the winning bid.

A tendering relationship is defined by contract and in this case the contract analysis subsumes any duty of care the respondent seeks to have recognized under tort law. While an action in tort may lie notwithstanding the existence of a contract, in assessing whether a tortious duty should be recognized where a contract defines the rights and obligations of the parties, courts will look to the contract as informing any duty in tort law. Here, the tort claim by the respondent cannot succeed for the same reasons that the contractual claim failed. Nor did the appellant breach a duty of care in drafting the tender specifications by including a contiguous space requirement. The trial judge's findings do not support the respondent's claim that this requirement had been mistakenly added to the specifications. The respondent also conceded that the requirement was one with which all other bidders needed to comply. Further, absent the contiguous space requirement, the respondent's bid would still have been more expensive than the successful bid. Costs not attributable to this requirement made the respondent's bid uncompetitive. In any event, the appellant did not owe the respondent a duty of care in drafting the tender specifications. The respondent's claim that the tender specifications were prepared negligently alleges a duty in an area not previously recognized and the Anns two-step analysis indicates that the sphere of recovery for pure economic loss should not be extended to cover the circumstances surrounding the preparation of the tender specifications in this case. Assuming without deciding that sufficient proximity existed between the parties, any prima facie duty of care is negated by policy considerations. In particular, the integrity of the tender process would become questionable if, by reason of a past relationship with, or special knowledge of, a potential bidder, there could be an enforceable obligation [page865] to take the interests of that particular bidder into account. It is imperative that all bidders be treated on an equal footing.

Cases Cited

Applied: Anns v. Merton London Borough Council, [1978] A.C. 728; referred to: D'Amato v. Badger, [1996] 2 S.C.R. 1071; Rivtow Marine Ltd. v. Washington Iron Works, [1974] S.C.R. 1189; Canadian National Railway Co. v. Norsk Pacific Steamship Co., [1992] 1 S.C.R. 1021; Cattle v. Stockton Waterworks Co. (1875), L.R. 10 Q.B. 453; Winnipeg Condominium Corporation No. 36 v. Bird Construction Co., [1995] 1 S.C.R. 85; Kamloops (City of) v. Nielsen, [1984] 2 S.C.R. 2; Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd., [1997] 3 S.C.R. 1210; Hercules Managements Ltd. v. Ernst & Young, [1997] 2 S.C.R. 165; B.D.C. Ltd. v. Hofstrand Farms Ltd., [1986] 1 S.C.R. 228; Just v. British Columbia, [1989] 2 S.C.R. 1228; The Queen in Right of Ontario v. Ron Engineering & Construction (Eastern) Ltd., [1981] 1 S.C.R. 111; M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd., [1999] 1 S.C.R. 619; Canadian Pacific Hotels Ltd. v. Bank of Montreal, [1987] 1 S.C.R. 711; Best Cleaners and Contractors Ltd. v. The Queen, [1985] 2 F.C. 293; Chinook Aggregates Ltd. v. Abbotsford (Municipal District) (1989), 35 C.L.R. 241; Martselos Services Ltd. v. Arctic College (1994), 111 D.L.R. (4th) 65, leave to appeal refused, [1994] 3 S.C.R. viii; Northeast Marine Services Ltd. v. Atlantic Pilotage Authority, [1995] 2 F.C. 132; Tarmac Canada Inc. v. Hamilton-Wentworth (Regional Municipality) (1999), 48 C.L.R. (2d) 236; Vachon Construction Ltd. v. Cariboo (Regional District) (1996), 136

D.L.R. (4th) 307; Health Care Developers Inc. v. Newfoundland (1996), 136 D.L.R. (4th) 609; Murphy v. Alberton (Town) (1993), 114 Nfld. & P.E.I.R. 34; Kencor Holdings Ltd. v. Saskatchewan, [1991] 6 W.W.R. 717; Colautti Brothers Marble Tile & Carpet (1985) Inc. v. Windsor (City) (1996), 36 M.P.L.R. (2d) 258; [page866] Yorkton Flying Services Ltd. v. Saskatchewan (Minister of Natural Resources), [1995] 9 W.W.R. 184; Central Trust Co. v. Rafuse, [1986] 2 S.C.R. 147; Queen v. Cognos Inc., [1993] 1 S.C.R. 87; BC Checo International Ltd. v. British Columbia Hydro and Power Authority, [1993] 1 S.C.R. 12; Twin City Mechanical v. Bradsil (1967) Ltd. (1996), 31 C.L.R. (2d) 210, rev'd (1999), 43 C.L.R. (2d) 275; Ken Toby Ltd. v. British Columbia Buildings Corp. (1997), 34 B.C.L.R. (3d) 263, rev'd (1999), 62 B.C.L.R. (3d) 308.

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APPEAL from a judgment of the Federal Court of Appeal, [1998] 4 F.C. 300, 229 N.R. 187, 163 D.L.R. (4th) 504, [1998] F.C.J. No. 1031 (QL), setting aside a judgment of the Trial Division (1997), 129 F.T.R. 249, [1997] F.C.J. No. 483 (QL), dismissing the plaintiff's action. Appeal allowed.

David Sgayias, Q.C., and F. B. Woyiwada, for the appellant. James H. Smellie and M. Lynn Starchuk, for the respondent.

Solicitor for the appellant: The Deputy Attorney General of Canada, Ottawa. Solicitors for the respondent: Osler, Hoskin & Harcourt, Ottawa.

The judgment of the Court was delivered by

IACOBUCCI and MAJOR JJ.

1 This appeal calls for an extension of the tort of negligence to include a duty of care on parties during negotiations, during the preparation of calls for tender and during the evaluation of bids submitted in response [page867] to such calls. In each instance the respondent sought

damages for pure economic loss.

I. Factual Background

2 The respondent, The Martel Building Limited ("Martel"), is the owner of a building at 270 Albert Street in the City of Ottawa ("Martel Building"). The National Capital Region Division of the Department of Public Works ("Department") leased most of the rentable space in the Martel Building under a 10-year lease with an expiration date of August 31, 1993. The lease contained an option for renewal.

3 The Department was responsible for contracting for space on behalf of government agencies such as the Atomic Energy Control Board ("AECB"), the principal physical tenant in this case.

4 The Department is divided into a number of branches with varying roles in the administration of its Public Works function. Here, two branches of the Department were involved: the Realty Services Branch and the Accommodation Branch. Two sections of the Accommodation Branch played a role. The Asset Management Section ascertained space requirements. The Investment Management Section ("Accommodation (IM)") evaluated the options available to the Crown. The Realty Services Branch included a "Leasing" department that negotiated with landlords for the acquisition of space on behalf of the Crown and informed the Accommodation Branch of the conditions of the relevant rental market, in this case Ottawa.

5 For ease of reference, nothing will be lost in these reasons by referring to all the government divisions as the Department.

6 Prior to the expiration of the lease, Martel's President and Chief Executive Officer, Mr. McMurray, arranged to meet with Mr. Séguin, the [page868] Chief of Leasing for the Department, to negotiate a renewal. In March of 1991, Mr. McMurray met with Mr. Bray, a subordinate of Mr. Séguin. He informed him of Martel's desire to negotiate a renewal of the lease and provided him with a copy of Martel's proposed "retrofit" of the Martel Building, which it hoped to complete in conjunction with a renewal of the lease to complement recent "fit-ups" completed by the tenant AECB. A "retrofit" is a renovation of the common areas of a building generally undertaken by the landlord. In contrast, a "fit-up" represents leasehold improvements undertaken by a tenant with respect to the space it usually occupies exclusively.

7 In May 1991, Mr. McMurray wrote to Mr. Séguin, reiterating the contents of the prior meeting with Mr. Bray. In June, Mr. Séguin reported to Mr. Ratcliffe, the Acting Director of Accommodation (IM), that Martel was interested in renegotiating its lease and inquired whether the Department would be interested in a renewal. Mr. Ratcliffe told him the Department intended to proceed with calling for tenders but at the same time requested Mr. Séguin to obtain a proposed rental rate from Martel.

8 Mr. Séguin delegated to Mr. Bray the responsibility of contacting Mr. McMurray. No action was taken. Nor did Mr. Séguin contact Mr. McMurray despite being directed by Department officials in October of 1991 to report on the status of negotiations with Martel.

9 In February of 1992, Mr. Séguin was to obtain a proposal from Martel based upon a defined lease term. Moreover, at the monthly meetings of the Department held between October of 1991 and April of 1992, Mr. Séguin led the Department to believe that a proposed rental rate was

forthcoming from Martel. Neither Mr. Séguin nor anyone else from the Department informed Mr. McMurray of this expectation. In fact, the only step taken by Mr. Séguin during this period was to arrange that [page869] an appraisal report be prepared on the Martel Building by a private contractor.

10 Mr. McMurray made two attempts to contact the Department between May of 1991 and April of 1992 for the purpose of arranging a meeting to discuss a renewal. The first attempt on December 17, 1991, was fruitless, but a second attempt in the spring of 1992 resulted in a meeting being scheduled for April 15, 1992.

11 Different accounts were given at the trial on what happened at the April 15 meeting. The Department maintained that it informed Mr. McMurray that a decision had been made to proceed with the tender process unless Martel made a particularly attractive offer to the Department. Mr. McMurray's version, which the trial judge accepted, was that while he always understood tendering to be a possibility, he was told the meeting was the commencement of negotiations for a renewal of the lease. Consistent with his version of the meeting, Mr. McMurray presented the Department officials present, Messrs. Séguin and Mahar, with proposed rental rates. Mr. Séguin then informed Mr. McMurray that a private appraisal had been commissioned and that he would inform Martel when it had been completed.

12 As considerable lead time would be required to relocate the tenant AECB prior to the August 1993 expiry of the Martel lease, the Department set June 30, 1992 as the "drop-dead date" by which time negotiations with Martel would have to be completed, or the tendering process would start. The drop-dead date was extended later to October 2, 1992.

13 Between June and September of 1992, Mr. McMurray met with Mr. Mahar on several occasions to present proposed rental rates. These proposals did not fall within the market range suggested by the appraisal commissioned by the Department, which it was agreed did not include the costs of the proposed retrofit. The parties did not have contact again until October 14, 1992, [page870] when Mr. McMurray, having heard that the tendering for space was to begin, telephoned Mr. Séguin.

14 It turned out that after the initial June 30, 1992 drop-dead date had passed, the Department began the initial steps required to proceed to tender for the AECB space. The Department required two approvals to tender and eventually to lease the space. The first, preliminary project approval ("PPA"), had to be obtained before the tender process began. The second, effective project approval ("EPA"), was sought after tenders had been received and evaluated. The authority to grant these approvals varies with the amount of space to be acquired and the value of the lease. In the AECB's case, the authority to grant PPA rested with the Assistant Deputy Minister - Accommodation ("ADM") and the authority to grant EPA rested with the Treasury Board.

15 The Department had an internal advisory structure geared toward preparing a recommendation for approval by the ADM. It was a time-consuming process. An Investment Analysis Report ("IAR") analysed the various options for obtaining rental space and made a recommendation. The report then proceeded through a bureaucratic chain ultimately resulting in the Investment Management Board ("IMB") of the Department making a recommendation to the ADM.

16 The IAR recommended renegotiating the Martel lease. It was considered by the Department

in late September, but no decision was made. The Department considered a revised report on October 9 but, due to declining rental rates in Ottawa recommended that the matter proceed to tender. Within the Department, the IMB was not involved in the tender proposal. Approval for tendering was obtained from the ADM although the evidence did not establish on what date that occurred.

17 Amid rumours that the AECB space was proceeding to tender, Mr. McMurray telephoned [page871] Messrs. Mahar and Séguin again on October 14 and 15. As a result of these calls Mr. McMurray received a letter confirming that the tendering process was proceeding and stipulating that the Department would not accept any proposal from Martel subsequent to October 22.

18 The October 22 deadline was subsequently extended to October 27. The parties held a meeting on October 27, the same day on which an expression of interest advertisement for tender of the AECB space appeared in the Ottawa Citizen newspaper. Mr. McMurray said he left the meeting with the understanding that if he met a $220/m2 rental rate, the Department would recommend to the Treasury Board that the Martel lease be renewed.

19 Mr. McMurray advised Mr. Séguin by telephone on October 29 that Martel could meet the $220/m2 rental rate. On October 30 Martel submitted a written offer of a rate of $249/m2 plus an allowance, calculated by the Department to be an effective rate of $219.39/m2. On the same day the Department decided that the remaining terms of the Martel lease, including the full details of the proposed retrofit, would have to be settled that day otherwise tendering would proceed. Martel was unable to provide finalized retrofit plans by that afternoon. On November 26 a letter was sent advising Mr. McMurray that Martel's October 30 offer was rejected. Tender documents were issued the same day with a deadline for submitting bids of December 3, 1992.

20 Martel bid on the project. When the bids were opened, Martel's bid was the lowest of the tenders. Martel was not awarded the contract.

21 Under the terms of the call for tenders the Department was not obligated to accept the lowest or any bid. Moreover, the Department conducted a financial analysis of the bids to consider the total costs that would be incurred as a result of accepting any one tender. These costs included fit-up costs, contiguous space requirements, and a [page872] secured card access system. The Martel Building's fit-up costs were calculated to be approximately one million dollars. As well, the Department added $60,000 to Martel's bid to cover the installation of a secured card access system. Based upon a net present value calculation, Martel's bid was higher than the second lowest initial bid of Standard Life. The tender was awarded to Standard Life.

II. Judicial History

1. Federal Court, Trial Division (1997), 129 F.T.R. 249

22 Martel sued in contract and in tort. In contract, Martel claimed the appellant had breached an implied term to renew the lease arising out of either the lease itself or an agreement reached between the parties on or about October 30, 1992. Martel's claim in tort rested on the Department's alleged breach of a duty to negotiate in good faith and on its alleged negligent conduct of the negotiation and tender processes.

23 The trial judge dismissed the contract claim. She also declined to consider liability based on a duty to negotiate in good faith when she was sceptical that such a duty existed under Canadian law. She did not address negligence in the tendering process, but noted that "a somewhat arbitrary assessment of fit-up costs appears to have been added to the financial analysis of the plaintiff's bid" (para. 76).

24 In the context of negotiations, the trial judge concluded that the relationship between the parties was sufficiently proximate to give rise to a duty of care in negligence. She held it was reasonably foreseeable the Department's carelessness might cause damage to Martel. She further concluded [page873] that the Department was negligent in its conduct of the negotiations.

25 However, she concluded that Martel had not established causation as it failed to prove that the Department's negligence caused Martel to lose the 10-year renewal. She dismissed the plaintiff's action.

2. Federal Court of Appeal, [1998] 4 F.C. 300

26 The Federal Court of Appeal held that the trial judge was correct that a duty of care arose from the conduct of the negotiations and that it had been breached. It too declined to consider whether a duty to negotiate in good faith had emerged in Canadian law.

27 The Federal Court of Appeal also addressed negligence in the tendering process. It held that "[n]egligence in the tendering process was a matter before the Trial Judge which she failed to address" (para. 31). In this respect, it found that the call for tenders gave rise to an implied contractual obligation to treat all bidders fairly. In turn, this obligation placed the parties in sufficient proximity to give rise to a duty of care. It concluded that the Department had breached this duty through evaluating the bids according to undisclosed conditions which included the addition of fit-up costs, secured card access system costs and contiguous space requirements.

28 The court held that in the context of the negotiations, the Department's negligence deprived Martel of the opportunity to negotiate a renewal of the lease. In the context of the tender, the Department's negligence deprived Martel of both the opportunity to participate fairly in the tender process and a reasonable expectation of being awarded the contract.

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29 The court disagreed with the trial judge on causation. It concluded that the Department's conduct was the principal, if not the only cause, of Martel losing the opportunity to negotiate and losing its reasonable expectation of being awarded the contract under a fair and proper tendering process.

30 The Federal Court of Appeal allowed the appeal with costs. It found the Department liable in negligence and ordered a continuance of the trial on the issue of damages.

III. Issues

31 This appeal raises two issues:

1. Given that one owes a duty of care not to harm those who might foreseeably suffer damage, does a duty of care exist to that same group with respect to negotiations? Does the tort of negligence extend to damages for pure economic loss arising out of the conduct of pre-contractual negotiations?
2. Did the Court of Appeal err in finding that the Department owed Martel a duty of care in the tendering process and that this duty was breached?

IV. Analysis

1. Given that one owes a duty of care not to harm those who might foreseeably suffer damage, does a duty of care exist to that same group with respect to negotiations? Does the tort of negligence extend to damages for pure economic loss arising out of the conduct of pre-contractual negotiations?

32 A central issue in this appeal is the extent to which Canadian jurisprudence recognizes a duty of care on parties in negotiations. If a cause of action [page875] exists in this context, it is apparent that the damages claimed would be a purely economic loss.

33 The appellant submitted that to extend the tort of negligence into the conduct of commercial negotiations would be an unnecessary and unsound invasion of the marketplace. It argued that this case involves business risks inherent in commercial negotiation, risks which should be borne by parties and not be re-allocated through the imposition of a duty of care.

34 A breach of a duty of care in negotiations would, in this case, result in the loss of an opportunity to negotiate a lease renewal. This is a claim for damages not accompanied by physical injury or property damage. What is left is a claim for pure economic loss. See D'Amato v. Badger, [1996] 2 S.C.R. 1071, at para. 13.

35 As a cause of action, claims concerning the recovery of economic loss are identical to any other claim in negligence in that the plaintiff must establish a duty, a breach, damage and causation. Nevertheless, as a result of the common law's historical treatment of economic loss, the threshold question of whether or not to recognize a duty of care receives added scrutiny relative to other claims in negligence.

36 An historical review of the common law treatment of recovery for economic loss has been undertaken by this Court on several occasions. See Rivtow Marine Ltd. v. Washington Iron Works, [1974] S.C.R. 1189; Canadian National Railway Co. v. Norsk Pacific Steamship Co., [1992] 1 S.C.R. 1021; and D'Amato, supra. Rather than re-canvassing the jurisprudential genealogy reviewed in these cases, it is enough to say that the common law traditionally did not allow recovery of economic loss where a plaintiff had suffered neither physical harm nor property damage. See Cattle v. [page876] Stockton Waterworks Co. (1875), L.R. 10 Q.B. 453.

37 Over time, the traditional rule was reconsidered. In Rivtow and subsequent cases it has been recognized that in limited circumstances damages for economic loss absent physical or proprietary harm may be recovered. The circumstances in which such damages have been awarded to date are few. To a large extent, this caution derives from the same policy rationale that supported the traditional approach not to recognize the claim at all. First, economic interests

are viewed as less compelling of protection than bodily security or proprietary interests. Second, an unbridled recognition of economic loss raises the spectre of indeterminate liability. Third, economic losses often arise in a commercial context, where they are often an inherent business risk best guarded against by the party on whom they fall through such means as insurance. Finally, allowing the recovery of economic loss through tort has been seen to encourage a multiplicity of inappropriate lawsuits. See D'Amato, supra, at para. 20, and A. M. Linden, Canadian Tort Law (6th ed. 1997), at pp. 405-6.

38 In an effort to identify and separate the types of cases that give rise to potentially compensable economic loss, La Forest J., in Norsk, supra, endorsed the following categories (at p. 1049):

1. The Independent Liability of Statutory Public Authorities;
2. Negligent Misrepresentation;
3. Negligent Performance of a Service;
4. Negligent Supply of Shoddy Goods or Structures;
5. Relational Economic Loss.

[page877]

See B. Feldthusen, "Economic Loss in the Supreme Court of Canada: Yesterday and Tomorrow" (1990-91), 17 Can. Bus. L.J. 356, at pp. 357-58; Winnipeg Condominium Corporation No. 36 v. Bird Construction Co., [1995] 1 S.C.R. 85, at para. 12; and D'Amato, supra, at para. 30.

39 The allegation of negligence in the conduct of negotiations does not fall within any of these classifications. Thus, Martel's claim is novel when weighed against the prior jurisprudence of this Court. That by itself should not preclude the claim. The question is whether the numbered categories ought to be enlarged or some other method identified to include a new head of economic loss. To answer this question it is useful to set out a framework for the recognition of new categories such as that advanced by Martel.

40 In attempting to mould such a framework, it is noteworthy that this Court has looked beyond the traditional bar against recovery of pure economic loss in favour of a case-specific analysis that seeks to weigh the unique policy considerations which arise. See Rivtow, supra, at pp. 1211-12; Kamloops (City of) v. Nielsen, [1984] 2 S.C.R. 2, at p. 33; Norsk, supra, at p. 1054, per La Forest J., and at p. 1155, per McLachlin J.; Winnipeg Condominium, supra, at para. 32; and D'Amato, supra, at paras. 31-34.

41 A presumptive exclusionary rule exists only within the narrow realm of contractual relational economic loss. This phrase is intended to define an economic loss suffered via a plaintiff's contractual relationship with a third party to whom the defendant is already liable for property damage. Prior to Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd., [1997] 3 S.C.R. 1210, it was undetermined whether the recognition of contractual relational economic loss was to be approached incrementally on a case-by-case basis, as with the other categories of economic loss, or through recognized categorical exceptions to a narrow exclusionary rule.

This debate arose out of the differing approaches expressed by McLachlin J. (as she then [page878] was) and La Forest J. in Norsk. The substance of these positions was reviewed in D'Amato and need not be repeated for the purpose of this appeal.

42 In Bow Valley, at para. 48, McLachlin J. resolved this debate, affirming that recovery for contractual relational economic loss is presumptively excluded, subject to categorical exceptions. However, the categories of recoverable loss are not closed and new ones may emerge as different cases arise. The majority in Bow Valley approved her reasons. See Iacobucci J. at para. 113:

> I understand my colleague's discussion of this matter to mean that she has adopted the general exclusionary rule and categorical exceptions approach set forth by La Forest J. in Norsk... . She points out that both her reasons and those of La Forest J. in Norsk recognize that the categories of recoverable contractual relational economic loss are not closed.

43 It is important to distinguish between the Bow Valley majority's reference to the categories of contractual relational economic loss, which falls within the fifth category, and the other four categories of economic loss listed above. This distinction is relevant because contractual relational economic loss receives unique treatment within the broader scope of economic loss in general. In this connection, we reject the assertions of certain commentators who have suggested that the same approach applies to all five categories of economic loss following the Bow Valley decision: see E. A. Cherniak and E. How, "Policy and Predictability: Pure Economic Loss in the Supreme Court of Canada" (1999), 31 Can. Bus. L.J. 209, at p. 232, and I. N. D. Wallace, "Contractual Relational Loss in Canada" (1998), 114 L.Q.R. 370, at pp. 374-77.

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44 Unlike the other areas of economic loss, contractual relational economic loss continues to operate under a presumption against recovery. The following categories of contractual relational economic loss are, to date, the sole exceptions to this presumption:

1. Where the claimant has a possessory or proprietary interest in the damaged property;
2. General average cases; and
3. Where the relationship between the claimant and the property owner constitutes a joint venture.

45 However, as noted above, these three categorical exceptions within contractual relational economic loss categories are not closed. The same is true for the five broader categories of economic loss: see Norsk, supra, at pp. 1150-53, per McLachlin J. As Professor Linden, supra, states, "further categories of economic loss cases will have to be identified beyond the five general ones of Professor Feldthusen" (p. 421). The reason for the broader five categories is merely to provide greater structure to a diverse range of factual situations by grouping together cases that raise similar policy concerns. These categories are merely analytical tools.

46 Canadian jurisprudence has consistently applied the flexible two-stage analysis of Anns v.

Merton London Borough Council, [1978] A.C. 728 (H.L.), originally adopted in Kamloops, supra, in determining whether to extend a duty of care in a given case. The Anns approach has been applied in this manner to each of the first four categories of economic loss. See, for example, Hercules Managements Ltd. v. Ernst & Young, [1997] 2 S.C.R. 165, at para. 19 (negligent misrepresentation); Winnipeg Condominium, supra, at para. 32 (negligent supply of shoddy goods or structures); and B.D.C. Ltd. v. Hofstrand Farms Ltd., [1986] 1 S.C.R. 228 (negligent performance of a service). It is likely that any extension to the categorical exceptions of contractual [page880] relational economic loss also would be considered under the same analysis. See Bow Valley, supra, at paras. 52-56, per McLachlin J., and para. 113, per Iacobucci J.

47 The Anns approach is equally applicable when, as in this appeal, the claim alleges a duty of care in an area not previously categorized. The respondent's submission has to be considered within that framework.

48 This analysis begins with the oft-repeated question:

> Was there a sufficiently close relationship between Martel and the Department so that, in the reasonable contemplation of the Department, carelessness on its part might cause damage to a party such as Martel with whom it negotiated?

49 See Hercules Managements, supra, at paras. 23-24, per La Forest J.:

> ... the term "proximity" itself is nothing more than a label expressing a result, judgment or conclusion; it does not, in and of itself, provide a principled basis on which to make a legal determination.
>
> ...
>
> The label "proximity", as it was used by Lord Wilberforce in Anns, supra, was clearly intended to connote that the circumstances of the relationship inhering between the plaintiff and the defendant are of such a nature that the defendant may be said to be under an obligation to be mindful of the plaintiff's legitimate interests in conducting his or her affairs.

50 So as to infuse the term "proximity" with greater meaning, the courts take into account a variety of factors in ascertaining whether the relationship between two parties gives rise to a prima facie duty of care. See McLachlin J. in Norsk, supra, at p. 1153:

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> In determining whether liability should be extended to a new situation, courts will have regard to the factors traditionally relevant to proximity such as the relationship between the parties, physical propinquity, assumed or imposed obligations and close causal connection. And they will insist on sufficient special factors to avoid the imposition of indeterminate and unreasonable liability.

51 It may be foreseeable that carelessness on the part of one negotiating party may cause an

opposite negotiating party economic loss. Generally, negotiation is undertaken with a view to obtaining mutual economic gain. Given the bilateral nature of most negotiations, such gains are sometimes obtained at the other party's expense. Although negotiations often provide synergistic effects for all concerned, the prospect of causing deprivation by economic loss is implicit in the negotiating environment. The causal relationship in contractual negotiations is usually significant for a finding of proximity. In the circumstances of this appeal, the appellant's pre-existing contractual arrangement with Martel is an impressive indicator of proximity.

52 Both the pre-existing lease arrangement and the communications between the appellant and respondent here are indicators of proximity. That does not mean that any exchange loosely viewed as a negotiation will necessarily give rise to a proximate relationship. The expression of interest does not automatically create proximity absent some evidence of genuine and mutual contracting intent. We are satisfied that the parties in this appeal evidenced such an intent. The communications between the appellant and Martel disclose a readiness to arrive at an agreement despite the fact one was never reached.

53 We conclude that the circumstances of this case satisfy the first stage of Anns and raise a prima facie duty of care. Although the Department is a government actor, in its negotiations with Martel, it was exercising an operational rather than a policy [page882] function. As such, this finding of a prima facie duty of care is not precluded by the appellant claiming to have exercised a bona fide discretionary policy decision. See Kamloops, supra, at p. 35, and Just v. British Columbia, [1989] 2 S.C.R. 1228.

54 In the wake of a finding of proximity, the second question in Anns arises:

> Are there any policy considerations that serve to negative or limit (a) the scope of the prima facie duty of care (b) the class of persons to whom it is owed or (c) the damages to which a breach of it may give rise?

55 Notwithstanding our finding of proximity above, there are compelling policy reasons to conclude that one commercial party should not have to be mindful of another commercial party's legitimate interests in an arm's length negotiation.

56 As noted by McLachlin J. in Norsk, supra, at pp. 1154-55:

> While proximity is critical to establishing the right to recover pure economic loss in tort, it does not always indicate liability. It is a necessary but not necessarily sufficient condition of liability. Recognizing that proximity is itself concerned with policy, the approach adopted in Kamloops (paralleled by the second branch of Anns) requires the Court to consider the purposes served by permitting recovery as well as whether there are any residual policy considerations which call for a limitation on liability. This permits courts to reject liability for pure economic loss where indicated by policy reasons not taken into account in the proximity analysis.

57 The scope of indeterminate liability remains a significant concern underlying any analysis of whether to extend the sphere of recovery for economic [page883] loss. In this appeal, however, the inherent nature of negotiations in this case place definable limits on the ultimate extent of liability so that concerns of indeterminacy are not determinative in this appeal.

58 Here, the class of potential claimants is limited to those persons that the Department directly

negotiated with. Although both La Forest and McLachlin JJ. rejected the "knowledge of the plaintiff" test in Norsk as noted in Hercules Managements, supra, at para. 37, knowledge of the plaintiff remains a policy factor that may militate against indeterminacy.

59 In addition, although the quantum of damages arising out of failed negotiations may be quite high, it is limited by the nature of the transaction being negotiated. As noted by the court below, Martel's claim is clearly restricted to the loss of an opportunity to conclude a 10-year lease renewal. While there are serious difficulties in valuing a lost opportunity, the extent of the loss has definable limits.

60 However, simply addressing indeterminacy does not represent the sole hurdle to extending a duty of care. This conclusion has caused concern and has been commented on. See Norsk, supra, at pp. 1067-68, per La Forest J.; Bow Valley, supra, at para. 55, per McLachlin J., and B. Feldthusen, "Liability for Pure Economic Loss: Yes, But Why?" (1999), 28 U. W. Austl. L. Rev. 84, at p. 87.

61 In light of the diverse array of factual circumstances that can fall under the moniker of pure economic loss, unique policy considerations may infuse the analysis of any given case. Indeed, notwithstanding the fact that indeterminacy does not rear its head sufficiently in this appeal, there are a number of ancillary policy considerations that necessitate precluding the extension of the tort of negligence into commercial negotiations. Even in the absence of any serious potential for indeterminate [page884] liability, these factors are sufficient to deny recovery notwithstanding the finding of proximity. What we have identified as ancillary policy considerations weighing against recovery are defined by the following five illustrations.

62 First, the very object of negotiation works against recovery. The primary goal of any economically rational actor engaged in commercial negotiation is to achieve the most advantageous financial bargain. As noted above, in the context of bilateral negotiation, such gains are realized at the expense of the other negotiating party. From an economic perspective, some authors describe negotiation as a zero-sum game involving a transference rather than loss of wealth: see Cherniak and How, supra, at p. 231; and B. Feldthusen, Economic Negligence: The Recovery of Pure Economic Loss (4th ed. 2000), at p. 14.

63 Perhaps following the traditional view that, at least in some circumstances, economic losses are less worthy of protection than physical or proprietary harm, it has been noted that the absence of net harm on a social scale is a factor weighing against the extension of liability for pure economic loss. That is to say, negotiation merely transfers wealth between parties. Although one party may suffer, another often gains. Thus, as an economic whole, society is not worse off: see Feldthusen, "Liability for Pure Economic Loss: Yes, But Why?", supra, at p. 102:

> ...many pure economic losses are qualitatively different from physical damage. They represent not social loss, as occurs when property is damaged or destroyed, but private loss when wealth is transferred from one party to another with nothing being lost overall. The plaintiff's loss will often be a competitor's gain. To hold the defendant liable for transfer losses as if they were true losses will over-deter useful conduct.

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64 Second, as Feldhusen notes in the above passage, to extend a duty of care to pre-contractual commercial negotiations could deter socially and economically useful conduct. The encouragement of economically efficient conduct can be a valid concern in favour of the extension of liability for pure economic loss. See Winnipeg Condominium, supra, at para. 37. Equally, in other circumstances, this goal may be a valid rationale against extending liability.

65 In essence, Martel claims that the appellant was negligent in not providing it with adequate information concerning the appellant's bargaining position or its readiness to conclude a renewal. The appellant's conduct in negotiating with Martel might be construed as "hard bargaining". The Department's agents displayed casual contempt towards Martel and its personnel as illustrated by broken appointments and general disregard of the minimal courtesy Martel could have reasonably expected. However indifferent the agents of the Department appear from the record, that by itself does not create a cause of action. Doubtless, the appellant's ability to assume such a position in relation to Martel was due to its dominant position in the Ottawa leasing market. The foregoing all point to the advantages enjoyed by the Crown, but do not point to liability.

66 In many if not most commercial negotiations, an advantageous bargaining position is derived from the industrious generation of information not possessed by the opposite party as opposed to its market position as here. Helpful information is often a by-product of one party expending resources on due diligence, research or other information gathering activities. It is apparent that successful negotiating is the product of that kind of industry.

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67 It would defeat the essence of negotiation and hobble the marketplace to extend a duty of care to the conduct of negotiations, and to label a party's failure to disclose its bottom line, its motives or its final position as negligent. Such a conclusion would of necessity force the disclosure of privately acquired information and the dissipation of any competitive advantage derived from it, all of which is incompatible with the activity of negotiating and bargaining.

68 Third, to impose a duty in the circumstances of this appeal could interject tort law as after-the-fact insurance against failures to act with due diligence or to hedge the risk of failed negotiations through the pursuit of alternative strategies or opportunities. This Court has previously expressed a reluctance to extend pure economic loss in this manner. See D'Amato, supra, at para. 51.

69 Notwithstanding Martel's hope that the negotiations would produce a favourable outcome, it could at any point have concluded that the Department was not serious or interested in concluding a renewal of the Martel Building lease, but simply delaying for an undisclosed reason and seeking other potential landlords. While Martel may have suffered from its innocence and optimism, at least some of the responsibility for the delays in communication evident in this appeal can be attributed to it. The retention of self-vigilance is a necessary ingredient of commerce.

70 Fourth, to extend the tort of negligence into the conduct of commercial negotiations would introduce the courts to a significant regulatory function, scrutinizing the minutiae of pre-contractual conduct. It is undesirable to place further scrutiny upon commercial parties when

other causes of action already provide remedies for many forms of conduct. Notably, the doctrines of undue influence, economic duress and unconscionability provide redress against bargains obtained as a result of [page887] improper negotiation. As well, negligent misrepresentation, fraud and the tort of deceit cover many aspects of negotiation which do not culminate in an agreement.

71 A concluding but not conclusive fifth consideration is the extent to which needless litigation should be discouraged. To extend negligence into the conduct of negotiations could encourage a multiplicity of lawsuits. Given the number of negotiations that do not culminate in agreement, the potential for increased litigation in place of allowing market forces to operate seems obvious.

72 For these reasons we are of the opinion that, in the circumstances of this case, any prima facie duty is significantly outweighed by the deleterious effects that would be occasioned through an extension of a duty of care into the conduct of negotiations. We conclude then that, as a general proposition, no duty of care arises in conducting negotiations. While there may well be a set of circumstances in which a duty of care may be found, it has not yet arisen.

73 As a final note, we recognize that Martel's claim resembles the assertion of a duty to bargain in good faith. The breach of such a duty was alleged in the Federal Court, but not before this Court. As noted by the courts below, a duty to bargain in good faith has not been recognized to date in Canadian law. These reasons are restricted to whether or not the tort of negligence should be extended to include negotiation. Whether or not negotiations are to be governed by a duty of good faith is a question for another time.

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2. Did the Court of Appeal err in finding that the Department owed Martel a duty of care in the tendering process and that this duty was breached?

(a) Introduction

74 The second branch of this case deals with the tendering process which followed the unfruitful negotiations. Martel alleged that the Department was negligent in failing to exercise due care in preparing the tender documents, and in evaluating Martel's bid made in response to the call for tenders. As mentioned above, the trial judge did not address the Department's liability, if any, arising from the tendering process. However, Desjardins J.A., in the Federal Court of Appeal, addressed this issue and found that the Department owed Martel a duty of care in the tender process under tort principles. This duty imposed upon the Department the "obligation to ensure fair treatment in the tenders by avoiding such factors as undisclosed preferences and awards of contracts to non-conforming bidders" (para. 37). Desjardins J.A. explained that this duty arose out of an implied contractual obligation to treat all bidders fairly.

75 The Court of Appeal held that the Department had breached its duty to treat Martel's bid fairly. Desjardins J.A. based this conclusion on the trial judge's following findings: (1) that the contiguous space requirement had not been required initially by the AECB and had been negligently added to the tender specifications; (2) that "a somewhat arbitrary assessment of fit-up costs appear[ed] to have been added to the financial analysis of the plaintiff's bid" (paras. 37 F.C. and 76 F.T.R.); (3) that some of the costs arbitrarily assessed to Martel's tender were

attributable to the contiguous space requirements; (4) that there had not been any mention of fit-up costs being required if the tenant stayed in the Martel building; and (5) that the costs of a secured card access system had been added to [page889] Martel's bid, and not to the Standard Life bid. Upon closer examination, it can be seen that the above findings related to both the preparation of the tender documents and the evaluation of the bid. Findings (1) and (4) related to the preparation of the tender documents, while findings (2), (3) and (5) related to the subsequent evaluation of the bid.

76 With respect, we believe that the Court of Appeal erred by conflating the drafting (or preparation) of the tender documents and the tender evaluation issues. The preparation of tender documents and the subsequent evaluation of bids involve different considerations, and each event must, to a certain extent, be analysed separately. As will be explained below, once the bids were submitted in response to the invitation to tender, the so-called Contract A was formed which imposed contractual obligations, both express and implied, on the parties involved in the tender process. While the evaluation of bids directly relates to the performance of this contract, the preparation of the tender documents on the other hand involves events which occurred before this contract was formed. Thus, we believe that the Department's liability with respect to the manner in which the tender documents were drafted, and the way in which the bids were subsequently evaluated, must be addressed separately.

77 In this connection, we note that counsel for Martel argued before our Court that the Department's duty in tort did not relate to its ability to estimate fit-up costs or evaluate the bids, but rather to its alleged failure to use reasonable care and diligence in drafting the tender specifications. More specifically, Martel contends that the Department was negligent in including the contiguous space as a requirement in the tender documents. In this Court, Martel took a narrower approach on the evaluation issue than did the Court of Appeal. [page890] However, we have reviewed the evaluation issue as dealt with in the Court of Appeal.

78 But before doing so, we should briefly recall the general principles of the law of tenders to set the stage for discussing the alleged negligence in the preparation of the tender documents and any liability arising in the evaluation of the bids. We will also review how the law of contract applies to the tender process in this case, as we find it important to discuss the nature of the tender process and the duties which generally flow from it. A discussion of Martel's negligence claim will then follow.

(b) The Tendering Process

(i) General Principles of the Law of Tenders

79 Any discussion of the duties or obligations arising from the tender process must begin with reference to The Queen in Right of Ontario v. Ron Engineering & Construction (Eastern) Ltd., [1981] 1 S.C.R. 111. This case established that an invitation to tender may constitute an offer to contract which, upon the submission of a bid in response to the call for tenders, may become a binding contract. Estey J. explained that this contract, which he labelled "Contract A", imposed certain obligations upon the contractor who had submitted a tender. He differentiated this contract from "Contract B", the ultimate construction contract resulting from the award of one of the tenders.

80 In M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd., [1999] 1 S.C.R. 619, this Court confirmed that Contract A also imposes obligations on the owner. It further explained that

Ron Engineering does not stand for the proposition that Contract A will always be formed, nor that the irrevocability of the tender will always be a term of such contract. Whether the tendering process creates a preliminary contract is dependant upon the terms and conditions of the tender call. This Court stated as follows, at para. 19:

[page891]

> What is important, therefore, is that the submission of a tender in response to an invitation to tender may give rise to contractual obligations, quite apart from the obligations associated with the construction contract to be entered into upon the acceptance of a tender, depending upon whether the parties intend to initiate contractual relations by the submission of a bid. If such a contract arises, its terms are governed by the terms and conditions of the tender call.

81 The Court also held that, while the terms stipulated in tender documents created express obligations in the context of Contract A, this contract, like all contracts, could also include implied obligations. The inclusion of implied terms may be based on custom or usage, as the legal incidents of a particular class or kind of contract, or based on the presumed intention of the parties where it is necessary to give a contract business efficacy or where it meets the "officious bystander" test: Canadian Pacific Hotels Ltd. v. Bank of Montreal, [1987] 1 S.C.R. 711, at p. 775; M.J.B. Enterprises, supra, at para. 27.

82 The tender documents involved in M.J.B. Enterprises included, as in the case at bar, a privilege clause stating that the lowest or any tender would not necessarily be accepted. The Court noted that in determining the intention of the parties, attention must be paid to the express terms of the contract. In light of the privilege clause, the Court rejected the proposition that the party who had instigated the tender call was required to accept the lowest compliant tender. The express language of the tender documents, which manifested a contrary intention, governed. However, an obligation to accept only compliant bids could be implied based on the presumed intention of the parties. This obligation was not incompatible with the privilege clause.

83 It is now well established that parties to a tender process may have reciprocal obligations arising from Contract A either expressly or impliedly. In the case at bar, Desjardins J.A. held that the appellant [page892] owed the respondent a duty of care in tort to treat all bidders fairly and equally. However, she explained that such duty arose out of a coextensive implied contractual obligation.

84 Various appellate courts have found the need to imply a contractual term into Contract A to treat all bidders fairly and equally. Best Cleaners and Contractors Ltd. v. The Queen, [1985] 2 F.C. 293 (C.A.), is often referred to as one of the earlier cases suggesting such a duty. Also, in Chinook Aggregates Ltd. v. Abbotsford (Municipal District) (1989), 35 C.L.R. 241, the British Columbia Court of Appeal unanimously held at p. 248 that the party calling for tenders was under a duty to "treat all bidders fairly and not to give any of them an unfair advantage over the others". Legg J.A., speaking for the Court, concluded that the owner had breached this implied contractual obligation by adopting a policy of preferring local contractors whose bids were within 10 percent of the lowest bid in awarding the contract, when that preference was not revealed by, nor stated in, the tender documents. The tenderers were not notified of this policy to avoid

alerting local contractors to the fact that they were afforded a preference. It was held that the privilege clause did not give the owner the right to attach an undisclosed condition to its offer.

85 The implied contractual duty of fair and equal treatment was also discussed in Martselos Services Ltd. v. Arctic College (1994), 111 D.L.R. (4th) 65 (N.W.T.C.A.), leave to appeal refused, [1994] 3 S.C.R. viii. The majority held that in order to protect the integrity of the bidding system, there should be "a duty to treat all bidders equally but [page893] still with due regard to the contractual terms incorporated into the tender call" (p. 71). See also: Northeast Marine Services Ltd. v. Atlantic Pilotage Authority, [1995] 2 F.C. 132 (C.A.); Tarmac Canada Inc. v. Hamilton-Wentworth (Regional Municipality) (1999), 48 C.L.R. (2d) 236 (Ont. C.A.); Vachon Construction Ltd. v. Cariboo (Reginal District) (1996), 136 D.L.R. (4th) 307 (B.C.C.A.); Health Care Developers Inc. v. Newfoundland (1996), 136 D.L.R. (4th) 609 (Nfld. C.A.). Many other lower courts have also recognized an implied contractual duty to treat all bidders fairly and equally: Murphy v. Alberton (Town) (1993), 114 Nfld. & P.E.I.R. 34 (P.E.I.S.C.T.D.); Kencor Holdings Ltd. v. Saskatchewan, [1991] 6 W.W.R. 717 (Sask. Q.B.); Colautti Brothers Marble Tile & Carpet (1985) Inc. v. Windsor (City) (1996), 36 M.P.L.R. (2d) 258 (Ont. Ct. (Gen. Div.)); Yorkton Flying Services Ltd. v. Saskatchewan (Minister of Natural Resources), [1995] 9 W.W.R. 184 (Sask. Q.B.). It should be noted that to the extent that any of the foregoing cases may be interpreted as suggesting that the lowest bid must be accepted despite the presence of a privilege clause, or that the irrevocability of the tender must form part of Contract A, we reiterate that such approach has clearly been rejected by this Court: M.J.B. Enterprises, supra.

(ii) Application of the Law of Tenders

86 Pursuant to the foregoing, we are of the view that the parties in the case at bar intended to initiate contractual relations by the call for and submission of the tender. The Department offered to consider bids for the lease of the AECB space through a two-stage tender process. An expression of interest first appeared in the Ottawa Citizen newspaper on October 27, 1992. Then, on November 26, the Department couriered to four parties, including Martel, a formal invitation to submit a tender for [page894] the AECB space requirement, together with the Lease Tender Document package.

87 While the tender documents contained detailed terms and conditions pertaining to the ultimate leasing contract to be entered into, they also included terms and conditions governing the relations of the parties under Contract A (see especially the Instructions to Offerors, the Statement of Requirements, and the Offer Form). The bidders were required to comply with the provisions, requirements and standards of the Lease Tender Document, as established by the Department (see clause 3.2 of the Instructions to Offerors). Tenderers were also instructed to include a security deposit with their sealed tender. In submitting a tender in response to the formal invitation, Martel accepted the Department's offer and agreed to comply with its requirements (see clauses 2.1 and 2.2.1 of the Offer Form). Following the analysis in Ron Engineering and M.J.B. Enterprises, Contract A clearly came into being in the circumstances of this case. Significantly, counsel do not dispute the emergence of Contract A.

88 In the circumstances of this case, we believe that implying a term to be fair and consistent in the assessment of the tender bids is justified based on the presumed intentions of the parties. Such implication is necessary to give business efficacy to the tendering process. As discussed above, this Court agreed to imply a term in M.J.B. Enterprises that only compliant bids would be accepted since it believed that it would make little sense to expose oneself to the risks

associated with the tendering process if the tender calling authority was "allowed, in effect, to circumscribe this process and accept a non-compliant bid" (para. 41). Similarly, in light of the costs and effort associated with preparing and submitting a bid, we find it difficult to believe that the respondent in this case, or any of the other three tenderers, would have submitted a bid unless it was understood by those involved that all bidders would be treated fairly and equally. This implication has a certain degree of obviousness to it to the extent that the parties, if questioned, would clearly agree that this obligation had been assumed. Implying an obligation to treat all [page895] bidders fairly and equally is consistent with the goal of protecting and promoting the integrity of the bidding process, and benefits all participants involved. Without this implied term, tenderers, whose fate could be predetermined by some undisclosed standards, would either incur significant expenses in preparing futile bids or ultimately avoid participating in the tender process.

89 A privilege clause reserving the right not to accept the lowest or any bids does not exclude the obligation to treat all bidders fairly. Nevertheless, the tender documents must be examined closely to determine the full extent of the obligation of fair and equal treatment. In order to respect the parties' intentions and reasonable expectations, such a duty must be defined with due consideration to the express contractual terms of the tender. A tendering authority has "the right to include stipulations and restrictions and to reserve privileges to itself in the tender documents" (Colautti Brothers, supra, at para. 6).

90 For ease of reference, we reproduce below the relevant clauses of the tender documents.

Instructions to Offerors

...

3. EVALUATION PROCESS

3.1 The evaluation of Offers received is an on-going process and the Lessee reserves the right to terminate any further consideration of any Offer at any time during the Acceptance Period.

...

3.4 In undertaking the financial analysis, the Lessee will discount all cash flows, including front-end costs, and incentives, as they happen over the original [page896] term of the Lease, (extensions are excluded). All cash flows are then depicted as a net present value cost to the Crown fixed as of the commencement date of the Lease.

(a) In completing the financial analysis, the Lessee will make certain estimates for this project, including, but not limited to, the following:

.1 fit-up costs (including but not limited to, all or part of the Unit Costs supplied for estimated quantities deemed necessary in Lessee's opinion to fulfil the fit-up requirements);

.2 moving costs;

.3 signage;

.4 screens; and,

.5 consultants.

(b) In addition to the above, in cases where the premises offered are currently under lease by the Lessee and it is estimated by the Lessee, in its sole opinion, that a temporary relocation of the occupants and/or furniture could become necessary to allow for the completion of all or any portion of the improvements to be made to the premises (this includes the improvements to be completed by both the Offeror and the Lessee), the Lessee may also make certain estimates of the additional costs expected to be incurred by the Lessee including, but not limited to, the following:

(aa) moving of furniture and equipment;

(bb) fit-up costs of temporary accommodation;

(cc)all rental costs of suitable temporary accommodation; and,

(dd) installation of telecommunications equipment.

(c) For the purpose of the financial analysis, the following provisions will apply:

(i) all costs estimated by the Lessee shall be final;

(ii) the measurements quoted in the Offer will be utilized;

(iii) with respect to any allowance which is unclear, the Lessee's decision on how to apply the allowance in the analysis shall be final.

3.5 Notwithstanding 3.3 above, the Lessee reserves the unqualified right to do a comparative evaluation of all Offers received and evaluate them based on considerations [page897] which in the sole opinion of the Lessee would yield to the Lessee the best value. This evaluation may be on such matters as, but not limited to, quality of space offered, the efficiency of the space offered, building design and access, and the level at which all requirements are met or achieved in comparison to the rental rate being requested.

4. ACCEPTANCE

4.1. The Lessee may accept any Offer whether it is the lowest or not or may reject any or all Offers. [Emphasis added.]

Moreover, the document referred to as "Statement of Requirements" outlined the type of space required:

5. SPACE

5.1 Category and amount of space required:

(a) Basic office space: approximately but not less than 7,420 contiguous square metres. [Emphasis added.]

91 The express terms of the tender call clearly conferred upon the Department significant latitude in evaluating the tenders. Not only did the Lease Tender Document include the standard privilege clause, but it also outlined factors which could be considered by the Department in

evaluating the tenders. Notably, the provisions of the Lease Tender Document explicitly left it up to the lessee to determine which fit-up costs were necessary (see clause 3.4(a).1), and indicated that the Department's cost estimates would be final (see clause 3.4(c)(i)). The breadth of the Department's discretion in analysing the bids is further highlighted by clause 3.5 of the Instructions to Offerors. This language is clear and unequivocal, and was included in the specifications which were sent to Martel.

92 While the Lease Tender Document affords the Department wide discretion, this discretion must nevertheless be qualified to the extent that all bidders must be treated equally and fairly. Neither the privilege clause nor the other terms of Contract A nullify this duty. As explained above, such an [page898] implied contractual duty is necessary to promote and protect the integrity of the tender system.

93 In assessing the competing bids, the Department engaged in a financial analysis. In the courts below, questions were raised with respect to the costs added to the respondent's bid relating to fit-ups, the contiguous space requirement, and a secured card access system.

94 Admittedly, $812,736 was added to the Martel bid for fit-up costs. However, as the Department pointed out, the Court of Appeal appears to have ignored that fit-up costs were also added to the other three bidders. In fact, $2,362,231.20 was added to the Commonwealth Building bid, $2,951,750.20 to the Constitution Square Tower II bid, and $1,808,179.80 to the Standard Life bid. These figures were derived from the Unit Price Tables submitted by each tenderer as part of their bid, using a general scenario to fit-up a 900 square metre area. This resulted in an average cost per square metre of fitted-up space. A certain percentage was then added uniformly to the four rates to account for increased costs that the Department had experienced in the past when using this computation.

95 We cannot find any breach of Contract A related to the addition of fit-up costs. The Department was expressly entitled to add fit-up costs which it deemed necessary. Furthermore, fit-up costs were added to all bids, using the same standard or method of calculation. In this regard, the Department complied with its implied contractual obligation to treat all bidders fairly and equally. A duty to treat all bidders fairly in this context means treating all bids consistently, applying assumptions evenly. There is no evidence of any colourable attempt to use fit-ups to achieve a desired result. In light of the trial judge's finding that "it was fit-up [page899] costs ... that made the plaintiff's bid the second lowest rather than the lowest bid" (para. 57), the respondent's claim is considerably weakened.

96 Martel also argued that, in evaluating its bid, the Department should have taken into account its recent expenditure of $1.4 million to improve the AECB's premises in the Martel Building. With respect, we disagree. Martel is essentially asking to be given special treatment based on its previous relationship with the Department. However, this would clearly give Martel an unfair advantage over the other bidders. It must be remembered that upon submitting a tender in response to the invitation to tender, the other three bidders also entered into Contracts A with the Department. Therefore, pursuant to the implied obligation of fair and equal treatment, the Department acted properly in disregarding any past or planned improvements of the Martel Building by not accounting for them in Martel's bid.

97 With respect to the costs related to the contiguous space specification, it cannot be maintained that these costs should not have been added to Martel's bid where such requirement was an express term of Contract A: Statement of Requirements, clause 5.1(a). In assessing

Martel's bid, the Department prepared two "scenarios" which illustrated the costs involved should the AECB remain in the Martel Building. The first scenario detailed the costs to be incurred should AECB be reorganized onto contiguous floors (Scenario A), while the second provided the figures to be added for non-contiguous space should the tenant remain in situ (Scenario B). At trial, when asked why Scenario A was ultimately chosen for the purpose of the [page900] calculation, Mr. Mahar explained that "Scenario A is what was required in the tender". Mr. Mahar also testified that "Scenario A follows the letter of the tender document. We had asked for 7,420 usable square metres of contiguous space".

98 Consistent with the principles canvassed above, we find that not only was the Department entitled to apply the contiguous space requirement to Martel's bid, but the Department was also in fact required to adopt that scenario consistent with the Lease Tender Document. The contiguous space requirement was an express term of Contract A. To ignore that requirement would have resulted in a violation of that provision. Moreover, as all other bidders were expected to take into account and to comply with the contiguous space requirement in responding to the tender, the Department was bound, under its implied contractual duty to treat all bidders fairly and equally, to apply this specification to Martel. Martel could not be given any unfair advantage based on its previous relationship with the Department. Thus, in subjecting Martel to the explicit words of the tender document, the Department fulfilled its obligation to all parties.

99 As discussed above, we believe that in conducting its financial analysis, the Department did not breach any duty by adding costs for fit-ups and contiguous space to Martel's bid. However, the addition of $60,000 solely to Martel's bid to account for a secured card system is problematic. At trial, Mr. Mahar explained that the costs for this option had been added to Martel's figures because the "other three buildings that [they] were looking at had that capability". However, the trial judge noted that "[t]his was not entirely true" since the Department "subsequently had to install systems in [page901] two of the Standard Life building elevators" (para. 60).

100 Given the clear provision included in the tender document which specified that the Department reserved to itself broad rights in evaluating the bids based on its own considerations, we do not find that the addition of such costs was problematic per se. However, the Department failed to add the secured card costs consistently to all bids. Consequently, the appellant breached its implied contractual duty to treat all bidders fairly and equally in this respect only.

101 However, counsel for the Department argued before our Court that the addition of the secured card system of $60,000 is a non-issue since the difference between the successful bid and Martel's bid was over $500,000. This leads us to the question of causation.

102 To be recoverable, a loss must be caused by the contractual breach in question. As noted above, the only breach of Contract A is limited to the addition of the security system costs to Martel's bid. However, we conclude that damages for this breach of Contract A are precluded for want of causation. We also find that the Department's breach did not cause Martel to lose a reasonable expectation of receiving Contract B. Even if the costs for a security system were deducted from Martel's bid (or also added to the Standard Life bid), the difference between the two bids would remain significant. While the trial judge noted that "it was fit-up costs ... that made the plaintiff's bid the second lowest rather than the lowest" (para. 57 (emphasis added)), the fit-up costs, as explained above, were added fairly and consistently to all bidders. At the end of the day, we also believe that Martel lost Contract B because Standard Life made a better

offer. In this respect, we note that Standard Life included compelling inducements in its bid which the Department discounted in evaluating that bid, as clause 3.4 of the Instructions to Offerors enabled [page902] the Department to do. In effect, Standard Life submitted a significant leasehold improvement allowance plus 18 months of free rent which considerably lowered its bid. While the tender document included a clause that the lowest or any bid would not necessarily be accepted, the Department properly exercised its discretion in awarding Contract B to Standard Life, whose bid in its opinion yielded the best value.

103 We conclude that Martel did not suffer any loss as a result of the conduct of the Department in the evaluation of the bids. The addition of the secured card access system costs by the Department to Martel's bid did not deprive Martel of an opportunity of being selected as the successful bidder.

104 In passing, we note that Desjardins J.A. also framed the loss in question as "the loss of opportunity to fairly participate in the tender" (para. 40). Assuming without deciding that the loss of opportunity to participate fairly is analytically different from, and independent of, the loss of a reasonable expectation of receiving the contract, it is arguable that the addition of the costs for the secured card system caused Martel to lose the opportunity to participate fairly (i.e., subject to equal treatment) in the tender. However, in the circumstances of this case, the addition of $60,000 to Martel's bid is of such negligible significance that damages would be nominal and judgement on this limited item is [page903] not warranted. Accordingly, we would not make any finding of recovery on this point.

(c) General Negligence Claims

(i) Evaluation of Tenders

105 While the tendering relationship is one which is defined by contract, Martel bases its cause of action on tort law. As discussed above with respect to negotiations, recognizing a duty of care in the tendering process would represent an extension of the categories under which recovery for pure economic loss has been granted. As noted above, the Federal Court of Appeal acceded to Martel's tort claim and accepted that the Department owed Martel a tortious duty of care arising out of the implied contractual obligation to treat all bidders fairly. In relation to the evaluation of the tenders, Desjardins J.A. held at para. 37 that the Department had breached its duty of care in tort to act fairly toward Martel based on the trial judge's findings of fact that "a somewhat arbitrary assessment of fit-up costs appear[ed] to have been added to the financial analysis of the plaintiff's bid"; that some of the costs arbitrarily assessed to Martel's tender were attributable to the contiguous space requirements; and that the cost of a secured card access system had been added to the Martel bid, and not to the Standard Life bid.

106 In our view, the enumeration of the alleged foregoing breaches clearly reveals that the contract analysis, as canvassed above, subsumes any duty of care that Martel seeks to have recognized under tort. In this connection, we acknowledge that it is well established that an action in tort may lie notwithstanding the existence of a contract. However, it is equally clear that in assessing whether a tortious duty should be recognized where a contract already defines the rights and obligations of the [page904] parties in a chosen relationship, courts will look to the contract as informing that duty. Nothing prevents reliance on a concurrent or alternative liability in tort if the contract does not limit or negative the right to sue in tort. Where concurrent liability in tort and contract exists a party may elect to bring an action in tort in place of an action for breach of contract: see Central Trust Co. v. Rafuse, [1986] 2 S.C.R. 147; Queen v. Cognos Inc.,

[1993] 1 S.C.R. 87; BG Checo International Ltd. v. British Columbia Hydro and Power Authority, [1993] 1 S.C.R. 12.

107 However, in the circumstances of this case, regardless of whether there exists a coextensive duty in tort to treat tenderers fairly and equally in evaluating the bids, Martel's tort claim cannot succeed for the same reasons that a contractual claim would fail. The duty of care alleged in tort in the case at bar is the same as the duty which is implied as a term of Contract A; this is not a case where Martel is suing in tort to avail itself of a more generous limitation period, or some other advantage offered only by tort law.

108 Finally, we note that Desjardins J.A. relied on two cases to support the view that a duty to treat all bidders fairly and equally has been recognized in the context of tort claims. However, we note that both cases have subsequently been reversed by appellate courts: Twin City Mechanical v. Bradsil (1967) Ltd. (1996), 31 C.L.R. (2d) 210 (Ont. Ct. (Gen. Div.)), rev'd (1999), 43 C.L.R. (2d) 275 (Ont. C.A.); Ken Toby Ltd. v. British Columbia Buildings Corp. (1997), 34 B.C.L.R. (3d) 263 (S.C.), rev'd (1999), 62 B.C.L.R. (3d) 308 (C.A.). In addition, reliance in tort was necessary because [page905] both cases involved situations where a subcontractor sought redress against the tender calling authority who had received bids from the general contractor. Since there was no privity of contract between the subcontractor and the owner, liability could only be founded in tort. In both cases, the appellate courts refrained from deciding whether or not a duty of care was owed in such situations, and preferred to limit their decisions to the fact that a breach could not be established. We believe that the issue of whether a duty of care can arise between a subcontractor and an owner must be left to a case in which it arises.

(ii) Drafting of Tender Documents

109 We now turn to the Department's alleged negligence in drafting the tender documents. Counsel for Martel focussed on this issue and argued that the requirement for contiguous space had been carelessly inserted into the tender specifications. Martel submitted that without this carelessly added term, no further fit-up assessment would have been necessary.

110 In the Court of Appeal, Desjardins J.A. found that the Department had been negligent in failing to exercise due care in preparing the tender documents. She stated, at para. 37, that:

> [The trial judge] also found that some of the costs arbitrarily assessed to the [respondent]'s bid were attributable to the tender's contiguous space requirements, which had not been required initially by AECB and which, obviously, had been negligently added to the tender specifications by Mr. Mahar, resulting in a higher bid for the [respondent]. [Emphasis added.]

In Desjardins J.A.'s view, this further supported the conclusion that the Department had breached its duty to act fairly towards Martel. Our response is two-fold.

[page906]

111 First, while Desjardins J.A.'s foregoing passage appears to suggest otherwise, the trial judge did not find that the contiguous space requirements had been negligently added to the tender specifications. This conclusion was reached only in the Federal Court of Appeal. That is

not to say that the trial judge did not comment on the preparation of the tender documents. On the contrary, she noted that in the past, Mr. Mahar had only prepared one or two other expression of interest advertisements and that he had been working from a precedent which called for tenders on contiguous space. Reed J. added at para. 36: "if one were seeking new space for the AECB, it would only make sense to require that the space be contiguous" (emphasis in original). We question whether Martel's submission that the contiguous space requirement had been mistakenly added to the specifications can be supported by the trial judge's findings. Martel conceded that contiguous space was a requirement with which all other bidders needed to comply. Therefore, it would be difficult to accept (though we make no finding on this issue) that this requirement was carelessly added in the tender specifications.

112 Second, contrary to Desjardins J.A.'s conclusion, the costs attributable to the contiguous space requirements did not "resul[t] in a higher bid for [Martel]" (para. 37). On the contrary, as we noted above, the trial judge explicitly concluded that "it was fit-up costs over and above these [costs attributable to the tender's contiguous space requirements] that made the plaintiff's bid the second lowest rather than the lowest" (para. 57). Thus, as the Department points out, the short answer to this debate is that the inclusion of the contiguous space requirements and the fit-up costs associated thereto did not, at the end of the day, make Martel's bid more expensive than the Standard Life bid. As mentioned above, in conducting its evaluation, the Department calculated fit-ups, both on the basis of contiguous space in the Martel Building, and on the basis of the AECB remaining in situ. Scenario B illustrates that the Department concluded that fit-up costs would still have been required even if [page907] the tenant remained in situ in the Martel Building. Absent the contiguous space requirement, Martel's bid would still have been approximately $300,000 more expensive than the successful bid.

113 In any event, we conclude that the Department did not owe Martel a duty of care in drafting the tender specifications. Martel's claim that the tender specifications were prepared negligently alleges a duty in an area not previously recognized. To determine whether the sphere of recovery for pure economic loss should be extended to cover the circumstances surrounding the preparation of the tender specifications in this case, the Anns two-step analysis must be applied.

114 Assuming without deciding that sufficient proximity existed between the parties, any prima facie duty of care would be negated by policy considerations. Indeed, considerations unique to the tendering process nullify any duty of care sought by Martel. First and foremost, we agree with the Department that it would call into question the integrity of the tender process if, by reason of a past relationship with, or special knowledge of, a potential bidder, there could be an enforceable obligation to take the interests of that particular bidder into account. While Martel argues that a duty of care would not entail taking into account the interests of a particular bidder, we note that all of its arguments relate to factors that are specific to its previous relationship with the Department.

115 In effect, all of Martel's submissions on this point pertain to information it obtained during the course of its previous negotiations with the Department. [page908] During the course of its negotiations with the Department, there was no suggestion that further fit-ups would be required in the Martel building or that the AECB, as tenant, desired contiguous space. Therefore, Martel alleges that the tender specifications "did not reflect the reality of the situation". While Martel concedes that once the bids were opened the Department could not hold private conversations with any bidder, it nevertheless maintains that the Department should have advised it beforehand of the requirements that would be considered.

116 With respect, we do not find this line of argument very persuasive. Once the Department decided to proceed by way of tender, it was not required to take into account its past relationship with Martel. To recognize that the Department owed a duty to Martel would be inconsistent with the basic rationale of tendering. As explained in M.J.B. Enterprises, supra, this rationale seeks to replace negotiation with competition. In this respect, it is imperative that all bidders be treated on an equal footing, and that no bidder be provided differential treatment on the basis of some previous relationship with the party making the call for tenders. It would defeat the purpose of fair competition to allow one bidder to be given some advantage from its previous dealings. The submission of a tender bid requires a great deal of effort and expense. Parties should at the very least be confident that their initial bids will not be skewed by some underlying advantage in the drafting of the call for tenders conferred upon only one potential bidder.

117 A party calling for tenders has the discretion to set out its own specifications and requirements. This includes the discretion to change its mind with respect to the terms or preferences that were discussed in the course of non-committal negotiations. Tender requirements are not negotiable. To decide otherwise would in fact force the party making the call for tenders to continue in its negotiations [page909] with one potential bidder even after those negotiations have proven unfruitful.

118 The terms of the call may grant a great deal of discretion upon the tender calling authority in evaluating the bid, and tenderers must make various assumptions and estimations in submitting a tender. As such, inherent risks are involved in submitting a tender bid, risks of which Martel was aware. Martel cannot by reason of its previous relationship with the Department expect or require under general principles of negligence some special position when it comes to tendering. Absent negligent misrepresentation upon which Martel would have relied to its detriment in entering into Contract A, we believe that it would be contrary to the underlying principles of the tender regime to accept that the Department owed it a duty of care in drafting the tender documents.

119 Finally, recognizing a duty of care in such a context could have significant repercussions on the tendering process and create many uncertainties. In this case, contiguous space was explicitly required in the tender specifications. Martel is essentially asking this Court to import a common law duty of care in the drafting of the call for the express purpose of avoiding this contractual provision. Accepting Martel's argument would have the effect of providing an out for those people who do not submit compliant bids. Indeed, other unsuccessful, non-compliant bidders could attempt to sue in negligence and argue that various terms of Contract A "did not reflect the reality of the situation". We believe that this further consideration clearly illustrates why a duty of care should not be imposed on the tender calling authority in drafting the tender documents.

[page910]

I. Disposition

120 In our view, the Federal Court of Appeal erred in allowing the respondent's claim. Accordingly, the appeal is allowed, the judgment of the Court of Appeal is set aside with costs in this Court and the courts below, and the judgment of the Federal Court, Trial Division, is

restored.

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