S.C.C. No.: 32460

IN THE SUPREME COURT OF CANADA
(On Appeal from the Court of Appeal for British Columbia)

BETWEEN:

TERCON CONTRACTORS LTD.

Appellant
(Respondent)

-and-

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA, BY HER MINISTRY OF TRANSPORTATION AND HIGHWAYS

Respondent
(Appellant)

FACTUM OF THE APPELLANT
(Tercon Contractors Ltd., Appellant)
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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TABLE OF CONTENTS

Part I – Statement of Facts

A. Overview

1. This appeal is about preserving the integrity of the tendering system and ensuring that a government tendering authority cannot employ a broadly worded 'no claims' clause to reserve to itself the privilege of unlimited discretion to accept non-compliant bids, to treat bidders unfairly and ignore - even deliberately and in bad faith - the promised evaluation criteria, thereby obviating the tendering process.

2. The Appellant ("Tercon"), submitted a compliant tender on a $26 million project giving rise to a tendering contract. The Ministry of Transportation and Highways (the "Ministry") preferred the tender of a joint venture of two contractors, one of whom was not eligible. Concerned that open acceptance of the joint venture tender might draw Tercon's attention and legal action, the Ministry falsified documents, falsely disclosed, and concealed that the successful tender was an ineligible joint venture.

3. The Trial Judge found that the Ministry had committed fundamental breaches of the tendering contract which she characterized as egregious. These breaches were not covered by the 'no claims' clause which the Ministry had incorporated into its tender documents and, alternatively, it would be unreasonable and unfair to enforce the clause. The Court of Appeal reversed, stating the 'no claims' clause covered fundamental breaches and giving effect to it. Judicial intervention was not the answer. Contractors would have to continue to bid in the hope that government acted in good faith.

4. Tercon submits the Court of Appeal erred:

- Its interpretation renders the Ministry's duty of fairness in the evaluation of tenders meaningless and destroys the premise – the integrity of the tendering system - upon which the parties intended to govern their relations. Having called tenders, the Ministry cannot have intended it had no enforceable obligation to evaluate tenders as promised - fairly and in good faith.

- There is implied in tendering contracts an obligation of good faith and fair dealing. The Ministry cannot use the 'no claims' clause as a license to abandon its performance of that obligation without liability – that would be to sanction what amounts to equitable fraud. Nor can the Ministry be permitted to resort to the 'no claims' clause when it concealed the truth - that would be to sanction

conduct amounting to fraudulent concealment depriving Tercon of the opportunity for judicial review.

- Government is held to a standard of good faith and fairness. Ministry officials cannot by private law of contract exempt government from liability for conduct which is unfair and in bad faith. Nor can they exempt government from liability when they, unfairly and in bad faith, obviate a tendering process mandated by legislation.

B. Initial Contracting Process - Design-Build Model

5. On February 9, 2000, the Ministry issued to the public a Request for Expressions of Interest ("RFEI") for the design and construction of a 25 kilometer highway (the Kincolith Extension Project). The Ministry received Expressions of Interest from six Proponents, including Tercon and Brentwood Enterprises Ltd. ("Brentwood").

Ref.: Judgment of Supreme Court below, at para. 5, [Record, Vol. I, Tab 2]

6. The Ministry's evaluation panel rated the proponents and shortlisted Tercon as first ranked. Brentwood was not included in the short list and was evaluated fifth.

Ref.: Judgment of Supreme Court below, at para. 6, [Record, Vol. I, Tab 2]

C. Approval of Alternative Contracting Process - Alliance Model

7. On July 7, 2000, the Ministry informed the six RFEI respondents that it did not intend to proceed on a design-build basis. Instead, the Ministry would design the project and issue to them a Request for Proposals ("RFP").

Ref.: Judgment of Supreme Court below, at para. 7, [Record, Vol. I, Tab 2]

8. By provincial statute, a public tender process with award to the lowest bidder is required for all highway construction unless an alternative competitive contracting process is authorized by the Minister. In October, the Minister issued his determination approving an alternative tendering process. By RFP – with competition based primarily on price – a preferred proponent would be identified, with whom good faith negotiations would ensue in the expectation that a construction contract generally as set out in the RFP would be executed. The Minister stipulated that only the original six Proponents would be eligible to submit proposals.

Ref.: Judgment of Supreme Court below, at paras. 7-8, 15, [Record, Vol. I, Tab 2]; *Ministry of Transportation and Highways Act*, R.S.B.C. 1996, at c. 311, s.23; Ministry Authorization, October 19, 2000, at s.3, [Record, Vol. I, Tab 9]

D. Request for Proposals – Original Six Only

9. On January 15, 2001, the Ministry issued its RFP to the original six Proponents. Consistent with the Minister's stipulation, paragraph 2.8(a) of the RFP provided:

> Eligibility
> Only the six Proponents, qualified through the RFEI process, are eligible to submit responses to this RFP. Proposals received from any other party shall not be considered.

Ref.: Judgment of Supreme Court below, at para. 13, [Record, Vol. I, Tab 2]
Request for Proposals, Kincolith Extension Project, January 15, 2001, [Record, Vol. II, Tab 1]

E. Relevant Terms of the RFP

10. Paragraph 5.1 described the manner and sequence by which the evaluation would be carried out and confirmed only those criteria would be used. Paragraph 5.2 of the RFP stipulated that a proposal's non-compliance could be waived by the Ministry provided that the waiver did not result in unfairness to the other Proponents. Paragraph 5.4 provided for interviews of the first and second ranked Proponents in accordance with Paragraph 6. Paragraph 6 stipulated that these two Shortlisted Proponents were not permitted to amend their original proposals in a way that would affect their relative ranking. Following the interviews, the Ministry could select either Shortlisted Proponent to commence good faith negotiations with, according to which was judged most likely to complete the Project within the overall objectives. If agreement could not be reached, the Ministry could terminate and commence negotiations with the other Shortlisted Proponent.

Ref.: Request for Proposals, Kincolith Extension Project, January 15, 2001, at ss. 5, 6, [Record, Vol. II, Tab 1]

11. The RFP also contained the following 'no claims' clause at paragraph 2.10:

> No Claim
> Except as expressly and specifically permitted in these Instructions to Proponents, no Proponent shall have any claim for compensation of any kind whatsoever, as a result of

participating in this RFP, and by submitting a Proposal each Proponent shall be deemed to have agreed that it has no claim.

Ref.: Judgment of Supreme Court below, at para. 140, [Record, Vol. I, Tab 2]
Request for Proposals, Kincolith Extension Project, January 15, 2001, para. 2.10, [Record, Vol. II, Tab 1]

F. Purposeful Obfuscation of the Joint Venture Relationship

12. Brentwood, one of the original six Proponents, lacked expertise in drilling and blasting, a deficiency apparent to other Proponents. With the delay in issuing the RFP, Brentwood was faced with limited bonding capacity due to commitments to other projects, a shorter construction period, potential unavailability of subcontractors, limited equipment and the perceived increased difficulty of the work. The President of Brentwood was considering not bidding.

Ref.: Judgment of Supreme Court below, at para. 18, [Record, Vol. I, Tab 2]

13. On January 22, 2001, Brentwood met with Emil Anderson Construction Co. ("EAC"), not one of the original six, to discuss a joint venture response. On January 24, Brentwood – believing a joint venture proposal might be ineligible under paragraph 2.8(a) unless prior approval was obtained – wrote to the Project Director, Tom Tasaka, to advise that it was forming a joint venture with EAC in order to submit a more competitive price. This letter was seen by both Tasaka and his assistant, Nazir Kurji.

Ref.: Judgment of Supreme Court below, at paras. 19-21, [Record, Vol. I, Tab 2]
January 24 Letter from Brentwood, [Record, Vol. II, Tab 2]

14. On January 26, 2001, after Brentwood and EAC had signed a pre-bid agreement, Tasaka spoke with Brentwood. Tasaka informed Brentwood that the qualified Proponent was Brentwood; the proposal had to be in Brentwood's name; and the make-up of the team would be reviewed at the evaluation stage. Tasaka understood a joint venture between Brentwood/EAC was not eligible to submit a proposal.

Ref.: Judgment of Supreme Court below, at para. 23, [Record, Vol. I, Tab 2]
Pre-Bid Agreement, [Record, Vol. II, Tab 3]

15. On January 29, 2001, Brentwood sent to its bonding company (AXA), a form of undertaking of Surety together with a copy of the executed Pre-Bid Agreement.

Ref: Judgment of Supreme Court below, para. 25, [Record, Vol. I, Tab 2]
January 29 fax – Brentwood to AXA, [Record, Vol. II, Tab 4]

16. Prior to the RFP closing date, there were other calls between Brentwood and Tasaka, the specifics of which are not recorded. Brentwood perceived Tasaka had advised that the joint venture proposal had to be submitted in the name of Brentwood with the expectation that the contract would be awarded to the joint venture if Brentwood was the successful Proponent. Brentwood and EAC jointly prepared their proposal, which was structured on a 50/50 arrangement reflecting their pre-bidding agreement. The legal name on the submission was Brentwood. EAC was simply described as a "major member" of the team without any specification as to the legal relationship between Brentwood and EAC. EAC was also described as a subcontractor for "roadbuilding", but no work details or price for EAC were listed where this information was required to be provided for true subcontractors (in Part B2 of the submission).

Ref.: Judgment of Supreme Court below, at para. 24-25, [Record, Vol. I, Tab 2]

17. The arrangement between Brentwood and EAC "bore no similarity to a standard subcontractor agreement" and, "the role of EAC was purposefully obfuscated to avoid an apparent conflict with section 2.8(a) of the RFP Instructions to Proponents."

Ref.: Judgment of Supreme Court below, at para. 25, [Record, Vol. I, Tab 2]

G. Evaluation and Selection Process – No Rejection

18. Four proposals were submitted to the Ministry, including the one in the name of Brentwood and one from Tercon.

Ref.: Judgment of Supreme Court below, at para. 35, [Record, Vol. I, Tab 2]

19. The evaluation process under the RFP called for the evaluation of the proposals by a Project Evaluation Panel ("PEP") appointed by the Ministry. An Independent Review Panel ("IRP") was to examine the fairness and consistency with which the PEP evaluated, selected and

shortlisted the candidates, and to ensure that the PEP selected a Preferred Proponent in accordance with the RFP documents. There were six steps to the evaluation.

Ref.: Judgment of Supreme Court below, at para. 35, [Record, Vol. I, Tab 2]

20. After reviewing the Brentwood proposal, Kurji gave it a Step 1 pass, despite knowing Brentwood intended to form a joint venture with EAC from Brentwood's January 24 letter. Kurji did not question the identity of the Proponent.

Ref.: Judgment of Supreme Court below, at para. 36, [Record, Vol. I, Tab 2]

21. On March 5, 2001, the chair of the PEP met with the IRP. The IRP questioned why EAC had not been listed as a subcontractor in Part B2 of Brentwood's proposal. As a result, on March 7 the chair of the PEP sent a letter to Brentwood requesting clarification of the "structure of the business arrangements" between Brentwood and EAC. Later the same day, Brentwood responded after discussing the letter with Tasaka. In its response, Brentwood explained the business arrangement was structured on a pre-bid agreement to form a 50/50 joint venture if successful in the RFP, and that the proposal was jointly prepared on that basis. On March 8, the Brentwood response was circulated to all members of the PEP.

Ref.: Judgment of Supreme Court below, at paras. 39-43, [Record, Vol. I, Tab 2];
March 7 letter to Brentwood, [Record, Vol. II, Tab 5];
March 7 letter from Brentwood in response, [Record, Vol. II. Tab 6]

22. On March 12, 2001, the PEP held the Step 6 interview with representatives of Brentwood and EAC, and confirmed the joint venture structure of Brentwood's proposal. Following the interviews, the PEP prepared its Step 6 Report which identified a joint venture of Brentwood/EAC as the Preferred Proponent.

Ref.: Judgment of Supreme Court below, at paras. 51-53, [Record, Vol. I, Tab 2];
Original Step 6 Report, [Record, Vol. II, Tab 7]

23. Later the same evening, the PEP met with the IRP and presented the signed Step 6 Report. Tasaka, the Project Director, was present and did not apprise anyone of his previous conversations with Brentwood or of Brentwood's January 24 letter, and gave no indication that a joint venture was ineligible.

Ref.: Judgment of Supreme Court below, at paras. 54 and 133, [Record, Vol. I, Tab 2]

H. Joint Venture Concealed from Unsuccessful Proponents – No Rejection

24. On March 13, 2001 the Chair of the PEP met with Tasaka, Kurji, representatives of the Ministry, and other stakeholders. The purpose was to present the view of the PEP and to identify the Brentwood/EAC as the Preferred Proponent. Concern was expressed about the Brentwood joint venture, specifically that the selected Proponent could not be named as the joint venture between Brentwood and EAC. It was decided that the successful Proponent would be referred to as Brentwood only, with no mention of the joint venture. It was also decided to send a letter to Brentwood naming it (only) as the successful Proponent, with a copy to the unsuccessful Proponents, and not to debrief the unsuccessful Proponents at that time. The letter was sent later the same day. As found by the B.C. Supreme Court, the effect of those decisions was:

> ... to ignore the substantive implications of EAC's involvement and the relationship with Brentwood; to follow Tasaka's original plan and consider the named proponent as the successful proponent regardless of the relationship; and not to indicate to others that the successful proponent was Brentwood/EAC as a joint venture. [Emphasis added]

Ref.: Judgment of Supreme Court below, at para. 55, [Record, Vol. I, Tab 2];
March 13 letter to Brentwood copied to other Proponents, [Record, Vol. II, Tab 8]

I. Every Reference to Joint Venture Deleted from PEP and IRP Reports

25. On the same day, because it was recognized that a joint venture of Brentwood/EAC was not eligible to submit a proposal, the Chair of the PEP sent the Step 6 Report (previously signed by all members of the PEP and given to the IRP) to Kurji for revision. It was then decided between Kurji and the Chair to delete every reference to "EAC" and "joint venture" from the report. The members of the PEP concurred in the revision. The revised report was circulated for signature. The Chair signed it March 27 and the last signature is dated May 16.

Ref.: Judgment of Supreme Court below, at para. 56, [Record, Vol. I, Tab 2];
Evidence of Nyland, Trial Transcripts, at pp. 104-105 Vol. 1, [Record, Vol. I, Tab 7];
Revised Step Six Report, [Record, Vol. II, Tab 12]

26. At the request of Kurji, the Chair of the IRP also agreed to remove every reference from its report to "joint venture" and "EAC". The revised signed report was sent to Tasaka March 22.

Ref.: Judgment of Supreme Court below, at para. 59, [Record, Vol. I, Tab 2]

27. On March 14 2001, Tasaka contacted legal counsel to represent the Ministry and informed him of the joint venture between Brentwood /EAC.

Ref.: Judgment of Supreme Court below, para. 57, [Record, Vol. I, Tab 2]

J. Negotiations with Preferred Proponent – No Rejection

28. On March 19, 2001, the first meeting in the negotiation phase was held with representatives of the Preferred Proponent. The first matter for discussion was the joint venture. Brentwood presented a copy of the Pre-Bid Agreement and a letter requesting that the name of the proponent be changed from Brentwood to "Brentwood Enterprises/Emil Anderson Joint Venture." Tasaka did not disclose he had previously discussed this matter with Brentwood. Following his original plan, he spoke in favour of granting the contract to the joint venture. The formal meeting minutes record instructions to the Ministry's counsel to "review proponent eligibility requirements specified in the RFEI and RFP documents and advise MOTH and Brentwood on an acceptable structure for [EAC] inclusion in the Brentwood team as a joint venture partner."

Ref.: Judgment of Supreme Court below, at para. 60, [Record, Vol. I, Tab 2];
March 19 Letter from Brentwood to Ministry, [Record, Vol. II, Tab 9];
March 19 meeting minutes, [Record, Vol. II, Tab 10]

29. On March 22, 2001, Tasaka met with representatives of the Ministry and other stakeholders to update them on the status of the negotiations. The group discussed the potential of "...a complaint from unsuccessful proponents on the joint venture structure of the successful proponent...". This referred to the arrangements that the group knew were in place as a result of the Pre-Bid Agreement between Brentwood and EAC and their knowledge that a joint venture was ineligible. It was decided to refer the matter to legal counsel to decide how to minimize future risk exposure from this issue.

Ref.: Judgment of Supreme Court below, at para. 61, [Record, Vol. I, Tab 2];
March 22 meeting minutes, [Record, Vol. II, Tab 11]

K. Seeking to Avoid Exposure – No More Mention of a Joint Venture

30. By March 29, 2001, a consensus developed that the award should be made in the name of Brentwood, rather than the joint venture, in order to avoid exposure. All agreed that the joint venture was not an eligible Proponent, but wanted to structure an agreement acceptable to both Brentwood and EAC. To this end, a conference call was held with representatives of Brentwood, EAC, their legal counsel and the Ministry lawyer. During the conference call, it became apparent to the Ministry lawyer that the Ministry's position that the contract could not be in the name of Brentwood and EAC as a joint venture, was not what EAC expected based on advice received from Tasaka.

Ref.: Judgment of Supreme Court below, at paras. 65-66, [Record, Vol. I, Tab 2]
March 29 Email from Kurji to Nyland, [Record, Vol. II, Tab 13]

31. In the end, the solution agreed upon by everyone was that the award would be made in the name of Brentwood only. Brentwood and EAC would conclude a separate agreement to formalize their internal agreement – the contract would be performed and the profits and losses shared equally between them. The Ministry insisted that the final form of the construction contract contain a provision by which Brentwood was required to enter into a contract with EAC that incorporated each term of the construction contract.

Ref.: Judgment of Supreme Court below, at paras. 69-75, [Record, Vol. I, Tab 2]
April 3 meeting minutes, [Record, Vol. II, Tab 14]

L. Tercon Seeks Damages - Supreme Court Agrees

32. On January 9, 2002, Tercon began legal proceedings to recover damages. The Supreme Court below first concluded that the RFP process, despite its name, was in reality a tender call intended to create Contract A relations with compliant bidders on the *Ron Engineering* model; and secondly that the Ministry had accepted a tender from an ineligible bidder, and by doing so, had fundamentally breached its Contract A obligations to Tercon. The Court awarded damages to Tercon.

Ref.: Judgment of Supreme Court below, at paras. 88, 95, 126, 138-139, 196, [Record, Vol. I, Tab 2]

33. As explained by the Supreme Court below, the Brentwood tender was from an ineligible Proponent, a joint venture between Brentwood and EAC. This was material non-compliance:

> From Brentwood's point of view, the joint venture with EAC allowed Brentwood to put forward a more competitive price than contemplated under the RFEI proposal. This went to the essence of the tendering process. Allowing Brentwood to jointly venture with EAC gave a competitive advantage to Brentwood. The Brentwood proposal was not valid. It was not capable of acceptance. [Emphasis added]

Ref.: Judgment of Supreme Court below, at paras. 126 and 139, [Record, Vol. I, Tab 2]

34. The Supreme Court below took note of the following conduct of the Ministry in relation to the Brentwood tender:

- When the PEP questioned the arrangement between Brentwood and EAC, Brentwood unequivocally confirmed the joint venture between them. The PEP concluded in its Step 6 Report that the shortlisted proponents were Tercon and "a joint venture of [Brentwood] and [EAC]". This report was delivered to the IRP.

- The real relationship between Brentwood and EAC was smothered through a number of steps including: revision to the Step 6 report; naming only "Brentwood" in the formal selection notification letter sent to all proponents; and removal of reference to the joint venture in the draft IRP report.

- The Project Director (Tasaka) informed no one, aside from his right hand man Kurji, about his conversations with Brentwood, the January 24 letter sent by Brentwood (advising of its pending joint venture proposal), his understanding that a joint venture was ineligible, or that he was following his "original plan" to consider the named Proponent (Brentwood) as the successful Proponent regardless of EAC's involvement as a joint venture partner.

- The Ministry was concerned that unsuccessful Proponents would sue and to minimize the risk it instructed its lawyer to integrate the joint venture within an acceptable structure. In this way, the guise of Brentwood continued into Contract B. At the same time EAC was required to agree with all the terms of Contract B in a separate internal agreement between Brentwood and EAC which the Ministry did not want to see.

- The Ministry sought legal advice as to how to minimize future risk exposure if there arose a complaint from unsuccessful Proponents on the joint venture structure of the successful Proponent.

Ref.: Judgment of Supreme Court below, at paras 23, 47, 54-55, 60-62, 65, 133-138, [Record, Vol. I, Tab 2]

35. In light of this conduct, the Trial Judge concluded the Ministry breached its implied duty of fairness to Tercon – it changed the terms of eligibility to Brentwood's competitive advantage. The Ministry breached the tendering contract in two respects: by accepting a bid that was incapable of acceptance for non-compliance, and by treating Tercon unfairly in the evaluation process by approving a non-compliant bid.

Ref.: Judgment of Supreme Court below, at paras. 126-127, 138-39, [Record, Vol. I, Tab 2]

36. The Trial Judge also declined to give effect to the 'no claims' clause - the clause was ambiguous and it could not be conceived that Tercon would have agreed that there would be no recourse against the Ministry for acceptance of a non-compliant bid or that the Ministry could fundamentally breach the contract and expect the bidders to accept that they had no legal recourse. Alternatively, it was neither fair nor reasonable to enforce the clause. Enforcement "would render the duty of fairness that underlies the dealings between the owner and bidder meaningless". The conduct of the Ministry deprived Tercon of any benefit under the contract. The Ministry acted egregiously. In these circumstances the court would not aid the Ministry by holding Tercon to the clause.

Ref.: Judgment of Supreme Court below, at paras. 146, 148-50, [Record, Vol. I, Tab 2]

M. Decision of Court of Appeal

37. In setting aside the Trial Judgment, the Court of Appeal opined that the 'no claims' clause barred Tercon's claim for damages. In its view, the parties mutually intended to exclude liability for the Ministry's fundamental breaches. Accordingly, Tercon could not advance that it would be unconscionable, unfair or unreasonable to enforce the bargain between the parties.

Ref.: Judgment of Court of Appeal below, at paras. 18, 21, [Record, Vol. I, Tab 4]

38. The Court of Appeal acknowledged the exclusion clause thwarted the public interest in an orderly and fair scheme for tendering in the construction industry, but rejected that the answer lay in judicial intervention.

Ref.: Judgment of Court of Appeal below, at para. 19, [Record, Vol. I, Tab 4]

39. The Court of Appeal also rejected the Trial Judge's second ground for refusing enforcement – the Ministry's conduct – stating it was not the Ministry's conduct but the exclusion clause which deprived Tercon of redress for its loss.

Ref.: Judgment of Court of Appeal below, at para. 20, [Record, Vol. I, Tab 4]

Part II – Statement of Issues

Issue 1: **Construction of Tendering Contracts – Was it Intended that Liability for Breach of the Duty of Fairness be Excluded?**

Issue 2: **Tendering Contracts – Can Liability for Breach of the Duty of Fairness be Excluded?**

Issue 3: **Tendering Contracts – Is there a Duty of Good Faith? Can Liability for its Breach be Excluded?**

Issue 4: **Government and Public Policy – Can Government Undermine Public Policy and its Own Legislation by Private Law of Contract?**

Part III – Statement of Argument

Issue 1: **Construction of Tendering Contracts – Was it Intended that Liability for Breach of the Duty of Fairness be Excluded?**

40. At the heart of this Appeal lies the following 'no claims' clause in a tendering contract:

> Except as expressly and specifically permitted in these Instructions to Proponents, no Proponent shall have any claim for compensation of any kind whatsoever, as a result of participating in this RFP, and by submitting a Proposal each Proponent shall be deemed to have agreed that it has no claim.

Ref.: Request for Proposals, Kincolith Extension Project, January 15, 2001, at para. 2.10, [Record, Vol. II, Tab 1]

41. The question is whether this clause, properly construed, excludes liability for the Ministry's deliberate selection of an ineligible Proponent:

- in breach of the express term in paragraph 2.8(a);
- in breach of the requirement that the Ministry conduct the evaluation process fairly and consistently;

- in breach of the requirement that the Ministry would not conceal, but fairly and honestly advise unsuccessful proponents of its selection;
- in breach of the requirement that the Ministry act in good faith; and
- when the Ministry had no authority to obviate the tendering process mandated by legislation by selecting an ineligible Proponent.

42. The Trial Judge addressed the issue of whether, as a matter of construction, the 'no claims' clause applied to the breaches, and opined it could not be construed to do so. In coming to this conclusion she considered the following rules of contract interpretation:

> (a) Clear language required to exclude liability: "It would take very clear language to effect a result whereby a party could be assured that irrespective of his non-performance of contractual obligations, he could benefit from an exclusion type clause... [E]xclusion clauses are regarded with hostility and judged with exacting standards because of the high degree of improbability that the contracting party would have agreed to such a limitation of liability."
>
> (b) The entire contract considered and given meaning: A clause must be interpreted "...within the context of the contract as a whole..."
>
> (c) Ambiguity resolved against the drafter: "... [T]he clause must be read *contra proferentem*..."
>
> (d) Commercial reality and a sensible commercial result achieved: "[C]ommercial reality is often the best indicator of contractual intention and that if a given construction would lead to an absurd result, the assumption is that the parties could not have intended the clause to apply in this way."
>
> Ref.: Judgment of the Supreme Court below, at para. 147, [Record, Vol. I, Tab 2]

43. In *Consolidated Bathurst Export Ltd. v. Mutual Boiler & Machinery Insurance Co.*, Justice Estey stated:

> Where words may bear two constructions, the more reasonable one, that which produces a fair result, must certainly be taken as the interpretation which would promote the intention of the parties. Similarly, an interpretation which defeats the intentions of the parties and their objective in entering into the commercial transaction in the first place should be discarded in favour of an interpretation ... which promotes a sensible commercial result.
>
> Ref.: *Consolidated Bathurst Export Ltd. v. Mutual Boiler & Machinery Insurance Co.* (1979), 112 D.L.R. (3d) 49 (S.C.C.), at p.58, [BA, Vol. I, Tab 7]

44. To achieve a sensible commercial result, the context and commercial purpose of the contract must be considered. This principle was expressed in *Reardon Smith Line Ltd. v. Yngvar Hansen-Tangen* as follows:

> No contracts are made in a vacuum: there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as "the surrounding circumstances" but this phrase is imprecise: it can be illustrated but hardly defined. In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.

Ref.: *Reardon Smith Line Ltd. v. Yngvar Hansen-Tangen,* [1976] 1 W.L.R. 989 (H.L.), at p. 995-996, [BA, Vol. I, Tab 38]

1.1 Trial Judge's Interpretation Consistent With Contract Purpose - Fair Procurement

45. The context and commercial purpose of this contract was the procurement of public work by way of a tendering process which required the fair and consistent evaluation of compliant bids. Tendering is a system of procurement that substitutes competition for negotiation. It is valued for its efficacy in obtaining the best price and for affording bidders the right to compete for contracts under a fair and transparent system. Competitive bidding requires a corresponding accountability in those who receive bids and exercise discretion in evaluating them. This eliminates opportunities for abuses and promotes honesty, economy and above board dealings in public procurement.

Ref.: Devonshire, Peter "*Contractual Obligations in The Pre-Award Phase of Public Tendering*" (1998), 36 Osgoode Hall Law Journal 2003, at pp. 234-236, [BA, Vol. II, Tab 4]

46. In a number of decisions, this Court has developed a contractual model of the tendering process that accounts for and clarifies the rights and obligations of both invitors and tenderers. As expressed in *Martel,* this model recognizes that contractual obligations are owed by invitors to all bidders that submit compliant tenders, including the obligation of fair and consistent evaluation of compliant bids:

> In the circumstances of this case, we believe that <u>implying a term to be fair and consistent in the assessment of the tender bids</u> is justified based on the presumed

> intentions of the parties. Such implication is necessary to give business efficacy to the tendering process... Implying an obligation to treat all 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. [Emphasis added]

Ref.: *Martel Building Ltd. v. Canada,* [2000] 2 S.C.R. 860 (S.C.C.) at para. 88, [BA, Vol. I, Tab 27];
Ontario v. Ron Engineering & Construction (Eastern) Ltd., [1981] 1 S.C.R. 111 (S.C.C.), [BA, Vol. I, Tab 35];
M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd., [1999] 1 S.C.R. 619 (S.C.C.), [BA, Vol. I, Tab 26];
Double N Earthmovers Ltd. v. Edmonton (City), [2007] 1 S.C.R. 116 (S.C.C.), [BA, Vol. I, Tab 9]

47. The development of tendering law has been overlaid with and informed by public policy concerns. As expressed by this Court in *Ron Engineering*, "the integrity of the bidding system must be protected where under the law of contracts it is possible so to do."

Ref.: *Ontario v. Ron Engineering & Construction (Eastern) Ltd.*, *supra*, at p. 121, [BA, Vol. I, Tab 35]

48. An interpretation of the 'no claims' clause which excludes the Ministry's liability for accepting a non-compliant bid makes the contractual duty of fair and consistent treatment meaningless and defeats the entire purpose of the tendering contract. Such an interpretation does not lead to a sensible commercial result – it is a commercially absurd result which cannot have been the intention of the parties. As argued by Professor Devlin, citing *Reardon Smith Line* and *Investors Compensation Scheme v. West Bromwich Building Society* in support:

> Thus if the conduct of one party leaves the other party without any benefits, "substantially nullifying" or "eviscerating" them, then this would suggest that the text does not capture their genuine and reasonable expectations. As Laskin, C.J.C. argued in 1975, there must be a "residue of obligation" and if the text suggests that this is not the case, then it can be questioned whether the text fully captures the parties' reasonable expectations ... Such an approach does not ignore the express terms; it seeks to contextualize them in the overall relationship between the parties so as to ensure that the fruits of the contract are not completely destroyed for one of the parties.

Ref.: Devlin, Richard F., "*Return of the Undead: Fundamental Breach Disinterred*", (2007) 86 The Canadian Bar Review 1 at pp. 33-34, [BA, Vol. II, Tab 3];
Investors Compensation Scheme Ltd. v. West Bromwich Building Society, [1998] 1 W.L.R. 896 (H.L.), at pp. 912-13, [BA, Vol. I, Tab 22];
Reardon Smith Line Ltd. v. Yngvar Hansen-Tangen, supra, at p. 995-997, [BA, Vol. I, Tab 38]

49. The Trial Judge was of the same view when she concluded:

> In this case, it is inconceivable that, given the preparation, detail, and expense required to submit a bid based upon elaborate tender documents, the practice and legal requirement to accept only compliant bids, and the eligibility requirements in the RFP, that Tercon would have agreed that the Ministry could accept a non-compliant bid without legal recourse against the Ministry for damages for breach of contract. It is equally inconceivable that the Ministry could expect to fundamentally breach the contract and expect a bidder to accept that they had no legal recourse after it had submitted a compliant bid itself…
>
> Although both parties are sophisticated, it could not have been contemplated that there would be no recourse if the Ministry accepted a non-compliant bid: to suggest otherwise would change the base of the tender system without notice. Enforcement of the exclusion clause in these circumstances would not give effect to the intention of the parties and would render the duty of fairness that underlies the dealings between the owner and bidder meaningless. [Emphasis added].

Ref.: Judgment of Supreme Court below, at paras. 148 and 150, [Record, Vol. I, Tab 2]

1.2 Trial Judge's Interpretation Consistent With Legislative Intent

50. The importance of maintaining the integrity of the tendering process is all the more relevant in this case in light of provincial legislation requiring (absent good faith ministerial or cabinet authorization) all highways contracts to be procured by public tender and awarded to the lowest bidder. The policy reasons for what became section 23 of the B.C. *Ministry of Transportation & Highways Act*, were set forth by Justice Brenner as follows:

> The policy reasons for s. 49 are in my view clear. The ultimate result of the tendering process is the expenditure of substantial sums of public money annually. Section 49 of the *Act* is designed to ensure that the MOTH carries out this process in a manner that is fair to tenderers and that the taxpayers of British Columbia obtain the maximum value for the public moneys so expended. On any given tender this requires that it be awarded to the lowest qualified bidder. In a broader sense, this requires that tenders be awarded to the lowest qualified bidder so that future prospective bidders will have a high level of confidence in the integrity of the bidding process and hence will be willing to spend the

> time and money necessary in bid preparation. If this confidence is eroded, future public tenders will produce fewer bidders and the interest of the people of British Columbia in obtaining the maximum value for the expenditure of their money will be compromised. [Emphasis added]

Ref.: *Tercon Contractors Ltd. v. British Columbia* (1991), 9 C.L.R. (2d) 197 (B.C.S.C.), at paras. 29-31, [BA, Vol. I, Tab 43]; affd. [1994] B.C.J. No. 2658 (B.C.C.A.), [BA, Vol. I, Tab 44]

51. These policy considerations were not displaced in the present case when the Minister authorized an alternative contracting process. The terms of the Minister's authorization stipulated: "only those firms who are short listed as a result of the EOI evaluation will be eligible to submit proposals to the Project". This led to the insertion of section 2.8(a) into the RFP.

Ref.: Request for Proposals, Kincolith Extension Project, January 15, 2001, at para. 2.8, [Record, Vol. II, Tab 1]

52. The 'no claims' clause cannot have been mutually intended to cover the selection of an ineligible proponent when the Ministry officials had no authority to make such a selection. From a public law perspective they must act with procedural fairness and cannot act in bad faith, standards from which they cannot exempt themselves or government. The tendering contract was entered into based on these fundamental assumptions.

1.3 Trial Judge's Interpretation Consistent With Protecting and Maintaining the Integrity of the Bidding System

53. The Trial Judge recognized it cannot have been contemplated that the 'no claims' clause exclude liability for breach of the Ministry's duty of fairness as this would "change the base of the tender system without notice" and "render the duty of fairness that underlies the dealings between the owner and bidder meaningless." This is consistent with this Court's judgment in *M.J.B. Enterprises* in relation to privilege clauses, where Justice Iacobucci said:

> Although the respondent has not disputed the trial judge's finding that the Sorochan tender was non-compliant, the respondent argues that the privilege clause gave it the discretion to award the contract to anyone, including a non-compliant bid, or to not award the contract at all, subject only to a duty to treat all tenderers fairly. It argues that because it accepted the Sorochan tender with the good faith belief that it was a compliant bid, it did not breach its duty of fairness.

> The words of the privilege clause are clear and unambiguous ... However, the privilege clause is only one term of Contract A and must be read in harmony with the rest of the tender documents. To do otherwise would undermine the rest of the agreement between the parties.
>
> Ref.: *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd., supra*, at paras. 43 - 45, [BA, Vol. I, Tab 26]

54. In reversing the trial judgment, the Court of Appeal opined that the 'no claims' clause was intended to shield the Ministry from liability:

> "In my respectful opinion, the judge followed a rational sequence in her analysis on a correct understanding of the law. I differ from her in only one crucial respect, and that is the interpretation of the clause. I appreciate the force of the argument advanced by the respondent that the integrity of the bidding process, especially for public works, should be given high value . . . But I find the words of the exclusion clause so clear and unambiguous that it is inescapable that the parties intended it to cover all defaults, including fundamental breaches." [Emphasis added]
>
> Ref.: Judgment of Court of Appeal below, at para. 14, [Record, Vol. I, Tab 4]

55. The Court of Appeal declined to read the 'no claims' clause "in harmony with the rest of the tender documents". This ignores the approach taken by this Court in *M.J.B. Enterprises Ltd.*

1.4 Effect of the Court of Appeal's Interpretation - No Fairness or Integrity

56. The Court of Appeal recognized that the "integrity of the bidding process, especially for public work, should be given high value" and that the effect of enforcement of the 'no claims' clause meant thwarting the public interest in an orderly and fair scheme for tendering. Even so, it declined to construe the disputed clause in a manner consistent with what must have been the reasonable expectation of the parties - that the contract would be interpreted in a manner consistent with the Ministry's reliance, in calling tenders, on the fairness and integrity of the tendering system. In the Court of Appeal's view, "the answer lies not in judicial intervention in commercial dealings like this but in the industry's response to all-encompassing exclusion clauses".

> Ref.: Judgment of Court of Appeal below, at paras. 14 and 19, [Record, Vol. I, Tab 4]

57. The Court of Appeal considered the 'no claims' clause unambiguous and was unprepared to read the clause *contra proferentum* as the Trial Judge did. The most logical reading of the clause is Tercon will have no claim for compensation if it is not selected as a result of the Ministry's fair and reasonable evaluation as prescribed in the RFP. Alternatively, and as contended for by the Ministry, it might mean Tercon has no claim if it is not selected, even as a result of the Ministry conducting its evaluation and exercising its discretion in a manner either not prescribed in or prohibited by the RFP. The former meaning is to be preferred as the latter is repugnant to the tendering contract and is so all-encompassing as to include fraud and bad faith (equitably fraudulent) conduct. The burden is on the Ministry to persuade the court the meaning it contends for reflects the intention of the parties: "[i]t is for the party seeking to rely on the exemption clause to show that the clause, on its true construction, covers the obligation or liability which it purports to restrict or exclude."

Ref.: Judgment of the Court of Appeal below, at para. 14, [Record, Vol. I, Tab 4]
Judgment of the Supreme Court below, at para. 148, [Record, Vol. I, Tab 2]
Chitty, Joseph Jr. *Chitty on Contracts,* vol. I, 29th ed. London: Sweet & Maxwell, 2004, at para. 14-018, [BA, Vol. II, Tab 9]

58. The Court of Appeal's interpretation of the 'no claims' clause is at odds with principles of interpretation of exclusion clauses. Nor does it account for the purpose or context of the tendering contract or accept the court's role in preserving the integrity of the tendering process. It cannot have been the intention of the parties that the government be exempt from liability for each and every breach set forth in paragraph 41 herein – conduct that amounts to bad faith and equitable fraud.

Issue 2: **Tendering Contracts – Can Liability for Breach of the Duty of Fairness be Excluded?**

59. After concluding, as a matter of construction, it was not intended that the 'no claims' clause survive fundamental breach, the Trial Judge continued in the alternative, to consider whether it was appropriate for the court to refuse to enforce the clause. She concluded:

> However, reason not to enforce the clause exists in the circumstances here. According to the approach in ***Guarantee*** and ***Hunter,*** whether the exclusion clause survives fundamental breaches depends on whether the result is unconscionable or unfair, unreasonable, or contrary to public policy.... A party should not be allowed to commit a

> fundamental breach sure in the knowledge that no liability can attend to it and the court should not be used to enforce a bargain that a party has repudiated (***Hunter*** at 509-510). While unconscionability is usually considered in situations of unequal bargaining power, there can be situations of equal bargaining power that still give rise to an unconscionable result (***Hunter*** at 515-516).
>
> In the circumstances here, it is neither fair nor reasonable to enforce the exclusion clause....
>
> Ref.: Judgment of Supreme Court below, at para. 149 - 150, [Record, Vol. I, Tab 2]

60. The Court of Appeal disagreed and held that the 'no claims' clause was enforceable:

> But if, as I have found, the parties clearly intended exclusion for fundamental breaches, then it is difficult to say that it would be unconscionable, unfair or unreasonable to enforce the bargain between sophisticated parties on a roughly equal footing.
>
> Ref.: Judgment of Court of Appeal below, at para. 18, [Record, Vol. I, Tab 4]

61. With respect, the parties here were not on roughly equal footing. The terms of the tendering contract are not negotiated but presented on a take it or leave it basis. Because the tendering process is "heavily weighted in favour of the invitor", it is necessary for the court to ensure invitors do not abuse their greater bargaining position to undermine the integrity of the tendering process. It is submitted that tendering contracts represent a class of contracts that should be recognized as contracts of adhesion as franchise contracts have been.

> Ref.: *Shelanu Inc. v. Print Three Franchising Corp.* (2003), 64 O.R. (3d) 533 (Ont. C.A), at para. 58, [BA, Vol. I, Tab 40]
> *Graham Industrial Services Ltd. v. Greater Vancouver Water District* (2004), 25 B.C.L.R. (4th) 214 (B.C.C.A.), at paras. 25, 26, 28, [BA, Vol. I, Tab 13]
> citing *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd., supra,* at para. 41, [BA, Vol. I, Tab 26]

62. According to *Hunter* and *Guarantee,* once it is determined that, on the true construction of the contract, the exclusion clause covers the breach, the court then inquires whether it would be unconscionable, unfair, unreasonable or otherwise contrary to public policy to enforce the clause. The judgment of the Court of Appeal is tantamount to a rule of law that "true construction" is the end of the inquiry in cases of equal bargaining power, even when there is deliberate breach and deception by government – and even in the context of a tendering contract,

under which government's performance is to be held to a standard of fairness and (as will be submitted) good faith.

Ref.: *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423 (S.C.C.) at para. 52, [BA, Vol. I, Tab 15],
Hunter Engineering Co. v. Syncrude Canada Ltd., [1989] 1 S.C.R. 426 (S.C.C.), [BA, Vol. I, Tab 21]

63. The judgment of the Court of Appeal also amounts to an interpretation of Chief Justice Dickson's judgment in *Hunter* as restricting the court's ability to refuse to enforce exclusion clauses to unconscionable transactions where the remedy is rescission of the contract. It is submitted Chief Justice Dickson's judgment does not limit the court's equitable jurisdiction to such an extent and, in any event, the Court of Appeal has disregarded the judgment of Justice Wilson who made it clear that this Court's jurisdiction is not so limited.

2.1 Exclusion Clauses – No Enforcement When Unconscionable, Unfair, Unreasonable

64. In *Hunter,* this Court was divided as to the correct approach to the enforcement of exclusion clauses. In Justice Wilson's view:

- The Court will refuse to give effect to an exclusion clause if it would be unfair and unreasonable, in the context of the particular breach that occurred, "such as a fundamental breach". The assessment is undertaken at the time of the breach.
- The Court's authority is founded upon public policy and "the need for the courts (apart from the interests of the parties) to balance conflicting values inherent in our contract law...".

Chief Justice Dickson drafted his judgment as a response to Justice Wilson's judgment, agreeing with the result, but not her analysis. In his view:

- As a tool for relieving parties from unfair and unreasonable exclusion clauses, fundamental breach is deficient. On the other hand, unconscionability, " ... as might arise from situations of unequal bargaining power between the parties... allows the courts to focus expressly on the real grounds for refusing to give force to a contractual term said to have being agreed to by the parties."

Ref.: *Hunter Engineering Co. v. Syncrude Canada Ltd., supra,* at paras. 57-60, 152-153, 158-160, [BA, Vol. I, Tab 21]

65. It is submitted that Chief Justice Dickson's judgment is consistent with the general principle of unconscionability as explained by Professor Waddams in his text *The Law of Contracts* (2d ed. 1984). Chief Justice Dickson stated:

> Only where the contract is unconscionable, as might arise from situations of unequal bargaining power between the parties, should the courts interfere with agreements the parties have freely concluded. The courts do not blindly enforce harsh or unconscionable bargains and, as Professor Waddams has argued, the doctrine of "fundamental breach" may best be understood as but one manifestation of a general underlying principle which explains judicial intervention in a variety of contractual settings. Explicitly addressing concerns of unconscionability and inequality of bargaining power allows the courts to focus expressly on the real grounds for refusing to give force to a contractual term said to have been agreed to by the parties. [Emphasis added]

Ref.: *Hunter Engineering Co. v. Syncrude Canada Ltd., supra,* at para. 59, [BA, Vol. I, Tab 21];
Waddams, S.M., *The Law of Contracts* (2d Edition). Toronto: Canada Law Book Inc., 1984, at pp. 326, 329, 336-337, 348-349, 352-353, 358-360, 398-405, [BA, Vol. II, Tab 12];
Waddams, S.M. *The Law of Contracts* (5th Edition). Toronto: Canada Law Book Inc., 2005, at para. 439-442, 447, 453, 456, 472, 477-478, 482-483, 538-548, [BA, Vol. II, Tab 13]

66. This general principle of unconscionability referred to by Chief Justice Dickson, was envisaged by Lord Denning in a number of cases. The question asked is whether it is unfair or unreasonable, and thus unconscionable, to enforce the impugned clause. In Lord Denning's words:

> The time may come when this process of "construing" the contract can be pursued no further. The words are too clear to permit of it. Are the courts then powerless? Are they to permit the party to enforce his unreasonable clause, even when it is so unreasonable, or applied so unreasonably, as to be unconscionable? When it gets to this point, I would say, as I said many years ago: "there is the vigilance of the common law which, while allowing freedom of contract, watches to see that it is not abused".... It will not allow a party to exempt himself from his liability at common law when it would be quite unconscionable for him to do so.

Ref.: *Gillespie Brothers & Co. v. Roy Bowles Transport Ltd.*, [1973] Q.B. 400 (C.A.), [BA, Vol. I, Tab 11];
Waddams, S.M. *The Law of Contracts* (2d Edition), *supra*, at pp. 358–359, 403-404, [BA, Vol. II, Tab 12];
Waddams, S.M. *The Law of Contracts* (5th Edition), *supra*, at para. 482-483, 546, [BA, Vol. II, Tab 13]

67. The difference between the judgment of Chief Justice Dickson and Justice Wilson diminishes when Chief Justice Dickson's judgment is read as adopting a general principle of unconscionability where the impugned clause (or the entire agreement) is unenforceable (rescinded) if it is so unfair or unreasonable as to be unconscionable. Although Justice Wilson would assess the unfairness or unreasonableness at the time of the breach, this is not different, in practice, from Chief Justice Dickson's approach in which subsequent events are relevant to an assessment of the unfairness, measured at the time of contracting. This is consistent with the approach taken by this Honourable Court in *Guarantee* as explained in *Shelanu*. In *Guarantee,* this court stated:

> [W]hether fundamental breach prevents the breaching party from continuing to rely on an exclusion clause is a matter of construction rather than a rule of law. The only limitation placed upon enforcing the contract as written in the event of a fundamental breach would be to refuse to enforce an exclusion of liability in circumstances where to do so would be unconscionable, according to Dickson, C.J. or unfair, unreasonable or otherwise contrary to public policy, according to Wilson, J. [Emphasis added]

Ref.: *Guarantee Co. of North America v. Gordon Capital Corp., supra*, at para. 52, [BA, Vol. I, Tab 15]
Shelanu Inc. v. Print Three Franchising Corp., supra, at para. 35, [BA, Vol. I, Tab 40]

68. The remaining difference between the two judgments is in relation to fundamental breach. Chief Justice Dickson would "lay the doctrine ... to rest" whereas Justice Wilson would use it to mark off "the boundaries of tolerable conduct." Regardless, fundamental breach should be a major factor in determining whether it would be unconscionable, unfair or unreasonable to enforce an exclusion clause.

Ref.: *Hunter Engineering Co. v. Syncrude Canada Ltd., supra*, at paras. 59, 159, [BA, Vol. I, Tab 21]

69. It is submitted that even where the parties are of equal bargaining strength, the question to be asked is: In all of the circumstances surrounding the particular breach, is it so unreasonable and unfair so as to be unconscientious for a person to take advantage of the protection of an exclusion clause?

70. Testing the enforceability of contracts and exclusion clauses in this manner recognizes that the tool at the court's disposal is the refusal to countenance equitable fraud. Equitable fraud was described in *Performance Industries v. Sylvan Lake Golf & Tennis Club Ltd.*, as follows:

> What amounts to "fraud or the equivalent of fraud" is, of course, a crucial question. In *First City Capital Ltd. v. British Columbia Building Corp.* (1989), 43 B.L.R. 29 (B.C.S.C.), McLachlin C.J.S.C. (as she then was) observed that "in this context 'fraud or the equivalent of fraud' refers not to the tort of deceit or strict fraud in the legal sense, but rather to the broader category of equitable fraud or constructive fraud... . Fraud in this wider sense refers to transactions falling short of deceit but where the Court is of the opinion that it is unconscientious for a person to avail himself of the advantage obtained" (p.37). Fraud in the "wider sense" of a ground for equitable relief "is so infinite in its varieties that the Courts have not attempted to define it", but "all kinds of unfair dealing and unconscionable conduct in matters of contract come within its ken": *McMaster University v. Wilchar Construction Ltd.*... [Emphasis added.]

Ref.: *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, [2002] 1 S.C.R. 678 (S.C.C.), at para. 39, [BA, Vol. I, Tab 36];
McCamus, John. *The Law of Contracts.* York University: Irwin Law Inc. 2005, at p.405, [BA, Vol. II, Tab 11]

71. The judgments of Chief Justice Dickson and Justice Wilson are consistent with this approach. They resonate with "unfair, unreasonable, unjust and unconscionable", which terms attend all descriptions of equitable jurisdiction to refuse enforcement of bargains in circumstances of equitable fraud "where the court is of the opinion that it is unconscientious for a person to avail himself of the advantage obtained." In the context of tendering, *Chinook Aggregates Ltd. v. District of Abbotsford* is consistent with this approach:

> But where the appellant attaches a condition to its offer, as the appellant did in the case at bar, and that condition is unknown to the respondent, the appellant cannot successfully contend that the privilege clause made clear to the respondent bidder that it had entered into a contract on the express terms of the wording of that clause. There was no consensus between the parties that the wording of the privilege clause governed. It would be inequitable to allow the appellant to take the position that the privilege clause governed when the appellant had reserved to itself the right to prefer a local contractor whose bid was within the 10 percent of the lowest bid. [emphasis added]

Ref.: *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd., supra,* at para. 39, [BA, Vol. I, Tab 36];
Chinook Aggregates Ltd. v. District of Abbotsford (1989), 40 B.C.L.R. (2d) 345 (B.C.C.A.), at p. 349-350, [BA, Vol. I, Tab 6]

Hunter Engineering Co. v. Syncrude Canada Ltd., *supra*, at paras. 153 and 160, [BA, Vol. I, Tab 21];
McMaster University v. Wilchar Construction Ltd. et al., [1971] 3 O.R. 801 (Ont. H.C.J.), at para. 46, [BA, Vol. I, Tab 29];
Ryan v. Moore, [2005] 2 S.C.R. 53 (S.C.C.), at para. 74, [BA, Vol. I, Tab 39];
H.F. Clarke Ltd. v. Thermidaire Corporation Ltd., [1976] 1 S.C.R. 319 (S.C.C.), at pp. 392, 398, [BA, Vol. I, Tab 17];
Waters v. Donnelly (1884), 9 O.R. 391 (C.L.), at p. 402, [BA, Vol. II, Tab 1];
Morrison v. Coast Finance Ltd. et al (1965), 55 D.L.R. (2d) 710 (B.C.C.A.), at p, 713, [BA, Vol. I, Tab 31]

2.2 Enforcement of Exclusion Clauses – the Role of Conduct

72. The conduct of the party seeking to enforce an exclusion clause is central to a court's inquiry into whether enforcement would amount to equitable fraud. In the present case, in concluding it was "neither fair nor reasonable to enforce the exclusion clause", the Trial Judge considered the Ministry's conduct from January 26, 2001 until the award of Contract B in the name of Brentwood. In summary, Ministry officials, knowing that they could not accept a bid from the Brentwood/EAC joint venture, concealed through a number of steps the true relationship between Brentwood and EAC. They:

- Advised Brentwood/EAC on how to structure its RFP submission (submission in the name of Brentwood only, not in the actually name of the joint venture) so as to give the impression the bid met the Minister's requirements;

- Divulged falsely to the unsuccessful proponents that the successful proponent was Brentwood rather than the Brentwood/EAC joint venture, despite actual knowledge to the contrary;

- Falsified the PEP's final signed Step 6 Report by substituting a revised report, which removed all references to the Brentwood/EAC joint venture in order to conceal that the successful proponent was the joint venture;

- Sought advice from legal counsel as to how to minimize the risk of liability for having accepted a non-compliant bid;

- Failed to inform legal counsel of the January 24 letter from Brentwood or subsequent conversations with Brentwood in order to implement the original plan to consider Brentwood the successful proponent, not the Brentwood/EAC joint venture known to be ineligible; and

- Awarded Contract B in the name of Brentwood – did not use the name Brentwood/EAC so as to avoid liability.

Ref.: Judgment of Supreme Court below, at paras. 55, 61-64, 68-70, 73, 133-138, 150, [Record, Vol. I, Tab 2]

73. The Ministry's conduct amounted to a colourable attempt to achieve a desired result, a circumstance this Honourable Court alluded to but was not faced with in *Martel.*

Ref.: *Martel Building Ltd. v. Canada*, *supra*, at para. 95, [BA, Vol. I, Tab 27]

74. It is submitted the Ministry's conduct was so unreasonable and unfair as to be unconscionable. The Trial Judge concluded:

> In the circumstances here, it is neither fair nor reasonable to enforce the exclusion clause.... The conduct of the Ministry deprived the plaintiff of any benefit under the contract, including the opportunity to conclude a contract B and to eventually construct the Kincolith Extension. The Ministry acted egregiously when it knew or should have known that the Brentwood bid was not compliant and then acted to incorporate EAC indirectly in contract B whilst ensuring that this fact was not disclosed. These circumstances do not lead this court to give aid to the defendant by holding the plaintiff to this clause.

Ref.: Judgment Supreme Court below, at para. 150, [Record, Vol. I, Tab 2]

75. The Court of Appeal held that the Ministry's conduct was not relevant:

> What is missing from this analysis is any connection between that behavior and the breach and the resultant loss. It appears that the Ministry officials may have downplayed EAC's role to avoid liability for a contract A breach. However, their conduct did not deprive the respondent of redress for the breach; the exclusion clause does that. Moreover, the true state of affairs became obvious as the process moved from contract A to contract B, and there was evidence that the respondent was aware of EAC's involvement. So if there was a ruse, it was ineffective and collateral to the main problem, which was acceptance of a non-complaint bid.

Ref.: Judgment of the Court of Appeal below, at para. 20, [Record, Vol. I, Tab 4]

76. With respect, the observations of the Court of Appeal are flawed:

- To say that it was the 'no claims' clause, not the Ministry's conduct, which deprived Tercon of redress for its loss misses the issue before it, i.e., whether the

Ministry ought to be precluded from relying on it on the basis that its conduct in relation to its breaches of the tendering contract were unconscionable, unfair, unreasonable or otherwise contrary to public policy.

- Tercon's loss was a result of the Ministry's deliberate selection, unfairly and in bad faith, of a Proposal from an ineligible Proponent coupled with deliberate deception – a deliberate failure to fairly and honestly disclose to the plaintiff what it had done. This deception continued beyond the award of contract B and the completion of the Project and was not unveiled until during the course of the trial.

- The Ministry officials did not merely "downplay" EAC's role. It was found by the Trial Judge that "the real relationship between Brentwood and EAC was smothered through a number of steps including: revision to the step 6 report; naming only "Brentwood" in the formal selection notification letter sent to all proponents; and removal of the joint venture in the final draft of the IRP report."

- The statement that "the true state of affairs became obvious as the process moved from contract A to contract B" is without evidentiary foundation. Tercon became aware of EAC's "involvement", but only in the sense its representatives attended the March 12 interview with representatives of Brentwood.

- The statement of the Court of Appeal questioning whether there was a "ruse", and suggesting if there was, it was ineffective, is unsupported by the evidence.

Ref.: Judgment of the Supreme Court below, at paras. 55, 60-61, 65, 73, 133-36,150, [Record, Vol. I, Tab 2]

77. In the context of a tendering contract with a duty of fairness, the conduct of the Ministry is relevant and justified the Trial Judge's refusal to give effect to the exclusion clause. As recognized by this Honourable Court in *Mason v. Freedman*: when a person "seeks to avoid a contract under a clause introduced for his relief, his conduct and his reasons for seeking to escape are matters of interest to the court."

Ref.: *Mason v. Freedman,* [1958] S.C.R. 483 (S.C.C.), at p. 487, [BA, Vol. I, Tab 28]

78. Fairness is defined as "honesty, impartiality, justice". It would be unconscientious indeed if the Ministry could abandon performance of a fundamental obligation of fairness without liability, by way of an exclusion clause. Such conduct "is sufficiently divergent from community standards of commercial morality" that, in the words of Justice Wilson, it would be unreasonable and unfair to enforce the 'no claims' clause. It would be unconscientious and in the broad sense of that word – unconscionable.

Ref.: Judgment of Supreme Court below, at paras. 138, 150, [Record, Vol. I, Tab 2]
Hunter Engineering Co. v. Syncrude Canada Ltd., supra, at para. 152, [BA, Vol. I, Tab 21]
Brown, L., ed., *The New Shorter Oxford English Dictionary,* (Clarendon Press, 1993), [BA, Vol. II, Tab 8]
Harry v. Kreutziger (1978), 95 D.L.R. (3d) 231 (B.C.C.A.), at para. 241, [BA, Vol. I, Tab 18]

2.3 Exclusion Clauses – No Enforcement if Contrary to Public Policy

79. The sort of unconscientious conduct engaged in by the Ministry in the present case is what Justice Wilson in *Hunter* had in mind when she said "I believe, however, that there is some virtue in a residual power residing in the court to withhold its assistance on policy grounds in appropriate circumstances."

Ref.: *Hunter Engineering Co. v. Syncrude Canada Ltd., supra,* at para. 160, [BA, Vol. I, Tab 21]

80. It is submitted that Justice Wilson's reference to policy was a reference to the court's jurisdiction (on equitable and public policy grounds) to strike the balance between freedom of contract and the need to protect against its abuse. Justice Wilson described the boundaries of tolerable conduct as "fundamental breach". As has been submitted, the boundaries of tolerable conduct are more generally drawn at equitable fraud, which is measured with reference to societal values of commercial morality – public policy. Justice Wilson's judgement in *Hunter* recognizes the necessity for the judiciary to retain the discretion to weigh public policy against freedom of contract and prefer the former.

Ref.: Kain, Brandon & Yoshida, Douglas T., *"The Doctrine of Public Policy in Canadian Contract Law"* (2007), Annual Review of Civil Litigation 2007, at pp. 14, 42-43, [BA, Vol. II, Tab 5]

81. In the context of tendering contracts this Honourable Court has already expressed that, as a matter of public policy, the integrity of the tendering process must be protected. The public interest in the integrity of the tendering system for public procurement in Canada will be thwarted if persons inviting tenders have *carte blanche* to breach the tendering contract by the device of an all encompassing exclusion clause which purports to oust the jurisdiction of the

courts. If not void as against public policy, such clauses are repugnant to tendering contracts and must not be given effect.

Ref.: *Ontario v. Ron Engineering & Construction (Eastern) Ltd. supra,* at p. 121, [BA, Vol. I, Tab 35]

82. As observed by Emanuelli in *Government Procurement*:

> . . . [T]he *Tercon* appeal decision purports to permit a purchaser to benefit from binding bids under a Contract A bidding process and to then bypass fairness obligations or judicial scrutiny by using a relatively standard and sweeping limitation of liability provision. This seems at odds with the traditional role of the court as protector of the integrity of the bidding process.

Ref.: Emanuelli, Paul. *Government Procurement*, LexisNexis, 2d Ed., 2008, at p. 128, [BA, Vol. II, Tab 10]

83. It is submitted that this Honourable Court should, on public policy grounds, refuse to enforce the 'no claims'. In this context, it is necessary for the court to limit freedom of contract in order to protect the integrity of the tendering system, prevent equitable fraud and to save the law of contract from abuses which will undermine it.

2.4 Exclusion Clauses - No Enforcement When Conduct Amounts to Fraudulent Concealment

84. This case also raises the question of the extent to which a 'no claims' clause is enforceable in the face of conduct amounting to fraudulent concealment (a subset of equitable fraud). Here, the Ministry concealed Tercon's right to challenge in summary proceedings (for declaratory relief or judicial review) the Ministry's selection of an ineligible Proponent when the Ministry unfairly and dishonestly notified Tercon and the other unsuccessful Proponents that Brentwood had been selected. It had actually selected the Brentwood/EAC joint venture, recognized to be ineligible.

Ref.: Judgment of the Supreme Court below, at paras. 55, 60-61, 64-65, 133-150, [Record, Vol. I, Tab 2];
Thomas C. Assaly Corporation. v. Canada (1990), 34 F.T.R. 156 (T.D.), at pp. 158-59, [BA, Vol. I, Tab 45];
British Columbia v. SCI Engineers & Contractors Inc., [1993] B.C.J. No. 248 (B.C.C.A.), [BA, Vol. I, Tab 2];

Smith Bros. and Wilson (B.C.) Ltd. v. British Columbia Hydro and Power Authority (1997), 30 B.C.L.R. (3d) 334 (B.C.S.C.), [BA, Vol. I, Tab 41];
Judicial Review Procedures Act, RSBC 1996, at c. 241

85. The doctrine of fraudulent concealment was developed in answer to the need for judicial intervention where a person concealed knowledge from another in circumstances where such concealment would be unconscientious.

Ref.: *Carter v. Boehm,* (1766) 3 Burr 1905 (H.L.), [BA, Vol. I, Tab 5]

86. In modern cases the doctrine has been applied to suspend the application of a limitation statute in circumstances in which the defendant had concealed the cause of action with the result that the claim became statute barred. It is submitted the doctrine is applicable to the present and like cases where fraudulent concealment prevents the opportunity for timely court application for effective relief. The leading modern authority in relation to fraudulent concealment is *Kitchen v. Royal Air Force Association*, where Lord Evershed, M.R. stated:

> It is now clear... that the word "fraud"...is by no means limited to common law fraud or deceit. Equally, it is clear...that no degree of moral turpitude is necessary to establish fraud within the section. What is covered by equitable fraud is a matter which Lord Hardwicke did not attempt to define two hundred years ago, and I certainly shall not attempt to do so now, but it is, I think, clear that the phrase covers conduct which, having regard to some special relationship between the two parties concerned, is an unconscionable thing for the one to do towards the other.

Ref.: *Kitchen v. Royal Air Force Association*, [1958] 2 All E.R. 241 (C.A.), at p. 249, [BA, Vol. I, Tab 25]

87. It is not necessary that the unconscientious conduct in question be undertaken dishonestly or for improper motives. It is sufficient that it "is an unconscionable thing for the one to do towards the other."

Ref.: *Guerin v. Canada,* [1984] 2 S.C.R. 335 (S.C.C.) at para. 115, [BA, Vol. I, Tab 16]

88. In *Can-Dive Services Ltd. v. Pacific Coast Energy Corp.*, the B.C. Court of Appeal referred to Story on *Equity*, and stated:

> Nor is it in every case where even a material fact is mistaken or unknown without any default of the parties that a Court of Equity will interpose. The fact may be unknown to

> both parties, or it may be known to one party and unknown to the other. If it is known to one party and unknown to the other, that will in some cases afford a solid ground for relief, as for instance where it operates as a surprise or a fraud upon the ignorant party. But in all such cases the ground of relief is not the mistake or ignorance of material facts alone, but the unconscientious advantage taken of the party by the concealment of them. [Emphasis added.]
>
> Ref.: *Can-Dive Services Ltd. v. Pacific Coast Energy Corp.* (2000), 74 B.C.L.R. (3d) 30 (B.C.C.A.), at para. 137, [BA, Vol. I, Tab 4]

89. In this case, the Ministry deliberately selected and disguised its selection of an ineligible proponent. Despite this behaviour, the Ministry now seeks to take unconscientious advantage of the 'no claims' clause to evade liability. The Ministry must be refused.

Issue 3: **Tendering Contracts – Is there a Duty of Good Faith? Can Liability for its Breach be Excluded?**

90. The effect of the decision of the Court of Appeal is contractors are left to bid in the "hope" that government acts in good faith – they are not entitled to a judicially enforceable expectation that government will act fairly and in good faith:

> [T]he respondent seeks to support the judgment on the basis that, to the extent the clause excuses acceptance of non-compliant bids, the pubic interest in an orderly and fair scheme for tendering in the construction industry is thwarted. This is a valid point. In my opinion, however, the answer lies not in judicial intervention in commercial dealings like this but in the industry's response to all-encompassing exclusion clauses. If the major contractors refuse to bid on highway jobs because of the damage to the tendering process, the Ministry's approach may change. Or, the industry may be prepared to accept that the Ministry wants to avoid suits for contract A violations, and the contractors will continue to bid in the hope that the Ministry acts in good faith. [Emphasis added.]
>
> Ref.: Judgment of Court of Appeal below, at para. 19, [Record, Vol. I, Tab 4]

91. The decision of the Court of Appeal assumes that there does not exist a good faith standard of conduct when an invitor evaluates and selects tenders. In its decision in *Continental Steel v. Mierau Contractors Ltd.*, the B.C. Court of Appeal opined that the duty of fairness is limited to treating all bids fairly and equally – there is no obligation to act in good faith.

> Ref.: *Continental Steel Ltd. v. Mierau Contractors Ltd.*, 2007 BCCA 292 (B.C.C.A.) at para. 31, [BA, Vol. I, Tab 8]

92. The position in British Columbia that there is no duty of good faith in the evaluation of tenders is at odds with the approach adopted in other provinces – an invitor is subject to a good faith standard of conduct when evaluating and selecting tenders.

Ref.: *Health Care Developers Inc. v. Newfoundland* (1996), 29 C.L.R. (2d) 237 (Nfld. C.A.), at paras. 34-35, 42, [BA, Vol. I, Tab 19];
Tarmac Canada Inc. v. Hamilton-Wentworth (Regional Municipality) (1999), 48 C.L.R. (2d) 236 (Ont. C.A.), at paras. 5, 9-10, [BA, Vol. I, Tab 42];
Mellco Developments Ltd. v. Portage La Prairie (City) (2002), 222 D.L.R. (4th) 67 (Man. C.A.), at paras. 79-82, 86, [BA. Vol. I, Tab 30];
Port Hawkesbury (Town) v. Borcherdt Concrete Products Ltd., (2008), 262 N.S.R (2d) 163 (N.S.C.A.), at paras. 21 and 32, [BA, Vol. I, Tab 37];
Northeast Marine Services Ltd. v. Atlantic Pilotage Authority, [1995] 2 F.C. 132 (C.A.), at para. 37, [BA, Vol. I, Tab 32]

3.1 Tendering Contracts - Good Faith is Required

93. Good faith is best defined as conduct which is not equitably fraudulent (in bad faith) – it is the "excluder" of bad faith. The words consistently used to describe good and bad faith conduct are: (un)reasonable, and (un)fair (including (dis)honesty). Dishonesty is measured objectively. It does not require improper motives or *mala fides*. Together, good faith and equitable fraud serve to identify and mark off "the boundaries of tolerable conduct" as dictated by "community standards of commercial morality" (public policy). In the employment context, this Court defined an employer's good faith obligation as follows:

> The obligation of good faith and fair dealing is incapable of precise definition. However, at a minimum, I believe that in the course of dismissal employers ought to be candid, reasonable, honest and forthright with their employees and should refrain from engaging in conduct that is unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive. [Emphasis added]

Ref.: *Wallace v. United Grain Growers*, [1997] 3 S.C.R. 701 (S.C.C.), at para. 98, [BA, Vol. I, Tab 46];
Hunter Engineering Co. v. Syncrude Canada Ltd., supra, at para. 159, [BA, Vol. I, Tab 21];
Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd., supra, at para. 39, [BA, Vol. I, Tab 36];
Harry v. Kreutziger, supra, at para. 241, [BA, Vol. I, Tab 18];
Guerin v. Canada, supra, at para. 115, [BA, Vol. I, Tab 16]
Burger King Corporation v. Hungry Jack's Pty Ltd. (2001), NSWCA 187, at paras. 150, 169-170, [BA, Vol. I, Tab 3]

Brown, L. ed., *The New Shorter Oxford English Dictionary, supra,* [BA, Vol. II, Tab 8]

94. A party to a contract cannot take advantage of a right or power conferred under the contract if it exercises that right or power in bad faith (unfairly and unreasonably). This principle is founded upon the need to prevent a party to a contract from taking unconscientious advantage of the other – the prevention of equitable fraud (bad faith). For example, a party to a contract cannot rely upon a discretionary power conferred under the contract if that power is exercised in bad faith. In other words, the power must be exercised in good faith.

Ref.: *Greenberg v. Meffert et al.* (1985), 18 D.L.R. (4th) 548 (Ont. C.A.), at pp. 554, 556, [BA, Vol. I, Tab 14];
Jack Wookey Holdings Ltd. v. Tanizul Timber Ltd. (1988), 27 B.C.L.R. (2d) 221 (B.C.C.A.), [BA, Vol. I, Tab 23]

95. In accordance with this principle, an invitor cannot rely upon a discretionary clause in a tendering contract if that power is exercised in bad faith. For example, a privilege clause which allows an invitor not to accept the lowest or any tender, cannot be relied upon if this discretion is exercised unreasonably or unfairly. The test is objective. It makes no difference that the invitor thought it was exercising its discretion fairly.

3.2 Exclusion Clauses – No Enforcement Where Discretion Exercised in Bad Faith

96. The same principle – the prevention of equitable fraud – disentitles a party to a contract to rely upon a clause which confers the right to escape performance of an obligation if the obligation is exercised in bad faith. This principle was expressed by Justice Judson in *Mason v. Freedman*:

> When a vendor seeks to avoid a contract under this clause, which is obviously introduced for his relief, his conduct and his reasons for seeking to escape his obligations are matters of interest to the Court. There is a general principle to be deduced from the cases and it is the one I have already stated incidentally. A vendor who seeks to take advantage of the clause must exercise his right reasonably and in good faith and not in a capricious or arbitrary manner...

Ref.: *Mason v. Freedman, supra*, at p. 487, [BA, Vol. I, Tab 28]

97. Exclusion of liability clauses confer a right to exclude liability for breach of a contractual obligation. The principle is the same as in *Mason v. Freedman* – a party is not entitled to rely upon the right to escape liability for breach of an obligation if the obligation is exercised in bad faith. It is submitted this principle forms the basis of this Honourable Court's judgment in *Hunter.* A clause excluding liability will not be enforced where the party seeking the protection of the clause has conducted itself – in relation to the breach – unfairly and unreasonably, according to Justice Wilson, or unconscionably (in the broad sense), according to Chief Justice Dickson. The guiding principle is the prevention of equitable fraud which is not to be countenanced. Freedom of contract is not unfettered and the boundary of tolerable conduct is set at equitable fraud.

Ref.: *Hunter Engineering Co. v. Syncrude Canada Ltd., supra,* at paras. 59-60, 152-153, 158-160, [BA, Vol. I, Tab 21]

98. Citing *Martel*, the Trial Judge said:

> The integrity of the tendering process depends upon no competitive advantage being given to any tenderer. As a result, there is an implied duty of fairness upon those calling for tenders in relation to their dealings with tenderers which calls for the reasonable expectation of the parties involved in the bidding process to be respected (*Martel* at para. 88. . .) The scope of the duty is defined in consideration of the terms of contract A so that the fate of proponents is not determined by undisclosed standards (*Martel* at paras. 88-89.) Fairness means consistent application of the tender rules without ". . any colourable attempt... to achieve a desired result..." (*Martel* at paras. 95 and 100). There can be no special treatment (*Martel* at para. 96). Requirements cannot be ignored *(Martel* at para. 98). [Emphasis added]

As found by the Trial Judge, the Ministry falsified documents, falsely disclosed, and concealed that the successful tender was an ineligible joint venture – "a colourable attempt...to achieve a desired result...". In these circumstances, the Ministry is disentitled to rely on the 'no claims' clause inserted for its benefit as its conduct in relation to its breach of section 2.8(a) and of its duty of fairness was so unreasonable and unfair as to be unconscionable – in bad faith.

Ref.: Judgment of Supreme Court below, at para. 127, [Record Vol. I, Tab 2]
Martel Building Ltd. v. Canada, supra, at para. 95, [BA, Vol. I, Tab 27]

3.3 Tendering Contracts - Good Faith and Fair Dealing Implied by Law

99. This Honourable Court has recognized that an obligation of good faith and fair dealing is owed by operation of law in employment relationships and insurance contracts. The Ontario Court of Appeal has added the franchisor-franchisee relationship (*Shelanu)* as another which requires good faith. In the insurance context (*Fidler*), an insurer's duty of good faith was defined to include the duty to deal with its insured's claim fairly.

Ref.: *Shelanu Inc. v. Print Three Franchising Corp., supra,* at paras. 63-74, 96, [BA, Vol I, Tab 40];
Fidler v. Sun Life Assurance Co. of Canada, [2006] 2 S.C.R. 3, (S.C.C.) at para. 63, [BA, Vol. I, Tab 10];
Wallace v. United Grain Growers, *supra,* at paras. 95-98, [BA, Vol. I, Tab 46]

100. Tendering contracts should be recognized as an added category of contract in respect of which an obligation of good faith and fair dealing is implied by operation of law, independent of the intention of the parties. Public policy considerations have a part to play in determining whether it is necessary to do so. Here, the implication of a duty of good faith and fair dealing would achieve the policy objective of protecting the integrity of the tendering system.

Ref.: *Hughes Aircraft Systems International v. Airservices Australia* (1997) FCA 558, at pp. 43-46, [BA, Vol. I, Tab 20]
O'Byrne, S.K., "*The Implied Term of Good Faith and Fair Dealings: Recent Developments*," (2007), 86 The Canadian Bar Review 193, at pp. 237-240, [BA, Vol. II, Tab 6];
Devonshire, Peter "*Contractual Obligations in The Pre-Award Phase of Public Tendering*", *supra*, at p. 237, [BA, Vol. II, Tab 4]

101. In the event a duty of good faith and fair dealing is implied as a legal incident to a tendering contract, bidders can be assured of the invitor's performance. Whatever limitations or exclusions of liability might be placed in the tender documents, they cannot be resorted to in bad faith. This does not undermine the ability of the invitor to include and rely in good faith on "stipulations, restrictions or privileges" in the tender documents, a matter with which this Court was concerned in *Martel.*

Ref.: *Martel Building Ltd. v. Canada, supra,* at para. 89, [BA, Vol. I, Tab 27]
Burger King Corporation v. Hungry Jack's Pty Ltd., supra, at para. 173, [BA, Vol. I, Tab 3]

Issue: 4 **Government and Public Policy – Can Government Undermine Public Policy and its Own Legislation by Private Law of Contract?**

102. As this Honourable Court articulated in *Wells v. Newfoundland*, in the absence of clear legislative intent to abrogate rights and obligations, the Crown, as a contracting party, is expected to honour its contractual obligations and in breach to pay compensation. Justice Major stated at para 46:

> In a nation governed by the rule of law, we assume that the government will honour its obligations unless it explicitly exercises its power not to. In the absence of a clear express intent to abrogate rights and obligations – rights of the highest importance to the individual – those rights remain in force. To argue the opposite is to say that government is bound only by its whim, not its word. In Canada this is unacceptable, and does not accord with the nation's understanding of the relationship between the state and its citizens.

Ref: *Wells v. Newfoundland,* [1999] 3 S.C.R. 199 (S.C.C.), at pp. 216, 218-19, 221, [BA, Vol. II, Tab 2]

103. The Court of Appeal decision ignores the point that government is bound to act in good faith, fairly and justly in its contractual relations. In *Agricultural Research Institute of Ontario v. Campbell-High*, after referring to *Wells v. Newfoundland*, Justice Abella (as she then was) stated:

> The government occupies a unique – and uniquely powerful – role in its relationship with the public. This power imbalance, in turn, creates a duty on the government to act in a way that enhances public confidence in reliable fairness from the government.
>
> Governments owe, and their citizens expect to receive, the benefit of a duty of good faith. When governments breach their agreements with a member of the public, they do more than violate contractual obligations; they also impair that person's legitimate expectations that the state will respect and comply with its legal obligations.

Ref: *Agricultural Research Institute of Ontario v. Campbell-High* (2002), 58 O.R. (3d) 321 (Ont. C.A.), at paras. 29-30, (lv. denied, [2003] S.C.C.A. No. 8), [BA, Vol. I, Tab 1]

104. In *Northern Territory of Australia v. Skywest Airlines Pty Ltd.,* Kearney, J. stated:

> But a government is not only a party to a contract; through its control of parliament it is a law-maker. In that capacity it has an interest in ensuring that the people respect and observe the laws, and to do so it must display by its actions some minimum respect for its own rules. Further, it is in the public interest that when a government contracts with an

> ordinary person, it deals fairly with that person, and is seen to do so. Accordingly it would be a serious matter for the rule of law if a government were perceived as refusing without proper cause to perform a contract for services to the public entered into in accordance with all the legal safeguards designed to protect the public interest...

Ref: *Northern Territory of Australia v. Skywest Airlines Pty Ltd.,* (1987), 90 F.L.R. 270 , at p. 24, [BA, Vol. I, Tab 33]

105. It is submitted that good faith and fair dealing by government in contracting is fundamental to the rule of law and not an obligation which government officials are permitted to contract away, directly or indirectly. Any attempt by government officials to contract on the basis that government is not obliged to honour its obligations, and is at liberty to abandon them without compensation, is inimical to the rule of law and contrary to public policy.

Ref: O'Byrne, S.K. "*Public Power and Private Obligation: An Analysis of the Government Contract*" (May 1992), 14 Dalhousie Law Journal 485, at pp. 492-495, 523-525, [BA, Vol. II, Tab 7]

106. A government's obligation to act fairly and in good faith, in the context of judicial review of a government tendering process, has been given expression by Justice Denault for the Federal Court stating: "*The Court must be vigilant in assuring itself that the Crown is acting in the utmost good faith and is not actually attempting to obviate the tendering process.*"

Ref: *Glenview Corp. v. Canada (Minister of Public Works)* (1990), 34 F.T.R. 292 (T.D.), at para. 21, [BA, Vol. I, Tab 12]

107. In the present case, Ministry officials were acting under the authority of and their conduct was subject to the *Ministry of Transportation and Highways Act.* Courts in other provinces have confirmed that government Ministries acting under legislative regimes analogous to the *Ministry of Transportation and Highways Act* are subject to the standard of good faith and fair dealing when evaluating and selecting tenders. As stated by Cameron, J.A. in *Health Care Developers Inc. v. Newfoundland*:

> The doctrine of good faith is applicable in this case. While one can logically conclude that good faith performance of contractual obligations should be imposed on all contracts, the necessity for its application to Government tendering to "protect the integrity of the bidding system" was expressed in *Kencor* and I need not state the principle more broadly than that it is a part of the law of tendering for Government contracts. As to the standard

> of conduct demanded by good faith, at a minimum, it would require that a party not act in bad faith. In my view, it would be acting in bad faith to award something other than contract B, to fail to reject tenders not in compliance with the call or to award contract B on the basis of an undisclosed preference.

Ref: *Health Care Developers Inc. v. Newfoundland, supra,* at paras. 34-35, 42, [BA, Vol. I, Tab 19]

108. In *Kencor Holdings Ltd. v. Government of Saskatchewan*, there existed a legislative scheme under the *Highways and Transportation Act,* corresponding to the legislation in British Columbia applicable in the present case, which mandated public tenders and award to the low bid. The Province selected the second lowest tender based on an undisclosed preference for a local contractor and obtained an Order in Council pursuant to the *Highways and Transportation Act*. The Court concluded the Province could not rely on either the privilege clause or the Order in Council. Otherwise, the Province's discretion would be virtually unlimited and, practically speaking, it would never be accountable in such situations. In other words, as in the present case, the public policy interest which the legislation was designed to protect would be undermined. The Order in Council was no more an impediment to the success of the action than the privilege clause. The implication is that the Order in Council would have been held invalid on judicial review for bad faith (delegated authority exercised for a purpose not authorized by the *Highways and Transportation Act*).

Ref: *Kencor Holdings Ltd. v. Saskatchewan,* [1991] 6 W.W.R. 717 (Sask. Q.B.), [BA, Vol. I, Tab 24]

109. It is submitted that in the present case government officials cannot, by private law of contract, obviate a legislatively mandated tendering process. The Ministry was bound to comply with the provisions of the *Ministry of Transportation and Highways Act* and with the authorization of the Minister pursuant thereto. Ministry officials were bound to act fairly and in good faith and had no ability by private law of contract to provide for the Province's escape from that obligation anymore than they had an ability to provide for their escape from the public law duty of fairness in the administration of the tendering process, which is subject to judicial review. Otherwise, Ministry officials would never be accountable and the public policy interest which the legislation was designed to protect would be undermined.

Ref: *Thomas C. Assaly Corporation v. Canada, supra,* at pp.158-59, [BA, Vol. I, Tab 45];
Ministry of Transportation and Highways Act, R.S.B.C. 1996, C. 311, 23

110. Moreover, it is inimical to the rule of law and contrary to public policy for government to impose on contractors submitting tenders that they waive all claims for the Ministry's breach of its duties under the *Ministry of Transportation and Highways Act* thereby reserving to government unlimited discretion to abandon contractual obligations without compensation. It is submitted the 'no claims' clause is invalid and not enforceable as a matter of public policy.

Ref: *Ontario (Human Rights Commission) v. Etobicoke (Borough),* [1982] 1 S.C.R. 202 (S.C.C.), at pp. 213-214, [BA, Vol. I, Tab 34]

Conclusion:

111. The decision of the Court of Appeal undermines the integrity of the tendering system and without the intervention of this Honourable Court, invitors in the public and private sectors inevitably will employ similar 'no claims' clauses in invitations to tender reserving for themselves unlimited discretion without judicial intervention. However, the application of existing public and private law principles in relation to contract law enables this Honourable Court to protect the public interest in the integrity of the tendering process for both public and private procurement.

Part IV – Submissions on Costs

112. The parties have agreed on costs and it is not necessary for the court to make any Order.

Part V – Order Requested

113. The Applicant respectfully requests that the judgment of the Court of Appeal be set aside and the decision of the Trial Judge be restored.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of November, 2008.

B.G. N. McLean
C.R. Armstrong
W.S. McLean
Counsel for the Applicant

Part VI – Table of Authorities

At Paras.

VOLUME I

VOLUME II

Articles

3. Devlin, Richard F. "*Return of the Undead: Fundamental Breach Disinterred*" (2007), 86 The Canadian Bar Review 1 48

4. Devonshire, Peter. "*Contractual Obligations in The Pre-Award Phase of Public Tendering*" (1998), 36 Osgoode Hall Law Journal 2003 ..... 45, 100

5. Kain, Brandon & Yoshida, Douglas T. "*The Doctrine of Public Policy in Canadian Contract Law*" (2007), Annual Review of Civil Litigation 2007 80

6. O'Byrne, S.K. "*The Implied Term of Good Faith and Fair Dealings: Recent Developments*" (2007), 86 The Canadian Bar Review 193 100

7. O'Byrne, S.K. "*Public Power and Private Obligation: An Analysis of the Government Contract*" (May 1992), 14 Dalhousie Law Journal 485 105

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8. Brown, L., ed., *The New Shorter Oxford English Dictionary* (Clarendon Press, 1993) 78, 93

9. Chitty, Joseph Jr. *Chitty on Contracts,* vol. I, 29th ed. London: Sweet & Maxwell, 2004 57

10. Emanuelli, Paul. *Government Procurement.* LexisNexis, 2d Ed., 2008 82

11. McCamus, John. *The Law of Contracts.* York University: Irwin Law Inc., 2005 70

12. Waddams, S.M. *The Law of Contracts (2d Edition).* Toronto: Canada Law Book Inc., 1984 ..... 65, 66

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Part VII – Statutory Provisions

Judicial Review Procedure Act, R.S.B.C. 1996, c. 241

Ministry of Transportation and Highways Act, R.S.B.C. 1996, c. 311, s.23

JUDICIAL REVIEW PROCEDURE ACT

[RSBC 1996] CHAPTER 241

Contents

Section

Definitions

1 In this Act:

"application for judicial review" means an application under section 2;

"court" means the Supreme Court;

"decision" includes a determination or order;

"licence" includes a permit, certificate, approval, order, registration or similar form of permission required by law;

"record of the proceeding" includes the following:

(a) a document by which the proceeding is commenced;

(b) a notice of a hearing in the proceeding;

(c) an intermediate order made by the tribunal;

(d) a document produced in evidence at a hearing before the tribunal, subject to any limitation expressly imposed by any other enactment on the extent to which or the purpose for which a document may be used in evidence in a proceeding;

(e) a transcript, if any, of the oral evidence given at a hearing;

(f) the decision of the tribunal and any reasons given by it;

"statutory power of decision" means a power or right conferred by an enactment to make a decision deciding or prescribing

(a) the legal rights, powers, privileges, immunities, duties or liabilities of a person, or

(b) the eligibility of a person to receive, or to continue to receive, a benefit or licence, whether or not the person is legally entitled to it,

and includes the powers of the Provincial Court;

"statutory power" means a power or right conferred by an enactment

(a) to make a regulation, rule, bylaw or order,

(b) to exercise a statutory power of decision,

(c) to require a person to do or to refrain from doing an act or thing that, but for that requirement, the person would not be required by law to do or to refrain from doing,

(d) to do an act or thing that would, but for that power or right, be a breach of a legal right of any person, or

(e) to make an investigation or inquiry into a person's legal right, power, privilege, immunity, duty or liability;

"tribunal" means one or more persons, whether or not incorporated and however described, on whom a statutory power of decision is conferred.

Application for judicial review

2 (1) An application for judicial review is an originating application and must be brought by petition.

(2) On an application for judicial review, the court may grant any relief that the applicant would be entitled to in any one or more of the proceedings for:

(a) relief in the nature of mandamus, prohibition or certiorari;

(b) a declaration or injunction, or both, in relation to the exercise, refusal to exercise, or proposed or purported exercise, of a statutory power.

Error of law

3 The court's power to set aside a decision because of error of law on the face of the record on an application for relief in the nature of certiorari is extended so that it applies to an application for judicial review in relation to a decision made in the exercise of a statutory power of decision to the extent it is not limited or precluded by the enactment conferring the power of decision.

Existing provision limiting judicial review not affected

4 Subject to section 3, nothing in this Act permits a person to bring a proceeding referred to in section 2 if the person is otherwise limited or prohibited by law from bringing the proceeding.

Powers to direct tribunal to reconsider

5 (1) On an application for judicial review in relation to the exercise, refusal to exercise, or purported exercise of a statutory power of decision, the court may direct the tribunal whose act or omission is the subject matter of the application to reconsider and determine, either generally or in respect of a specified matter, the whole or any part of a matter to which the application relates.

(2) In giving a direction under subsection (1), the court must

(a) advise the tribunal of its reasons, and

(b) give it any directions that the court thinks appropriate for the reconsideration or otherwise of the whole or any part of the matter that is referred back for reconsideration.

Effect of direction

6 In reconsidering a matter referred back to it under section 5, the tribunal must have regard to the court's reasons for giving the direction and to the court's directions.

Power to set aside decision

7 If an applicant is entitled to a declaration that a decision made in the exercise of a statutory power of decision is unauthorized or otherwise invalid, the court may set aside the decision instead of making a declaration.

Power to refuse relief

8 (1) If, in a proceeding referred to in section 2, the court had, before February 1, 1977, a discretion to refuse to grant relief on any ground, the court has the same discretion to refuse to grant relief on the same ground.

(2) Despite subsection (1), the court may not refuse to grant relief in a proceeding referred to in section 2 on the ground that the relief should have been sought in another proceeding referred to in section 2.

Defects in form, technical irregularities

9 (1) On an application for judicial review of a statutory power of decision, the court may refuse relief if

(a) the sole ground for relief established is a defect in form or a technical irregularity, and

(b) the court finds that no substantial wrong or miscarriage of justice has occurred.

(2) If the decision has already been made, the court may make an order validating the decision despite the defect, to have effect from a time and on terms the court considers appropriate.

Interim order

10 On an application for judicial review, the court may make an interim order it considers appropriate until the final determination of the application.

No time limit for applications

11 An application for judicial review is not barred by passage of time unless

(a) an enactment otherwise provides, and

(b) the court considers that substantial prejudice or hardship will result to any other person affected by reason of delay.

No writ to issue

12 (1) No writ of mandamus, prohibition or certiorari may be issued.

(2) An application for relief in the nature of mandamus, prohibition or certiorari, must be treated as an application for judicial review under section 2.

Summary disposition of proceedings

13 (1) On the application of a party to a proceeding for a declaration or injunction, the court may direct that any issue about the exercise, refusal to exercise or proposed or purported exercise of a statutory power be disposed of summarily, as if it were an application for judicial review.

(2) Subsection (1) applies whether or not the proceeding for a declaration or injunction includes a claim for other relief.

Sufficiency of application

14 An application for judicial review is sufficient if it sets out the ground on which relief is sought and the nature of the relief sought, without specifying by which proceeding referred to in section 2 the claim would have been made before February 1, 1977.

Notice to decision maker and right to be a party

15 (1) For an application for judicial review in relation to the exercise, refusal to exercise, or proposed or purported exercise of a statutory power, the person who is authorized to exercise the power

(a) must be served with notice of the application and a copy of the petition, and

(b) may be a party to the application, at the person's option.

(2) If 2 or more persons, whether styled a board or commission or any other collective title, act together to exercise a statutory power, they are deemed for the purpose of subsection (1) to be one person under the collective title, and service, if required, is effectively made on any one of those persons.

Notice to Attorney General

16 (1) The Attorney General must be served with notice of an application for judicial review and notice of an appeal from a decision of the court with respect to the application.

(2) The Attorney General is entitled to be heard in person or by counsel at the hearing of the application or appeal.

Court may order record filed

17 On an application for judicial review of a decision made in the exercise or purported exercise of a statutory power of decision, the court may direct that the record of the proceeding, or any part of it, be filed in the court.

Informations in the nature of quo warranto

18 (1) Informations in the nature of quo warranto are abolished.

(2) If a person acts in an office in which the person is not entitled to act and an information in the nature of quo warranto would, but for subsection (1), have been available against the person the court may, under an application for judicial review, grant an injunction restraining the person from acting and may declare the office to be vacant.

(3) A proceeding for an injunction under this section may not be taken by a person who would not immediately before February 1, 1977, have been entitled to apply for an information in the nature of quo warranto.

Relationship between this Act and *Crown Proceeding Act*

19 This Act is subject to the *Crown Proceeding Act.*

References in other enactments

20 If reference is made in any other enactment to a proceeding referred to in section 2 or 18, the reference is deemed to be a reference to an application for judicial review.

MINISTRY OF TRANSPORTATION AND HIGHWAYS ACT

CHAPTER 311

Contents

Continuation of ministry

1 (1) The Ministry of Transportation and Highways is continued.

(2) The minister presides over and is responsible to the Lieutenant Governor in Council for the direction of the ministry.

(3) The minister may establish branches or divisions of the ministry as the minister considers advisable.

Officers and staff

2 One or more deputy ministers, a chief architect and other officers and employees required to carry out the ministry's business may be appointed under the *Public Service Act*.

PART 1 – TRANSPORTATION

Definition

3 In this Part **"transport"** means a method, manner or means of transportation and, without limiting this definition, includes aircraft, ships, boats and vessels, elevated, surface or subsurface railways or tramways, elevated cable cars, motor vehicles and trailers, all terrain vehicles, hovercraft, and the hoists, cables, rails, rolling stock, pipelines and conduits used in connection with transport.

Duties and powers of minister

4 The duties, powers and functions of the minister extend to and include all matters relating to transportation that are assigned to the minister by any Act or by the Lieutenant Governor in Council, and that are not assigned to another minister, ministry, branch or agency of the government.

Purpose and functions of ministry

5 The ministry has the following purpose and functions:

(a) to prepare and develop comprehensive policies on transportation in British Columbia, to make reports and recommendations to the minister on their implementation and to implement them as the minister directs;

(3) If the wall, fence or boundary mark has been replaced or the canal, ditch, drain or earthwork is completed, the owner or occupier of the land must maintain the wall, fence or boundary mark, canal, ditch, drain or earthwork to the same extent as the owner or occupier might be by law required to do if the wall, fence or boundary mark had never been taken down or removed, or the canal, ditch, drain or earthwork had always existed.

Control of public property

20 The following property remains vested in the government and under the minister's control, unless otherwise provided by law:

(a) streams, watercourses and property acquired for the use of government buildings, highways and public works;

(b) locks, dams, hydraulic and other works for improving the navigation of any water;

(c) hydraulic powers created by the construction of government buildings, highways and public works;

(d) drains, drainage and irrigation works;

(e) property acquired, constructed, repaired, maintained or improved at the expense of the government, and not under the control of Canada.

Control of public works

21 All government buildings, highways and public works constructed or completed at the expense of the government and provided for in this Act must, unless otherwise provided by law, be under the minister's control and subject to this Act.

Minister to direct construction

22 The minister must direct the construction, maintenance and repair of all government buildings, highways and public works in progress, or constructed or maintained at the expense of the government, and which are under the minister's control.

Tenders

23 (1) The minister must invite tenders by public advertisement, or if that is impracticable, by public notice, for the construction and repair of all government buildings, highways and public works, except for the following:

(a) in case of pressing emergency if delay would be injurious to the public interest;

(b) if from the nature of the work it can be more expeditiously and economically executed by the officers and employees in the ministry;

(c) if the minister determines that an alternative contracting process will result in competitively established costs for the performance of the work.

(2) The minister must cause all tenders received to be opened in public, at a time and place stated in the advertisement or notice.

(3) The prices must be made known at the time the tenders are opened.

(4) In all cases where the minister believes it is not expedient to let the work to the lowest bidder, the minister must report to and obtain the approval of the Lieutenant Governor in Council before passing by the lowest tender, except if delay would be injurious to the public interest.

(5) Subsection (4) does not apply to a case where the minister does not let the work to the lowest bidder because the lowest bidder fails to comply with the *Skills Development and Fair Wage Act*.

(6) The minister or a person designated by the minister must make available to the public, on request, the value of a contract awarded under subsection (1) (c) and the name of the contractor.

Security to be taken

24 (1) If a government building, highway or public work is being carried out by contract, and in all other cases, the minister must take all reasonable care that security is given to the government, and deposited with the Minister of Finance, for performance of the work within the amount and time specified.

(2) Money must not be paid to the contractor or work commenced on a contract until the contract has been signed by all parties named in it and the requisite security given, except as specified above.

(3) On the minister's recommendation, the Lieutenant Governor in Council may release or surrender to the contractor all or part of the security given for the due performance of work.

Contracts for government use

25 Contracts respecting any government building, highway, public work or property under the minister's control, entered into by the minister or by an authorized person, take effect to the use of the government, and may be enforced as if entered into with the government under the authority of this Act.

Power to contract

26 (1) The minister may contract with any person as may be advisable to carry out this Part, but no deed, contract, document or writing is binding on or is the act of the minister unless signed by the minister and sealed with the ministry seal.

(2) Despite subsection (1), the deed, contract, document or writing may be signed by a person authorized in writing by the minister to do so if it is inconvenient for the minister to sign.

Compensation if there is a contract

27 (1) In awarding on a claim arising out of a written contract, the arbitrators or umpire must decide in accordance with the contract, and must not award compensation to a claimant on the ground that the claimant expended a larger sum to perform the contract than the amount stipulated in it.