Court File No. CV-16-11389-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT,* R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF URBANCORP TORONTO MANAGEMENT INC., URBANCORP (ST. CLAIR VILLAGE) INC., URBANCORP (PATRICIA) INC., URBANCORP (MALLOW) INC., URBANCORP (LAWRENCE) INC., URBANCORP DOWNSVIEW PARK DEVELOPMENT INC., URBANCORP (952 QUEEN WEST) INC., KING RESIDENTIAL INC., URBANCORP 60 ST. CLAIR INC., HIGH RES. INC., BRIDGE ON KING INC. (COLLECTIVELY, THE "APPLICANTS") AND THE AFFILIATED ENTITIES LISTED IN SCHEDULE "A" HERETO

CASE CONFERENCE BRIEF OF THE MONITOR

(February 15, 2017 – Home Buyer Damage Claims)

Davies Ward Phillips & Vineberg LLP
155 Wellington Street West
Toronto, ON M5V 3J7

Robin B. Schwill (LSUC #38452I)
rschwill@dwpv.com
Tel: 416.863.5502
Fax: 416.863.0871

Lawyers for the Monitor
KSV Kofman Inc.

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ONTARIO
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IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT,* R.S.C. 1985, c. C-36, AS AMENDED

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TAB 1

DICKINSON WRIGHT LLP

199 BAY STREET, SUITE 2200
P.O. BOX 447, COMMERCE COURT POSTAL STATION
TORONTO, ON CANADA M5L 1G4
TELEPHONE: (416) 777-0101
FACSIMILE: (844) 670-6009
http://www.dickinsonwright.com

LISA S. CORNE
LCorne@dickinsonwright.com
(416) 646-4608

December 16, 2016

VIA E-MAIL

Robin B. Schwill
Davies Ward Phillips & Vineberg LLP
155 Wellington Street West
Toronto, ON M5V 3J7

Dear Mr. Schwill:

Re: Claims of Home Buyers from Urbancorp (Lawrence) Inc., Urbancorp (St. Clair Village) Inc., Urbancorp (Mallow) Inc., Urbancorp (Bridlepath) Inc., Urbancorp (Woodbine) Inc. (collectively, the "Urbancorp Entities")

As you should be aware, our office filed with KSV Kofman, Inc., in its capacity as Monitor, Home Buyer Objection Notices on behalf of 56 purchasers of homes from the Urbancorp Entities (the "**Home Buyers**"), broken down by project, as follows:

- St. Clair – 13
- Lawrence – 16
- Bridlepath – 14
- Woodbine – 12
- Mallow – 1

The Home Buyers are claiming damages suffered due to the Urbancorp Entities' failure to perform their essential obligations under the purchase agreements, including completing the various projects and transferring ownership to the Home Buyers.

Preliminary Legal Determination

The Home Buyers submit that section 45 of Schedule "A" (Additional Terms) to the purchase agreements (the "**Exclusion Clause**"), which purports to limit the Urbancorp Entities' liability under the purchase agreement, cannot oust the jurisdiction of a court of equity to refuse to enforce the Exclusion Clause on the basis that it is unconscionable. We also understand that the standard form agreements signed by the Home Buyers, and the Exclusion Clause contained therein, were non-negotiable and can therefore be categorized as 'contracts of adhesion'. In such 'circumstances, given the inequality of bargaining power between the consumer Home Buyers

and the Urbancorp Entities, coupled with the fact that the Exclusion Clause was not drawn to the attention of the Home Buyers, there is a reasonable basis to assert that the Urbancorp Entities will be found to have abused their bargaining power thereby vitiating the Exclusion Clause.

The Urbancorp Entities did not simply commit a breach of contract; they completely repudiated the essence of the agreement (i.e. the Urbancorp Entities' fundamental promise to deliver homes as contracted). The actions of the Urbancorp Entities before and after entering into the purchase agreements must be investigated in order to assess whether the Urbancorp Entities acted in good faith in connection with the performance of their obligations under the purchase agreements. Moreover, it would be unconscionable to allow the Urbancorp Entities to rely on the Exclusion Clause in order to take advantage of the appreciation in value of the properties and deprive the Home Buyers of the benefit of the bargain they made.

In our view, it makes sense for the threshold legal issue regarding the enforceability of the Exclusion Clause to be determined prior to addressing the quantification of the Home Buyers' damages and incurring the attendant costs inherent in that process. We therefore propose that the court or a claims officer appointed by the court pursuant to paragraph 42 of the Claims Procedure Orders make a preliminary determination on the enforceability of the Exclusion Clause.

Monitor's Investigation

To ensure that the court has all of the relevant facts necessary to determine the enforceability of the Exclusion Clause, we are requesting that the Monitor undertake an investigation and report to the court on the financial and operational circumstances in which the Urbancorp Entities entered into the purchase agreements with the Home Buyers, including without limitation:

- whether the Urbancorp Entities knew or ought to have known before contracting with the Home Buyers that they were not in a position to meet their obligations;
- whether the Urbancorp Entities acted in good faith in failing to perform their contractual obligations;
- whether the representations made by the Urbancorp Entities to the Home Buyers were made at a time when the Urbancorp Entities knew or ought to have known that such representations were false or misleading;
- the status of the registrations of the Urbancorp Entities with Tarion Warranty Corporation ("**Tarion**") and any investigations by Tarion of the Urbancorp Entities prior to and after the date of the purchase agreements; and

- the timing of the Urbancorp Entities' financial challenges and solvency issues.

Interim Distribution

We have been asked by our clients to request that the Monitor make an interim distribution representing all or part of the deposits as soon as possible. Our clients desperately need to begin recovering some of their extensive losses. For many, the deposits alone are substantial and the loss of that money continues to impact their lives significantly, including preventing many from re-entering the housing market.

With respect to the Home Buyers who are claiming damages in excess of the refund of their deposits, we ask that the Monitor obtain approval to distribute the portion of their claims pertaining to the deposits, pending determination of the balance of their claims.

Document and Information Request

The Home Buyers are anxious to proceed with the determination of their claims. In order to do so, and as previously requested in our e-mail dated November 25, 2016, we wish to review (i) copies of the appraisal reports prepared for the Lawrence, St. Clair, Woodbine, Bridlepath, and Mallow properties, and (ii) the claims and supporting documentation filed by or on behalf of the Israeli bondholders.

We hope the Monitor will cooperate in providing this information and that a motion for disclosure will not be necessary.

Finally, we trust that Monitor now has the information necessary to complete its report outlining the "estimated illustrative recoveries" as you suggested in your e-mail to our office dated November 25, 2016.

Please advise when the Monitor expects to file this report and the timing of an interim distribution in relation to our clients on account of their deposits.

We look forward to hearing back from you.

Very truly yours,
DICKINSON WRIGHT LLP

per:
Lisa S. Corne

LSC/mjb

TAB 2

DICKINSON WRIGHT LLP

199 BAY STREET, SUITE 2200
P.O. BOX 447, COMMERCE COURT POSTAL STATION
TORONTO, ON CANADA M5L 1G4
TELEPHONE: (416) 777-0101
FACSIMILE: (844) 670-6009
http://www.dickinsonwright.com

LISA S. CORNE
LCorne@dickinsonwright.com
(416) 646-4608

February 3, 2017

VIA E-MAIL

Edmond E.B. Lamek
Weir Foulds LLP
Barristers & Solicitors
The TD Bank Tower, Suite 4100
66 Wellington Street West,
Toronto, ON M5K 1B7
- and –

Robin B. Schwill
Davies Ward Phillips & Vineberg LLP
155 Wellington Street West
Toronto, ON M5V 3J7

Dear Messrs. Lamek and Schwill:

Re: Home Buyer Damage Claim in connection with the Matter of Compromise or Arrangement of Urbancorp Toronto Management Inc. et al. (Court File No. CV-16-11389-00CL); and The Matter of the Plan of Compromise or Arrangement of Urbancorp (Woodbine) Inc. and Urbancorp (Bridlepath) Inc. (Court File No. CV-16-11549-00CL)

In connection with litigation pertaining to the resolution of the Home Buyer damage claims, we are enclosing draft Agreed Statements of Facts.

In addition, we are writing to request documentary production from your clients, and trust we will receive the documents requested well in advance of the examination of Mr. Saskin scheduled for February 23, 2017.

For the purposes of this request, the term "document" shall have the meaning provided for under 30.01 of the *Rules Of Civil Procedure,* and includes any correspondence, notes, or other written record or data or information in electronic form, in the possession or under the control of KSV Kofman Inc. (the "**Monitor**"), or Urbancorp (St. Clair Village) Inc., Urbancorp (Mallow) Inc., Urbancorp (Lawrence) Inc., Urbancorp (Woodbine) Inc., and Urbancorp (Bridlepath) Inc. (collectively, the "**Vendors**");

Pease provide the following documents:

1. All advertising, and promotional documents relating to the homes sold by the Vendors;

2. Any documents relating to any litigation against any of the Vendors or persons or corporations related to the Vendors in relation to the acquisition of the real properties owned by the vendors or financing and construction of the developments thereon;

3. All documents relating to the financial problems experienced by the Vendors, including the failure by the Vendors to pay obligations to creditors as and when due;

4. All documents evidencing or relating to the Vendors' registrations with Tarion, or the cancellation thereof;

5. All documents relating to appraisals or appraisal information obtained in relation to the real property owned by any of the Vendors;

6. All documents relating to applications by the Vendors for financing of the acquisition, construction and development of the homes sold by the Vendors, including all responses from prospective lenders or investors;

7. All documents evidencing or relating to the disposition of any and all financing obtained from any party in connection with the acquisition, development, or construction of the real properties owned by the Vendors;

8. All financial statements for each of the Vendors from the date of their incorporation to December 31, 2016, whether audited or unaudited, including all balance sheets, income statements and pro forma financial statements;

9. All Minutes of the Board of Directors meetings or shareholders of each of the Vendors from the date of their incorporation until the present date;

10. All Minutes of the meetings of any audit committee of any of the Vendors from the date of incorporation to date;

11. All documents relating in any way to the timing, and estimated costs of construction of the developments to be completed by the Vendors;

12. All bank statements and accounting records evidencing the disposition of the Home Buyers' deposits received by each of the Vendors; and

13. All communications to the Home Buyers with respect to the progress or status of the development of the real properties owned by the Vendors, and the timing of completion of the construction and/ or the tentative closing dates.

Yours truly,
DICKINSON WRIGHT LLP

per:
Lisa S. Corne

LSC/jss
TORONTO 71772-1 1242190v2

TAB 3

DAVIES

155 Wellington Street West
Toronto ON M5V 3J7
dwpv.com

February 13, 2017

Robin B. Schwill
T 416.863.5502
F 416.863.0871
rschwill@dwpv.com

File No. 256201

BY E-MAIL

Dickinson Wright LLP
199 Bay Street
Suite 2200
Commerce Court West
Toronto ON M5L 1G4

Attention: Lisa S. Corne

Dear Ms Corne:

In the Matter of a Plan of Compromise or Arrangement of Urbancorp Toronto Management Inc., et al., Court File No. CV-16-11389-00CL
In the Matter of a Plan of Compromise or Arrangement of Urbancorp (Woodbine) Inc. and Urbancorp (Bridlepath) Inc., et al., Court File No. CV-16-11549-00CL

In response to your request for documents contained in your letter dated February 3, 2017, our response is set out below in accordance with each document request made by you. We understand that the documents provided are all contained in a DropBox folder populated by representatives of the company, the details and access particulars which will be provided to you under separate e-mail.

1. All advertising and promotion documents relating to the homes sold by the Vendors.

   These documents have been provided in the DropBox.

2. Any documents relating to any litigation against any of the Vendors or persons or corporations related to the Vendors in relation to the acquisition of the real properties owned by the Vendors or financing and construction developments thereon.

   These documents have been provided in the DropBox.

3. All documents relating to the financial problems experienced by the Vendors, including the failure by the Vendors to pay obligations to creditors as and when due.

Copies of any and all demand letters and default notices provided to any of the Vendors has been provided in the DropBox.

4. All documents evidencing or relating to the Vendors' registration with Tarion, or cancellation thereof.

   These documents have been provided in the DropBox.

5. All documents relating to appraisals or appraisal information obtained in relation to the real property owned by any of the Vendors.

   These documents have been provided in the DropBox.

6. All documents relating to applications by the Vendors for financing of the acquisition, construction and development of the homes sold by the Vendors, including all responses from prospective lenders or investors.

   All loan and mortgage documentation relating to the Vendors has been provided in the DropBox.

7. All documents evidencing or relating to the disposition of any and all financing obtained from any party in connection with the acquisition, development, or construction of the real properties owned by the Vendors.

   See response to 6 above.

8. All financial statements for each of the Vendors from the date of their incorporation to December 31, 2016, whether audited or unaudited, including all balance sheets, income statements and pro forma financial statements.

   These documents have been provided in the DropBox.

9. All Minutes of the Board of Directors meetings or shareholders of each of the Vendors from the date of their incorporation until the present date.

   These documents have been provided in the DropBox.

10. All Minutes of the meetings of any audit committee of any of the Vendors from the date of incorporation to date.

    No such documents exist.

11. All documents relating in any way to timing, and estimated costs of construction of the developments to be completed by the Vendors.

These documents have been provided in the DropBox.

12. All bank statements and accounting records evidencing the disposition of the Home Buyers' deposits received by each of the Vendors.

    It is far too onerous, time consuming and expensive to provide such documentation and irrelevant to the enforceability of the exclusion of liability clause issue, especially since the Home Buyers are likely to receive the return of their deposits assuming the damage claims are disallowed.

13. All communications to the Home Buyers with respect to the progress or status of the development of the real properties owned by the Vendors, and the timing of completion of the construction and/or the tentative closing dates.

    These documents have been provided in the DropBox.

Yours very truly,

Robin B. Schwill

RS/ae

cc: Bobby Kofman, *KSV Kofman Inc.*
Noah Goldstein, *KSV Kofman Inc.*
Edmond Lamek, *Weir Foulds LLP*
Danny Nunes, *Weir Foulds LLP*
Neil Rabinovitch, *Dentons LLP*
Raj Sahni, *Bennet Jones LLP*

TAB 4

Court File No. CV-16-11389-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF URBANCORP TORONTO MANAGEMENT INC., URBANCORP (ST. CLAIR VILLAGE) INC., URBANCORP (PATRICIA) INC., URBANCORP (MALLOW) INC., URBANCORP (LAWRENCE) INC., URBANCORP DOWNSVIEW PARK DEVELOPMENT INC., URBANCORP (952 QUEEN WEST) INC., KING RESIDENTIAL INC., URBANCORP 60 ST. CLAIR INC., HIGH RES. INC., BRIDGE ON KING INC. (Collectively the "Applicants") AND THE AFFILIATED ENTITIES LISTED IN SCHEDULE "A" HERETO

MEMORANDUM OF LAW
(February 15, 2017 Case Conference)

Background

1. KSV Kofman Inc. ("**KSV**"), in its capacity as the court-appointed monitor (the "**Monitor**") of the Applicants and the affiliated entities listed on Schedule "A" (collectively, the "**CCAA Entities**", and each individually a "**CCAA Entity**"), pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. c-36, as amended (the "**CCAA**") will make a motion on April 13, 2017 for an order declaring that any claim for damages made by any Home Buyer (as defined in the Claims Procedure Order made in these proceedings on September 15, 2016 (the "**Claims Procedure Order**")) be disallowed in full.

2. Each Home Buyer Agreement (as defined in the Claims Procedure Order) contains an exclusion of liability clause whereby the Home Buyer agreed that in the event that the Vendor (as defined therein) cannot complete the subject transaction the

Vendor shall not be responsible or liable to the Home Buyer in any way for any damages or costs whatsoever including, without limitation, loss of bargain, relocation costs, loss of income, professional fees and disbursements and any amount, other than the deposit amount.

3. It is the Monitor's understanding that the Home Buyers will argue that the exclusion of liability clause should not be enforced on the basis that it is unconscionable.

The Law

4. The leading case addressing limitation of liability or exculpatory clauses is *Tercon Contractors Limited v. British Columbia (Ministry of Transportation and Highways)* (2010), 315 D.L.R. (4th) 385 (S.C.C.). In that decision, the Supreme Court of Canada replaced the traditional doctrine of "fundamental breach" as it applied to such clauses with a three-fold test to determine whether such a contractual term precluded liability in a particular fact situation. The three-fold test states that one must first determine, on a narrow interpretation of the clause, whether the exclusion clause applies to the fact situation at hand. Second, assuming that the clause does apply when so interpreted so as to preclude liability, whether the exclusion clause "was unconscionable at the time the contract was made, 'as might arise from situations of unequal bargaining power between the parties'". If the clause is not determined to result from unconscionable bargaining, the third step considers whether there might be some reason of public policy why the clause should not be permitted to apply to the particular fact situation (as in cases of, for example, egregious wrongdoing).

5. In his analysis of the three-fold test in *Tercon*, Binnie J. gave no indication that anything other than the traditional test of unconscionability and inequality of bargaining power would be applied in the step two analysis.

6. The traditional test for inequality of bargaining power as it has developed in the context of the Canadian law of unconscionable transactions was accurately

summarized by McIntyre J.A. in the leading case of *Harry v. Kreutziger* (1978), 95 D.L.R. (3d) 231 at p. 237 (B.C.C.A.):

> "Where a claim is made that a bargain is unconscionable, it must be shown for success that there was inequality in the position of the parties due to the ignorance, need, or distress of the weaker, which would leave him in the power of the stronger, coupled with proof of substantial unfairness in the bargain. When this has been shown a presumption of fraud is raised and the stronger must show, in order to preserve his bargain, that it was fair and reasonable."

7. There is no support in the Canadian jurisprudence for the notion that inequality of bargaining power is established simply because a natural person of ordinary sophistication is dealing with a large corporate entity.

February 14, 2017

Davies Ward Phillips & Vineberg LLP
155 Wellington Street West
Toronto, ON M5V 3J7

Robin B. Schwill (LSUC #38452I)
Tel: 416.863.0900
Fax: 416.863.0871

Lawyers for the Monitor

SCHEDULE "A"

LIST OF NON APPLICANT AFFILIATES

Urbancorp Power Holdings Inc.
Vestaco Homes Inc.
Vestaco Investments Inc.
228 Queen's Quay West Limited
Urbancorp Cumberland 1 LP
Urbancorp Cumberland 1 GP Inc.
Urbancorp Partner (King South) Inc.
Urbancorp (North Side) Inc.
Urbancorp Residential Inc.
Urbancorp Realtyco Inc.

Court File No. CV-11389-00CL

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF URBANCORP TORONTO MANAGEMENT INC., ET AL.

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

(PROCEEDING COMMENCED AT TORONTO)

MEMORANDUM OF LAW
(February 15, 2017 Case Conference)

Davies Ward Phillips & Vineberg LLP
155 Wellington Street West
Toronto, ON M5V 3J7

Robin B. Schwill
(LSUC #: 38452I)

Telephone: 416.863.5502
Facsimile: 416.863.0871

Lawyers for the Monitor

TAB 5

Tercon Contractors Ltd. v. The Queen in right of the Province of British Columbia, by her Ministry of Transportation and Highways; Attorney General of Ontario, Intervener

[Indexed as: Tercon Contractors Ltd. v. British Columbia (Ministry of Transportation and Highways)]

Court File No. 32460

2010 SCC 4

Supreme Court of Canada
McLachlin C.J.C., Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

Heard: March 23, 2009
Judgment rendered: February 12, 2010

Contracts — Building contracts — Obligations of owner — Province issued tender call for construction of highway — Request for proposals restricted qualified bidders — Province breached terms of tendering contract by accepting bid from ineligible bidder — Exclusion clause protecting province from liability arising from participation in tendering process inapplicable — Parties did not intend to waive compensation for conduct striking at heart of integrity and business efficacy of tendering process.

Contracts — Exemption clauses — Clause to be enforced unless unconscionable or contrary to ordinary public policy — No doctrine of fundamental breach.

Contracts — Unconscionability — General — Exemption clauses — Clause to be enforced unless unconscionable or contrary to ordinary public policy — No doctrine of fundamental breach.

Six teams responded to the province of British Columbia's request for expression of interest for the design and construction of a highway. The province subsequently informed the six proponents that it intended to design the highway itself and issued a request for proposals for its construction. Open only to the six original proponents, the request for proposal set out a specifically defined project and contemplated that proposals would be evaluated according to specific criteria. The request for proposal also included an exclusion of liability clause which provided: "Except as expressly and specifically permitted in these Instructions to Proponents, no Proponent shall have any claim for any 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".

One of the bidders, Brentwood Enterprises Ltd. ("Brentwood"), lacked expertise in drilling and blasting, so in order to prepare a more competitive proposal, it

entered into a pre-bidding agreement with a non-qualified bidder to undertake the work as a joint venture. The appellant and Brentwood were the two short-listed proponents, but the province ultimately selected Brentwood for the project.

The appellant brought an action in damages against the province. The trial judge held that the Brentwood bid was submitted by a joint venture of Brentwood and the non-qualified bidder and the province, aware of the situation, breached the express provisions of the tendering contract with the appellant by considering a bid from and awarding the work to an ineligible bidder. She held that the exclusion clause was ambiguous and resolved the ambiguity in the appellant's favour. She found that the province's breach was fundamental and it would not be fair or reasonable to enforce the exclusion clause.

The province's appeal was allowed. The Court of Appeal held that the exclusion clause was clear and unambiguous and barred compensation for all defaults.

On appeal by the unsuccessful proponent to the Supreme Court of Canada, **held**, McLachlin C.J.C., Binnie, Abella and Rothstein JJ. dissenting, the appeal should be allowed.

Per Cromwell J. (LeBel, Deschamps, Fish and Charron JJ. concurring): The doctrine of fundamental breach in relation to exclusion clauses should be laid to rest. The appropriate framework of analysis was that set out by Binnie J. Applying the first stage of that analysis, it could not be said that the exclusion clause applied to the province's breaches in this case.

Submitting a compliant bid in response to a tender call may give rise to a contract ("Contract A") between the bidder and the owner, the express terms of which are found in the tender documents. There was no basis to interfere with the trial judge's finding that there was an intent to create contractual obligations upon submission of a compliant bid. The request for proposal set out a specifically defined project, invited proposals from a closed and specific list of eligible proponents, and contemplated that proposals would be evaluated according to specific criteria. There was no basis to challenge the finding that there was offer, acceptance and consideration in the invitation to tender and the appellant's bid.

It was not contested that only the six original proponents that qualified through the request for expression of interest process were eligible to bid. This was specified in the Minister of Transportation and Highway's approval of the process before the request for proposal was issued. Nor was there any doubt that the province was contractually bound to accept bids only from eligible bidders.

Although Brentwood ultimately submitted a proposal in its own name, the proposal in substance was from the joint venture between Brentwood and the non-qualified bidder, and it was evaluated as such. The trial judge found that the province fully understood that the Brentwood bid was on behalf of a joint venture, thought that a bid from that joint venture was not eligible, and took active steps to obscure the reality of the situation.

The bid by joint venture constituted "material non-compliance" with the tendering contract. Permitting the bid to proceed gave the joint venture a competitive

advantage in the bidding process and the joint venture nature of the bid was one of its attractions during the selection process. This breached not only the express eligibility provisions of the tender documents but also the implied duty to act fairly towards all bidders.

The exclusion clause excluded compensation for claims resulting from "participating in this RFP". This claim does not fall within the terms of the exclusion clause. The special commercial context of tendering, particularly the context of public procurement, require transparency and fairness in the tendering process. The requirement that only compliant bids be considered contributes to the integrity and business efficacy of the tendering process. Clear language is necessary to exclude liability for breach of such a basic requirement of the tendering process, particularly in the case of public procurement.

Limiting eligibility of bidders to those who had responded to the request for expression of interest was the foundation of the whole request for proposal. Acceptance of a bid from an ineligible bidder attacks the underlying premise of the process established by the request for proposal. Liability for such an attack is not excluded by a clause limiting compensation resulting from participation in this request for proposal. The parties did not intend to waive compensation for conduct like that of the province that strikes at the heart of the integrity and business efficacy of the tendering process that it undertook.

The trial judge did not err in finding that the province breached the tendering contract or in finding that the appellant's remedy in damages for that breach was not precluded by the exclusion clause in the contract.

Per Binnie J. (dissenting) (McLachlin C.J.C., Abella and Rothstein JJ. concurring in the dissent): When a plaintiff seeks to escape the effect of an exclusion clause or other contractual terms to which it previously agreed, the following analysis should be applied.

The first issue is whether, as a matter of interpretation, the exclusion clause applies to the circumstances established in evidence. This depends on the assessment of the intention of the parties as expressed in the contract. If the exclusion applies, the second issue is whether the exclusion clause was unconscionable at the time the contract was made. If the exclusion clause is valid and applicable, the court may undertake a third enquiry, namely whether the court should nevertheless refuse to enforce the valid exclusion clause because of the existence of an overriding public policy that outweighs the very strong public interest in the enforcement of contracts.

"Participating in this RFP" began with "submitting a Proposal" for consideration. The appellant participated in the request for proposal process and its bid was considered. There was no relevant imbalance in bargaining power nor did the exclusion clause violate public policy. The exclusion clause was valid at the time the contract was made.

The minister's performance could not be characterized as so aberrant as to forfeit the protection of the contractual exclusion clause on the basis of some overriding

public policy. A sensible and realistic view is that the parties expected that the exclusion of compensation clause would operate even where the eligibility criteria in respect of the bid were not complied with. All bidders were aware of a certain flexibility with respect to the composition of any proponent's "team". While the appellant had reason to complain about the ministry's misconduct, it did not rise to the level where public policy would justify the court depriving the ministry of the protection of the exclusion of compensation clause freely agreed to by the appellant, a major contractor, in the contract.

Cases referred to

By Cromwell J.

Canadian Pacific Hotels Ltd. v. Bank of Montreal (1987), 40 D.L.R. (4th) 385, [1987] 1 S.C.R. 711, 41 C.C.L.T. 1, 21 O.A.C. 321, 77 N.R. 161, 4 A.C.W.S. (3d) 299 — **refd to**

Double N Earthmovers Ltd. v. Edmonton (City) (2007), 275 D.L.R. (4th) 577, [2007] 1 S.C.R. 116, 28 B.L.R. (4th) 169, 58 C.L.R. (3d) 4, 29 M.P.L.R. (4th) 1, [2007] 3 W.W.R. 1, 391 W.A.C. 329, 68 Alta. L.R. (4th) 1, 401 A.R. 329, 356 N.R. 211, 153 A.C.W.S. (3d) 583, 2007 SCC 3, [2007] S.C.J. No. 3 — **refd to**

Fraser Jewellers (1982) Ltd. v. Dominion Electric Protection Co. (1997), 148 D.L.R. (4th) 496, 32 B.L.R. (2d) 2, 35 C.C.L.T. (2d) 298, 34 O.R. (3d) 1, 101 O.A.C. 56, 71 A.C.W.S. (3d) 871, [1997] O.J. No. 2359 — **consd**

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APPEAL from a judgment of the British Columbia Court of Appeal, 289 D.L.R. (4th) 647, 40 B.L.R. (4th) 26, 66 C.L.R. (3d) 1, [2008] 2 W.W.R. 410, 414 W.A.C. 103, 73 B.C.L.R. (4th) 201, 249

B.C.A.C. 103, 162 A.C.W.S. (3d) 939, 2007 BCCA 592, 2007 CarswellBC 2880, [2007] B.C.J. No. 2558, setting aside a judgment of Dillon J., 18 B.L.R. (4th) 88, 51 C.L.R. (3d) 227, [2006] 6 W.W.R. 275, 53 B.C.L.R. (4th) 138, 148 A.C.W.S. (3d) 389, 2006 BCSC 499, 2006 CarswellBC 730, [2006] B.C.J. No. 657, awarding damages for breach of a tendering contract.

Chris R. Armstrong, *Brian G. McLean*, *William S. McLean* and *Marie-France Major*, for appellant, Tercon Contractors Ltd.

J. Edward Gouge, Q.C., *Jonathan Eades* and *Kate Hamm*, for respondent, The Queen in right of the Province of British Columbia, by her Ministry of Transportation and Highways.

Malliha Wilson and *Lucy McSweeney*, for intervener, Attorney General of Ontario.

CROMWELL J. (LEBEL, DESCHAMPS, FISH and CHARRON JJ. concurring):—

I. Introduction

[1] The Province accepted a bid from a bidder who was not eligible to participate in the tender and then took steps to ensure that this fact was not disclosed. The main question on appeal, as I see it, is whether the Province succeeded in excluding its liability for damages flowing from this conduct through an exclusion clause it inserted into the contract. I share the view of the trial judge that it did not.

[2] The appeal arises out of a tendering contract between the appellant, Tercon Contractors Ltd., who was the bidder, and the respondent, Her Majesty the Queen in Right of the Province of British Columbia, who issued the tender call. The case turns on the interpretation of provisions in the contract relating to eligibility to bid and exclusion of compensation resulting from participation in the tendering process.

[3] The trial judge found that the respondent (which I will refer to as the Province) breached the express provisions of the tendering contract with Tercon by accepting a bid from another party who was not eligible to bid and by ultimately awarding the work to that ineligible bidder. In short, a bid was accepted and the work awarded to a party who should not even have been permitted to participate in the tender process. The judge also found that this and related conduct by the Province breached the implied duty of fairness to bidders, holding that the Province had acted "egregiously" (2006 BCSC 499,

53 B.C.L.R (4th) 138, at para. 150, 148 A.C.W.S. (3d) 389). The judge then turned to the Province's defence based on an exclusion clause that barred claims for compensation "as a result of participating" in the tendering process. She held that this clause, properly interpreted, did not exclude Tercon's claim for damages. In effect, she held that it was not within the contemplation of the parties that this clause would bar a remedy in damages arising from the Province's unfair dealings with a party who was not entitled to participate in the tender in the first place.

[4] The Province appealed and the Court of Appeal reversed (2007 BCCA 592, 73 B.C.L.R. (4th) 201, 289 D.L.R. (4th) 647). Dealing only with the exclusion clause issue, it held that the clause was clear and unambiguous and barred compensation for all defaults.

[5] On Tercon's appeal to this Court, the questions for us are whether the successful bidder was eligible to participate in the request for proposals ("RFP") and, if not, whether Tercon's claim for damages is barred by the exclusion clause.

[6] In my respectful view, the trial judge reached the right result on both issues. The Province's attempts to persuade us that it did not breach the tendering contract are, in my view, wholly unsuccessful. The foundation of the tendering contract was that only six, preselected bidders would be permitted to participate in the bidding. As the trial judge held, the Province not only acted in a way that breached the express and implied terms of the contract by considering a bid from an ineligible bidder, it did so in a manner that was an affront to the integrity and business efficacy of the tendering process. One must not lose sight of the fact that the trial judge found that the Province acted egregiously by "ensuring that [the true bidder] was not disclosed" (para. 150) and that its breach "attacke[d] the underlying premise of the [tendering] process" (para. 146), a process which was set out in detail in the contract and, in addition, had been given ministerial approval as required by statute.

[7] As for its reliance on the exclusion clause, the Province submits that the parties were free to agree to limitations of liability and did so. Consideration of this submission requires an interpretation of the words of the clause to which the parties agreed in the context of the contract as a whole. My view is that, properly interpreted, the exclusion clause does not protect the Province from Tercon's

damage claim which arises from the Province's dealings with a party not even eligible to bid, let alone from its breach of the implied duty of fairness to bidders. In other words, the Province's liability did not arise from Tercon's participation in the process that the Province established, but from the Province's unfair dealings with a party who was not entitled to participate in that process.

[8] I would allow the appeal and restore the judgment of the trial judge.

II. Brief Overview of the Facts

[9] I will have to set out more factual detail as part of my analysis. For now, a very brief summary will suffice. In 2000, the Ministry of Transportation and Highways (the "Province") issued a request for expressions of interest ("RFEI") for designing and building a highway in northwestern British Columbia. Six teams made submissions, including Tercon and Brentwood Enterprises Ltd. Later that year, the Province informed the six proponents that it now intended to design the highway itself and would issue a RFP for its construction.

[10] The RFP was formally issued on January 15, 2001. Under its terms, only the six original proponents were eligible to submit a proposal. The RFP also included a clause excluding all claims for damages "as a result of participating in this RFP" (s. 2:10).

[11] Unable to submit a competitive bid on its own, Brentwood teamed up with Emil Anderson Construction Co. ("EAC"), which was not a qualified bidder, and together they submitted a bid in Brentwood's name. Brentwood and Tercon were the two short-listed proponents and the Ministry ultimately selected Brentwood as the preferred proponent.

[12] Tercon brought an action seeking damages, alleging that the Ministry had considered and accepted an ineligible bid and that but for that breach, it would have been awarded the contract. The trial judge agreed and awarded roughly $3.5 million in damages and pre-judgment interest. As noted, the Court of Appeal reversed and Tercon appeals by leave of the Court.

III. Issues

[13] The issues for decision are whether the trial judge erred in finding that:

1. the Province breached the tendering contract by entertaining a bid from an ineligible bidder.

2. the exclusion clause does not bar the appellant's claim for damages for the breaches of the tendering contract found by the trial judge.

IV. Analysis

A. Was the Brentwood Bid Ineligible?

[14] The first issue is whether the Brentwood bid was from an eligible bidder. The judge found that the bid was in substance, although not in form, from a joint venture of Brentwood and EAC and that it was, therefore, an ineligible bid. The Province attacks this finding on three grounds:

(i) a joint venture is not a legal person and therefore the Province could not and did not contract with a joint venture;

(ii) it did not award the contract to EAC and EAC had no contractual responsibility to the Province for failure to perform the contract;

(iii) there was no term of the RFP that restricted the right of proponents to enter into joint venture agreements with others; this arrangement merely left Brentwood, the original proponent, in place and allowed it to enhance its ability to perform the work.

[15] While these were the Province's main points, its position became more wide-ranging during oral argument, at times suggesting that it had no contractual obligation to deal only with eligible bidders. It is therefore necessary to take a step back and look at that threshold point before turning to the Province's more focussed submissions.

1. The Province's Contractual Obligations in the Bidding Process

[16] The judge found, and it was uncontested at trial, that only the six original proponents that qualified through the RFEI process were eligible to submit a response to the RFP. This finding is not challenged on appeal, although there was a passing suggestion during oral argument that there was no contractual obligation of this sort at all. The trial judge also held, noting that this point was uncontested, that a joint venture between Brentwood and EAC was ineligible to bid. This is also not contested on appeal. These two findings are critical to the case and provide important background for an issue that is in dispute, namely whether the Brentwood bid was ineligible.

It is, therefore, worth reviewing the relevant background in detail. I first briefly set out the legal framework and then turn to the trial judge's findings.

2. Legal Principles

[17] Submitting a compliant bid in response to a tender call *may* give rise to a contract — called Contract A — between the bidder and the owner, the express terms of which are found in the tender documents. The contract may also have implied terms according to the principles set out in *Canadian Pacific Hotels Ltd. v. Bank of Montreal,* [1987] 1 S.C.R. 711, 40 D.L.R. (4th) 385; see also *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.,* [1999] 1 S.C.R. 619, 170 D.L.R. (4th) 577, and *Martel Building Ltd. v. Canada,* 2000 SCC 60, [2000] 2 S.C.R. 860, 193 D.L.R. (4th) 1. The key word, however, is "may". The Contract A – Contract B framework is one that arises, if at all, from the dealings between the parties. It is not an artificial construct imposed by the courts, but a description of the legal consequences of the parties' actual dealings. The Court emphasized in *M.J.B.* that whether Contract A arises and if it does, what its terms are, depend on the express and implied terms and conditions of the tender call in each case. As Iacobucci J. put it, at para. 19:

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

3. The Trial Judge's Findings Concerning the Existence of Contract A

[18] The question of whether Tercon's submission of a compliant bid gave rise to contractual relations between it and the Province was contested by the Province at trial. The trial judge gave extensive reasons for finding against the Province on this issue. We are told that the Province did not pursue this point in the Court of Appeal but instead premised its submissions on the existence of Contract A. The Province took the same approach in its written submissions in this Court. However, during oral argument, there was some passing reference in response to questions that there was no Contract A. In

light of the position taken by the Province on its appeal to the Court of Appeal and in its written submissions in this Court, it is now too late to revisit whether there were contractual duties between Tercon and the Province. Even if it were open to the Province to make this argument now, I can see no error in legal principle or any palpable and overriding error of fact in the trial judge's careful reasons on this point.

[19] The trial judge did not mechanically impose the Contract A – Contract B framework, but considered whether Contract A arose in light of her detailed analysis of the dealings between the parties. That was the right approach. She reviewed in detail the provisions of the RFP which supported her conclusion that there was an intent to create contractual relations upon submission of a compliant bid. She noted, for example, that bids were to be irrevocable for 60 days and that security of $50,000 had to be paid by all proponents and was to be increased to $200,000 by the successful proponent. Any revisions to proposals prior to the closing date had to be in writing, properly executed and received before the closing time. The RFP also set out detailed evaluation criteria and specified that they were to be the only criteria to be used to evaluate proposals. A specific form of alliance agreement was attached. There were detailed provisions about pricing that were fixed and non-negotiable. A proponent was required to accept this form of contract substantially, and security was lost if an agreement was not executed. The Ministry reserved a right to cancel the RFP under s. 2.9 but in such event was obliged to reimburse proponents for costs incurred in preparing their bids up to $15,000 each. Proponents had to submit a signed proposal form, which established that they offered to execute an agreement substantially in the form included in the RFP package. Further, they acknowledged that the security could be forfeited if they were selected as the preferred proponent and failed to enter into good faith discussions with the Ministry to reach an agreement and sign the alliance agreement.

[20] In summary, as the trial judge found, the RFP set out a specifically defined project, invited proposals from a closed and specific list of eligible proponents, and contemplated that proposals would be evaluated according to specific criteria. Negotiation of the alliance construction contract was required, but the negotiation was constrained and did not go to the fundamental details of either the procurement process or the ultimate contract.

[21] There is, therefore, no basis to interfere with the judge's finding that there was an intent to create contractual obligations upon submission of a compliant bid. I add, however, that the tender call in this case did not give rise to the classic Contract A – Contract B framework in which the bidder submits an irrevocable bid and undertakes to enter into contract B on those terms if it is accepted. The alliance model process which was used here was more complicated than that and involved good faith negotiations for a contract B in the form set out in the tender documents. But in my view, this should not distract us from the main question here. We do not have to spell out all of the terms of Contract A, let alone of Contract B, so as to define all of the duties and obligations of both the bidders and the Province. The question here is much narrower: did contractual obligations arise as a result of Tercon's compliant bid and, if so, was it a term of that contract that the Province would only entertain bids from eligible bidders? The trial judge found offer, acceptance and consideration in the invitation to tender and Tercon's bid. There is no basis, in my respectful view, to challenge that finding even if it were open to the Province to try to do so at this late stage of the litigation.

4. The Trial Judge's Finding Concerning Eligibility

[22] It was not contested at trial that only the six original proponents that qualified through the RFEI process were eligible to bid. This point is not in issue on appeal; the question is what this eligibility requirement means. It will be helpful, therefore, to set out the background about this limited eligibility to bid in this tendering process.

[23] To begin, it is worth repeating that there is no doubt that the Province was contractually bound to accept bids only from eligible bidders. This duty may be implied even absent express stipulation. For example, in *M.J.B.*, the Court found that an implied obligation to accept only compliant bids was necessary to give business efficacy to the tendering process, noting, at para. 41, that a bidder must expend effort and incur expense in preparing its bid and must submit bid security and that it is "obvious" that it makes "little sense" for the bidder to comply with these requirements if the owner "is allowed, in effect, to circumscribe this process and accept a non-compliant bid". But again, whether such a duty should be implied in any given case will depend on the dealings between the parties. Here, however, there is no need to rely on implied terms. The

obligation to consider only bids from eligible bidders was stated expressly in the tender documents and in the required ministerial approval of the process which they described.

[24] As noted, in early 2000, the Province issued a RFEI based on a design-build model; the contractor would both design and build the highway. The RFEI contemplated that a short list of three qualified contractors, or teams composed of contractors and consultants, would be nominated as proponents. Each was to provide a description of the legal structure of the team and to describe the role of each team member along with the extent of involvement of each team member as a percentage of the total scope of the project and an organization chart showing each team member's role. Any change in team management or key positions required notice in writing to the Province which reserved the right to disqualify the proponent if the change materially and negatively affected the ability of the team to carry out the project.

[25] Expressions of interest ("EOI") were received from six teams including Tercon and Brentwood. The evaluation panel and independent review panel recommended a short list of three proponents with Tercon topping the evaluation. Brentwood was evaluated fifth and was not on the short list. Brentwood was known to lack expertise in drilling and blasting and so its EOI had included an outline of the key team members with that experience. EAC did not participate and had no role in the Brentwood submission. The results of this evaluation were not communicated and the process did not proceed because the Province decided to design the project itself and issue an RFP for an alliance model contract to construct the highway.

[26] It was clear from the outset that only those who had submitted proposals during the RFEI process would be eligible to submit proposals under the RFP. This was specified in the approval of the process by the Minister of Transportation and Highways ("Minister") before the RFP was issued. It is worth pausing here to briefly look at the Minister's role.

[27] Pursuant to s. 23 of the *Ministry of Transportation and Highways Act*, R.S.B.C. 1996, c. 311, the legislation in force at the relevant time, the Minister was required to invite public tenders for road construction unless he or she determined that another process would result in competitively established costs for the work. The section provided:

> 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:
>
> ...
>
> (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.
>
> ...

[28] These provisions make clear that the work in this case had to be awarded by public tender, absent the Minister's approval of an alternative process, and had to be awarded to the lowest bidder, absent approval of the Lieutenant Governor in Council. As noted, ministerial approval was given for an alternative process under s. 23(1)(c). The Minister issued a notice that, pursuant to that section, he approved the process set out in an attached document and had determined it to be an alternative contracting process that would result in competitively established costs for the performance of the work. The attached document outlined in seven numbered paragraphs the process that had been approved.

[29] The document described the background of the public RFEI (which I have set out earlier), noting that *only those firms identified through the EOI process would be eligible to submit proposals for the work* and that they would receive invitations to do so. The Minister's approval in fact referred to the firms who had been short-listed from the RFEI process as being eligible. If this were taken to refer only to the three proponents identified by the evaluation process of the RFEI, Tercon would be included but Brentwood would not. However, no one has suggested that anything turns on this and it seems clear that ultimately all six of the RFEI proponents — including both Tercon and Brentwood — were intended to be eligible. The ministerial approval then briefly set out the process. Proposals "by short listed firms" were to be evaluated "using the considerations set out in the RFP".

[30] It is clear, therefore, that participation in the RFP process approved by the Minister was limited to those who had participated in the RFEI process.

[31] The Province's factum implies that the Minister approved inclusion of the exclusion clause in the RFP. However, there is no evidence of this in the record before the Court. The Minister's approval is before us. It is dated as having been prepared on August 23, 2000 and signed on October 19, 2000, and approves a process outlined in a two-page document attached to it. It says nothing about exclusion of the Province's liability. The RFP, containing the exclusion clause in issue here, is dated January 15, 2001 and was sent out to eligible bidders under cover of a letter of the same date, some three months after the Minister's approval.

[32] The RFP is a lengthy document, containing detailed instructions to proponents, required forms, a time schedule of the work, detailed provisions concerning contract pricing, a draft of the ultimate construction contract and many other things. Most relevant for our purposes are the terms of the instructions to proponents and in particular the eligibility requirements for bidders.

[33] The RFP reiterates in unequivocal terms that eligibility to bid was restricted as set out in the ministerial approval. It also underlines the significance of the identity of the proponent. In s. 1.1, the RFP specifies that only the six teams involved in the RFEI would be eligible. The term "proponent", which refers to a bidder, is defined in s. 8 as "a team that has become eligible to respond to the RFP as described in Section 1.1 of the Instructions to Proponents". Section 2.8(a) of the RFP stipulates that *only* the six proponents qualified through the RFEI process were eligible and that *proposals received from any other party would not be considered.* In short, there were potentially only six participants and "Contract A" could not arise by the submission of a bid from any other party.

[34] The RFP also addressed material changes to the proponent, including changes in the proponent's team members and its financial ability to undertake and complete the work. Section 2.8(b) of the RFP provided in part as follows:

> If in the opinion of the Ministry a material change has occurred to the Proponent since its qualification under the RFEI, including if the composition of the Proponent's team members has changed ... or if, for financial or other reasons, the Proponent's ability to undertake and complete the Work has

> changed, then the Ministry may request the Proponent to submit further supporting information as the Ministry may request in support of the Proponent's qualification to perform the Work. If in the sole discretion of the Ministry as a result of the changes the Proponent is not sufficiently qualified to perform the Work then the Ministry reserves the right to disqualify that Proponent and reject its Proposal.

[35] The proponent was to provide an organization chart outlining the proponent's team members, structure and roles. If the team members were different from the RFEI process submission, an explanation was to be provided for the changes: s. 4.2(b)(i). A list of subcontractors and suppliers was also to be provided and the Ministry had to be notified of any changes: s. 4.2(e).

[36] The RFP provided proponents with a mechanism to determine whether they remained qualified to submit a proposal. If a proponent was concerned about its eligibility as a result of a material change, it could make a preliminary submission to the Ministry describing the nature of the changes and the Ministry would give a written decision as to whether the proponent was still qualified: s. 2.8(b).

[37] Brentwood tried to take advantage of this process. The trial judge thoroughly outlined this, at paras. 17-23 of her reasons. In brief, Brentwood lacked expertise in drilling and blasting and by the time the RFP was issued, it faced limited local bonding capacity due to commitments to other projects, a shorter construction period, the potential unavailability of subcontractors and limited equipment to perform the work. It in fact considered not bidding at all. Instead, however, it entered into a pre-bidding agreement with EAC that the work would be undertaken by a joint venture of Brentwood and EAC and that upon being awarded the work, they would enter into a joint venture agreement and would share 50-50 the costs, expenses, losses and gains. The trial judge noted that it was common in the industry for contractors to agree to a joint venture on the basis of a pre-bid agreement with the specifics of the joint venture to be worked out once the contract was awarded and that Brentwood and EAC acted consistently throughout in accordance with this industry standard.

[38] Brentwood sent the Province's project manager, Mr. Tasaka, a preliminary submission as provided for in s. 2.8(b) of the RFP, advising of a material change in its team's structure in that it wished to form a joint venture with EAC. This was done, the trial judge

found, because Brentwood thought it would be disqualified if it submitted a proposal as a joint venture without the Ministry's prior approval under this section of the RFP. The Province never responded in writing as it ought to have according to s. 2.8(b).

[39] It seems to have been assumed by everyone that a joint venture of Brentwood and EAC was not eligible because this change would not simply be a change in the composition of the bidder's team, but in effect a new bidder. Without reviewing in detail all of the evidence referred to by the trial judge, it is fair to say that although Brentwood ultimately submitted a proposal in its own name, the proposal in substance was from the Brentwood-EAC joint venture and was evaluated as such. As the trial judge concluded:

> The substance of the proposal was as a joint venture and this must have been apparent to all. The [project evaluation panel] approved Brentwood/EAC as joint venturers as the preferred proponent. The [panel] was satisfied that Tercon had the capacity and commitment to do the job but preferred the joint venture submission of Brentwood/EAC. [para. 53].

[40] There was some suggestion by the Province during oral argument that the trial judge had wrongly imposed on it a duty to investigate Brentwood's bid, a duty rejected by the majority of the Court in *Double N Earthmovers Ltd. v. Edmonton (City)*, 2007 SCC 3, [2007] 1 S.C.R. 116, 275 D.L.R. (4th) 577. In my view, the trial judge did no such thing. As her detailed findings make clear, the Province: (1) fully understood that the Brentwood bid was in fact on behalf of a joint venture of Brentwood and EAC; (2) thought that a bid from that joint venture was not eligible; and (3) took active steps to obscure the reality of the situation. No investigation was required for the Province to know these things and the judge imposed no duty to engage in one.

5. The Province's Submissions

[41] I will address the Province's first two points together.

(i) a joint venture is not a legal person and therefore the Province could not and did not contract with a joint venture; and

(ii) it did not award the contract to EAC and EAC had no contractual responsibility to the Province for failure to perform the contract;

[42] I cannot accept these submissions. The issue is not, as these arguments assume, whether the Province contracted with a joint

venture or whether EAC had contractual obligations to the Province. The issue is whether the Province considered an ineligible bid; the point of substance is whether the bid was from an eligible bidder.

[43] At trial there was no contest that a bid from a joint venture involving an ineligible bidder would be ineligible. The Province's position was that there was no need to look beyond the face of the bid to determine who was bidding: the proposal was in the name of Brentwood and therefore the bid was from a compliant bidder. Respectfully, I see no error in the trial judge's rejection of this position. There was a mountain of evidence to support the judge's conclusions that first, Brentwood's bid, in fact if not in form, was on behalf of a joint venture between itself and EAC; second, the Province knew this and took the position that it could not consider a bid from or award the work to that joint venture; third, the existence of the joint venture was a material consideration in favour of the Brentwood bid during the evaluation process; and finally, that steps were taken by revising and drafting documentation to obfuscate the reality of the situation.

[44] Brentwood was one of the original RFEI proponents and was of course eligible to bid, subject to material changes in the composition of its team. EAC had not submitted a proposal during the RFEI process. It had been involved in advising the Ministry in relation to the project in 1998 and, in the fall of 2000, the Ministry had asked EAC to prepare an internal bid for comparison purposes (although EAC did not do so) as EAC was not entitled to bid on the Project.

[45] As noted earlier, after the RFP was issued, Brentwood and EAC entered into a pre-bidding agreement that provided that the work would be undertaken in the name of Brentwood-Anderson, a joint venture, that the work would be sponsored and managed by the joint venture and that upon being awarded the contract, the parties would enter into a joint venture agreement. Brentwood advised the Ministry in writing that it was forming a joint venture with EAC "to submit a more competitive price"; this fax was in effect a preliminary submission contemplated by s. 2.8(b) of the RFP and was written, as the trial judge found, because Brentwood assumed that it could be disqualified if it submitted a proposal as a joint venture unless prior arrangements had been made. The Province never responded in writing to this preliminary submission, as required by s. 2.8(b). There were, however, discussions with the Province's

project manager, Mr. Tasaka who, the trial judge found, understood that a joint venture from Brentwood and EAC would not be eligible. As the judge put it, the Province's position appears to have been that the Brentwood/EAC proposal could proceed as long as the submission was in the name of Brentwood.

[46] In the result, EAC was listed in the ultimate submission as a "major member" of the team. The legal relationship with EAC was not specified and EAC was listed as a subcontractor even though, as the trial judge found, their relationship bore no resemblance to a standard subcontractor agreement. The trial judge found as facts — and these findings are not challenged — that Brentwood and EAC always intended between themselves to form a joint venture and to formalize that arrangement once the contract was secured, and further, that the role of EAC was purposefully obfuscated in the bid to avoid an apparent conflict with s. 2.8(a) of the RFP.

[47] During the selection process, it became clear that the bid was in reality on behalf of a joint venture. The project evaluation panel ("PEP") requested better information than provided in the bid about the structure of the business arrangements between Brentwood and EAC. Brentwood responded by disclosing the pre-bid agreement between them to form a 50/50 joint venture if successful. The PEP understood from this that Brentwood and EAC had a similar interest in the risk and reward under the contract and that this helped satisfy them that the "risk/reward" aspect of the alliance contract could be negotiated with them flexibly. The PEP clearly did not consider EAC to be a subcontractor although shown as such in the bid. In its step 6 report, the PEP consistently referred to the proponent as being a joint venture of Brentwood and EAC or as "Brentwood/EAC" and the trial judge found that it was on the basis that they were indeed a joint venture that PEP approved Brentwood/EAC as the preferred proponent. This step 6 report was ultimately revised to refer only to the Brentwood team as the official proponent. The trial judge found as a fact that this revision was made because "it was apparent that a joint venture was not eligible to submit a proposal"(para. 56).

[48] The findings of the trial judge and the record make it clear that it was no mere question of form rather than a matter of substance whether the bidder was Brentwood with other team members or, as it in fact was, the Brentwood/EAC joint venture. As she noted, at para. 121 of her reasons, the whole purpose of the joint venture

was to allow submission of a more competitive price than it would have been able to do as a proponent with a team as allowed under s. 2.8(b) of the RFP. The joint venture permitted a 50/50 sharing of risk and reward and co-management of the project while at the same time avoiding the restrictions on subcontracting in the tendering documents. As the judge put it, the bid by the joint venture constituted "material non-compliance" with the tendering contract: "[t]he 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" (para 126).

[49] The Province suggests that the trial judge's reasons allow form to triumph over substance. In my view, it is the Province's position that better deserves that description. It had a bid which it knew to be on behalf of a joint venture, encouraged the bid to proceed and took steps to obfuscate the reality that it was on behalf of a joint venture. Permitting the bid to proceed in this way gave the joint venture a competitive advantage in the bidding process, and the record could not be clearer that the joint venture nature of the bid was one of its attractions during the selection process. The Province nonetheless submits that so long as only the name of Brentwood appears on the bid and ultimate contract B, all is well. If ever a submission advocated placing form above substance, this is it.

[50] It is true that the Province had legal advice and did not proceed in defiance of it. However, the facts as found by the trial judge about this legal advice hardly advance the Province's position. The judge found that the Province's lawyer was not aware of the background relevant to the question of whether the Brentwood bid was eligible, never reviewed the proponent eligibility requirements in the RFP and was not asked to and did not direct his mind to the question of eligibility. As the trial judge put it, the lawyer "appears to have operated on the assumption that Brentwood had been irreversibly selected" (para. 70).

[51] The Brentwood/EAC joint venture having been selected as the preferred proponent, negotiations for the alliance contract ensued. The trial judge found that by this time, all agreed that a joint venture was not an eligible proponent and the Ministry was taking the position that the contract could not be in the name of the joint venture. Brentwood and EAC executed a revised pre-contract agreement that provided, notwithstanding the letter of intent from the

Ministry addressed to Brentwood indicating that the legal relationship between them would be contractor/subcontractor, the contract would be performed and the profits shared equally between them. The work was to be managed by a committee with equal representation, the bond required by the owner was to be provided by both parties and EAC indemnified Brentwood against half of any loss or cost incurred as a result of performance of the work. According to schedule B4 of the RFP, all subcontracts were to be attached to the RFP but no contract between Brentwood and EAC was ever provided or attached to the proposal.

[52] The Province has identified no palpable and overriding error in these many findings of fact by the trial judge. I conclude, therefore, that we must approach the case on the basis of the judge's finding that the bid was in fact, if not in form, submitted by a joint venture of Brentwood and EAC, that the Ministry was well aware of this, that the existence of the joint venture was a material consideration in favour of the bid during the evaluation process and that by bidding as a joint venture, Brentwood was given a competitive advantage in the bidding process.

[53] I reject the Ministry's submissions that all that matters is the form and not the substance of the arrangement. In my view, the trial judge's finding that this bid was in fact on behalf of a joint venture is unassailable.

[54] I turn to the Province's third point:

(iii) there was no term of the RFP that restricted the right of proponents to enter into joint venture agreements with others; this arrangement merely left Brentwood, the original proponent in place and allowed it to enhance its ability to perform the work.

[55] This submission addresses the question of whether the joint venture was an eligible bidder. The Province submits that it is, arguing that s. 2.8(b) of the RFP shows that the RFP contemplated that each proponent would be supported by a team, that the composition of the team might change and that the Province under that section retained the right to approve or reject changes in the team of any proponent. I cannot accept these submissions.

[56] Section 2.8 must be read as a whole and in light of the ministerial approval which I have described earlier. Section 2.8(a), consistent with that approval, stipulates that only the six proponents

qualified through the RFEI process were eligible to submit responses and that proposals from any other party "shall not be considered". The word "proponent" is defined in s. 8 as a team that has become eligible to respond to the RFP. The material change provisions in s. 2.8(b) should not be read as negating the express provisions of the RFP and the ministerial approval of the process. When read as a whole, the provisions about material change do not permit the addition of a new entity as occurred here. The process actually followed was not the one specified in the bidding contract and was not authorized by the statute because it was not the one approved by the Minister.

[57] Moreover, even if one were to conclude (and I would not) that this change from the Brentwood team that participated in the RFEI to the Brentwood/EAC joint venture by whom the bid was submitted could fall within the material change provisions of s. 2.8(b), the Province never gave a written decision to permit this change as required by that provision. As the trial judge noted, in fact the Province's position was that such a bid would not be eligible and its agents took steps to obfuscate the true proponent in the relevant documentation.

[58] The trial judge also found that there was an implied obligation of good faith in the contract and that the Province breached this obligation by failing to treat all bidders equally by changing the terms of eligibility to Brentwood's competitive advantage. This conclusion strongly reinforces the trial judge's decision about eligibility. Rather than repeating her detailed findings, I will simply quote her summary at para. 138:

> The whole of [the Province's] conduct leaves me with no doubt that the [Province] breached the duty of fairness to [Tercon] by changing the terms of eligibility to Brentwood's competitive advantage. At best, [the Province] ignored significant information to its [i.e. Tercon's] detriment. At worst, the [Province] covered up its knowledge that the successful proponent was an ineligible joint venture. In the circumstances here, it is not open to the [Province] to say that a joint venture was only proposed. Nor can the [Province] say that it was unaware of the joint venture when it acted deliberately to structure contract B to include EAC as fully responsible within a separate contract with Brentwood, so minimizing the [Province's] risk that the contract would be unenforceable against EAC if arrangements did not work out. .... The [Province] was ... prepared to take the risk that unsuccessful bidders would sue: this risk did materialize.

[59] To conclude on this point, I find no fault with the trial judge's conclusion that the bid was in fact submitted on behalf of a joint venture of Brentwood and EAC which was an ineligible bidder under the terms of the RFP. This breached not only the express eligibility provisions of the tender documents, but also the implied duty to act fairly towards all bidders.

B. The Exclusion Clause:

1. Introduction

[60] As noted, the RFP includes an exclusion clause which reads as follows:

> 2.10 ... Except as expressly and specifically permitted in these Instructions to Proponents, no Proponent shall have any claim for compensation of any kind whatsoever, as a result of participating in this RFP, and by submitting a Proposal each Proponent shall be deemed to have agreed that it has no claim. [Emphasis added.]

[61] The trial judge held that as a matter of construction, the clause did not bar recovery for the breaches she had found. The clause, in her view, was ambiguous and, applying the *contra proferentem* principle, she resolved the ambiguity in Tercon's favour. She also found that the Province's breach was fundamental and that it was not fair or reasonable to enforce the exclusion clause in light of the nature of the Province's breach. The Province contends that the judge erred both with respect to the construction of the clause and her application of the doctrine of fundamental breach.

[62] On the issue of fundamental breach in relation to exclusion clauses, my view is that the time has come to lay this doctrine to rest, as Dickson C.J. was inclined to do more than 20 years ago: *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426, at p. 462, 57 D.L.R. (4th) 321. I agree with the analytical approach that should be followed when tackling an issue relating to the applicability of an exclusion clause set out by my colleague Binnie J. However, I respectfully do not agree with him on the question of the proper interpretation of the clause in issue here. In my view, the clause does not exclude Tercon's claim for damages, and even if I am wrong about that, the clause is at best ambiguous and should be construed *contra proferentem* as the trial judge held. As a result of my conclusion on the interpretation issue, I do not have to go on to apply the rest of the analytical framework set out by Binnie J.

[63] In my view, the exclusion clause does not cover the Province's breaches in this case. The RFP process put in place by the Province was premised on a closed list of bidders; a contest with an ineligible bidder was not part of the RFP process and was in fact expressly precluded by its terms. A "Contract A" could not arise as a result of submission of a bid from any other party. However, as a result of how the Province proceeded, the very premise of its own RFP process was missing, and the work was awarded to a party who could not be a participant in the RFP process. That is what Tercon is complaining about. Tercon's claim is not barred by the exclusion clause because the clause only applies to claims arising "as a result of participating in [the] RFP", not to claims resulting from the participation of other, ineligible parties. Moreover, the words of this exclusion clause, in my view, are not effective to limit liability for breach of the Province's implied duty of fairness to bidders. I will explain my conclusion by turning first to a brief account of the key legal principles and then to the facts of the case.

2. Legal Principles

[64] The key principle of contractual interpretation here is that the words of one provision must not be read in isolation but should be considered in harmony with the rest of the contract and in light of its purposes and commercial context. The approach adopted by the Court in *M.J.B.* is instructive. The Court had to interpret a privilege clause, which is somewhat analogous to the exclusion clause in issue here. The privilege clause provided that the lowest or any tender would not necessarily be accepted, and the issue was whether this barred a claim based on breach of an implied term that the owner would accept only compliant bids. In interpreting the privilege clause, the Court looked at its text in light of the contract as a whole, its purposes and commercial context. As Iacobucci J. said, at para. 44, "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."

[65] In a similar way, it is necessary in the present case to consider the exclusion clause in the RFP in light of its purposes and commercial context as well as of its overall terms. The question is whether the exclusion of compensation for claims resulting from "participating in this RFP", properly interpreted, excludes liability

for the Province having unfairly considered a bid from a bidder who was not supposed to have been participating in the RFP process at all.

3. Application to this Case

[66] Having regard to both the text of the clause in its broader context and to the purposes and commercial context of the RFP, my view is that this claim does not fall within the terms of the exclusion clause.

[67] To begin, it is helpful to recall that in interpreting tendering contracts, the Court has been careful to consider the special commercial context of tendering. Effective tendering ultimately depends on the integrity and business efficacy of the tendering process: see, e.g., *Martel*, at para. 88; *M.J.B.*, at para. 41; *Double N Earthmovers Ltd.*, at para. 106. As Iacobucci and Major JJ. put it in *Martel*, at para. 116, "it is imperative that all bidders be treated on an equal footing ... Parties should at the very least be confident that their initial bids will not be skewed by some underlying advantage in the drafting of the call for tenders conferred upon only one potential bidder".

[68] This factor is particularly weighty in the context of public procurement. In that context, in addition to the interests of the parties, there is the need for transparency for the public at large. This consideration is underlined by the statutory provisions which governed the tendering process in this case. Their purpose was to assure transparency and fairness in public tenders. As was said by Orsborn J. (as he then was) in *Cahill (G. J.) & Co. (1979) Ltd. v. Newfoundland and Labrador (Minister of Municipal and Provincial Affairs)*, 2005 NLTD 129, 250 Nfld. & P.E.I.R. 145, at para. 35, 141 A.C.W.S. (3d) 416:

> The owner — in this case the government — is in control of the tendering process and may define the parameters for a compliant bid and a compliant bidder. The corollary to this, of course, is that once the owner — here the government — sets the rules, it must itself play by those rules in assessing the bids and awarding the main contract.

[69] One aspect that is generally seen as contributing to the integrity and business efficacy of the tendering process is the requirement that only compliant bids be considered. As noted earlier, such a requirement has often been implied because, as the Court said in *M.J.B.*, it makes little sense to think that a bidder would comply with the bidding process if the owner could circumscribe it by

accepting a non-compliant bid. Respectfully, it seems to me to make even less sense to think that eligible bidders would participate in the RFP if the Province could avoid liability for ignoring an express term concerning eligibility to bid on which the entire RFP was premised and which was mandated by the statutorily approved process.

[70] The closed list of bidders was the foundation of this RFP and there were important competitive advantages to a bidder who could side-step that limitation. Thus, it seems to me that both the integrity and the business efficacy of the tendering process support an interpretation that would allow the exclusion clause to operate compatibly with the eligibility limitations that were at the very root of the RFP.

[71] The same may be said with respect to the implied duty of fairness. As Iacobucci and Major JJ. wrote for the Court in *Martel*, at para. 88, "[i]mplying an obligation to treat all bidders fairly and equally is consistent with the goal of protecting and promoting the integrity of the bidding process." It seems to me that clear language is necessary to exclude liability for breach of such a basic requirement of the tendering process, particularly in the case of public procurement.

[72] The proper interpretation of the exclusion clause should also take account of the statutory context which I have reviewed earlier. The restriction on eligibility of bidders was a key element of the alternative process approved by the Minister. It seems unlikely, therefore, that the parties intended through this exclusion clause to effectively gut a key aspect of the approved process. Of course, it is true that the exclusion clause does not bar all remedies, but only claims for compensation. However, the fact remains that as a practical matter, there are unlikely to be other, effective remedies for considering and accepting an ineligible bid and that barring compensation for a breach of that nature in practical terms renders the ministerial approval process virtually meaningless. Whatever administrative law remedies may be available, they are not likely to be effective remedies for awarding a contract to an ineligible bidder. The Province did not submit that injunctive relief would have been an option, and I can, in any event, foresee many practical problems that need not detain us here in seeking such relief in these circumstances.

[73] The Province stresses Tercon's commercial sophistication, in effect arguing that it agreed to the exclusion clause and must accept the consequences. This line of argument, however, has two weaknesses. It assumes the answer to the real question before us which is: what does the exclusion clause mean? The consequences of agreeing to the exclusion clause depend on its construction. In addition, the Province's submission overlooks its own commercial sophistication and the fact that sophisticated parties can draft very clear exclusion and limitation clauses when they are minded to do so. Such clauses contrast starkly with the curious clause which the Province inserted into this RFP. The limitation of liability clause in *Hunter Engineering*, for example, provided that "[n]otwithstanding any other provision in this contract or any applicable statutory provisions neither the Seller nor the Buyer shall be liable to the other for special or consequential damages or damages for loss of use arising directly or indirectly from any breach of this contract, fundamental or otherwise ..." (p. 450). The Court found this to be clear and unambiguous. The limitation clause in issue in *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423, 178 D.L.R. (4th) 1, provided that legal proceedings for the recovery of "any loss hereunder shall not be brought ... after the expiration of 24 months from the discovery of such loss" (para. 5). Once again, the Court found this language clear. The Ontario Court of Appeal similarly found the language of a limitation of liability clause to be clear in *Fraser Jewellers (1982) Ltd. v. Dominion Electric Protection Co.* (1997), 34 O.R. (3d) 1, 148 D.L.R. (4th) 496. The clause provided in part that if the defendant "should be found liable for loss, damage or injury due to a failure of service or equipment in any respect, its liability shall be limited to a sum equal to 100% or the annual service charge or $10,000, whichever is less, as the agreed upon damages and not as a penalty, as the exclusive remedy ..." (p. 4). These, and many other cases which might be referred to, demonstrate that sophisticated parties are capable of drafting clear and comprehensive limitation and exclusion provisions.

[74] I turn to the text of the clause which the Province inserted in its RFP. It addresses claims that result from "participating in this RFP". As noted, the limitation on who could participate in this RFP was one of its premises. These words must, therefore, be read in light of the limit on who was eligible to participate in this RFP. As noted

earlier, both the ministerial approval and the text of the RFP itself were unequivocal: only the six proponents qualified through the earlier RFEI process were eligible and *proposals received from any other party would not be considered*. Thus, central to "participating in this RFP" was participating in a contest among those eligible to participate. A process involving other bidders, as the trial judge found the process followed by the Province to be, is not the process called for by "this RFP" and being part of that other process is not in any meaningful sense "participating in this RFP".

[75] The Province would have us interpret the phrase excluding compensation "as a result of participating in this RFP" to mean that compensation is excluded that results from "submitting a Proposal". However, that interpretation is not consistent with the wording of the clause as a whole. The clause concludes with the phrase that "by submitting a Proposal each Proponent shall be deemed to have agreed that it has no claim". If the phrases "participating in this RFP" and "submitting a Proposal" were intended to mean the same thing, it is hard to understand why different words were used in the same short clause to express the same idea. The fact that the Minister had approved a closed list of participants strengthens the usual inference that the use of different words was deliberate so as not to exclude compensation for a departure from that basic eligibility requirement.

[76] This interpretation of the exclusion clause does not rob it of meaning, but makes it compatible with other provisions of the RFP. There is a parallel between this case and the Court's decision in *M.J.B.* There, the Court found that there was compatibility between the privilege clause and the implied term to accept only compliant bids. Similarly, in this case, there is compatibility between the eligibility requirements of the RFP and the exclusion clause. Not any and every claim based on any and every deviation from the RFP provisions would escape the preclusive effect of the exclusion clause. It is only when the defect in the Province's adherence to the RFP process is such that it is completely outside that process that the exclusion clause cannot have been intended to operate. What is important here, in my view, is that the RFP in its conception, in its express provisions and in the statutorily required approval it was given, was premised on limiting eligibility to the six proponents in the RFEI

process. Competition among others was not at all contemplated and was not part of the RFP process; in fact, the RFP expressly excluded that possibility. In short, limiting eligibility of bidders to those who had responded to the RFEI was the foundation of the whole RFP. As the judge found, acceptance of a bid from an ineligible bidder "attacks the underlying premise of the process" established by the RFP: para. 146. Liability for such an attack is not excluded by a clause limiting compensation resulting from participation in this RFP.

[77] This interpretation is also supported by another provision of the RFP. Under s. 2.9, as mentioned earlier, the Province reserved to itself the right to unilaterally cancel the RFP and the right to propose a new RFP allowing additional bidders. If the exclusion clause were broad enough to exclude compensation for allowing ineligible bidders to participate, there seems to be little purpose in this reservation of the ability to cancel the RFP and issue a new one to a wider circle of bidders. It is also significant that the Province did not reserve to itself the right to accept a bid from an ineligible bidder or to unilaterally change the rules of eligibility. The RFP expressly did exactly the opposite. None of this, in my opinion, supports the view that the exclusion clause should be read as applying to the Province's conduct in this case.

[78] To hold otherwise seems to me to be inconsistent with the text of the clause read in the context of the RFP as a whole and in light of its purposes and commercial context. In short, I cannot accept the contention that, by agreeing to exclude compensation for participating in this RFP process, the parties could have intended to exclude a damages claim resulting from the Province unfairly permitting a bidder to participate who was not eligible to do so. I cannot conclude that the provision was intended to gut the RFP's eligibility requirements as to who may participate in it, or to render meaningless the Minister's statutorily required approval of the alternative process where this was a key element. The provision, as well, was not intended to allow the Province to escape a damages claim for applying different eligibility criteria, to the competitive disadvantage of other bidders and for taking steps designed to disguise the true state of affairs. I cannot conclude that the parties, through the words found in this exclusion clause, intended to waive compensation for

conduct like that of the Province in this case that strikes at the heart of the integrity and business efficacy of the tendering process which it undertook.

[79] If I am wrong about my interpretation of the clause, I would hold, as did the trial judge, that its language is at least ambiguous. If, as the Province contends, the phrase "participating in this RFP" could reasonably mean "submitting a Proposal", that phrase could also reasonably mean "competing against the other eligible participants". Any ambiguity in the context of this contract requires that the clause be interpreted against the Province and in favour of Tercon under the principle *contra proferentem*: see, e.g. *Hillis Oil and Sales Ltd. v. Wynn's Canada, Ltd.,* [1986] 1 S.C.R. 57, at pp. 68-69, 25 D.L.R. (4th) 649. Following this approach, the clause would not apply to bar Tercon's damages claim.

V. Disposition

[80] I conclude that the judge did not err in finding that the Province breached the tendering contract or in finding that Tercon's remedy in damages for that breach was not precluded by the exclusion clause in the contract. I would therefore allow the appeal, set aside the order of the Court of Appeal and restore the judgment of the trial judge. The parties advise that the question of costs has been resolved between them and that therefore no order in relation to costs is required.

[81] BINNIE J. (dissenting) (MCLACHLIN C.J.C., ABELLA and ROTHSTEIN JJ. concurring in the dissent):—The important legal issue raised by this appeal is whether, and in what circumstances, a court will deny a defendant contract breaker the benefit of an exclusion of liability clause to which the innocent party, not being under any sort of disability, has agreed. Traditionally, this has involved consideration of what is known as the doctrine of fundamental breach, a doctrine which Dickson C.J. in *Hunter Engineering Co. v. Syncrude Canada Ltd.,* [1989] 1 S.C.R. 426, 57 D.L.R. (4th) 321, suggested should be laid to rest 21 years ago (p. 462).

[82] On this occasion we should again attempt to shut the coffin on the jargon associated with "fundamental breach". Categorizing a contract breach as "fundamental" or "immense" or "colossal" is not particularly helpful. Rather, the principle is that a court has no discretion to refuse to enforce a valid and applicable contractual

exclusion clause unless the plaintiff (here the appellant Tercon) can point to some paramount consideration of public policy sufficient to override the public interest in freedom of contact and defeat what would otherwise be the contractual rights of the parties. Tercon points to the public interest in the transparency and integrity of the government tendering process (in this case, for a highway construction contract) but in my view such a concern, while important, did not render unenforceable the terms of the contract Tercon agreed to. There is nothing inherently unreasonable about exclusion clauses. Tercon is a large and sophisticated corporation. Unlike my colleague Justice Cromwell, I would hold that the respondent Ministry's conduct, while in breach of its contractual obligations, fell within the terms of the exclusion clause. In turn, there is no reason why the clause should not be enforced. I would dismiss the appeal.

I. Overview

[83] This appeal concerns a contract to build a $35 million road in the remote Nass Valley of British Columbia (the "Kincolith project"). The respondent Ministry accepted a bid from Brentwood Enterprises Ltd. that did not comply with the terms of tender. Tercon, as the disappointed finalist in the bidding battle, seeks compensation equivalent to the profit it expected to earn had it been awarded the contract.

[84] Tercon alleged, and the trial judge found, that although the winning bid was submitted in the name of Brentwood (an eligible bidder) Brentwood in fact intended, with the Ministry's knowledge and encouragement, to do the work in a co-venture with an ineligible bidder, Emil Anderson Construction Co. ("EAC"). The respondent Ministry raised a number of defences including the fact that the formal contract was signed in the name of Brentwood alone. This defence was rejected in the courts below. The Ministry's substantial defence in this Court is that even if it failed to abide by the bidding rules, it is nonetheless protected by an exclusion of compensation clause set out clearly in the request for proposals ("RFP"). The clause provided that "no Proponent shall have any claim for compensation of any kind whatsoever, as a result of participating in this RFP" and that "by submitting a Proposal each Proponent shall be deemed to have agreed that it has no claim" (s. 2.10 of the RFP).

[85] The appeal thus brings into conflict the public policy that favours a fair, open and transparent bid process, and the freedom of

contract of sophisticated and experienced parties in a commercial environment to craft their own contractual relations. I agree with Tercon that the public interest favours an orderly and fair scheme for tendering in the construction industry, but there is also a public interest in leaving knowledgeable parties free to order their own commercial affairs. In my view, on the facts of this case, the Court should not rewrite — nor should the Court refuse to give effect to — the terms agreed to by the parties.

[86] I accept, as did the courts below, that the respondent Ministry breached the terms of its own RFP when it contracted with Brentwood, knowing the work would be carried out by a co-venture with Brentwood and EAC. The addition of EAC, a bigger contractor with greater financial resources than Brentwood, created a stronger competitor for Tercon than Brentwood alone. However, I also agree with the B.C. Court of Appeal that the exclusion of compensation clause is clear and unambiguous and that no legal ground or rule of law permits us to override the freedom of the parties to contract (or to decline to contract) with respect to this particular term, or to relieve Tercon against its operation in this case.

II. The Tendering Process

[87] For almost three decades the law governing a structured bidding process has been dominated by the concept of Contract A/Contract B initially formulated in *The Queen in Right of Ontario v. Ron Engineering & Construction (Eastern) Ltd.,* [1981] 1 S.C.R. 111, 119 D.L.R. (3d) 267. The analysis advanced by Estey J. in that case was that the bidding process, as defined by the terms of the tender call, may create contractual relations ("Contract A") prior in time and quite independently of the contract that is the actual subject matter of the bid ("Contract B"). Breach of Contract A may, depending on its terms, give rise to contractual remedies for non-performance even if Contract B is never entered into or, as in the present case, it is awarded to a competitor. The result of this legal construct is to provide unsuccessful bidders with a *contractual* remedy against an owner who departs from its own bidding rules. Contract A, however, arises (if at all) as a matter of interpretation. It is not imposed as a rule of law.

[88] In *Ron Engineering*, the result of Estey J.'s analysis was that as a matter of contractual interpretation, the Ontario government was allowed to retain a $150,000 bid bond put up by Ron Engineering

even though the government was told, a little over an hour after the bids were opened, that Ron Engineering had made a $750,058 error in the calculation of its bid and wished to withdraw it. Estey J. held:

> The contractor was not asked to sign a contract which diverged in any way from its tender but simply to sign a contract in accordance with the instructions to tenderers and in conformity with its own tender. [p. 127]

In other words, harsh as it may have seemed to Ron Engineering, the parties were held to their bargain. The Court was not prepared to substitute "fair and reasonable" terms for what the parties had actually agreed to.

[89] In *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619, 170 D.L.R. (4th) 577, Contract A included a "privilege" clause which stated that the owner was not obliged to accept the lowest or *any* tender. The Court implied a term, based on the presumed intention of the parties, that notwithstanding the privilege clause, only compliant bids were open to acceptance. While the owner was not obliged to accept the lowest compliant bid, the privilege clause did not, as a matter of contractual interpretation, give the owner "the privilege" of accepting a non-compliant bid. *M.J.B.* stops short of the issue in the present appeal because in that case, there was a breach of Contract A but no clause purporting to exclude liability on the part of the owner to pay compensation in the event of a Contract A violation.

[90] In *Naylor Group Inc. v. Ellis-Don Construction Ltd.*, 2001 SCC 58, [2001] 2 S.C.R. 943, 204 D.L.R. (4th) 513, the Court enforced the rules of the bid depository system against a contractor whose bid was based on what turned out to be a mistaken view of its collective bargaining status with the International Brotherhood of Electrical Workers. The Court again affirmed that "[t]he existence and content of Contract A will depend on the facts of the particular case" (para. 36). Ellis-Don sought relief from its bid on the basis of a labour board decision rendered subsequent to its bid that upheld, to its surprise, the bargaining rights of the union. This Court held that no relief was contemplated in the circumstances under Contract A and none was afforded, even though this was a costly result when viewed from the perspective of Ellis-Don.

[91] In *Martel Building Ltd. v. Canada*, 2000 SCC 60, [2000] 2 S.C.R. 860, 193 D.L.R. (4th) 1, citing *M.J.B.*, the Court implied a term in Contract A obligating the owner to be fair and consistent in

the assessment of tender bids. On the facts, the disappointed bidder's claim of unfair treatment was rejected.

[92] Finally, in *Double N Earthmovers Ltd. v. Edmonton (City)*, 2007 SCC 3, [2007] 1 S.C.R. 116, 275 D.L.R. (4th) 577, the unsuccessful bidder claimed that Edmonton had accepted, in breach of Contract A, a competitor's non-compliant bid to provide heavy equipment of a certain age to move refuse at a waste disposal site. The Court refused to imply a term "requiring an owner to investigate to see if bidders will really do what they promised in their tender" (para. 50). Accepting the existence of a duty of "fairness and equality", the majority nevertheless held that "[t]he best way to make sure that all bids receive the same treatment is for an owner to weigh bids on the basis of what is actually in the bid, not to weigh them on the basis of subsequently discovered information" (para. 52). In other words, the majority's interpretation of the express terms of Contract A was enforced despite Double N Earthmovers' complaint of double dealing by the owner.

[93] On the whole, therefore, while *Ron Engineering* and its progeny have encouraged the establishment of a fair and transparent bidding process, Contract A continues to be based not on some abstract externally imposed rule of law but on the presumed (and occasionally implied) intent of the parties. Only in rare circumstances will the Court relieve a party from the bargain it has made.

[94] As to implied terms, *M.J.B.* emphasized (at para. 29) that the focus is "the intentions of the actual parties". A court, when dealing with a claim to an implied term, "must be careful not to slide into determining the intentions of reasonable parties" (emphasis in original). Thus "if there is evidence of a contrary intention, on the part of either party, an implied term may not be found on this basis".

[95] Tercon is a large and experienced contractor. As noted by Donald J.A. in the B.C. Court of Appeal, it had earlier "successfully recovered damages from the [Ministry] on a bidding default on a previous case" (2007 BCCA 592, 73 B.C.L.R. (4th) 201, at para. 15, 289 D.L.R. (4th) 647). See *Tercon Contractors Ltd. v. British Columbia* (1993), 9 C.L.R. (2d) 197, 39 A.C.W.S. (3d) 779 (B.C.S.C.), aff'd, [1994] B.C.J. No. 2658, 51 A.C.W.S. (3d) 833 (C.A.) (QL). Thus Tercon would have been more sensitive than most contractors to the risks posed by an exclusion of compensation

clause. It nevertheless chose to bid on the project on the terms proposed by the Ministry.

III. Tercon's Claim for Relief from the Exclusionary Clause it Agreed to

[96] In these circumstances, the first question is whether there is either a statutory legal obstacle to, or a principled legal argument against, the freedom of these parties to contract out of the obligation that would otherwise exist for the Ministry to pay compensation for a breach of Contract A. If not, the second question is whether there is any other barrier to the court's enforcement of the exclusionary clause in the circumstances that occurred. On the first branch, Tercon relies on the *Ministry of Transportation and Highways Act*, R.S.B.C. 1996, c. 311 ("*Transportation Act*" or the "Act"). On the second branch, Tercon relies on the doctrine of fundamental breach.

A. The Statutory Argument

[97] Section 4 of the *Transportation Act* provides that before awarding a highway contract, "the minister must invite tenders in any manner that will make the invitation for tenders reasonably available to the public", but then provides for several exceptions: "The minister need not invite tenders for a project ... if ... (c) the minister believes that an alternative contracting process will result in a competitively established cost for the project". Here the required ministerial authorization was obtained for an "alternative process". The reason is as follows. As noted by Cromwell J., the Ministry's original idea was to use a "design-build" model where a single contractor would design and build the highway for a fixed price. The Ministry issued a request for expressions of interest ("RFEI") which attracted six responses. One was from Tercon. Another was from Brentwood. EAC declined to bid because it did not think the "design-build" concept was appropriate for the job.

[98] On further reflection, the Ministry decided not to pursue the design-build approach. It decided to design the highway itself. The contract would be limited to construction, as EAC had earlier advocated. EAC was not allowed to bid despite the Ministry coming around to its point of view on the proper way to tender the project. The Ministry limited bidding on the new contest to the six respondents to the original RFEI, all of whom had been found capable of performing the contract. But to do so, it needed, and did obtain, the Minister's s. 4 approval.

[99] A question arose during the hearing of the appeal as to whether the Minister actually approved an "alternative process" that not only restricted eligibility to the six participants in the RFEI process (an advantage to Tercon and the other five participants), but also contained the "no claims" clause excluding compensation for non-observance of its terms (no doubt considered a disadvantage). In its factum, the Ministry states:

> In this case, the Minister approved an alternate process under [s. 4(2) of the B.C. *Transportation Act*]. That process was set out in the Instructions to Proponents, which included the No Claim Clause. Having been approved by the Minister, the package (including the No Claims Clause) complied with section 4 of the *Transportation Act*. [para. 70]

[100] Tercon argued at the hearing of this appeal that as a matter of *law*, Contract A could not have included the exclusion clause because

> [t]he policy of the [*Transportation Act*] is to ensure that the Ministry is accountable; to preserve confidence in the integrity of the tendering process. To ensure that is so and that the Minister is accountable, the Ministry must be held liable for its breach of Contract A in considering and accepting a proposal from the joint venture....
>
> ...
>
> *MADAM JUSTICE ABELLA:* Can I just ask you one question. Is it your position, sir, that you can never have — that a government can never have a no claims clause?
>
> *MR. McLEAN:* Yes. Under this statute because of the policy of the statute. [Transcript, at pp. 26-27]

[101] While it is true that the Act favours "the integrity of the tendering process", it nowhere prohibits the parties from negotiating a "no claims" clause as part of their commercial agreement, and cannot plausibly be interpreted to have that effect.

[102] In the ordinary world of commerce, as Dickson C.J. commented in *Hunter*, "clauses limiting or excluding liability are negotiated as part of the general contract. As they do with all other contractual terms, the parties bargain for the consequences of deficient performance" (p. 461). Moreover, as Mr. Hall points out, "[t]here are many valid reasons for contracting parties to use exemption clauses, most notably to allocate risks" (G.R. Hall, *Canadian Contractual Interpretation Law* (2007), at p. 243). Tercon for example is a sophisticated and experienced contractor and if it decided that it was in its commercial interest to proceed with the bid despite

the exclusion of compensation clause, that was its prerogative and nothing in the "policy of the Act" barred the parties' agreement on that point.

[103] To the extent Tercon is now saying that as a matter of *fact* the Minister, in approving the RFP, did not specifically approve the exclusion clause, and that the contract was thus somehow *ultra vires* the Ministry, this is not an issue that was either pleaded or dealt with in the courts below. The details of the ministerial approval process were not developed in the evidence. It is not at all evident that s. 4 *required* the Minister to approve the actual terms of the RFP. It is an administrative law point that Tercon, if so advised, ought to have pursued at pre-trial discovery and in the trial evidence. We have not been directed to any exploration of the matter in the testimony and it is too late in the proceeding for Tercon to explore it now. Accordingly, I proceed on the basis that the exclusion clause did not run afoul of the statutory requirements.

B. The Doctrine of the Fundamental Breach

[104] The trial judge considered the applicability of the doctrine of fundamental breach. Tercon argued that the Ministry, by reason of its fundamental breach, had forfeited the protection of the exclusion of compensation clause.

[105] The leading case is *Hunter* which also dealt with an exclusion of liability clause. The appellants Hunter Engineering and Allis-Chalmers Canada Ltd. supplied gearboxes used to drive conveyor belts at Syncrude's tar sands operations in Northern Alberta. The gearboxes proved to be defective. At issue was a broad exclusion of warranty clause that limited time for suit and the level of recovery available against Allis-Chalmers (i.e. no recovery beyond the unit price of the defective products). Dickson C.J. observed: "In the face of the contractual provisions, Allis-Chalmers can only be found liable under the doctrine of fundamental breach" (p. 451).

[106] This doctrine was largely the creation of Lord Denning in the 1950s (see, e.g., *Karsales (Harrow) Ltd. v. Wallis*, [1956] 1 W.L.R. 936 (C.A.)). It was said to be a rule of law that operated independently of the intention of the parties in circumstances where the defendant had so egregiously breached the contract as to deny the plaintiff substantially the whole of its benefit. In such a case, according to the doctrine, the innocent party was excused from

further performance but the defendant could still be held liable for the consequences of its "fundamental" breach even if the parties had excluded liability by clear and express language. See generally S.M. Waddams, *The Law of Contracts* (5th ed. 2005), at para. 478; J.D. McCamus, *The Law of Contracts* (2005), at pp. 765 *et seq.*

[107] The five-judge *Hunter* Court was unanimous in the result and gave effect to the exclusion clause at issue. Dickson C.J. and Wilson J. both emphasized that there is nothing inherently unreasonable about exclusion clauses and that they should be applied unless there is a compelling reason not to give effect to the words selected by the parties. At that point, there was some divergence of opinion.

[108] Dickson C.J. (La Forest J. concurring) observed that the doctrine of fundamental breach had "spawned a host of difficulties" (p. 460), the most obvious being the difficulty in determining whether a particular breach is fundamental. The doctrine obliged the parties to engage in "games of characterization" (p. 460) which distracted from the real question of what agreement the parties themselves intended. Accordingly, in his view, the doctrine should be "laid to rest". The situations in which the doctrine is invoked could be addressed more directly and effectively through the doctrine of "unconscionability", as assessed at the time the contract was made:

> It is preferable to interpret the terms of the contract, in an attempt to determine exactly what the parties agreed. If on its true construction the contract excludes liability for the kind of breach that occurred, the party in breach will generally be saved from liability. 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. [p. 462]

Dickson C.J. explained that "[t]he courts do not blindly enforce harsh or unconscionable bargains" (p. 462), but "there is much to be gained by addressing directly the protection of the weak from overreaching by the strong, rather than relying on the artificial legal doctrine of 'fundamental breach'" (p. 462). To enforce an exclusion clause in such circumstances could tarnish the institutional integrity of the court. In that respect, it would be contrary to public policy. However, a *valid* exclusion clause would be enforced according to its terms.

[109] Wilson J. (L'Heureux-Dubé J. concurring) disagreed. In her view, the courts retain some residual discretion to refuse to enforce exclusion clauses in cases of fundamental breach where the doctrine

of *pre*-breach unconscionability (favoured by Dickson C.J.) did not apply. Importantly, she rejected the imposition of a general standard of reasonableness in the judicial scrutiny of exclusion clauses, affirming that "the courts...are quite unsuited to assess the fairness or reasonableness of contractual provisions as the parties negotiated them" (p. 508). Wilson J. considered it more desirable to develop through the common law a *post*-breach analysis seeking a "balance between the obvious desirability of allowing the parties to make their own bargains ... and the obvious undesirability of having the courts used to enforce bargains in favour of parties who are totally repudiating such bargains themselves" (p. 510).

[110] Wilson J. contemplated a two-stage test, in which the threshold step is the identification of a fundamental breach where "the foundation of the contract has been undermined, where the very thing bargained for has not been provided" (p. 500). Having found a fundamental breach to exist, the exclusion clause would *not* automatically be set aside, but the court should go on to assess whether, having regard to the circumstances of the breach, the party in fundamental breach should escape liability:

> Exclusion clauses do not automatically lose their validity in the event of a fundamental breach by virtue of some hard and fast rule of law. They should be given their natural and true construction so that the meaning and effect of the exclusion clause the parties agreed to at the time the contract was entered into is fully understood and appreciated. But, in my view, the court must still decide, having ascertained the parties' intention at the time the contract was made, whether or not to give effect to it in the context of subsequent events such as a fundamental breach committed by the party seeking its enforcement through the courts....[T]he question essentially is: in the circumstances that have happened should the court lend its aid to A to hold B to this clause? [Emphasis added; pp. 510-11.]

[111] Wilson J. reiterated that "as a general rule" courts should give effect to exclusion clauses *even in the case of fundamental breach* (p. 515). Nevertheless, a residual discretion to withhold enforcement exists:

> Lord Wilberforce [in *Photo Production Ltd. v. Securicor Transport Ltd.*, [1980] A.C. 827 (H.L.)] may be right that parties of equal bargaining power should be left to live with their bargains regardless of subsequent events. 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. [Emphasis added; p. 517]

Wilson J. made it clear that such circumstances of disentitlement would be rare. She acknowledged that an exclusion clause might well be accepted with open eyes by a party "very anxious to get" the contract (p. 509). However, Wilson J. did not elaborate further on what such circumstances might be because she found in *Hunter* itself that no reason existed to refuse the defendant Allis-Chalmers the benefit of the exclusion clause.

[112] The fifth judge, McIntyre J., in a crisp two-paragraph judgment, agreed with the conclusion of Wilson J. in respect of the exclusion clause issue but found it "unnecessary to deal further with the concept of fundamental breach in this case" (p. 481).

[113] The law was left in this seemingly bifurcated state until *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423, 178 D.L.R. (4th) 1. In that case, the Court breathed some life into the dying doctrine of fundamental breach while nevertheless affirming (once again) that whether or not a "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" (at para. 52). In other words, the question was whether the parties *intended* at the time of contract formation that the exclusion or limitation clause would apply "in circumstances of contractual breach, whether fundamental or otherwise" (para. 63). The Court thus emphasized that what was important was not the label ("fundamental or otherwise") but the intent of the contracting parties when they made their bargain. "The only limitation placed upon enforcing the contract as written in the event of a fundamental breach", the Court in *Guarantee Co.* continued,

> 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 [note the disjunctive "or"] unfair, unreasonable or otherwise contrary to public policy, according to Wilson J. [Emphasis added; para. 52.]
>
> (See also para. 64.)

What has given rise to some concern is not the reference to "public policy", whose role in the enforcement of contracts has never been doubted, but to the more general ideas of "unfair" and "unreasonable", which seemingly confer on courts a very broad after-the-fact discretion.

[114] The Court's subsequent observations in *ABB Inc. v. Domtar Inc.*, 2007 SCC 50, [2007] 3 S.C.R. 461, 287 D.L.R. (4th) 385,

should be seen in that light. *Domtar* was a products liability case arising under the civil law of Quebec, but the Court observed with respect to the common law:

> Once the existence of a fundamental breach has been established, the court must still analyse the limitation of liability clause in light of the general rules of contract interpretation. If the words can reasonably be interpreted in only one way, it will not be open to the court, even on grounds of equity or reasonableness, to declare the clause to be unenforceable since this would amount to rewriting the contract negotiated by the parties. [Emphasis added; para. 84.]

While the *Domtar* Court continued to refer to "fundamental breach", it notably repudiated any judicial discretion to depart from the terms of a valid contact upon vague notions of "equity or reasonableness". It did not, however, express any doubt about the residual category mentioned in *Guarantee Co.*, namely a refusal to enforce an exclusion clause on the grounds of public policy.

[115] I agree with Professor Waddams when he writes:

> [I]t is surely inevitable that a court must reserve the ultimate power to decide when the values favouring enforceability are outweighed by values that society holds to be more important. [para. 557]

[116] While memorably described as an unruly horse, public policy is nevertheless fundamental to contract law, both to contractual formation and enforcement and (occasionally) to the court's relief *against* enforcement. As Duff C.J. observed:

> It is the duty of the courts to give effect to contracts and testamentary dispositions according to the settled rules and principles of law, since we are under a reign of law; but there are cases in which rules of law cannot have their normal operation because the law itself recognizes some paramount consideration of public policy which over-rides the interest and what otherwise would be the rights and powers of the individual.
>
> (*Re Millar Estate*, [1938] S.C.R. 1, at p. 4, [1938] 1 D.L.R. 65)

See generally B. Kain and D.T. Yoshida, "The Doctrine of Public Policy in Canadian Contract Law", in T.L. Archibald and R.S. Echlin, eds., *Annual Review of Civil Litigation, 2007* (2007), 1.

[117] As Duff C.J. recognized, freedom of contract will often, but not always, trump other societal values. The residual power of a court to decline enforcement exists but, in the interest of certainty and stability of contractual relations, it will rarely be exercised. Duff C.J. adopted the view that public policy "should be invoked only in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences

of a few judicial minds" (p. 7). While he was referring to public policy considerations pertaining to the nature of the *entire contract*, I accept that there may be well-accepted public policy considerations that relate directly to the nature of the *breach*, and thus trigger the court's narrow jurisdiction to give relief against an exclusion clause.

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

[119] A less extreme example in the commercial context is *Plas-Tex Canada Ltd. v. Dow Chemical of Canada Ltd.*, 2004 ABCA 309, 245 D.L.R. (4th) 650. The Alberta Court of Appeal refused to enforce an exclusion clause where the defendant Dow knowingly supplied defective plastic resin to a customer who used it to fabricate natural gas pipelines. Instead of disclosing its prior knowledge of the defect to the buyer, Dow chose to try to protect itself by relying upon limitation of liability clauses in its sales contracts. After some years, the pipelines began to degrade, with considerable damage to property and risk to human health from leaks and explosions. The court concluded that "a party to a contract will not be permitted to engage in unconscionable conduct secure in the knowledge that no liability can be imposed upon it because of an exclusionary clause" (para. 53). (See also McCamus, at p. 774, and Hall, at p. 243). What was demonstrated in *Plas-Tex* was that the defendant Dow was so contemptuous of its contractual obligation and reckless as to the consequences of the breach as to forfeit the assistance of the court.

The public policy that favours freedom of contract was outweighed by the public policy that seeks to curb its abuse.

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

[121] The present state of the law, in summary, requires a series of enquiries to be addressed when a plaintiff seeks to escape the effect of an exclusion clause or other contractual terms to which it had previously agreed.

[122] The first issue, of course, is whether as a matter of interpretation the exclusion clause even *applies* to the circumstances established in evidence. This will depend on the Court's assessment of the intention of the parties as expressed in the contract. If the exclusion clause does not apply, there is obviously no need to proceed further with this analysis. If the exclusion clause applies, the second issue is whether the exclusion clause was unconscionable at the time the contract was made, "as might arise from situations of unequal bargaining power between the parties" (*Hunter*, at p. 462). This second issue has to do with contract formation, not breach.

[123] If the exclusion clause is held to be valid and applicable, the Court may undertake a third enquiry, namely whether the Court should nevertheless refuse to enforce the valid exclusion clause because of the existence of an overriding public policy, proof of which lies on the party seeking to avoid enforcement of the clause, that outweighs the very strong public interest in the enforcement of contracts.

IV. Application to the Facts of this Case

[124] I proceed to deal with the issues in the sequence mentioned above.

A. Did the Ministry Breach Contract A?

[125] The trial judge found that the parties intended to create contractual relations at the bidding stage (i.e. Contract A): 2006 BCSC 499, 53 B.C.L.R. (4th) 138, at para. 88, 148 A.C.W.S. (3d) 389. I agree with that conclusion. If there were no intent to form Contract A, there would be no need to exclude liability for compensation in the event of its breach.

[126] The Ministry argued that Contract A was not breached. It was entitled to enter into Contract B with Brentwood and it did so. There was no privity between the Ministry and EAC. The Ministry would have had no direct claim against EAC in the event of deficient performance. I accept as correct that Brentwood, having obtained Contract B, was in a position of considerable flexibility as to how and with whom it carried out the work. Nevertheless, it was open to the trial judge to conclude, as she did, that the RFP process was not conducted by the Ministry with the degree of fairness and transparency that the terms of Contract A entitled Tercon to expect. At the end of an unfair process, she found, Contract B was not awarded to Brentwood (the eligible bidder) but to what amounted to a joint venture consisting of Brentwood and EAC. I therefore proceed with the rest of the analysis on the basis that Contract A was breached.

B. What is the Proper Interpretation of the Exclusion of Compensation Clause and Did the Ministry's Conduct Fall Within its Terms?

[127] It is at this stage that I part company with my colleague Cromwell J. The exclusion clause is contained in the RFP and provides as follows:

> 2:10 ...
>
> Except as expressly and specifically permitted in these Instructions to Proponents, no Proponent shall have any claim for compensation of any kind whatsoever, as a result of participating in this RFP, and by submitting a Proposal each Proponent shall be deemed to have agree that it has no claim.

In my view, "participating in this RFP" began with "submitting a Proposal" for consideration. The RFP process consisted of more than the final selection of the winning bid and Tercon participated in it. Tercon's bid *was* considered. To deny that such participation occurred on the ground that in the end the Ministry chose a Brentwood joint venture (ineligible) instead of Brentwood itself

(eligible) would, I believe, take the Court up the dead end identified by Wilson J. in *Hunter*:

> ... exclusion clauses, like all contractual provisions, should be given their natural and true construction. Great uncertainty and needless complications in the drafting of contracts will obviously result if courts give exclusion clauses strained and artificial interpretations in order, indirectly and obliquely, to avoid the impact of what seems to them *ex post facto* to have been an unfair and unreasonable clause. [p. 509]

Professor McCamus expresses a similar thought:

> ... the law concerning exculpatory clauses is likely to be more rather than less predictable if the underlying concern is openly recognized, as it is in *Hunter*, rather than suppressed and achieved indirectly through the subterfuge of strained interpretation of such terms. [p. 778]

[128] I accept the trial judge's view that the Ministry was at fault in its performance of the RFP, but the conclusion that the process thereby ceased to be the RFP process appears to me, with due respect to colleagues of a different view, to be a "strained and artificial interpretatio[n] in order, indirectly and obliquely, to avoid the impact of what seems to them *ex post facto* to have been an unfair and unreasonable clause".

[129] As a matter of interpretation, I agree with Donald J.A. speaking for the unanimous court below:

> The [trial] judge said the word "participating" was ambiguous. With deference, I do not find it so. The sense it conveys is the contractor's involvement in the RFP/contract A stage of the process. I fail to see how "participating" could bear any other meaning. [Emphasis added; para. 16.]

Accordingly, I conclude that on the face of it, the exclusion clause applies to the facts described in the evidence before us.

C. Was the Claim Excluding Compensation Unconscionable at the Time Contract A was Made?

[130] At this point, the focus turns to contract formation. Tercon advances two arguments: firstly, that it suffered from an inequality of bargaining power and secondly, (as mentioned) that the exclusion clause violates public policy as reflected in the *Transportation Act*.

(1) Unequal Bargaining Power

[131] In *Hunter*, Dickson C.J. stated, at p. 462: "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." Applying that test to the case before him, he concluded:

> I have no doubt that unconscionability is not an issue in this case. Both Allis-Chalmers and Syncrude are large and commercially sophisticated companies. Both parties knew or should have known what they were doing and what they had bargained for when they entered into the contract. [p. 464]

While Tercon is not on the same level of power and authority as the Ministry, Tercon is a major contractor and is well able to look after itself in a commercial context. It need not bid if it doesn't like what is proposed. There was no relevant imbalance in bargaining power.

(2) Policy of the Transportation Act

[132] As mentioned earlier, Tercon cites and relies upon the policy of the Act which undoubtedly favours the transparency and integrity of the bidding process. I have already discussed my reasons for rejecting Tercon's argument that this "policy" operates as a bar to the ability of the parties to agree on such commonplace commercial terms as in the circumstances they think appropriate. In addition, the exclusion clause is not as draconian as Tercon portrays it. Other remedies for breach of Contract A (specific performance or injunctive relief, for example) were available.

[133] In this case, injunction relief *was* in fact a live possibility. Although Tercon was not briefed on the negotiations with other bidders, the trial judge found that Glenn Walsh, the owner of Tercon, "had seen representatives of EAC with Brentwood following [the Brentwood/EAC interviews with the Ministry and Bill Swain of Brentwood]", and when asked whether Tercon was going to sue, Walsh had said "no" without further comment. Had Tercon pushed for more information and sought an injunction (as a matter of private law, not public law), at that stage the exclusion clause would have had no application, but Tercon did not do so. This is not to say that estoppel or waiver applies. Nor is it to say that injunctive relief would be readily available in many bidding situations (although if an injunction had been sought here, the unavailability of the alternative remedy of monetary damages might have assisted Tercon). It is merely to say that the exclusion clause is partial, not exhaustive.

[134] The Kincolith road project presented a serious construction challenge on a tight time frame and within a tight budget. Contract A did not involve a bid for a fixed price contract but for the right to negotiate the bid details once the winning proponent was selected. In

such a fluid situation, *all* participants could expect difficulties in the contracting process. Members of the construction bar are nothing if not litigious. In the circumstances, the bidders might reasonably have accepted (however reluctantly) the Ministry's need for a bidding process that excluded compensation, and adjusted their bids accordingly. The taxpayers of British Columbia were not prepared to pay the contractor's profit twice over — once to Brentwood/EAC for actually building the road, and now to Tercon, even though in Tercon's case the "profit" would be gained without Tercon running the risks associated with the performance of Contract B. The Court should not be quick to declare such a clause, negotiated between savvy participants in the construction business, to be "contrary to the Act".

D. Assuming the Validity of the Exclusion Clause at the Time the Contract was Made, is There Any Overriding Public Policy That Would Justify the Court's Refusal to Enforce it?

[135] If the exclusion clause is not invalid from the outset, I do not believe the Ministry's performance can be characterized as so aberrant as to forfeit the protection of the contractual exclusion clause on the basis of some overriding public policy. While there is a public interest in a fair and transparent tendering process, it cannot be ratcheted up to defeat the enforcement of Contract A in this case. There *was* an RFP process and Tercon participated in it.

[136] Assertions of ineligible bidders and ineligible bids are the bread and butter of construction litigation. If a claim to defeat the exclusion clause succeeds here on the basis that the owner selected a joint venture consisting of an eligible bidder with an ineligible bidder, so also by a parity of reasoning should an exclusion clause be set aside if the owner accepted a bid ineligible on other grounds. There would be little room left for the exclusion clause to operate. A more sensible and realistic view is that the parties here expected, even if they didn't like it, that the exclusion of compensation clause would operate even where the eligibility criteria in respect of the bid (including the bidder) were not complied with.

[137] While the Ministry's conduct was in breach of Contract A, that conduct was not so extreme as to engage some overriding and paramount public interest in curbing contractual abuse as in the *Plas-Tex* case. Brentwood was not an outsider to the RFP process. It was a legitimate competitor. All bidders knew that the road contract

(i.e. Contract B) would not be performed by the proponent alone. The work required a large "team" of different trades and personnel to perform. The issue was whether EAC would be on the job as a major subcontractor (to which Tercon could not have objected) or identified with Brentwood as a joint venture "proponent" with EAC. All bidders were made aware of a certain flexibility with respect to the composition of any proponent's "team". Section 2.8(b) of the RFP provided that if "a material change has occurred to the Proponent since its qualification under the RFEI, including if the composition of the Proponent's team members has changed, ... the Ministry may request [further information and] ... reserves the right to disqualify that Proponent, and reject its Proposal". Equally, "[i]f a qualified Proponent is concerned that it has undergone a material change, the Proponent can, at its election, make a preliminary submission to the Ministry, in advance of the Closing Date, and before submitting a Proposal. ...The Ministry will, within three working days of receipt of the preliminary submission give a written decision as to whether the Proponent is still qualified to submit a Proposal."

[138] The RFP issued on January 15, 2001. The Ministry was informed by Brentwood of a "proposed material change to our team's structure" in respect of a joint venture with EAC by fax dated January 24, 2001. From the Ministry's perspective, the change was desirable. EAC was a bigger company, had greater expertise in rock drilling and blasting (a major part of the contract) and a stronger balance sheet. EAC was identified in Brentwood's amended proposal as a sub-contractor. In the end, the Ministry did not approve the January 14, 2001 request, presumably because it doubted that a change in the "composition of the Proponent's team's members" could, according to the terms of the RFP, include a change in the Proponent itself.

[139] The Ministry did obtain legal advice and did not proceed in defiance of it. On March 29, 2001, the Ministry noted in an internal e-mail that a Ministry lawyer (identified in the e-mail) had come to the conclusion that the joint venture was not an eligible proponent but advised that Contract B could lawfully be structured in a way so as to satisfy both Brentwood/EAC's concerns and avoid litigation from disappointed proponents.

[140] I do not wish to understate the difference between EAC as a sub-contractor and EAC as a joint-venturer. Nor do I discount the trial judge's condemnation of the Ministry's lack of fairness and

transparency in making a contract B which on its face was at odds with what the trial judge found to be the true state of affairs. Tercon has legitimate reason to complain about the Ministry's conduct. I say only that based on the jurisprudence, the Ministry's misconduct did not rise to the level where public policy would justify the court in depriving the Ministry of the protection of the exclusion of compensation clause freely agreed to by Tercon in the contract.

[141] The construction industry in British Columbia is run by knowledgeable and sophisticated people who bid upon and enter government contracts with eyes wide open. No statute in British Columbia and no principle of the common law override their ability in this case to agree on a tendering process including a limitation or exclusion of remedies for breach of its rules. A contractor who does not think it is in its business interest to bid on the terms offered is free to decline to participate. As Donald J.A. pointed out, if enough contractors refuse to participate, the Ministry would be forced to change its approach. So long as contractors are willing to bid on such terms, I do not think it is the court's job to rescue them from the consequences of their decision to do so. Tercon's loss of anticipated profit is a paper loss. In my view, its claim is barred by the terms of the contract it agreed to.

V. Disposition

[142] I would dismiss the appeal without costs.

Appeal allowed.

TAB 6

HARRY v. KREUTZIGER

British Columbia Court of Appeal, McIntyre, Craig and Lambert, JJ.A.
December 29, 1978.

Contracts — Unconscionability — Sale of fishing boat at under-value by unsophisticated seller — Whether contract should be set aside.

The appellant, an inarticulate retiring person, an Indian of Grade V education, partially deaf, agreed to sell his fishing boat for $4,500. In fact, the boat was worth $16,000, largely because of a fishing licence attached to it. The buyer, a man of greater business experience and with full knowledge of the true value of the boat, induced the sale by assuring the appellant that he could easily obtain another licence. On appeal from a refusal to set aside the sale, *held*, allowing the appeal, the sale should be set aside.

Per McIntyre, J.A., Craig, J.A., concurring: An improvident transaction will be set aside as unconscionable where it was induced by an inequality in the position of the parties due to the ignorance, need or distress of the weaker.

Per Lambert, J.A., Craig, J.A., concurring: The question was whether the transaction, seen as a whole, was sufficiently divergent from community standards of commercial morality that it should be rescinded. It was appropriate for the Court, in assessing this question, to consider not only the decisions of Courts, but also analogous legislative provisions.

[*Waters v. Donnelly* (1884), 9 O.R. 391; *Morrison v. Coast Finance Ltd. et al.* (1965), 55 D.L.R. (2d) 710, 54 W.W.R. 257; *Knupp v. Bell et al.* (1966), 58 D.L.R. (2d) 466; affd 67 D.L.R. (2d) 256; *Marshall v. Canada Permanent Trust Co.* (1968), 69 D.L.R. (2d) 260; *Lloyd's Bank Ltd. v. Bundy*, [1974] 3 All E.R. 757; *Miller et al. v. Lavoie* (1966), 60 D.L.R. (2d) 495, 63 W.W.R. 359; *Gladu v. Edmonton Land Co.* (1914), 19 D.L.R. 688, 8 Alta. L.R. 80, 7 W.W.R. 279; *Hnatuk v. Chretian* (1960), 31 W.W.R. 130, refd to]

APPEAL from a judgment of Hinkson, J., 3 B.C.L.R. 348, dismissing an action to set aside a contract.

Robert Easton, for appellant.
Timothy P. Cameron, for respondent.

MCINTYRE, J.A.:—The appellant sued to have the Court set aside the sale to the respondent of his 6-ton fishing boat, the "Glenda Marion". He alleged fraudulent misrepresentation, and in the alternative sought relief from an unconscionable bargain. At trial the action was dismissed [3 B.C.L.R. 348]. This appeal was taken, and before this Court the appellant confined his claim to that of unconscionable bargain.

The appellant is an Indian who lives in Powell River, British Columbia. He is married with six children aged from 6 to 19. He suffers from a congenital hearing defect, but is by no means totally deaf. He has a Grade V education, and according to the trial Judge is a mild, inarticulate, retiring person, and it would appear

from the evidence that he is not widely experienced in business matters. He is a commercial fisherman and a logger.

In 1958 the appellant purchased the "Glenda Marion", a 30-foot gas-powered fishing boat. It was registered as a 6-ton vessel and was used for gill-netting and trolling. The vessel had become largely obsolete by 1973 and had very small value as a boat. However, because of the commercial fishing licence attributable to the vessel, it acquired substantial value after 1968 and particularly in 1973.

Prior to 1968, any person could apply for and acquire a commercial salmon fishing licence. In 1968 the situation changed, when the Government adopted the policy of reducing the size of the salmon fishing fleet in the interests of economy and conservation. Fishing boats were granted licences in one of three categories, A, B and C, depending upon quantities of salmon landed in previous years. Any new boat could be licensed for salmon fishing only if a transfer of an existing licence from an old boat could be arranged. The effect of this arrangement was to freeze the number of commercial licences, and as a result they began to acquire real value.

The appellant wished to replace the "Glenda Marion", which had a licence, with a new boat. He had saved $5,200 towards a new vessel and had made two unsuccessful applications, one in 1971 and one in 1972, for financial assistance to the Indian Fishermen's Assistance Programme for this purpose. He made a third application in 1973. This programme was administered by the Fisheries Service of the Department of the Environment and received its funds from the Department of Indian Affairs and Northern Development. Under this plan an Indian could obtain a grant of tonnage, that is, an entitlement to a commercial fishing licence based on the tonnage of a boat, from a "tonnage bank" operated by the programme. This tonnage had to be purchased by the acquisition of licensed boats by the scheme. It was available to needy Indians who were assisted under the programme. If the appellant's application had been accepted, the programme could have acquired the "Glenda Marion" by purchase from the appellant. The licence or tonnage attributable to the vessel, that is, 6 tons, would have passed with the purchase to the tonnage bank. When the appellant purchased his new boat, if the events reached that stage, the tonnage in the tonnage bank would have been available to him. His new boat would have been licensed. He was also free, if he chose, to sell the boat privately. If he adopted this course, however, the licence or tonnage would follow the sale and

he would lose it and thereby virtually exclude himself from further fishing. He had been warned by an officer of the programme that the assistance fund, formed as it was to protect and assist Indian fishermen, would not look favourably upon an application for assistance if the appellant sold his boat privately thus depriving the fund of the tonnage and making it more difficult to carry out its objectives.

After making his application for aid in August of 1973, the appellant spoke to one Robinson, administrator of the programme, who arranged to have one Fred Shaughnessy acquire the "Glenda Marion" for the fund. On October 4, 1973, the appellant signed a transfer of the boat to the Department of the Environment for $2,000. The Department held the transfer, but the matter was never concluded. No reason for the failure to complete the sale was given in evidence. Had it been concluded, the appellant would have received $2,000 and the tonnage would have been passed to the tonnage bank. On the acquisition of his new boat, he could have, and he intended to, apply for the tonnage from the bank. Subject to qualifying for assistance in the first place, he would have received the tonnage and had the licence and would have acquired a new boat fully licensed. The only fair inference one can draw from these facts is that in the abortive arrangements made with the Indian Assistance Fund and described above, the appellant was attempting to dispose of his boat only and was not surrendering as well the licence or the tonnage necessary for his continued fishing.

A further detail regarding the licensing of boats should be mentioned. The category of licence sought by the respondent in his purchase of the "Glenda Marion" was an A licence. The "Glenda Marion" had an AI licence. This was a form of licence available only to Indians for which a lower licence fee was payable than upon an A licence. Otherwise, the licences were identical. When a boat with an AI licence was sold to a white man, he could convert the AI licence to an A licence, but only upon paying to the Government full licence fees for the previous years during which it had existed as an AI licence.

In November, 1973, the respondent was seeking to purchase a vessel with an A licence. It was clear from the evidence that due to the restrictive licensing policy described above and due as well to the fact that 1973 yielded one of the best salmon harvests in British Columbia's history, licences had acquired great value. The evidence showed, and the trial Judge found, that Class A licensed tonnage was worth about $2,500 per ton. This figure was in addi-

tion to the value of the hull and machinery. The "Glenda Marion", being licensed for 6 tons, had a value for licence alone of $15,000. The respondent was well aware of this valuation. He knew the licence had value apart from the boat. The trial Judge said:

> I am satisfied the defendant believed the "Glenda Marion" with its licence had a value of $16,000 in November 1973 and that sales of similar vessels on the open market at that time supported this belief.

There was ample evidence to support this conclusion. It may be found in the evidence of one Mazzone, an employee of a large fishing company actively engaged in 1973 in the purchase of tonnage, and of one Bell, engaged then in the "Government Buy Back Programme", by which licensed vessels were acquired by the Government and retired from fishing to assist in reducing the fleet. It should also be observed that in registering the transfer of the boat with the Regional Director of Fisheries in Vancouver the respondent was required to sign a record of transfer form covering the transaction. In completing the form in the space for purchase price which required that he show "total value including value of all other consideration", he entered the figure of $16,000.

The respondent approached the appellant on November 18, 1973, in Powell River. The "Glenda Marion" had sunk a few days before (no reason was disclosed in the evidence) and had been refloated by the appellant. This fact is mentioned to indicate the boat as such was of small value at this time. After some discussion, during which the appellant told the respondent of his arrangement to sell the boat to the assistance programme, the appellant expressed doubt about the sale and said he wished to acquire a new boat and licence. The respondent, though he conceded in evidence that he knew little of the operation of the assistance programme, assured the appellant that as an Indian he would not have any difficulty in acquiring a new licence after sale to the respondent. The respondent gave the appellant a cheque for $2,000, which had been back-dated by the respondent to September 1, 1973, obviously to give the impression that the sale had been arranged before the agreement with the assistance programme. The appellant took the cheque and said he would consider the matter and give the respondent his decision the next day.

The appellant decided against the sale overnight, after discussions with his brother, and gave the cheque to his brother to return to the respondent. He said he adopted this course because he did not wish to face the respondent. The cheque was returned the

next day, but after receipt the respondent went to the appellant's home and slipped the cheque under his door. A further meeting took place on November 20, 1973, when the respondent gave further assurances to the appellant that he would be able to get a licence for a new boat. The cheque was handed back and forth several times, the respondent returning it to the appellant after each refusal to sell. Finally it was agreed that the boat would be sold for $4,500. A handwritten memorandum to this effect was signed by the parties. A further cheque was given for the remainder of the purchase price to the appellant. However, when the respondent sought to transfer the licence he discovered the necessity to repay back licence fees in the amount of $570 in order to convert the licence into an A licence. He stopped payment of the cheque for $2,000, and issued a new one for $1,430, which was sent to the appellant. This was done without notice to or consent of the appellant.

From this recital it is at once clear that the appellant made an improvident bargain. He parted with an asset worth $16,000 for $4,500, later reduced by $570. The question for decision is: Did he enter into this bargain under such circumstances that the Court will exercise its equitable jurisdiction to rescind the contract and return the parties to their original positions? The trial Judge held that he had not. He said, after declining to find that the appellant had been induced to enter the contract by false representations and after discussing various authorities [at pp. 355-6]:

> In the present case, I conclude that the principles discussed by Lord Denning, M.R. in the *Bundy* case [*infra*] are not applicable. To begin with, this is not a case where the plaintiff was compelled to enter into the transaction by reason of his own needs or desires. He complains that he did not have any independent advice before entering into the transaction. But, again, this is not a situation where the agreement was reached as a result of one session of bargaining. Rather, the defendant approached the plaintiff and made a proposal to him and tendered a cheque. The plaintiff accepted that cheque but reserved his right to consider the proposal before reaching a decision. Then he went away and, after considering the matter, decided not to sell the "Glenda Marion" to the defendant. He had his brother return the cheque the next day. Thereupon the defendant attended at the residence of the plaintiff and slipped the cheque under the door. At that point the plaintiff had made his decision known to the defendant. He could have torn up the cheque and refused to discuss the matter further with the defendant. Instead, he went the next day and bargained with the defendant. He indicated to the defendant that he had been dealing with a third party who had considered offering him $4,500 for the vessel. Apparently that transaction had fallen through. Ultimately the defendant offered to pay $4,500 for the "Glenda Marion" and the plaintiff accepted that offer. Now the plaintiff complains that the consideration was grossly inadequate. However, over the span of the three days

during which negotiations took place the plaintiff had an opportunity, if he had desired, to seek independent advice as to the current market value of a class "A-1" commercial salmon fishing licence with a six-ton vessel. He did not seek such independent advice. In the circumstance he cannot be heard to complain that the price was inadequate.

The principles upon which a Court will interfere with a concluded transaction and nullify it upon the ground that it is unconscionable have found frequent expression. An early Canadian case is *Waters v. Donnelly* (1884), 9 O.R. 391. The leading pronouncement on the subject in British Columbia is to be found in *Morrison v. Coast Finance Ltd. et al.* (1965), 55 D.L.R. (3d) 710 at p. 713, 54 W.W.R. 257 at p. 259, where Davey, J.A., speaking for himself and Bull, J.A., said:

> The equitable principles relating to undue influence and relief against unconscionable bargains are closely related, but the doctrines are separate and distinct. The finding here against undue influence does not conclude the question whether the appellant is entitled to relief against an unconscionable transaction. A plea of undue influence attacks the sufficiency of consent; a plea that a bargain is unconscionable invokes relief against an unfair advantage gained by an unconscientious use of power by a stronger party against a weaker. On such a claim the material ingredients are proof of inequality in the position of the parties arising out of the ignorance, need or distress of the weaker, which left him in the power of the stronger, and proof of substantial unfairness of the bargain obtained by the stronger. On proof of those circumstances, it creates a presumption of fraud which the stronger must repel by proving that the bargain was fair, just and reasonable: *Earl of Aylesford v. Morris* (1873), L.R. 8 Ch. 484, *per* Lord Selborne, L.C., at p. 491; or perhaps by showing that no advantage was taken: see *Harrison v. Guest* (1855), 6 De G. M. & G. 424 at p. 438, 43 E.R. 1298; affirmed (1860), 8 H.L.C. 481 at pp. 492-3, 11 E.R. 517. In *Fry v. Lane* (1888), 40 Ch. D. 312, Kay, J., accurately stated the modern scope and application of the principle, and discussed the earlier authorities upon which it rests. At p. 322 he said:
>
> > "The result of the decisions is that where a purchase is made from a poor and ignorant man at a considerable undervalue, the vendor having no independent advice, a Court of Equity will set aside the transaction.
> >
> > "This will be done even in the case of property in possession, and *à fortiori* if the interest is reversionary.
> >
> > "The circumstances of poverty and ignorance of the vendor, and absence of independent advice, throw upon the purchaser, when the transaction is impeached, the onus of proving, in Lord Selborne's words, that the purchase was 'fair, just, and reasonable.' "

This case has been followed in such cases as *Knupp v. Bell et al.* (1966), 58 D.L.R. (2d) 466 [affd 67 D.L.R. (3d) 256 (Sask. C.A.)], and *Marshall v. Canada Permanent Trust Co.* (1968), 69 D.L.R. (2d) 260, and it was cited with approval by Lord Denning, M.R., in *Lloyd's Bank Ltd. v. Bundy*, [1974] 3 All E.R. 757 at p. 764, which case discusses the applicable principles.

From these authorities this rule emerges. Where a claim is made that a bargain is unconscionable, it must be shown for success that there was inequality in the position of the parties due to the ignorance, need or distress of the weaker, which would leave him in the power of the stronger, coupled with proof of substantial unfairness in the bargain. When this has been shown a presumption of fraud is raised and the stronger must show, in order to preserve his bargain, that it was fair and reasonable.

Like many principles of law, it is much easier to state than to apply in any given case. In the cases cited above the facts were such that the application of the remedy was clearly required. In the case at bar the facts do not speak as clearly. None the less, I am of the view that this appeal should succeed and the contract be rescinded. The appellant, by education, physical infirmity and economic circumstances, was clearly not the equal of the respondent. The evidence supports the conclusion that the appellant wanted to continue fishing and wanted to retain his licence or tonnage. It shows as well that the respondent proceeded aggressively with full knowledge of the value of the licence. He expressed regret at one stage that he had not acquired three or four more licences, they were so valuable. The appellant did not wish to sell and resisted for a time by returning the cheque and delaying a decision. The arbitrary withholding of $570 by the respondent is illustrative of his attitude to the appellant. Despite the fact that the trial Judge found that the appellant had not shown that he entered the contract on the basis of representations made by the defendant, I cannot but conclude that the appellant was anxious to preserve his licence, and that he was assured, falsely or recklessly by the respondent that he would have no difficulty getting another licence if he sold the "Glenda Marion" to the respondent. In this respect he was given assurances on a subject of prime importance by the respondent, who admitted he knew little or nothing of the matter. The respondent also knew that the preservation of his licence was a vital consideration to the appellant. The respondent sought out the appellant and in his dealings would not take no for an answer. He persuaded the appellant to enter a bargain after, by his own admission, making assurances which were untrue regarding the chance of the appellant to get a licence. He thereby procured an asset worth $16,000 for $4,500, which he later chose to reduce by $570. The position taken by appellant's counsel was that the appellant's ignorance, coupled with pressures exerted upon him by the respondent, caused the inequality of the bargaining position. In my

view, the improvidence of the bargain is shown. On the whole of the evidence, it is also my view that the appellant was so dominated and overborne by the respondent that he was, in the sense of that term used by Davey, J.A., in the *Morrison* case, *supra*, within the power of the respondent in these dealings.

Some more precise reference to the evidence may be helpful. The first meeting between the respondent and the appellant took place on November 18, 1973. During the conversation that day the licence was discussed and, while the appellant indicated that he would be willing to sell the boat, he did not wish to part with the licence. He was told "there was no problem to get licences for Indians". There was also conversation about another possible purchaser for the boat who, it was said, might pay $4,500. This was why the respondent raised his price. At the close of this meeting the respondent gave the appellant a cheque for $2,000 which, as has been noted, he back-dated to September 1, 1973, to give the appearance that the sale had preceded the sale to the assistance scheme. The appellant took the cheque because, he said, the respondent kept telling him he could easily get a licence. That evening, after a discussion with his brother, he returned the cheque by sending it back with his brother. He said "I did not want to face him." The respondent, despite this incident, pressed on to acquire the boat. He returned the cheque to the appellant's house. When the appellant received it — he was absent when it arrived — he took it back personally. He said: "He kept phoning me all the time at night and I thought if I went back I might as well face him, you know."

There is some confusion about how many subsequent meetings occurred. The appellant's brother testified that two more meetings took place, and at both of these meetings the appellant continually reiterated his fear that he would not be able to obtain another licence and received repeated assurances that being an Indian he would get one easily. The respondent said, however, that there was only one more meeting. In any event, this final meeting occurred on November 20, 1973, in the coffee shop of the Marine Hotel; the respondent, the appellant and the appellant's brother, James Harry, were present. At this meeting the appellant again returned the respondent's cheque saying "I am not going to sell my boat, I am scared of losing my licence." Discussion continued for some time; they left the coffee shop and went into the bar where the respondent and James Harry drank beer but apparently the appellant did not. At length the appellant apparently decided that he would sell his boat for $4,500. He swore

that the only reason for finally agreeing to the sale was that he had accepted the advice that he could preserve his licence. He said in cross-examination, "I believed him, that is the only reason I let her go." In my opinion, it is clear from the evidence that the respondent, a man of greater business experience, greater education and with a full knowledge of the value attributable in the autumn of 1973 to a commercial fishing licence, took advantage of his general superiority and prevailed upon the appellant to enter into this bargain against his best interests.

I take this view with the utmost respect to the trial Judge. I have, however, considered his reasons for refusing to apply the principles in the *Bundy* case and I remain of the view that I have expressed. It is true, as he has pointed out, that appellant could have sought advice; he could have torn up the cheque; he could have refused to have any dealings with the respondent; but this will be true of almost any case where an unconscionable bargain is claimed. If the appellant had done these things, no problem would have arisen. The fact remains, however, he did not, and in my view of the evidence it was because he was overborne by the respondent because of the inequality in their positions and the principles of the cases cited apply.

I would allow the appeal and direct that the contract be rescinded; that the respondent deliver the "Glelnda Marion" to the appellant upon payment by the appellant to the respondent the sum of $3,930.

CRAIG, J.A.:—I agree that this appeal should be allowed for the reasons given by McIntyre, J.A., and also for the reasons given by Lambert, J.A., and I agree with the order which McIntyre, J.A., proposes.

LAMBERT, J.A.:—I have had the advantage of reading the opinion of my erstwhile brother McIntyre. That opinion has been handed to my brother McFarlane to be announced in open Court and left with the Registrar in accordance with s. 27(3) of the *Court of Appeal Act*, R.S.B.C. 1960, c. 82, as amended [1961, c. 13, s. 2]. I would allow the appeal and make the order proposed by McIntyre, J.A.

The leading judgment of this Court on unconscionable bargains is *Morrison v. Coast Finance Ltd. et al.* (1965), 55 D.L.R. (2d) 710, 54 W.W.R. 257, and a concise expression of the legal principle followed in that case by Davey, J.A., and by my brother Bull is set out in the judgment of Davey, J.A., in these words [at p. 713 D.L.R., p. 259 W.W.R.]:

> . . . a plea that a bargain is unconscionable invokes relief against an unfair advantage gained by an unconscientious use of power by a stronger party against a weaker. On such a claim the material ingredients are proof of inequality in the position of the parties arising out of the ignorance, need or distress of the weaker, which left him in the power of the stronger, and proof of substantial unfairness of the bargain obtained by the stronger. On proof of those circumstances, it creates a presumption of fraud which the stronger must repel by proving that the bargain was fair, just and reasonable . . .

McIntyre, J.A., has re-stated that principle in his judgment.

I do not disagree that the principle, as stated by Davey, J.A., and by McIntyre, J.A., is appropriate to apply in this case as an aid in the determination of whether this is a case where rescission should be granted, though I am not satisfied that the principle, so stated, exhausts all cases where rescission might be ordered under the rubric of unconscionable bargain.

I agree wholeheartedly with McIntyre, J.A., when he says that it is easier to state the principle than to apply it in a given case. Indeed, to my mind, the principle is only of the most general guidance. It is not a principle of the type which can be applied to facts to produce, by a logical process, a clear conclusion. To think of it as such a principle is to obscure the real process of consideration and judgment that leads to a decision in this kind of case.

I consider that the judgment of the English Court of Appeal in *Lloyd's Bank Ltd. v. Bundy*, [1974] 3 All E.R. 757, is subject to the same limitation. In that case, Lord Denning, M.R., analyzed five types of unconscionable bargain and synthesized them into one general principle. He called the five types: duress of goods, unconscionable transactions, undue influence, undue pressure and salvage agreements. He stated the general principle in these terms [at p. 765]:

> Gathering all together, I would suggest that through all these instances there runs a single thread. They rest on "inequality of bargaining power". By virtue of it, the English law gives relief to one who, without independent advice, enters into a contract on terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other. When I use the word "undue" I do not mean to suggest that the principle depends on proof of any wrongdoing. The one who stipulates for an unfair advantage may be moved solely by his own self-interest, unconscious of the distress he is bringing to the other. I have also avoided any reference to the will of the one being "dominated" or "overcome" by the other. One who is in extreme need may knowingly consent to a most improvident bargain, solely to relieve the straits in which he finds himself. Again, I do not mean to suggest that every transaction is saved by independent advice. But the absence of it may be fatal. With these explanations, I hope this principle will be found to reconcile the cases.

This statement was clearly not intended as a touchstone, since the liberal employment of adjectives makes it too flexible for that purpose, but rather as a demonstration that the categories of grounds for rescission are interrelated and based on a common foundation, so that cases of one of the five types may provide guidance on another of the types. Accordingly, again, the statement of principle has been only of the most general assistance to me in reaching my decision on the facts of this case.

In my opinion, questions as to whether use of power was unconscionable, an advantage was unfair or very unfair, a consideration was grossly inadequate, or bargaining power was grievously impaired, to select words from both statements of principle, the *Morrison* case and the *Bundy* case, are really aspects of one single question. That single question is whether the transaction, seen as a whole, is sufficiently divergent from community standards of commercial morality that it should be rescinded. To my mind, the framing of the question in that way prevents the real issue from being obscured by an isolated consideration of a number of separate questions; as, for example, a consideration of whether the consideration was grossly inadequate, rather than merely inadequate, separate from the consideration of whether bargaining power was grievously impaired, or merely badly impaired. Such separate consideration of separate questions produced by the application of a synthetic rule tends to obscure rather than aid the process of decision.

The single question of whether the transaction, seen as a whole, is sufficiently divergent from community standards of commercial morality that it should be rescinded must be answered by an examination of the decided cases and a consideration, from those cases, of the fact patterns that require that the bargain be rescinded and those that do not. In that examination, Canadian cases are more relevant than those from other lands where different standards of commercial morality may apply, and recent cases are more germane than those from earlier times when standards were, in some respects, rougher and, in other respects, more fastidious. In my opinion, it is also appropriate to seek guidance as to community standards of commercial morality from legislation that embodies those standards in law. I have, therefore, particularly considered the facts and decisions in *Morrison v. Coast Finance Ltd., supra*; *Knupp v. Bell et al.* (1966), 58 D.L.R. (2d) 466; affirmed 67 D.L.R. (2d) 256 (Sask. C.A.); *Miller et al. v. Lavoie* (1966), 60 D.L.R. (2d) 495, 63 W.W.R. 359; *Marshall v. Canada Permanent Trust Co.* (1968), 69 D.L.R.

(2d) 260; *Gladu v. Edmonton Land Co.* (1914), 19 D.L.R. 688, 8 Alta. L.R. 80, 7 W.W.R. 279; and *Hnatuk v. Chretian* (1960), 31 W.W.R. 130; and I have considered the provisions of the *Trade Practices Act*, 1974 (B.C.), c. 96, and the *Consumer Protection Act*, 1977 (B.C.), c. 6.

I have applied the standards derived from those authorities to the facts in this case, which are that the respondent purchased for $4,500 a boat that he knew to be worth $16,000 from the appellant, whom he knew to be partially deaf, easily intimidated and ill-advised, by a process of harassment. In my opinion, the whole circumstances of the bargain reveal such a marked departure from community standards of commercial morality that the contract of purchase and sale should be rescinded.

I do not believe that the process of reasoning that I have adopted is in any way different from the process of reasoning adopted by McIntyre, J.A., in this case or by Davey, J.A., in the *Morrison* case, *supra*.

I would allow the appeal and make the order proposed by McIntyre, J.A.

Appeal allowed.

RE CANADIAN NATIONAL RAILWAYS AND CANADIAN PACIFIC LTD.

British Columbia Court of Appeal, Seaton, Craig and Lambert, JJ.A.
November 17, 1978.

Arbitration — Error of law — Necessary elements to establish error of law so as to set aside arbitration award — Considerations.

If an arbitration award is to be set aside on the ground of error in law, it must be established that the arbitrators made an error; that the error was on a point of law; that the face of the record shows that an error of law had been made; that the decision on the point of law formed part of the reasoning leading to the answer to the question submitted; and that the point of law was not the very question referred to arbitration.

Accordingly, where an arbitrator fails to find a phrase ambiguous and the meaning of the phrase is the very question referred to him, his refusal to find ambiguity cannot amount to an error in law. Moreover, once the arbitrator has decided there is no ambiguity he does not commit an error in law in deciding that it is not necessary to consider evidence of subsequent conduct. Finally, even where the arbitrator mis-states a principle, if the principle mis-stated does not form part of the reasoning leading to the answer to the question submitted no error of law is committed.

Court File No. CV-16-11389-00CL

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF URBANCORP TORONTO MANAGEMENT INC., URBANCORP (ST. CLAIR VILLAGE) INC., URBANCORP (PATRICIA) INC., URBANCORP (MALLOW) INC., URBANCORP (LAWRENCE) INC., URBANCORP DOWNSVIEW PARK DEVELOPMENT INC., URBANCORP (952 QUEEN WEST) INC., KING RESIDENTIAL INC., URBANCORP 60 ST. CLAIR INC., HIGH RES. INC., BRIDGE ON KING INC. (COLLECTIVELY, THE "APPLICANTS") AND THE AFFILIATED ENTITIES LISTED IN SCHEDULE "A" HERETO

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

(PROCEEDING COMMENCED AT TORONTO)

CASE CONFERENCE BRIEF

(February 15, 2017 – Home Buyer Damage Claims)

Davies Ward Phillips & Vineberg LLP
155 Wellington Street West
Toronto, ON M5V 3J7

Robin B. Schwill (LSUC #38452I)
rschwill@dwpv.com

Telephone: 416.863.5502
Facsimile: 416.863.0871

Lawyers for the Monitor
KSV Kofman Inc.