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S.C.C. No.: 32460

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

BETWEEN:

**TERCON CONTRACTORS LTD.**

Applicant
(Respondent)

SERVED COPY
SIGNIFICATION

-and-

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

Respondent
(Appellant)

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# REPLY OF THE APPLICANT
**(Tercon Contractors Ltd., Applicant)**
**(Pursuant to Rule 28 of the *Rules of the Supreme Court of Canada*)**

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## Reply of Applicant

### A. Integrity of Tendering Process at Issue

1. In its Response, at paragraph 30, the Ministry argues that the decision of the Court of Appeal cannot be overturned because it is beyond the scope of this Court's authority to refuse to enforce exclusion clauses. This cavalier approach highlights why leave is appropriate – relying on the decision of the Court of Appeal, public authorities will now take it for granted that they can apply secret preferences, falsify documents and falsely disclose what they are doing so as to award Contract "B" to a non-compliant bidder. Unless the Court of Appeal is overturned, "the public interest in an orderly and fair scheme for tendering is thwarted".

Ref.: Judgment of Court of Appeal below, at para. 19 [**Leave Application Tab 4B**]

### B. Unreasonable Result

2. At paragraph 1 of the Response, Tercon's position is mischaracterized. Tercon's argument is not solely to the effect that the disputed exclusion clause is unfair, unconscionable or contrary to public policy. Tercon raises the important question whether, in determining if effect should be given to exclusion clauses, courts should also look at the "result" of enforcing such clauses – would the end result of enforcement be unreasonable, unfair, unconscionable or otherwise contrary to public policy?

Ref.: Applicant's Memorandum, at paras. 39-47 [**Leave Application Tab 5, pp.63-66**]

### C. Non-Compliant Bid Accepted

3. At paragraph 4 of its Response, the Ministry takes the position that s. 5.2 of the RFP permitted an ineligible proponent to amend its proposal to render it eligible. The problem with this argument is that s. 5.2 specifically did not allow a material change or any change that was unfair to other proponents. In addition, s. 6 of the RFP did not permit a proponent to amend its proposal in a way that would affect the relative ranking of the proposals as submitted.

Ref.: RFP, ss. 5.2 and 6 [**Response to Leave Application, p.56, ln.22; p.59, ln.25**]

4. The position advocated by the Ministry demonstrates one implication of letting the decision of the Court of Appeal stand: it encourages the sort of duplicity that Justice Charron was concerned about in *Double N*. Despite the fact that the Ministry knew a joint venture was ineligible it advised Brentwood/EAC how to structure their tender so it appeared compliant then

"smothered" the real relationship between Brentwood and EAC including misrepresenting to Tercon that it had formally selected Brentwood. To minimize the risk of litigation, the Ministry "elected to incorporate EAC indirectly in Contract B whilst ensuring this fact was not disclosed", conduct which the trial judge characterized as egregious.

> Ref.: *Double N. Earthmovers Ltd.* v. *Edmonton (City)*, [2007] 1 S.C.R. 116, at para. 123 **[Leave Application Tab 4B]**
> Judgment below, at paras. 53-55,60-62,65,133-138,150 **[Leave Application Tab 4A]**

**D. Unresolved Questions**

5. At its core, this case is about the conflict between two diametrically opposed terms in a tendering contract – on the one hand an obligation of good faith and fair dealing and on the other an exclusion of liability. It raises important novel issues not yet dealt with by this Court:

- Can a contracting party with an obligation to conduct itself fairly and in good faith rely upon an exclusion of liability clause where its conduct was unfair and in bad faith? What if the contracting party is a government tendering authority which has also acted contrary to its legislative protocol?
- Can government rely upon a private law "no claims" clause when it has concealed – unfairly and in bad faith – a public law remedy until it is ineffective, thereby ousting access to and the jurisdiction of the court?
- What role does this Court's equitable jurisdiction have in determining whether a defendant can rely upon an exclusion of liability clause?

6. These questions are raised in Tercon's Leave Application. The Ministry offers no response. Instead, the Ministry takes the position that the decision in *Gordon Capital* is dispositive of all of the issues. Yet, *Gordon Capital* did not involve public tendering or public policy issues; obligations of fairness and good faith were not an issue; there was no egregious conduct, concealment or equitable fraud; and the contract at issue was freely negotiated rather than imposed.

> Ref.: *Guarantee Co. of North America* v. *Gordon Capital Corp.*, [1999] 3 S.C.R. 423 **[Leave Application, Tab 7I]**

7. The Ministry's approach in relation to the concept of "unconscionability" also emphasizes the need for guidance from this Court: Was Dickson, C.J.C.'s use of the word

"unconscionable" in *Hunter Engineering* meant to convey that the court can only refuse to enforce exclusion clauses in cases of unconscionable transactions? This question was not resolved in *Gordon Capital.*

Ref.: *Hunter Engineering Co.* v. *Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426, at p.462 **[Leave Application Tab 7K, p.181]**
J.B. McCamus, *The Law of Contracts*, Irwin Law, 2005 at p.771 [**Tab 3C**]

8. The word "unconscionable" has traditionally been used more broadly – to describe conduct which a court of equity will not countenance by refusing to allow reliance upon statutory or contractual legal rights where to do so would be against conscience. It is in this equitable sense that Tercon raises fraud in its Leave Application, not in the common law sense suggested by the Ministry in its Response at paragraph 11. The question is whether the Ministry is disentitled, on equitable principles, to rely upon the "no claims" clause.

Ref.: *Performance Industries Ltd.* v. *Sylvan Lake Golf & Tennis Club Ltd.*, [2002] 1 S.C.R. 678, at para. 39 [**Leave Application Tab 7Ra, p.302**]
*Guerin* v. *Canada*, [1984] 2 S.C.R. 335, at pp.356,390 [**Tab 3A**]
*Ryan* v. *Moore*, [2005] 2 S.C.R. 53 at para. 74 [**Tab 3B**]

**E. Setting the Record Straight**

9. A number of factual errors appear in the Ministry's Response, including:

- Paras. 5-6: Mr. Tasaka was not merely "concerned" or afraid the joint venture would be ineligible – he understood it was ineligible.

  Ref.: Judgment below, para.23, [**Leave Application Tab 4A**]

- Paras. 6,12: It was conceded at trial that a joint venture between Brentwood/EAC was ineligible. The question at trial was limited to whether the Brentwood tender was actually from a joint venture.

  Ref: Judgment below, paras. 55,65,115-117 **[Leave Application Tab 4A]**

- Paras. 7-10: The suggestion that the joint venture was not a proponent and that Brentwood was not acting as agent for EAC pursuant to their joint venture relationship is absurd. Brentwood/EAC continuously informed the Ministry of their joint venture relationship and tried to convince the Ministry to award Contract "B" to the joint venture – on March 7, March 12, March 19 and March 29/30. Brentwood's May 3 letter (the date used by the trial judge is the April 30 draft) points out that it would be difficult for the

Ministry to continue representing to the other proponents that it was not contracting with a joint venture if it left Article 4 as it was then drafted. The letter says:

> The Owner's [sic] have made it quite clear from the beginning that they would not let us change our submission to a joint venture due to the possibility of litigation. We would suggest that if certain parties were to see this document worded like it is it would be obvious that this is more than just a contractor, sub-contractor relationship. This is the first time we have seen such wording to cover a prime contractor, sub-contractor relationship. Do the Owner's [sic] not feel secure enough with the bonding that we are required to provide?

Ref.: Judgment below, paras. 41,51-53,60,65-66,73 **[Leave Application Tab 4A]**

- Para. 10: EAC (and its financial covenantors) did have a legal obligation to the Ministry as they had signed an indemnity jointly with Brentwood in favour of the surety providing the performance bond. In the event of default, EAC would, by reason of its indemnity and bonding, be required to complete the project. The only reason EAC was not a signatory to Contract "B" was the Ministry's concern about litigation.

  Ref.: Judgment below, paras. 61,65-70,73,75 **[Leave Application Tab 4A]**

- Paras. 13-16: Interviews and the ferry conversation were March 12 not March 19. The suggestion that Tercon actually knew what was going on and had evidence upon which to found a Petition for Judicial Review (as would have been the case had the Ministry honestly disclosed) is not supported by the evidence; nor is the suggestion that the Ministry in deciding to select the ineligible joint venture relied upon Swaine's statement that Tercon did not intend to sue.

  Ref.: Judgment below, paras. 54,60 **[Leave Application Tab 4A]**

**F. It Was All Pleaded at Trial**

10. The Ministry argues that this Court should deny leave because the issues raised in the leave application were not pleaded at trial. This is simply false. Tercon's Statement of Claim specifically refers to the Ministry's duty of fairness and good faith (paras.22,22.2,27) and that the Ministry deceived Tercon and disguised the selected proponent (paras.18.6,18.7). The material RFP provisions, including the exclusion clause, were pleaded (para.18). Although no reply was filed, the issue of the enforceability of the exclusion clause was joined, and Tercon's position was clearly articulated in its opening statement and again in argument. No obligation was ever

raised as it was perfectly obvious that the enforcement of the exclusion clause and the application of *Hunter Engineering* was a central issue in the case.

Ref.: Statement of Claim [**Response to Leave Application, pp. 119-140**]
Tercon's Trial Opening, pp.1-2 [**Tab 2A**]
Tercon's Trial Argument Summary, paras. 10-12 [**Tab 2B**]
Tercon's Trial Argument re: Exclusion Clause, pp.1-5 [**Tab 2C**]

**G. Undeniable National Importance of Case**

11. The national importance of this case is undeniable. As succinctly set out in the Affidavit from the President of the Canadian Construction Association:

- ...the goal of tendering is to replace negotiation with fair and open competition among bidders, and to use that competition to extract the most satisfactory price and product for owners. The CCA considers that this goal can only be achieved in a framework which promotes and enforces honesty and aboveboard dealing. Bid-shopping, favoritism, collusion and other unfairness are incompatible with this model.
- ...it is extremely important to commerce and to the construction industry that there be certainty in determining whether owners can exempt themselves from damage claims and avoid legal accountability by the use of exclusion clauses.

Ref.: Affidavit of Michael Atkinson, at paras.5,7 [**Leave Application Tab 2A**]

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10th day of March, 2008

Marie-France Major, as ottawa agent for

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