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Thomas Heintzman specializes in arbitration, mediation and litigation relating to corporate disputes, shareholder's rights, securities law, broadcasting/telecommunications, construction law, and class actions.

He has been counsel in many important actions, arbitrations, and appeals before all levels of courts in many Canadian provinces and has made numerous appearances before the Supreme Court of Canada.

Thomas Heintzman is the author of *Heintzman & Goldsmith on Canadian Building Contracts*, 4th Edition which provides an analysis of the law of contracts as it applies to building contracts in Canada.

Heintzman & Goldsmith on Canadian Building Contracts has been cited in over 183 judicial decisions including the two leading Supreme Court of Canada decisions on the law of tendering:

Tercon Contractors? The Latest Chapter

The 2010 decision of the Supreme Court of Canada in ***Tercon Contractors Ltd v. British Columbia (Transportation and Highways)*** is one of the most important recent Canadian decisions relating to contract law. It has particular importance to building contracts. Those interested in construction law are watching to see how Tercon will be applied in subsequent cases. In the recent decision of the British Columbia Court of Appeal in ***Roy v. 1216393 Ontario Inc*****,** we now have one of our first indications of where *Tercon* will go.

The facts behind Roy v. 1216393 Ontario Inc.

In *Roy,* the plaintiffs entered into an agreement to buy a building lot from the defendants for $184,700 and gave the defendants' lawyer a deposit of $18,470. The defendants had previously sold the lot to another party but neither the defendants nor their lawyer told that to the plaintiffs. The other party sued for specific performance and this precluded the defendants from completing the sale to the plaintiffs. So the plaintiffs sued the defendants and their lawyer for damages.

The agreement of purchase stated that if the agreement was not completed due to the vendor's fault, then the sole remedy of the plaintiffs, the purchasers, was the payment to them of the deposit, as liquidated damages. The Court of Appeal noted, "as the deposit monies came from the purchaser, it has the effect of being an exclusion of liability clause."

The trial judge refused to apply this clause and awarded the plaintiffs $317,000 in damages against the defendants. The trial judge held that the clause was unconscionable because "it permitted the vendor to walk away from the contract with no consequence, though the purchasers would face significant consequences on failure to comply with obligations imposed on them. From the purchaser's perspective, it would render the purported contract no contract at all."

Harkening back to *Tercon,* the B.C. Court of Appeal noted that the dissenting judgment in the Supreme Court established three questions with respect to the enforcement of the exclusion clauses:

1. Does the clause even apply to the circumstances in issue? If it does:

2. Was the clause unconscionable at the time of the contract? If not,

3. Should enforcement of the exclusion clause be denied on grounds of public policy?

The exemption clause will not be applied if the answer to question (1) is No, or the answer to question (2) or(3) is Yes.

The trial judge applied the second test and concluded that the clause in question was unconscionable. But, the Court of Appeal said, the trial judge did not perform the proper analysis of unconscionability. The Court of Appeal said that there are two elements to unconscionability; inequality of bargaining power, and substantial unfairness. The Court of Appeal said that the trial judge had only considered the "substantial unfairness" element, not the inequality of bargaining power element.

The Court of Appeal refused to make its own decision as to whether there was inequality of bargaining power between the parties. It also refused to consider whether the fraud of the defendant or its lawyer invoked the third ("public policy") element of the *Tercon* test or precluded the defendants from relying on the exclusion clause at all. The Court sent those matters back for a re-hearing.

In the result, we can draw a number of conclusions about how appellate courts in Canada are likely to apply the three-part test developed by the dissenting judgment in *Tercon*.

First, this dissenting judgment was accepted by the B.C. Court of Appeal as establishing the law with respect to the enforcement of exclusion clauses. This is so even though the majority judgment in *Tercon* decided the appeal based on the first issue, namely that the dispute did not fall within the exclusion clause at all.

Second, the B.C. Court of Appeal confirmed that the unconsionability element of this test has two elements:

inequality of bargaining power and substantial unfairness.

In the case of the tendering of building or construction contracts, it may be very difficult, if not impossible, to establish inequality of bargaining power. As the minority judgment in *Tercon* said:

> "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."

The B.C. Court of Appeal did not deal with the third element of the test, namely, whether the exclusion clause should be enforced having regard to public policy. But the remarks of the minority in *Tercon* make it difficult to avoid an exclusion clause in the context of a tender of a construction project:

> "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."

In the result, the decision of the B.C. Court of Appeal in *Roy* confirms that a bidder under an invitation to tender a construction contract will have a real challenge in avoiding an exclusion clause in the tender, at least under the second and third elements of the dissenting judgment in *Tercon*. The bidder will more likely avoid that clause by showing that it does not apply to the dispute in question at all. Otherwise the bidder may have to take the whole matter back to the Supreme Court and argue that the three part test was not the rationale of the majority decision in *Tercon* and not part of Canadian law.

Another way of looking at the decisions in *Tercon* and *Roy* is to question whether the invitation to tender creates any enforceable rights at all. If it contains an exclusion clause that gives no enforceable rights to the bidding contractor, then there may be no consideration for the contractor's bid, and therefore no Contract A created by the tender. If that is so, then the contractor's bid is itself just an invitation to treat. If the contractors bid is just an invitation to treat, then the owner's "acceptance" is just an offer and the contractor is not obliged to leave its bid open or accept the owner's "offer". That could be the result of an owner's invitation to bid containing an exclusion clause which eliminates any risk or obligation of the owner.

See *Heintzman and Goldsmith on Canadian Building Contracts* (4th ed), chapter 1, part 1(f)

Building Contracts – Tenders - Exclusion Clause

***Roy v. 1216393 Ontario Inc,* 2011 BCCA 500**

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