



**Law of Tendering:
Implications of the Supreme Court of
Canada decision – *Tercon Contractors
Ltd v British Columbia* (Transportation
and Highways)**

Friday, April 16, 2010

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***TERCON AND THE LAW OF TENDERS &
REQUESTS FOR PROPOSALS***

April 16, 2010
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And
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You Know it is Not a Good Day When:

- ④ *“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.”*
 - ④ *Opening words of the majority judgment of the Supreme Court of Canada in Tercon Contractors Ltd v British Columbia (MOT) 2010 SCC 4*



The Facts, the Facts....

- ④ Tercon could not have had a better set of proven facts
 - ④ The characterization of the conduct of the Province in this case was critical
 - ④ The majority of judges found the conduct of the Province essentially unethical



The Facts, the Facts....

- ⦿ RFP created Contract A because, in part:
 - ⦿ Bids irrevocable for 60 days.
 - ⦿ \$50,000 security required as part of bid to be increased to \$200,000 on acceptance
 - ⦿ Detailed evaluation criteria
 - ⦿ Form of alliance agreement attached
 - ⦿ Fixed and non-negotiable pricing required



Courts are Typically Loathe to Uphold or Support Egregious Conduct

- ⦿ *“Except as expressly and specifically permitted in these Instructions 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.”*
 - ⦿ *Exclusion Clause contained in the Tercon RFP*



Judicial Scrutiny of an Exclusion Clause

- ④ The only issue in the Tercon case, at the end of the day, was whether this exclusion clause applied to allow the Province to avoid a claim from Tercon
- ④ The SCC was split 5:4 on the exclusion clause point with both Justices Binnie and McLachlin in the minority



Judicial Scrutiny of an Exclusion Clause

- ⦿ The majority decision nuanced the language of the exclusion clause:
 - ⦿ *“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 clause is not effective to limit liability for breach of the Province’s implied duty of fairness to bidders.”*



Judicial Scrutiny of an Exclusion Clause

- ④ The minority decision would have applied the exclusion clause in favour of the Province.
 - ④ “..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. ...”
 - ④ Minority Judgment of SCC in Tercon



Putting Tercon in Context

- ◉ Review of the Development of the Law of Tendering: Ron Engineering to Tercon Contractors



Contract A / Contract B Analysis

- ④ ***The Queen (Ont.) v. Ron Engineering,***
(1981) SCC
 - ④ Contract A = bid contract formed with each tenderer upon submission of irrevocable bid
 - ④ Contract B = written contract entered into by successful bidder and owner



Contract A / Contract B Analysis

- ④ ***Ron Engineering (cont'd.)***

- ④ Three key terms of Contract A:

- ④ Only a compliant tender could be accepted by an owner
 - ④ The lowest compliant tender should be accepted
 - ④ The owner owed bidding contractors a duty of fairness in analyzing the tenders



M.J.B. and Double N

- ◉ ***M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd., (1999) SCC***
- ◉ Privilege clause stated: “the lowest or any tender shall not necessarily be accepted.”



M.J.B. and Double N

- ④ ***M.J.B. (cont'd.)***

- ④ “... the privilege clause is incompatible with an obligation to accept only the lowest compliant bid”
- ④ Owner can decline to accept any tender based on reasonable and relevant grounds



M.J.B. and Double N

- ④ ***Double N Earthmovers v. Edmonton, (2007) SCC***
 - ④ Call for tenders required all equipment to be 1980 or newer
 - ④ Sureway submits bid listing equipment as 1980 or newer but in fact, some equipment was older
 - ④ Double N sued City for awarding contract to Sureway alleging breach of duty of fairness



M.J.B. and Double N

⦿ *Double N (cont'd.)*

- ⦿ Although tender allowed City to cancel award if tender false that did not oblige the City to do that if it learned tender was false.
- ⦿ Tender was compliant on its face and City could accept without breaching the duty of fairness to Double N.



Pre Bid Duty and Cancellation

- ④ ***Hub Excavating v. Orca et al.*, (2009) BCCA**
 - ④ No duty before the formation of Contract A
 - ④ Questions as to whether to tender or whether it is economically feasible to proceed with a project are discretionary business judgments



Grounds for Rejecting Low Bidder

- ④ ***Sound Contracting Ltd. v. Nanaimo, (2000)***
BCCA
 - ④ Privilege clause stated: “The Owner reserves the right to reject any or all tenders; the lowest will not necessarily be accepted.”
 - ④ Criteria must be disclosed in tender documents
 - ④ Reject lowest bidder on “objective reasons”
 - ④ For example, owner may take past dealings with contractor into consideration



Grounds for Rejecting Low Bidder

- ④ ***Sound Contracting v. Hood Point Improvement District, (2000) BCSC***
 - ④ Privilege clause stated: “The lowest, or any tender, will not necessarily be accepted.”
 - ④ Owner also “... encourages the use of local labour, materials and equipment.”
 - ④ “Nuanced view” of project cost



Grounds for Rejecting Low Bidder

- ④ ***Oviatt v. Kitimat Hospital,***
(2002) BCCA
 - ④ Owner could award contract to any compliant bidder so long as award made in good faith



Grounds for Rejecting Low Bidder

- ④ ***Stanco v. HMTQ, (2006) BCCA***

- ④ Owner must act in good faith in rejecting low compliant tender
- ④ Bid shopping / bid manipulation is not good faith
- ④ Decisions made on undisclosed criteria are not good faith



Non-Compliant Bids

- ④ **Acceptance of non-compliant bids**
 - ④ Under *M.J.B.* privilege clause, the owner is always entitled – indeed obligated - to reject a non-compliant bid
 - ④ But in *M.J.B.*, the privilege clause did not expressly allow for acceptance of a non-compliant bid
 - ④ Recent case law: carefully crafted privilege clause may allow owner to accept non-compliant



Non-Compliant Bids

- ④ ***Kinetic Construction Ltd. v. Comox – Strathcona, (2004) BCCA***
 - ④ Privilege clause stated: “The owner may, however, in its sole discretion, reject or retain for its consideration tenders which are nonconforming ...”
 - ④ Privilege clause prevailed
 - ④ Owner was entitled to accept non-compliant tender over compliant ones



Non-Compliant Bids

- ④ ***Midwest Management (1987) Ltd./Monad Contractors Ltd. v. BC Gas Utility Ltd., (2000) BCCA***
 - ④ “... OWNER reserves the right, in its sole and absolute discretion, to accept or reject any Tender which in the view of the OWNER is incomplete, obscure, or irregular...”
 - ④ Ability to accept a non-compliant bid did not also carry with it a reciprocal duty of fairness with respect to non-compliant bidders



Non-Compliant Bids

- ④ ***Maystar General Contractors Inc. v. Newmarket (Town), 2009 ONCA 675***
 - ④ The Town accepted a tender that contained a discrepancy in the bid price
 - ④ The Court held that because the price was uncertain, the tender was non-compliant
 - ④ Consequently, the tender could not be accepted by the Town



Non-Compliant Bids

- ② *Maystar (ONCA) (cont'd.)*

- ② Privilege clause stated: “The owner hereby reserves the right, privilege, entitlement and absolute discretion and for any reason whatsoever to: ... Waive any informalities, requirements, discrepancies, errors, omissions or any other defects or deficiencies in any Bid Form or Bid submission.... Accept or reject any unbalanced, irregular or informal Bids...”
- ② The Court held that this language was not sufficiently clear to allow the Town to accept a non-compliant bid



Non-Compliant Bids

- ◉ ***Graham Industrial v. GVWD et al,***
(2004) BCCA
 - ◉ Privilege clause stated: “If a Tender contains a defect or fails in some way to comply . . . the Corporation may waive the defect and accept the Tender.”
 - ◉ “The Tender submitted by the Tenderer shall be irrevocable ...”



Non-Compliant Bids

- ④ ***Graham Industrial (cont'd.)***

- ④ Despite privilege clause, tender became irrevocable only if compliant
- ④ Court distinguished ***Kinetic*** - Graham had revoked its offer before it was accepted by the GVWD
- ④ ***Midwest*** and ***Kinetic***: court referred to a non-compliant bid as a counter-offer to the call for tenders



Non-Compliant Bids

- ④ ***Kinetic and Graham* create problems**
 - ④ Invitation for tenders just an invitation for negotiations?
 - ④ Advantageous to bidders to submit bids which are non-compliant?
 - ④ Waste of bidders' time and effort to prepare well-conceived bids with “sharpened pencils”?



Applying Tendering Law to RFPs

- ④ RFPs and “hybrid” procurement processes provide owners with greatest degree of flexibility to negotiate
- ④ However, tendering law may apply to the RFP process depending on circumstances (*Tercon*)
- ④ Whether or not tendering law applies will depend on the form of the RFP and intention to create contractual relations
- ④ Imposing tendering law limits the flexibility of owners to negotiate – gives rise to Contract “A” and duty of fairness



Beyond Tercon

- ④ Tercon decision was foreshadowed in cases that lead up to it
- ④ When the facts reveal an owner acting in bad faith, deliberately and intentionally attempting to by-pass or undermine principles of fairness and equal treatment, a Court will go to some lengths to get around any exculpatory clause



Beyond Tercon

- ◉ When the facts suggest that an owner was acting in good faith in legitimately attempting to apply proper principles of evaluation, Court will likely uphold the conduct, even if the owner might have reached the wrong result



Beyond Tercon

- ② The Court left open the possibility that a properly crafted exculpatory clause would be upheld
- ② Exculpatory clauses will be strictly interpreted
- ② From a practical perspective, public tendering authorities who craft clear exculpatory clauses to eliminate duties of good faith, duties to treat persons fairly and equally will be subject to public criticism



Beyond Tercon

- ④ From a practical perspective:
 - ④ public tendering authorities who craft clear exculpatory clauses to eliminate duties of good faith, duties to treat persons fairly and equally will be subject to public criticism;
 - ④ Private tendering authorities may find an industry response at those times when contractors have leverage



Beyond Tercon

- ④ Room for More Appeals to SCC:
 - ④ Conflicts between a tendering authority's published or unpublished procurement policies and tendering language
 - ④ Tendering in the Construction Management environment
 - ④ Issues between subcontractors and contractors



Beyond Tercon

- ④ Room for More Appeals to SCC:
 - ④ Cancelled Procurements
 - ④ Qualified bids
 - ④ Application of alternatives



Tenders vs RFPs

- ⦿ Assumption that tendering law has no applications to RFPs is not correct
- ⦿ In many of the cases, the court makes no distinction and procurements which are in fact RFPs are referred to in reasons for judgment as tenders
- ⦿ Terminology of ‘tenders’ and ‘bids’ is often used by courts generically



Tenders vs RFPs

- ⦿ In theory a tender refers to circumstances where the purpose of the request is clear and the only variables between persons submitting prices would be price and potentially schedule for performance.
- ⦿ Tendering Authority can do an apples to apples comparison on bids received
- ⦿ Competition is substituted for negotiation



Tenders vs RFPs

- ⦿ In theory an RFP, as originally envisaged, was a true ‘invitation to treat’ with no legal relationship intended
- ⦿ Owner was inviting innovation and creativity and interested in considering all options without commitment to any one and the project work was not clearly ascertained
- ⦿ Negotiation was and intended consequence of the procurement process



Tenders vs RFPs

- ④ As use of RFPs evolved:
 - ④ The projects for which RFPs were sought became more complex and proponents were spending a great deal of money preparing responses
 - ④ Owner's saw benefit in imposing 'legal terms' commonly used in tenders on persons submitting proposals



Tenders vs RFPs: If It Quacks Like a Duck

- ⦿ RFPs now typically combine elements that are typical of true tendering processes and are referred to as hybrid processes
- ⦿ In *Hughes Aircraft Systems v Airservices Australia* (1997) 146 ALR 1, the process involved staged deliverables with short listed proponents being asked for a ‘best and final offer’. Held: Contract A did not arise until the submission of BAFO.



Conclusion

- ④ Courts may enforce clear privilege clause language even if it allows the owner to
 - ④ reject the lowest compliant bid, or
 - ④ accept a non-compliant bid over a compliant bid
- ④ Bidder may revoke non-compliant bid any time prior to acceptance by owner



Conclusion (cont'd.)

- ⦿ Owner should carefully consider the desirability of including the broadest possible privilege clause
- ⦿ *Tercon* (SCC) limits the flexibility provided in the RFP process by applying tendering law
- ⦿ However, including a properly crafted exclusion clause can bar proponents from suing or limit liability to them



Law Of Tenders & Requests For Proposals Presentation

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TENDERING and REQUESTS FOR PROPOSALS
THE ROAD FROM RON ENGINEERING TO TERCON CONTRACTORS

Privilege Clause: a standard term in a tender or request for proposal that provides that an owner has no obligation to accept the lowest or any tender or proposal

DATE	COURT	CASE NAME/	SUMMARY OF FINDINGS
1981	SCC	Ron Engineering	Tender is not an ‘invitation to treat’. Two contract analysis: Contract A upon submission of tender, Contract B is the ultimate contract. Each contract has terms and conditions, express or implied and will give rise to contractual rights and obligations
1985	Alta CA (aff’d by SCC)	Calgary v Northern Construction	After bid opening, low bidder advised owner that it had made error, not obvious on the face of its tender, and asked to withdraw or enter a contract for a higher amount. Owner declined and accepted the bid as submitted. Bidder refused to contract. H: Owner successfully sued for the difference between low bidder and next bidder.
1985	Fed CA	Best Cleaners v R	DOT sought bids for 2 year airport maintenance contract. In the Instructions to Bidders DOT asked for firm price for 2 years and an ‘indication’ of price for another two years if contract were extended. Best Cleaners was low on the 2 year price but high on the indication for another 2 years. DOT approached 2 nd low and asked if they would enter contract for 4 years. DOT then takes legal advice and backs away from these discussion but nonetheless contracted with second low bidder for a 2 year contract, relying on the privilege clause. H: Court found as a fact that the 2 year contract was a sham – 2 year in form, 4 years in substance. Held that DOT could not rely on privilege clause to avoid a breach of their implied duty to treat all bidders fairly.
1987	OntSC	Elgin Construction v Russell Township	Township called for bids for water main. Asked for schedule. Elgin’s bid was lowest but it proposed a schedule that was 2x longer than second bidder. Township asked Elgin if it would hold its price and do the work faster and Elgin said yes. Township contracted with second bidder, relying on the privilege clause. Elgin lead expert evidence on custom of the trade to award to lowest. Township relied on privilege clause.

DATE	COURT	CASE NAME/	SUMMARY OF FINDINGS
			Held: evidence of custom of trade was trumped by express language of the Instructions to Tenderers. Township could rely on privilege clause.
1989	OntSC	Megatech Contracting v Ottawa Carleton	Language of Instructions to Tenderers referred to “irregular” bids in one section and “informal” bids in another section, Selected bidder did not name its subcontractors as required by the ITT. Owner relied on privilege clause to award. Issue was whether this was a non compliant bid , not capable of being accepted. H: Owner could award.
1989	BCCA	Chinook Aggregates v Abbot	Gravel crushing contract. Award to bidder who was local because the tendering authority had a policy to award to local contractor if he was within 10% of low bidder. This policy was not disclosed to bidders City argued privilege clause. Held: when an owner attaches a condition unknown to contractor it would be inequitable to let owner hide behind a disclaimer clause – breach of duty to treat all bidders fairly and giving one bidder and unfair advantage
1991	Sask QB	Kencor Holdings v Saskatchewan	Tender for a bridge. Bidder A was low by \$100,000 and according to the evaluation team was the more experienced in bridge work. Team made a recommendation to Deputy Minister to accept Bidder A. Day following the submission of this recommendation, Minister announced contract with Bidder B, stating publically that it considered to be in the public interest to awarded to a local contractor. Relied on privilege clause. H: “to maintain the integrity of the tendering process it is imperative that the low, qualified bidder succeed. This is especially true in the public sector. If governments meddle in the process and deviate from the industry custom of accepting the low bid, competition will way. The inevitable consequence will be higher cost to the taxpayer> Moreover when governments for reason of patronage or otherwise apply criteria unknown to the bidders great injustice follows.

DATE	COURT	CASE NAME/	SUMMARY OF FINDINGS
1992	Ont CA	Acme Bulldozing v Newcastle	Second lowest bid was accepted based on shorter schedule and higher local content, both of which factors were disclosed in the ITT. Low bid argues industry practice breached. Held: nothing improper in the conduct. No obligation to disclose weighting to be put on factors being assessed. Privilege clause applies.
1996	BCCA	Vachon Construction v Cariboo	Claimant was an unsuccessful bidder who alleged that the bid of the successful bidder was non-compliant. The successful bidder had expressed its bid price first in words as four hundred and eighty eight thousand four hundred and fifty dollars, followed by the bracketed figure \$492,450.00 . Noting the error, the tendering authority asked which was intended to which the bidder responded that the lower figure was correct. H: This bid was uncertain as to price and could not form Contract A and the bid could not be corrected. Awarding of bid was a breach of duty of fairness
1999	SCC	MJB Enterprises v Defence Construction	Tenders for construction of a pump house, water distribution system and water tank. Tenderers to submit lump sum on two items and unit price on distribution system. Type of fill to be used was not specified. One bidder indicated that its price assumed use of native backfill and if Type 2 material was required the price would be higher. Other bidders asserted that this note was a qualification that invalidated the bid. Owner held that it was a clarification and accepted the bid. H: bid was invalid and incapable of acceptance. Privilege clause could not be used to accept an invalid bid.
1999	Ont CA	Wimpey Canada v Hamilton Wentworth	Bid call for road construction. Bidders had to be prequalified. There was only \$20,000 between the 2 low bids. Evaluation team recommended lowest bidder. However 2 nd lowest was local contractor and put pressure on the municipality to award to it. Award made to the 2 nd low bidder with no reasons being given. Municipality relied on privilege clause. Lowest bidder alleged secret preference. H privilege clause did not exclude duty of fairness.

DATE	COURT	CASE NAME/	SUMMARY OF FINDINGS
2000	FCA	Siemens Westinghouse v Canada	Department of Public Works contract awarded to Siemens following an RFP. Two unsuccessful bidders launched a joint complaint, alleging (a) Siemens proposal did not contain information to assess experience and therefore authority must have relied on information outside the proposal and (b) the evaluators changed the evaluation methodology. First instance tribunal found on both points for the complainants. On appeal held that the Siemens bid was compliant, but the proposals had to be re-evaluated on original evaluation methodology. AIT requires that tender documents clearly identify the evaluation criteria, weighting, methodology This was done but the applied methodology changed and court found that the change could have given one an advantage.
2000	SCC	Martel Building v Canada	There is an implied obligation of fairness to treat all bidders fairly and equally
2000	BCCA	Sound Contracting v City of Nanaimo	Although Sound was low, City took into account previous litigation experience with Sound. Sound argued that it was applying an undisclosed criterion; H consideration of past dealing did not constitute an undisclosed criterion. “..the privilege clause ...release Nanaimo from the obligation to award the work to the lowers bidder if there are valid, objective reason for concluding that better value may be obtained by accepting a higher bid. Owner can consider a ‘nuanced’ view of costs and past history with bidder may be relevant to costs.
2000	BCCA	Midwest Management v BC Gas	Call for tenders for pipeline. ITT contained clauses: “Tender Documents to be completed exactly as requested in order that bids may be compared on a uniform basis. Tenders shall make no changes to the Tender Document in format or in any manner. If Tendered wishes to take exception it may do so in Statement of Discrepancies and Omissions.” Bidder M referred to an exclusion from its bid in a covering letter but not in the Statement of Discrepancies. M bid rejected. M sued for breach of duty of fairness H: No Contract A as the bid was not compliant. In the absence of Contract A there is no free-standing duty of fairness. Contract A has to arise before a duty of fairness can be alleged to exist

DATE	COURT	CASE NAME/	SUMMARY OF FINDINGS
2001	SCC	Naylor Group v Ellis Don Construction 2001 SCC 58	Hospital tender through bid depository. Ellis Don was low. Their bid used Naylor's electrical price. After award of contract to Ellis Don Ontario Labour Relations found that Ellis Don was obliged to use only union subs. Held: use of the bid depository committed ED to use Naylor's tender absent any reasonable objection. Contract A not frustrated by LRDB decision because ED knew when it carried Naylor's price that the LRB hearing was in progress and there might be an adverse finding
2002	BCCA	J Oviatt Contracting v Kitimat Hospital	Bid for site work. Spread between low and second bidders was not high. Evaluation done by Owner's geotechnical consultant and recommendation was made to go with 2 nd low bidder; three reasons were given, unit rate for granular fill better, low bidder had not completed the bid form and low bidder had qualified its bid by excluding a temporary road. H: qualifications made the bid non compliant and in any event, owner acting fairly and in good faith in accepting 2 nd bidder.
2002	Sask CA	Wind Power Inc v Sask Power	This was an RFP. Court approached it as if tender. Sask Power called for proposals for wind power. One of them was within the prescribed budget; however when Sask Power sought government approval it was denied.
2002	Ont SC (affd)	Fullercon v City of Ottawa	Faxed tender was missing a seal and signature. Tender provided an affidavit proving that the document had been signed and sealed Held: bid was non conforming.
2002	Man CA	Mellco v Portage La Prairie	In this case the Court analyzed the RFP and distinguished it from a tender, concluding that the terms of this RFP made it clear that there was no intention to create any binding contractual relationship between the tendering authority and the preferred proponent.
2003	BCSC	Kinetic Construction v Comox – Strathcona,	RFP for infrastructure. The RFP documents included a privilege clause which allowed the owner to accept bids that are 'nonconforming because they do not contain the content or form required by the ITT'. K argued that owner had accepted a non compliant bid.

DATE	COURT	CASE NAME/	SUMMARY OF FINDINGS
2004	BCSC	Northland Road Services v MOT	Application for judicial review of a decision by MOT to reject applicant's proposal on the grounds that the proposal was non compliant. As part of the proposal process, the proponent was to submit certain third party documents which were evaluated on a pass/fail. Northland's documents were irregular and were given a fail. MOT took independent legal advice on the issue at the time. H: "MOT complied with the most stringent standard, that of correctness, and it is not necessary to consider whether or not a lesser standard of review would be appropriate"
2007	NSSC	Steelmac Ltd. v NS,	Court considering whether a bid materially complied – wrong bid from used. That fact alone did not make it non compliant, but the form used neglected to include all of the information required.
2004	BCSC	Stanco Projects v BC,	Tender for water reservoir tanks at Cypress. Ministry wanted to obtain prices for two different tank designs, asked for price for both tanks together and each individually. Tender instructions were ambiguous. Stanco was low on both and was then asked to submit a price on one. Also asked another bidder to price. Consultant asked bidders to submit 'offers of credit' against their prices. H the conduct in dealing with the bids was bid shopping. Bidders knew Stanco's price and were given an opportunity to re price. Stanco was awarded damages, Ministry sued its consultant Refers to bid shopping: conduct where a tendering authority uses the bids submitted to it as a negotiating tool
2004	BCCA	Graham Construction v GVWD,	RFP for GVWD project at Mt Seymour. After opening Graham realized it had made an error, not obvious on the face. Owner refused to allow Graham to withdraw and tendered a contract for execution. Graham applied to court for an order that its proposal was not compliant and incapable of being accepted H: Graham's responses to the RFP's request for traffic management plan and environmental plan were deficient and constituted a material non compliance. Only a compliant tender will establish a contractual relationship. Therefore Graham's proposal was incapable of acceptance.

DATE	COURT	CASE NAME/	SUMMARY OF FINDINGS
2004	BCCA	Silex Restoration Ltd. v Strata Plan VR2096,	Strata authorized its consultant to seek bids for leaky building remediation. Post tenders there were discussions between strata and Silex and parties were proceeding on basis that Silex was successful. Then strata lost faith in the designed remediation, terminated its consultant and advised Silex that it was not proceeding. Court looked at Silex's original bid and found it to be non-compliant, improper bid security provided.
2004	Ont SC	Leeds Transit Sales Ltd v City of Ottawa 2004	Court considers that the process was an RFP and not a tender: "The duty of bargaining in good faith is now firmly established in the formal tendering process. However this duty is not so clear in RFP situations. There must be enough fairness and equality in the procedure to ensure its integrity and fairness but these principles are based on the intentions and expectations of the parties."
2005	Alta CA	NAC Constructors Ltd v Alberta Capital Region Wastewater	Tender for wastewater treatment. Low tender submitted late. ITT included a clause that allowed owner to accept non-compliant bids. H: the language of the ITT was not sufficient. It has to expressly allow the owner to accept late bids.
2008	NBCA	Cherubini Metal Works v New Brunswick Power Corp.	Bids for steel buildings. Evaluators recommended acceptance of second lowest bid, based on perceived inexperience of Cherubini's proposed subcontractor.
2008	SCC	Design Services Ltd v Canada,	Tender for Design Build. Contract awarded to non compliant bidder. Subcontractor who was carried by the bidder that should have received the contract sued the Owner> H: no duty of care exists between an owner and a subcontractor.
2008	Ont SC	Maystar General Contractors v Newmarket	Tender for a recreation centre. One of the bidders GST and total price was wrong and when it was corrected, that bidder was low and was then the successful bidder. H: offer was uncertain as to price and therefore was non compliant, not capable of being accepted.

DATE	COURT	CASE NAME/	SUMMARY OF FINDINGS
2008	FC	Irving Shipbuilding v AG of Canada and CSMG Ltd	Contractor sought to quash decision to award contract to another because one or more of the employees of the successful contractor had been involved in the statement of work that lead to the RFP. Unsuccessful contractor argued that successful contractor had an unfair advantage H: Application dismissed. Probability of mischief was not established. No reasonable apprehension that the owner bias existed or tainted the process.
2008	Ont SC	Aloia Bros Concrete Contractors v Peel	Owner rejected all bids. H: no evidence that owner acted unfairly or in bad faith. Owner entitled to rely on privilege clause.
2008	NSSC	Force Construction v QE II Health Sciences Centre	Tender for health centre. Lowest bidder had high unit labour rates and contract was awarded to second low bidder. H: owner did not act fairly. Owner's decision not to award to the low bidder was to discourage the practice of high unit labour rates.
2008	Ont SC	G & S Electric v Devlan construction	Owner requested low bidder to achieve cost savings and contractor went to three electrical (including the electrical it has used in its bid) and seek prices. H: conduct by low bidder was in breach of implied terms of contract between contractor and subcontractor: should have asked only the electrical contractor it used to make a revised submission,

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Charles F. Willms is a partner in the litigation department and has had considerable experience in Aboriginal, Commercial, Construction and Forestry matters. He has appeared as counsel before the Supreme Court of British Columbia, Yukon Supreme Court, Alberta Court of Queens Bench, the Courts of Appeal of British Columbia, Alberta and the Yukon and the Federal Court and Federal Court of Appeal. He has been counsel in the Supreme Court of Canada on numerous occasions. Charles F. Willms has had considerable experience in Construction mediation, arbitration and litigation including complex contract disputes, lien and surety issues, tendering and request for proposal issues.

Representative Experience

He has appeared as counsel in numerous construction trials and arbitrations including the following lengthy trials and arbitrations:

- Acting for an airport authority in relation to a delay and extras claims related to electrical improvements
- Acting for a mining company in relation to an indemnity claim under a construction contract
- Acting for a contractor in relation to a grain terminal refurbishment
- Acting for a contractor in relation to railroad tunnel construction
- Acting for a contractor in relation to ferry terminal construction
- Acting for a contractor in relation to a small craft harbour construction

Presentations

- Law of Tendering: Implications of the Supreme Court of Canada decision *Tercon Contractors Ltd v British Columbia* (Transportation and Highways), Construction Group Seminar, April 16, 2010



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Areas of Practice

Litigation and Dispute
Resolution

Construction, Procurement &
Infrastructure

Education

LL.M., 2003
Osgoode Hall Law School at
York University

LL.B., 1981
The University of British
Columbia

B.A., 1977
University of Toronto

Called to the Bar

British Columbia, 1982

Marina Pratchett, partner, practises in the area of construction and engineering law. She acts for major public and private owners and developers and large contractors and construction managers in respect of various types of projects including institutional, commercial, industrial, high-rise residential and infrastructure projects. She is also trained and acts as both an arbitrator and mediator of construction disputes.

Marina has lectured to various groups including banks, construction industry organizations and contracting companies on the new *Builders Lien Act*. She has also lectured at the Architectural Institute of British Columbia.

Marina was presented with the prestigious "Outstanding Woman in Construction" award by the Vancouver Regional Construction Association's annual Awards of Excellence dinner in November 2006.

Representative Experience

- Advised Rapid Transit Project 2000 Ltd. regarding all matters related to the Millennium Line Project in Vancouver including environmental assessment and other approvals, contracting strategy and construction and procurement agreements.
- Contract negotiations and contract preparation for various types of project delivery systems: design-build, design-bid-build, project management, fixed price, guaranteed maximum upset price, build-own-operate-transfer and EPCM contracts
- Drafting and advising on tendering, requests for proposals, requests for expressions of interest, unsolicited proposals, bid depository, tendering disputes and tendering evaluation issues
- Advancing and responding to claims and disputes including claims for additional compensation and time extensions, delay and productivity claims, defective workmanship claims, professional negligence claims, bond claims

Marina Pratchett, Q.C.

- Advising on large project risk management, insurance coverage and defences
- Advising on On-line construction and project management
- Advising on project document management and retention

Presentations

- Law of Tendering: Implications of the Supreme Court of Canada decision *Tercon Contractors Ltd v British Columbia* (Transportation and Highways), Construction Group Seminar, April 16, 2010
- Advanced Insolvency Law & Practice, The Canadian Institute, September 16-17, 2009
- Keeping Pace with a Changing Industry, September 25, 2007
- Construction Dispute Arbitration Seminar, November 18, 2005
- Mandatory Mediation, Working with the Rules of Court, Continuing Legal Education, May 2003
- Mediation of Construction Disputes, BCACIC Workshop, Harvard Law School, June 1993
- Continuing Legal Education Society Seminar, 1997-1998

Publications

- "*Design Services Ltd. v. Canada: Liability of Owner to Subcontractors in Tendering Context*", Construction, Procurement & Infrastructure Bulletin, May 20, 2008

Memberships and Affiliations

- Director, BC Construction Roundtable
- Former Executive Member, Canadian Bar Association, Construction Section (National)
- Former Governor, Law Foundation
- Canadian Construction Women
- Fellow, The Canadian College of Construction Lawyers
- Former Director and executive member, Amalgamated Construction Association
- Former Member, BC Construction Association Task Force on the Environment
- Former Member, Amalgamated Construction Association Task Force on Employment Equity
- Former Member, Amalgamated Construction Association Task Force on Contractor Accreditation
- Former Chairperson, Manufacturers and Suppliers Division Board, Amalgamated Construction Association

Marina Pratchett, Q.C.

- Former Chairperson, Amalgamated Construction Association
- Former Director, Canadian Construction Association
- Chair, CLE - Builders Liens

Honours and Awards

- Best Lawyers in Canada 2010, Construction Law
- Canadian Legal Lexpert Directory 2009, Repeatedly Recommended, Construction Law
- "Outstanding Woman in Construction" award, Vancouver Regional Construction Association (November 2006)

Community Involvement

- Honorary Board Member, Big Sisters of British Columbia
- Community Outreach Program, Canadian Construction Women
- Director and Vice President, Pro Bono Law of British Columbia
- Advisory Panel for Builders Liens
- Former Adjunct Professor, Faculty of Law, UBC

Best Lawyers in Canada (2010) directory lists 96 of the firm's lawyers as experts in 37 areas of practice

The Canadian Legal Expert Directory recognizes 77 of our lawyers and the **Expert/American Lawyer Guide to the Leading 500 Lawyers in Canada** lists 20 of our lawyers

Chambers Global 2009 Guide to The World's Leading Lawyers lists 33 of the firm's partners; some of whom are listed for multiple practice areas

Thomson Reuters ranks Fasken Martineau #2 among all law firms globally for the number of Canadian M&A transactions completed in the first quarter of 2009

The **International Who's Who of Business Lawyers** has ranked Fasken Martineau the world's #1 firm in mining law for the past five consecutive years

At a Glance

Business leaders need legal advice that marries legal expertise with business smarts. The global nature of today's business community demands clear counsel and representation on complex legal issues. Fasken Martineau is a leading international business law and litigation firm with more than 650 lawyers with offices in Canada, the UK, France and South Africa. Our practice includes every sector of business, industry and government. We pride ourselves on going beyond results to focus on your goals and long-term business success.

Our Clients

Fasken Martineau provides strategic and thoughtful advice in virtually all areas of business law to a broad range of clients including more than half of the Fortune 100 companies. We work with corporate clients, government agencies, regulatory authorities, non-profit bodies and individual clients.

Clients benefit from our:

- **Commitment to quality** – Our legal practice is rooted in the relationships we build with our clients. That means a comprehensive and sustained focus on service at the highest levels throughout our entire firm to meet and anticipate your evolving needs. Quite simply, we start building relationships by listening to you, our clients. We gauge our success from our clients who continue to entrust us with their most pressing matters.
- **Cogent advice** – Known for our ability to think strategically and deliver practical solutions, we have extensive experience acting for clients on domestic and international issues. Our lawyers are often asked to comment on legal issues affecting business and are quoted regularly in the media
- **International reach** – To meet our clients' needs in Canada and abroad, we have teams of lawyers and professionals working in our offices across Canada in Vancouver, Calgary, Toronto, Ottawa, Montréal, Québec City, and abroad in London, Paris and Johannesburg.

Our Expertise

With top-ranked lawyers in a wide range of practice areas and business sectors, clients rely on us for our expertise in:

- Aboriginal
- Antitrust/Competition & Marketing
- Asia Pacific
- Banking & Finance
- Class Actions
- Communications
- Construction & Procurement
- Corporate/Commercial
- Energy, Environmental, Climate Change & Regulatory
- Financial Institutions & Services
- Forestry
- Government Relations & Ethics
- Health
- Infrastructure and Public-Private Partnerships
- Insolvency & Restructuring
- Insurance
- International Law (Dispute Resolution & Arbitration and Trade & Customs)
- Investment Products & Wealth Management
- Labour, Employment & Human Rights
- Life Sciences
- Litigation & Dispute Resolution
- Mining
- Privacy & Information Protection
- Private Equity
- Product Liability
- Real Estate
- Securities and Mergers & Acquisitions
- Taxation
- Technology & Intellectual Property
- Trusts, Wills, Estates and Charities

Selected Experience

Advised **Addax Petroleum Corporation** on its \$8.2 billion acquisition by The Sinopec Group, the largest overseas acquisition ever by a Chinese state-owned company.

Advising **MDS Inc.** on the sale of its instrument division to Danaher Corporation for US\$650 million.

Advised **Gold Reserve Inc.** before the Ontario Superior Court of Justice in successfully restraining Rusoro Mining Ltd. from proceeding with a hostile takeover bid for the company because of alleged conflicts of interest and confidentiality violations.

Advised **EnStream LP**, a mobile commerce joint venture company owned by Canada's three leading wireless operators, on multiple aspects of the development, structuring and launch of Zoompass, a breakthrough mobile money transfer and payment service.

Advising **various parties** in relation to the high-profile cross-border insolvencies of Nortel, AbitibiBowater and Quebecor World.

Advised **Kerry (Canada) Inc.** in a dispute with former employees over the use of surplus in the employee pension plan by plan administrators, culminating in a landmark decision by the Supreme Court of Canada in favour of Kerry, with wide implications for employers, pension plan administrators and employees of Canadian companies.

Advised **Export Development Canada** which, along with a syndicate of lenders, extended a term credit facility of up to \$700 million to Air Canada.

Advised **ING Canada** with respect to its transformation from a Canadian subsidiary of ING Group into an independent Canadian-listed and widely-held company, including advice on regulatory matters and its rebranding as Intact Insurance.

Advised **The Royal Bank of Scotland** on Canadian bank and securities regulatory and antitrust matters in connection with the UK government becoming a 58% majority stakeholder in the bank.

Advised a **consortium led by The Royal Bank of Scotland** on Canadian aspects of its successful competitive bid for Dutch bank ABN AMRO, the largest financial services merger in history.

Advised the **underwriters led by TD Securities** on more than \$10 billion in equity and debt offerings for TD Bank Financial Group in 2008 and 2009.

Advised **key parties**, including the issuer trusts and Desjardins Group, in the landmark Canadian \$32 billion Asset-Backed Commercial Paper restructuring.

Advised a **syndicate of European banks** and a **core group of North American banks** on the refinancing by Bombardier of US\$6.24 billion letter of credit facilities.

Advised the **Special Committee of Alcan Inc.** in Alcan's \$38.1 billion acquisition by Rio Tinto, to form the world's leader in aluminum.

Advised the **lenders** for \$460 million in financing in support of an agreement between the Government of Alberta and BBPP Alberta Schools to design-build-finance-maintain 18 state-of-the-art schools in Alberta, the largest ever Canadian schools P3 transaction.

Advised **issuers** (including **Inmet Mining, IAMGOLD, First Quantum Minerals, Gold Wheaton Gold and First Uranium**) and **underwriters** on \$2 billion in mining equity financings in the first half of 2009.

Advised **Rohm & Haas** on Canadian regulatory law with respect to its US\$16.5 billion acquisition by The Dow Chemical Company.

Advised **Tyco Safety Products** in a dispute with one of its competitors before The Federal Court of Canada resulting in a landmark patent decision and a clear victory for Tyco.

Advised the **lenders** for the construction bank financing and long term bond financing for the \$759 million Niagara Health System Alternative Financing and Procurement project, Infrastructure Ontario's first full design-build-finance-maintain hospital project.

Advised **The Bank of Nova Scotia** in litigation before the Supreme Court of Canada resulting in the SCC issuing a precedent-setting decision in favour of the bank concerning the recovery of the proceeds of fraud.

Best Lawyers in Canada (2010) recognizes several of our lawyers for their expertise in construction and engineering law

Canadian Legal Lexpert Directory ranks many of our construction lawyers

Martindale-Hubbell includes peer review ratings for some of our construction lawyers

International Who's Who Legal consistently recognizes our lawyers for their construction and engineering law expertise

Our team includes Fellows and a Past President of the **Canadian College of Construction Lawyers**

The Law Society of Upper Canada recognizes members of our construction team as **Certified Specialists in Construction Law**

Construction

Construction projects demand a multidisciplinary team approach with clear definition and understanding of the roles and obligations of each party. You need a team with hands-on experience structuring projects, managing risks, preparing and negotiating workable contracts, and resolving disputes efficiently. Fasken Martineau offers first-hand expertise in all legal matters related to the construction industry. We have been actively providing construction-related legal services for more than a century and have been involved in major projects across Canada and around the world.

Our Clients

Clients involve us in assignments ranging from routine construction and engineering projects and material and equipment supply contracts to major infrastructure developments and public-private partnerships. We work closely with owners, developers, architects, engineers, major contractors, subcontractors and suppliers.

As a seamless and often integrated part of our clients' project teams, we deliver expertise to the construction industry based on our:

- **Broad construction experience** – From the smallest and simplest developments to the largest, we've seen it all. We have represented major Canadian and international consortia in "Build, Own and Transfer" infrastructure projects. With solid expertise in two key industries – energy and mining – we have been actively involved in prominent infrastructure projects, such as electricity generation in Canada and in emerging nations. Our firm has also been named "Law Firm of the Year for Global Mining" by Who's Who Legal for the past five years.
- **Dispute resolution expertise** – In unfortunate situations when construction projects do not progress as intended or where tendering disputes arise, we provide strategic advice on dispute avoidance, resolution and litigation. We have structured and been involved in all types of dispute resolution proceedings in residential, commercial, industrial and infrastructure projects, including dispute processes involving project referees, dispute review boards, mediation, arbitration and court litigation.
- **Practical legal advice** – Our lawyers are thoroughly versed in construction practices and processes in Canada – a background that is essential when providing practical legal advice in this complex field. Several of our lawyers have backgrounds in engineering and mining, allowing them to deliver an understanding and capability that goes beyond the law.
- **Strong industry ties** – We are active members and participants in industry associations and conferences dealing with construction law matters. Our high profile reputation in the field is also evidenced by our lawyers' valued participation in continuing legal education forums and industry conferences.

Our Expertise

Drawing on our knowledge and experience in the construction industry, we deliver pragmatic and effective advice regarding:

- Construction contracts and interpretation
- Construction liens
- Dispute resolution (mediation, arbitration and litigation)
- Material and equipment supply contracts
- Negotiations
- Procurement strategies (including tendering and requests for proposals)
- Project delivery
- Project planning
- Specialized project structures, including "Build, Own and Transfer."

Given the multidisciplinary and team approach of the construction business, our team also offers experience in the related areas of financing, energy, environmental and regulatory, health infrastructure, community buildings and schools, transportation, mining, aboriginal, insurance, real estate law, and public-private partnerships.

Selected Experience

Acted for **Newfoundland and Labrador Hydro** (a Crown corporation) in the context of the hydroelectric development of the Lower Churchill River in Newfoundland and Labrador (2824 MW): providing counsel on all regulatory matters pertaining to the transmission of electricity, access to market and the marketing of energy and advising on the construction and financing of the development.

Advising **Infrastructure Ontario** and **St. Joseph's Health Care**, London with respect to a build-finance project for St. Joseph's Hospital.

Advising **Infrastructure Ontario** and **London Health Science Centre** with respect to a build-finance project for Victoria Hospital in London, Ontario.

Advising **Infrastructure Ontario** and **Hamilton Health Sciences Corporation** with respect to a build-finance project for Hamilton General Hospital.

Advising **Infrastructure Ontario** and **Hamilton Health Sciences Corporation** with respect to a build-finance project for Henderson General Hospital.

Advising a **major steel company** in connection with the preparation and the updating of standard terms to be included in contracts for the supply of material, equipment and services, as well as representing Dofasco in negotiations with international suppliers of steel-making equipment in connection with large supply contracts under which the suppliers included Mannesman, NKK, Mitsui and Voest Alpine.

Represented an **international mining company** in connection with the preparation of an RFT for a hydro-electric plant in connection with its New Caledonia nickel project.

Represented **members of a consortium** for the design and construction of a major wind farm in Gaspé, Québec, valued at \$180 million.

Numerous contracts for **major oil and gas utility companies in British Columbia**, including construction of major compressor stations and pipelines (South Okanagan Natural Gas Project and \$400 million Southern Crossing Project), directional drills, underwater pipeline crossings and upgrades to existing facilities (including reviewing and revising technical specifications).

Represented a **consortium of engineers and builders** on a Design-Build Project for reconstructing a portion of Queen Elizabeth Way in Toronto, Ontario.

Represented a **corporation** in the preparation of the joint venture for redevelopment and privatization of Terminals 1 and 2 at Toronto-Pearson International Airport and negotiations with the Government of Canada, lenders, co-joint venturers and other interested parties.

Represented a **consortium** in connection with its proposal for the construction of a 40-km, open-sea fixed link bridge across the Northumberland Strait between the Canadian provinces of New Brunswick and Prince Edward Island.

Advised the **Québec public-private partnerships agency**, with respect to a public-private partnership for the design, construction, financing and maintenance of a long term care home that will provide for 200 places.

Advised a **consortium member** in connection with a public-private partnership to design, build, finance, operate and maintain a five-lane floating highway replacement bridge near Kelowna, British Columbia.

Advised the **Privatization Secretariat of the Province of Ontario** with regard to Highway 407. With sale proceeds in excess of \$3.1 billion, this was the largest privatization in Canadian history. Recognized as the project of the year (1999) by The Canadian Council for Public-Private Partnerships.

Advised **Lockheed Corporation** which was a partner in the partnership that financed, developed, built and owned Terminal 3 and which was also the manager and operator of Terminal 3. A \$665 million project, this was the first privately-owned international air terminal in Canada and an exceptionally complex transaction involving many different parties.

Represented an **international mining company** in connection with the development of a mine that was purchased from a third party in the Sudbury area. The work included preparation of a construction contract that had to be specifically tailored to certain requirements that are not typical.

Represented the **consortium** that acted as general contractor for all phases of Project James Bay LG-2, one of the biggest hydroelectric projects in the world. Process Documents, RFP, Proposal Competition Agreement and Design-Build Contract for \$200+ million Keenleyside 170MW power plant project, as well as for the new 100MW Brilliant Expansion Project.

Acted as **project counsel** in the successful completion of the \$1.2 billion Millennium Line Advanced Rapid Transit Project in British Columbia. This four-year construction project engaged Fasken Martineau to act as project counsel to complete substantially all of the legal work required including the design and engineering agreements, site acquisition and environmental assessment, design-build contracts for the system guide-way and stations and procurement of the complex electrical/mechanical systems and automated vehicles.

Represented **Goldcorp** in connection with the expansion of its Red Lake mine. The work included giving strategic advice on the relationship between various contractors and suppliers of goods and services, preparation of several contracts; and review of and revisions to forms of contract proposed by contractors and suppliers.

Represented the **Government of Ontario** in connection with all aspects of the Palladium Sports Facility in Ottawa, including the financing and development of the infrastructure, roadways and services and the sewer and water infrastructure.