Dalhousie Law Journal

Volume 35 | Issue 1 Article 8

4-1-2012

Assessing Exclusion Clauses: The Supreme Court of Canada's Three Issue Framework in Tercon Contractors Ltd v British Columbia (Transportation and Highways)

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Introduction

The Supreme Court of Canada's 2010 decision in *Tercon Contractors Ltd v British Columbia (Transportation and Highways)*[1] concerned the enforceability of a broadly drafted exclusion clause in the context of public procurement tendering. It is noteworthy for several reasons. First, the decision unanimously articulated a three-issue framework for determining the enforceability of exclusion clauses. Second, and on a more theoretical front, *Tercon* offered competing visions as to how contracts are to be interpreted. Though the Supreme Court was unanimous that parties to a contract should—of course—generally be bound by its terms, the majority and dissent followed significantly different paths for determining the scope of the agreement at bar. Justices LeBel, Deschamps, Fish, Charron, and Cromwell (in a majority decision delivered by Cromwell J.) approached the task of contractual interpretation by elevating the long-standing and judicially enforced values that specifically inform the tendering process[2] including notions of integrity, transparency, and business efficacy. The dissent, per McLachlin C.J., Binnie, Abella, and Rothstein JJ., in a judgment delivered by Binnie J., emphasized another set of long-standing

* Professor, Faculty of Law, University of Alberta. A version of this comment was presented at the National Judicial Institute's Civil Law Seminar (Contracts, Conflicts and Remedies: A "Supreme" Update) on 2 May 2012 in Moncton, NB. I would like to thank Justice Adèle Kent (Alberta Court of Queen's Bench) for first suggesting this topic. I would also like to thank Professors David Percy and Tamara Buckwold (Faculty of Law, University of Alberta), Professor Richard Devlin (Faculty of Law, Dalhousie University), and Edmonton lawyer James McGinnis (Parlee McLaws) as well as an anonymous reviewer, for their very useful commentary on an earlier version of this paper. Errors and omissions remain my own.

1. 2010 SCC 4 [*Tercon*].

2. As is well known, the Supreme Court of Canada in *The Queen (Ont) v Ron Engineering*, [1981] 1 SCR 111 [*Ron Engineering*] ruled that when a tenderer submits a bid this may give rise to "Contract A." Contract A refers to the contract which governs the relationship between tenderer and owner during the tendering process. Only the successful tenderer enters into the main contract for the project in question, which is called Contract B. Whether Contract A comes into existence depends on the parties' intentions, as emphasized in *MJB Enterprises Ltd v Defence Construction*, [1999] 1 SCR 619 at para 19 [*MJB Enterprises*]. For analysis, see *Tercon*, *ibid*, para 17 (per Cromwell J) and para 87 to 94 (per Binnie J). For very recent analysis, see, also, David Percy, "The Evolving Reality of Tendering Contracts: Some Commonwealth Comparisons" (2012) 28 Construction Law Journal 105 [forthcoming], and David Percy, "Tercon in the Supreme Court of Canada: Much Ado About Nothing or All's Well that Ends Well?" (2010) copy on file with the author.

and judicially enforced values, namely freedom of contract and fidelity to the legal principle that contracts are to be enforced according to their words. And third, the Supreme Court of Canada laid to rest the doctrine of fundamental breach as it applies to exclusion clauses—or attempted to at least.[3]

In order to explore these themes, this comment provides a brief account of the facts of *Tercon* and the Supreme Court of Canada's three issue framework concerning the enforceability of exclusion of liability clauses. It demonstrates that *Tercon* is, at bottom, simply a clearer statement of the law first articulated by Dickson C.J. and Wilson J. in *Hunter Engineering Co v Syncrude Canada Ltd.*[4] This comment then offers some brief conclusions, including that Canada's pre-*Tercon* caselaw retains much of its precedential shine.

Tercon concerned the enforceability of a wide-reaching exclusion of liability clause (called a "no-claims" clause in this case) emanating from a request for proposals (RFP) for highway construction by the Province of British Columbia (the Province). The exclusion clause in Contract A stated as follows:

> Except as expressly and specifically permitted...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.[5]

The main question for the court was whether this clause sanitized breaches of Contract A by the Province which included intentionally accepting a bid from an ineligible bidder.[6] The successful bid ostensibly came from Brentwood (an eligible bidder) but, in truth, was made on behalf of a joint venture between Brentwood and Emil Anderson Construction Co (EAC). EAC's participation rendered the bid patently ineligible; the Province plainly and clearly knew that.[7] Also of tremendous concern was that the Province concealed its selection of an ineligible, joint venture bid by making it appear that Brentwood was the sole bidder.[8] As noted by Justice Cromwell, the trial judge (Justice Dillon) made it clear that the Province:

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3. See Angela Swan & Jakub Adamski, "Fundamental Breach Is Dead; Or Is It? Tercon Contractors Ltd v British Columbia (Transportation and Highways)" (2010) 49 Can Bus LJ 452 (on the Supreme Court's failure to end fundamental breach, despite its efforts) and my comments *infra*.
4. [1989] 1 SCR 426 [*Hunter Engineering*].
5. *Tercon*, *supra* note 1 at para 60.
6. *Ibid* at para 59.
7. *Ibid* at para 43. See also paras 10 and 23.
8. *Ibid* at para 43.

> (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.[9]

Given these troubling circumstances, the trial judge refused to permit the Province to shelter behind the exclusion clause on two grounds. First, she concluded that the clause was ambiguously phrased, which *contra proferentem* resolved in favour of plaintiff Tercon.[10] Second, she applied the Supreme Court of Canada's dual analysis in *Hunter Engineering*,[11] as combined in *Guarantee Co of North America v Gordon Capital Corp.*[12] Dillon J. concluded that the Province had breached Contract A in a fundamental way[13] and that whether the exclusion clause prevailed depended on whether the result would be "unconscionable [per Dickson C.J.] or unfair, unreasonable, or contrary to public policy [per Wilson J.]."[14] Justice Dillon determined that the Province's conduct was highly objectionable and that it was accordingly "neither fair nor reasonable to enforce the exclusion clause."[15] As she concluded:

> The Ministry acted egregiously when it knew or should have known that the Brentwood bid was not compliant and then acted to incorporate EAC indirectly in contract B whilst ensuring that this fact was not disclosed. These circumstances do not lead this court to give aid to the defendant by holding the plaintiff to this clause.[16]

Justice Dillon awarded the plaintiff approximately $3.3 million, representing its loss of profit on the highway project.[17]

The majority of the Supreme Court of Canada largely affirmed the trial judge's decision though following a slightly different path. It determined that the concept of fundamental breach in relation to exclusion clauses

9. *Ibid* at para 40.
10. *Tercon v Province of British Columbia*, 2006 BCSC 499 at para 148, per Dillon J [*Tercon 2006*].
11. *Supra* note 4.
12. As the court states in *Guarantee Co of North America v Gordon Capital Corp*, [1999] 3 SCR 423 [*Guarantee Co*]: "The only limitation placed upon enforcing the contract as written in the event of fundamental breach would be to refuse to enforce an exclusion of liability in circumstances where to do so would be unconscionable, according to Dickson C.J., or unfair, unreasonable or otherwise contrary to public policy, according to Wilson J." at para 52. Note that this summary is correct in relation to Wilson J's test but not in relation to Dickson CJ's test—his test is not triggered by the precondition of there being a fundamental breach, only hers is.
13. *Tercon 2006*, *supra* note 10 at para 148.
14. *Ibid*.
15. *Ibid* at para 150.
16. *Ibid* at para 150.
17. *Ibid* at para 187.

should be laid "to rest"[18] and then concluded that the no-claims clause did not cover the breach in question whether on its plain meaning or, assuming ambiguity, via *contra proferentem*.[19]

Justice Binnie's dissenting decision also found that the Province was in breach of Contract A[20] but held that the Province could rely on its exclusion clause as a full defense. The dissent thereby affirmed the unanimous decision of the British Columbia Court of Appeal[21] in its entirety.[22]

Both the majority and dissent concurred, however, with respect to the three issue approach or framework that courts are to follow in assessing the enforceability of exclusion clauses. Binnie J.'s introduction of this three issue framework is as follows:

> The first issue, of course, is whether as a matter of interpretation, the exclusion clause even applies to the circumstances 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 the situations of unequal bargaining power between the parties" (*Hunter*, at p 462). This second issue has to do with contract formation, not breach.
>
> 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.[23]

It is important to emphasize that the Supreme Court was unanimous only with respect to the barebones of the framework itself (quoted above) and not in how that framework is to be understood or analysed or applied. While Justice Cromwell for the majority stated that he agreed 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.,"[24] including that the doctrine of fundamental breach should be

18. *Tercon*, *supra* note 1 at para 62.
19. *Ibid.*
20. *Ibid* at para 126.
21. *Tercon Contractors Ltd v British Columbia*, 2007 BCCA 592.
22. *Tercon*, *supra* note 1 at para 142.
23. *Ibid* at para 122-123.
24. *Ibid* at para 62.

retired,[25] his judgment did not offer an endorsement of the way in which Binnie J. described the framework. In fact, as already briefly alluded to, the majority and the dissent expressly disagreed on how the first issue should be deployed in relation to the dispute at bar. And only Binnie J. offered any commentary at all on issues 2 and 3. Accordingly, while the three issue framework itself states the law in Canada, only Cromwell J.'s analysis of issue 1 is the majority view. Commentary offered by Binnie J. on issues 2 and 3—with the exception of the matter of fundamental breach —saw no express majority endorsement and remains part of the dissenting judgment.

What follows is Binnie J.'s framework, with commentary from the majority and dissent as relevant.

1. *As a matter of interpretation, does the exclusion clause apply to the circumstances?*

Justice Cromwell interpreted Contract A's exclusion clause by following an expressly contextual approach. Indeed, the majority uses the word "context" at least ten times[26] in assessing the clause's reach. As will be seen, the dissent—by way of contrast—was persuaded by a siloed strategy which focused much more exclusively on the strict words of the exclusion clause itself.

Justice Cromwell concluded that the exclusion clause did not apply to the circumstances at bar, stating: "Having regard to both the text of the clause and 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."[27] In short, Tercon's damages claim did not arise from Tercon's participation in the Province's process—which was all the clause purported to cover—but from the Province's "unfair dealings with a party who was not entitled to participate in that process."[28]

The Court justified its conclusion by referencing *MJB Enterprises*[29] and the longstanding principle that contractual interpretation does not occur in isolation from the contract's "purposes and commercial

25. *Ibid.*

26. *Ibid* at para 64 ("commercial context" used twice); para 65 ("commercial context"); para 66 ("commercial context" and "broader context"); para 67 ("special commercial context"); para 68 ("context" used twice); para 72 ("statutory context"); and para 78 ("commercial context"). Cromwell J uses the word context elsewhere in his judgment, but not in this sense. By way of contrast, Binnie J uses the words "commercial context" only on two occasions: in para 118 and 119 in his analysis of when an exclusion clause might not be enforced based on public policy. He also uses "commercial context" in para 131 but as a means of explicating freedom of contract.

27. *Ibid* at para 66.

28. *Ibid* at para 7.

29. *Supra* note 2, cited by Cromwell J in *Tercon*, *supra* note 1 at para 67.

context."[30] Cromwell J went on to note that tendering triggers a "special commercial context,"[31] which includes the importance of making the process "effective."[32] This, in turn, invoked the values of "integrity and business efficacy."[33] Relying on Iacobucci and Major JJ. in *Martel Building Ltd v Canada*,[34] Cromwell J. quoted as follows: "[i]t 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."[35]

Justice Cromwell also emphasized the need for "transparency for the public at large"[36] in the context of public procurement.[37] In direct support of bringing this value to his contractual analysis, Cromwell J. referenced the relevant statute, the *Ministry of Transportation and Highways Act*,[38] (the *Transportation Act*) which mandated public tenders for highway construction as modified by ministerial approval.[39] Justice Cromwell concluded that such legislation—which seeks to "assure transparency and fairness in public tenders"[40]—was germane to the interpretational task at hand.

Beyond this, Cromwell J. sought to locate the exclusion clause in the overall context offered by the contract itself. He observed that Contract A expressly restricted the eligibility of who could bid to only six named players. It would, therefore, seem "unlikely" that the parties would intend the exclusion clause to "effectively gut a key aspect of the approved process."[41] Cromwell J.'s objective was to interpret the exclusion clause

30. *Ibid* at para 64. For Angela Swan & Jakub Adamski's concerns about this approach, see *supra* note 3.
31. *Tercon*, *supra* note 1 at para 67.
32. *Ibid.*
33. *Ibid.*
34. *Martel Building Ltd v Canada*, 2000 SCC 60 [*Martel*].
35. *Tercon*, *supra* note 1 at para 67, quoting Martel, *ibid* at para 116.
36. *Ibid* at para 68.
37. *Ibid.*
38. RSBC 1996, c 311 [*Transportation Act*].
39. In *Tercon*, supra note 1at para 27, Justice Cromwell emphasized s 23 (1) of the *Act*, which provided: "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. ...
(4) In all cases where the minister believes it is not expedient to let the work to the lowest bidder, the minster 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."
40. *Ibid* at para 68.
41. *Ibid* at para 72.

in a manner compatible with other provisions of the RFP and its premise of limiting eligibility to six proponents.[42] This is a principle of wholistic interpretation that the Supreme Court of Canada has regularly advanced in the past, including in *MJB Enterprises*,[43] as noted by Cromwell J. Another example is *BG Checo International Ltd v British Columbia Hydro & Power Authority*.[44]

For Cromwell J., it would make very little sense for eligible bidders to 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."[45] He concluded that the clause did not foreclose Tercon's action and on this basis, stopped the majority analysis at issue 1 of the framework. The majority awarded judgment to Tercon in the amount provided for by the trial judge.[46]

Justice Binnie, in dissent, stated that "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."[47] This juxtaposition exposes the real divide between the majority and the dissent. It is this: did the parties to the contract intend the exclusion clause to erase the default values and characteristics that courts have said accompany Contract A (such as integrity, transparency, and good faith) or did the parties intend that the exclusion clause should be interpreted within the context provided by those default values and characteristics?

As already noted, Cromwell J. chose the latter conclusion regarding contractual intention. Binnie J. chose the former and did so by emphasizing freedom of contract—a matter which his judgment expressly mentioned on at least nine occasions.[48] To similar effect, Binnie J. referred to

42. *Ibid* at para 76.
43. *Supra* note 2.
44. [1993] 1 SCR 12 [*BG Checo*].
45. *Tercon*, *supra* note 1 at para 69. In relation to this kind of analysis, Jassmine Girgis expresses the concern that *Tercon* could spell the demise of *Ron Engineering*. In short, a properly worded exclusion clause would permit the owner to contract out of the requirement to choose compliant bids and to treat bidders equally and with fairness: "Tercon Contractors: The Effect of Exclusion Clauses on the Tendering Process" (2010) 49:2 Can Bus LJ 187 at 211.
46. *Tercon*, *supra* note 1 at para 80.
47. *Ibid* at para 93.
48. *Ibid* at para 82 ("freedom of contract"); para 85 ("freedom of contract"); para 86 ("freedom of the parties"); para 96 ("freedom of contract"); para 117 ("freedom of contract"); para 118 ("freedom of contract"); para 119 ("freedom of contract"); and para, 120 ("freedom of contract"). Cromwell J's judgment does not contain the phrase "freedom of contract."

Tercon's status—repeatedly—as a large,[49] experienced,[50] sophisticated,[51] knowledgeable[52] contractor which in no way suffered from inequality of bargaining.[53] The clear driver was that Tercon could take care of itself and should be bound by the exclusion clause.

While the majority looked to the *Transportation Act*[54] as providing an important context to interpreting Contract A—including the values of integrity and transparency[55]—Binnie J's main enquiry went to whether the legislation forbade the exculpatory clause in question or not. He stated: "While it is true that the Act favours 'the integrity of the tendering process', it nowhere prohibits the parties from negotiating an 'exclusion' clause as part of their commercial agreement."[56] Since the *Act* did not place any statutory fetters on freedom of contract, an exclusion clause was therefore permissible.[57]

Finding that the clause was permissible, Binnie J. also concluded that the values of the statute had been implicitly ousted such that, on its face, the clause covered the Province's breach. The Province thereby had a full defense to Tercon's action[58] (subject to analysis of issue 2 and issue 3). By submitting a tender, Tercon was "participating" in the RFP and its action was, therefore, excluded. Views to the contrary, he noted with respect, offered a "strained and artificial interpretation."[59]

The dissent concluded that that the clause applied even though the Province—in Binnie J.'s surprisingly mild words given the government's egregious conduct—"was at fault in its performance of the RFP."[60] This is consistent with the notion that freedom of contract included the freedom to make a bad bargain. As Binnie J. observed, the plaintiff Tercon "chose to bid on the project on the terms proposed by the Ministry."[61] This echoed the Province's submission that Tercon was a sophisticated commercial party and should be bound by the terms to which it agreed, including the exclusion clause.[62] But such an argument is highly problematic since, as

49. *Ibid* at paras 82 and 95.
50. *Ibid* at paras 85, 95 and 102.
51. *Ibid* at paras 82, 85, 102 and 141.
52. *Ibid* at para 141, referring to contractors like Tercon.
53. *Ibid* at para 141.
54. *Supra* note 38.
55. See *supra* footnotes 37-41 of this comment and surrounding text.
56. *Tercon, supra* note 1 at para 101.
57. *Ibid* at paras 101-102.
58. *Ibid* at para 128.
59. *Ibid.*
60. *Ibid.*
61. *Ibid* at para 95.
62. *Ibid* at para 73.

Cromwell J. noted, it "assumes the answer to the real question before us which is: what does the exclusion clause mean?"[63] And that is very much the crux of the issue.

It is also highly problematic for the dissent to conclude so easily that the values associated with the *Transportation Act* could be ousted by the Province. The legislation required that a provincial call for tenders be made "reasonably available to the public," but that the minister could also approve an alternate approach if the "minister believes that an alternative contracting process will result in a competitively established cost for the project."[64] Such an alternate process was followed in *Tercon* and beyond this, ministerial approval was apparently given to the no-claims clause at issue.[65] Even with that being the case, it is unconvincing for the dissent to limit its analysis to this stark question: does the legislation itself expressly forbid exclusion clauses? The overall legislative context—which Binnie J. acknowledges "favours the 'integrity of the tendering process'"[66]—must also drive the analysis. A reading of the legislation that aligns with the values associated with public procurement would permit exclusion clauses to shelter the Province should it, for example, make an honest error in awarding a tender to an ineligible bidder. Such an allocation is consistent with the values of integrity and fairness mandated by legislation and the common law of tendering alike: the bidder is being asked to assume the risk of government making a mistake but not of government intentionally defying the rules and seeking to obfuscate such conduct. Accordingly, within the context of values offered by the *Act*, a clause that purports to sanitize egregious governmental conduct is impermissible.[67] The clause should either be understood as unenforceable for being contrary to the legislation, or, following the solution offered by the majority, "read down" so as to bring the clause in line with overarching legislative values.

As previously stated, the majority stopped its analysis after issue one based on its finding that the clause did not cover the Province's breach. The dissent, however, continued on with its assessment given its determination that the clause did in fact provide a full defense to Tercon's claim.

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63. *Ibid.*
64. *Ibid* at para 97.
65. *Ibid* at para 99.
66. *Ibid* at para 101.
67. For discussion on point, see Christopher Armstrong, "The Life and Meaning of *Tercon*—A Basil Fawlty Guide" in *Construction Law Update*, 2010 (Vancouver: Continuing Legal Education Society of British Columbia, 2010) at 1.1.7, online: CLEBC <http://online.cle.bc.ca/CourseMaterial/pdfs/2010/358_1_1.pdf>. Armstrong also contends, at 1.1.8, that tendering contracts be recognized as containing a term going to good faith and fair dealing, which term cannot be contracted out of by operation of law.

2. *Was the exclusion clause unconscionable at the time the contract was made, "as might arise from situations of unequal bargaining power between parties"?*

With the endorsement of the majority,[68] Binnie J. officially retired the doctrine of fundamental breach (as it relates to exclusion clauses) in assessing the second issue.[69] He chose—again with the majority's blessings—to adopt Dickson C.J.'s view in *Hunter Engineering*[70] that exclusion clauses are to be set aside when they are unconscionable as measured at the time of contract formation.[71] The competing test offered by Wilson J. in *Hunter* was considered but implicitly rejected by Binnie J.[72]

Given uncertainty surrounding fundamental breach and what Dickson C.J. precisely meant by the term "unconscionable," it is essential to briefly review *Hunter*. The goal is to locate the proper scope or interpretation of issue 2 in relation to this pivotal word "unconscionable" and how it differs from the public policy analysis that ultimately drives issue 3.

As is well known, the doctrine of fundamental breach was created by Lord Denning and holds that when a party breaches its contract in a fundamental way then, by operation of law, that party cannot rely on an exclusion clause in its favour.[73] While there is no universally accepted definition of fundamental breach, it includes the notion that one party, through breach, has deprived the other party of substantially the whole benefit intended under their contract.[74] The Supreme Court of Canada in *Beaufort Realties et al v Chomedey Aluminum*,[75] in accord with the House of Lords,[76] rejected Lord Denning's operation of law approach to fundamental breach because that approach was divorced from an enquiry regarding the parties' actual intentions.

In *Hunter*, the Supreme Court of Canada concurred that the reach of an exclusion clause depended on the parties' intentions, but was evenly split on the test as to when, on an exceptional basis, the court should not give effect to the exclusion clause in question. Dickson C.J. (with La Forest J. concurring) concluded that the notion of fundamental breach

68. *Tercon*, *supra* note 1 at para 62
69. *Ibid* at para 82
70. *Supra* note 2.
71. *Tercon*, *supra* note 1 at para 108.
72. *Ibid* at 122 where Dickson CJ's test is chosen in the wording of issue 2 of the framework.
73. *Karsales (Harrow) Ltd v Wallis*, [1956] 1 WLR 936 (CA), referenced by Binnie J in *Tercon*, *supra* note 1 at para 106.
74. See Lord Diplock in *Photo Production Ltd v Securicor Transport Ltd*, [1980] AC 827 (HL) at 849 [*Photo Production*] and other cases cited by Wilson J in *Hunter*, *supra* note 4 at para 137.
75. [1980] 2 SCR 718.
76. *Photo Production*, *supra* note 74 at 842-843.

was unhelpful and should simply be replaced with an enquiry going to whether the clause in question was unconscionable, as when there is inequality of bargaining between the parties.[77] Though Dickson C.J. most regrettably did not define precisely what he meant by unconscionability, Wilson J. implicitly saw him as invoking the classic contract law doctrine whereby courts could set a contract aside based on the test of procedural inequality and substantive unfairness.[78] By way of contrast, Wilson J. (with L'Heureux-Dubé J. concurring), would preserve a role for fundamental breach as a circumscribed trigger. When one party fundamentally breached the contract, a court could decline to apply an exclusion clause where enforcement would be "unfair or unreasonable."[79]

Whereas Dickson C.J. advocated assessing the contract only at the time of formation, Wilson J. said her enquiry would take place with reference to what actually happened, provided that a fundamental breach had occurred.[80] Wilson J. expressed concern that the doctrine of unconscionability referenced by Dickson C.J. did not cover all relevant circumstances and that the court had the power to take more into account.[81] In Wilson J.'s words, there was "virtue in a residual power residing in the court to withhold its assistance on policy grounds in appropriate circumstances,"[82] including the context provided by the fundamental breach in question. To emphasize, Wilson J. did not reject the doctrine of unconscionability per se. This is an indispensable contract law doctrine that measures the voluntariness of an agreement at time of formation. Wilson J.'s view, however, was that courts have a bounded discretion to consider more than voluntariness.

Chief Justice Dickson criticized Wilson J.'s approach in the following terms:

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77. *Hunter Engineering*, *supra* note 4 at para 59 and as noted at para 108 of *Tercon*, *supra* note 1.

78. *Ibid* at para 159. There are various iterations of the doctrine of unconscionability, but, as stated by McLachlin JA (as she then was) in *Principal Investments Ltd v Thiele Estate* (1987) 12 BCLR (2d) 258 at 263 (CA), the doctrine requires proof of two elements: "The first is proof of inequality in the position of the parties arising out of some factor such as ignorance, need or distress of the weaker, which leaves him or her in the power of the stronger [procedural inequality]. The second element is proof of substantial unfairness in the bargain obtained by the stronger person [substantive unfairness.] The proof of these circumstances creates a presumption of fraud which the stronger must repel by proving the bargain was fair, just and reasonable..."

79. *Hunter Engineering*, *supra* note 4 at para 161. Note that the Supreme Court of Canada in *Guarantee Co*, *supra* note 12, summarized Wilson J's test slightly differently, adding reference to public policy. According to *Guarantee Co*, at para 52, the "only limitation placed upon enforcing the contract as written in the event of a fundamental breach would be to refuse to enforce an exclusion of liability in circumstances where to do so would be unconscionable, according to Dickson CJ, or *unfair, unreasonable, or otherwise contrary to public policy*, according to Wilson J." [emphasis added]

80. *Hunter Engineering*, *supra* note 4 at para 159.

81. *Ibid* at para 159-160.

82. *Ibid* at para 160.

> I do not favour, as suggested by Wilson J, requiring the court to assess the reasonableness of enforcing the contract terms after the court has already determined the meaning of the contract based on ordinary principles of contract interpretation. In my view, the courts should not disturb the bargain the parties have struck....[83]

There are two responses to this. First, Wilson J.'s assessment of the clause's reasonableness is *only* triggered in face of fundamental breach. Otherwise, Wilson J. emphatically rejected a general reasonableness measure[84] noting, for example, that a contractual provision that may seem unfair to a third party "may have been the product of hard bargaining between the parties and, in my view, deserves to be enforced by the courts in accordance with its terms."[85] Second, it is more than puzzling for Dickson C.J. to suggest that considering events at time of breach is necessarily improper. There are many judicial pronouncements confirming the court's residual power to deal with an unscrupulous party. As Binnie J. noted in *Tercon*—from a more general perspective—the law recognizes that one party's contractual performance can be "so aberrant"[86] and "extreme"[87] as to "forfeit the protection of a contractual exclusion clause."[88] The court's public policy goal in such an exercise is, as Binnie J. observed, to "curb contractual abuse."[89]

As the summary above also shows, there are considerable and significant differences[90] between the tests offered by Wilson J and Dickson C.J. in *Hunter*. According to Richard Devlin, for example:

> Dickson C.J.C. assimilated fundamental breach into the doctrine of unconscionability, whereas Wilson J. retained fundamental breach/ex post reasonableness as a supplementary regulatory mechanism by which the courts could police contracts they found objectionable. Despite the clarity of their disagreement...not everyone agrees that there is a substantive difference in their opinions.[91]

That the two judgments in *Hunter* actually offer opposing views has not always been sufficiently acknowledged either by the judiciary or by academics. This merging or blending of crucial distinctions has been led in part by Steven Waddams who offered the view that the difference between

83. *Ibid* at para 51.
84. *Ibid* at para 150.
85. *Ibid* at para 151.
86. *Ibid* at para 135.
87. *Ibid* at para 137.
88. *Ibid* at para 135.
89. *Ibid* at para 137.
90. For helpful discussion on the differences between the judgments of Dickson CJ and Wilson J as well as overall analysis of the problem, see Richard Devlin, "Return of the Undead: Fundamental Breach Disinterred" (2007) 86 Can Bar Rev 1 at 10-13.
91. *Ibid* at 13.

unconscionable (per Dickson C.J.) and unfair, unreasonable, or otherwise contrary to public policy (per Wilson J.) "in practice is unlikely to be large."[92] This analysis has seen judicial approval on multiple occasions.[93] Though John McCamus has deftly suggested a way of uniting the two judgments by taking an expansive reading of the word "unconscionability" in Dickson C.J.'s decision,[94] even this exercise cannot erase Dickson C.J.'s unequivocal rejection of Wilson J.'s view that a court could rightly take into account circumstances at the time of breach. For Dickson C.J., that "would disturb the bargain the parties have struck."[95]

It can also be seen that while Binnie J. purported to "shut the coffin on jargon associated with 'fundamental breach'"[96] he may not have succeeded. Binnie J. opined that categorizing a contractual breach as "'fundamental' or 'immense' or 'colossal' is not particularly helpful"[97]; yet in his very own judgment, he inevitably and unavoidably found himself having to distinguish between types or levels of contractual breach all the same. For example, in reference to issue 3, Binnie J. agreed that contractual performance could be "so aberrant"[98] that the exclusion clause's protection is forfeit[99]; he acknowledged situations where one party's conduct in breach of contract had been "so extreme"[100] as to "engage some overriding and paramount public interest in curbing contractual abuse."[101] It is virtually impossible not to read these references as surrogates for the phrase "fundamental breach."[102] Likewise, Cromwell J.'s judgment is forced to

92. Waddams, *The Law of Contract*, 3d ed (Toronto: Canada Law Book, 1993) at 323. See analysis by Devlin, *supra* note 90 at his footnote 52.

93. For example, Waddams' view is quoted with approval in *Fraser Jewellers (1982) Ltd v Dominion Electric Protection Co* (1997), 148 DLR (4th) 496 (Ont CA) at para 28; *Solway v Davis Moving & Storage Inc* (2002), 222 DLR (4th) 251 (Ont CA) at para 17; *Plas-Tex Canada Ltd v Dow Chemical of Canada Ltd* (2004), 245 DLR (4th) 650 at para 51 [*Plas-Tex*]; and *Van Hooydonk v Jonker*, 2009 ABQB 8 at para 47. Cases that recognize a difference between the Wilson J and Dickson CJ approaches include *MacKay v Scott Packing and Warehousing Co (Canada) Ltd* (1995), 192 NR 118 (FCA) and *Knowles v Whistler Mountain Ski Corp*, [1991] BCJ No 61 (SC); See Devlin's analysis of these and related cases, *supra* note 90 at 16 and following.

94. John McCamus, *The Law of Contract* (Toronto: Irwin Law, 2005) at 772 and following.

95. *Hunter*, *supra* note 4 at para 51.

96. *Tercon*, *supra* note 1 at para 82.

97. *Ibid.*

98. *Ibid* at para 135.

99. *Ibid.*

100. *Ibid* at para 137.

101. *Ibid* at para 135.

102. Swan & Adamski observe, *supra* note 3, that if *Tercon* simply means that the phrase "fundamental breach" will no longer appear in judgments then "it won't have done much," at 453.

offer synonyms for the moniker, including references to the "foundation of the whole RFP"[103] and "very root of the RFP."[104]

Setting all this to the side, however, it is very clear that, as at issue 2, Chief Justice Dickson carried the day. The unequivocal question at issue 2 is whether the exclusion clause in question is unconscionable at time of contract formation. Case law subsequent to *Tercon*—including cases decisions from Alberta,[105] British Columbia,[106] and Ontario[107]—has uniformly understood the word "unconscionable" in issue 2 of *Tercon* as requiring proof of procedural inequality and substantive unfairness[108] (though the precise articulation of the test itself varies across jurisdictions.) As summarized by the British Columbia Court of Appeal: "It is apparent from the comments of Binnie J. [under issue 2]... that he was not intending to signal a departure from the usual test for unconscionablity."[109]

3. *Assuming validity of the clause at the time the contract was made, is there any overriding public policy that would justify the court's refusal to enforce it?*

According to Justice Binnie, exclusion clauses are enforceable unless the innocent party "can point to some paramount consideration of public policy sufficient to override the public interest in freedom of contract and defeat what would otherwise be the contractual rights of the parties."[110] This notion of public policy triggers the court's residual power—which is rarely exercised—not to enforce the clause in question. For back up, Binnie J. relied on Steven Waddams' assessment that "it 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."[111] Binnie J. also relied on an important pronouncement by Duff C.J. in the Supreme Court of Canada decision of *Re Miller Estate*:

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103. *Tercon*, supra note 1 at para 76.

104. *Ibid.* See also, Armstrong, *supra* note 67 at 1.1.9, suggesting that, *Tercon* notwithstanding, fundamental breach "is alive and well."

105. *Horizon Resource Management Ltd v Blaze Energy Ltd*, 2011 ABQB 658 at para 1015 [*Horizon Resource*], citing the Alberta Court of Appeal in *Cain v Clarica Life Insurance Co*, 2005 ABCA 437.

106. *Loychuk v Cougar Mountain Adventures Ltd*, 2012 BCCA 122 at 29 and following; *Roy v 1216393 Ontario Inc* 2011 BCCA 500 at para 30 [*Roy*]; *Hans v Volvo Trucks North America Inc*, 2011 BCSC 1574 at para 81 and following.

107. *Gyimah v Toronto Hydro-Electric System Ltd*, 2012 ONSC 683 at para 46, citing *Titus v William F Cooke Enterprise Ltd* 2007 ONCA 573; see also *Allarco Entertainment 2008 Inc v Rogers Communications Inc*, 2011 ONSC 5623 at para 176.

108. See *supra* note 78 for an unconscionablity test offered by McLachlin JA (as she then was). For discussion of unconscionability in relation to *Tercon*, see Stephen Waddams, "Abusive or Unconscionable Clauses from a Common Law Perspective" (2010) 49 Can Bus LJ 378 at 391-92.

109. *Roy*, *supra* note 106 at para 30.

110. *Tercon*, *supra* note 1 at para 82.

111. *Ibid* at para 115.

> 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 overrides the interest and what otherwise would be the rights and power of the individual. [112]

As an example of public policy analysis derived from the case law, Binnie J. referenced *Plas-Tex*, a decision of the Alberta Court of Appeal.[113] In *Plas-Tex*, the defendant Dow intentionally supplied defective resin to the plaintiff who would use the resin in manufacturing natural gas pipelines. Dow failed to disclose this defect to the plaintiff. Some years later, the pipelines began to fail causing property damage—including by an explosion—and risk to human health and safety. The Alberta Court of Appeal found Dow's attempts to exclude its liability on these facts was "unconscionable."[114] As summarized by Binnie J. in *Tercon*, the defendant Dow had been "so contemptuous of its contractual obligation and reckless as to the consequences of breach as to forfeit the assistance of the court."[115] In this way, Binnie J. read *Plas-Tex* as going to an *ex post* public policy analysis of all the circumstances.

Other examples of conduct violating public policy offered by Binnie J. are even more extreme, namely:

- A vendor intentionally selling toxic cooking oil to unsuspecting consumers; and
- A vendor intentionally selling toxic milk for consumption by babies.[116]

It is clear that no judge would permit an exclusion clause—however masterfully drafted and intended at time of formation to exclude all claims—to permit the wrongdoer to escape liability in any of these examples. Fraud (and criminality) unravels all. It is important to note, however, that while Binnie J.'s examples are extreme, something less would most certainly do. As he states: "[c]onduct 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,"[117] but that "the contract breaker's

112. *Ibid* at para 116, Binnie J quoting *Re Millar Estate*, [1938] SCR 1 at 4.
113. *Supra* note 93.
114. *Ibid* at para 129. For discussion, see Devlin, *supra* note 90 at 15 and at 35-36 who concluded that court in *Plas-Tex* ultimately followed a Wilsonian approach.
115. *Tercon*, *supra* note 1 at para 119.
116. *Ibid* at para 118.
117. *Ibid* at para 120 [emphasis added].

conduct need not rise to the level of criminality or fraud to justify a finding of abuse."[118]

Analysis of public policy at issue 3 most certainly can take into account the context and nature of breach, putting one in mind of Wilson J.'s judgment in *Hunter*. For example, Binnie J. stated that where misconduct—such as serious criminality or egregious fraud—"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."[119] And beyond this, Binnie J. stated: "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."[120]

It is particularly instructive to see Binnie J. quoting with approval the following pronouncement from *Plas-Tex*, namely 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."[121] This *Plas-Tex* quotation, in turn, echoes a rhetorical question posed by Wilson J. in *Hunter*:

> should a party be able to commit a fundamental breach secure in the knowledge that no liability can attend to it? Or should there be room for the courts to say: this party is now trying to have his cake and eat it too. He is seeking to escape almost entirely the burdens of the transaction but enlist the support of the courts to enforce its benefits.[122]

Justice Binnie's approach resonates with Wilson J.'s view in *Hunter* that the extreme nature of the breach—by whatever name—may preclude the defendant from relying on the contract based on public policy. It is hard to see a large difference between issue 3 in Binnie J.'s framework and Wilson J.'s approach to the problem of exclusion clauses in *Hunter*. It is true that Binnie J. was unhappy with the Wilson J. test because it stated that a court may refuse to enforce an exclusion clause, in face of fundamental breach, when it is "unfair, unreasonable, or otherwise contrary to public policy."[123] As he indicated in *Tercon*, "[w]hat has given rise to some concern [regarding Wilson J.'s test] is not the reference to 'public policy',

118. *Ibid* at para 118 [emphasis added].
119. *Ibid* at para 120 [emphasis added].
120. *Ibid* at para 117 [emphasis added].
121. *Plas-Tex*, *supra* note 93 at para 53, quoted with approval by Binnie J in *Tercon*, *supra* note 1 at para 119.
122. *Hunter*, *supra* note 4 at para 152.
123. This is the summary of the Wilsonian test offered by the SCC in *Guarantee Co*, *supra* note 12 at para 52. For the entire test, see *supra* note 12.

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."[124] But the response to that criticism is this: the Wilson J. test of reasonableness and fairness is triggered only in face of fundamental breach, that is, in the context of what must be extreme and egregious conduct. In this way, judicial discretion is confined to a very narrow range. And, at bottom, whether a judge used Wilson J.'s language or Binnie J.'s language as a springboard for analysis, there would appear to be very little difference in what would actually be said.

As an example, consider the facts in *Plas-Tex*. Deploying Wilson J.'s test and exact language (as indicated by italics), a judge might pronounce as follows: "Dow committed a *fundamental breach* by failing to disclose that it was supplying defective resin to the plaintiff, particularly as it knew that the resin would be used in the construction of a natural gas pipeline. The defective resin caused the pipes to fail, contributed to an explosion, and put human health at risk. *It would be unfair, unreasonable, and contrary to public policy* to permit Dow to rely on its exclusion clause." Is this really very much different from a judge, this time relying on Binnie J.'s test and exact language (as indicated by italics) saying: "Dow's contractual *performance*—in supplying defective resin [and other deficiencies cited just above]—was *so aberrant* and *so extreme* as to *forfeit the protection of the contractual exclusion clause based on public policy*."

Though Binnie J. intentionally only used the words "public policy" in his wording of issue 3 and eschewed reference to "vague notions of 'equity or reasonableness'",[125] the divide between his test and Wilson J.'s is small indeed. He appears to have functionally adopted Wilson J.'s approach as the test in issue 3, albeit minus any *express* reference to fundamental breach. Indeed, the notion of fundamental breach is implicitly present in Binnie J.'s reference to breaches that are "so aberrant" or "so extreme" as "to forfeit judicial assistance.[126] Beyond this, issue 3 addresses public policy measured at time of breach, which is all that Wilson J. ever did.

On the facts of *Tercon*, Binnie J. found no overarching public policy objection to enforcing the Province's clause as written:

124. *Tercon, supra* note 1 at para 113.
125. *Ibid* at para 114.
126. *Ibid* at paras 135-137.

> 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.[127]

Since the *Tercon* decision, there is at least one case which has considered Binnie J.'s approach to public policy in issue 3. In *Horizon Resource*, the defendant argued that the plaintiff's exclusion clauses did not apply because their operation "was premised" on the plaintiff's complying with relevant Alberta Energy and Utility Board regulations.[128] As summarized by Justice Brooker, the contention was "that the exclusion clauses should not be enforced as the goals of overriding public policy with respect to workers' safety, public safety, and the environment outweigh the enforcement of the exclusionary clauses."[129] In response, the court stated:

> This case is not like *Plas-Tex*, in which Dow was found to have knowingly and deliberately withheld information at significant peril to life and property. I do not agree that technical non-compliance with regulation of the sort in this case is one of those "substantially incontestable" considerations of public policy that justifies interference with freedom of contract.[130]

While the trial judge is correct that substantially incontestable considerations—such as egregious fraud and serious criminality—will cause the exclusion clause to fall—it is worth emphasizing that something less might do. As Binnie J. noted in his analysis of public policy: "the contract breaker's conduct need not rise to the level of criminality or fraud to justify a finding of abuse."[131]

At the end of a long journey, this comment concludes that *Tercon*'s three issue framework offers a reconstituted and streamlined *Hunter Engineering*. Dickson C.J.'s unconscionablity test drives issue 2 and, though not expressly acknowledged, Wilson J.'s test is at the heart of issue 3.

Conclusion

This comment offers two mains conclusions. The first is this: the Supreme Court is philosophically divided (5:4) on how to approach the question of contractual interpretation in issue 1. While the majority took a broad,

127. *Ibid* at para 135.
128. *Horizon Resource, supra* note 105 at 1022.
129. *Ibid.*
130. *Ibid* at 1023.
131. *Tercon, supra* note 1 at para 118.

contextual approach to determining the reach of an exclusion clause, the dissent's method is largely isolated from the values governing the tendering process (under statute and at common law) as well as the context offered by the contract as a whole. Though both the majority and the dissent sought to enforce freedom of contract and locate the parties' true intention, they followed very different means of doing so. That said, the majority's broad, contextual approach to issue 1 is very much the law.[132]

Beyond this, the majority took the proper approach to interpretation. When the Province initiated its RFP, it inevitably and intentionally triggered a set of values (including transparency and fairness) that have infused the tendering process through decades of common law. These values are heightened in the public procurement context because the public interest is more reliably served—at all times but especially in the long term—when government receives competitive bids, as assessed by a fair process. This perspective is also reflected in the *Transportation Act*, which legislation, as already noted, Binnie J. himself acknowledged as favouring "transparency and integrity of the bidding process."[133] It is very troubling to think that these values are up for grabs simply because the legislation does not expressly forbid an exclusion of liability clause in Contract A. Exclusion clauses can indeed serve the public interest, but only as assessed in the statutory context of fairness, openness, good faith, and accountability. It is true, as Binnie J. remarked, that declaring the no-claims clause as contrary to the Act would result in British Columbia's taxpayers having 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."[134] The apparent sting in these words, however, is misplaced. First, the exclusion clause in *Tercon* stands or falls based on legal principles, not on what happens to the taxpayers as a result of those legal principles being applied. If the taxpayers have to pay twice over because the Province intentionally mishandled a tender call, then that is the fault of the Province and the taxpayers have a political solution to that problem: the ballot box. In fact, there is a very large cost the other way. Setting aside the justice question in relation to betrayed bidders like Tercon, public trust and confidence

132. And it is not just the Supreme Court of Canada that is divided over how to interpret the exclusion clause in question. As David Percy notes in "Tercon in the Supreme Court of Canada", *supra* note 2 at 23: "[t]he closeness of the debate over interpretation is underscored by the fact that of the 13 judges who were involved in *Tercon* until its final disposition, seven unequivocally found that the clause protected the owner and six strenuously argued that it failed to do so."

133. *Tercon*, *supra* note 1 at para 132.

134. *Ibid* at para 134.

in government is jeopardized when governments play by an unfair set of procurement rules. Third, though Tercon is, as Binnie J. pointed out, awarded its profit—should the clause fail—without the risks of having to perform Contract B that is, again, because of the conduct of the Province. Tercon was perfectly willing to assume the risks of Contract B—after all, it bid on the project—but the Province egregiously shut Tercon out of the competition and selected a patently ineligible bidder. It is puzzling for Binnie J. to even implicitly lay any of this at Tercon's feet.

The second conclusion is: the framework for accessing the enforceability of exclusion clauses offered by a unanimous Court in *Tercon* is, at bottom, a more calibrated version of *Hunter Engineering*. Courts are no longer asked to simply choose between the tests of Dickson C.J. and Wilson J. or apply legal propositions trying to combine their two very different approaches, as in *Guarantee Co.*[135] Instead, as I have argued, the Supreme Court functionally broke out the competing *Hunter* tests and treated them as distinct issues in a three issue framework. The court in *Tercon* relied on Dickson C.J.'s approach in *Hunter Engineering* to power issue 2 and—functionally—slotted Wilson J.'s approach into issue 3. Though the court purported *not* to follow Wilson J.'s judgment in *Hunter* and *not* to retain her notion of fundamental breach, it has largely done both notwithstanding.

Binnie J.'s failure to recognize Wilson J.'s contribution to issue 3 of the framework is regrettable on two fronts. First, it misses an opportunity to acknowledge Wilson J.'s ongoing contribution to modern Canadian jurisprudence. Second, it obscures the *Hunter Engineering* pedigree of issue 3 and the implicit relevance of subsequent case law which interprets Wilson J. 's public policy approach.

From a more general perspective, Justice Brooker from the Alberta Court of Queen's Bench has already responded to the argument that *Tercon* mandates a very different approach to exclusion clauses and that pre-*Tercon* case law cannot be relied upon. In response, he stated:

> I do not agree that *Tercon* has created a fundamentally different approach to exclusion clauses. Rather, it has clarified the confusion and set out the current state of the law. It is a logical, incremental progression from the cases of the last two decades. It does not require discarding all of the prior jurisprudence on exclusion clauses, only that which is inconsistent with the current approach.[136]

135. *Supra* note 12. As David Percy observed in his comments on this comment, there are, at bottom, only a few vantage points from which to assess an exclusion clause. Accordingly, adoption of both of the approaches in *Hunter*, however stated or articulated, is somewhat inevitable.

136. *Horizon Resource*, *supra* note 105 at para 1011.

Prior jurisprudence retains considerable precedential shine because, as this comment has endeavoured to show, *Tercon* can very much be regarded as *Hunter Engineering* redux.