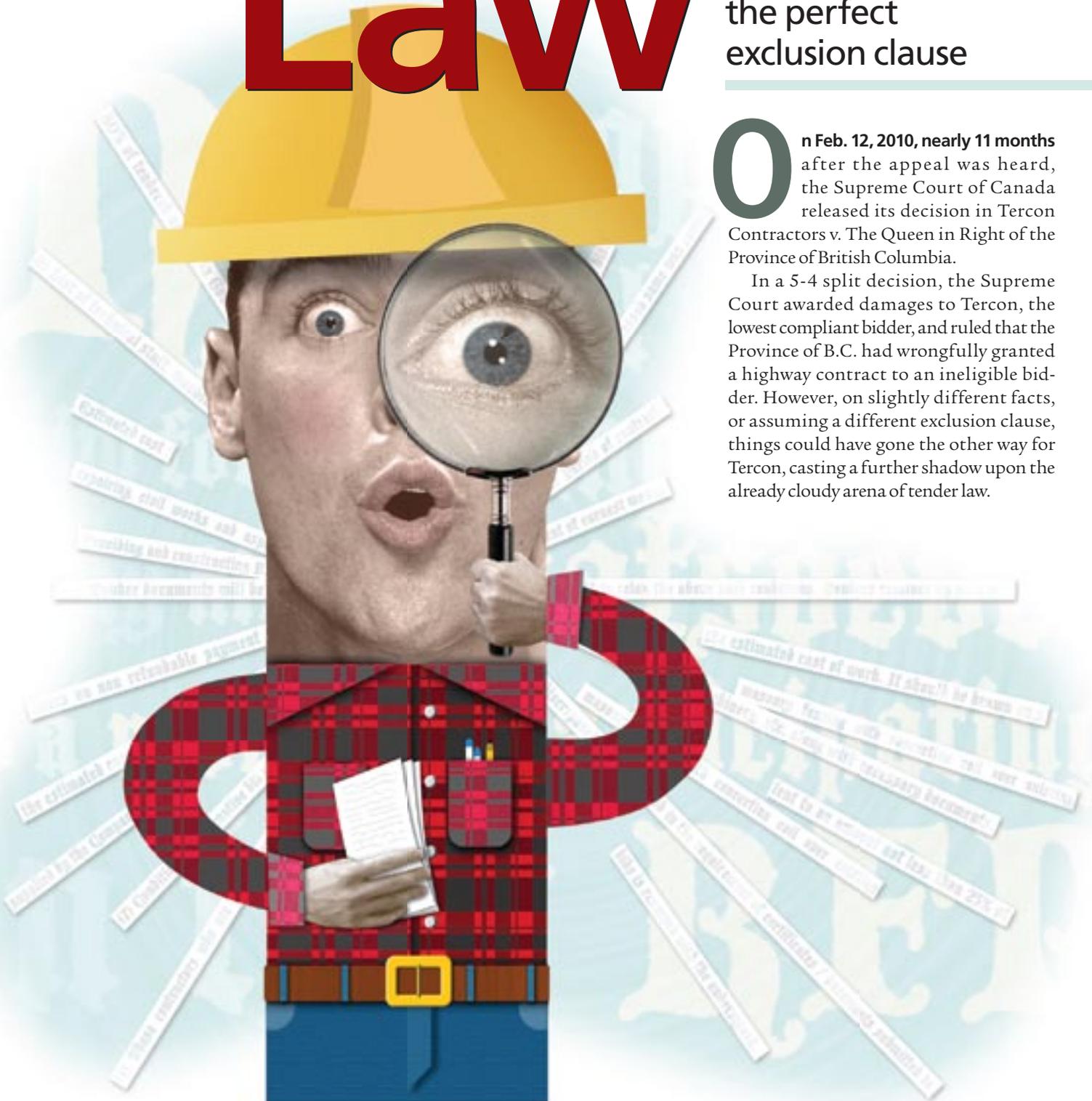


Tendering Law

The search for
the perfect
exclusion clause

On Feb. 12, 2010, nearly 11 months after the appeal was heard, the Supreme Court of Canada released its decision in *Tercon Contractors v. The Queen in Right of the Province of British Columbia*.

In a 5-4 split decision, the Supreme Court awarded damages to Tercon, the lowest compliant bidder, and ruled that the Province of B.C. had wrongfully granted a highway contract to an ineligible bidder. However, on slightly different facts, or assuming a different exclusion clause, things could have gone the other way for Tercon, casting a further shadow upon the already cloudy arena of tender law.



BY RYAN KARY AND CORBIN DEVLIN

The Tercon tender process was one in which only six pre-approved bidders were able to bid on the contract, and one of the bidders teamed up with an outside (non-approved) contractor to form a joint venture. When the province accepted the proposal from the joint venture Tercon sued, claiming it was the lowest compliant bidder and entitled to its lost profits.

The province relied upon an exclusion clause which stated that, “No Proponent shall have any claim for any compensation of any kind whatsoever, as a result of participating in this RFP [request for proposal].” At trial, the court refused to enforce the exclusion clause, and awarded damages to Tercon. On appeal, the B.C. Court of Appeal reversed the trial decision, ruling that the exclusion clause prevented Tercon from obtaining damages against the province.

The Supreme Court abandoned previously established case law based on “fundamental breach” of contract, and all nine judges agreed on a three-part test to determine if the province’s exclusion clause would be enforced:

1. Does the exclusion clause apply to the circumstances established in evidence?
2. If “yes” to question one, was the exclusion clause unconscionable at the time the contract was made?
3. If “yes” to question one and “no” to question two, should the court nevertheless refuse to enforce the valid exclusion clause because of the existence of overriding public policy?

The majority (five judges) of the Supreme Court determined that the exclusion clause did not apply to the tender. The court ruled that since the province accepted a bid from a party (the joint venture) that was not one of the six approved contractors, Tercon did not suffer damages “as a result of participating in this RFP,” because this RFP involved a bidder who was not contemplated in the initial tender process.

The minority (four judges) felt that the majority analysis required a strained interpretation of the exclusion clause, and concluded that the clause clearly applied to the facts. More importantly, the minority stated the exclusion clause was not unconscionable, and public policy would not bar its enforcement.

Beyond the establishment of a new test for exclusion clause enforcement, the significance of the Tercon decision lies in the “what now” factor, as the door has been opened for owners to draft exclusion clauses which will give them greater flexibility (accepting non-compliant bids, for example) and legal protection from contractors claiming unfair treatment in the tender process. The law of tender has

evolved, in part, to limit construction owners’ ability to accept non-compliant bids, or engage in bid-shopping, or evaluate bids based on undisclosed criteria. The Tercon decision suggests that owners have a legitimate means to regain at least some of these advantages by drafting more aggressive (and specific) exclusion clauses.

If owners are able to formulate legally sound “Tercon clauses,” the nature of tendering could be in for a significant change in the coming years. ☐

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