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THE DUTY TO TREAT BIDDERS FAIRLY DURING CALLS FOR TENDERS AND THE VALIDITY OF EXONERATION CLAUSES

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INTRODUCTION

Nearly three decades ago, the Supreme Court of Canada used a dual-contract paradigm to describe what happens during a call for tenders.[1] A call for tenders may consist of a contract "A," whereby the work provider invites potential bidders to offer their services and state their price with the goal of obtaining work that will ultimately be the object of a contract "B," i.e., the actual construction contract.

The work provider sets out certain criteria that bidders must meet in order for their bids to be compliant and valid. To ensure fairness in the bidding process, the work provider judges all bidders according to the same bidding criteria when the bids are finally opened. The work provider agrees to only choose among the compliant bids, while the bidders agree that if their bid is chosen, they will carry out the work at the price stated in their bid. That, in theory, is the essence of contract "A."

The work provider's obligation to treat the bidders fairly is seen by many as a fundamental obligation that the work provider owes to the bidders by virtue of contract "A." For example, the duty to act fairly requires that a work provider not consider bidders who do not comply with the criteria set in the tender documents. Another requirement of the duty to act fairly would be that a work provider not give bidders preferential treatment by, for instance, allowing only one bidder to modify its bid to the detriment of the other bidders once the bidding period is closed.

About ten years ago, however, the Supreme Court of Canada specified that the existence of the contract "A"/contract "B" dichotomy is not automatic and that the ensuing obligations that arise with the formation of a contract "A" prior to the formation of contract "B" depend upon the intentions of the parties.2 The Supreme Court considered that contract "A" is formed when a formal tendering process involving complex documentation and terms invites tenderers to submit their bids with a promise to consider bids for contract "B." Preparing bids takes time and costs money so the Supreme Court saw this effort on the part of bidders as good consideration for the work providers' promise to consider the bids. But, it held, the extent of the obligation to consider the bids arising out of contract "A" was to be found in the terms of the tender documents.

As a result, work providers have often either attempted to deny the formation of contract "A" in their tender documents or they have tried to limit their obligation to act fairly towards their bidders or, alternatively, they have tried to limit the legal recourses available to bidders in the event that the work provider breaches its duty to act fairly towards them.

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1 *The Queen (Ont.) v. Ron Engineering*, [1981] 1 S.C.R. 111, 1981 CanLII 17 (S.C.C.).

2 *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.,* [1999] 1 S.C.R. 619.

An effective technique to circumvent the fairness obligation would ostensibly be to insert clauses known as privilege, limitation-of-liability, exclusion, or exoneration clauses. Such clauses could state something to the effect that no bidder shall have any claim or recourse whatsoever against the work provider as a result of participating in the call for tenders. The point would be to preempt an action by a disgruntled bidder in the event that a work provider should decide not to choose the lowest bid or even decide to choose a bid that does not comply at all with the criteria outlined in the tender documents.

Now, if we do accept that contract "A" has arisen and that the fundamental aspect of contract "A" is the work provider's obligation to act fairly towards bidders, then the possibility of an exoneration clause in such a context would be incongruous, to say the least, since such clauses purport to allow a work provider to breach, without repercussion, the very obligation which is presumably the essence of contract "A." In other words, if a work provider cannot be held to its obligation to treat bidders fairly, then the very purpose of holding or participating in a call for tenders appears defeated from the outset.

Incongruous as they may seem, exoneration clauses have indeed been included in tender documents. They have been invoked by work providers against unsuccessful and dissatisfied bidders who have felt unfairly treated in the bidding process, and their validity has been argued before courts of law with contradictory results at either end of the country.

Two recent decisions of the respective appellate courts of British Columbia and Quebec highlight the divergent approaches of the judiciary to exclusion, exoneration, or limitation-of-liability clauses in calls for tenders, and this despite the fact that both accept that the work provider's obligation to treat bidders fairly is fundamental. What follows is a brief summary of the facts of each matter along with an analysis of the respective reasons for judgment and a comparative look at the philosophical currents that the judges drew upon in rendering their decisions, beginning with that in British Columbia.

THE BRITISH COLUMBIA COURT OF APPEAL DECISION

In *Tercon Contractors Ltd. v. British Columbia* (*Transportation and Highways*),[3] the matter involved a project to build 25 kilometres of highway from Greenville to Kincolith in British Columbia's Nass Valley. The British Columbia transport ministry (the "Ministry") issued a call for tenders in order to get the work done. Tercon Contractors Ltd was one of the bidders and, although it had the capacity to do the job, the Ministry decided not to award the contract to Tercon, preferring instead to award the work to a firm named Brentwood Enterprises Ltd. But Brentwood, on its own, did not have the capacity to complete the work. Brentwood could only accomplish the work by joining forces with another firm called Emil Anderson Construction Co. ("EAC"). The trouble was that although Brentwood and Tercon complied with Ministry criteria and were therefore qualified bidders, EAC did not.

Tercon objected to the fact that the Ministry awarded the contract to Brentwood, a bidder who could only perform the work with the assistance of a firm that was not qualified to bid in the first place. The Ministry's tender documents, however, included an exoneration clause which held that bidders would have no claim for any compensation of any kind whatsoever as a result of participating in the bidding.

The trial judge agreed with Tercon. She held, for one, that the Ministry awarded the contract to a non-compliant bidder and that the exoneration clause did not apply because, on the one hand, the clause was vague as to what "participating" in the bidding meant and, on the other, that it was "inconceivable" that the parties could have intended to exclude a fundamental breach such as the obligation to act fairly towards the bidders. The judge also mentioned that even if the clause clearly excluded liability for a fundamental breach, an unconscionable result would ensue if the Court decided to enforce such a clause.

The British Columbia Court of Appeal overturned the trial judge's decision. The appellate court chose to not even address the issue of whether the Brentwood/EAC "joint venture" constituted a compliant bidder. Instead, the Court focused exclusively on the exoneration clause and the clarity of its terms.

According to the British Columbia Court of Appeal the question of whether or not the Brentwood/EAC "joint venture" was a compliant bidder or not was beside the point. What mattered to the Court was

3 2007 BCCA 592 (CanLII).

that the terms of the exoneration clause were so clear and unambiguous that it was unmistakable that the parties intended it to include any type of breach, be it fundamental or otherwise. The Court, in interpreting the broad terms of the clause, saw no reason to exempt fundamental breaches from its scope.

Although the duty for a work provider to act fairly towards bidders is a fundamental obligation, a clear and unambiguous exoneration clause can, according to the British Columbia Court of Appeal, effectively bar a bidder's otherwise legitimate claim.

Tercon's attorneys have appealed to the Supreme Court of Canada, which heard the case last March 23. We discuss the issues raised in the appeal to the Supreme Court further below.

THE QUEBEC COURT OF APPEAL DECISION

The leading case in Quebec is *3051226 Canada Inc. v. Aéroports de Montréal*,[4] pitting a building maintenance company ("Genesis") against the Montreal airport authority ("ADM") in a matter involving a contract to provide building maintenance services at Montreal's Pierre-Elliott Trudeau International Airport.

In 2001, ADM issued a call for tenders for maintenance companies to bid on a maintenance contract. The bidders would be evaluated on a points-based system. Bidders received instructions dealing with, on the one hand, evaluation or points-based criteria, and, on the other, criteria that could lead to the automatic rejection of received bids, subject to ADM's discretion. Among the latter criteria was the requirement for bidders to provide a bid bond and undertaking by the bonding company to issue a three-year performance, labour, and material bond so that failure to provide such security could, again at ADM's sole discretion, entail the rejection of a bid. The tender documents, however, did not state that points would be assigned to bidders on the basis of their respective bid bond's contents.

Genesis secured the bid bond by means of a bond broker, who was charged with the task of obtaining a bond that met ADM's requirements. The broker obtained the bid bond from an insurance company, who undertook to issue the performance, labour, and material bonds but, instead of the mandatory three years, the duration of these bonds would only be valid for one year and was subject to yearly renewals by mutual agreement. The broker neglected to tell Genesis of the modification and the latter filed its bid "as-is" at the deadline.

On the last day of the bidding process, another firm named Advance, which was also in the running for the maintenance contract from ADM, obtained the same bid bond from the same insurance company as Genesis but, contrary to Genesis, Advance realized before filing that the undertaking contained in the bond was only valid for one year, as opposed to the mandatory three. Advance therefore filed, along with its bid, a letter explaining the situation to ADM, indicating that it was too late to correct the problem but that, at ADM's request, Advance would gladly rectify the situation.

The various bidders submitted their bids on or before the deadline of June 5, 2001. It was on that date that an open sitting was held allowing bidders to assess their respective ranking strictly on the basis of the prices that they submitted. This preliminary sitting took place even before the bids were examined to see whether or not each was compliant. At this stage, and on the basis of price alone, Genesis came out second while its competitor, Advance, was in third place.

A few days after the June 5 deadline, representatives from Advance visited the ADM offices to drop off an envelope containing a new bid bond containing an undertaking for the issuance of a new three-year bond intended to replace the first one.

No other bidder was informed of Advance's actions nor was any other bidder given the chance to replace or improve its bid bond.

Despite the fact that ADM had never stated that the bid bond would be part of the *graded* criteria, ADM's evaluation committee did attribute points to bidders for their bid bond. On the basis of this criterion, Genesis received two points out of a possible five while Advance received a perfect five because it was evaluated according to its new and improved bond.

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4 2008 QCCA 722 (CanLII).

As a result, Advance came up first with a score of 88.78% while Genesis was runner up with a score of 86.38%. If, however, Advance had been evaluated on the basis of the bid bond that it had initially submitted, it would have only received two points and Genesis would have come out on top.

Convinced it had been unfairly treated, Genesis tried to stop ADM from awarding the maintenance contract to Advance by petitioning the Quebec Superior Court to issue an injunction to that effect. The Court dismissed the request.

Genesis then launched an action in damages against ADM, citing the latter's obligation to treat all bidders fairly, which it defaulted on by allowing Advance to modify its bid after the bidding process had ended, and having done so without disclosing any of it to the other bidders.

The trial judge dismissed the suit. His reasons were that the new bid bond filed by Advance after the deadline did not modify its initial bid and that, in any event, ADM's tender documents included an exoneration clause that effectively precluded Genesis's action.

The Quebec Court of Appeal overturned the trial judge's decision. The appellate court ruled that Advance's new bid bond was indeed a modification of its initial bid and that ADM had clearly failed in its obligation to treat all bidders fairly.

Once it had established that there was a breach of the duty of fairness, the Court of Appeal applied the reasoning that even a clearly-worded exoneration clause cannot excuse ADM's actions and cannot preclude the action by Genesis because the duty of fairness to all bidders in the process is implicit in contract "A" and, moreover, is fundamental to it.

Ultimately, in Quebec, a work provider that has breached a fundamental duty arising from contract "A" in a call for tenders cannot invoke an exoneration or privilege clause to protect itself against recourses resulting from such a breach.

A COMPARATIVE ANALYSIS OF BOTH DECISIONS

First, it is interesting to note that both the Quebec and the British Columbia appellate courts similarly characterize the work provider's duty to act fairly towards bidders as a *fundamental* aspect of contract "A."

Where the two appellate courts essentially differ is on the issue of whether an exoneration clause for breaches of contract can extend to breaches of duties that are fundamental to the contract. Fundamental duties, such as fairness towards all bidders in contract "A" of a call for tenders, are characterized as fundamental because to derogate from such duties would be to distort the very nature of the contract itself.

The British Columbia Court, while acknowledging the fundamental nature of the work provider's duty of fairness in a call for tenders, chose to prioritize the parties' freedom to contract according to terms they see fit.

The reasoning is that if two equally sophisticated parties, by using clear and unambiguous terms, choose in their commercial dealings to cover all breaches, including those that are fundamental, the courts ought not to intervene. Instead, the Court proposed that the industry regulate itself, citing that if major contractors stop bidding on jobs because the tendering process has been compromised, then a work provider such as the Ministry may have to change its approach. Alternatively, the British Columbia Court states that the industry may just have to accept that the Ministry wishes to avoid claims for its breaches to contract "A" duties and, accordingly, contractors will just have to bid in the hope that the Ministry acts in good faith.

In stark contrast, Quebec law dictates that a party to a contract need not merely hope that the other party acts in good faith. Good faith is an obligation that is enshrined in the *Civil Code of Quebec*, in force since 1994, and which states that every person is bound to exercise his civil rights–including the right to enter a contract–in good faith.

The Quebec Court of Appeal, in essence, applied the good-faith doctrine which now permeates Quebec's civilian legal tradition. It ruled that to give effect to a clause which exonerates a party for a fundamental breach of contract would be tantamount to allowing a party to pervert the very nature of the contract.

More precisely, the Quebec Court held that contract "A" is basically what the *Civil Code* refers to as a contract of adhesion, defined as a contract whose essential terms are drawn up by one of the parties and which are not negotiable. The *Civil Code* also defines an abusive clause as one which is excessively and unreasonably detrimental to one of the parties and is therefore not in good faith. It further identifies an abusive clause as one which so departs from the fundamental obligations arising from the rules normally governing the contract that it changes the contract's nature. Finally, the *Civil Code* provides that when an abusive clause is found in a contract of adhesion, that clause is null. In light of the foregoing principles, the Quebec Court of Appeal had no difficulty in determining that a work provider may not invoke a clause in contract "A" that would exonerate it from facing the consequences of having violated the fundamental duty of fairness towards bidders.

While the reasons of the Quebec Court of Appeal for not enforcing the exoneration clause are decidedly civilian, there are indeed common-law doctrines that one could invoke to achieve the same result.

One such doctrine is unconscionability. This doctrine evokes the common-law distinction between law and equity and the dual role of our common-law courts in applying both. It reminds us that the strict application of the law can lead to harsh results which the principles of equity serve to alleviate. Though it is true that the exoneration clause in the British Columbia case was clear and unambiguous, it can be argued that the result of enforcing such a clause is unconscionable in respect of the aggrieved party as well as contrary to public policy in general. From a public-policy perspective, courts have, in the past, recognized the fundamental importance of preserving the element of fairness in the tendering process.

Conversely, one need not necessarily resort to equity to argue that an exoneration clause has no place in contract "A" of a call for tenders, provided, of course, that we accept that contract "A" has been formed. The strictly legal common-law argument would be that in order for contracts to be valid, both parties must provide consideration. In a theoretical contract "A," the bidder's consideration is that it will, if chosen, promise to honour its bid for the period indicated in the tender documents and therefore carry out the work at the price stated in its bid. The work provider's correlative consideration is the promise to treat all bidders fairly according the criteria that it has established in advance and only choose bids from compliant bidders. An exoneration clause in the context of such a contract "A" would effectively eliminate the work provider's obligation and therefore would compromise the entire contract's validity for lack of consideration.

As we mentioned above, Tercon's attorneys sought leave to appeal and, in fact, pleaded their client's case before the Supreme Court of Canada last March. In an interesting turn of events, they did, in effect, invoke the doctrine of unconscionability, citing the notion of "contract of adhesion" and inviting the Supreme Court to consider contract "A" as such, which could ensure that the obligation to treat bidders fairly subsists in contract "A" regardless of the existence of an all-encompassing exoneration clause. Tercon's attorneys also pleaded that the Supreme Court consider the duty of good faith and that a party ought not to be allowed to exclude its liability for breach of this duty in the context of contract "A." Finally, another argument put to the Supreme Court suggests that upholding the British Columbia Court of Appeal's decision would be akin to allowing the government to use the private law of contract to shirk its private law duty of fairness and thus be at odds with statutes and public policy that enshrine a defined tendering process.

CONCLUSION

Despite the different historical origins of the common-law tradition in British Columbia and the civilian tradition in Quebec, it still seems peculiar that two courts should have such contradictory views on the enforcement of clauses meant to exonerate a party who breaches a duty that both courts agree is fundamental to the contract.

Unlike Quebec, the obligation to conduct oneself in good faith in contractual relations is nowhere codified under the common law of British Columbia. So, whereas in Quebec the good-faith obligation takes precedence over freedom to contract, in British Columbia, the Court of Appeal applied common-law principles to hold the contrary view, even if doing so meant potentially compromising the tendering process.

Such a result does not necessarily mean that the common law offers no conceivable recourse to a bidder faced with a clause ostensibly exonerating a work provider that has utterly shirked its duty to treat bidders fairly.

Thus, at the time of the present writing, we and counsel for Tercon in the British Columbia case await a decision from the Supreme Court of Canada on the merits of their appeal.

Given the crucial role in the construction industry of the tendering process as a fair and objective process in the awarding of contracts, and given that exoneration clauses fundamentally alter the dynamics between bidder and work provider and between competing bidders, the definitive ruling of the Supreme Court of Canada on the validity of such clauses in tender documents will be of colossal importance. It is therefore with great interest that we await this imminent judgment.

FEDERATED CONTRACTORS INC. V. ONTARIO REALTY CORP.: BE CAREFUL WHAT YOU CERTIFY

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At issue in the recent Ontario Superior Court of Justice decision in *Federated Contractors Inc. v. Ontario Realty Corp.* was the legal effect of monthly payment certificates issued by an architect or engineer pursuant to a stipulated sum contract.

The action arose out of a contract for the renovation and expansion of the St. Lawrence Valley Treatment Centre, a secure facility and treatment center located in Brockville, Ontario. The prime contract of over $41 million was between Ontario Realty Corp. as owner and PCL Constructors Canada Inc. ("PCL") as general contractor. Lockerbie & Hole Contracting Ltd. ("Lockerbie") was the mechanical subcontractor to PCL, and entered into a further subcontract for the sum of $1,679,400.00 (plus GST) for the provision of sheet metal work by the plaintiff, Federated Contractors Inc. ("Federated").

Following concerns with Federated's work and failure to provide sufficient labour in light of union action on site, Lockerbie terminated Federated's contract. At the time, Federated had been paid $591,581.77 on account of issued payment certificates in the amount of $1,043,238.22. Federated's action sought payment of the $451,656.45 remaining under the certificates, as well as several alleged extras. Lockerbie's position was that Federated's billings were severely "front-loaded", but that this practice is common in construction contracts and is typically counterbalanced by a payment certifier's ability to withhold substantial completion and final payment until all work is complete and deficiencies rectified at the end of the contract. In the interim, Lockerbie submitted, the use of monthly payment certificates is merely a mechanism and that these certificates are provisional and subject to reassessment as to true value. Lockerbie adduced the evidence of a quantity surveyor to show that Federated was actually paid for the approximate value of the work it provided to the project. Federated, on the other hand, took the position that monthly certificates are final and conclusive and cannot be reopened once issued.

At the beginning of trial, the Honourable Justice Colin McKinnon agreed to hear a motion with argument on the discrete issue of payment certificates and to make a ruling prior to any witnesses being called by the parties. Justice McKinnon ruled in favour of Federated in finding that, absent fraud, monthly payment certificates are final and conclusive. Following the decision on the issue of certificates, the parties reached a settlement as to the remaining issues in the case and the trial was discontinued.

The contact between Lockerbie and Federated was standard in its wording pertaining to payment certification by an owner's payment certifier and stated that the certifier was the interpreter at first instance of "whether or not the quality or quantity of the work and/or any material supplied or proposed to be supplied by the Contractor meets the requirements of the Contract". Under the contract, the certifier had ten days following the submission of a progress billing in which to amend the billing and/or advise why parts of it were not approved.

Finding in favour of Federated, Justice McKinnon followed a line of Canadian case law dating back to the nineteenth century which found payment certificates to be final. However, most of these decisions dealt with cases where the certificate at issue was a final certificate. Lockerbie relied on the extensive

English case law discussing the issue of interim certificates prior to a final certificate, which holds that interim certificates are not final and can be readjusted if gross overpayment is discovered. Justice McKinnon found the two lines of case law not to be in opposition. Instead, His Honour differentiated the English case law by stating that these cases dealt with contracts in which monthly certificates were *expressly* provisional.

Justice McKinnon summarized his decision by quoting the British Columbia case of *J.C.R. Construction Ltd. v. Colwood* (*City*), in which Justice McDonald wrote, "The owner's obligation is to pay what is certified. The time for discussion is before certification. It is not up to the owner to do the arithmetic and decide what to pay." His Honour found that a subcontractor or subtrade in a fixed price contract should not be put to a "nuts and bolts" analysis that would be found in a "cost plus" contract.

In reality a payment certifier will rarely conduct such a "nuts and bolts" inquiry when approving monthly payment certificates. To do so would slow projects down to a crawl. However, Justice McKinnon's decision now leaves the door open to an opportunistic subcontractor to draw down on payments well exceeding the actual value of work put into a project and then precipitate a termination of the contract. The subcontractor would then be immune to an owner or general contractor's attempt to withhold monies already certified at the time of termination. This results regardless of whether the certified amounts were grossly in excess of the amount of work actually supplied.

Luckily, future projects need not result in a similar situation. Justice McKinnon found that there is a presumption in standard construction contracts that all monthly payment certificates are final and conclusive. This problem can be avoided by the insertion of an express clause in future agreements which explicitly states that all interim monthly certificates are not conclusive as to the value or quality of services provided and are subject to reopening and readjustment.

WHAT'S HAPPENING AROUND MILLER THOMSON

Our firm is pleased to welcome our newest colleague to the national Construction and Infrastructure Group:

Paul Ryzuk, Associate, Edmonton

Paul maintains a litigation practice focused on construction, transportation and professional liability matters. He has appeared before all levels of court in Alberta, the Federal Court of Canada and various administrative tribunals including the NEB, the Alberta Surface Rights Board, and the Alberta Energy Resources Conservation Board. In addition to his law degree, Paul has his Masters in Engineering, and had previously worked on a variety of residential and commercial developments throughout Vancouver Island. He is based in our Edmonton office.

And Off the Presses

Miller Thomson authors ***Business Laws of Canada***, a ThomsonReuters/West publication.

Business Laws of Canada is a just-released reference guide authored by lawyers from across our firm's offices. It contains 27 topical chapters that are intended to assist non-Canadian legal counsel and clients in understanding Canadian laws and regulations affecting business investment and operations in Canada. To order copies, visit www.west.thomson.com or call 1.800.344.5009

Bill Pigott and **Paul Sandori** have recently completed the manuscript of *Bidding and Tendering: What is The Law?* Fourth Edition and delivered it to LexisNexis. This updated work on bidding and tendering will be on the publisher's shelves late this spring or early in the summer. Although devoted principally to assisting the construction industry, this book includes useful information for anyone involved in the procurement of any type of goods or services.

Recent Seminars and Speaking Engagements

Newsletters such as this one are not the only way we attempt to communicate with our clients and with the industry. Members of the Miller Thomson Construction and Infrastructure Group are frequent speakers at seminars across the country.

Wendy Baker was a recent speaker at the Construction Law 2009 course of the Continuing Legal Education Society of British Columbia (BCCLE) last month (April 17). Wendy spoke on the topics of Self-Help Remedies and Garnishing Orders and Effective Resolution of Disputes.

At the Ontario General Contractors Association 6th Annual Construction Symposium (April 23rd – 25th), **Bill Pigott** made a presentation with his colleague **Paul Sandori** entitled *Don't Waste Your Bid*. The focus of this presentation was to show contractors how bidding case law affected them day to day and how their knowledge of this case law could help them avoid bid disputes.

Bill Pigott spoke at the Ontario Association of Architects' 2009 Admission Course (May 8) on the subject of bid theory, bid practice and related legal issues.

Upcoming Events of Potential Interest

In Calgary

Construction - **Bill Kenny** will be a presenter at a Canadian Institute conference entitled Managing Risk at the Pre-Tender Stages of Your Construction Project (June 24-25)

In Kitchener-Waterloo

Labour and Employment - Miller Thomson's **Labour and Employment Law Group** will present a case study as part of a client seminar focused on *Managing the Workplace in Challenging Times: Some Creative Solutions* (June 2)

In Toronto

Construction - On September 29th, 2009, **Bill Pigott** will be a presenter at a Canadian Institute Conference in Toronto entitled *Managing Risk at the Pre-Tender Stages*. **Bill** and **Paul Sandori** will conduct a roundtable discussion entitled *Exploring Strategies for Managing Risks Arising From RFP's.*

For more information on these or other events taking place at Miller Thomson, please visit our website or contact one of the lawyers listed on the last page of this newsletter.

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MILLER THOMSON LLP CONSTRUCTION AND INFRASTRUCTURE GROUP

Our Construction and Infrastructure Law Group is comprised of approximately 80 lawyers across the country. Our key contacts in Miller Thomson's offices are listed below. These individuals are able to assist you with any questions that you may have, or will refer you to the appropriate lawyers within our national group, depending upon the nature or scope of your inquiry.

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