Keel Cottrelle LLP
Barristers & Solicitors

Toronto —
36 Toronto St. Suite 920 Toronto ON M5C 2C5
416-367-2900 fax: 416-367-2791

Mississauga —
100 Matheson Blvd. E. Suite 104 Mississauga ON L4Z 2G7
905-890-7700 fax: 905-890-8006

Public Sector

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Canadian International Trade Tribunal finds Federal Government breached procurement procedures

In *Re MTS Allstream Inc.*, [2009] C.I.T.T. No. 9 (Fréchette), MTS Allstream Inc. filed a Complaint with the Canadian International Trade Tribunal (the "Tribunal") pursuant to ss. 30.11(1) of the *Canadian International Trade Tribunal Act*. The Complaint related to a procurement by the Department of Public Works and Government Services Canada on behalf of the RCMP for portable and mobile radios. The Tribunal found that the actions of the Department of Public Works prejudiced the integrity and efficiency of the procurement procedure.

The Department of Public Works submitted an RFP on September 2, 2008 allowing bidders to submit proposals, of which two were received: one from MTS Allstream Inc. ("MTS") and one from Motorola Canada Limited ("Motorola"). There were two scenarios under which proposals could be submitted. Under the first scenario, the bidder would provide the requested radios and support. Under the second scenario, the bidder would provide the requested radios and support and would allow the RCMP to trade in its existing radios to reduce the overall price. When MTS initially submitted their proposal, it was deemed compliant. However, the contract was awarded to Motorola because they had submitted a lower-cost proposal based on the second scenario.

MTS advised the Department of Public Works that MTS should have been given the contract based on the minimum difference required by the RFP. The difference between MTS's bid under scenario one and Motorola's bid under scenario two was not larger than the minimum difference requirement. The Department of Public Works then re-evaluated MTS's bid and found its proposal to be non-compliant to the established evaluation procedures in the RFP because MTS had not properly supported its claims of compliance. MTS argued that their bid was compliant and that they should have been awarded the contract in question. They requested to be compensated for the profit lost because the contract was awarded to Motorola.

The Tribunal found that, based on the RFP, MTS was compliant with each of the mandatory technical criteria established in the RFP. The Tribunal rarely substitutes its judgment over the evaluators, unless they have: ignored vital information in the proposal; incorrectly interpreted the scope of the requirement; based their evaluation on undisclosed criteria; or have not conducted the evaluation in a procedurally fair way. The Tribunal found that the interpretation and application of the requirements were unreasonable and unfair. It concluded that the Department of Public Works violated Article 506(6) of the *Agreement on Internal Trade* which states that *"…tender documents shall clearly identify the requirements of the procurement, the criteria that will be used in the evaluation of bids and the methods of weighting and evaluating the criteria*". By not properly applying the evaluation criteria and inappropriately declaring MTS's bid to be non-compliant, the Department of Public Works violated

Article 506(6). The MTS bid met the requirements of the RFP; it offered the exact products being requested and committed itself to those products. The Tribunal held that MTS should have been awarded the contract for their bid under scenario one because the Motorola proposal did not meet or exceed the minimum price difference required by the RFP.

The Tribunal held that the complaint was valid. The Tribunal recommended that the Department of Public Works compensate MTS for the profit that it would have earned had it been awarded the contract. MTS was also awarded costs incurred in preparing and proceeding with the complaint.

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SCC rules only Canadian suppliers can apply to Canadian International Trade Tribunal

In *Northrop Grumman Overseas Services Corporation v. Canada (Attorney General)*, [2009] 3 S.C.R. 309, the Supreme Court of Canada ("SCC") held that only Canadian suppliers have standing before the Canadian International Trade Tribunal (the "Tribunal") to bring a complaint based on the *Agreement on Internal Trade* ("AIT").

The Appellant, Northrop Grumman Overseas Services Corporation ("Northrop"), a company incorporated in Delaware and wholly owned by another Delaware company, submitted a bid in response to an RFP by Public Works and Government Services Canada (the "Department of Public Works") for the procurement of multi-role sensors for military use. The procurement was awarded to an alternate bidder, and Northrop filed a complaint with the Tribunal alleging that the Department of Public Works failed to properly evaluate the bids.

The Department of Public Works challenged Northrop's standing to file a Complaint with the Tribunal based on a breach of the AIT on the ground that Northrop was a U.S. company and therefore not a Canadian supplier, and that access to the Tribunal via the AIT is only available to Canadian suppliers.

The Tribunal ruled that Northrop did have standing to bring their complaint, but the majority of the Federal Court of Appeal overturned this ruling on judicial review. Northrop appealed to the SCC. The main issue on appeal was resolving the correct interpretation of the AIT and *Canadian International Trade Tribunal Act* (the "CITT Act").

Standing for procurement issues before the Tribunal is governed by ss. 30.11(1) of the CITT Act, which states that "*a potential supplier may file a complaint with the Tribunal concerning any aspect of the procurement process that relates to a designated contract and request the Tribunal to conduct an inquiry into the complaint*".

The SCC analyzed the definitions under the CITT Act and Regulations, as well as several articles of the AIT in determining the proper interpretation of the statute and agreement. Article 502(1) of the AIT does not expressly state who may be a

supplier in the case of procurements covered by the AIT. Thus, the Court turned to an analysis of other provisions, the preamble, and Articles of the AIT for assistance.

The SCC stated that "*it is abundantly clear…that the agreement pertains to domestic trade within Canada. Essentially, it is a domestic free trade agreement*." Further, the SCC held that the procurements within Article 502(1) are those "*between a government entity of a party to the AIT and a supplier of another party*".

In conclusion, the SCC held that since Northrop did not have a place of business in Canada, and was a wholly American entity, it was not entitled to utilize the AIT in order to have standing before the Tribunal.

Finally, the SCC noted that access to the Tribunal is pursuant to specific trade agreements, which are negotiated by governments. If the government of a supplier has not negotiated access, there will be no access for suppliers under that government. In such a case, suppliers are entitled to recourse by way of judicial review as opposed to through the Tribunal. Since Northrop is within the jurisdiction of a government that did not secure access to the Tribunal for this type of procurement, it must seek recourse through judicial review in the Federal Court.

SCC confirms damages for unfair dealings, restricts exclusion clause

In *Tercon Contractors Ltd. v. British Columbia*, [2010] S.C.J. No. 4, Tercon Contractors Ltd. ("Tercon") appealed the decision from the B.C. Court of Appeal to the Supreme Court of Canada ("SCC"). The matter related to the tendering contract between Tercon and The Province of British Columbia. A Request for Expression of Interest ("REI") was issued by the Ministry of Transportation and Highways for designing and building a highway in northwestern B.C. Submissions were made by six teams, including Tercon and Brentwood Enterprises Ltd. ("Brentwood"). A few months later, the six teams were informed that the Province of B.C. intended to design the highway. An RFP was then issued by the Province. Under the RFP, only the six original teams were able to submit a proposal. The RFP also included an exclusion of liability clause for any claims for damages arising as a result of participating in the RFP. Brentwood submitted its bid with Emil Anderson Construction Co. ("EAC"), because it did not have the expertise to complete the project on its own. EAC was not a member of the original bid process. Brentwood and Tercon were both short-listed and the Province selected Brentwood for the RFP. Tercon held that the Ministry had considered and accepted an ineligible bid, and, but for the breach, they would have been awarded the contract.

At trial the Judge agreed with Tercon and awarded damages in favour of the

Plaintiff. This decision was reversed at the Court of Appeal. The SCC allowed the appeal agreeing with the results of the Trial Judge.

The first consideration for the SCC was whether the Brentwood bid was ineligible. The SCC held that a bid from a joint venture involving an ineligible bidder was ineligible for the tendering process. The relationship between Brentwood and EAC was held as a joint venture between the parties. However, in Brentwood's submission, EAC was listed as a "major member" of the team. The Province understood it was a joint venture but still allowed the bid to proceed. The existence of the joint venture was a material consideration in favour of Brentwood's success in obtaining the contract. The joint venture provided Brentwood with a competitive advantage, leading to its selection for the project. The exclusion of joint ventures from the bidding procedure was identified in the express eligibility provisions of the RFP and from the implied duty to act fairly towards all bidders. The Province breached these provisions by awarding Brentwood the contract.

The SCC dealt extensively with the two significant issues raised by the matter: the application of the principle of fundamental breach; and the principles applicable to exclusion clauses. The nine Judges of the SCC concurred on the applicable principles. However, the Judges disagreed on whether the exclusion clause in this particular matter could avoid liability for the Province.

On the issue of fundamental breach, Cromwell, J., writing on behalf of five of the Judges, stated: "*On the issue of fundamental breach in relation to exclusion clauses, my view is that the time has come to lay this doctrine to rest*".

Writing for the minority, Binnie, J., concurred: "*On this occasion we should again attempt to shut the coffin on the jargon associated with 'fundamental breach'. Categorizing a contract breach as 'fundamental' or 'immense' or 'colossal' is not particularly helpful. Rather, the principle is that a court has no discretion to refuse to enforce a valid and applicable contractual exclusion clause unless the plaintiff (here the appellant Tercon) 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*".

In essence, the nine Judges did concur on effectively eliminating the concept of fundamental breach with respect to exclusion clauses.

On the issue of the principles applicable to exclusion clauses, the nine Judges also agreed. Cromwell, J., writing for the majority of five, stated: "*I agree 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. However, I respectfully do not agree with him on the question of the proper interpretation of the clause in issue here*". (The analysis with respect to the specific clause is referred to below).

Writing for the minority of four, Binnie, J. deals with the issue of the principles, as referred to by Cromwell, J., and states:

"*The first issue, of course, is whether as a matter of interpretation the exclusion clause even applies to the circumstances established 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 situations of unequal bargaining power between the parties'. 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".

As a result, the nine Judges agreed on the principles applicable to the interpretation and application of exclusion clauses. However, the nine Judges disagreed on whether the specific clause in Tercon did or did not exclude liability in the particular circumstances.

The exclusion clause in the RFP stated, *"…except as expressly and specifically permitted in these Instructions to Proponents, 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*." The SCC majority held that the exclusion clause did not exclude the claim for damages brought forward by Tercon. The exclusion clause related to claims arising from "participating in the RFP" not those related to the participation of ineligible bidders. The liability created in this case arose from the Province's unfair dealings with the ineligible bidder. It would be unfair to the bidders and negatively contribute to the integrity and efficiency of the tendering process if the Province was able to ignore the requirement that only compliant bids and teams in the closed list of bidders were to be accepted. The restriction on the bidders involved was fundamental in the process of the RFP; the exclusion clause was not meant to eliminate this aspect of the bidding process. The Court held that an exclusion clause will apply as long as it covers the conduct in question and it is not unconscionable at the time of formation. There is a strong public interest in the enforcement of contracts, and the only means to override this is with public policy. To deviate from the contractual obligations established, a party must provide public policy reasons; as was the case here. The majority of the SCC held that it was vital to consider the commercial context of the tendering document. Specifically, in this case, the context of public procurement was to be considered. The public nature of the undertaking required a need for transparency and fairness. Therefore, the majority of the SCC found that the exclusion clause did not apply to the breach that was established.

The majority of the SCC also found that the clause was ambiguous. Ambiguity

requires that the clause be interpreted in favour of Tercon. As a result, the clause would not apply to bar Tercon's claim for damages.

The majority of the SCC found that the Province breached the tendering contract. The appeal was allowed and the judgment of the trial judge was restored.

The minority held that the Province did breach the terms of the RFP, however, there should not be any liability due to the exclusion clause. The exclusion clause was clear and unambiguous, and the minority of the SCC concluded that there was no ground to override the freedom of the parties to contract. The clause operated to preclude Tercon from raising a liability claim.

The decision of the SCC, both majority and minority, will have a significant impact on procurement law. In the first place, all of the Judges agreed on effectively eliminating the principle of fundamental breach as it applies to procurement law. The concept of fundamental breach would apply only where there was a "*paramount consideration of public policy sufficient to override the public interest in freedom of contract*".

The nine Judges of the SCC also agreed on the principles to be applied in interpreting specific exclusion clauses. However, the Judges of the SCC disagreed on whether the specific clause in the Tercon matter did or did not exclude liability. Given the approach of the majority of the SCC, public agencies should take great care in the drafting of exclusion clauses if there is an intent to avoid any and all possible liability. If a public agency wishes to include an exclusion clause which attempts to exclude any and all liability, consideration must also be given as to whether such clause will deter possible bidders. Further, in exceptional circumstances, any such clause might be considered to be contrary to public policy and, therefore, could re-open the issue of fundamental breach.

Perhaps it is appropriate to conclude with the comment that, while the decision of the SCC is significant, the fact that the Judges did not agree on the application of the specific exclusion clause creates some uncertainty.

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Appeal Court applies privilege clause

In *Amber Contracting Ltd. v. Halifax (Regional Municipality)*, [2009] N.S.J. 464 (C.A.), a majority of the Nova Scotia Court of Appeal allowed an appeal from the judgment rendered by the Trial Court. According to the majority, there is interplay between the duty of fairness and privilege clauses. As such, when defining the nature and scope of the duty of fairness in a particular case, one must consider the express provisions in the tender document. The majority found that the Trial Judge had erred by first finding that the duty of fairness was breached, and subsequently, concluding that the breach precluded a reliance on the privilege clause.

In this case, Halifax issued a call for tenders for the construction of a sanitary pumping station. Three bids were submitted in response to the RFP. All

three were determined to be significantly over budget. As such, Halifax cancelled the RFP. Subsequent to the termination of the bidding process, Halifax engaged in negotiations with the lowest bidder, Amber Contracting, in order to secure a more budget-friendly price. However, these negotiations were unsuccessful.

Seven months after the original RFP was cancelled, Halifax issued a second call for tenders for the project. In response to the second RFP, four bids were submitted, including a bid from Amber Contracting. As a result of the second RFP, Halifax awarded the contract to Eisener, the lowest bidder. Amber Contracting was a close second. Importantly, Eisener's bid was higher than Amber's bid on the original RFP and, more significantly, over $100,000 more than the price negotiated between Halifax and Amber prior to the issuance of the second call for tenders. As a result of Halifax awarding the contract to Eisener, Amber sued for breach of the duty of fairness.

At trial, before the Nova Scotia Supreme Court, the trial judge found that Halifax's conduct amounted to bid shopping. Furthermore, the trial judge held that Halifax had breached its duty of fairness to Amber by "*(1) trying to obtain a better price through re-tendering and (2) not following its practice of negotiating with the lowest bidder*". The trial judge initially found that Halifax had breached its duty of fairness and, as such, they could not rely on the privilege clause.

On appeal, the majority found that the appropriate standard of review was one of correctness as the issue of whether a privilege clause can affect the implied duty of fairness was a question of law. The majority also relied on the principle of fairness established by the case law that an owner "*is under an obligation to treat all bidders fairly and equally*" in the bidding process. This implied duty of fairness upholds the principle of integrity in the bidding process.

The majority of the Court of Appeal held that the trial judge had erred in the approach in determining the scope of the duty of fairness. According to the majority, "*privilege clauses are to be examined in the context of the entirety of the tender documents in order to determine the duty of fairness in a particular case*."

The majority of the Court of Appeal, in relying on established case law, found that "*in determining the nature and extent of the duty of fairness, due regard must be given to the contractual terms in the particular tender call.*" The tender document in this case included a privilege clause which allowed Halifax to reject any unsatisfactory bids as well as providing the right to terminate the bidding process at any time. Furthermore, when considering the duty of fairness in light of a privilege clause, the courts have held that such privilege clauses do not exclude the implied duty of fairness.

Upon inspection of the privilege clause in this case, the majority found that the tender document expressly authorized Halifax's conduct, – i.e. in re-tendering, as the privilege clause permitted the rejection of all tenders and the option to call for additional tenders. According to the majority of the Court of Appeal, the "*privilege clauses excluded, as basis for*

[Halifax's] implied duty, the very factors the trial judge relied upon to establish [Halifax's] breach of its implied duty of fairness. [Halifax's] right to act as it did was set out before all bidders in the tender documents. That it chose to proceed as contemplated and permitted by those contractual terms cannot amount to an attack on the integrity of the bidding process."

As such, the majority of the Court allowed the appeal and held that Halifax's rejection of all bids tendered in response to the first RFP as being over budget followed by a second call for tenders was not a case of bid shopping.

The minority would not have allowed the appeal as it held that a "*term should be implied in the tender documents that [Halifax] would not terminate the first tender process and re-tender the identical project six months later to try to obtain a lower price*." According to the dissent, the application of the duty of fairness to a tender document was a finding of mixed fact and law. As such, the trial judge's decision that Halifax was engaged in bid shopping should be entitled to a high degree of deference and should only be disturbed if "*they result from palpable and overriding error*." The dissent was not convinced that the requisite degree of error was established in this case.

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Appeal Court supports determination that successful bidder compliant

Bot Construction Ltd. v. Ontario (Ministry of Transportation), [2009] O.J. No. 5309 (C.A.), was an appeal by the Crown from Bot Construction's successful application for judicial review. The Divisional Court quashed the Ministry of Transportation's decision to award a major highway construction project to Thomas Cavanagh Construction ("Cavanagh").

The Ontario Ministry of Transportation ("MTO") released a Request for Tender for a highway project on Highway 417. A Declaration of Declared Value of Imported Steel and a statement of value of Canadian structural steel products supplied were to be completed by each bidder. The MTO applied a 10% preference for Canadian steel content. Cavanagh was awarded the contract for the lowest bid; Bot Construction came in second. Bot Construction held that Cavanagh's bid should have been rejected because it was not compliant with the MTO design. The project required "rolled steel beams" which were not available in Canada and Cavanagh had not submitted a Declaration of Declared Value of Imported Steel. Cavanagh held that they had changed the specifications to use Canadian steel which would better meet the needs of the design. The MTO found that Cavanagh's bid was compliant with the requirements.

At judicial review the standard of review was held to be reasonableness. The Divisional Court held that Cavanagh did not comply with the requirements of the MTO drawings. Cavanagh would be using Canadian steel, which did not meet the design specifications the MTO had imposed. Therefore, the MTO's decision that Cavanagh was compliant was not reasonable.

The Court of Appeal disagreed with the conclusion reached by the Divisional Court. The MTO owed a duty of fairness to Bot Construction after receiving a complaint about the tendering process. The MTO had conducted an investigation and obtained support of Cavanagh's compliance with the bid requirements. Its efforts in the investigation were diligent and met the duty of fairness obligation. This fact removed the decision from the realm of unreasonable outcomes; the decision that Cavanagh was compliant with the bidding process fell within "*a range of possible, acceptable outcomes that are defensible in respect of the facts and law*." The Court also held that the MTO had experience with the public tender process and therefore a judicial review must be based on the reasonableness standard of review.

The appeal was allowed and the application for judicial review was dismissed.

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Court confirms duty of fairness was complied with and defect was not material

In *North America Construction (1993) Ltd. v. York (Municipality)*, [2009] O.J. No. 3631 (S.C.J.), the Regional Municipality of York (the "Region") released a formal Request for Tender for the construction of a water treatment plant. North America Construction (1993) Ltd. ("NAC") and Kenaidan Contracting Ltd. ("Kenaidan") were the only two bidders for the project.

For the bid process, the Region released tender documents which outlined the scope of the project and the procedure to be followed for bidding. The bid documentation included instructions to bidders, definitions, a bid form, articles of agreement, general conditions and supplementary conditions. To clarify the scope of the work the Region also issued thirteen addenda. The addenda set out amendments to the contract, contained clarifications, provided answers to technical questions raised by the bidders, and included attachments (drawings, sketches, specifications). The addenda included a request for its inclusion in the bid submission along with the attachments issued with the addendum. Two weeks before the tender deadline, Kenaidan sent an e-mail to the purchasing analyst of the Region, asking if the attachments needed to be submitted with the bid. The Region informed Kenaidan that it was not necessary to submit the attachments; however, NAC was not advised of this suggestion. The Region was not intending to provide any unfair advantage to Kenaidan. Kenaidan did not include the attachments in its bid. The issue raised by NAC is that Kenaidan failed to include the attachments from the addendum in its bid submission. The Region confirmed that the submission of the attachments played no role in the bidding process but merely provided confirmation of receipt of the documents.

NAC ultimately filed a complaint with the Region for Kenaidan's failure to include the attachments to the addenda in its bid. The Bid Review Committee ("BRC") considered NAC's complaint. The BRC held that the missing attachments were a minor "irregularity" and the bid was still capable of being considered by the Ministry. The NAC then raised the issue

with the Ontario Superior Court holding that the BRC erred in its conclusion.

The first issue raised was whether the Kenaidan bid was compliant and capable of being accepted by the Region. The test to be used is an objective one. After review of the Instructions to Bidders and the bid form, it was concluded that the inclusion of the attachments to the addenda in the bid package was only required as acknowledgment of receipt. Further, instructions at clause 6 of the Instructions to Bidders indicated that a "*failure to acknowledge receipt of all addenda shall result in the rejection of the Bid*." Based on an objective analysis it was concluded that the Region simply needed to be advised that the bidders received the attachments. NAC had interpreted the inclusion of the attachments as necessary for the bid to be considered. For the purpose of the analysis, the Court held that the Kenaidan bid was not compliant with the tendering process.

The second issue raised was if the bid was found to be non-complaint, did the Region have the ability to waive the non-compliance and accept the bid. Clause 3.8 and 3.9 of the Tendering Procedures and Clause 8 of the Instructions to Bidders suggested that certain non-compliant bids may still be accepted by the Region. Clause 3.8 provided some discretion to the owner to waive non-compliant bids. The discretion extended to issues of immaterial non-compliance. The Court reviewed the defect in the matter to determine if it was a material issue. The attachments were prepared and issued by the Region. There was neither a variation of the attachments between bidders nor any possibility for the bidders to vary them. Kenaidan did not receive any benefit from failing to include the attachments and this did not prejudice NAC in any way. The "defect" in this case had no impact on the price of the contract, the work to be completed, the schedule for the contract or any other issue that related to an advantage of one bidder over the other. The "defect" was not material to the decision making process of the Region. The Court concluded that the tender procedure allowed for insignificant and immaterial deficiencies in a bid to be waived. The 'defect" of Kenaidan's bid had no effect with respect to the fairness and consistency of the bidding process because all other specifications of the bids were comparable.

The Court concluded that Kenaidan's bid was able to be lawfully considered by the Region. The Region treated both bidders fairly and Kenaidan was chosen for its lower price. The application of NAC was dismissed.

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Court rules non-compliance makes bid unacceptable

In *Thales Rail Signalling Solutions v. Toronto Transit TTC*, [2009] O.J. No. 1797 (S.C.J.), the Superior Court of Justice dismissed a motion by the plaintiff, Thales Rail Signalling Solutions ("Thales"), for an interlocutory injunction preventing the defendant Toronto Transit Commission ("TTC") from proceeding with the tender process until it considered Thales' bid. The Court held that the tender submitted by Thales did not meet the criteria

established by the TTC and that Thales did not take advantage of the opportunity to have their tender reviewed by the TTC for suitability prior to the deadline. There was therefore no issue to be tried as to whether Contract A had come into force between the parties and no lack of procedural fairness could be claimed by Thales.

The TTC issued an RFP for a contract related to the design, supply and technical support for installation and testing of a new communication system for its subway line. Among other things, each applicant was required to submit an agreement to bond or an agreement to provide an irrevocable letter of credit to serve as contract security. The TTC included the required wording for this letter as "*I/we, the undersigned…hereby agree to become bound for the above named Proponent in the form of an irrevocable Letter of Credit (for Contract Security) included in the Proposal Documents…*".

Thales submitted a letter of credit from its banker using the language "*We, the Undersigned…hereby express that, under current conditions and our current expectations, we envision being in a position to issue…and irrevocable Letter of Credit…*".

The TTC rejected Thales' claim on the basis that the wording of the agreement submitted by Thales was not in compliance with the terms and conditions of the RFP.

Thales brought a motion for interlocutory injunction to prevent the TTC from proceeding until its bid was considered.

The Court discussed the appropriate test for granting an interlocutory injunction, as established in *R.J.R. MacDonald Inc. v. Canada (Attorney General)*, (1994, S.C.C.). There must be a serious question to be tried, the applicant must suffer irreparable harm if the application were refused, and which party would suffer greater harm from granting or refusing the remedy must be assessed. This case focussed on whether there was a serious issue to be tried.

In this case, Thales argued that Contract A came into existence as the letter they submitted was in compliance with the requirements of the RFP. Therefore, Thales took the position that they were owed a duty of fairness and should have been given an opportunity to fix the document if it was found to be unacceptable. The TTC argued that the form submitted by Thales did not use language in compliance with the requirements of the RFP and therefore no Contract A was formed and consequently no duty of fairness arose.

The Court agreed with the position of the TTC, noting that the form submitted by Thales was not an agreement, and that "*being in a position to issue a letter of credit is not agreeing to issue a letter of credit.*" The bid did not comply with the RFP.

Further, the Court commented that even if the bid was seen as compliant and forming Contract A, there was no unfairness to Thales since the TTC had provided an opportunity for tenderers to submit their questions to the TTC prior to submitting their bid. Thales could therefore have submitted their form to

the TTC for review before making its formal bid to determine if it was acceptable.

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Ontario Courts have jurisdiction over claims against Federal Government

In *TeleZone Inc. v. Canada (Attorney General)*, 94 O.R. (3d) 19 (C.A.), the Court of Appeal ruled on four cases raising the same issue — whether jurisdiction lay in the Superior Court of Ontario or in the Federal Court. In all four cases the plaintiff commenced their claim for damages against the Crown in the Superior Court. The Crown brought a motion pursuant to the *Rules of Civil Procedure*, to have each action dismissed on the basis that the decisions in question were those of a federal board, commission or other tribunal and could only be challenged by way of an application for judicial review under s.18 of the *Federal Court Act* (the "FCA") The Crown relied on *Grenier v. Canada (Attorney General)*, (2005, F.C.A.), and s.18 of the FCA in asserting their position that the Superior Court did not have jurisdiction over claims against the Crown for damages.

In the courts below, two judges held that the Federal Court had jurisdiction, while two judges held that the Superior Court had jurisdiction. The Court of Appeal held that the Superior Court had jurisdiction to hear all four cases since Section 18 of the FCA only deals with remedies and does not remove jurisdiction. Damages are not a remedy included in s.18 of the FCA, and in none of the four cases at issue was a remedy sought that did fit within s.18. Further, in none of the cases was there a collateral attack on the underlying administrative decision.

① TeleZone Inc. v. Canada

In 1995, TeleZone applied for a licence to provide personal communication services ("PCS") in Canada. The Ministry of Industry (now Industry Canada) rejected the application. TeleZone brought an action in the Superior Court against the Crown in 1999 for damages for breach of contract or negligence. They argued that Industry Canada did not apply the licensing criteria fairly and in good faith to their application. TeleZone did not seek to vary the decision regarding who was or was not afforded a licence, but rather sought damages against the Crown.

In 2007, the Crown brought a motion to dismiss the action on the grounds that the Superior Court did not have jurisdiction to hear the issue and that TeleZone was making a collateral attack on the decision of the Ministry. The position of the Crown was that the decision to decline a licence to TeleZone was made by a federal board or tribunal and therefore a challenge would have to be brought by way of judicial review application in the Federal Court pursuant to s.18 of the FCA. The motions judge dismissed the motion concluding that the action for damages did not fall within the scope of s.18 of the FCA, and that TeleZone was not making a collateral attack since they were not challenging the decision of the Ministry. This decision was supported by the Court of Appeal.

② G-Civil Inc. v. Canada

G-Civil submitted a tender for repair work to be done in Ottawa in response to a call made by the Minister of Public Works and Government Services Canada (the "Crown"). The Crown disqualified the tender on the basis that it was incomplete. G-Civil brought an action in the Superior Court for damages for breach of contract against the Crown in February, 2004. G-Civil argued that its tender was complete, that it was the lowest tenderer, and that the Crown therefore breached a contract by disqualifying their submission.

In December 2006, the Crown served notice of motion to dismiss the action on the ground that jurisdiction lay in the Federal Court since the Minister was acting as a federal board or tribunal at the time of disqualifying the tender. The motions judge granted the motion stating that G-Civil was required to commence an application for judicial review under s.18 of the FCA. This decision was reversed by the Court of Appeal.

④ Fielding Chemical v. Canada

Fielding's principal business is chemical recycling and hazardous waste disposal. Between 1995 and 1997 the Government of Canada issued several orders resulting in a ban on the export of PCB waste to the United States. In 2005, Fielding brought an action in the Superior Court against the Attorney General of Canada (the "Crown") for damages resulting from misfeasance in public office. Fielding argued that the orders were authorized for a purpose contrary to that stated in the legislation.

The Crown brought a motion to strike Fielding's claim and dismiss the action in 2007, alleging that the Superior Court did not have jurisdiction and that the orders could only be challenged by application for judicial review in the Federal Court. The motion judge dismissed the motion on the basis that the action challenged the conduct of officials and not the lawfulness of the decision that was made. The Superior Court therefore had jurisdiction and there was no collateral attack issue. Again, this decision was supported by the Court of Appeal.

③ McArthur v. Canada

McArthur, an inmate, was continuously isolated in solitary confinement at several institutions from 1994 to 1999. In 2001, McArthur brought an action against the Attorney General of Canada (the "Crown") in Superior Court for damages for wrongful conviction or false imprisonment. In 2006, the Crown brought a motion to dismiss the action alleging the Superior Court did not have jurisdiction to hear it. Once again the Crown argued that the only way to challenge the decision to place an inmate in confinement is by way of judicial review pursuant to s.18 of the FCA.

The motions judge granted the Crown's motion noting that a claim for damages against the Crown could be made, but that someone wishing to do so must first succeed on an application for judicial review. The Court of Appeal disagreed.

THE COURT OF APPEAL DECISION

On the jurisdictional issue, the Court applied a two-stage test: does the Superior Court have jurisdiction to adjudicate the plaintiff's claim? If so, is there legislation or an arbitral agreement

that clearly and unequivocally removes that jurisdiction?

In applying the test to the cases at bar, the Court found the Superior Court has jurisdiction over all claims that constitute a reasonable cause of action. S.18 of the FCA grants exclusive jurisdiction to the Federal Court only for those issues which are listed under that section. There is no remedy for damages included under s.18, and therefore none of the four cases at issue fell within the jurisdiction of the Federal Court.

On the issue of collateral attack, the Court concluded that "*a claim should only be struck as a collateral attack if it seeks to affect a decision's legal validity.*"

The Court found that none of the four cases included in this decision were challenging the legal validity of the lower court decision, and therefore none constituted a collateral attack.

The Court further rejected the Crown's use of the reasoning in *Grenier*, a case in which an inmate sued the Crown for damages arising from time spent in solitary confinement. In *Grenier*, the Federal Court concluded that judicial review was the proper avenue for the inmate to pursue his action. The Court of Appeal indicated the decision in *Grenier* was "*not correctly decided*" and even if it was, they were not bound to follow the *Grenier* decision.

It appears from this case that claims for damages against the Crown can now be brought in the Superior Court without issue, provided there is no legislation or arbitral agreement removing the jurisdiction and a collateral attack is not being made. However, leave to appeal to the Supreme Court of Canada was granted. The Supreme Court of Canada heard this case in January, 2010 but has yet to release its judgment.

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Court finds no agreement, and awards damages based on quantum meruit

In *1579137 Ontario Ltd. (c.o.b. SMRS Construction) v. Atlantis Marine Construction Inc.,* [2009] O.J. No. 1209 (S.C.J.), the contract between two contractors was in dispute. Atlantis Marine Construction Inc. ("Atlantis"), had a contract with the Riverside Subdivision in Collingwood. Atlantis had obtained a permit to clear trees from the subdivision, but because this had been obtained late, SMRS Construction ("SMRS") was contracted to help perform some of the work required. Atlantis claimed that the arrangement was made on a fixed-price contract which started at $25,000 and was subsequently increased to $55,000. SMRS claimed that the agreement was based on an hourly rate for labour and equipment. SMRS brought an action claiming the difference of $83,338.36, owed to SMRS because of the payment dispute.

SMRS was contacted by Atlantis on an urgent basis, with clearing and soil stripping to be completed in 3 months on the property. SMRS began work on March 6, 2006, and ended April 28, 2006, working 36 days on site. Tasks included clearing debris and wood left by the tree-clearing contractor, stripping topsoil,

digging and rough-grading the storm water management pond, cutting swales, installing the check dams, and supervising the work and labourers. Over the course of the work, SMRS was presented with two documents: the first a contract for $25,000 and the second, a contract which had some changes and was priced at $55,000. SMRS did not sign either of the contracts nor did it conclude that this represented the payment plan. SMRS was under the assumption that it was being paid per hour for labour and equipment. SMRS maintained a site log of the work completed, the hours worked by each labourer, the equipment on site, and the hours logged by the equipment. This information was provided on invoices and forwarded to Atlantis. As the job progressed, SMRS asked for payment. Atlantis considered this a draw whereas SMRS considered this payment for the invoices. Payment was consistent and SMRS assumed that this plan had been agreed to by the parties. Atlantis, however, was under the assumption that the hourly breakdown of billing was a mere formality, and the parties were in agreement with the fixed price contract.

The Court first raised the issue of whether an oral agreement was implied by the conduct of the parties. There were two oral agreements, the hourly contracted rate assumed by SMRS through the invoices supplied, and secondly, the fixed contracts Atlantis relied on that were unsigned by SMRS. Before finding a binding oral contract, there must be an inference that the work has been consented to based on the terms of the contract; if it is consented to based on conduct, this will be measured by an objective standard. The Court found that both parties made oral offers; however, there was no acceptance of these offers. Therefore, no oral agreement existed.

The Court found that the value of work performed by SMRS could be determined on a *quantum meruit* basis. *Quantum meruit* allows a court to order payment of the reasonable value of services to a service provider when the contract under which the services were provided does not state a price for those services or when that contract cannot be enforced. In this matter, there was no contract between the parties, however there was considerable work completed by SMRS that was deserving of payment. The Court found that the value of equipment supplied by SMRS could be determined by agreement of the parties on rates charged by SMRS. With experience in the industry, this was a norm for both parties. The equipment was valued at a total of $20,625. The labour was based on $22 per hour, and the hours recorded by SMRS were used. The labour was valued at $44,231. SMRS was awarded $74,096 on a *quantum meruit* basis; the balance paid to SMRS was $36,081.82.

Atlantis sought a counterclaim, holding that the pond was not dug in the correct location. The counterclaim was dismissed because there was no proof of the damage and SMRS was not given an opportunity to correct the mistake. Further, Atlantis had not pointed out the mistake while on the property when the work was being completed.

— KC LLP —

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For information, contact

Bob Keel: 905-501-4444 rkeel@keelcottrelle.on.ca

or

Tony Rosato: 905-501-4433 arosato@keelcottrelle.on.ca

KEEL COTTRELLE LLP

100 Matheson Blvd. E., Suite 104
Mississauga, Ontario L4Z 2G7
Phone: 905-890-7700
Fax: 905-890-8006

36 Toronto St. Suite 920
Toronto, Ontario M5C 2C5
Phone: 416-367-2900
Fax: 416-367-2791

Keel Cottrelle LLP
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Robert Keel - Executive Editor
Tony Rosato - Managing Editor

Contributors —
The articles in this Newsletter were prepared by Jennifer Asnani and Krista Moreau, who are associated with Keel Cottrelle LLP.