

Understanding Limitations of Liability: Recent Alberta and Canadian Case Law

By: Ryan P. Krushelnitzky and Kelly E. Starrak¹

A. Introduction

Contractual liability limitations are a means of managing risk in construction contracts. Depending on the type of project, the type of possible damages, and the availability (or unavailability) of insurance, liability limitations can play an important role in risk allocation. This is particularly so in situations where a small breach of contract can result in very significant damages.

Limitation of liability clauses allow parties to attempt to allocate risks, rather than transfer them wholesale to parties who are unable to bear them. Parties can limit the amounts owed by one to the other, can limit the type of damages due, or can limit the type of claims that can be brought. Contractors can avoid a “bet the farm” situation by limiting their exposure as provided for by the liability limitation clauses. And, owners can bear the additional risk, as part of the overall risk/reward allocation agreed to by the parties.

Liability limitations are only useful if they are enforceable. Enforceability turns on questions of contractual interpretation, unconscionability and public policy. This paper will explore a number of recent cases that deal with these issues, in order to highlight considerations to bear in mind when negotiating, drafting or litigating limitation of liability provisions.

B. Tercon and the Fundamentals of Liability Limitations

The Supreme Court of Canada’s *Tercon Contractors Ltd. v. British Columbia* decision sets out the state of Canadian law generally on the issue of enforceability of liability limitations.² There, the Court set out a three-step test concerning enforcement:³

¹ Ryan Krushelnitzky and Kelly Starrak are lawyers, practicing at the firm Field LLP, www.fieldlaw.com

² *Tercon Contractors Ltd. v. British Columbia*, [2010] 1 S.C.R. 69

³ *Tercon* at paras. 122 and 123 per Binnie J. in dissent but not on this point

1. First, as a matter of contractual interpretation, whether the exclusion clause in fact applies to the circumstances;
2. Second, whether the clause was unconscionable at the time the contract was made;
3. Third, whether there is an overriding public policy reason for the court to refuse to enforce the clause.

The first part of the *Tercon* test looks at the contract itself, to see if it can be interpreted to apply to the situation at issue. During this stage, a court attempts “to ascertain the objective intent of the parties – a fact specific goal – through the application of the legal principles of interpretation.”⁴ Courts do this using “a practical, common sense approach not dominated by technical rules of construction”:

The overriding concern is to determine the intent of the parties and the scope of their understanding..... To do so, a decision maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract.⁵

The surrounding circumstances “vary from case to case” and encompass the “objective evidence of the background facts at the time of the execution of the contract.”⁶ They consist of “knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting.”⁷ The context that makes up the surrounding circumstance of an agreement can include: the genesis of the transaction, the background, the context, the market in which the parties are operating, the purpose of the agreement and the nature of the relationship created by the agreement.⁸

⁴ *Sattva v. Capital Corp. v. Creston Moly Corp.*, [2014] 2 S.C.R. 633 at para. 49.

⁵ *Sattva* at para. 47

⁶ *Sattva* at para. 58

⁷ *Sattva* at para. 58

⁸ *Sattva* at paras 47 and 48

In addition, there are certain basic principles of contractual interpretation which courts make use of when dealing with liability limitations:

1. Contracts should be enforced regardless of the stringency of their terms limiting liability because parties require certainty that negotiated provisions in a contract will be legally enforceable;⁹ and,
2. Generally a limitation clause is strictly construed against the party that seeks to invoke the clause, although that does not mean that one can ignore interpretative principles, such as the contract is to be read as a whole and the contract shall not be read so as to reach an absurd commercial result¹⁰.

The second part of the ***Tercon*** test looks at unconscionability at the time of contract formation. Unconscionability generally requires inequality in the position of the parties arising from the ignorance, need or distress of the weaker party, which left it in the power of the stronger party, along with proof of substantial unfairness in the bargain.¹¹

The doctrine of “unconscionability [...] aims to temper the ideal of freedom to contract with the need to prevent abuse and to protect the weak”.¹² Courts have found inequality to exist in contracts involving the mentally infirm, the aged, the inebriated or drug-dependant, the emotionally distressed, the impecunious, or the financially naïve. Inequality of bargaining power is the “touchstone for intervention”.¹³

The third part of the ***Tercon*** test looks at whether the public interest in the enforcement of a contract is overridden by some other countervailing public policy interest.¹⁴ The Supreme

⁹ ***Plas-Tex Canada Ltd. v. Dow Chemical of Canada Ltd.***, 2004 ABCA 309 at para. 49

¹⁰ ***New Brunswick Power Corp. v. Westinghouse Canada Inc.*** 2008 NBCA 70 at para. 19

¹¹ ***McNeill v. Vandenberg***, 2010 BCCA 583 at para. 14

¹² ***Ohlson v. CIBC***, 1997 ABCA 413 at para. 20

¹³ ***Calgary (City) v. Northern Construction Company Division***, 1985 ABCA 285 at para. 54

¹⁴ ***Tercon*** at para. 120 per Binnie J. in dissent but not on this point

Court explained that “serious criminality or egregious fraud” would be “examples of well-accepted and ‘substantially incontestable’ considerations of public policy that may override the ...public policy that favours freedom of contract”.¹⁵

The enforceability of any given limitation of liability clause will be a highly fact and case specific question. Whether any given clause will be enforceable will depend on the specific contractual language used, and the surrounding circumstances. This paper will examine a number of recent cases that touch on each of the three steps in the ***Tercon*** analysis. Those cases provide guidance with respect to issues that arise when limitation of liability provisions are in dispute.

C. The first Tercon step: does the liability limitation apply

The first step in the ***Tercon*** analysis looks to see if the contractual limitation applies to the specific breach at issue. Often this is strictly a matter of contractual interpretation, and whether the specific breach at issue is captured by the liability limitation in the contract. But, as recent cases illustrate, issues surrounding contract creation, consensus, and privity will also come into play.

1. Wood Group and the importance of consensus

Before a court even gets to the stage of interpreting a limitation of liability provision, the court must first determine whether the provision is even a part of the contract itself. This comes down to the basics of contract creation. Those basics provide that “parties will be held to have reached an agreement when they have formed a mutual intention to enter into a bargain with each other and, further, are in agreement as to the terms of that bargain”.¹⁶

Canadian Natural Resources Limited v. Wood Group Mustang (Canada) Inc. (IMV Projects Inc.)¹⁷ serves as a good reminder that even sophisticated commercial actors who seek to limit their liability can fail to do so when they forget basic contractual principles in the process.

¹⁵ ***Tercon*** at para. 120 per Binnie J. in dissent but not on this point

¹⁶ John D. McCamus, *The Law of Contracts*, 2005 Irwin Law Inc. Toronto, at 31

¹⁷ ***Canadian Natural Resources Limited v. Wood Group Mustang (Canada) Inc. (IMV Projects Inc.)***, 2017 ABQB 106

Wood Group involved a dispute between the oil and natural gas producer CNRL and, among others, Wood Group Mustang (Canada), formerly known as IMV Projects. The dispute arose from IMV's provision of engineering work for the construction of a buried 32 kilometer emulsion pipeline owned by CNRL. The pipeline experienced design and operational problems, and ultimately had to be abandoned and replaced. CNRL successfully brought an action against IMV for negligence and breach of contract, and obtained judgment as against IMV for 20% of the \$45,425,204 in damages CNRL sustained (being a total judgment against IMV of \$9,085,040).¹⁸

At trial, IMV attempted, unsuccessfully, to rely on a limitation of liability provision that it claimed limited its liability to \$50,000 for any claim arising out of its work. The critical aspect of the limitation of liability issue wasn't about what the provision said, but rather whether it was part of the contract to begin with. The evidence at trial established that:

- IMV and CNRL were party to a contract (which they called an MOA) for engineering consulting services, procurement and construction management.¹⁹ The parties all acted on the understanding that the contract was in force, and IMV sent in yearly rate sheets when the contract was renewed on an annual basis.
- CNRL took the position that the contract was sixteen-pages long, with annual rates being provided by IMV as the contract was renewed annually. IMV took the position that the original contract was nineteen-pages long: the sixteen pages agreed to by CNRL, plus two pages of hourly rates and a final page, called a General Conditions Agreement ("GCA"). The GCA contained a term that limited IMV's liability to \$50,000.²⁰

¹⁸ **Wood Group** at para. 531

¹⁹ **Wood Group** at para. 340

²⁰ **Wood Group** at para. 340

- Several forms of the contract were produced by CNRL and appeared in various correspondence between the parties. The first ten pages were the same for all versions, but they each varied in content after that.²¹
- The only evidence about the negotiation and signing of the contract was from the CNRL employee who signed it. He testified that he had discussions with the principal at IMV about fees, but otherwise used the CNRL template. The contract with his signature would have been sent to the principal at IMV. CNRL's employee identified the sixteen-page document that he signed. As to the three pages in dispute, he said had never seen the GCA (which contained the limitation clause) until he was preparing to testify.²²
- The procedure was that CNRL's employee would sign the proposed contract and CNRL's contracting group would send it out to the other party for execution. There was no central filing system for storing contracts. There was no evidence about the sending and receipt of the specific contract at issue, or how a nineteen-page version of the contract came into CNRL's possession.²³
- No one from IMV was available to testify to the negotiation or signing of the contract. The IMV employee who signed the document, and dated his signature, also put his initials on each page, including the last three pages in dispute. That person, however, was no longer involved with IMV and his whereabouts were unknown.²⁴

Based on the above, the judge held that given that there were "multiple copies of the contracts, in various forms" the court had to "look at the versions and the evidence and decide in this circumstances: what were the terms of the contract that were agreed between the parties".²⁵

²¹ **Wood Group** at para. 352

²² **Wood Group** at para. 343

²³ **Wood Group** at para. 344

²⁴ **Wood Group** at para. 345

²⁵ **Wood Group** at para. 351

The trial judge concluded that “the most logical inference to draw” was that CNRL’s employee “signed the standard template comprised of sixteen pages” and sent it to IMV’s principal. IMV’s principal then received it, and signed it, but added a 2 page rate sheet (which he initialed), along with a one page GCA (which he also initialed). There was, however, “no evidence as to how the nineteen page document was returned back to or received at CNRL, or that the final page GCA was ever reviewed by or agreed to by anyone at CNRL.”²⁶

Accordingly, the trial judge concluded that:

In the circumstances, there was only offer and acceptance around the first sixteen pages in the contract. The annual rates were accepted and paid by CNRL. The GCA was never accepted by CNRL. As a result, it is the sixteen-page document that outlines the terms of the MOA.²⁷

The **Wood Group** case highlights the importance of ensuring that consensus is achieved with respect to all critical terms of a contract, including limitations of liability. It also highlights the importance of documenting the steps leading up to the execution of a final agreement.

Simply put, it doesn’t matter that an expertly worded limitation of liability provision would limit a \$45 million dollar claim to \$50 thousand dollars when that provision cannot be proven to be part of the contract. A party seeking to include a limitation of liability provision into a contract should take steps to expressly draw it to the other party’s attention, discuss its purpose, and then document those steps. Steps should then be taken, and documented, to ensure that the final executed version of the contract includes the agreed upon limitation in liability.

As the **Wood Group** case shows, adding a standard form terms and conditions sheet into a document that has already been executed by the other party will not be sufficient, and can leave a party without the protections that it otherwise intended to include in its contract.

²⁶ **Wood Group** at para. 352

²⁷ **Wood Group** at para. 353

2. *Whitecourt: What terms apply and to whom*

Whitecourt Power Limited Partnership v. Elliott Turbomachinery Canada Inc.²⁸ is another example of the importance of basic contract creation principles. This case dealt with a fairly common situation, in which a supplier is asked to do work, but instead of executing a formal agreement, the supplier simply appends a copy of some terms and conditions to an invoice or purchase acknowledgement.

In ***Whitecourt***, Interpro Technical Services was hired by the owner of an electrical generating plant to overhaul a power generator. Elliott Turbomachinery was involved in work on a significant component of the power generator during the overhaul.

The owner subsequently sued Interpro for \$6.7 million in damages it alleged were the result of vibration problems caused by that overhaul. Interpro defended, and alleged that some of the work was performed by contractors, including Elliott. Interpro claimed that Elliot had been directly hired by the owner. The owner denied it hired Elliott. Interpro brought a third party claim against Elliott seeking contribution for the owner's claims. Elliott sought by way of summary judgment to have the third party claim brought by Interpro against Elliot dismissed.

Whitecourt was the appeal of Elliot's summary judgment application to have Interpro's third party claim dismissed. The basis for seeking the dismissal was, among other things, that Elliott claimed there was a limitation of liability clause in a contract between it and the owner. If that were the case, then Interpro would have no claim for contribution against Elliott for the owner's damages, since the owner's damages against Elliott would be limited.

However, it was not clear whether or not the limitation of liability provision was ever agreed to. Whether a contract existed between Elliott and the owner, and what its terms might be, was in

²⁸ ***Whitecourt Power Limited Partnership v. Elliott Turbomachinery Canada Inc.***, 2015 ABCA 252

dispute. There was no signed contract between Elliott and the owner, nor was there any signed contract between Interpro and Elliott.²⁹

Instead, Elliott argued that terms and conditions pages attached to two “Sales Order Acknowledgement” documents (only one of which was created prior to Elliott’s work), and then later attached to an invoice created a contract between it and the owner. The terms and conditions pages included two clauses which Elliott argued limited its liability to the owner.

There was conflicting evidence over who hired Elliott. The sales acknowledgment forms and invoice were allegedly sent by Elliott to the owner, though there was no evidence to confirm whether this was done or was not. The evidence showed that the owner paid the invoice. However, an Elliott employee testified that Interpro (not the owner) asked Elliott to do the work. The same employee also testified that he was under the impression that Elliott was doing the work for Interpro, but that Elliot would be invoicing the owner. He also testified that the purpose of sending the sales order acknowledgments to the owner was to notify the owner that the generator part had arrived at Elliott’s shop.³⁰

The chambers judge who initially heard the summary judgment application concluded that the contractual situation was not clear, and that summary judgment was therefore not appropriate. A dispute existed in terms of which parties were privy to a contract, and over what the terms of the contract might be. The Court of Appeal agreed, finding that “the parties’ contractual terms were an issue of genuine merit” that required a trial, and therefore did not meet the threshold necessary for summary judgment.³¹

While the ultimate decision as to whether the liability limitation applied was left for a future trial (which does not appear to have yet occurred), *Whitecourt* illustrates a typical kind of dispute that can arise when dealing with liability limitations. Often, parties will not execute

²⁹ *Whitecourt* at para. 16

³⁰ *Whitecourt* at paras. 17 to 23

³¹ *Whitecourt* at paras. 24 and 25

formal agreements, but will instead send each other various, often conflicting, purchase orders, purchase acknowledgments, quotations, and invoices that purport to impose terms and conditions that have not been expressly agreed to by both parties. **Whitecourt** shows the risks of such practices, as they can give rise to uncertainty over who the contracting parties are, what the terms of their contract are, and whether any agreement over liability limitations was ever reached.

Whitecourt shows that it may not be sufficient to simply attach standard terms and conditions to sales order acknowledgments or invoices and assume the liability limitations attached thereto apply. In such cases, uncertainty can arise over who the parties might be, and what the terms of their agreement are.

3. *Swift: Who does the limitation apply to and what is its scope*

Disputes over limitation of liability clauses can also involve questions about who is bound by and who is entitled to take the benefit of such a clause, and about the scope of the clause. The recent **Swift v. Tomecek Roney Little & Associates Ltd.**, case dealt with these issues in the context of a limitation of liability provision in a design services contract for a new residential home.³²

Swift concerned a dispute between two homeowners (Mr. and Ms. Swift) as a result of a defective structural design for a new home on Vancouver Island. There were serious deficiencies in the seismic design of the home, giving rise to approximately \$1.9 million in damages. The Swifts sued the architects and structural engineers (who were sub-consultants of the architects) involved with the design.

³² **Swift v. Tomecek Roney Little & Associates Ltd.**, 2014 ABCA 49

A contract existed between one of the Plaintiff homeowners (Mr. Swift) and the architects that contained the following limitation of liability provision:

3.8.1 With respect to the provision of services by the Designer to the Client under this Agreement, the Client agrees that any and all claims which the Client has or hereafter may have against the Designer which arise solely and directly out of the Designer's duties and responsibilities pursuant to this Agreement (hereinafter referred to in this Article 3 as "claims"), whether such claims sound in contract or in tort, shall be limited to the amount of \$500,000.00.³³

The Designer in this paragraph includes officers, directors, his or her employees, representatives and consultants.

The contract defined one of the architects as the "Designer", and Mr. Swift as the "Client". The other Plaintiff homeowner, Ms. Swift (the spouse of Mr. Swift and joint owner of the home), did not sign the contract, and was not referred to in the terms of the contract.

The trial judge found that the contract, and its limitation provision, bound both Plaintiffs, on the theory that Mr. Swift was the agent of Ms. Swift. The judge also found that the limitation of liability provision was broad enough to extend to the engineers. These findings were appealed.

The Court of Appeal explained the "crux" of the appeal was "who is a party to the Agreement and who is bound by or can benefit from the Limitation Clause". That is, whether Ms. Swift was a party to the contract, and whether the non-party engineer could take advantage of the limitation of liability provision found in the contract.³⁴

In terms of Ms. Swift being a party to the contract, the evidence was as follows:

- Mr. Swift testified that he did not have authority to sign the contract on behalf of Ms. Swift;
- The architects testified that they did not believe Mr. Swift was executing the contract on behalf of Ms. Swift;
- The contract only defined Mr. Swift as the "client"; and,

³³ *Swift* at para. 2

³⁴ *Swift* at para. 20

- There was no clear and unequivocal evidence from which to imply that Mr. Swift had implied authority to act as Ms. Swift's agent and sign the contract on her behalf.

Given the above, the Court of Appeal observed that "the evidence at trial established that the Architects intended to contract with Mr. Swift only and that Mr. Swift had no express authority to bind Ms. Swift".³⁵ As such, Ms. Swift was not a party to the contract, and the limitation of liability provision did not apply with respect to her claims.

In terms of the non-party engineer's ability to rely on the limitation of liability clause (as against Mr. Swift), the Court of Appeal concluded that the clause "applies to the liability of the Architects or those retained by them to carry out the prescribed services under the Agreement".³⁶ This included the non-party engineer: its liability could also be limited by way of this clause. This finding was based on the use of the word "Designer" in the clause, which was expressly stated to include the architect's "consultants".

The Court of Appeal also commented, without deciding, on an argument raised about whether the limitation clause applied to limit each individual cause of action, or to the totality of all claims. The limitation provision used the wording "any and all claims...shall be limited to the amount of \$500,000.00". The Court of Appeal observed that "the phrase 'any and all' does not necessary import the meaning of an aggregate sum" and that the argument that the clause applied to each cause of action (rather than to the totality of all claims) "may have merit".³⁷

The Court did not decide whether such an interpretation actually applied, since it ultimately found that the Plaintiffs' claims for negligent misrepresentation were not captured by the limitation. The court explained that the limitation provision applied only to claims that arose "solely and directly" out of the architect's "duties and responsibilities" under the contract. The

³⁵ *Swift* at para. 43.

³⁶ *Swift* at para. 47

³⁷ *Swift* at para. 48

negligent misrepresentation of the engineers was not such a claim, and thus “fall outside the parameters of the” limitation of liability clause.³⁸

In sum, **Swift** highlights a number of considerations to keep in mind when drafting or litigating limitation of liability clauses:

- The limitation clause will only apply to actual parties to the contract. In multi-owner projects, an attempt should be made to ensure that all owners are identified and made parties to the contract. Or, alternatively, a provision should be added to expressly state that the owner who is signing the contract is doing so as agent of, and on behalf of, all of the other owners who agree to be bound. Failure to do so can mean that an owner who is not a party to the contract (like Ms. Swift) will not be subject to any of the contractual limitation of liability provisions.
- Owners should be mindful of limitation clauses that use wording that says the clauses include consultants or subcontractors, or other entities down the contractual chain. Wording like this can extend the application of the limitation provisions to those parties, as occurred with the engineers in Swift.
- Courts will interpret limitation clauses narrowly. Wording such as “any and all claims” might not necessarily mean a limit to the “aggregate sum” sum of all claims in totality. Instead, the limits might apply to each distinct cause of action. Construction disputes often involved a number of distinct causes of action (breach of contract, unjust enrichment, negligence, breach of the duty of honest contractual performance), which give rise to different heads of damage. Parties who want to limit liability in the totality, rather than on a cause of action by cause of action basis should use clear language to that effect.

³⁸ **Swift** at paras. 57 and 58

- Similarly, wording that limits claims arising “solely and directly” out of a party’s duties under a contract might not limit tort claims arising outside of the contract. Clear and express language is needed to properly capture the specific types of claims that the parties intend to be limited. *Swift* accords with earlier Canadian case law which warned that in some instances unless negligence is specifically mentioned, that the parties did not intend to limit claims in negligence.³⁹ Alternatively, parties could use broad language to try to exclude all types of claims (e.g. “any and all claims arising from breach of contract, negligence or other fault of X howsoever arising, or from any other theory of legal liability”) then provide for specific exceptions to the exclusion (for gross negligence, willful misconduct, breach of IP rights, etc.).

D. The second Tercon step: Unconscionability

The second step in the *Tercon* analysis looks at unconscionability. Given that inequality of bargaining power is the “touchstone for intervention”⁴⁰, situations involving unconscionable conduct are more likely to arise in contracts between individuals, or in the consumer context.

Larger, sophisticated, commercial entities, who are often represented by counsel, will generally have sufficient equality of bargaining power to be held to their contractual agreements. Absent inequality, courts “have generally held that contracts should be enforced regardless of the stringency of their terms limiting liability because parties require certainty that negotiated provisions in a contract will be legally enforceable”.⁴¹

Nevertheless, there are situations where unconscionability has arisen in the context of a commercial arrangement between sophisticated commercial parties. *Plas-Tex* is such an example.

³⁹ *Miida Electronics Inc. v. Mitsui O.S.K. Lines Ltd.*, [1986] 1 S.C.R. 752

⁴⁰ *Calgary (City) v. Northern Construction Company Division*, 1985 ABCA 285 at para. 54

⁴¹ *Plas-Tex* at para. 49

In *Plas-Tex*, a petro-chemical company knowingly sold defective natural gas pipe resin, knowing that the resin would be used in natural gas transmission pipelines.⁴² The contract between the petro-chemical company, and one of the companies to which it supplied the resin included clauses that limited the petro-chemical company's liability by stating that its customer accepted all liability for loss or damage resulting from use of the resin.⁴³ One of the many issues in that case was whether the petro-chemical company could rely on the limitation of liability provision to avoid the claim of its customer arising from the defective pipe resin.

The trial judge held that inequality of bargaining power arose when "the sophisticated chemical company with complete knowledge of the formulation of the product, 'knew that there were significant problems with the resin and did not disclose those concerns to' its customer."⁴⁴ The Alberta Court of Appeal agreed, finding that the chemical company was "prevented from relying on the limitation of liability clause in the contract" with its customer.⁴⁵

The facts in *Plas-Tex* were that the chemical company knew (before its first commercial shipment of its resin) that its product was defective, knew pipe manufactured from its product would fail, knew that others would be using the pipe for natural gas transmission, and knew that failures in that type of pipe could result in potential danger to persons and property.⁴⁶ Rather than "disclosing this knowledge" to its customer, the chemical company "chose to protect itself from liability by inserting liability limiting clauses in its contract".⁴⁷ The Court of Appeal concluded that "there can be no doubt that this conduct was unconscionable."⁴⁸

In arriving at that conclusion, the Court of Appeal explained that "unconscionability should be used sparingly to avoid an exclusionary clause". Nevertheless, "a party to a contract will not be

⁴² *Plas-Tex* at para. 1

⁴³ *Plas-Tex* at para. 44

⁴⁴ *Plas-Tex* at para. 46

⁴⁵ *Plas-Tex* at para. 55

⁴⁶ *Plas-Tex* at para 54

⁴⁷ *Plas-Tex* at para 54

⁴⁸ *Plas-Tex* at para. 55

permitted to engage in unconscionable conduct secure in the knowledge that no liability can be imposed upon it because of an exclusionary clause.”⁴⁹

While the Alberta Court of Appeal dealt with **Plas-Tex** as an example of unconscionability, it should be noted that in **Tercon**, Binnie J. used it as an example of a situation where overriding public policy would render a limitation unenforceable. Binnie J. referred to the conduct of the chemical company as being “so contemptuous of its contractual obligation and reckless as to the consequences of the breach as to forfeit the assistance of the court”.⁵⁰

In any event, **Plas-Tex** serves as an example of a situation, in the commercial context, where unconscionability arose and prevented a limitation of liability clause from being enforced. With respect to unconscionability, parties should be particularly mindful of:

- Ensuring that limitation of liability provisions are specifically drawn to the other party’s attention, especially when one of the parties is particularly vulnerable.
- For vulnerable parties, including express recommendations that they should seek independent legal advice and were given the opportunity to do so in the contract itself.
- Ensuring that the reasons for including a limitation of liability provision are fully disclosed, so that legitimate risk/reward allocation purposes are furthered (rather than trying to make use of a limitation of liability).

E. The third Tercon step: Overriding public policy

The third aspect of the **Tercon** analysis looks at whether the public interest in the enforcement of contracts is overridden by a countervailing public policy reason. Three recent decisions touch on this public policy aspect of the **Tercon** analysis.

⁴⁹ **Plas-Tex** at para. 35

⁵⁰ **Tercon** at para. 119

The British Columbia Court of Appeal case of **Roy**⁵¹ is an example of a situation in which fraud was used as a public policy reason to avoid the enforcement of a clause limiting contractual liability.

Roy concerned the purchase and sale of a strata lot that was part of a real estate development on a lake near Vernon, B.C. The purchase contract contained a provision limiting the corporate vendor's damages simply to the return of the purchasers' deposit. The contractual term provided that the return of the deposit was "the Purchaser's sole remedy without further recourse against the vendor".⁵²

At trial, the vendor's agent was found to have engaged in two type of fraudulent conduct. First, before the contract was executed, the agent withheld information that legal action was threatened with respect to the property. Second, after the contract was executed, the agent deceived the purchasers regarding his inability to complete the transaction. The trial judge concluded that the conduct of the agent did not approach seriously criminality nor was it egregious, and enforced the limitation of liability clause.

The purchasers' appealed this finding. The Court of Appeal held that the limitation clause was "unenforceable in the circumstances of this case".⁵³ The Court of Appeal explained that the trial judge erred in requiring conduct that approached "criminal behavior or egregious fraud", and that mere fraud (as opposed to egregious fraud) would be a sufficient reason to not enforce a limitation provision.⁵⁴

The Court of Appeal concluded that the trial judge's finding of fraud "led directly to the [purchasers'] damage". As a result, the limitation clause was unenforceable because the

⁵¹ **Roy v. Kretschmer**, 2014 BCCA 429

⁵² **Roy** at para. 7

⁵³ **Roy** at para. 76

⁵⁴ **Roy** at paras 70 to 74

vendor “should not be allowed to hide behind the exclusion clause to avoid the effect of fraudulent conduct that masked its breach of contract and caused injury to the [purchasers]”.⁵⁵

Precision Drilling Canada Limited Partnership v. Yangarra Resources Ltd.⁵⁶ is another recent example of public policy as a potential means to render a liability clause unenforceable.

The dispute in ***Precision Drilling*** involved a claim for unpaid drilling fees brought by one of the parties (Precision Drilling), and resisted by the other (Yangarra) on the basis of set-off and damages associated with an oil well that was abandoned after a drilling string and bit became stuck in the drill hole. Yangarra raised a number of allegations against Precision Drilling, including fraudulent misrepresentation.

The contract at issue purported to release Precision Drilling “from any liability associated with drilling the well resulting from ‘negligence or other fault of either party or howsoever arising, or from any other theory of legal liability’”.⁵⁷

Precision Drilling was an appeal of a summary judgment application in which, at first instance, a Master and then Chambers Judge held that Yangarra’s claim was excluded by a number of exclusion and limitation of liability clauses. The Chambers Judge found that while the allegations of fraud might not be excluded by the contract, that there was no evidence to support the allegations of fraud.

The majority of the Court of Appeal ultimately held that a trial would be required on the fraud issue, and that summary judgment was not appropriate. In *obiter* the Court noted that even if the limitation clause did have the effect of excluding liability for a claim in fraudulent

⁵⁵ ***Roy*** at para. 75

⁵⁶ ***Precision Drilling Canada Limited Partnership v. Yangarra Resources Ltd.***, 2017 ABCA 378

⁵⁷ ***Precision Drilling*** at para. 40

misrepresentation, that such an exclusion “*may be contrary to public policy.*”⁵⁸ The issue was framed by the majority as follows:

[...] The contract purports to release Precision from any liability associated with drilling the well resulting from “negligence or other fault of either party or howsoever arising, or from any other theory of legal liability”. But even if the contract effectively barred a fraudulent misrepresentation claim (which issue we specifically refrain from making a determination on), the issue would then become one of whether the court could intervene in the name of public policy to nullify that exclusion if a party had a legitimate claim of fraud.⁵⁹

The majority did not rule on this issue, observing instead that “a determination as to whether public policy would intervene in the circumstances would best be made by a trial judge on hearing evidence relevant to the issue.”⁶⁰ The majority held that “the determination as to whether public policy should intervene to render the exclusion clauses unenforceable should take place *after* the factual record is established ...” so as to provide the trial judge the opportunity to “carefully examine” whether public policy reasons exist, and their consequences (on the parties, and on third parties as well).⁶¹

Public policy arguments were also considered, and rejected, by the British Columbia Court of Appeal in ***Felty v. Ernst & Young LLP***.⁶² ***Felty*** involved a claim brought against an accountant for negligent cross-border tax advice it provided to one of its clients. The accounting firm argued that the client’s damages, which were in the range of \$500,000, were limited by a limitation of liability clause that limited damages to the amount of the fees paid to the accountant (about \$15,000).

The limitation provision in question limited the accountant’s “total liability for any claim arising out of the performance of the services, regardless of the form of claim, shall in no event exceed

⁵⁸ ***Precision Drilling*** at para. 11

⁵⁹ ***Precision Drilling*** at para. 40

⁶⁰ ***Precision Drilling*** at para. 11

⁶¹ ***Precision Drilling*** at para. 46

⁶² ***Felty v. Ernst & Young LLP***, 2015 BCCA 445

the total fees paid to [the accountant] for the services.”⁶³ The provision included specific exceptions for personal injury or property damage caused by negligence of the accountant, and for loss caused by fraud or willful misconduct (meaning those types of claims were not limited). The Plaintiff argued that it was contrary to public policy to permit an accountant to limit its liability to the fees paid. Such limitations, it was argued, would stand in the way of the “desirability of holding professional advisors to a high standard of diligence”.⁶⁴

In addressing the public policy argument, the Court of Appeal observed that the “question of enforceability of so-called exclusion clauses” has “vexed Canadian courts for some time”.⁶⁵ It then went on to hold that the discretion to refuse to enforce a limitation clause on public policy grounds “is to be confined to cases that are ‘compelling’ or ‘overriding’”⁶⁶, involving conduct that is so reprehensible that it would be contrary to the public interest to permit a party to avoid liability.⁶⁷

The Court concluded that “as desirable as it might be to hold the accounting profession to a high standard of care”, it was not persuaded that “the giving of erroneous tax advice” rose to that level of reprehensible conduct”⁶⁸ As such, there was no overriding public policy, and the limitation clause was enforceable.⁶⁹

The above three cases indicate that the conduct of the parties, both before and during the performance of the contract, will be the focus of the public policy analysis. Conduct that is criminal or fraudulent in nature will often be enough to persuade a court to not enforce a limitation clause. Public policy reasons will only arise on rare, compelling and overriding instances, in which conduct is so “reprehensible” that the ordinary public interest in enforcing contracts can be set aside.

⁶³ *Felty* at para. 11

⁶⁴ *Felty* at para. 48

⁶⁵ *Felty* at para. 46

⁶⁶ *Felty* at para 51

⁶⁷ *Felty* at para. 53

⁶⁸ *Felty* at para. 53

⁶⁹ *Felty* at para. 53

F. Conclusions

Liability limitations can be useful means for parties to attempt to allocate risks. But, they are only useful if they are enforceable. Enforceability turns on the *Tercon* factors of contractual interpretation, unconscionability and public policy. The enforceability of any given liability limitation will depend on the specific contract and facts.

Case law, like that discussed in this paper, can provide guidance on the sorts of issues that arise during disputes involving contractual liability limitations, and the takeaways from these cases are useful to study and be aware of in contractual situations going forward. Knowledge of current case law is useful to ensure that contracts are drafted with enforceable limitation of liability provisions. After all, they are only useful risk management tools if they are enforceable.