

S.C.C. No.:

**IN THE SUPREME COURT OF CANADA**  
**(On Appeal from the Court of Appeal for British Columbia)**

BETWEEN:

TERCON CONTRACTORS LTD.

Applicant  
(Respondent)

-and-

HER MAJESTY THE QUEEN IN RIGHT OF THE  
PROVINCE OF BRITISH COLUMBIA, BY HER  
MINISTRY OF TRANSPORTATION AND HIGHWAYS

Respondent  
(Appellant)

**AFFIDAVIT**

I, MICHAEL ERNEST, Architect and Provincial Association Executive,  
of 100 - 440 Cambie Street, in the City of Vancouver, in the Province of British  
Columbia, MAKE OATH AND SAY THAT:

**ARCHITECTURAL ASSOCIATION OF BRITISH COLUMBIA**

1. I am Director of Professional Practice for the Architectural Institute of British Columbia ("AIBC"). The AIBC is a self-governing body created by provincial statute and responsible for regulating all aspects of the profession and practice of architecture in the province.
2. As Director of Professional Practice I am responsible for practice issues. I advise AIBC members, the public, partners, and authorities on conditions of engagement and standards of practice
3. I have read the Reasons for Judgment of the British Columbia Court of Appeal in this matter as released on December 3, 2007.

## **TENDERING AND ACCOUNTABILITY**

4. AIBC members are very interested in legal aspects of the tendering process since they are frequently responsible for preparation of instructions to bidders, answering questions and issuing addenda during the tender period, opening and analyzing tenders received, and advising their clients on selection of successful bidders.

5. Although architects owe their primary duties to the owners who engage them, architects also consider themselves bound by a duty of fairness and good faith owed to bidders during the tender process, and to the successful contractor during the construction phase of each project.

6. It is evident to me that fair competition among bidders is an essential aspect of the tendering system. As overseers of the process, architects have a role to play in ensuring that fairness is also extended to the review of bids and, for example, the determination of whether a given bid is eligible or ineligible for consideration.

7. It would be a concern to me and to AIBC members if the tendering process did not include some degree of accountability for owners who choose not to follow the rules set for bidders, or choose to unfairly exercise the discretion reserved to them by the bid rules.

8. I believe most project owners would recognize that accountability to bidders is one of the prices they pay for obtaining the benefits tendering provides.

9. AIBC members, too, recognize that the tendering process is an efficient one because it balances the interests of owners and the interest of bidders. I believe that if this equilibrium is disturbed – for example, if owners were free to select a non-compliant bid and have no resulting obligations to compliant bidders – the tender system and its benefits may not survive.

10. I make this Affidavit in support of an application by the Applicants for leave to appeal to the Supreme Court of Canada.

SWORN BEFORE ME at the City )  
of Vancouver, in the Province of British )  
Columbia on this \_\_\_ day of January, 2008. )  
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)  
\_\_\_\_\_)  
Name: \_\_\_\_\_ )  
A Commissioner for Taking Affidavits )  
in the Province of British Columbia )

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MICHAEL ERNEST