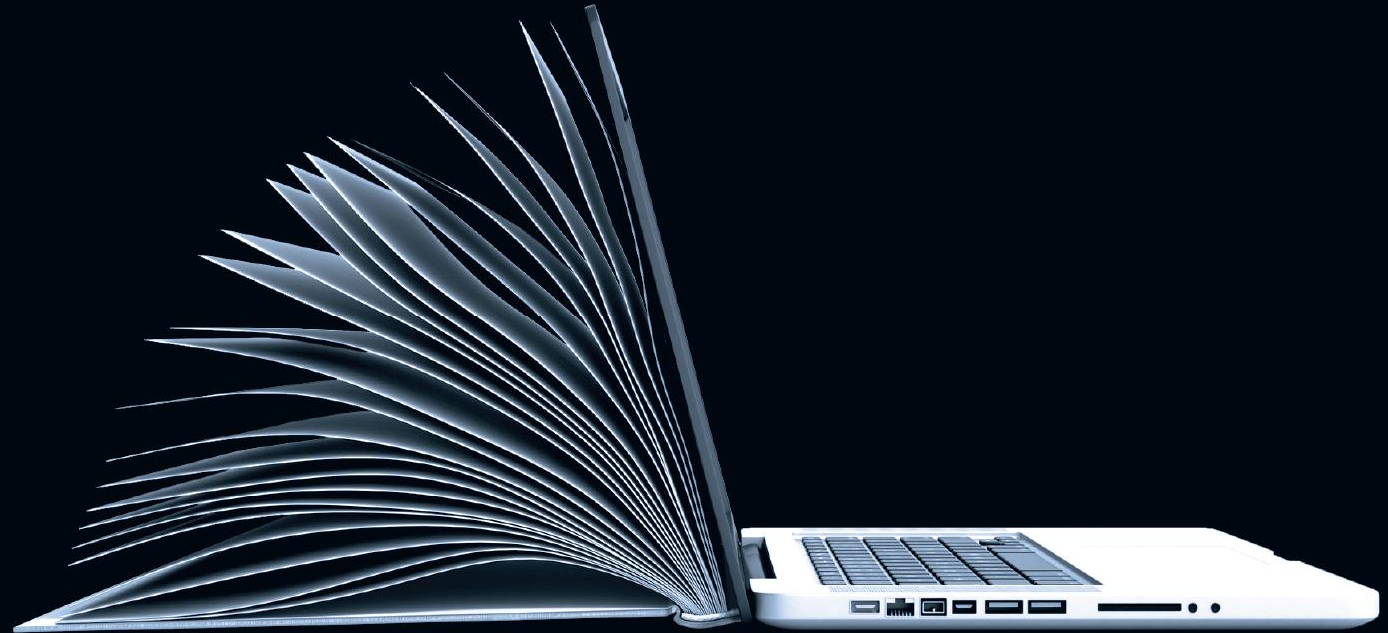




THE CANADIAN  
BAR ASSOCIATION

# LAW SERIES



## The Conflicted Expert: Reinforcing the Obligations of the Claims Consultant

October 13, 2020

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## Setting the Stage: The Role of the Expert

“Expert opinion tendered by a party is a unique type of evidence. Although generally retained by one side to the litigation or the other, experts are expected to be neutral. Their testimony is meant to assist the court and the trier of fact, not to bolster the theory of the case presented by one of the two sides. Their status as experts derives, in significant measure, from the assumption that they will offer the court objective opinions on which the court is entitled to rely.”

Conceicao Farms Inc. v. Zeneca Corp.

2006 CarswellOnt 4558, 214 O.A.C. 161, 272 D.L.R.(4th) 532, 82 O.R. (3d) 229



## Setting the Stage: The Role of the Expert

“... our courts have become increasingly concerned with the lack of objectivity or impartiality that certain experts have apparently exhibited. This is seen as inconsistent with the privileged role that experts are afforded as “assistants” to the court, rather than as advocates for the clients that have retained their services. Indeed, the rationale that justifies allowing expert opinion is based on a recognition that the court does not have the requisite experience or knowledge with respect to a specific issue, and that expert opinion is therefore necessary for the proper administration of justice. Because the court admits such evidence in recognition of its own limitations with regard to certain areas of human knowledge, it is felt that the court ... is more vulnerable to being deceived or misled than with respect to purely factual evidence.



## Setting the Stage: The Role of the Expert

“This vulnerability to expert testimony appears to be the basis for suggesting that expert witnesses owe an additional duty to the court, akin to the duties which lawyers undertake as officers of the court. ...”

“Experts in Civil Litigation: A Retrospective on Their Role and Independence with a View to Possible Reforms”, Guy Pratte, Nadia Effendi, Jennifer Brusse

In Annual Review of Civil Litigation 2008 (Mr. Justice Todd L. Archibald and Mr. Justice Randall Echlin)



**Which brings us to ...**

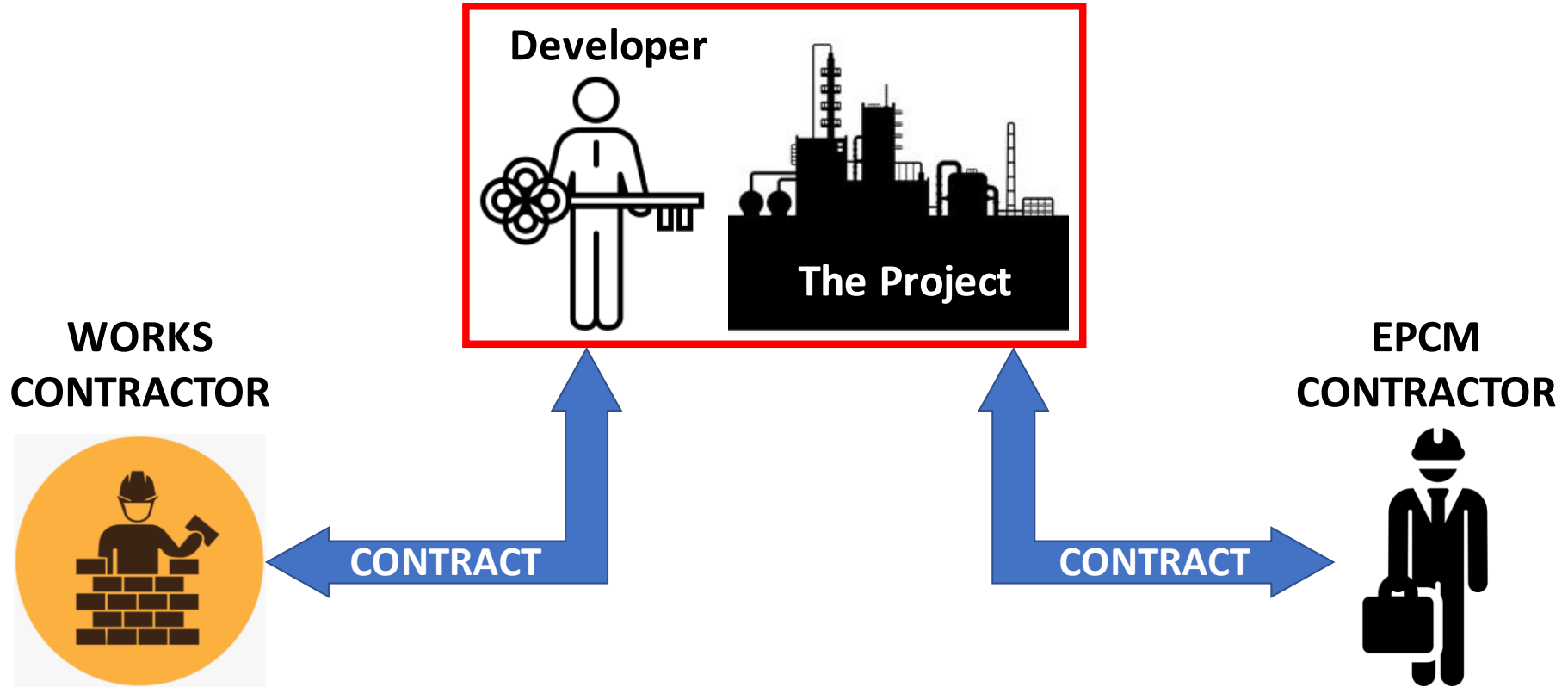
# **A Company v X, Y, Z**

[2020] EWHC 809 (TCC)



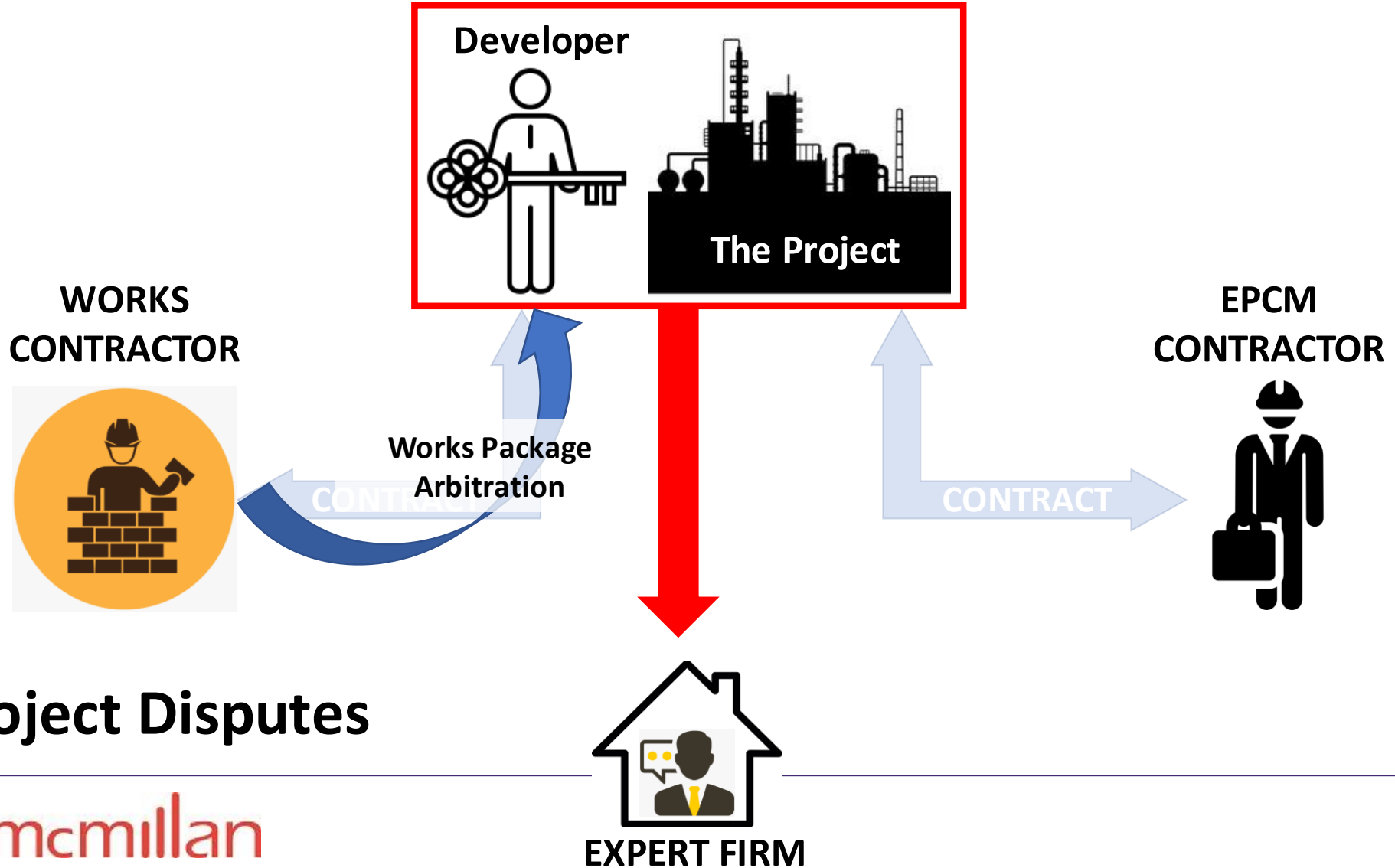
## Background

- Decision from the High Court of England and Wales, Technology and Construction Court, Hon. Madam Justice O'Farrell
- Hearing conducted March 31, 2020. Decision issued April 3, 2020
- The matter related to “..the continuation of an injunction granted by the Court on March 23, 2020, restraining the...(an expert company)... from acting as experts for a third party in ICC arbitration proceedings against the claimant”
- The claimant was a Developer building a petro-chemical plant in the Middle East (the “Project”). The defendant was a construction expert consulting firm
- The primary reason the Developer was seeking the injunction was because the expert company was trying to work on behalf of the Developer in one dispute and work against the Developer in a second dispute ***on the same Project***

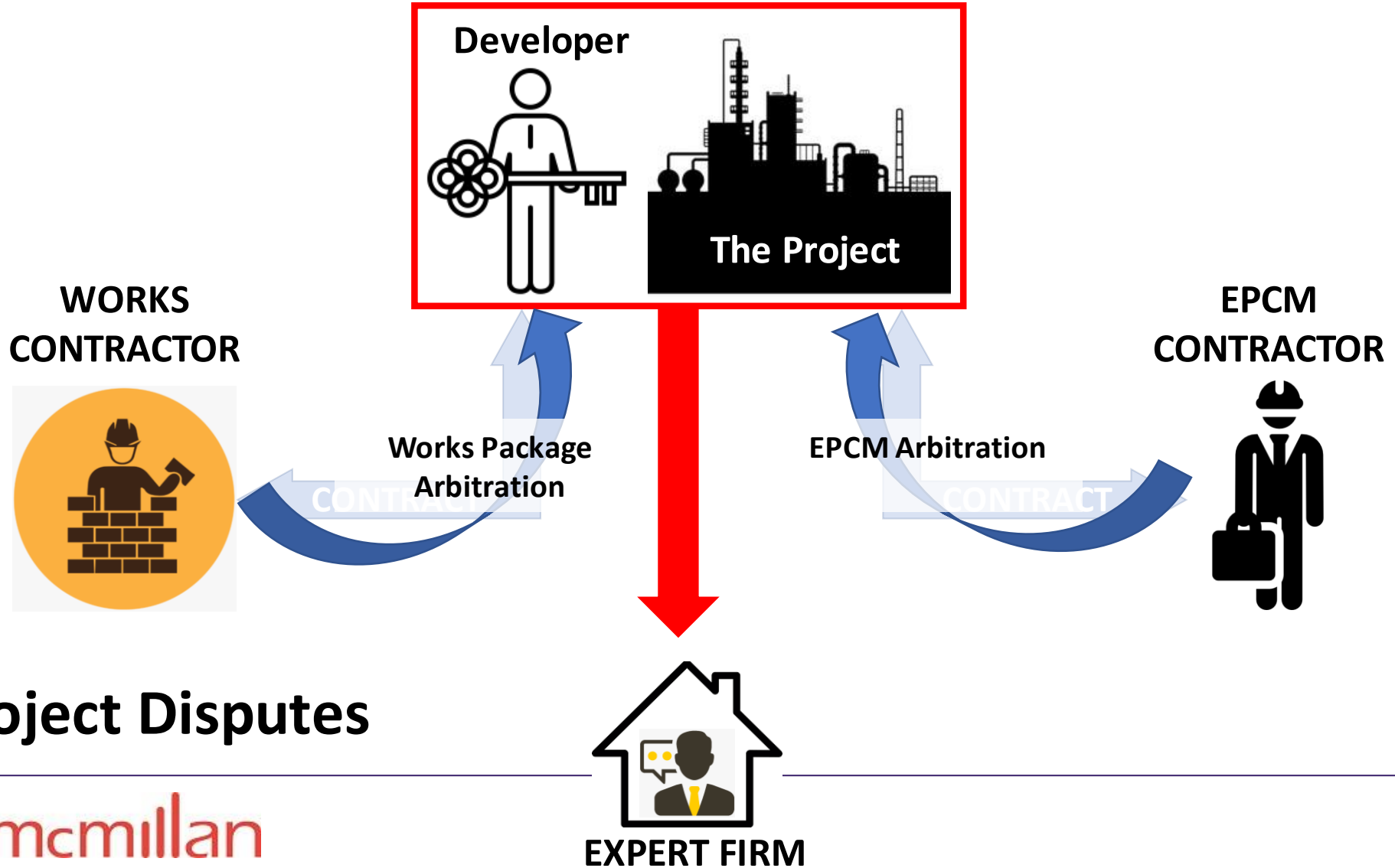


## The Project Relationships

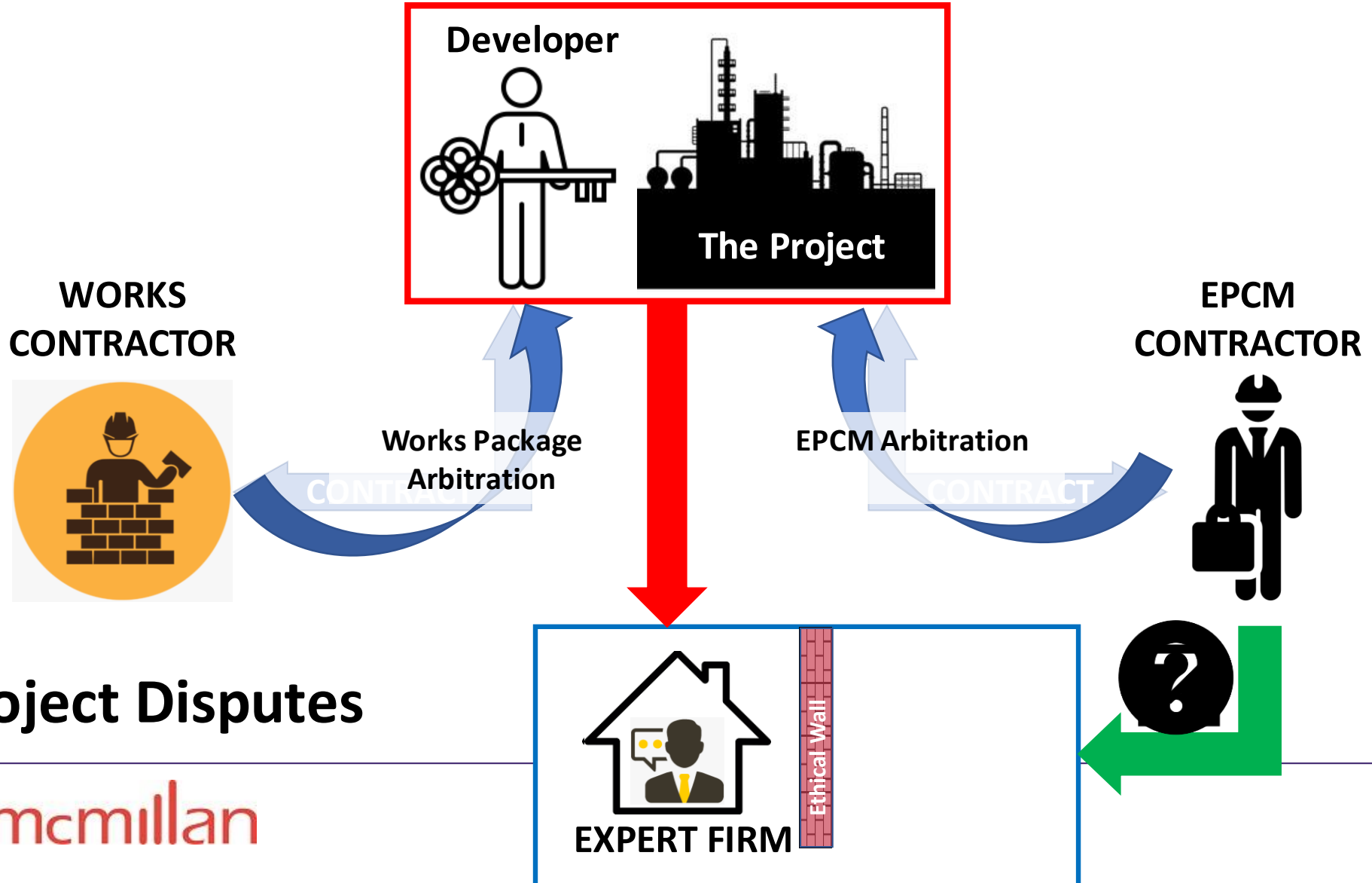




## The Project Disputes

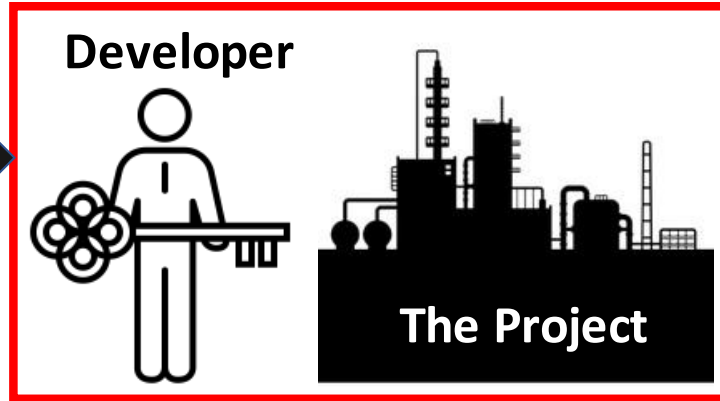


## The Project Disputes



# A v. X,Y,Z

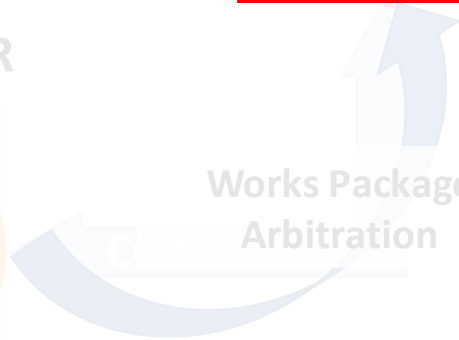
The CLAIMANT ("A  
Company")



WORKS  
CONTRACTOR



Works Package  
Arbitration



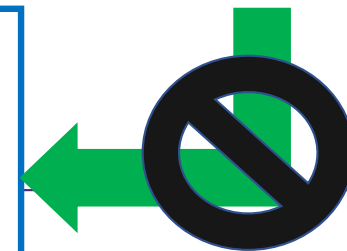
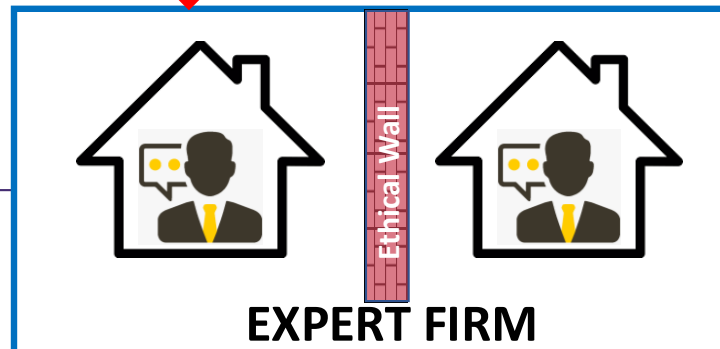
EPCM Arbitration



EPCM  
CONTRACTOR



The DEFENDANT  
("X, Y & Z")





## The Party's Positions

- The Developer - The Expert must not work against the Developer on the EPCM Arbitration as it is a breach of the duty of loyalty that was formed when it agreed to act for the Developer in the Works Package Arbitration.
- The Expert Firm's Position
  1. As independent experts they owe no duty of loyalty to the Developer. Its duty is of independence to the tribunal.
  2. There is no risk that confidential Developer information would be disclosed to the EPCM Company because of separate corporate entities separation and the ethical wall.



## The Decision

The Court determined that:

*“i) The defendant group owes a fiduciary duty of loyalty to the claimant arising out of its engagement to provide expert services in connection with the Works Package Arbitration.*

*ii) The defendant group is in breach of that fiduciary duty of loyalty by accepting instructions to provide expert services in connection with the EPCM Arbitration.*

*iii) Pending trial of this matter, the claimant is entitled to a continuation of the interim injunction to restrain the defendants from providing expert services to the third party in connection with the EPCM Arbitration.”*



## Basis of the court's decision

- An expert retained by a party has a fiduciary duty to that party, distinguished by an obligation of loyalty. The expert must not place himself in a position where his duty and his interest conflict.
- An expert who acts for two principals with potentially conflicting interests places himself into a position where his duty to one *may* conflict with his duty to other. This automatically constitutes a breach of fiduciary duty.
- While the expert owes duties to the court that may not align with the interests of his client (i.e. a duty to render an honest, objective opinion that may not support his client), this paramount duty to the court is not inconsistent with the expert's additional duty of loyalty to the client.



## Basis of the court's decision

- An ethical wall will not suffice. The fiduciary obligation of loyalty is not satisfied simply by erecting an ethical wall. The issue is not that confidentiality is at risk, it is that the duty of loyalty is breached, that the expert has put himself in a position where his duty and his interest *may* conflict.
- The duty of loyalty extends beyond the individual to the company, particularly if the corporate structure of the Expert firm (here, separate entities under a holding company) provides for a common interest in marketing, management and sharing of profits. The expert firm acts as one company. Therefore the duty of loyalty extends to entire group.





## The lawyer's perspective in the Canadian context

- Are expert conflicts a problem in Canada?
- Potential implications to the party – and the lawyer – arising from a failure to consider conflict issues
- Best practices when retaining an expert



## The expert's perspective in the Canadian context

- Creates need for increased scrutiny of conflict check processes
- Establishes important understanding of the limitation of ethical walls
- Need for increased awareness about sharing of information for mandates and potential clients (when does the duty of loyalty become established)



## The arbitrator's perspective on all this...

- Why the arbitrator needs expert evidence
- Why a conflicted expert is a problem
- Assessing the trustworthiness of the expert generally
- How might the problem of the “hired gun” advocate expert be addressed?
- Different approaches in different jurisdictions

# QUESTIONS



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# Upcoming CBA LAW SERIES Webinars

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**Issues in Labour and  
Employment Settlements**  
October 15, 2020



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