Some Recent Judicial and Legislative Developments of Interest to Commercial Litigation Practitioners in Alberta

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1. INTRODUCTION*

The primary purpose of this paper is to identify and discuss certain recent legislative and judicial developments which might be of interest to commercial litigation practitioners in Alberta. The focus is on Alberta legislation and case law. "Recent" is defined as developments occurring in 2008, 2009 and early 2010.

There were far more such developments than could be described in this paper. So the exercise is necessarily selective and discretionary on the part of the author, and the developments described do not purport to be exhaustive. Further, legislative developments affecting the business climate, such as proposal for a national securities regulator and tax changes or developments are not the focus of this paper.

2. CONTRACT INTERPRETATION AND RELATED ISSUES - SOME RECENT DECISIONS

Contract interpretation cases are grouped: first, some decisions of interest about the process of contract interpretation; and second, some specific contract interpretation decisions that have precedential value for other cases.

(a) Contract interpretation process

There are many examples of Alberta cases applying the fundamental principles of contract interpretation that the parties' intention is primarily to be discerned from the objective meaning of the language they chose, and that the court is not to refashion their bargain to arrive at something the Court considers fairer, better or more reasonable than the meaning their words objectively bear. In the words of the Court of Appeal, the Courts give slavish effect to the parties' written agreements.[1]

The courts are continually faced with attempts to vary written bargains based on oral assurances, previous conduct, and the like. Similarly, appeals are made to ambiguity (opening the door to other sources of contract meaning such as the parties' conduct), commercial context, industry custom or practice, and good faith as circumstances that modify the application of the written agreement and as justification to deny summary judgment.

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[1] *Wilde v Archean Energy*, 2007 ABCA 385, at para 43; *Enron Canada v. Marathon Canada*, 2008 ABQB 408, at para 83; *1081748 Alberta Ltd. v. Enervest Resource Management Ltd.*, 2008 ABQB 793, at para. 48.

Absent ambiguity, the Alberta Courts have been careful to discern the bargain from the objective meaning of the words used. This is not to say that the interpretation of an agreement can be isolated from factual evidence. The Courts permit some degree of commercial context to be referred to in understanding the parties' intentions. In the words of Lord Wilberforce:

> No contracts are made in a vacuum: there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as "the surrounding circumstances" but this phrase is imprecise: it can be illustrated but hardly defined. In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.[2]

Consideration of the commercial setting in which a contract is made is not to be confused with parol evidence of the intention of the parties. That is not admissible. But the commercial setting of the contract assists in ascertaining the intention of the parties from the language they have used[3].

It is often observed that a contract must be interpreted considering the factual and legal background against which it was concluded and the practical objectives which it was intended to achieve[4]. Tension arises where one party asserts that the words of the contract are clear and summary judgment ought to be granted while the other asserts that the genesis of the transaction, the background, the context, and the market in which the parties are operating are important and should only be determined at a trial. If evidence of commercial context or surrounding circumstances is always admissible, how may the Court grant summary judgment where the evidence concerning them is contested? As noted below, recent Alberta Court of Appeal decisions appear to place limits on the admissibility of extrinsic evidence of commercial context. They also remind of the importance of tightly drafted clauses and of identifying potential holes that would create litigation risk of a trial over oral and collateral commitments.

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[2] *Reardon Smith Line Ltd. v. Yngvar Hansen- Tangen*, as quoted in *Paddon Hughes Development Co. v. Pancontinental Oil Ltd.* (2004), 223 A.R. 180 (C.A.).

[3] *Bank of British Columbia v. Turbo Resources Ltd*. (1983), 27 Alta. L.R. (2d) 17 (C.A.).

[4] *Morrison v. Rod Pantony Professional Corp*, 2008 ABCA 145, at para. 14; *ATCO Electric Ltd. v. Alberta (Energy and Utilities Board)*, 2004 ABCA 215, 31 Alta. L.R. (4th) 16, at para. 77; *Paddon Hughes Development Co v. Pancontinental Oil Ltd*, *supra* n. 2, at para. 36; *Dreco Energy Services v. Wenzel*, 2008 ABCA 290; *Orbus Pharma Inc. v. Kung Man Lee Properties Inc*., 2008 ABQB 754; *Alpine Resources Ltd. v. Bowtex* (1989), 96 A.R. 278 (QB), at para. 3; *Prenor Trust Co of Canada v. Kirkoff Properties Inc*., [1994] A.J. No. 492 (QB), at para. 14 - 18.