Contract Law Update: Developments of Note

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CONTRACT LAW UPDATE: DEVELOPMENTS OF NOTE (2013)

Each summer, I review judgments dealing with contract law issues looking for decisions of relevance to commercial lawyers and business leaders.[1] Contract law principles typically do not change overnight; rather, they are modified incrementally. Where I find a case that illustrates an incremental change, I use it as a springboard for discussing the state of the law on the particular issue and how it affects commercial practice.

This paper is not meant to be a comprehensive review of Canadian contract law principles, but rather a snapshot of particular principles of interest that arose in case law over the past 12 months.

This year, the topics I have chosen are:

- The implied duty of good faith performance and entire agreement clauses;
- The efficacy of arbitration clauses in terms of finality and certainty;
- The duty to mitigate where specific performance is sought as a remedy;
- Professionals relying on limitation of liability clauses;
- Contracting with First Nations under the *Indian Act*;
- Conditions precedent;
- Binding effect and enurement clauses; and
- Contractual obligations to negotiate in good faith.

If I have not covered a topic of interest to you in this year's paper, I may have covered it in past papers (published in the materials for this seminar in prior years and on-line at http://www.lawsonlundell.com/Team/Lawyers/Lisa-Peters).

If I had to pick a single theme for this year's paper it would be the number of contract-law-related cases that have been heard or will be heard by the Supreme Court of Canada in 2012 and 2013. I have ordered the topics in this paper to deal with these cases (and the issues they raise) first.

[1] I would like to acknowledge the assistance of UBC law student Daniel Draht and University of Toronto law student Peter Rowntree in the research for this year's paper.

Implied Duty of Good Faith Performance and Entire Agreement Clauses

In my 2012 paper, I commented on the decision of the Alberta Court of Queen's Bench in *Bhasin v. Hrynew*, 2011 ABQB 637. In that case, Madam Justice Moen held that where there is an imbalance of power between contracting parties, the stronger party will not be permitted to rely on an entire agreement clause to preclude the Court from implying a duty of good faith performance. The entire agreement clause in that case specifically provided that, "There are no representations, warranties, terms, conditions or collateral agreements, express, implied or statutory, other than expressly set out in this Agreement."

The plaintiff Bhasin operated a business that sold Education Savings Plans. In 1989, Bhasin signed a contract with Canadian American Financial Corp. (Canada) Limited ("CAFC"), under which he operated as an Enrollment Director and received compensation and bonuses for obtaining subscribers for scholarship agreements with a CAFC operated trust plan. While Enrollment Directors under contract to CAFC were independent business people, the relationship was a close one, under which Bhasin was not able to sell other products and owed fiduciary duties to CAFC. In 1998, CAFC decided it wanted to enter into a standard agreement with all Enrollment Directors. Bhasin had input into the process of shifting to a standard contract. Mr. Bhasin agreed to sign the new standard contract after accepting assurances that a specific clause in it would not be interpreted strictly so as to provide CAFC a means to end their relationship. Thereafter, however, CAFC did rely on this clause to let the contract lapse rather than renewing it.

Madam Justice Moen implied a duty of good faith performance (*i.e.*, that decisions whether to renew the contract would be carried out in good faith) and awarded significant damages for its breach.[2]

The case went to the Alberta Court of Appeal (2013 ABCA 98). The Court took the opportunity to articulate ten principles, the application of which led it to allow the appeal and dismiss Mr. Bhasin's claim:

1. There is no duty to perform most contracts in good faith.

2. The only duty of good faith in employment contracts is relatively narrow; not to announce or implement their termination in a harsh or demeaning way.

3. (a) Courts can imply terms in contracts which are not explicit only when the new term is

    (i) so obvious that it was not even thought necessary to mention, or

[2] She also found that the individual defendant had intentionally induced breach of contract and that he and the corporate defendant were liable for civil conspiracy.

(ii) truly necessary to make the contract work at all, not merely reasonable or fair.

(b) Mere foresight of a possible happening is not enough; both parties must have intended the term.

(c) The law's presumption is against implying terms.

4. Notwithstanding #3, a term cannot be implied in a contract which would contradict an express term of that contract.

5. Though Mr. Bhasin's case at trial emphasized mental suffering, it is not compensated in contracts law (partly subject to #2 above on harsh modes of termination).

6. Some degree of inequality of bargaining power, need, or knowledge, is not enough to upset or amend the terms of a contract, short of actual unconscionability.

7. Parol evidence is not to be used directly to interpret a contract

    (a) if its words are unambiguous,

    (b) or to look at the actual subjective intent of one or both parties.

8. A contract can validly exclude or nullify parol evidence, previous negotiations, representations, terms, promises or conditions not found in the written document (absent fraud).

9. Courts should be especially wary of altering or interpreting creatively formal documents carefully negotiated and written, with legal advice.

10. Courts should not attempt after the fact to rewrite a contract to accord with what the court now thinks, or one party now believes, is more just or more businesslike, especially in the full light of hindsight.

The trial judge erred, the appellate court concluded, in implying a term requiring good faith conduct into an unambiguous contract containing an entire agreement clause.

Leave to appeal was granted by the Supreme Court of Canada on August 23, 2013 (Docket 35380). It is exciting to this author that a case raising core contract law and contract interpretation principles and their interaction is on its way to Canada's highest court.

Bottom line: Canadian courts have made it clear that a duty of good faith performance will not be implied as a matter of course into every contract. My papers in prior years

have considered the circumstances in which a duty of good faith may be implied. The issue that the Supreme Court of Canada may resolve is the extent to which an entire agreement clause is effective to preclude such a duty being implied.

Arbitration – When Final and Binding Dispute Resolution Isn't Really Final or Binding

Commercial parties insert arbitration clauses into their agreements because of perceived advantages of arbitration as a dispute resolution process, including:

- Potential for a quicker resolution
- Potential for cost savings
- Confidentiality of proceedings
- Ability to choose the arbitrator
- Ability to choose applicable procedural rules
- World-wide enforceability of arbitration awards under the *New York Convention*
- Finality of the process.

Over the past year, there have been a number of reported cases where parties to a commercial arbitration ended up in court.[3] One particular case illustrates why inserting an arbitration clause will not necessarily result in the certainty and finality or cost savings clients may expect from arbitration as a dispute resolution process.

Under B.C.'s *Arbitration Act*, R.S.B.C. 1996, c. 55,[4] the Supreme Court of British Columbia has a codified supervisory role over procedural aspects of an arbitration, including jurisdiction to appoint and remove arbitrators in certain circumstances and to make orders supporting the arbitration (such as issuance of a subpoena).

The Court may become involved mid-arbitration by deciding a question of law arising in the arbitration. Pursuant to s. 34, a party to the arbitration can make an application to the court for determination of a question of law with consent of the other parties or the arbitrator if it is satisfied that substantial savings in the costs of the arbitration would

[3] By my count, more than 20 cases involving an arbitration award ended up before a Canadian appellate court over the last year.

[4] Formerly the *Commercial Arbitration Act*. The arbitration statutes in other provinces contain similar, but not identical, provisions.

result. The Court also has the power to make an order that the arbitrator give more detailed reasons for an award in certain circumstances (s. 33).

When a party is dissatisfied with the arbitrator's award, the *Arbitration Act* gives them two potential avenues to pursue:

- An application to set aside the award on the basis it has been improperly procured or the arbitrator has committed an arbitral error (s. 30);
- An appeal on any question of law arising out of the award (with leave of the court or with the consent of all parties) (s. 31).

It may be stating the obvious, but if one or both of these avenues is pursued, there is a potential appeal from the B.C. Supreme Court decision to the Court of Appeal and then to the Supreme Court of Canada with leave. In the result, the parties could face four stages in the proceeding,[5] rather than the three they could face were there not an arbitration clause.

A contractual term by which the parties purport to exclude the jurisdiction of the court under sections, 31, 33 and 34 in advance of the arbitration has no effect. Parties may, after an arbitration has commenced, agree in writing to exclude the jurisdiction of the court.[6]

There is a distinct regime, in which the courts have a more limited supervisory role and the parties have more limited recourse to the courts to have an arbitration award set aside, under the *International Commercial Arbitration Act*, R.S.B.C. 1996, c. 233.

The parties in *Creston Moly Corp. v. Sattva Capital Corp*. first arbitrated their dispute regarding a finder's fee in 2008 (under the then *Commercial Arbitration Act*). They are still engaged in litigation five years later, with leave to appeal not one, but two Court of Appeal judgments in the case having been granted to the Supreme Court of Canada in March of this year.

The issue before the court in *Creston* was whether consideration paid in shares is limited by the agreed maximum finder's fee when the value of the shares has increased between market price date and the date of actual payment.

The issue arose after Sattva introduced Creston to a mining deposit in Mexico. Creston's subsequent purchase of the mining interest triggered a finder's fee to be paid in shares of the company (Sattva had the contractual option of taking any combination of cash and

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[5] Not counting the leave application to the B.C.S.C. and to the S.C.C. as distinct stages.

[6] Except in the case of family law disputes.

shares). The Finder's Fee Agreement set an agreed maximum for the finder's fee of $1.5 million under the TSX Venture Exchange policy – Sattva earned the maximum on this transaction.

Shares of Creston rose between the agreed "Market Price" date under the Agreement and the agreed date of payment. A dispute arose, therefore, as to how the shares comprising the payment of the finder's fee should be valued. Creston argued the shares should have been valued at $0.70 per share because that was the value after the agreement had been announced whereas Sattva contended the shares were to be valued at $0.15 each because that was the market price of the shares at closing on the last day before the press release (which would result in Sattva receiving the benefit of the increased share value – approximately $6.5 million).

Creston obtained TSXV approval for the finder's fee in cash and did not pursue approval of the finders' fee in shares at the Market Price of $0.15 as requested by Sattva. The Exchange subsequently confirmed that the minimum share price it would approve for settling the finder's fee was $.70.

The parties took the dispute to arbitration. The arbitrator found that Creston had breached the Agreement by failing to act in good faith and use best efforts in seeking approval of the TSXV of the finder's fee based on $0.15 per share. He awarded damages in the amount of $4,140,000. Creston sought leave to appeal that decision to the B.C. Supreme Court, which was denied by Mr. Justice Greyell on the ground that the application for leave was not based solely on a question of law. That decision to deny leave was appealed to the Court of Appeal, which overturned Greyell J's ruling and granted leave to appeal the arbitrator's decision based on a question or questions of law relating to the arbitrator's interpretation of the Agreement. [7]

The actual appeal under s. 31 of the *Arbitration Act* was heard by Mr. Justice Armstrong of the B.C. Supreme Court, who dismissed it on the merits. [8] Off the parties went to the Court of Appeal for a second time. That Court overturned the judgment of Armstrong J., concluding that, "The finding of the arbitrator and the chambers judge – that Sattva is

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[7] 2010 BCCA 239. Creston translated Newbury J.A.'s reasons into two grounds of appeal when the case went back before the B.C.S.C.: (1) That the arbitrator failed to consider that on a proper construction of para. 3.1 of the agreement that the maximum fee limitation in the proviso applied to payment of the fee in shares as well as to the payment of the fee in cash, or in any combination of shares and cash, and therefore erred in failing to find that the maximum fee payable to Sattva, whether paid in shares or cash, had a maximum value limitation of US $ 1.5 million; and (2) The arbitrator failed to consider Sattva's claim to a fee paid in shares at a price of $0.15 per share (the last price before the press release announcing the acquisition), resulting in a fee many times the value of the maximum fee payable under the para. 3.1 of the agreement, and was an ambiguous construction of the Agreement, and was therefore excluded by the *contra proferentem rule*.

[8] 2011 BCSC 597.

entitled to an $8 million finder's fee in the face of a proviso in the Agreement that limits the fee to $1.5 million creates an absurdity".[9]

Sattva sought leave to appeal both rulings of the Court of Appeal to the Supreme Court of Canada. Leave was granted in March of this year. The Attorney General of British Columbia and the BCICAC Foundation (which operates the British Columbia International Commercial Arbitration Centre) have been granted intervenor status.

We can expect some guidance from the Court as to the role of the courts in relation to arbitration awards. Perhaps that guidance will result in less judicial oversight of arbitration awards or at least less attempts by losing parties to engage that oversight.

Bottom line: For Creston and Sattva, arbitration was anything but final or binding. Clients considering selecting arbitration as a dispute resolution mechanism should understand that an arbitration award is generally not entirely immunized from court review. In B.C., parties cannot agree in advance to oust the supervisory role of the courts under ss. 30 and 31 of the *Arbitration Act*, but if they truly seek finality, they should consider agreeing in writing to exclude the court's jurisdiction under those provisions after the arbitration has commenced. If the contract is governed by another province's law, check the relevant *Arbitration Act* to determine the extent to which the court's jurisdiction can be contractually ousted.

The Duty to Mitigate Where Specific Performance is Sought as a Remedy

In *Southcott Estates Inc. v. Toronto Catholic District School Board*, 2012 SCC 51 [*Southcott*], the Supreme Court of Canada weighed in on the obligation of a party seeking specific performance to mitigate (and on the availability of the remedy of specific performance in relation to investment properties).

Southcott was incorporated solely for the purpose of acquiring a parcel of land. It had no assets other than the funds advanced to it by its parent company for the deposit. The vendor of the property failed to satisfy a condition and refused to extend the closing. Southcott sued seeking specific performance and took the position it had no obligation to mitigate. The trial judge found that the vendor had breached the agreement and had failed to prove that Southcott failed to take advantage of a reasonable opportunity to mitigate its loss. He did not consider purchases made by other members of the corporate group to which Southcott belonged as "mitigatory". He refused to award specific performance but awarded damages of $1,935,500 for loss of chance to make profits.

The Court of Appeal held that the trial judge had erred in his approach to mitigation and concluded that Southcott had unreasonably failed to take available steps to mitigate its loss. It reduced the damages to $1.

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[9] 2012 BCCA 329 at para. 45.

Under the doctrine of mitigation, a plaintiff cannot, in an action for damages, recover for losses that could have been prevented by the exercise of ordinary care on his part. Therefore, such a plaintiff owes a duty to mitigate his loss and cannot recover as damages any sum which is due to his own neglect.[10] But where a plaintiff does take reasonable steps to mitigate, he or she will be able to recover as damages the costs and expenses incurred in taking those reasonable steps, provided that the costs and expenses are reasonable and were truly incurred in the mitigation of damages.[11]

The narrow issue in Southcott was whether a single-purpose corporation is excused from mitigating its losses when a vendor breaches an agreement of purchase and sale, particularly when it has promptly brought an action for specific performance. The short answer from the Court was "no". The broader issue was the extent to which a plaintiff must mitigate where it has claimed specific performance. In responding to that question, the Court outlined a number of key propositions:

- While proof of impecuniosity may relieve a plaintiff from the obligation to mitigate, status as a single purpose corporation in and of itself will not allow a plaintiff to invariably argue that its losses could not be reasonably avoided.

- Southcott did not lead any evidence that it had no access to capital or that borrowing money would have been unreasonably risky or costly – the Court impliedly takes the view that a plaintiff leading such evidence might be relieved from mitigation on the basis of impecuniosity.[12] This indirect endorsement of impecuniosity as a means of avoiding the duty to mitigate is a change from prior case law that prohibited reliance on impecuniosity as a justification for failure to mitigate.[13]

- A corporation within a group of corporations cannot point to purchases of properties by related corporations within the group as mitigation – as a separate

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[10] *Burke v. Cory* (1959), 19 D.L.R. (2d) 252 (Ont. C.A.)

[11] P. Bates, "Mitigation of Damages: A Matter of Commercial Common Sense" (1991-2), 13 Advocates Q. 273.

[12] At paragraph 29, Karakatsanis J. stated: "In the absence of actual evidence of impecuniosity, finding that losses cannot be reasonably avoided, simply because it is a single-purpose corporation within a larger group of companies, would give an unfair advantage to those conducting business through single-purpose corporations."

[13] See, for example, *Mejia v. Omeasoo*, 2000 ABQB 41; *Spurgeon v. Smith*, 2009 BCSC 1526; *Kawanami v. Bartram*, 2013 ABQB 328; *Jones v. McIssac*, 2001 CanLII 33838 (Nfld. S.C.T.D.). But see also *contra*, *Leland Walton & Sons Ltd. v. Hillspring Farms Ltd.*, 2007 NBCA 7. There is also a line of cases that allow recovery where the impecuniosity was caused by the defendant's actions see *Russell v. Turcott*, 2009 ABQB 19; suppl. Reasons, 2009 ABQB 236; *Quinlan v. Quaiscer*, 2009 BCSC 1288.

legal entity, the plaintiff corporation has the duty to mitigate itself by making diligent efforts to find a substitute property.

- A plaintiff deprived of an investment property will not succeed in a claim for specific performance unless it can show that money is not a complete remedy because the land has a peculiar and special value to the plaintiff. On the facts in *Southcott*, the particular qualities of the property in question were only of value due to their ability to further profitability.

Bottom line:

Whether seeking specific performance or damages as a remedy, a plaintiff would be well-advised to mitigate and document the steps it took in doing so. It cannot rely on mitigation steps taken by other in a corporate group and cannot hide behind the fact it is a single purpose corporation. Impecuniosity, which is raised more often in personal injury cases, may have some scope in commercial litigation where the plaintiff is a corporate entity.

The *Tercon* Aftermath Continues – Professionals Limiting Liability

As my 2011 paper revealed, home inspectors were early adopters of the practice of limiting liability to the amount of their fees, taking advantage of the likelihood of limitation of liability clauses being enforced after the decision in *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4.

There was a B.C. Supreme Court decision involving a home inspector this year: *Gordon v. Krieg*, 2013 BCSC 842. Ms. Gordon bought a house in Kelowna, removing subjects after receiving the report of a house inspector. There was a sloping floor in one room, but the inspector told Ms. Gordon it did not relate to the foundation. As it turned out, the foundation in one corner of the building had settled so that floor joists had pulled away from the sill plate on the foundation's top surface. Ms. Gordon was found to be contributorily negligent in the amount of 25%. In the result, she recovered 75% of the home inspector's fee as damages ($408!), although her damages were over $67,000. As the amount recovered was within the monetary jurisdiction of small claims court, she was not entitled to recover her costs, only her disbursements.

Other professionals have jumped on the limitation of liability bandwagon. Cases involving accountants and architects were tried in the past year.

In *Felty v Ernst & Young LLP*, 2013 BCSC 815, the plaintiff received erroneous U.S. tax advice in relation to the transfer of shares in a family corporation to her husband as part of their divorce settlement. She was told that the transfer attracted no U.S. tax, but in fact she ended up paying over $600,000. Ms. Felty's lawyer (Ms. Robin) had retained a subsidiary of Ernst & Young to do valuation work in relation to the family assets. A second Engagement Agreement was drafted by Ernst & Young and executed by Ms.

Robin when she concluded that Ms. Felty required U.S. tax advice. Ms. Robin dealt with a local accountant, Ms. Jacob, who in turn enlisted a tax attorney in Ernst & Young's California office to give the actual advice.

One of the principal issues at trial was whether the Engagement Agreement, and in particular the limitation of liability clause contained in it, bound Ms. Felty, since the other named contracting party was Ms. Robin's law firm. Mr. Justice Truscott concluded on the evidence that the law firm executed the Engagement Agreement as agent for Ms. Felty, who was its disclosed principal.

The limitation of liability clause at issue was present in both the first Engagement Agreement for the valuation work and the second Engagement Agreement for the tax advice. It read as follows:

> ... the parties agree that:
>
> (c) EY'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 an amount equal to the total fees paid to EY for the Services. This clause shall not limit EY's liability for death, personal injury or property damage caused by the negligent acts or omissions of EY and its partners and staff, or for loss or damage caused by their fraud or wilful misconduct.

Interestingly, there was evidence that Ms. Robin objected to the clause in the first Engagement Agreement and was told it was non-negotiable and that if she was not prepared to sign the standard form Engagement Agreement, Ernst & Young would not take on the engagement.

Ms. Felty argued that if she was bound by the Engagement Agreement, then the limitation of liability clause was unenforceable on public policy grounds. She submitted that to allow a major accounting firm to hide behind this type of limitation of liability provision and not be accountable for their negligence, which was the sole cause of the plaintiff's loss, would be contrary to public policy and that the public policy of ensuring professionals are accountable to the public should outweigh the policy of protecting freedom of contract. The accounting firm, in turn, stressed that Ms. Felty had the benefit of independent legal advice and could have chosen to engage another firm if the limitation of liability clause was not acceptable to her.

Mr. Justice Truscott upheld the limitation of liability, noting that Ms. Felty was independently advised by Ms. Robin and had at least one other choice of professional for the tax advice (the firm that did her return each year) whose retainer agreement included a less onerous limitation of liability. Accordingly, although her losses exceeded $600,000, Ms. Felty recovered only the amount of Ernst & Young's fees -- $15, 314.95.

In *Swift v. Eleven Eleven Architecture Inc*., 2012 ABQB 764, the agreement containing a limitation of liability clause was between an architectural firm and a land owner who wanted to build a new family home and retained the architects to do the design work (only Mr. Swift was a party to this agreement although his wife was a party to the tort claims against other defendants and a joint owner of the property) (the "Architect Agreement"). The architectural firm in turn engaged a structural engineering firm ("TRL") to do the structural design. There was no written contract between the Swifts and the engineering firm. There were letter agreements between the architectural firm and TRL.

The limitation of liability clause in the Architect Agreement read as follows:

> 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. The Designer in this paragraph includes officers, directors, his or her employees, representatives and consultants.
>
> 3.8.2 The Prime Consultant/Designer agrees to enlist the services of a registered Professional Engineer (whose fees for services are included within the contract amount of this agreement) whose professional stamp will be included on all relevant drawings and who shall certify to the structural soundness of the design.

Mr. Swift acknowledged that he received legal advice about this clause and that the amount of the limitation was the subject of negotiations (with the architects starting at $100,000 and Mr. Swift at $1,000,000).

The project ran into budget and scheduling problems. The Chief Building Inspector raised concerns about seismic design and took the position that the residence had to be built in compliance with Part 4 of the B.C. Building Code.

The Swifts sued the architects in contract and TRL in negligence. They alleged that the residence would require repairs and sought damages for mental distress and for the delayed occupancy. The architects settled with the plaintiffs for $1,000,000.

TRL (and its principal) sought to shelter under the limitation of liability clause in the Architect Agreement, taking the position that they fell within the express language of the clause (as consultants) and were third party beneficiaries under the contract despite the fact they were not parties to it. They argued that despite the fact that Mrs. Swift was not

a party to the Architect Agreement, she was bound by it because Mr. Swift entered into it on his own behalf and as her agent.

The trial judge held that the limitation clause applied to TRL. Applying the analysis in the Supreme Court of Canada cases on third party beneficiaries to a contract,[14] Mr. Justice Miller held that TRL and its principal were in the contemplation of the parties to the Architect Agreement and were performing the very work thereby contemplated. He held that the limitation clause applied to their liability in tort as well as contract. In his view, to find otherwise would permit the plaintiffs to escape the application of a negotiated contractual term, contrary to the principles set forth in *Tercon*.

The plaintiffs' damages were assessed at over $1.9 million. The liability of the defendants globally was limited to $500,000 as per the Architect Agreement. The plaintiffs ended up recovering $1,000,000 because of the settlement with the architects and were limited to a $500,000 recovery from TRL. The architects recovered $500,000 from TRL on the basis of indemnity.

Bottom line: With professionals other than lawyers, limitation of liability clauses appear to have become a matter of standard practice, with many professionals limiting their liability to the amount of their fees. When retaining professionals for your clients, be alive to this development; clients may need to shop around to find professionals who are not limiting their liability in this way.

Contracting with First Nations under the *Indian Act*

A recent Saskatchewan decision serves as a reminder that when transacting with a First Nation, it is important to confirm the statutory or other applicable formalities required for the contract to be valid.

In *W. Downer Holdings Ltd. v. Red Pheasant First Nation*, 2012 SKQB 468, the plaintiffs were related gravel companies who entered into two gravel pit development, crushing and reclamation agreements with the First Nation. The First Nation Chief signed both agreements on behalf of the Band, which were not submitted to and approved by Chief and Council.

The First Nation made the requisite payments under the first agreement, but not the second. The plaintiffs sued. A settlement of the action was negotiated between a band member (Wuttunee) and the principal of the plaintiff companies, and a settlement agreement was drafted by the plaintiffs' lawyer. Wuttnee was not a member of Band Council. Rather than taking the proposed settlement agreement to Band Council for approval, he approached and obtained individual signatures of six Band councillors

[14] *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299; *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.* [1999] 3 S.C.R. 108.

(constituting a majority). The plaintiffs executed the settlement agreement and forwarded to the lawyer who was acting for the First Nation in the litigation. When the First Nation did not make the payments contemplated by the settlement agreement, the plaintiffs sued to enforce it. At trial, Scherman J. addressed the issue of the settlement agreement's enforceability in the context of s. 2(3) of the *Indian Act*, R.S.C. 1985, c. I-5, which provides as follows:

> (3) Unless the context otherwise requires or this Act otherwise provides,
>
> > (*a*) a power conferred on a band shall be deemed not to be exercised unless it is exercised pursuant to the consent of a majority of the electors of the band; and
> >
> > (*b*) a power conferred on the council of a band shall be deemed not to be exercised unless it is exercised pursuant to the consent of a majority of the councillors of the band present at a meeting of the council duly convened.

The First Nation argued that the settlement agreement was not binding on it as s. 2(3)(b) had not been complied with because under this provision, the powers conferred on Council are deemed not to be exercised unless done pursuant to the consent of the majority of the councillors present at a meeting of the Band Council duly convened. The plaintiffs argued that Indian bands have an implied power to contract, without the need for authority being found in the *Indian Act* and, in the alternative, argued that s. 2(3) should be interpreted in a generous, broad and remedial way so as to recognize this implied power and permit bands to be governed by the usual laws of contract. Such an interpretation, they posited, made practical and commercial sense in light of the increasing involvement of Indian bands in commercial transactions.

Mr. Justice Scherman reviewed existing jurisprudence on s. 2(3) and distinguished cases in which the Band council, properly convened, voted to authorize the Chief or someone else to negotiate or sign a specific contract. He held that the fact that a majority of the councillors signed the settlement agreement did not suffice, when the statute required a meeting. He analogized band councils to municipal councils, and explained the requirement for a meeting in s. 2(3)(b) as follows:

> For band councils and a host of other decision-making bodies including municipal councils, decisions cannot be made without the matter being brought before a meeting of the body. This permits all members of council who might disagree the opportunity to voice their opposition and reasons for their opposition. The required meeting and debate might well change the views of those who came prepared to approve. One of the strengths of the democratic process is the opportunity to debate matters to be decided and to convince others. The requirement for matters to be dealt with and approved at a meeting of the body, ensures public transparency relating to the decisions of governing bodies. In each of the cases relied upon by the

> plaintiff, the band or the band council had the opportunity to debate the matter and made a decision to authorize its chief to proceed.

His Lordship then went on to consider whether the Band was bound by virtue of the ostensible authority of the Chief. He referred to a decision of the Nova Scotia Supreme Court, *Maloney v. Eskasoni Indian Band,* 2009 NSSC 177, in which Mr. Justice Moir confirmed that the indoor management rule does not apply to Band councils, but recognized that a First Nation may be bound by actions of an agent exercising ostensible authority.

Had the Chief or Band manager negotiated and signed the settlement agreement, Scherman J. concluded, there might have been scope for finding ostensible authority. While all of the councillors acting as a collective might be viewed as having ostensible authority to bind the Band, he was of the view that individual councillors or a collection of councillors did not in light of the way in which Band council authority is dealt with in the *Indian Act*.

Bottom line: Clients entering into commercial contracts with First Nations should not assume that legal principles developed in the context of contracts entered into by corporations apply. The indoor management rule does not apply to First Nations. Where the First Nation is one to which the *Indian Act* applies, care should be taken to ensure that s. 2(3) is complied with. Where the First Nation is outside the *Indian Act,* you should determine the required formalities arising from the relevant land claim agreement and related legislation.

Conditions Precedent – Two Kinds or Three (and Why do I Care)?

Conditions precedent are a category of contractual term that is frequently the subject of litigation. Where a clause describes a state of affairs that must exist before an obligation becomes enforceable, it is typically referred to as a condition precedent.

Categorization of conditions precedent is important both in terms of the question of whether the condition can be waived (and by whom) and in terms of the consequence of non-fulfillment of the condition. A condition precedent may be framed so as to stipulate states of affairs that must exist before the very contract comes into existence or may merely make conditional the enforceability of particular undertakings within a contract.

What parties and judges refer to as conditions precedent are usually the latter category, that is, terms that suspend one party's further performance obligations until the condition is fulfilled by the other party. By contrast, a true condition precedent results in there being no binding contract until the condition is fulfilled. As part and parcel of the policy of seeking to uphold contractual bargains, courts are disinclined to label a condition precedent as a true condition precedent. A true condition precedent is an external condition dependent upon a future uncertain event, the happening of which depends entirely on the will of a third party.

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The categorization of a condition precedent as a "true condition precedent" or not impacts on whether the condition precedent can be waived unilaterally. In 1959, the Supreme Court of Canada held that a true condition precedent cannot be waived by one of the parties to a contract, even if it was inserted for their benefit, absent express reservation of a power of waiver.[15] In jurisdictions where this common law proposition has not been modified by statute, there will be no enforceable contract if the true condition precedent is not fulfilled (or waived by all parties).[16]

In B.C., the common law has been modified by s. 54 of the *Law and Equity Act*, R.S.B.C. 1996, which has been interpreted as applying to all conditions precedent, including true conditions precedent:[17]

> If the performance of a contract is suspended until the fulfillment of a condition precedent, a party to the contract may waive the fulfillment of the condition precedent, even if the fulfillment of the condition precedent is dependent on the will or actions of a person who is not a party to the contract if
>
> (a) the condition precedent benefits only that party to the contract,
>
> (b) the contract is capable of being performed without fulfillment of the condition precedent, and
>
> (c) where a time is stipulated for fulfillment of the condition precedent, the waiver is made before the time stipulated, and where a time is not stipulated for fulfillment of the condition precedent, the waiver is made within a reasonable time.

Despite the statutorily-modified law in B.C., solicitors practicing here still need to be able to distinguish between a true condition precedent and an ordinary condition precedent since they often will be dealing with contracts governed by the law of other jurisdictions and because even in B.C., categorization of a condition precedent as a true condition precedent matters in terms of the consequences of its non-fulfillment (assuming it is also not waived).

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[15] *Turney v. Zhilka*, [1959] S.C.R. 578.

[16] See the discussion in recent appellate decisions in other provinces: *Hilchie v. Waterton Condominiums Inc.*, 2012 NSCA 126; *Leasing Group Inc. v. Prospect Developments (2003) Inc.*, 2011 ABCA 83; *Swan Group Inc. v. Bishop*, 2013 ABCA 29.

[17] See, for example, *Gulston v. Aldred*, 2011 BCCA 147 and *Tenenbaum v. Broome* (1981), 26 B.C.L.R. 346 (S.C.).

In British Columbia, and in Saskatchewan, courts apply the tri-partite approach to categorization of conditions precedent suggested by Mr. Justice Lambert in dissent in the 1985 decision in *Wiebe v. Bobsien.*[18]

His three categories, as summarized in a recent Saskatchewan decision,[19] are:

> (i) *Entirely subjective* – Such a condition is entirely dependent on the subjective state of mind of the contracting parties. It is only a standing offer. No contract is created. Since there is no contract, there is no obligation to act in good faith to remove the condition; either party can walk away from the agreement. The contract does not exist until the condition precedent has been met or waived.
>
> (ii) *Clear, precise and objective* – When the condition is fulfilled, the contract is completed. Neither party can withdraw from it, although performance of the contractual obligations remain in suspense until the objective condition precedent is fulfilled.
>
> (iii) *Partly subjective and partly objective* – In this situation, there is an implied term that the parties will take all reasonable steps to cause the condition precedent to be fulfilled. This categorization applies when the obligation is objective, but one of the contracting parties has to do something to cause the condition precedent to be fulfilled. Examples of such conditions are when a purchaser of real property is obligated to seek approval of a plan of subdivision or to seek financing to close the deal.

According to this analysis, a true condition precedent is one that is entirely subjective.

Mr. Justice Lambert's three categories of condition precedent were revisited by the B.C. Court of Appeal in 2012 in *Peier v. Cressey Townhomes Ltd. Partnership*, 2012 BCCA 28.

An addendum to a developer's standard form purchase agreement (for the sale of a newly constructed townhouse in Whistler) contained the following condition:

> It is a condition of this contract that the power/hydro lines on Nancy Greene Drive be buried prior to completion. Should the power lines not be

[18] (1985), 64 B.C.L.R. 295 (C.A.), leave to appeal refused, [1985] 2 S.C.R. v (note). The majority of the Court of Appeal endorsed this approach in *Mark 7 Development Ltd. v. Peace Holdings Ltd*. (1991), 53 B.C.L.R. (2d) 217 (C.A.), leave to appeal refused, [191] 3 S.C.R. ix.

[19] *Perrault v. Ruchotzke*, 2012 SKQB 465 at para. 19.

> able to be buried, the Purchaser may cancel this contract at their option and have all deposit monies returned including interest.

On the date for completion, the purchaser gave notice that he would not be completing and was terminating the agreement because the power lines had not yet been buried. The vendor, in turn, gave notice that the completion date was delayed. The purchaser then sued for return of his deposit. The trial judge framed two issues: did the power lines clause permit the purchaser to terminate the agreement and did the vendor have the contractual ability to extend the completion date? He characterized the power lines clause as a "fundamental condition" which gave the purchaser the right to elect to terminate the contract if that clause was breached. He held that the vendor had no right to extend the completion date.

In the Court of Appeal, Mr. Justice Lowry took the view that whether or not the power line clause entitled the purchaser to terminate the agreement depended on the nature of the clause as a condition, *i.e.,* whether it was a true condition precedent or simply a condition precedent.

He endorsed Mr. Justice Lambert's three categories and held that the power lines clause was the third kind of condition precedent (so not a true condition precedent). It was partly objective since burying the power lines was something BC Hydro was required to do but also partly subjective because the vendor was required to make arrangements and pay to have the work done. With this type of condition precedent, he held, the court will imply a term whereby the party responsible for having the condition fulfilled promises to make a *bona fide* effort to have it done. Until the condition is fulfilled or waived, the obligation of the parties to complete the transaction will be suspended. The purchaser, then, was not entitled to walk away from the purchase. He was obligated to complete the purchase whenever the power lines were buried providing that this was done prior to the extended outside date for closing.

Courts in Alberta have moved away from a focus on whether a condition operates to merely suspend performance obligations or to prevent contract formation until it is fulfilled. Rather than adopting Mr. Justice Lambert's three categories of conditions, Alberta courts have focussed on distinguishing between true conditions precedent and ordinary conditions. The two essential qualities of a true condition precedent in that province are: 1) it cannot be unilaterally waived; and 2) it depends on a future, uncertain event, which depends upon the will of a third party.

In *1092369 Alberta Ltd. v. Joben Investments Ltd*., 2013 ABQB 310, the condition in question required a plan of subdivision to be registered and building permits being obtainable by a set date. The Agreement provided that the buyer and seller could unilaterally waive or satisfy their conditions by giving notice on or before a set date (the "Condition Date"). Both buyer and seller were contractually required to use reasonable efforts to satisfy their conditions and an express term stated that the Contract was intended to create binding legal obligations.

Joben had obtained conditional approval of its subdivision, but until certain conditions imposed by the City of Edmonton were fulfilled, the subdivision plan could not be registered. Those conditions were not fulfilled by the Condition Date and Joben gave notice it would not close. The plaintiff alleged that Joben had not made the required reasonable efforts. Joben argued that the subdivision registration condition was a true condition precedent, and as it did not waive the condition, its failure to secure registration of the subdivision plan by the set date brought the contract to an end.

Mr. Justice Brown concluded the condition was not a true condition precedent because the parties had expressly provided that it could be unilaterally waived. Since this was a term upon which the parties agreed, he held that it should govern. To allow otherwise, in his view, would disrespect their liberty to contract while undermining one of the central purposes of a contract, which is to bring certainty to the parties' relationship, particularly their mutual obligations and entitlements. In the alternative, he found that the condition was not a true condition precedent because it was not dependent upon the exercise of discretion by others such as the City. Subdivision had already been conditionally approved and all that remained was for Joben to satisfy the conditions. He held that Joben breached its contractual obligation to use reasonable efforts to satisfy the condition and awarded damages to the plaintiffs.

Bottom line: Where the characterization of a condition is not clear, courts will still need to address whether the condition was intended to be true condition precedent or not. That question will be decided based on principles of contract interpretation. In provinces that do not have a provision equivalent to s. 54 of B.C.'s *Law and Equity Act*, one way of signalling the parties' intention that a condition is not a true condition precedent will be to expressly provide for its unilateral waiver by one of the parties. Where the intention is for the condition to be a true condition precedent, expressly describing it as such and stipulating that it cannot be unilaterally waived should be determinative. In B.C., where the ability to waive most conditions is statutorily mandated, very explicit language may be required to ensure characterization of a condition as a true condition precedent. In this province, a condition dependent on the subjective state of mind of a party may be the only type of condition that can be characterized as a true condition precedent.

Binding Effect and Enurement Clauses

Almost invariably, contract drafters include a boilerplate clause providing that the agreement enures to the benefit of and is binding on the parties and their respective heirs, executors, administrators, successors and assigns.

The purpose of such a clause is to ensure the continuation of all rights and liabilities contained in a contract from one party to another and to bind substituted parties

(whatever their mode of substitution for the original parties) notwithstanding the doctrine of privity.[20]

Where the relevant contractual rights and obligations pass to a third party by operation of law, an enurement clause doesn't really accomplish anything; however, it is often placed in agreements as a catch-all for personal rights that may not pass by operation of law.

It is the references to successors and assigns in such a clause that are usually relevant from a commercial law perspective.

It is important to consider the interaction of this boilerplate clause with any clauses dealing more specifically with successorship or assignment rights of the parties, such as clauses prohibiting assignment without consent, or limiting assignment to related corporations, *etc*. A boilerplate enurement clause will not be interpreted as permitting an assignment contrary to or inconsistent with a specific clause governing assignment rights.

Assume the existence of a corporate successor to an original corporate party to the contract or a party to an assignment from one of the original contracting parties. Does a boilerplate enurement clause remove concerns about lack of privity between the other original contracting party and the successor or assign?

In a recent decision, the Ontario Court of Appeal seems to be saying exactly that, at least in the context of the successor or assign enforcing obligations to their benefit.

In *Brown v. Belleville (City)*, 2013 ONCA 148, a farmer (Sills) and the municipality entered into an agreement in 1953 under which the municipality agreed to perpetually maintain and repair that part of a storm sewer drainage system that it had constructed on and near the farmer's lands (the "Agreement"). Sills died in 1966 and the property changed hands several times until it was acquired by the Browns. The original municipality became part of the Corporation of the City of Belleville (the "City") in the late 1990's as part of an amalgamation. Accordingly, both parties to the litigation were "successors" under the enurement clause, which read as follows:

> THIS INDENTURE Shall inure [sic] to the benefit of and be binding upon the parties hereto and their respective heirs, administrators, successors and assigns.

The original municipality breached the Agreement early on. The owners who held the property after Sills in the 1980s tried to hold the municipality to its obligations but the municipality unilaterally repudiated the Agreement. When the Browns acquired the property they asked the City to honour its maintenance and repair obligations under the

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[20] Cynthia L. Elderkin and Julia S. Shin Doi, *Behind and Beyond Boilerplate: Drafting Commercial Agreements*, 3rd ed. (Toronto: Carswell, 2011) at 668.

Agreement, which the City refused to do. In defending the lawsuit brought by the Browns, the City argued, among other defences, that the Browns had no standing to enforce the Agreement since they had no privity of contract with the City. The Browns responded by arguing that the enurement clause was an “exception” or qualification to the privity of contract doctrine, relying on the Supreme Court of Canada jurisprudence dealing with third party beneficiaries. The trial judge adopted this argument, finding that the Browns, as successors under this clause, had standing to sue the City.

The Court of Appeal did not agree that an enurement clause was properly described as an “exception” to the doctrine of privity on the current state of the law. Madam Justice Cronk reviewed third party beneficiary cases and found they were not directly on point since they were not dealing with an enurement clause.

However, Her Ladyship held that the strict application of the doctrine of privity would ignore the nature, stated purpose and express terms of the Agreement and allow the City, as the original covenantor, to escape the covenants to which, as a matter of law, it must be seen to have expressly consented. In these circumstances, she said, the strict application of the doctrine of privity should not stand in the way of justice. Having stepped into the shoes of Farmer Sills, the original contracting party, the Browns were entitled to enforce the Agreement.

In the alternative, Madam Justice Cronk held that the Browns would have standing to enforce the Agreement based on the principled exception to the privity doctrine on the basis that the original contracting parties intended to extend the benefit of the City’s covenants to an ascertainable group or class of persons that included the Browns.

Brown v. Belleville (City) was applied in *Dekort v. Kilmer*, 2013 ONSC 4434. The agreements at issue in that case were Private Road Maintenance Agreements between Van Hove Construction Limited and a group of private land owners. The defendants (the Kilmers) purchased their property from Van Hove. While there was an Agreement between Van Hove and the Kilmers and between each of the other land owners and Van Hove, the Kilmers were not parties to the Private Road Maintenance Agreements with the other land owners. When the neighbouring property owners sought to enforce the Agreements to which they were parties against the Kilmers by a submission to mediation or arbitration, the Kilmers argued that they were not bound by the Agreements.

Mr. Justice Lofchik noted the binding effect and enurement clause found in each of the Agreements, and concluded that it showed an intent that each of the parties should benefit from the Agreement with each of the other parties with respect to the very activity contemplated by the Agreements, namely a sharing of the cost of the maintenance of the road, a right to require a meeting of the parties for the purpose of discussing and resolving any issues and the right to have unresolved issues submitted to mediation or arbitration.

Given the facts of these cases, the relaxation of the doctrine of privity in each of them is not particularly surprising. What will be interesting is the extent to which parties may seek to extend the *ratio* in these cases to other circumstances and, in particular, to circumstances where the successor or assign is not seeking to enforce a benefit under a contract but rather a contracting party is seeking to enforce an obligation imposed under the contract on such a person. In my view, reliance on a binding effect and enurement clause in that situation would be contrary to the doctrine of privity as it is currently applied by Canadian courts.

Bottom line: Binding effect and enurement clauses may be inserted in contracts as a matter of routine. It is important to keep two things in mind: 1) you need to ensure that they are consistent with any specific clauses in the agreement dealing with assignment and successorship rights; and 2) while boilerplate in nature, such clauses have contractual force. If an original contracting party only seeks to be personally bound to perform a particular covenant by the other original contracting party (and not its successors or assigns) that intention should be made plain.

Is there a Duty of Good Faith Negotiation? Foreshadowing Next Year's Paper

It is uncontroversial that Canadian law does not recognize a duty of care (in tort) to negotiate in good faith.[21] As a corollary of this proposition, Canadian courts have not recognized a pre-contractual duty to negotiate in good faith. Second, courts are reluctant to imply a duty to negotiate *in good faith* as a means of saving a bare contractual obligation to negotiate that is otherwise too uncertain to be enforceable. Third, even where there is an express term in an existing contract requiring parties to negotiate or negotiate in good faith towards a new contract or contract renewal, there is some debate as to the enforceability of such a term.

The vast majority of cases considering an express duty to negotiate a future contract or terms of a future contract (such as a right of renewal in a lease) have found it to be unenforceable.[22] However, most of the cases involve a bald duty to negotiate (without the contract requiring that the negotiations be carried out in good faith) and without an objective formula by which the term or terms to be negotiated can be otherwise determined.

A 1990 decision of the B.C. Court of Appeal is cited by some authors and in some recent B.C. Supreme Court cases as supporting the proposition that a duty of good faith

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[21] *Martel Building Ltd. v. R.*, 2000 SCC 60.

[22] *Mannpar Enterprises Ltd. v. Canada*, 1999 BCCA 239; *EdperBrascan Corp. v. 177373 Canada Ltd.* (2000), 50 O.R. (3d) 425 (S.C.J.), aff'd (2002), 22 B.L.R. (3d) 42 (Ont. C.A.); *Labatt Brewing Co. v. NHL Enterprises Canada L.P.,* 2011 ONSC 5652; *Georgian Windpower Corporation Corp. v. Stelco Inc.*, 2012 ONSC 3759.

negotiation may be implied as a means of requiring parties to conclude the remaining terms in a contract such as a lease renewal rate. In *Empress Towers Ltd. v. Bank of Nova Scotia,*[23] the lease contained an option to renew for an additional five years at a rental "which shall be the market rental prevailing at the commencement of that renewal as mutually agreed between the Landlord and the Tenant".

Mr. Justice Lambert noted that if the parties had simply provided for renewal at "the market rental prevailing," the agreement could have been enforced in those terms. The difficulty, from the point of view of enforceability of the obligation, was the additional requirement that the rate be "as mutually agreed by the parties". While Lambert J.A. held that the landlord could not be compelled to enter into a renewal tenancy at a rate that it did not find acceptable, he went on to say that the term carried with it "an implied term that the landlord will negotiate in good faith with the tenant with the objective of reaching an agreement on the market rental rate and, secondly, that agreement on a market rental will not be unreasonably withheld." He implied these terms under the "business efficacy" category, to prevent the renewal clause being struck down as uncertain. He then held that the landlord had not negotiated in good faith and dismissed the landlord's writ of possession.

Subsequent cases, in particular the decision of the B.C. Court of Appeal in *Mannpar Enterprises v. Canada*,[24] have limited the applicability of *Empress Towers* to scenarios where: 1) the obligation to negotiate is in an existing contract; 2) the obligation relates to a single (or possibly a few) terms; and 3) the contract contains an objective standard against which the negotiations can be judged.[25]

In *Mannpar Enterprises*, a permit for the extraction of sand and gravel from an Indian Reserve contained a clause giving the permittee the right to renew the permit for a further five-year period subject to satisfactory performance and renegotiation of the royalty rate and annual surface rental. The clause also provided that under no circumstances would the royalty rate or surface rental be less that the rates received in the preceding term. The Court of Appeal upheld the trial decision dismissing Mannpar's claim for breach of the contract by the Crown in failing to negotiate the renewal in good faith. The obligation to negotiate was held to be unenforceable.

These decisions do not deal with the scenario where a provision imposes a duty to negotiate an agreement, but expressly imposes a "good faith" standard on the negotiation

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[23] (1990), 50 B.C.L.R. (2d) 126 (C.A.), leave to appeal to S.C.C. refused (1991), 79 D.L.R. (4th) vii.

[24] 1999 BCCA 239.

[25] See *Neumann Ventures v. Smith*, 2007 BCSC 1664 and *Miller v. Jellybean Park International Inc*., 2013 BCSC 1237.

obligation. Does the express imposition of a good faith standard save the obligation from being too uncertain to be enforceable?

The prevailing view is that even where the obligation to negotiate is qualified by a requirement that the parties negotiate in good faith, it is still too uncertain to be enforceable.

The English Court of Appeal summarized the reasons courts are reluctant to enforce an obligation to negotiate in good faith in *Petromec Inc. v. Petroleo Brasileiro SA*:[26]

> The traditional objections to enforcing an obligation to negotiate in good faith are (1) that the obligation is an agreement to agree and thus too uncertain to enforce, (2) that it is difficult, if not impossible, to say whether, if negotiations are brought to an end, the termination is brought about in good or in bad faith, and (3) that, since it can never be known whether good faith negotiations would have produced an agreement at all or what the terms of any agreement would have been if it would have been reached, it is impossible to assess any loss caused by breach of the obligation.

A recent motion for interlocutory relief before the Ontario Superior Court of Justice led to a lengthy discussion of the enforceability of an obligation to negotiate in good faith. Assuming that case proceeds to trial, it will serve as a platform for addressing this issue in depth in my paper next year.

In *Molson Canada 2005 v. Miller Brewing Co*., 2013 ONSC 2758, Molson was seeking an interlocutory injunction pending trial, setting aside and enjoining Miller's notice of termination of a licence agreement. Molson had been the exclusive Canadian licensed distributor of Miller's key trademarks and brands since 1982.

An amendment to their licence agreement was to be effective from January 1, 2012 to December 31, 2015. It provided that if the licence agreement was not amended to allow local production of Miller Brands in clear bottles in Canada prior to January 1, 2013, the Amendment would automatically terminate. However, the same clause also stated that the parties will negotiate in good faith in relation to Volume Targets for Miller Genuine Draft, to provide for additional brand launches, to insure an equitable profit split across the Miller portfolio and any other provision or matters that the Parties wish to discuss.

There were a number of issues as to the proper interpretation of this provision, including whether the good faith negotiation provision was a condition precedent.

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[26] [2005] EWCA Civ. 891 at para. 116.

Wilton-Siegel J. rejected the categorization of good faith negotiation obligations found in the prior cases; in his view, there was no reason to draw a distinction between an obligation of good faith negotiation entered into prior to the existence of an agreement between the relevant parties and an obligation of good faith negotiation included in an agreement previously reached between contracting parties provided that in each case good consideration was given for the obligation.

He articulated a number of propositions that he drew from the existing case law:

- A bald agreement to agree, or to negotiate, constitutes an unenforceable obligation. The reason such an agreement is unenforceable is the lack of certainty with respect to the specific obligation.

- The cases do not suggest that an agreement to negotiate in good faith is *a priori* an uncertain obligation – each case remains dependent on its own facts.

- An agreement to negotiate in good faith may be sufficiently certain to be an enforceable obligation, either on its plain meaning or when interpreted in the context of the factual circumstances in which it was negotiated and executed. The content of any such obligation is therefore of critical importance.

- Where the interpretation of such a clause requires a party to a prospective negotiation to make a commitment to negotiate against its own interests, it would be unreasonable to find that a party to a prospective negotiation would have intended to make such a commitment.

- However, there are a number of possibilities as to what parties intend when they include an obligation to negotiate in good faith. One is that it is a commitment to use reasonable efforts or best efforts. In most circumstances, a clause with this meaning would also be void for uncertainty because it may be impossible for a court to establish a standard of behaviour of a negotiating party against which performance of the obligation could be measured. Another possibility is that such a clause is a commitment to act reasonably in prospective negotiations, but without an objective standard for “reasonableness” such covenant would be impossible to interpret and enforce.

- The inability of a court to award damages for breach of such a covenant should not be determinative as there may well be circumstances where injunctive or other equitable relief is an appropriate remedy. Alternatively, there may be circumstances where out-of-pocket expenses or similar costs are an appropriate remedy, even where the court can neither write an agreement for the parties nor award damages for the loss of the economic benefits that would have been received if the parties had reached an agreement.

- There are cases, including *Empress Towers*, where courts have upheld an obligation to negotiate where there was sufficient certainty regarding the issue or issues to be negotiated to provide an objective standard to the court regarding an alleged breach.

- In some circumstances courts have concluded that a covenant to negotiate in good faith is sufficiently certain to be enforceable because the parties have reached sufficient agreement on the principal issues. He gives good faith negotiation covenants in letters of intent as an example, citing a U.S. case[27] and a recent Ontario decision.[28]

After his lengthy review of the law, Wilton-Siegel J. concluded, at para. 108:

> Ultimately, any covenant to negotiate in good faith, as any other contractual obligation, must be interpreted in accordance with the intention of the parties in the context in which the agreement was negotiated and executed. The issue is not whether a court should imply an obligation to negotiate in good faith as a matter of commercial morality but rather whether the parties themselves understood from the circumstances in which an express commitment to negotiate in good faith was given, and intended in those circumstances, that any breach of the specific commitment was to have some legal consequences. In this regard, in my opinion, *Siga* and the case law cited therein reflect a much more nuanced and modern understanding of commercial realities than the arbitrary and formulaic approach evidenced in the case law which would exclude the possibility of an enforceable obligation to negotiate in good faith under all circumstances.

It will be interesting to see if other judges embrace these views going forward, but in the meantime the balance of authority stands for the proposition that obligations to negotiate in good faith, even when they are contained in an existing contract, will be unenforceable, unless they fall within the narrow band of factual circumstances illustrated by *Empress Towers*, *i.e.*, where there is only one term to negotiate and the contract provides an objective measure by which it can be determined.

More on this topic, including what is happening in other Commonwealth jurisdictions, in next year's paper.

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[27] *Siga Technologies Inc. v. Parmathene Inc.* (May 24, 2013), Doc. 314/13 (Del. S.C.), 2013 WL 2303303.

[28] *TDL Group Corp. v. DXStorm.com Inc.*, 2012 ONSC 5717. Note that this case is not available on CanLII or from other on-line sources.

Bottom line: At present, a contractual obligation to negotiate in good faith will only be enforced if it falls within a narrow band of case law, epitomized by decisions like *Empress Towers*. There may be a shift in the prevailing views developing, however, such that such express contractual obligations will be enforceable in broader circumstances.