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Contract Law Update: Developments of Note 2014

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The target audience for this paper is comprised of commercial litigators and commercial solicitors. For that reason, the cases I selected from those decided over the last year (post-October 2013) are primarily those in which contract law principles are discussed in a commercial context.

I have attached as an appendix a list of topics covered in prior updates. Those updates are all available on Lawson Lundell LLP's website under my profile.

This year's topics are:[1]

- The standard of review on contract issues – *Sattva Capital Corp. v. Creston Moly Corp.* in the Supreme Court of Canada
- Efficient breach – what is it and why does it matter?
- Restrictive covenants – commercial context vs. employment context
- Exclusion clause update
- Intersection of contract law and conflicts of law – non-signatories and forum selection clauses
- Interaction of entire agreement, arbitration and attornment clauses
- Contractual duties of good faith (to be continued…)

1. The Standard of Review on Contract Interpretation Issues – The SCC Speaks

In my 2013 paper, I dealt at length with the adjudicative history of the dispute between Sattva Capital Corporation and Creston Moly Corporation, which, prior to leave being granted to the Supreme Court of Canada, was comprised of an arbitration hearing, two hearings in the B.C. Supreme Court and two appeals before the B.C. Court of Appeal. In August, the Supreme Court of Canada released its judgment in this case: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53.

[1] I would like to acknowledge the assistance of Max Walker, summer articled student and UBC Law student, for his help in reviewing this year's crop of cases and choosing likely topics.

The issue arbitrated was the appropriate date on which to value Creston shares to be provided to Sattva as consideration under a finder's fee agreement and the number of shares to which Sattva was therefore entitled as representing the finder's fee of $1.5 million.

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 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 and therefore much more than $1.5 million should it sell the shares).

I provided details of the decisions at each level in my last year's paper, where I used this case as an illustration of how inclusion of an arbitration clause in a commercial agreement may not lead to a single-stage, final and binding resolution of a dispute.
The decision of the Supreme Court of Canada informs that issue: one of the questions the Court asks and answers is how the balance between reviewability and finality of commercial arbitration awards under the B.C. *Arbitration Act*, R.S.B.C. 1996, c. 55, is to be determined.[2]
The decision is also significant, however, based on two other issues it addresses:

- The standard of review for contract interpretation questions; and
- The role and nature of "surrounding circumstances" in the contract interpretation exercise.

I will discuss the ruling on these latter two issues first.

The standard of review issue arose because under s. 31 of the *Arbitration Act*, appeals from an arbitration awards are limited to questions of law (with leave being necessary if the parties do not consent to the appeal). The Court dealt with standard of review both in terms of characterization of the question and the standard to be applied to the appellate review of the decision.

[2] The Court also ruled that appeal courts are not bound by comments on the merits of the appeal made by the justice or panel granting leave. This is an uncontroversial ruling consistent with prior jurisprudence.

After noting significant historical precedent for treating contract interpretation issues as questions of law, Mr. Justice Rothstein outlined the historical reason for that approach, namely the widespread illiteracy of English juries centuries ago. He tracked the shift away from this approach in Canada, informed in part by courts having regard to the surrounding circumstances of the contract they are interpreting, and concluded that the historical approach should be abandoned. Contract interpretation issues, he held, are questions of mixed fact and law.

Rothstein J. left the door slightly ajar for those who seek to characterize a specific contract interpretation error as a question of law. He explained that it may be possible to identify an extricable question of law from what was initially characterized as a question of mixed fact and law, such as the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor, while advising courts to be cautious in identifying such "extricable issues" going forward.

The second part of the analysis had the Court assessing the standard of review (as a form of alternative reasoning, since it had already found that leave to appeal the arbitrator's award should not have been granted). Mr. Justice Rothstein conceded that consensual nature of the arbitration process and the applicable legislative regime governing appeals from arbitrations were different from the factual and legislative framework underpinning judicial review. Nonetheless, he held that judicial review of administrative tribunal decisions and appeals of arbitration awards are analogous in some respects, such that aspects of the framework developed by the Court in *Dunsmuir v. New Brunswick*, 2008 SCC 9, "were helpful" in determining the standard of review for appeals from arbitration awards.

He concluded that the appropriate standard of review in this context was reasonableness, unless the question was one that would attract the correctness standard, such as constitutional questions or questions of law of central importance to the legal system as a whole and outside the adjudicator's expertise. It would appear that the framework from *Dunsmuir* (refined by post-*Dunsmuir* jurisprudence) was more than "helpful" –the approach to standard of review was imported directly into the arbitration award context.

In British Columbia, at least, the Court's ruling on standard of review will limit the availability of appeals from commercial arbitration awards, many of which turn on contract interpretation.[3] The Court's ruling has implications beyond appeals from arbitration awards, however. The characterization of contract interpretation issues as questions of mixed fact and law will have implications for appeals from trial court decisions as well. While the characterization of contract interpretation issues will not bar the door to an appeal in that context, it will likely make it harder to obtain leave, where leave is necessary, and harder to succeed on the appeal.

[3] Most other jurisdictions permit appeals on questions of fact or mixed fact and law as well, but only where the arbitration agreement so provides: see, for example, *Arbitration Act*, R.S.A. 2000, c. A-43, s. 44; *Arbitration Act*, 1991, S.O. 1991, c. 17, s. 45; *The Arbitration Act*, C.C.S.M., c. A-120, s. 44.

A detailed analysis of the role and nature of "surrounding circumstances" in contract interpretation was not, strictly speaking, necessary to the issues on appeal. Having gone there to explain why contract interpretation issues were questions of mixed fact and law, the Court took the opportunity to discuss the role and nature of surrounding circumstances. Perhaps the justices felt the need to correct the interpretation some lawyers and commentators gave to their prior decision in *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129, namely that recourse to surrounding circumstances was inappropriate if the words of the contract were sufficiently unambiguous and the intent of the parties therefore plain "on the face of the agreement".

There is no longer any doubt that the "surrounding circumstances" of a contract are relevant to the interpretative exercise in every case. The key passage from the judgment (at paras. 47-48 and 58) reads as follows:

> … the interpretation of contracts has evolved towards 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. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:
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> > No contracts are made in a vacuum: there is always a setting in which they have to be placed. . . . 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.
> >
> > (*Reardon Smith Line*, at p. 574, *per* Lord Wilberforce)
>
> The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement …
>
> The nature of the evidence that can be relied upon under the rubric of "surrounding circumstances" will necessarily vary from case to case…it should consist only of objective evidence of the background facts at the time of the execution of the contract…that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting.

The Supreme Court also decided to address the interaction between consideration of surrounding circumstances in the interpretative process and the parol evidence rule. As a leading author on contract interpretation points out, the parol evidence rule is more about determination of the *contents* of a contract and the evidence that is admissible to prove those contents than it is about contract interpretation *per se*.[4] However, the two are often muddled in argument, so I for one welcome the clarification the Court provides. Mr. Justice Rothstein states that the parol evidence rule does not apply to preclude evidence of the surrounding circumstances but does preclude evidence of the subjective intentions of parties (among other things).

The Court's ruling on standard of review answered, in part, the question of how the balance between reviewability and finality of commercial arbitration awards under the B.C. *Arbitration Act* is to be determined. The Court also answered that question by going through each of the prongs of s. 31(2) of the *Arbitration Act* (the grounds on which the Court may grant leave) and addressing the court's discretion under this provision. Discussion of this part of the judgment is better suited to a paper on arbitration than a paper on contract law, so I will not engage in that discussion here.

Bottom line: Arbitration awards, particularly in B.C., have become more final and binding where the issue is one of contract interpretation (as often is the case in commercial disputes). At the same time, appeals from lower court decisions, where the issue is one of contract interpretation have become more of an uphill battle. The *Sattva* decision parallels the SCC's approach to judicial review, with the Court signalling a preference for limiting the availability, or at least the scope, of review from decisions of original decision-makers, be they administrative tribunals, arbitrators or lower courts.

2. Efficient Breach – What is it and Why Does it Matter?

While we all heard about efficient breach in our law school contracts class, the concept[5] had not been the subject of much Canadian judicial commentary until a rash of cases decided in the last year.

Because efficient breach was referenced five times by courts since April of 2013, I was inspired to revisit the concept and its role in Canadian contract law. In doing that, I learned that the concept and its proper role are the subject of a great deal of academic commentary, particularly in the U.S. Efficient breach is a topic that commentators, particularly those that are critical of how the concept has been applied by courts, get exercised about.

Summarizing the academic debate is beyond the scope of this paper and weighing in on the substantive arguments, most of which involve economic theory, is beyond my capabilities.[6]

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[4] Geoff R. Hall, *Canadian Contractual Interpretation Law*, 2nd ed. (Markham: LexisNexis, 2012) at 55.

[5] I have chosen this neutral word deliberately, to avoid weighing in on whether efficient breach is a theory or a doctrine.

[6] Two articles I found both easy to read and informative were: Jeffrey L. Harrison, "A Nihilistic View of the Efficient Breach" (2013) Mich. St. L.Rev. 167 and Nina C.Z. Khouri, "Efficient Breach Theory in the Law of Contract: An Analysis" (2002-3) 9 Auckland U.L.Rev. 739.

Instead, I will describe how the concept arises in the recent case law, and how even the limited discussion of economic breach in those cases reflects a tension in the law of contract damages.

The primary context in which the concept of efficient breach comes up is in the context of justifying or explaining the usual measure of damages for breach of contract, namely the expectation measure. This measure focusses on the value of performance and aims to put the innocent party in the same position, with respect to damages, as they would have been in had the contract been performed.

The primary alternative to expectation damages is what are variously described as restitution damages, restitutionary damages or disgorgement damages. This measure of damages looks not at the loss suffered by the plaintiff, but rather the profit made by the defendant.

An efficient breach scenario is one where the defendant's profit from the breach is greater than the measure of damages required to compensate the plaintiff. In other words, the defendant can breach, pay damages and still come out ahead.

The Ontario Court of Appeal articulated the traditional view of the relationship between efficient breach and contract damages in *Dasham Carriers Inc. v. Gerlach*, 2013 ONCA 707 at para. 30:

> Even when there is an efficient breach, courts award expectation damage – the amount of the plaintiff's loss. The injured party is not entitled to a higher damage award merely because the breaching party has profited from his repudiation of the contract. To the contrary, the Supreme Court has issued a clear directive that an "[e]fficient breach should not be discouraged by the courts. This lack of disapproval emphasizes that a court will usually award money damages for breach of contract equal to the value of the bargain to the plaintiff" [citation omitted].[7]

Dasham Carriers Inc. v. Gerlach involved a dispute between a landlord and a tenant under a three-year lease. The tenant had sublet the premises when the landlord improperly terminated the lease. What seems to have prompted this explanation of efficient breach by the Court was the claim by the respondent tenant, on appeal, that the trial judge correctly allowed recovery of the full amount it would have collected from its subtenant, without deduction of the rent that would have been payable under the principal lease to the landlord. The discussion of an efficient breach by the landlord appears to have been mooted as a hypothetical event, with the Court returning to the expectation measure of

[7] The Ontario Court was citing, as virtually every case discussing efficient breach does, the decision in *Bank of America Canada v. Mutual Trust Co.*, 2002 SCC 43. The discussion of efficient breach in that case includes a description of what economists describe as a Pareto optimal outcome where one party may be better off but no one is worse off, was in *dicta*.

damages on the particular facts, and deducting from the damages award to the tenant the $70,000 owed to the landlord under the principal lease.

The majority and dissenting opinions in a 2013 Supreme Court of Canada case help illustrate the percolating tension in the law of contract damages as to when the compensation principle, which in turn underlies the expectation measure of damages, should give way to other considerations.

In *Waterman v. IBM Canada Ltd.*, 2013 SCC 70, the issue was deductibility of pension benefits received by a wrongfully dismissed employee during the reasonable notice period. The plaintiff was terminated at age 65, without cause or notice. He began receiving full pension benefits pursuant to the employer's defined benefit plan. He sued for wrongful dismissal and was awarded damages based on reasonable notice of 20 months. The trial judge found that the pension benefits the plaintiff received during that 20 months were not deductible. The employer's appeal was dismissed.

The B.C. Court of Appeal found that the pension benefits were properly characterized as a form of non-deductible, non-indemnity insurance that was triggered by the wrongful termination.

The majority of the Supreme Court held that there was a "collateral benefit" problem in the case that could not be simply resolved by the compensation principle (as IBM had argued). Mr. Justice Cromwell noted that: 1) considerations other than the extent of the plaintiff's actual loss shape the way the compensation principle is applied; and 2) there are well-established exceptions to the compensation principle. He cited *Attorney General v. Blake*, [2001] 1 A.C. 268 (U.K.H.L) and *Bank of America Canada v. Mutual Trust Co.* for the proposition that in some cases, an award of damages in contract may be based on the advantage gained by the defendant as a result of the breach rather than the loss suffered by the plaintiff.

He concluded that the compensation principle should not be strictly applied on the facts because the pension benefits fell within the private insurance exception, and therefore should not be deducted from the wrongful dismissal damages.

In a robust dissent, Mr. Justice Rothstein stated that the majority's approach discouraged efficient breach in the context of an employer with a defined benefit pension plan who wishes to terminate an employee. In his view, failing to deduct the pension benefits would incentivize employers to require the employee to work through the notice period (and avoid paying out the pension benefits) instead of offering the employee a separation package that would be economically superior for the employee (such as one where the employee would receive the amount he or she would have been paid during the notice period without having to work through the notice period, freeing them up to earn more from alternative employment).

In *Farwell v. Citair Inc.*, 2014 ONCA 177, efficient breach was referenced in a slightly different context, as an aspect of, or rather a justification for, an employee's obligation to mitigate by remaining with his or her employer for the period of working notice.[8]

Efficient breach as it relates to the measure of damages for breach of contract was the subject of discussion in *Nunavut Tunngavik Incorporated v. Canada (Attorney General)*, 2014 NUCA 2.

The NTI sued Canada, alleging numerous breaches of the Nunavut Land Claims Agreement. The NTI sought and obtained partial summary judgment in relation to a breach of a specific clause of the Agreement, regarding the implementation of an informational monitoring plan. Canada appealed.

Two of the issues on appeal were:

- Whether restitutionary damages were available for the breach; and
- Whether the record on the quantum of damages was sufficiently clear to permit summary judgment.

The case management judge concluded that calculation of expectation damages would not be feasible and that nominal damages would not be an appropriate remedy for the breach. He awarded damages equivalent to the amount Canada "saved" by delaying implementation of the monitoring plan until 2010.

In assessing whether the case management judge erred in this approach to remedy, the Court of Appeal reviewed principles relating to contract damages. It noted that courts will generally award only expectation damages for breach of contract, in order to avoid discouraging efficient breach, but noted that restitutionary damages are available in exceptional cases. The Court gave the following summary of the applicable principles (at para. 85):

> a) The presumptive rule is that the plaintiff is entitled to expectation damages: *Bank of America Canada* at paras. 25-6. The plaintiff is to be put in the position it would have been in if the contract had been performed.
>
> b) Exceptionally, where damage is shown but expectation damages are not readily quantifiable, or where the circumstances of the case call for a different measure of damages to provide an effective remedy:

[8] Efficient breach was also referenced in *Indutech Canada Limited v Gibbs Pipe Distributors Ltd.*, 2013 ABCA 111, where the Alberta Court of Appeal noted that while efficient breach would permit the appellants to have broken the agency agreements at issue with impunity if they indemnified Indutech for any resulting loss, that doctrine had no place in addressing remedies for breach of fiduciary duty. The Court therefore did not have to decide if it agreed with the trial judge that a disgorgement measure of damages was appropriate for certain breaches of contract.

i) where the anticipated "bargain" was non-financial or intangible, then damages can be assessed and awarded at large to reflect the expectations of the parties, for example where the contract is not commercial in nature, or the damages are not liquidated: *Fidler v Sun Life Assurance Co. of Canada*, [2006] 2 SCR 3 at paras. 44-5, 2006 SCC 30; *Honda Canada Inc. v Keays*, 2008 SCC 39 at paras. 55, 59, [2008] 2 SCR 362; *Jarvis v Swan Tours Ltd.*, [1973] QB 233 (CA).

ii) in some cases a restitutionary remedy (disgorgement of some benefit achieved by the defendant from the breach) is a potential remedy. Some exceptional circumstances are required (as in *Blake*, and the facts in *Dolly Varden*) to justify this approach. The trial judge should give consideration to the concept of "efficient breach", and the effect that has on the calculation of damages: *Bank of America Canada* at paras. 31-3; *Dasham Carriers Inc. v Gerlach*, 2013 ONCA 707 at paras. 29-30.

For these purposes "not readily quantifiable" does not just mean that the plaintiff has not marshaled the evidence necessary to prove what would be provable.

c) Where breach is shown, but no damage is evident, nominal damages should be awarded: *B.M.P. Global Distribution Inc. v Bank of Nova Scotia*, 2009 SCC 15 at para. 90, [2009] 1 SCR 504; *Métis National Council Secretariat Inc. v Dumont*, 2008 MBCA 142 at paras. 40-6, 305 DLR (4th) 356; *Place Concorde East Limited Partnership v Shelter Corp. of Canada Ltd*. (2006), 270 DLR (4th) 181 at para. 78, 211 OAC 141 (CA).

Advocating for (and awarding) restitution damages for breach of contract in appropriate cases is not a new frontier: Professor Lionel Smith, in an article he wrote for the Canadian Business Law Journal two decades ago, pointed out that disgorgement for breach of contract was awarded by Lord Mansfield in 1760.[9] But it may be that there is more enthusiasm for departing from the traditional view that the compensation principle reigns supreme and for mapping out new categories of cases where other policy imperatives might override any concern about discouraging efficient breach.

Bottom line: The compensation principle, and the expectation measure of damages for breach of contract that principle informs, should not be considered to be unassailable bedrock underlying contract law. Parties, particularly contract-breaching defendants, for whom the traditional expectation measure of damages is favourable because they can profit from their breach in the particular circumstances, will continue to espouse a measure of damages that embraces (or at least does not discourage) efficient breach. We

[9] Lionel D. Smith, "Disgorgement of the Profits of Breach of Contract: Property, Contract and 'Efficient Breach'" (1994-5) 24 Can. Bus. L.J. 121 at 139.

can expect plaintiffs' counsel (especially class-action counsel), however, to advocate for restitution damages in cases falling within the categories listed in *Nunavut Tunngavik* and to press for new categories of cases where such damages ought to be awarded. Similarly, simple resort to the compensation principle as the basis for invariably deducting collateral benefits received by plaintiffs because of the defendant's breach will not always be enough for the defendant to prevail. The Supreme Court of Canada, in *Waterman v. IBM Canada Ltd.*, has served notice that the compensation principle cannot be, and is not, applied strictly or inflexibly in a manner that is divorced from other considerations.

3. Restrictive Covenants – Commercial context vs. employment context

Recent decisions dealing with non-competition and non-solicitation clauses (which I will refer to collectively as restrictive covenants where appropriate) remind us of principles applying to the interpretation of such clauses which, while not new, are worth reviewing.

The Supreme Court of Canada decision in *Payette v. Guay Inc.*, 2013 SCC 45, while arising out of Quebec, speaks more generally to the important distinctions between how courts interpret and enforce restrictive covenants in the commercial and employment contexts.

The Court reiterated and expanded upon what it had stated in earlier decisions:[10]

- The scope of a restrictive covenant depends on the context in which the covenant was negotiated. A covenant in restraint of trade is enforceable only if it is reasonable between the parties and with reference to the public interest.

- The legal framework applicable to contracts of employment takes account of the imbalance of power that generally characterizes an employer-employee relationship.

- In relationships between vendors and purchasers in the commercial context, there is ordinarily no such imbalance. In such cases, therefore, much more flexibility and latitude is required in interpreting restrictive covenants in order to protect freedom of trade and promote the stability of commercial agreements.[11]

One of the core issues in the case was whether the restrictive covenants at issue were properly linked to a contract of employment or an asset purchase agreement. This was particularly significant under Quebec law, as the Civil Code of Quebec contains an article providing that an employer who has resiliated the contract of employment without a serious reason may not avail him or herself of a non-compete clause.

The plaintiff Payette and his partner controlled several companies in the crane rental business. Guay purchased the assets of these companies. To ensure a smooth transition in

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[10] In *Elsley v. J.G. Collins Insurance Agencies Ltd.*, [1978] 2 S.C.R. 916; *Doerner v. Bliss & Laughlin Industries Inc.*, [1980] 2 S.C.R. 865; *Shafron v. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6.

[11] at paras. 2-5 and 35-39.

operations, the parties agreed to include a provision in their sales agreement by which Payette and his partner undertook to work full-time for Guay as consultants for six months, with an option to subsequently agree on a contract of employment, which Payette and Guay did after the six-month period. Guay dismissed Payette in August 2009 and the parties entered into an agreement for compensation. Payette thereafter entered into employment with a competing crane rental company.

Guay sought injunctive relief against Payette requiring him to comply with the restrictive covenants. Payette argued that Article 2095 of the Civil Code applied, such that Guay could not rely on the restrictive covenants, having dismissed him without cause.

The Supreme Court of Canada, after reviewing the agreements, concluded that the purpose of the restrictive covenants was to protect the assets acquired by Guay in return for the $26 million it paid to the vendors. If Guay had not obtained the protection of the covenants, the transaction would never have taken place. There was therefore a direct causal link between the restrictive covenants and the sale of the assets. Accordingly, the reasonableness of the restrictive covenants was properly assessed in a commercial context, and they would be found lawful unless it could be established on a balance of probabilities that their scope was unreasonable.

After assessing whether the covenants were limited (as to their term and the territory and activities to which they applied) to what was necessary for the legitimate interest of the party in whose favour they were granted, the Court upheld both covenants.

The fact that the non-solicitation clause did not contain a territorial limit did not, in the Court's view, impact on its reasonableness and therefore its validity. In the context of the modern economy and new technologies, territorial limitations in non-solicitation clauses have become obsolete.

Mr. Justice Skolrood of the B.C. Supreme Court recently applied the principles enunciated in *Payette v. Guay* when considering a clause in a contract between trucking companies which contained non-solicitation provisions: see *Eos Transport Inc. v. Alta Pacific Transport Ltd.*, 2013 BCSC 2033.

Another issue receiving judicial consideration this past year was whether restrictive covenants that do not prohibit competition *per se*, but instead exact a payment from the former employee who competes, are enforceable.[12]

In *Rhebergen v. Creston Veterinary Clinic Ltd.*, 2014 BCCA 97, Dr. Rhebergen, a recent graduate of veterinary school, entered into an "Associate Agreement" with the defendant in

[12] See also *Levinsky v. TD Bank*, 2013 ONSC 5637, in which the Court considered a clause under which the employee's right to Restricted Share Units (which had been allocated to him under a compensation plan but had not yet matured and become payable in cash) was forfeited without notice if he resigned from service. The Court held that this clause was not a restrictive covenant in the sense of restricting post-termination activity. It went on to hold that the clause was a form of loyalty incentive and not a restraint of trade.

order to gain the necessary field training. The Agreement contained the following clauses:

> 11. NON-COMPETITION
>
> 1. The Associate acknowledges and agrees that she will gain knowledge of and a close working relationship with the CVC's [Creston Veterinary Clinic Ltd.'s] patients and clients which would injure CVC if made available to a competitor or used for competitive purposes.
>
> 2. The Associate covenants and agrees that in consideration of the investment in her training and the transfer of goodwill by CVC, if at the termination of this contract with CVC she sets up a veterinary practice in Creston, BC or within a twenty-five (25) mile radius in British Columbia of CVC's place of business in Creston, BC, she will pay CVC the following amounts:
>
> If her practice is set up within one (1) year termination of this contract - $150,000.00;
> If her practice is set up within two (2) years termination of this contract - $120,000.00;
> If her practice is set up within three (3) years termination of this contract - $90,000.00.
>
> * * *
>
> 13. TERMINATION
>
> 1. CVC agrees not to terminate this agreement during the term hereof except for just cause as hereinafter defined.
>
> 2. The Associate cannot terminate this agreement prior to the expiry of the term, except for death, permanent disability preventing the Associate from continuing to practice veterinary medicine, or default of this agreement by the CVC….

Differences arose between the parties after only 14 months and Dr. Rhebergen purported to terminate the Agreement. The defendant pointed out that only it had that right and then terminated her for cause.

Dr. Rhebergen intended to set up a mobile dairy veterinary practice in the Creston area that would directly compete with her former employer. She sought a declaration that clause 11 of the Agreement was unenforceable as being an unreasonable restraint of trade. She was successful in the trial court, where Mr. Justice Betton held that the clause was unreasonable because it was ambiguous and because the amount to be paid was a penalty.

On appeal, all of the appellate justices held that even though the clause was not a traditional restrictive covenant, it was a restraint of trade since the required payment compromised the employee's opportunity to compete. They also all agreed that the payment could not be characterized as a penalty. The Court split on the question of whether the clause was ambiguous and unreasonable because of ambiguity. The majority found that the clause was not ambiguous and therefore allowed the appeal.

The final decision worth noting in this area is *Greenaway v. Sovran* , 2014 ONCA 110, which confirms that subject to partners contracting to the contrary, a general dissolution will effectively prevent any partner from seeking to enforce a restrictive covenant against his copartners (although this may not be the case if a restriction was imposed on a partner who retired before the date of dissolution).

Bottom line: When an acquirer of a business intends to retain the services of prior owners or their principals as employees or consultants, thought should be given to the location and content of restrictive covenants in the suite of agreements. Usually, the non-solicitation and non-competition clauses will be an important component of the commercial bargain. Where that is the case, the clauses should be contained in the commercial agreement (rather than an employment or consulting agreement) and the fact that they form part of the consideration under that agreement made clear. These steps should result in the restrictive covenants being assessed for their reasonableness in the context of the commercial agreement, resulting in reduced likelihood of them being found to be unenforceable.

In the employment context, if the employer is investing significant time and money in training a recently-graduated professional, particularly in a geographic location where the client base is limited, it may be worth considering the type of "payback" clause used in *Rhebergen v. Creston Veterinary Clinic Ltd.*

Territorial limits do not appear to be necessary for a non-solicitation clause (as opposed to a non-compete) to be found reasonable and not in restraint of trade.

4. Exclusion Clause Update

In each annual paper following the seminal Supreme Court of Canada decision in *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, I have provided an update on the application of the *Tercon* test by the lower courts. This year is no exception.

In *Tercon*, the Supreme Court of Canada articulated a test for dealing with the application of exclusion clauses where there is a breach of the contract by a party *prima facie* entitled to rely on such clause, and an allegation by the innocent party that the breaching party should not be permitted to so rely.

The Court first must ask whether, as a matter of interpretation, the exclusion clause even applies to the circumstances established in evidence. If the exclusion clause does apply, the

second step is to consider whether the exclusion clause was unconscionable and thus invalid at the time the contract was entered into.

If the answer to the second question is "no", then the court may consider whether it should nevertheless refuse to enforce the exclusion clause because of overriding public policy.

While the B.C. Court of Appeal provided some guidance in 2012 on circumstances in which an exclusion clause or limitation will not offend public policy,[13] this year it has provided guidance on when it may.

The plaintiff in *Niedermeyer v. Charlton*, 2014 BCCA 165, signed up for a "zip line experience" at Whistler operated by Ziptrek Ecotours Incorporated. Ironically, she was not injured on the zip-line, but rather when the bus operated by Charlton, an employee of Ziptrek, went off the road.

The plaintiff signed a comprehensive Release of Liability, Waiver of Claims and Indemnity Agreement, the terms of which are set out in the reasons for judgment (the "Release"). The Release was, of course, scrutinized under the *Tercon* test at trial, with the plaintiff unsuccessfully making arguments under all three prongs of the test.

The issue on which the Court of Appeal split was the third element of the *Tercon* test, namely whether the Court should refuse to enforce the exclusion clause because of the existence of an overriding public policy.

The overriding public policy identified by the plaintiff was the existence of a compulsory vehicle insurance scheme in B.C., under the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231.

The majority of the Court of Appeal, in reasons authored by Garson J.A., reviewed the legislative history of this regime, including the discussion in the 1968 report "Royal Commission on Automobile Insurance". It also considered cases (pre-*Tercon*) in which Courts found it would be contrary to public policy to allow parties to contract out of human rights legislation.

Madam Justice Garson concluded at paragraphs 71, 72 and 114:

> In my opinion, it is contrary to public policy to permit the owner and /or operator of a motor vehicle to contract out of liability for damages for personal injuries suffered in a motor vehicle accident in British Columbia. British Columbia has a statutory scheme of compulsory universal insurance coverage for damages for personal injury arising from motor vehicle accidents, as well as other types of insurance not pertinent to this discussion. In the face of the legislature's intention in enacting that statutory scheme, and for the reasons that follow, I believe it would be contrary to public policy to permit the respondents to enforce the release of liability for a claim that

[13] *Loychuk v. Cougar Mountain Adventures Ltd.*, 2012 BCCA 122.

> arose not from an injury that occurred in the course of the Ziptrek activity, but rather in the course of transportation to the site of that activity.
>
> The trial judge found that the Release did not impact public policy or the statutory automobile insurance scheme that is compulsory and mandatory in this province. In his view, the Release functioned only to prevent the appellant from recovering damages in negligence from the respondents. Because a provision of the scheme allows indemnification of an insured only when liability has been established, the trial judge found the statutory scheme was essentially irrelevant in the circumstances of this case and thus there was no public policy interest at play. I cannot agree. The longstanding statutory scheme is a strong indication that there is a public policy interest engaged when motor vehicle accidents are at issue, but it is the interest the legislature was attempting to address in enacting the scheme that overrides freedom of contract in this case. […]
>
> In my view, the ICBC regime is intended as a benefit for the public interest just as is human rights legislation. It would be contrary to public policy and to a harmonious contextual interpretation of the legislation to allow private parties to contract out of this regime. As such, to the extent that the Release purports to release liability for motor vehicle accidents it is contrary to public policy and is unenforceable. The judge erred in finding that the public policy interest exemplified in a compulsory universal insurance scheme was incapable of defeating society's interest in freedom of contract.

Mr. Justice Hinkson (as he then was), in dissent, addresses the history of the concept of "public policy" and suggests that this history limits the scope of what Binnie J. was referring to in the third branch of the *Tercon* test. He concludes that if the Legislature had intended for drivers to be prevented from contracting out of their primary insurance coverage, the Act would have included an express provision prohibiting such contracting out.

One of the things the decision in *Niedermeyer v. Charlton* reminds us of, therefore, is that statutes can expressly prohibit contracting out of or limiting liability in specific contexts.

A class action that has been working its way through the B.C. courts illustrates this proposition.

The plaintiffs in *Lam v. University of British Columbia*, 2013 BCSC 2094, stored sperm in a cryptopreservation unit at UBC, which were damaged or destroyed due to an electrical supply interruption.

Two of the certified common issues were effectively the second and third prongs of the *Tercon* test as applied to the facts.[14]

At a Trial Case Management Conference, the parties proposed that a sub-issue be tried at the scheduled date for the common issues trial:

> Is the defendant, UBC, precluded from relying upon the exclusion clause in the Agreement as against the Class members by virtue of the *Warehouse Receipt Act*, R.S.B.C. 1996, c. 481?

Each class member had signed a Sperm Bank Facility Agreement containing an exclusion clause, which broadly excluded UBC, its governors, directors, officers, employees or agents from liability for any destruction of, damage or alteration to or misuse of the sperm samples.

The *Warehouse Receipt Act*, in s. 13, sets out an explicit standard of care applicable to warehousers:

> A warehouser is liable for loss of or injury to goods caused by the warehouser's failure to exercise the care and diligence in regard to them as a careful and vigilant owner of similar goods would exercise in the custody of them in similar circumstances.

The Act also provides that a warehouser is not permitted to include a term in a warehouse receipt that is contrary to the Act (s. 2(4)(a)) and cannot contract out of its obligation to take care of the goods it stores (s. 2(4)(b)).

On the trial of the sub-issue, a good deal of argument was directed towards the question of whether sperm samples were "goods" under the Act. Mr. Justice Butler found that they were.

On the question of whether the exclusion clause ran afoul of ss. 13 and 2(4)(a) of the Act, UBC took the position that the clause merely limited liability (to zero) and cited prior cases in which a clause limiting damages payable was found not to violate the Act. Mr. Justice Butler rejected this argument and found that UBC was precluded from relying on the exclusion clause in light of the legislative prohibition.

Last year I commented on the Alberta Court of Queen's Bench decision in *Swift v. Eleven Elven Architecture Inc.*, 2012 ABQB 764, which considered a limitation of liability clause in a contract between a homeowner and an architectural firm and the question of whether structural engineers retained by the architectural firm (not the homeowner) could shelter under that clause. The trial judge found that the engineers could rely on the clause, such

[14] In the Court of Appeal decision in which the class action was certified, the Court underscored the distinct nature of these two prongs, finding that the chambers judge had committed reversible error by conflating the law relating to unconscionability and public policy: 2010 BCCA 325.

that damages recoverable by the plaintiff were limited in the aggregate to $500,000, resulting in the architects, who had settled with the plaintiffs, being unable to recover more than that amount by way of indemnity.

That decision was appealed and the reasons on appeal were issued early this year (2014 ABCA 49).[15] The trial judgment was varied. The Court of Appeal commented on the interpretation of the scope of the limitation of liability clause by the trial judge, but found it unnecessary to opine on those interpretation issues as it found that the trial judge erred in finding that the negligent misrepresentation claim against the engineers was caught by the limitation of liability clause. It would be unreasonable, said the Court, to conclude that a negligent misrepresentation by the engineer in terms of compliance with Part 4 of the Building Code was something that "arises solely and directly" out of the architectural firm's duties and responsibilities so as to fall within the limitation of liability clause. As a result, the architect's judgment for indemnity against the engineers was increased from $500,000 to $1,000, 000 (the amount they settled for), with the plaintiff recovering the amount of damages over the $1,000,000 settlement from the engineers as well.

Bottom line: *Tercon* has not resulted in exclusion clauses being entirely bulletproof. If there is an overarching legislative scheme for the benefit of the public directly implicated by the harm-causing event, even if that regime does not contain an express provision prohibiting contracting out, the exclusion clause may be unenforceable as contrary to public policy.

If there is governing statute that expressly prohibits contracting out of liability, then that statute, as opposed to freedom of contract, will prevail.

5. Intersection of Contract Law and Conflicts of Law – Non-Signatories and Forum Selection Clauses

Commercial contracts frequently contain clauses with procedural and jurisdictional objectives. Two obvious examples are choice of forum clauses and arbitration clauses.

Case law over the past year shone a spotlight on two issues:

> (a) the question of when a party to a related contract will be treated as a party to a contract to which he or she is not a party so as to be bound by a choice of forum clause; and
>
> (b) the question of when Canadian courts will refuse to enforce a forum selection clause.

A 2013 decision of the Ontario Court of Appeal considers the issues that arise where a particular litigant, while closely connected to the contracting parties, is not a signatory to the contract containing a choice of forum clause.

[15] Leave to appeal refused, 2014 CarswellAlta 1273/1274 (S.C.C.).

In *Aldo Group Inc. v. Moneris Solutions Corp.*, 2013 ONCA 725,[16] the relevant contracts were licence agreements between MasterCard, on the one hand, and the Bank of Montreal ("BMO") and Harris National Association ("Harris") on the other hand. BMO and Harris, as member banks with a contractual relationship with MasterCard, issued MasterCard credit cards and acquired merchants willing to accept MasterCard's credit cards as a method of payment. Pursuant to the licence agreements, the merchants were entitled to use MasterCard trademarks and service marks provided that they complied with MasterCard's standards.

The licence agreements contained choice of law and choice of forum clauses in favour of New York. BMO and Harris contracted with a third party processor, Moneris to support their MasterCard activity (the "TPP Agreements"). In those TPP Agreements, Moneris agreed to a choice of law and choice of forum clause in favour of New York.

The plaintiff Aldo is an international footwear retailer with a substantial retail presence in Ontario. Moneris entered into a merchant agreement with Aldo on its own and BMO's behalf. MasterCard was not a party to this contract. Certain terms required by MasterCard were incorporated into the merchant agreement; the forum selection clause was not such a required term and was not incorporated. In fact, the merchant agreement included a choice of forum and choice of law clause in favour of Ontario.

Aldo initiated an action in Ontario against MasterCard and Moneris. The litigation arose when Moneris debited Aldo's account in the amount of $4.929 million. There was an apparent security breach of Aldo's computer system that allegedly led to fraudulent transactions. MasterCard took the position that the security breach was an Account Data Compromise Event under the licence agreements with the banks. Therefore, pursuant to the MasterCard Security Rules forming part of those agreements, the banks were liable to MasterCard. When MasterCard debited the banks' accounts to reflect the financial liability attributed to the security breach (the "Assessments"), Moneris then debited Aldo's account, to make the banks whole, relying on a clause in the merchant agreement imposing data security obligations.

In its pleadings, Aldo took the position that MasterCard wrongfully imposed and collected the Assessments from the banks on the basis that they were illegal, invalid, in violation of the MasterCard Standards and not authorized by the MasterCard Security Rules. It alleged that Moneris also acted wrongfully and had no right to debit Aldo under the merchant agreement.

Aldo, which was not in a contractual relationship with MasterCard, framed its claims against that defendant in tort and unjust enrichment.

MasterCard applied for a stay of Aldo's claim against it, seeking to rely on the choice of forum clause in its licence agreements with the banks. It was unsuccessful in the Superior Court of Ontario and again on appeal.

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[16] Leave to appeal dismissed, 2014 CanLII 21559 (S.C.C.).

The Ontario Court of Appeal upheld the motion judge's characterization of Aldo's claim against MasterCard as being non-contractual. MasterCard was unsuccessful in seeking to characterize the claim as "essentially contractual" and somehow designed to "get around" the forum selection clause in contracts to which Aldo was not a party. The Court also rejected the argument that Aldo was bringing its claim as an equitable subrogee, noting that Aldo was not purporting to rely on an exception to the doctrine of privity or to stand in the shoes of another.

The Court went on to consider whether it should apply the "closely related" doctrine applied by courts in New York and other U.S. states. That doctrine operates to bind non-signatories to a contract's forum selection clause where they are so closely related to the dispute that it is foreseeable they would become bound by the clause.

While not categorically rejecting the possible application of the closely related doctrine in Ontario, the Court clearly saw its application in most cases as being inconsistent with Canadian jurisprudence. The Court cited *Z.I. Pompey Industrie v. ECU-Line N.V.*, 2003 SCC 27, as setting out the policy rationales for enforcing forum selection clauses, including certainty and security in commercial transactions. A foreseeability inquiry, it observed, injected significant flexibility, and thus uncertainty, into the scope of application of forum selection clauses and thus ran contrary to these policy rationales.[17]

The Court left open the possibility of the closely related doctrine being applied in the future, suggesting that it may be "sensibly" applied in some circumstances, such as where the interests of the non-signatories are completely derivative of the interests of contract signatories. However, it declined to reverse the motion judge's conclusion that it was not foreseeable to Aldo that MasterCard's New York forum selection clauses would apply to its claim.

There is an obvious parallel with the case law considering when an arbitration clause binds non-signatories. In that context, commentators have identified a number of legal theories under which a non-signatory may be bound, including: [18]

1. The arbitration clause in question is incorporated by reference into another contract between one of the parties and a non-party;

2. There is an agency relationship between one of the parties and a non-signatory;

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[17] The closely related doctrine has been the subject of criticism in the U.S. for similar reasons. See, for example, Lukas A. Anton, "*C.H. Robinson Worldwide, Inc. v. FLS Transportation, Inc.: How Minnesota's Closely-Related-Party Doctrine Undermines Long-Settled Principles of Contract Law*" (Spring 2012) 35 Hamline L. Rev. 497.

[18] See, for example, J. Kenneth McEwan and Ludmila B. Herbst, *Commercial Arbitration in Canada* (Toronto: Canada Law Book, 2012) at §2:110; Michael P. Daly, "Come One, Come All: the New and Developing World of Nonsignatory Arbitration and Class Arbitration", 62 U. Miami L. Rev. 95 (2007-2008); Michael H. Bagot, Jr. and Dana A. Henderson, "Not Party, Not Bound? Not Necessarily: Binding Third Parties to Maritime Arbitration", 26 Tul. Mar. L.J. 413 (2001-2002).

3. The relationship between a parent and subsidiary corporation may be sufficiently close as to justify piercing the corporate veil and holding one corporation legally accountable for the actions of the other;

4. The non-party is bound by an estoppel;

5. The non-party is bound by operation of law, *e.g*., by the operation of a successors and assigns clause or associated persons clause; and

6. The non-party has consented or acquiesced to being a party to the arbitration.

Each of these legal theories has the potential of serving as a basis for arguing that a forum selection clause applies to a non-signatory in a given case.

Because the decision in *Aldo Group Inc. v. Moneris Solutions Corp*., involved a plaintiff, the case squarely raised the issue of when a non-signatory is bound by a forum selection clause.

A 2014 Alberta case comes at the issue from the perspective of forcing non-signatory *defendants* to litigate in a forum that is named in a forum selection clause binding the plaintiff and other defendants. The analysis is slightly different in this context – it is more a question of *forum conveniens* than it is a question of contractually binding non-signatories.

1400467 Alberta Ltd. v. Adderley, 2014 ABQB 339, involved an action brought by the corporate plaintiff against individual and corporate defendants. The action was summarized by the ultimate trial judge in an earlier motion[19] as alleging "breach of a non-compete clause in a contract for sale of a business".

The share and asset purchase agreement in question contained a "Choice of Law and Attornment Clause" by which the courts of Alberta were stated to have exclusive jurisdiction to determine all disputes and claims arising between the parties. Certain parties signed a non-competition agreement and non-solicitation and confidentiality agreements, which selected Alberta law as the governing law and had the parties expressly submit to the jurisdiction of Alberta.

Certain of the defendants brought an application in the Alberta court asking it to decline jurisdiction on the basis that Saskatchewan, not Alberta, was *forum conveniens*. The majority of the applicants were not signatories to a contract containing a choice of forum clause. They argued that this fact served as a basis for the Alberta court declining jurisdiction.

Madam Justice Veit held that where a written contract contains a broad, unambiguous and unqualified choice of Alberta law as governing law and Alberta as the forum where contractual disputes will be heard, the contractual terms have primordial importance in

[19] 2013 ABQB 656.

choosing the forum. Relief from contractual obligations will be granted sparingly and only in exceptional circumstances.

Madam Justice Veit took the opportunity to summarize the types of circumstances that may amount to "exceptional circumstances"[20] justifying a court in exercising its discretion not to enforce a forum selection clause, including:

- the refusal by the forum chosen in the contract to assume jurisdiction;
- the emergence of material changes in the structure of the forum chosen that would justify a contracting party to conclude that they could no longer receive justice in that jurisdiction; and
- inordinate delay in relying on the contractual forum during which delay the contracting party attorned to, and took many steps in, another jurisdiction.

While she accepted that the existence of non-signatory defendants might amount to exceptional circumstances in some cases, she held it did not in the case before her. The applicants who did not sign the contracts were closely related to, or associated with, or subsidiaries of, the applicants who did sign the contract. Inextricably linked to the issue of the signatories allegedly breaching a non-compete clause was whether their related parties had done so.

She cited *Aldo Group Inc. v. Moneris Solutions Corp*., U.S. case law and U.K. case law for the proposition that all the circumstances of signatories and non-signatories must be taken into account in deciding whether it is fair to bind them all to the same lawsuit in the same jurisdiction. In that Alberta was the appropriate forum for the signatory defendants, and given the intertwining of the situation of signatory and non-signatories, she concluded that the applicants had not made out a basis for excluding the non-contractual parties from the litigation.

While it does not raise a question of whether non-signatories can be bound by forum selection clauses, commercial litigators in B.C. should be aware of *Douez v. Facebook,* 2014 BCSC 953. That case considered a choice of forum clause contained in Facebook's Terms of Use, which named California as the chosen jurisdiction. The plaintiff in that case sought to certify a class proceeding on behalf of BC Facebook Users whose names and images were featured in advertisements sent to their contacts without their consent. The plaintiff alleged that this conduct breached the *Privacy Act,* R.S.B.C. 16, c. 373.

Madam Justice Griffin found that there was strong cause for not enforcing the forum selection clause, namely the requirement in the *Privacy Act* that claims under that statute by heard and determined by the B.C. Supreme Court.

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[20] Under the test enunciated in *Z.I. Pompey Industrie v. ECU-Line N.V.*, 2003 SCC 27. Veit J. noted that some cases use the terminology "exceptional circumstances" and others "strong cause" and postulated that while they may amount to the same thing, the cases favouring the "strong cause" language" may be seen as more generous in granting relief from choice of forum clauses.

Bottom line: In commercial relationships involving layers of agreements and where the contracting parties vary as among the agreements, consider whether having all disputes resolved in one place and under one governing law is a desirable objective. If it is, then frame the choice of law and choice of law forum clauses so as to capture non-contractual claims. In addition, to the extent your client has the bargaining power to do so, require that related contracts contain clauses that mirror those choice of law and choice of forum clauses or incorporate them by reference.

A periodic review of a web of related or interlocking contracts that contain renewal provisions is always a good idea to determine if there is internal dissonance or dysfunction on jurisdictional issues that can be rectified.

If you choose to insert an arbitration clause and it does not cover all disputes (for example, tort claims), then you will want to consider a choice of forum clause as well. If your arbitration clause is comprehensive, a true choice of forum clause may be redundant, since under most jurisdictions' arbitration statutes, the domestic court is given supervisory jurisdiction over arbitration awards made in the jurisdiction. An attornment clause might serve some purpose in these circumstances but I question whether it is really necessary when the parties have chosen to arbitrate in the jurisdiction.

6. Interaction of Entire Agreement, Arbitration and Attornment Clauses

The decision of the B.C. Court of Appeal in *One West Holdings v. Greata Ranch Holdings Corp., 2014 BCCA 67*, illustrates the interpretative problems that can arise where a suite of agreements are clearly related, but only one contains an arbitration clause and there are parties to some agreements that are not parties to the agreement to arbitrate.

The three agreements in issue were:

- A limited partnership agreement (the "LPA"), to which GRHC, GRDC, COD and CDLP were parties and pursuant to which the Greata Ranch Developments Limited Partnership (the "limited partnership") was formed;
- A project management agreement (the "PMA") between the limited partnership and One West, an affiliate of COD; and
- A purchase agreement (the "PA") between GRDC and the limited partnership.

The purpose of the limited partnership was to subdivide and develop the property on Okanagan Lake that was purchased from GRDC.

Forms of both the PMA and the PA were scheduled to the LPA.

The LPA contained an arbitration clause. Neither the PMA nor the PA contained such a clause.

When disputes arose, GRHC and GRDC initiated an arbitration against COD, CDLP and One West. One West took the position that the claimants could not join it as a party to the arbitration as it was not a party to the LPA and not a party to any agreement to arbitrate. One West therefore disputed the jurisdiction of the arbitrator. The arbitrator held that One West was a proper party to the arbitration. The award was overturned on appeal to the B.C. Supreme Court.

Central to the decision of the chambers judge was the content of a clause in the PMA entitled "Entire Agreement", which read as follows:

> 17.1 This Agreement, the Partnership Agreement and the Purchase Agreement and any documents expressly contemplated by this Agreement, constitute the entire agreement between the parties and/or affiliates of the parties and supersede all previous communications, representations and agreements whether oral or written, between the parties with respect to the subject matter.

The LPA contained a different "entire agreement" clause:

> This Agreement constitutes the entire agreement between the parties hereto with respect to all of the matters herein and its execution has not been induced, nor do any of the parties hereto rely upon or regard as material, any representations or writings whatsoever not incorporated herein and made a part hereof.

The chambers judge framed the question as whether One West and the limited partnership intended to include the terms of the LPA, including the arbitration clause into their contract, *i.e.*, the PMA. GRHC and GRDC pointed to the entire agreement clause in the PMA and argued that by referencing the LPA as part of the entire agreement between the parties, clause 17.1 incorporated the LPA by reference, including the arbitration clause.

The chambers judge rejected this argument. One of his reasons for doing so was his conclusion that the plain and ordinary meaning of words may be displaced by the parties' use of legal terms of art (in this case "entire agreement", which refers to a clause that attempts to limit the scope of contractual reference to the four corners of the specified document or documents). He then concluded that it made no sense to interpret clause 17.1 as incorporating by reference the terms of the other agreements. Many of those terms would not be relevant to the PMA and incorporating others would create vast areas of redundancy since those terms had nothing to do with the parties subject to the PMA.

A more reasonable construction of clause 17.1, he said, was that it simply operated as a traditional entire agreement clause, limiting the scope of evidence to be considered by the contract interpreter. Thus, while clause 17.1 permitted the court to look to the LPA and other documents for contractual context, it did not require the court to incorporate any terms by reference.

The Court of Appeal took a different approach. It focussed on the plain words of clause 17.1, regardless of its title. The language in that provision was, in its view, unambiguous. While it contained wording in the second clause ("and supersede all previous communications, representations, *etc*.") that performed the usual role of an entire agreement clause, it also contained the first clause whereby all three agreements were stated to constitute the entire agreement between the parties and/or their affiliates. That clause, said the Court of Appeal, was an arbitration commitment binding on One West.

One West pointed to an attornment clause in the PMA and argued that it evidenced the intention of the parties to that agreement to litigate rather than arbitrate. That clause read as follows:

> **Governing Law and Attornment**. This Agreement will be governed by and construed in accordance with the laws of the Province of British Columbia and [One West] and the Partnership hereby attorn to the jurisdiction of the Courts of British Columbia.

The Court of Appeal explained the difference between an attornment clause, which this clause was, and a choice of forum clause, which this clause was not. An attornment provision, particularly in the context of an agreement containing an arbitration clause, is an agreement to submit to the jurisdiction of a court that may have a supervisory or enforcement role to play. A choice of forum clause, such as the arbitration clause in this case, is a clause by which parties contractually commit to having disputes resolved by a particular court or body. Thus, the attornment clause and arbitration clause in the PMA were not inconsistent.

Bottom line: When negotiating and drafting a related suite of agreements that are meant be read together, try to ensure that the dispute resolution and choice of forum clauses are consistent in each and that all parties to the various agreements are bound by the relevant clause. If you do not, parties who do not want to arbitrate (or conversely who are unhappy with a choice of forum) may have fodder for jurisdictional arguments.
A clause by which parties merely attorn to the jurisdiction of a particular court is not a choice of forum clause. Drafters often muddle the two. Be clear about which concept the parties are agreeing to and draft accordingly.
Review not just substantive provisions, but also boilerplate provisions, such as entire agreement clauses, to ensure as much consistency as possible and thereby avoid litigation about how the agreements are to be read and interact with each other.

7. Contractual Duties of Good Faith

In my 2013 paper, I predicted that contractual duties of good faith would be a topic covered in this year's paper. I made that prediction on the basis of leave being granted by the Supreme Court of Canada in *Bhasin v. Hrynew*, 2013 ABCA 98, and the expected progression to trial of the dispute between Molson and Miller (*Molson Canada 2005 v. Miller Brewing Co.*, 2013 ONSC 2758, discussed in last year's paper, is the judgment on an injunction application).

Both these cases are discussed in the 2013 paper: *Bhasin v. Hrynew* is about good faith performance and *Molson Canada 2005* is about good faith negotiation.

While *Bhasin v. Hrynew* was heard by the Supreme Court in February, reasons have not yet been issued.

The trial in *Molson Canada 2005* was adjourned until November of 2014.

Accordingly, I will revisit good faith next year.

I note that there were two interesting cases dealing with contractual good faith decided this year.

In *SCM Insurance Services Inc. v. Medisys Corporate Health LP*, 2014 ONSC 2632, Justice Wilton-Siegel, who was the chambers judge who wrote extensively on whether there was a duty to negotiate in good faith in *Molson Canada 2005*, revisited that topic on an application for an interlocutory injunction in which breach of such a duty was alleged.

In *Bank of Montreal v. No. 249 Seabright Holdings Ltd.*, 2014 BCSC 1094, Mr. Justice Burnyeat considered an allegation by borrowers that the Bank breached a duty to negotiate in good faith the terms and timing of proposed DIP financing if the borrowers undertook CCAA proceedings. He found that there was no such obligation. This decision is under appeal and may therefore inform the good faith topic next year.

Bottom line: Coming next year.

CONTRACT LAW – DEVELOPMENTS OF NOTE
SUMMARY OF TOPICS

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