eLaw

Litigation Update

June 2009 - No. 32

ISSN 1916-3932

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1. Duty to Consult Fulfilled by Regulatory Process: FC

In *Brokenhead Ojibway First Nation v. Canada (Attorney General)*, 2009 FC 484 the Federal Court rejected the Treaty One First Nations' argument that the regulatory process used to approve the construction of pipelines over Aboriginal land could not properly address unresolved land claims, which are a larger obligation of the Crown requiring separate consultation and agreement. In the absence of evidence to prove that the proposed pipeline projects would be likely to interfere with traditional Aboriginal land use or would represent a meaningful interference with the future settlement of outstanding land claims in southern Manitoba, the court found that the Crown's duty to consult "was fulfilled by the notices that were provided to the Treaty One First Nations and to other Aboriginal communities in the context of the NEB proceedings and by the opportunities that were afforded there for consultation and accommodation." The following article discusses the import of the decision.

- *Federal Court Affirms Regulatory Process May Satisfy Duty to Consult* an Osler update posted May 26, 2009

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2. Court's Dissatisfaction Reflected in Costs Decision

In *Hnatiuk v. Court*, 2009 MBQB 114 the parties returned to the judge who had referred them to arbitration on their unanimous shareholders agreement, seeking direction as to what issues should be determined by the arbitrator and a determination on costs. The court acknowledged that s.6 of *The Arbitration Act* gave it the power to intervene and assist in the arbitration. Beyond repeating its general directions on the nature of the dispute, however, the court declined to further define the issues it found to be within the sole discretion of the arbitrator.

The court found no reason to award anything other than normal costs as per the tariff. Interestingly, as an expression of his dissatisfaction with the unwillingness of the parties to cooperate in bringing the matter to conclusion, the judge declined to award costs to either party on the motion for directions.

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3. Extrinsic Evidence Inadmissible if Contract Clear

In *Good Shepherd Pharmacy Ltd. v. First Canadian Health Management Corporation Inc*, 2009

MBQB 122 the court dismissed the plaintiff's application for an interim mandatory injunction compelling the defendants to reinstate an agreement permitting its pharmacies to participate in the Non-Insured Health Benefits Program. Rejecting the plaintiff's argument that implied terms of acting reasonably and in good faith should be read into the termination clause of the agreement, the court said:

> The golden rule is that the words used by the parties are to be given their plain, ordinary and literal meaning, unless to do so would result in an absurdity…. Extrinsic parole evidence is not admissible if the language in the written contract is clear and unambiguous. Where there is an ambiguity, extrinsic evidence may be admitted to aid in resolving the ambiguity, but a court should not strain to create an ambiguity that does not exist.

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4. Onus on Applicant to Establish Merits of Limitation Period Extension

In two recent decisions, the Manitoba Court of Queen's Bench dismissed applications to extend the limitation period under s. 7(1) or s.14(1) of *The Limitation of Actions Act*, C.C.S.M. c. L150. In *Panciera v. Rokovetsky*, 2009 MBQB 129, the court found that the applicant, who suffered a significant form of mental illness during the limitation period, did not meet the onus under either section to establish that she was incapable of managing her legal affairs for any specific period of time during the ordinary limitation period. In *Farrow v. Manitoba (Attorney General)*, 2009 MBQB 127 the court rejected the plaintiff's argument that the limitation period did not begin to run until the plaintiff understood that the cause of his mental illness was connected to alleged defamatory remarks made several years earlier by the defendants. Both decisions refer to *Einarsson v. Einarsson*, 1992 CanLII 4016, in which the Court of Appeal outlines the practice on s.14 applications.

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5. Review of Queen's Bench Rule 20A

The Rule 20A process review committee chaired by Justices Beard and Scurfield has developed proposed revisions to Rule 20A intended to make it possible for modest claims to be adjudicated quickly and at reasonable cost. Introductory remarks by Chief Justice Marc Monnin and the May 2009 proposed draft of the new rule are posted on both the Manitoba Courts and Law Society websites. Interested members of the bar are invited to attend a meeting to discuss the changes on Monday, June 22, 2009 at noon in the Main Floor Conference Room, 363 Broadway or to direct comments to the committee chairs in writing by June 30, 2009.

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6. Sports Waivers Report: MLRC

Waivers of Liability for Sporting and Recreational Injuries, Manitoba Law Reform Commission Report #120, is now available in Full Report PDF and Executive Summary format on the Commission's website. The report provides an overview of civil liability for providers of sporting and recreational activities for the personal injuries or death of consumers arising under three regimes of legal responsibility: *The Occupiers' Liability Act*, the tort of negligence and the law of contract. It recommends that there be limitations on the use of waivers of liability for personal injuries or death resulting from negligence in sporting and recreational activities.

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7. QB Rules Update

The Civil Litigation section of the Manitoba Bar Association is hosting a presentation by the Queen's Bench Rules Committee on Monday, June 22, 2009 from 12:00 noon to 1:30 p.m. at the Main Floor Conference Room, 363 Broadway. The Honourable Justice Karen Simonsen will provide an update on recent and proposed changes to the rules. The Rule 20A review committee will also present.
