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# Agricultural Law *NetLetter*™

A twice-monthly current awareness service reviewing recent cases on land use, marketing boards, environmental issues, creditors rights, animals, grain, import/export and other matters in an agricultural context.

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**** HIGHLIGHTS ****

* The Alberta Court of Appeal has rejected the appeal of Canadian National Resources Ltd. from a decision of the Court of Queen's Bench of Alberta, which had upheld the decision of the Surface Rights Board (Alberta). The decision concerns whether there are fixed rules for assessing expert evidence concerning comparable rental values for surface rights leases, and the weight to be given to expert evidence. While confirming that this is a question of fact in each case, the Court appears to uphold the utility of judicial "guidelines" for assessing this type of evidence. (Canadian Natural Resources Ltd. v. Bennett & Bennett Holdings Ltd., CALN/2010-009, [2010] A.J. No. 330, Alberta Court of Appeal)

* A Justice of the British Columbia Supreme Court has rejected a defence of economic duress advanced by a British Columbia logging company which argued that a contract it signed for compensation for the use a road which a farmer had blocked with his Caterpillar was unenforceable. The Court observed that the owner's conduct was "understandable" given the logging company's negotiating practices, and that the logging company had other options available to it. (Schneider v. Mid Mountain Ventures Ltd., CALN/2010-010, [2010] B.C.J. No. 540, British Columbia Supreme Court)

**** NEW CASE LAW ****

*Canadian Natural Resources Ltd. v. Bennett & Bennett Holdings Ltd.; CALN/2010-009, Full text: [2010] A.J. No. 330; Alberta Court of Appeal, J.E.L. Côté, E.I. Picard and C.D. O'Brien JJ.A., March 30, 2010.*

Expropriation and Surface Rights -- Expert Evidence Concerning Comparable Rental Rates.

Canadian Natural Resources Ltd. ("CNRL") appealed to the Alberta Court of Appeal from a decision of the Alberta Court of Queen's Bench which had upheld a decision of the Surface Rights Board (the "Board").

The Board had increased the compensation payable by CNRL for 7 surface leases which had been granted by Bennett & Bennett Holdings Ltd. and Circle B. Holdings Ltd. (collectively "Bennett"). CNRL had been represented before the Board by Darcy Edwards of Edwards Land Services ("Edwards").

CNRL's appeal from the Board to the Alberta Court of Queen's Bench was conducted as a trial de novo under the Surface Rights Act (Alberta). The Act specifically provides that an appeal to the Court of Queen's Bench is to be a new hearing.

Edwards gave evidence as an expert witness before the Court of Queen's Bench. He provided evidence with respect to "the pattern of dealings" regarding amounts paid for surface leases in his land work over 30 years and in the course of his involvement with approximately 25,000 surface leases, right-of-way agreements, damage claims and rental reviews. He testified that he attempted to negotiate the renewal of the surface leases in question and had been CNRL's advocate at the Board hearing.

The Queen's Bench Justice rejected Edwards' evidence with respect to a "pattern of dealings" for the following reasons [at para. 4]:

> ...
>
> a) There was no definition, precise or general, of the area to which this pattern was said to apply.
>
> b) There was no information with respect to how many sites, overall, are within the area.
>
> c) There was no indication of how many sites were reviewed in order to ascertain the comparables, nor any indication of why other sites reviewed were not comparable.
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> d) There was no explanation of why this pattern was applicable to a certain area.
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> e) There was no information provided with respect to the number of parties, either operator or landowner, represented within the comparables.
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> f) There was no information with respect to the negotiation process.
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> g) With respect to the chart showing CNRL irrigation and dryland leases, almost half of the leases do not fit the compensation pattern.

h) There was no explanation of why leases that were presented as comparables but that did not fit the compensation pattern supported the pattern of dealings.

i) There was no explanation as to why initially only new agreements were considered appropriate comparables, but why later, rent reviews were also considered to be properly included.

Decision: The Court of Appeal dismissed CNRL's appeal [at para. 34].

The Court rejected CNRL's argument that the trial judge had concluded that the reasons in his judgment were "pre-conditions" to making a finding of a "pattern of dealings".

The Court concluded that determination of rental values through the use of comparable sales was a question of fact and that there was no palpable or overriding error of fact, stating [at para. 9 to 12]:

> 9 ...What the expert in question was suggesting was something very similar to comparable sales. In all cases of disputed land values (including various types of expropriation), using comparable sales is one of a handful of well-established and very common methods used by appraisers to find prices or values.
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> 10 Whether past sales (or leases) of other properties are evidence of the sale (or rental or compensation) value of the piece of land in question, is usually a question of fact (if the right definition of "value" or "price" or "rent" is used). Though there may be a vast number of possible reasons why a past sale is insufficiently comparable, a handful of those reasons recur, and are commonly argued. Someone (judge or otherwise) who has some experience with appraisal evidence will naturally tend to think of a number of those common considerations to test similarity vs. divergence. A judge, tribunal member, or arbitrator may even cite (or flatteringly imitate) the considerations discussed in one or two past decisions. There is nothing the matter with that.
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> 11 A judge who does so should not be assumed to be tying himself or herself to a rigid rules of law, nor adopting the incorrect view that decided court cases are precedent on factual questions (without clearer words than those found here).
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> 12 Therefore, the question is whether the Queen's Bench reasons here contained reversible error in reaching the factual conclusion that an applicable pattern of dealings was not proved. Did the Court act unreasonably? That is the only live issue. Neither palpable and overriding error of fact, nor serious misquotations of evidence, was argued in the Court of Appeal.

The Court observed [at para. 13 to 25] that many of the guidelines set out in Intensity Resources Ltd. v. Dobish [1989] A.J. No. 160, 94 A.R. 366, 66 Alta. L.R. (2d) 43 nonetheless applied to the expert's evidence in this case, and that there may have been proper grounds for the rejection of the expert witness' evidence.

The Court also ruled [at para. 26 to 32] that the failure to cross-examine the expert on some comparables did not justify directing a new trial.

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*Schneider v. Mid Mountain Ventures Ltd.; CALN/2010-010, Full text: [2010] B.C.J. No. 540; 2010 BCSC 400, British Columbia Supreme Court, V.R. Curtis J., March 26, 2010.*

Contracts -- Economic Duress.

Alfred and Marianne Schneider (the "Schneiders"), who operated a farm near Prince George, British Columbia, brought an action for breach of contract and damages against a logging company, Mid Mountain Ventures Ltd. ("Mid Mountain") concerning Mid Mountain's use of a private road to the Schneiders' farm.

The Schneiders had constructed the road over their farm property, and had obtained permits where the road crossed over Crown land. The British Columbia Forest Range and Practices Act provides a mechanism for compensating permit holders for the use of their roads by logging companies. The Act provides:

> 22.1 (1) A person must not use a road for
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> > (a) timber harvesting, including the transportation of the timber or associated machinery, materials or personnel,
> >
> > ...
> >
> > except in one or more of the following circumstances:
> >
> > (e) the road is one for which another person has ... a ... road permit ...
>
> (7) A person who uses a road under subsection (1) ... must give at least 5 clear days notice of the date on which the person will begin to use the road.
>
> > (a) to the holder of the applicable road permit...
> >
> > ...

22.3 (1) By written notice under subsection (2), a holder of a road permit ... may require payment, within the limits imposed under subsection (2), from a person who uses a road that is under the permit ... for ...

(a) a purpose referred to in section 22.1(1) or (2) ...

(2) A written notice under subsection (1) must specify

(a) that payment is required, and

(b) the amount of the payment, which amount must be limited to one or more of the following:

(i) a reasonable contribution to the expense of maintaining the road;

(ii) the reasonable expense of modifying the road to accommodate the special needs of the person;

(iii) the reasonable expense of repairing any damage to the road caused by the person's use of the road.

(3) If the holder of the road permit, ... who gives a written notice under subsection (1) and the person who receives the notice to not agree on what amount of payment should be required, the holder and the person must submit that question for resolution

(a) by an agreed process of dispute resolution, or

(b) by binding arbitration under the Commercial Arbitration Act.

(4) A person who receives a written notice under subsection (1) is liable to the holder of the permit ... who gave the notice for payment of the amount that is

(a) specified in the notice, or

(b) determined under section (3) in a case to which that subsection applies.

Mid Mountain started using the road without notice in June of 2005.

The Schneiders asked for compensation and hired a consultant to provide a price as to the amount which they should charge to Mid Mountain.

An agreement dated July 15, 2005 was prepared and presented to Mid Mountain. The Schneiders testified that Mid Mountain agreed upon the rate set out in the contract but never signed it. Mid Mountain's evidence was that they never agreed to the rate, and that the rate was unreasonably high.

Mid Mountain continued to use the road, which the Schneiders maintained. When payment was not received, Mr. Schneider parked his Cat across the road. This prevented Mid Mountain from using the road. Mid Mountain's representatives signed the agreement "under protest" because the blockade prevented Mid Mountain from proceeding with its logging operations.

The Schneiders then continued to maintain the road after the contract was signed.

Mid Mountain, however, failed to pay any amounts due under the agreement and took the position that it was signed under economic duress and was therefore unenforceable.

Decision: Curtis, J. granted the Schneiders judgment for approximately $53,084.00 [at para. 28].

Curtis, J. reviewed the law concerning economic duress [at para. 21 and 22], stating:

> [21] There is no issue between the parties as to the law which applies to a claim of economic duress. The concept is discussed in the case of Gordon v. Roebuck (1993), 9 O.R. (3d) 1 (Ont. C.A.). At para. 3 of the Reasons of McKinlay J.A., it is stated:
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> > To succeed on the ground of economic duress, the plaintiff must prove that his will was coerced and the pressure exerted to do that was not legitimate. Lord Scarman [in Pao On v. Law Yiu, [1979] 3 All E.R. 65 at 78] has set out four factors to consider in determining if a party's will has been coerced. They are:
> >
> > 1) Did he protest?
> > 2) Was there an alternative course open to him?
> > 3) Was he independently advised?
> > 4) After entering the contract did he take steps to avoid it?
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> [22] The concept is also discussed in the case of Gotaverken Energy Systems Ltd. v. Cariboo Pulp & Paper Co. (1993), 9 C.L.R. (2d) 71 by Vickers J., who in paragraph 125-135 of his decision refers to the

authorities as follows:

> 125 Central to the notion of a contract is the fact that parties are willing participants, free to strike the bargain that best suits personal interests. Hard bargains may be driven and the law will be quick to protect those bargains where the arrangement was without mistake, free of fraud and the product of willing minds. Conversely, the law will not protect contractual arrangements brought about by duress in any form.
>
> 126 Early this century the law recognized that improper payments made involuntarily, for the purpose of avoiding some threatened action, were not voluntary payments but were payments made preserving the right to dispute the legality of the demand. Such payments were made under the compulsion of urgent and pressing necessity, analogous to duress. Maskell v. Horner (1915), 84 L.J.K.B. 1752, [1915] 3 K.B. 106.
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> 127 A similar approach was taken by the Supreme Court of Canada in Saint John (City) v. Fraser-Brace Overseas Corp., [1958] S.C.R. 263 and George (Porky) Jacobs Enterprises Ltd. v. Regina (City), [1964] S.C.R. 326, where payments made under compulsion of urgent and pressing necessity and not voluntarily could be recovered.
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> 128 The present day law on economic duress appears to have been shaped by the decision of the Privy Council in Pao On v. Lau Yiu, [1979] 3 All E.R. 65. In that case, the third of three questions posed to the learned law lords asked if a guarantee, given with consideration, was unenforceable where consent was induced by duress? Lord Scarman, in responding to that question said at page 78:
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> Duress, whatever form it takes, is a coercion of the will so as to vitiate consent. Their Lordships agree with the observation of Kerr J. in The Siboen and The Sibotre [1976] 1 Lloyd's Rep. 293 at 336 that in a contractual situation commercial pressure is not enough. There must be present some factor "which could in law be regarded as a coercion of his will so as to vitiate his consent". This conception is in line with what was said in this Board's decision in Barton v. Armstrong, [1975] 2 All E.R. 465 at 476-477, [1976] A.C. 104 at 121 by Lord Wilberforce and Lord Simon of Glaisdale, observations with which the majority judgment appears to be in agreement. In determining whether there was a coercion of will such that there was no true consent, it is material to enquire whether the person alleged to have been coerced did or did not protest; whether, at the time he was allegedly coerced into making the contract, he did or did not

have an alternative course open to him such as an adequate land remedy; whether he was independently advised; and whether after entering the contract he took steps to avoid it. All these matters are, as was recognized in Maskell v. Horner, [1915] 3 K.B. 106, [1914] All E.R. Rep. 595, relevant in determining whether he acted voluntarily or not.

129 In B & S Contracts and Design Ltd. v. Victor Green Publications Ltd., [1984] I.C.R. 419, the Court of Appeal in England had to consider the issue of economic duress. In that case, the plaintiffs had agreed to erect exhibition stands for the defendants under a contract containing a clause that the plaintiff would make every effort to perform, subject to a right to vary or cancel in the event of a strike. Workers from an insolvent subsidiary company in Wales, who had been given redundancy notices, refused to work until their demand for severance pay, to which they were not entitled, was paid. An offer, made by the plaintiff, to pay one-half the sum demanded was rejected by the workers.

130 The plaintiff then informed the defendants the contract would be cancelled unless the defendants paid the remaining portion of the money demanded by the workers, not as an advance on the contract price but as an addition to the contract price. The defendant resisted but finally its representative agreed to the payment, stating the plaintiff had him "over a barrel". The money was paid but in the end, deducted from the final contract payment, resulting in proceedings to recover the balance of the contract price.

131 The court found that cancellation of the contract would have caused serious damage to the defendant's economic interests and they had no choice but to make the payment. It was a payment made under duress and the defendant was entitled to recover from the final contract payment.

132 Eveleigh L.J., at page 423, adopted a passage from the judgment of Lord Diplock in Universe Tankships Inc. of Monrovia v. International Transport Workers' Federation, [1982] 2 All E.R. 67. That passage refers to illegitimate pressure exercised by one party on another with the consequence that consent is treated in law as revocable unless "approbated either expressly or by implication after the illegitimate pressure had ceased to operate". Stating it was unnecessary to consider the precise meaning of legitimate, Eveleigh L.J. said that for the purpose of the case before him it was "sufficient to say that if the claimant has been influenced against his will to pay money under the threat of unlawful damage to his economic interest he will be entitled to claim that money back".

> 133 A more recent decision of the English Courts is Atlas Express Ltd. v. Kafco *Importers & Distributors) Ltd., [1989] 1 All E.R. 641. That was a situation more akin to this case, because it is an example of a party to a contract being forced to renegotiate the terms to his disadvantage. There was no alternative but to accept the new terms offered. In holding there had been economic duress which vitiated the apparent consent to new terms; the case stands as clear authority for the proposition that a new agreement will not be enforced if its terms are accepted under duress and where it is revoked after the illegitimate pressure has ceased to operate.
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> 134 Finally, the authority of British Columbia jurisprudence arises out of the pre-trial motions for judgment under R. 18A, in this case. In Canadian Energy Services Ltd. v. Gotaverken Energy Systems Ltd. (1989), 36 C.L.R. 238, Cohen J. relied upon the authority of Pao On (supra). Noting the conflict in the affidavit evidence before him, he said the key question for him to consider on the issue of duress was whether Gotaverken had exerted illegitimate pressure on Cariboo to the extent that would vitiate the Cariboo consent. He concluded there was a triable issue which would "turn mainly on the conclusions and inferences to be drawn from the events surrounding the May 27 weekend negotiations".
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> 135 On appeal, at (1990), 42 C.L.R. 50, Hinkson J.A. gave judgment for the court, noting at page 53 that no issue was raised with respect to the passage from Pao On v. Lau Yiu (supra) relied upon by Cohen J. in the trial judgment as correctly stating the law. Similarly, no issue was taken in these proceedings with the statement of Lord Scarman to which I have already referred. My conclusions which follow rely on that judgment and take into account each of the four elements raised by Lord Scarman.

Curtis, J. held that Mid Mountain could not rely on the defence of economic duress, stating, at para. 24 and 25:

> [24] Mr. Schneider did not have to close the road as he did, he could have given the notice for payment under the Forest and Range Practices Act. It is, however, quite understandable why he acted as he did. Mid Mountain appeared to be pursing the infamous talk and log strategy and was on a course to finish with the use of his road before agreeing upon the rate they would pay him for it. Furthermore, it was not until Mid Mountain had finished hauling over his road that it made clear to Mr. Schneider that it would not pay the rate he expected. Mid Mountain could have obtained a court order to end the road block but instead chose to sign the 9C contract.
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> [25] In those circumstances, I find Mid Mountain cannot rely upon the defence of economic duress to avoid the 9C/ M3/km contract Mr. Dakus

signed for TFL A74856 which involved 12.6 km of road...

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## ** CREDITS **

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