# In the Court of Appeal of Alberta

**Citation: Marathon Canada Limited v. Enron Canada Corp., 2009 ABCA 31**

**Date:** 20090123
**Docket:** 0801-0242-AC
**Registry:** Calgary

**Between:**

**Marathon Canada Limited**

Respondent
(Plaintiff/Defendant by Counterclaim)

- and -

**Enron Canada Corp.**

Appellant
(Defendant/Plaintiff by Counterclaim)

- and -

**Marathon Oil Company and Husky Oil Operations Limited**

Respondents
(Defendants by Counterclaim)

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**The Court:**

**The Honourable Madam Justice Ellen Picard**
**The Honourable Mr. Justice Peter Costigan**
**The Honourable Mr. Justice Jack Watson**

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**Memorandum of Judgment**

Appeal from the Judgment by
The Honourable Mr. Justice T.F. McMahon
Dated the 2nd day of July, 2008
Filed on the 2nd day of July, 2008
(2008 ABQB 408, Docket: 0201-07692)

## Memorandum of Judgment

**The Court:**

[1] The appellant challenged a trial judge's decision awarding damages plus interest to the respondent Marathon Canada Limited ("Marathon") against the appellant Enron Canada Corporation ("Enron"), and dismissing Enron's counterclaim against Marathon: [2008] A.J. No. 1113 (QL), 2008 ABQB 408. We dismissed the appeal with reasons to follow. These are those reasons.

[2] The claims arise out of a natural gas purchase agreement dated January 30, 1995 ("the Agreement") involving Marathon's predecessor, Tarragon Oil and Gas Limited ("Tarragon"), and Enron's predecessor, Enron Capital and Trade Resources Canada Corporation ("ETC"). Enron's counterclaim brought the respondent Husky Oil Operations Limited into the matter ,who acquired Marathon after the relevant events in 2001.

[3] The trial judge found Marathon to have reasonably concluded that a "Triggering Event" of a "Material Adverse Change" ("TE/MAC") had occurred on November 28, 2001 to Enron's parent corporation within the meaning of Articles 9.1 and 9.3 of the Agreement: Trial Reasons, paras 80 to 97. This entitled Marathon to give notice of termination of the Agreement to Enron, which Marathon promptly did, effective December 1, 2001. As Marathon had supplied natural gas under the Agreement in November, 2001, for which Enron did not pay, Marathon was awarded damages of $560,007.94. Marathon was also awarded interest from December 27, 2001 to date of judgment on July 2, 2008 in the amount of $251,553.09, the interest rate being specified under the Agreement.

[4] Marathon was said to have benefited otherwise from the termination of the Agreement. The value of the gas yet to be delivered by Marathon to Enron under the Agreement had risen in price since the Agreement. Enron claimed liquidated damages against Marathon under Article 9.2, arguing that Marathon was not entitled to terminate the Agreement. The trial judge rejected Enron's claim that Article 9.2 embodied a "two way" arrangement, finding that Article 9.2, despite some ambiguity, contemplated a "one way" contract whereby Marathon, on lawful termination, could walk away from the Agreement and would not have to compensate Enron for the loss of the favourable contract price under it. The trial judge also rejected the alternative submission of Enron that it should get relief from the 'forfeiture' involved in the "one-way" interpretation. The trial judge therefore rejected Enron's counterclaim for liquidated damages under Article 9.2. The trial judge provisionally found that if (a) Marathon wrongly terminated and (b) Article 9.2 was a two-way provision entitling Enron to claim liquidated damages, then Enron would be entitled to liquidated damages of $55,212,000.00, plus interest, less Marathon's set-off for the November supply: Reasons, paras. 192 to 194. Enron does not challenge these latter findings on appeal though it claimed more in liquidated damages at trial. Enron conceded on appeal that if Marathon was entitled to terminate the Agreement on the basis that it did, the counterclaim failed.

[5] Accordingly, Enron's appeal rests on whether the Agreement, properly read, allowed Marathon to terminate the Agreement effective December 1, 2001, which in turn rests on whether there was a TE/MAC under the terms of the Agreement which justified Marathon doing so.

[6] Enron contends that the standard of review of the trial judge's interpretation of the Agreement is correctness, citing ***Jager v. Liberty Mutual Fire Insurance Co.*** (2001), 281 A.R. 273, [2001] A.J. No. 820 (QL), 2001 ABCA 163 at para. 14. Correctness would apply to the extent that the appeal depends on a strict reading of only the terms of the Agreement. However, Enron also sought to have the trial judge consider its submissions about (a) industry custom and practice or "commercial context", (b) good faith, (c) the knowledge or motives of Robert Shepherd, Marathon's president in 2001, who did not testify and (d) alleged unjust enrichment of Marathon due to the "one-way agreement" (although the appellant no longer presses the unjust enrichment argument). Enron's contentions raise fact sensitive questions. The reasonableness standard, with its associated concept of palpable and overriding error, applies to those aspects of this appeal: ***942925 Alberta Ltd. v. Thompson*** (2008), 432 A.R. 177, [2008] A.J. No. 194 (QL), 2008 ABCA 81 at para. 18; ***Klemke Mining Corporation v. Shell Canada*** (2008), 433 A.R. 172, [2008] A.J. No. 725(QL), 2008 ABCA 257 at para. 15; ***Dreco Energy Services Ltd. v. Wenzel*** (2008), 93 Alta. L.R. (4th) 260, [2008] A.J. No. 944 (QL), 2008 ABCA 290, at para. 11; ***Conway v. Zinkhofer***, [2008] A.J. No. 1262 (QL), 2008 ABCA 392 at paras. 31 to 32.

[7] Articles 9.1 and 9.3(h) of the Agreement provide as follows:

> 9.1. Early Termination
>
> If a Triggering Event (defined in Section 9.3 below) occurs with respect to either Party at any time during the term of this Agreement, the other party (the "Notifying Party") may, upon two Business Days' written notice to the first Party, and which notice shall be given no later than sixty days after the occurrence of the Triggering Event, establish a date on which this Agreement will terminate (the "Early Termination Date"), except as provided in Section 15.2 hereof. Notwithstanding the foregoing, if a Triggering Event occurs, the Notifying Party may in its sole discretion (without waiving any of its rights to later declare an Early Termination Date) agree, as a condition to continuing to perform its obligations under this Agreement, to accept from the Affected Party (defined in Section 9.3) (i)a letter of credit, (ii)cash prepayments, or (iii)other security in a form acceptable to the Notifying Party. .....
>
> 9.3. Triggering Event shall mean with respect to a Party (the "Affected Party"): .....
>
> (h) the occurrence, in the reasonable opinion of the Notifying Party, of a Material Adverse Change of the Affected Party; provided that such Material Adverse Change shall not be considered to be a Triggering Event if the Affected Party establishes, and maintains throughout the term hereof, a Letter of Credit (naming the Notifying Party as the beneficiary thereof) in an amount equal to the greater of (i) the Notifying

> Party's Liquidated Damages or (ii) if the Notifying Party is the Seller, the aggregate of the amounts Seller is entitled to receive during the sixty-Day period preceding the Material Adverse Change. The amount of such Letter of Credit shall be adjusted quarterly if necessary, to cover the Notifying Party's Liquidated Damages at that point in time; or .....

[8] "Material Adverse Change" is defined in the Agreement as:

> "Material Adverse Change" means (i) with respect to Buyer, Enron Corp. shall have long-term debt unsupported by third party credit enhancement that is rated by Standard & Poor's below BBB-; or .....

[9] There was no dispute that Enron did not at any time prior to December 1, 2001, establish and maintain a letter of credit under Article 9.3(h): Trial Reasons, para. 82. Enron did not post such a letter of credit even after Marathon gave notice of termination: Trial Reasons, para. 84. At trial, Enron argued that Article 9.3(i) modified the meaning of Article 9.3(h). Article 9.3(i) provides:

> 9.3. Triggering Event shall mean with respect to a Party (the "Affected Party"): .....
>
> (i) the Affected Party fails to establish, maintain, extend or increase a Letter of Credit when required pursuant to this Agreement, or any Exhibit, or after reasonable notice fails to replace the issuing bank with another bank acceptable to the Beneficiary Party; or .....

[10] The trial judge found that Articles 9.3(h) and 9.3(i), separated by the word "or" were alternative Triggering Events under the Agreement, and thus that Article 9.3(i) did not modify Article 9.3(h). Article 9.3(i) had application to other aspects of the Agreement so reading Article 9.3(i) to alter Article 9.3(h) was not necessary for an overall correct reading of the Agreement.

[11] As to the TE/MAC in this instance, the trial judge, relying on unchallenged expert evidence, found as a fact that the "long term debt" of "Enron Corp." had dropped below the two alternative Standard and Poors' categories of BBB- on November 28, 2001: Trial Reasons, para. 91. The "Enron Corp." rating was B-, which was non-investment grade or "junk" status. The trial judge noted that the parties to the Agreement had agreed to link the Triggering Event with the credit status of Enron Corp., the indirect parent of Enron. Significantly, as found by the trial judge, Article 9.3(h) allowed Marathon to regard the matter as a TE/MAC based on Marathon's "reasonable opinion" to that effect. The President and CEO of Enron admitted to Marathon by letter on December 2, 2001, that under many of Enron's trading contracts, this credit downgrade was in actuality a "Material Adverse Change": Trial Reasons, para. 96. The TE/MAC was, in the trial judge's view, a reality within the meaning of the Agreement despite the evidence as to the alleged solvency of Enron itself: Trial Reasons, paras. 30 to 37. The trial judge also found as a fact that Enron did not, within the "Two Business Days" written notice period under Article 9.1 respond to the notice by furnishing any letter of credit or other assurances of Marathon's rights to its contract sums. Indeed, Enron's

response was to deny the occurrence of a TE/MAC. We are not persuaded that there is palpable and overriding error in the fact findings of the trial judge that Marathon could form the reasonable opinion that a TE/MAC had occurred under the terms of Articles 9.1 and 9.3(h), assuming he interpreted them correctly. We also find no error in his rejection of the relevance of the absence of evidence from Robert Shepherd.

[12] As for interpretation of Articles 9.1 and 9.3(h), the position of Enron comes down to a submission that, despite their plain wording, the Articles should be read as limited by "industry practice" or "commercial context" interpretation, or should be restrained by an imposition of a "good faith" requirement on the exercise by Marathon of its legal rights under the Agreement. As to these points, we note that under Article 3.1(e) of the Agreement, each party represented and warranted that the Agreement "..... constitutes a legal, valid, and binding act and obligation of it, enforceable against it, in accordance with its terms .....". Under the title "Merged Document", Article 15.5 of the Agreement also provides:

> 15.5 This Agreement, the Exhibits hereto, and the Confirmation Letter constitute the entire agreement between the Parties hereto. There are no prior or contemporaneous agreements or representations affecting the subject matter hereof other than those herein expressed. No amendment, modification or change to this Agreement shall be enforceable, except as specifically provided for in this Agreement, unless reduced to writing and executed by both Parties.

[13] Enron characterizes Marathon's decision to exercise the Articles as a "hair trigger termination" which the parties, in light of the commercial context and industry practice, could not have contemplated and did not accomplish in the Agreement. Despite the extensive analysis of evidence offered by Enron, we are unable to see how either of these arguments is more than an attempt to re-write the plain terms of the Agreement. This is not a case where the terms of the Agreement are ambiguous, requiring the Court to consider the relevant commercial context to understand what the wording would have meant to the parties at the time: see ***Wilde v. Archean Energy Ltd.*** (2007), 422 A.R. 41, [2007] A.J. No. 1335 (QL), 2007 ABCA 385 at para. 26; ***Ramona Morrison Hospitality Services Ltd. v. Stonebridge Hotel Ltd.*** (2008), 294 D.L.R. (4th) 574, [2008] A.J. No. 617 (QL), 2008 ABCA 222 at para. 6; ***Klemke Mining**, supra* at paras. 18 to 20, 26 to 27; ***Dreco**, supra* at para. 22. The rules for implying terms into a contract are strict and do not favour contradicting the contract's express terms: ***Apex Corporation v. Ceco Developments*** (2008), 429 A.R. 110, [2008] A.J. No. 325 (QL), 2008 ABCA 125 at paras. 31 to 32, leave denied, [2008] S.C.C.A. No. 264 (QL). We find no palpable and overriding error in the trial judge's conclusion that the parties to this Agreement were sophisticated and knowledgeable in this specific business area and, indeed, Enron's in-house legal team drafted the Agreement: Trial Reasons, paras. 118 to 119.

[14] Enron's main submission in more than one form is that Marathon was required by commercial context or industry practice to give Enron more time, or to firstly negotiate better security for its diminished credit rating, or to invite Enron to provide a letter of credit or otherwise to hold off. This submission depends in part on the argument that Article 9.3(i) modifies Article

9.3(h) which the trial judge rejected. It also depends on the broader context and **industry** practice which the trial judge found to not be established to his satisfaction: Trial Reasons paras. 98 to 125.

[15] Before us, Enron seemed to say that "industry practice" was a factual issue but that "commercial context" was something which required no evidential assessment and had to be applied correctly by the trial judge. We find no merit in this submission. We also see no palpable and overriding error in the trial judge's rejection of the existence of an alleged industry practice or commercial context demanding that Marathon hold back on its contractual rights. Indeed, on the evidence before the trial judge, other counter parties were similarly not labouring under the alleged industry practice or commercial context as they acted as did Marathon. Even if one were to ignore that evidence, the trial judge accepted evidence that the Agreement was virtually drafted by Enron's in-house Counsel, a finding not disputed before us. Accordingly, we detect no palpable error in a conclusion that, if Enron felt business practice or commercial context demanded a right to negotiate after a TE/MAC or a time period of more than two business days to take steps to address the TE/MAC before the termination took effect, it would have written its contracts to say so. We also find no error in the trial judge's conclusion that Articles 9.3(h) and 9.3(i), separated but linked by the conjunction "or" are Articles providing for alternatives as to Triggering Events.

[16] Enron also submits that the words "provided that" which appear in Article 9.3(h) imply an agreement by Marathon to await a reasonable time for a letter of credit to come into existence before acting on the Triggering Event. This approach parses a clause in the Article and is oblivious to its meaning as a whole. As with Enron's submission as to reading the Articles as subject to business practice or commercial context, this submission would read in a piecemeal way words in a clause which should be read as a whole and which speaks for itself without need of assistance in the Agreement: ***Amerada Minerals Corporation v. Mesa Petroleum Co.*** [1986] A.J. No. 1405 (QL) at para. 12; ***Freyberg v. Fletcher Challenge Oil and Gas Inc.*** (2005), 363 A.R. 35, [2005] A.J. No. 108 (QL), 2005 ABCA 46, at paras. 56 to 59.

[17] In any event, the trial judge did not find anything missing from the Agreement needed to give it business efficacy. Although the appellant's witnesses used the term "commercial context" in their evidence, it fell to the trial judge to decide if that concept was meaningful to the decision he had to make. To read into the contract a "reasonable time" period when Article 9.3(h) provided for two business days notice would substitute a court **replacement** time limit for what the parties expressly specified: ***Pennock v. United Farmers of Alberta Co-operative Limited***, [2008] A.J. No. (QL), 2008 ABCA 278 at para. 14. The trial judge noted the 'entire agreement clause' in the Agreement which should be given its worth by the Court: see ***Paddon Hughes Development Company v. Pancontinental Oil Ltd.*** (1998), 223 A.R. 180, [1998] A.J. No. 1120 (QL), 1998 ABCA 333 at paras. 42 to 46; ***Freyberg**, supra* at para. 56; ***Landex Investments Company v. John Volken Foundation***, [2008] A.J. No. 1131 (QL), 2008 ABCA 333 at para. 8; ***Highwood Distillers Ltd. v. Panorama Public and Industrial Communications Ltd.*** (2005), 363 A.R. 239, [2005] A.J. No. 239 (QL), 2005 ABCA 107 at para. 13. To read into this Agreement a duty for Marathon to negotiate despite **what they could reasonably find to be a triggering event** is not appropriate: see ***Dow***

***Agroscience Canada Inc. v. Philom Bios Inc.*** (2007), 57 C.P.R. (4th) 369, [2007] A.J. No. 380 (QL), 2007 ABCA 122, at para. 17 and 71.

[18] Since Marathon was acting within the scope of the Articles as worded, it did not repudiate the Agreement as claimed by Enron. It follows that the trial judge did not err in finding that Enron had not made out its counterclaim. Any opinion held by Enron's witnesses years after the fact as regards how the notice letter by Marathon dated November 28, 2001 was to be read did not bind the trial judge to conclude that Marathon was repudiating the Agreement.

[19] As for good faith, we note that although the appellant's argument suggests unfairness on the part of Marathon in the manner in which it exercised its rights under the Agreement, there is no specific argument as to how an express good faith clause would be insinuated into this Agreement on a *post-facto* basis and, if so, what effect that would have. There may be contractual situations where good faith is imposed by law onto the superstructure of contracts. However, the trial judge rejected a contention before him of lack of good faith citing ***Transamerica Life Canada Inc. v. ING Canada Inc.*** (2003), 68 O.R. (3d) 457, [2003] O.J. No. 4656 (QL) at para. 53. We need not address this issue except to point out that the trial judge made no findings of fact that Enron was a vulnerable party, or that there was lack of good faith by Marathon, or that Marathon took an unfair opportunistic advantage for a "disingenuous" motive, or that Marathon ran roughshod over reasonable contractual expectations that existed in the Agreement. Although suggestions like this are braided into the appellant's arguments, there is no specific basis for an attack on good faith in the evidence and no specific challenge to the trial judge's finding on that issue. Under those circumstances, we do not need to address good faith.

[20] The trial judge's fact findings were reasonable. He did not misdirect himself on the law when he interpreted the contract. The appeal is dismissed, inclusive of the appeal from the dismissal of the counterclaim by Enron.

Appeal heard on January 15, 2009

Memorandum filed at Calgary, Alberta
this 23rd day of January, 2009

Authorized to sign for: Picard J.A.

Costigan J.A.

Watson J.A.

**Appearances:**

J.L. Lebo, Q.C./D.W. Dear/J.P. Flanagan
for the Respondents

D.W. McGrath/M. O'Brien
for the Appellant