The Contra Proferentem Rule

Whereas Ambiguity Goes Against the Drafter

The principle of *contra proferentem* is a legal doctrine of contractual interpretation providing that ambiguous or conflicting terms within a contract should be construed against the party that drafted the agreement or demanded inclusion of the ambiguous terms within the contract.

The contra proferentem rule applies where an ambiguous term or clause was imposed at the unilateral insistence of one party. Where both (or all if more than two) parties mutually negotiated the ambiguous term or clause the law will avoid the automatic favouring of one party over another. This is not to say that the interpretation should become neutral but to say that when the ambiguous term or clause is without unilateral imposition, applying of the contra proferentem principle should be avoided. Furthermore, the *contra proferentem* rule is only applicable where an ambiguous term or clause exists as determined by a court of law within the proceedings of a contract dispute. The *contra proferentem* rule is irrelevant to

disputes involving ambiguous terms or clauses within legislated statutes (although the laws applicable to the interpretation of statutes and regulations may produce a similar result - interpretation against the drafter, the drafter being the provincial legislature or federal Parliament or even a municipality in the case of by-laws).

The basic reasoning for the contra proferentem rule is to encourage drafters of contracts to apply diligence and seek explicit clarity and avoidance of ambiguity and to carefully consider foreseeable circumstances during the drafting process. Additionally, the contra proferentem rule embodies the law's disliking of the use of standard contract documents such as insurance policies or residential lease agreements. Courts view standard contract documents as lacking a genuine bargaining between the parties often resulting in inequitable positions. The *contra proferentem* rule helps to mitigate unfairness by applying the interpretation that gives benefit of doubt to the party upon whom the contract was forced.

Very importantly, the *contra proferentem* rule places the burden of losses caused by ambiguity upon the party best in position to avoid the harm in the first place, this being the party that drafted the contract. As above, a primary example is where ambiguous terms or clauses within standard contract documents (i.e. insurance policies) will be interpreted and applied in a manner that goes against the drafter (i.e. insurance company).

The contra proferentem doctrine was articulated well in the case of ***Cote v. JDR Coachworks***, 2005 CanLII 6374 at paragraphs 22 to 23 as follows:

> [22] The contra proferentem rule of construction provides that ambiguity in a contract "is interpreted as against him who has stipulated and in favour of him who has contracted the obligation. *City of Toronto v. Toronto Railway Co.*, [1907] A.C. 315." The Supreme Court of Canada discussed contra proferentem in *Hillis Oil and Sales Ltd. v. Wynn's Canada Ltd.* where LeDain J. wrote at paragraph 17 that *contra proferentem* is a rule of general application:

> [17] ... It is true that [contra proferentem] has been most often invoked with reference to the construction of insurance contracts, particularly clauses in such contracts purporting to limit or exclude the insurer's liability. Statements of the rule and its application in such cases may be found in the decisions of this Court in *Consolidated-Bathurst*, [1980] 1 S.C.R. 888, and *McClelland and Stewart*, [1981] 2 S.C.R. 6. The rule is, however, one of general application whenever, as in the case at bar, there is ambiguity in the meaning of a contract which one of the parties as the author of the document offers to the other, with no opportunity to modify its wording. ... [emphasis added].

[23] While LeDain J. only discussed contra proferentem in situations where a party has had no opportunity to modify the contract, Abella J.A. (as she then was) wrote at paragraph 93 of her dissenting judgment in *Arthur Anderson Inc. v. Toronto Dominion Bank* that contra proferentem applies even where a right of modification exists:

> [93] If I am wrong in relying on the extrinsic factual context to reject the bank's interpretation of the agreement, then I would nonetheless still resolve any ambiguity against the bank's interpretation by applying the contra proferentem rule. I do not understand this rule of interpretation or its explication in *Hillis Oil and Sales Ltd. v. Wynn's Canada Ltd.*, [1986] 1 S.C.R. 57, as being restricted to those situations where no right of modification exists. It is a rule meant to relieve the non-authorial party to a contract from an interpretation that [a] party could not clearly discern from a plain reading of the document. This prevents the party who did draft and understand the contract from springing a hidden contractual burden on an unsuspecting signator (Anson's Law of Contract, 25th ed. (1979) at p. 151; Fridman, The Law of Contract in Canada, 2nd ed. (1986), at pp. 44-45; *Consolidated Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.*, [1980] 1 S.C.R. 888 [emphasis added].