

Limited Partnerships: Devon Canada Corporation v. PE-Pittsfield, LLC

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Cases Considered:

[*Devon Canada Corporation v. PE-Pittsfield, LLC*, 2008 ABCA 393.](#)

In *Devon Canada Corporation v. PE-Pittsfield, LLC*, the Alberta Court of Appeal clarified the law respecting foreign limited partnerships and discovery of limited partners in two respects. First, it determined that limited partners cannot be examined when the limited partnership is named as a defendant in an action. Second, it determined that a foreign, unregistered limited partnership has the same rights and obligations of a limited partnership under Alberta law.

The plaintiff Devon Canada Corp. (Devon) commenced the action against several defendants including the general partner, PE-Pittsfield, LLC (Pittsfield). Pittsfield carries on business as Pittsfield Generating Company, LP (PGC). PGC is a registered Delaware limited partnership and Pittsfield is the general partner in PGC. Devon's claim dealt with the termination of two power sales agreements between PGC and two third parties who were not involved in the litigation. PGC counterclaimed, with regard to Devon's subsequent failure to deliver gas to PGC under a natural gas supply agreement. General Electric Capital Corp (GECC) and General Electric Credit Corp of Tennessee (GECC-Tennessee) are limited partners in PGC but were not named in the litigation. This particular case arose because Devon wanted to examine the two limited partners.

Three issues were before the Court of Appeal (Justices Constance Hunt, Marina Paperny, and Patricia Rowbotham). First, the legal status of an unregistered foreign limited partnership under Alberta law needed to be determined. Second, the Court had to determine whether Rules 80 and 201 of the *Alberta Rules of Court*, Alta. Reg. 390/68 apply to limited partnerships to allow for the examination for discovery of limited partners. Finally, the Court considered whether the case management judge erred in determining that the limited partners had not assumed management of the business and therefore lost their limited partner status.

A limited partnership, in contrast to an ordinary partnership, grants its limited partners limited liability. It consists of one or more general partners and one or more limited partners. The general partner has unlimited liability, and the limited partners will lose their limited liability status if they start participating in the management of the business. The partners in an ordinary partnership, as agents for each other, have joint and several liability for the debts and obligations of the other partners in the partnership.

On the first issue, the limited partnership, PGC, registered in Delaware, had not registered under s.52(2) of the Alberta *Partnership Act*, R.S.A. 2000, c. P-3. Pursuant to s. 52, a partnership formed in a jurisdiction other than Alberta and registered as a limited partnership under the laws of that jurisdiction, may be registered as a limited partnership under the Alberta Act (s.52(2)). Once registered, it has the same rights and duties as a firm formed in Alberta (s.52(5)). Devon argued that the failure to register meant Part 2 of the *Partnership Act* did not apply and that PGC was an ordinary partnership, meaning GECC and GECC-Tennessee ceased being limited partners and became ordinary partners. The Court disagreed with that argument for two reasons. It saw the matter as one of private international law, and that a limited partnership's status was a matter to be determined by the jurisdiction in which it was created. Specifically, "whether or not PGC is a limited partnership and GECC and GECC-Tennessee are limited partners is a question for the laws of Delaware, not the Alberta *Partnership Act*" (para. 27). And the status of the partnership had not been challenged in Delaware.

A change in legal status of the partnership would amount to a substantive change of legal rights, and a consequent finding that the limited partners were ordinary partners. A change in status of the partners would mean they would become joint and severally liable for the debts and obligation of their partnerships and subject to discoveries on behalf of their partnership. Such a removal of legal rights would require express statutory language, which the *Partnership Act* fails to provide. Using a statutory interpretation argument, the Court maintained that the *Partnership Act* is silent on the effect of non-registration of a foreign limited partnership, a silence which is to be contrasted with Part 3, s.93 of the Act, which specifically indicates that the non-registration of a foreign limited liability partnership meant the status would change to one of an ordinary partnership. Given the difference in statutory language, the conclusion that non-registration converts a limited partnership into an ordinary one, is unsupported. Therefore, the principles of private international law and the clear language employed in s.93 of the Act could only mean that the legal status of limited partnerships does not change regardless of non-registration.

The decision of the case management judge on the second issue, that the *Rules of Court* do not allow the examination for discovery of limited partners, was also upheld by the Court.

Rule 80 provides:

Subject to the provisions of any enactment, any two or more persons claiming to be entitled or alleged to be liable as partners in respect of a cause of action and carrying on business within the jurisdiction may sue or be sued in the name of the firm of which they were partners at the time when the cause of action accrued.

Rule 201 provides:

A member of a firm which is a party and a person for whose benefit an action is prosecuted or defended shall be regarded as a party for the purposes of examination.

Devon argued that limited partners are subject to examination under Rule 201 and used the decision in *Sorrel 1985 Ltd. Partnership v. Sorrel Resources Ltd.*, [1992] A.J. No. 480, 3 Alta L.R. (3d) 90 (Q.B.) [*Sorrel*], to maintain that Rule 80 deemed the limited partners to be parties as a result of having named the limited partnership as a defendant. *Sorrel* dealt with an action among partners. The Court disagreed, maintaining “[n]either *Rule 80* nor *Rule 201* makes limited partners parties to an action against the limited partnership” (para. 38). In particular, *Sorrel* involved an action between partners, under which circumstances, partners can be subject to examination (*Partnership Act*, s.77). As a result, the substantive law of limited partnerships remains unchanged by the Rules and a limited partner’s liability cannot be ignored. To do so would be to ignore the limited partner’s inability to participate in the management of a partnership.

With regard to whether the limited partners had assumed control of the business and therefore lost their limited partner status, the Court determined the case management judge was entitled to considerable deference and found no basis for intervention.