

RECENT JUDICIAL DECISIONS OF INTEREST TO ENERGY LAWYERS

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Contract Law

CM Callow Inc v Zollinger & Wastech Services Ltd. v Greater Vancouver Sewerage and Drainage District

Implications:

- At present there is little to no judicial guidance on what constitutes actively misleading conduct, whether by overt act or silence, in a commercial context involving counterparties that are sophisticated in their areas of business.
- The present judicial articulation of what constitutes actively misleading conduct is very broad. So too is the judicially pronounced concept that the duty of honest performance prevents discretion from being exercised capriciously or arbitrarily. The likely result will be the spawning of a significant amount of litigation which eventually will assist contracting counterparties to understand what they can and cannot do.
- For example:
 - i. How will the structuring a transaction which avoids the triggering of a Right of First Refusal clause be treated by courts with respect to the organizing principles of good faith and the duty of honest performance?
 - ii. How does the duty of honest performance interact with contractually stipulated disclosure obligations in joint venture agreements?
 - iii. Is an operator obligated to disclose its valuation methodology when exercising its rights under an “Accounting and Remittance of Production Sales Proceeds” provision?

CM Callow Inc v Zollinger & Wastech Services Ltd. v Greater Vancouver Sewerage and Drainage District

General Principles:

- The SCC in *Bhasin* clarified the principle of good faith in contract law and introduced the duty of honest performance (a contractual requirement not to lie to or mislead a counterparty)
- The decisions in *Callow* and *Wastech* represent the SCC's expansion of its prior holding in *Bhasin*.
- With respect to *Callow*, the SCC ruled that silence that misleads a counterparty could establish a breach of the duty of honest performance.
- With respect to *Wastech*, the SCC ruled that an examination of the purpose for which a party can exercise contractual discretion will act as a lens in judging whether the discretion was exercised reasonably and in accordance with the duty of good faith.
- What remains as a constant is that any actively misleading conduct, whether by overt act or silence, must be directly linked to the performance of the contract in order to amount to a breach of the duty of honest performance.

Environment

La Rose v Canada, Misdzi Yikh v Canada & Mathur v Ontario

General Principles:

- The three decisions continue the development of Canadian Charter jurisprudence with respect to the imposition of positive obligations by the Charter on government actors.
- It remains that to be justiciable, a matter of policy “must be translated into law or state action” (footnote para 38 in La Rose) and *Charter* review must be “connected to specific laws or state action” (footnote para 43 in La Rose) - it is not for the court to dictate to the legislative branch to create specific laws.
- The issue must have a legal component, and is not a purely political question, a dispute will meet the parameters of justiciability.

La Rose v Canada, Misdzi Yikh v Canada & Mathur v Ontario

Implications:

- The Courts have not outright dismissed the idea that claimed damage from government climate change policy or practices can ground infringements of Charter rights. *La Rose* and *Mathur* advance the proposition that positive environmental rights do exist under sections 7 and 15 of the Charter.
- Provided that an issue has a legal component, and is not a purely political question, a dispute will meet the parameters of justiciability.
- The cases signal the need for cogent and clear action to be taken by government on the issues presented as a result of climate change. Failure to take meaningful action simply invites individual citizens, either alone or in concert, to initiate rights based climate change litigation.
- *La Rose* and *Mathur* advance the proposition that positive environmental rights do exist under sections 7 and 15 of the Charter.
- The Courts have not dismissed outright the idea that damage claimed from government climate change policy or practices could infringe a persons Charter rights. The cases signal the need for cogent and clear action to be taken by government on the issues presented as a result of climate change and a Climate “capable of sustaining human life and liabilities”. Failure to take meaningful action simply invites individual citizens, either alone or in concert, to initiate rights based climate change litigation.

Energy

References Re Greenhouse Gas Pollution Pricing Act

General Principles:

- Federal parliament is possessed of the jurisdiction to enact the GGPPA under the national concern of peace order and good government.
- While the GGPPA impacts provincial autonomy the impact is qualified, limited and justifiable having regard to the environmental benefits the federal legislation seeks to realize.
 - In assessing the impact on provincial autonomy the majority of the SCC established a new “threshold question” as regards the doctrine of national concern. The majority articulates that the question invites a common sense inquiry into the national importance of the proposed matter.
 - Further, the majority introduced a new proportionality test as regards national concern whereby the outcomes of determining the proposed matter as one of national concern must outweigh the consequences suffered as a result of the intrusion on provincial autonomy.
 - Finally, the majority established that to engage national concern a court is to consider whether the provinces are constitutionally incapable of enacting legislation in respect of the matter. The majority determined that GHG emissions and the effects of climate change will have extra-provincial consequences.

References Re Greenhouse Gas Pollution Pricing Act

Implications:

- The decision creates a greater degree of regulatory certainty across Canada with respect to GHG emissions.
- The decision affirms federal legislative capacity for implementing the GGPPA schemes; however that capacity is with respect to carbon pricing. The decision does not stand for the proposition that Parliament has general authority over GHG emissions. This aspect of the SCC decision leaves the door open to future challenges should Parliament alter or expand the GGPPA beyond the purpose of creating minimum national standards of GHG price stringency.
- The provinces and territories remain able to enact their own legislative schemes subject a stringency review undertaken by the Governor in Council i.e. pricing regimes must at least match the national minimums.
- Businesses across Canada will experience higher costs as regards their GHG emissions; however, the regulatory certainty will allow those businesses to better budget for, and assess their environmental, social and corporate governance initiatives.

References Re Greenhouse Gas Pollution Pricing Act. (GGPPA)

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PricewaterhouseCoopers Inc. v. Perpetual Energy Inc.

General Principles:

- The ABCA affirmed that *Redwater* stands for the proposition that end-of-life abandonment and reclamation obligations (AROs) are real liabilities of a company, now and in the future.
- AROs are continuing obligations of a bankrupt company that must be discharged in priority to secured creditors.
- A Trustee has the obligation to act impartially and owes a primary duty to the creditors of the bankrupt's estate.
- A director of a special purpose company owes the same duties as directors generally.

PricewaterhouseCoopers Inc. v. Perpetual Energy Inc.

Implications:

- The ABCA decision reiterates and clarifies the prior decision in *Redwater* with respect to the nature of ARO, the manner in which AROs are to be discharged, and the reviewable nature of transactions aimed at transferring ARO's to another.
- The decision reaffirms that a trustee in bankruptcy has the obligation to act impartially and owes a primary duty to the creditors of the bankrupt's estate. The Court also provided guidance with respect to a Trustee's ability to examine a bankrupt's pre-bankruptcy conduct, challenge same and seek relief for oppression in the capacity of a "proper person" under the *Business Corporations Act*.
- The ABCA decision raises the possibility that an agreement releasing a director from liability may not operate to release the director from duties owed to the public.

Insolvency

Re Quest University Canada

General Principles:

- Reverse Vesting Orders (RVO) were recognized in a contested context in *Quest and Nemaska Lithium Inc.* (2020 QCCS 3218, leave to appeal to SCC dismissed April 29, 2021).
- An RVO permits the sale of shares of the debtor company to a purchaser where unwanted assets and liabilities are excluded. The purchaser of the shares thereby assumes control of a “clean” company absent the need for a plan of arrangement and requisite creditor approval.
- In considering the approval of an RVO the court, in accordance with s.36 of the CCAA, must:
 - determine whether sufficient efforts to were undertaken to identify relief other than an RVO;
 - that all stakeholders are treated as fairly and reasonably as the circumstances permit;
 - conclude that if the RVO was not approved that the debtor company would face receivership, or liquidation via bankruptcy;

Re Quest University Canada

Implications:

- Query the prospect of obtaining Court approval of an RVO in circumstances where the debtor company has significant abandonment and reclamation obligations?

Re Bellatrix Exploration Ltd.

Implications:

- The paper focuses on the decision of Justice Romaine which remains good law as a result of the ABCA dismissal of an application for leave to appeal (2021 ABCA 85 (CanLii)).
- Justice Romaine held:
 - While an EFC cannot be disclaimed there is no obligation on the part of the debtor to continue to perform its obligations pursuant to the EFC;
 - The non-insolvent counterparty may only exercise a right of set-off if the EFC provides for the exercise of a right of set-off and the EFC has been terminated;
 - Any claims against the debtor company pursuant to the EFC will be unsecured claims in the absence of evidence of a security interest.
- Apart from considering the taking of security to secure the obligations owing under the EFC, and ensuring contractual rights of set-off, a counter party must take into account the potential impact of the broad discretion the Court can exercise in furtherance of the remedial objectives of the CCAA.

Re Accel Energy Canada Limited and Re Accel Canada Holdings Limited

General Principles:

- The insolvency proceedings of Accel Energy and Accel Holdings yielded decisions concerning:
 - whether GORRs granted by Accel Holdings and Accel Energy constituted interests in land or contractual security for the payment of debt;
 - whether certain agreements entered into prior to a CCAA filing constituted a preference under the BIA; and
 - whether an irrevocably authorized direction to pay (IDP) issued to Accel Energy's oil and gas marketer constituted an enforceable independent obligation against the marketer.
- In each case the Court determined no interest greater than that of an unsecured creditor had been created.
- Applicable general principles common to each of the decisions were:
 - whether the contractual language chosen by the parties to create the claimed interest, or obligation, actually does so;
 - the necessity of considering the surrounding circumstances in addition to the language chosen by the parties; and
 - recognition of the remedial objectives expressed in insolvency legislation.

Re Accel Energy Canada Limited and Re Accel Canada Holdings Limited

Implications:

- Clear and careful drafting to connote an intention to create an interest in land, or an independent obligation, will not be enough to gain a priority position over other creditors.
- Consideration of the surrounding circumstances, in addition to the words of the agreement, best ensures fair and balanced resolution of claims in an insolvency context.

Aboriginal Law

Baffinland Iron Mines Corp v Inuavak

- This is an insightful decision in the context of injunctions, resource development and protests and blockades.
- In this case, the Court distinguishes between asserted Aboriginal rights and the settled Nunavut Land Claims Agreement.
- The Court explained that if the Defendants were protesting Baffin Iron Mines Corp's application to expand mining operations, the appropriate remedy would be to apply for judicial review.
- The Court clarifies that the injunctive relief granted in this case does not prohibit the Defendants from carrying out protests in other locations within the territory.
- This case has implications for resource development industries facing potential opposition from Aboriginal groups.

Gamlaxyeltxw v British Columbia (Minister of Forests, Lands & Natural Resource Operations)

- This case demonstrates some resistance on behalf of the Court to stray beyond the Haida test as it currently stands.
- The Haida test is codified in Section 35 of the *Constitution Act*, and it requires the Crown consult with a First Nation where the Crown has knowledge of the potential existence of an Aboriginal right and contemplates conduct that might adversely affect it.
- The Court considers the test in relation to the duty to consult in a modern treaty setting, but opposes the change put forward by the lower Court. This case establishes that modern treaty rights do not necessarily prevail over the duty to consult a non-treaty First Nation.
- The duty to consult is a real and significant issue for many resource development companies and the application of the duty to consult in this 2020 decision is important to consider in the context of modern treaties.

R v Desautel

- This case demonstrates an application of Aboriginal rights established under the *Constitution Act* to a modern scenario.
- It demonstrates the fluidity of Aboriginal rights in their application to a non-Canadian.
- The law established in this case could have application to future development projects where a foreign person or group could establish negative impact on the basis of historical rights.
- Future cases will be required to determine how an Aboriginal group's non-resident status impacts the required "depth" of consultation.

Labour and Employment

Matthew Maharajh v Atlantic Offshore Medical Services Limited (2020)

- This case demonstrates that in the context of medicinal cannabis use there is often tension between the rights employees receive under legislation and the legislative obligations imposed on employers. Specifically, an employer's duty to provide a safe work environment and an employee's right to be free from discrimination.
- The rights and obligations imposed on parties in an employment relationship require careful and calculated balancing. With a growing number of Canadians turning to medical cannabis as an alternative to traditional medicine, a new layer to achieving this balance has been added.
- What remains clear is that, although the world of medicinal cannabis use continues to evolve, accommodation up to the point of undue hardship remains central to any employer's duty and this applies in the context of the energy industry.

Phillips v Westcan

- Alcohol and drug addictions can be considered a disability, therefore company policies or practices that adversely impact workers can conflict with human rights statutes. For employers, care must be used when implementing any policy which may have an indirect and adverse impact on disabled employees.
- This decision serves as a reminder that random testing may be justified if it can be considered a proportionate response to demonstrable safety concerns. Courts are more likely to defer to a random testing policy when the nature of the work is dangerous, remote, and unsupervised.
- The application of random testing is of ongoing significance in the energy industry given the safety sensitive nature of much of the work.

Fraser v Canada (Attorney General)

- In this decision, the Supreme Court of Canada considered whether a job-sharing program with significant pension consequences had an adverse impact on women with children.
- Justice Abella's opinion in this case serves as another reminder that an employer who intentionally applies **different** rules or policies to its employees is not the only avenue to a finding of discrimination.
- A rule or requirement that treats every employee the **same** on its face can still indirectly discriminate on some employees because of a personal characteristic.

Matthews v Ocean Nutrition Canada Ltd

- At the center of every employment contract is the pay, benefits and bonuses an employee receives.
- The decision in *Matthews* demonstrates that long-term incentive plans or bonus plans that occur within the notice period are recoverable in a wrongful dismissal or constructive dismissal case.
- Employers wishing to reward or incentivize employees with similar plans should ensure the terms of the contract are clearly drafted if they want to remove the employees' common law right of recovering within the notice period.

Shareholder Rights and Oppression

Haack v Secure Energy (Drilling Services) Inc

- This case addressed employment issues related to a wrongful dismissal, the breach of the duty of good faith, and the improper exercise of a penalty clause resulting in a share buyback.
- This case provides an example of how a minority shareholder can advance a successful oppression remedy claim against the individual directors and a company. The approach the Court took in determining share value, based on the date of termination, is useful for those pursuing or facing similar litigation.
- This case demonstrates that a finding of wrongful conduct alone is not enough to justify a punitive damages award and that behavior must be extraordinarily bad to qualify a plaintiff for punitive damages.

Civil Procedure

McAllister and H2S Solutions

- The Alberta Court of Appeal's decisions in *McAllister* and *H2S Solutions* reflects the emphasis that courts will place on achieving the goals of costs awards.
- *McAllister* is the most recent ABCA decision which emphasizes that in ordinary circumstances, the goal of costs awards is the partial (40-50%) indemnification of the successful party, and accordingly, for long protracted proceedings, using Schedule C as a default mechanism for calculating costs may not be appropriate.
- Likewise, in *H2S Solutions*, the Court explained that the double costs rules in the Alberta *Rules of Court* are meant to encourage settlement, accordingly, it held that a formal offer which does not contain a genuine offer of compromise would be incapable of triggering the double costs rules because it does little to promote compromise or encourage settlement.

Atlantic Lottery Corp Inc v Babstock

- In *Babstock*, the Supreme Court of Canada definitively ruled on the existence of the “waiver of tort” cause of action.
- Until *Babstock*, the case law was in a state of significant uncertainty with respect to whether or not the “waiver of tort” cause of action existed. Particularly at the certification stage for class actions, judges continually declined to rule on whether the cause of action existed, instead opting to certify the class actions on the basis that it was not “plain and obvious” that the cause of action did *not* exist.
- After a review of the law of Restitution and gain-based remedies, the Court held that “waiver of tort” and the remedy of disgorgement were choices of remedies, and *not* independent causes of action.
- The plaintiffs in *Babstock* were essentially asking the Court to grant them the gain-based remedy of disgorgement based on an allegation of negligence, without any proof of damages. The Court found that determining a remedy for a claim of negligence before liability (i.e. damages) is even established would be futile and nonsensical.

Questions & Discussion

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