

# Recent Judicial Decisions of Interest to Energy Lawyers

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OSLER

CONTRACT

## *Northrock Resources v ExxonMobil Canada Energy*

- 2016 SKQB 188 (Currie J.)
- 2017 SKCA 60 (Caldwell, Herauf and Whitmore JJ.A.)

## Facts:

- Northrock and ExxonMobil were parties to various agreements that included ROFRs over certain of the others' interests in Saskatchewan. ROFRs permitted transfer of such interests to affiliates but did not address subsequent sale of shares in those affiliates to third parties as ExxonMobil tried to dispose of its interests that were subject to the ROFR granted to Northrock in a “busted butterfly” transaction.

## Key Issue:

- What is the appropriate interpretation of the ROFR and its scope and the applicable standard of review for interpretation of the clause upon appellate review and whether there was breach of good faith?

## The Decision:

- SKCA confirmed as per *Sattva* that interpretation of contract is a question of mixed law and fact that requires palpable and overriding error to justify appellate intervention. SKCA held that the trial judge did not err.
- Analysis of ROFR issue starts from the premise that everyone is free to dispose of property. Limits on disposal of property must arise from contract.
- As per *Bhasin*, breach of duty of good faith if structure chosen to avoid ROFR. No evidence that the transaction was structured solely to avoid the triggering of the ROFR.

## Commentary:

- Illustrates the deferential standard being applied to questions of contractual interpretation following the *Sattva* decision.
- Indicates that courts are reluctant to use *Bhasin* to re-write contracts.

## *Encana Oil & Gas Partnership v Ardco Services Ltd*

- Order by Crighton J. dated June 7, 2016 (Docket: 1003 18227)
- 2018 ABCA 401 (Berger, McDonald and Schutz JJ.A (dissenting))



## Facts:

- Motor vehicle accident involving company car used during personal time. Driver killed and two passengers seriously injured.
- Ardco was a service company contracted to manage and provide contract workforce for Encana.
- Indemnity clause stated that Encana would be indemnified and held harmless from all claims brought against Encana arising out of the negligent acts, omissions, or tortious acts of Ardco or any of Ardco's personnel, where those acts arose in connection with the performance of the Master Service Agreement or its related services.

## Key Issue:

- Does an indemnity clause in an master service agreement cover third-party claims arising from a contractor's negligent operation of a company vehicle for personal use?

## The Decision:

- QB held that factual matrix evidence showed that the employee was allowed to use company car to ensure timely attendance at work and, as such, use of the car was related to the services provided under the MSA.
- CA majority found that the MSA was a standard form contract, followed SCC in *Ledcor*, and applied a correctness standard to the question of interpretation. Indemnity only applied “in connection with, related to or arising out of performance ... of the Master Agreement” and thus there was no obligation to indemnify.
- Schutz JA (dissenting) held that the MSA was not a standard form contract and applied palpable and overriding error test from *Sattva* to uphold the QB interpretation of the MSA.

## Commentary:

- Appellate courts appear to be willing to interpret what they consider to be “standard form contracts” somewhat widely in order to apply a correctness standard to intervene (vs. *Sattva*).
- As indemnity clauses are common in MSAs with various service providers and contractors, it warrants a review of those clauses to ensure they cover instances similar to the one in this case, especially as company vehicles are often provided to both employees and contractors if risk is to be allocated to the contractor/service provider.

# SUMMARY JUDGMENT

## *Talisman Energy Inc v Questerre Corporation*

- 2016 ABQB 618 (Hawco J.)
- 2017 ABCA 218 (Veldhuis, Martin and O’Ferrall JJ.A. (concurring in the result))

## Facts:

- Talisman sought various drilling costs owed to it by Questerre under a Farmout Agreement
  - CAPL operating procedure: Talisman could maintain an action for any unpaid accounts without such actions being subject to set-off or counterclaim
- Second agreement between the parties regarding the drilling and completion of two wells in Quebec (ultimately unfinished)
- Questerre defended and counterclaimed based on the Second Agreement (breach of Talisman's contractual obligation to complete the two wells)
- Talisman sought summary judgment for drilling costs of: (i) two wells in Quebec; and, (ii) four other wells not related to Second Agreement

## Key Issue:

- Whether summary judgment could be granted based solely on the Farmout Agreement (i.e., CAPL operating procedure)



## The Decision:

- Court of Appeal recognized the shift in culture in respect of summary judgment as per *Hryniak*
  - **BUT** Court of Appeal agreed with court below that “a trial is necessary to determine the nature of the alleged second agreement, along with its possible effect on the first”
- Partial summary judgment was not available under the liquidated demand clause under CAPL for the four wells (i.e., those not under the Second Agreement)
  - Because Talisman confirmed it would maintain liens on four wells until the dispute was fully resolved

## Commentary:

- Example of a case where summary judgment or partial summary judgment found not appropriate complex commercial case
- Emphasis on the need for summary judgment to be “fair and just”
  - *Condominium Corp No 0321365 v Cuthbert* (ABCA): “complex legal questions may be sufficient to deny summary judgment. A full trial is required when the summary record cannot be used to decide legal questions that are unsettled, complex or intertwined with facts”.
- Contrast with approach in *Stoney Tribal Council v Canadian Pacific Railway*

## *Stoney Tribal Council v Canadian Pacific Railway*

- 2016 ABQB 193 (Jeffrey J.)
- 2017 ABCA 432 (Paperny, Greckol and Wakeling JJ.A. (concurring in the result))

## Facts:

- CPR built transnational railway across Stoney reserve lands in the late 1800s; Canada transferred to CPR portions of reserve lands for railway purposes
- In 1940, Stoney surrendered mineral rights in the reserve lands to Canada (excluding railway lands, owned by CPR)
- In 1960s, CPR transferred mineral title interest to Encana's predecessor
- Stoney brought action against CPR and Encana for trespass and conversion
  - Conveyance to CPR of petroleum, natural gas and related hydrocarbons underlying the railway lands not effective at law
  - Title to same reverted to the reserve lands when the railway lands ceased to be used for railway purposes
- Stoney sought: (i) damages; and (ii) return of the *in situ* petroleum, natural gas and related hydrocarbons
- CPR and Encana both applied for summary dismissal of the claim
  - Encana's application dismissed; CPR's granted.

## Key Issue:

- Whether summary dismissal of the claim against CPR was “fair and just” on the factual record

## The Decision:

- Case Management Judge (Jeffrey J.) granted summary dismissal of the claim against CPR because:
  - CPR had no current interest in the petroleum, natural gas and related hydrocarbons, so any claim against it for recovery of same had no hope of success
  - Remaining claims were out of time and therefore without merit
- Jeffrey J. refused summary dismissal of the claim against Encana because:
  - The factual record was insufficient to allow the fair and just resolution of the issues before him.

## The Decision:

- Court of Appeal
  - Upheld Jeffrey J's decision to grant summary dismissal of claim against CPR
  - Majority clarified the summary judgment test in Rule 7.3
    - Test is set out in *Hryniak and Windsor v Canadian Pacific Railway*: Court must examine the existing record, to see if a disposition that is fair and just to both parties can be made on that record
    - Test does not require an assessment of the relative strength of the positions of the moving and non-moving party
  - Rejected the wholesale argument that it is not fair, just and proportionate to grant summary judgment to one of three defendants in a complex, multi-party litigation

## Commentary:

- Shows some openness of the Alberta courts to promote the early disposition of unmeritorious claims (per *Hryniak*), even where dealing with complex multi-party litigation
- However, whether summary judgment will be appropriate necessarily depends on the circumstances
  - Summary judgment may not be a just and fair resolution in many multi-party/complex litigation
  - Potential concerns re: duplicative proceedings and inconsistent findings
  - Not an issue in *Stoney*; Jeffrey J. made no findings of fact that could prejudice remaining parties at trial



## Other Decisions of Interest:

- *Precision Drilling Canada Limited Partnership v Yangarra Resources Ltd*, 2017 ABCA 378
  - Summary judgment not appropriate where case is factually complex and involves allegations of fraud
- *Geophysical Service Incorporated v Encana Corporation*, 2017 ABQB 466
  - Partial summary judgment/dismissal granted in complex commercial litigation over seismic data licensing agreement
- *Butera v Chown, Cairns LLP*, 2017 ONCA 783
  - Ontario approach: partial summary judgment a “rare procedure” reserved for issues that are easily bifurcated and that can be addressed expeditiously and in a cost effective manner

# EMPLOYMENT & LABOUR

## *Stewart v. Elk Valley Coal Corp.*

- 2012 AHRC 7 (Tribunal)
- 2013 ABQB 756 (Michalyshyn J.)
- 2015 ABCA 225 (Picard, Watson and O’Ferrall JJ.A.)
- 2017 SCC 30 – Reasons for Judgment (McLachlin C.J. (Abella, Karakatsanis, Côté, Brown and Rowe JJ. concurring));  
Concurring Reasons for Judgment (Moldaver and Wagner JJ.);  
Dissenting Reasons (Gascon J.)

## Facts:

- Employee terminated after workplace accident for violating drug policy.
- Employee made a human rights complaint alleging discrimination on the grounds of drug dependency. Claimed that Elk Valley required to reasonably accommodate his condition and provide him with an opportunity to return to employment.
- Elk Valley asserted strict policy required to encourage self-reporting pre-accident and, therefore, workplace safety.
- AHRC sided with Elk Valley finding no discrimination and, even if there was discrimination, termination was warranted.

## Key Issues:

- Is termination of an employee with a drug dependency for drug use discriminatory?
- What is “reasonable accommodation” for employees with a drug dependency in a dangerous workplace?

## The Decisions:

- QB upheld AHRC decision finding that there was no discrimination. QB went on in *obiter dicta* to observe that if there was discrimination, then there was not reasonable accommodation.
- CA majority upheld the QB decision.
- CA dissent (O’Ferrall J.) held that drug dependency was the real reason for dismissal and, accordingly, there was discrimination. He further found that there was a failure to reasonably accommodate.

## Supreme Court of Canada:

- Majority (per McLachlin CJ): in the circumstances of this case there was no discrimination because the complainant made “rational choices in terms of his drug use.” McLachlin CJ declined to consider the question of reasonable accommodation.
- Dissent (per Gascon J) held that the condition (drug dependency) cannot be separated from its effect (drug use) and that self-reporting “places a burden on complainants to avoid discrimination, rather than on employers not to discriminate.”
- Concurrence (Moldaver & Wagner JJ) adopted Gascon J’s finding of discrimination, but concluded that there was reasonable accommodation because of the importance of safety in such a hazardous workplace.

## Commentary:

- 6-3 majority on the issue of non-discrimination may ebb as composition of the SCC changes. Views of majority unknown on question of reasonable accommodation.
- Gascon J's reasons regarding drug dependency and drug use are compelling and likely to prevail in the long-run.
- Even if the majority on discrimination shifts, drug policies similar to Elk Valley's will survive where there is a strong record showing the hazards of the workplace and the importance of safety.
- Drug Policies that provide for treatment and return to work in some capacity are more likely to constitute reasonable accommodation.



## ***Suncor Energy Inc. v. Unifor Local 707A***

- 2016 ABQB 269 (Nixon J.)
- 2017 ABCA 313 (McDonald, Veldhuis and Schutz JJ.A.)
- Leave to appeal to SCC denied

## Facts:

- Suncor's oil sands sites employ both union and non-union workers.
- Suncor has a robust drug and alcohol policy and testing program.
- Suncor's drug testing program formerly provided for random testing of employees in safety sensitive positions except post-incident, where there was reasonable cause, or employees on a return to work program.
- In 2012, Suncor instituted random drug testing of all employees in safety sensitive positions.
- Unifor took the position that random drug testing was contrary to the collective bargaining agreement and commenced arbitration.

## Key Issues:

- The SCC held in *Irving* that random drug and alcohol testing may be implemented in a hazardous workplace where it is demonstrated that there is a drug and alcohol problem.
- The issue to be decided in *Suncor v. Unifor* is whether it must be demonstrated that there is a drug and alcohol problem in the bargaining unit or more generally in the workplace.

## The Decisions:

- Majority of the arbitral panel found that there was insufficient evidence of a drug and alcohol problem in the bargaining unit.
- Majority concerned that Suncor did not track drug and alcohol data by type of employee (union/non-union) and presented only aggregate data.
- Minority of the arbitral panel found that there was sufficient evidence of a drug and alcohol problem in the workplace.
- QB held that the arbitral decision was unreasonable and ordered a new arbitration. Evidence of drug and alcohol in broader workplace is relevant.

## The Decisions (continued):

- CA observed that the evidence showed that Suncor's workforce was integrated and that unionized and non-unionized workers worked side by side.
- CA held that arbitral panel acted unreasonably in narrowing its focus to the bargaining unit and refusing to consider evidence of drug and alcohol problems in the workplace generally.

## Commentary:

- Case has given rise to several injunction applications. Unifor has been successful in resisting implementation of random testing prior to completion of arbitration.
- Unifor sought leave to the SCC; leave denied.
- Given that a new arbitration is proceeding and the parties are locked into their positions, this case promises to play out through appeals over the next several years.

# PRIVILEGE ISSUES

## ***Alberta v. Suncor Energy Inc.***

- 2016 ABQB 264 (Manderscheid J.)
- 2017 ABCA 221 (Berger, Watson and Greckol JJ.A)
- Leave to appeal to SCC denied



## Facts:

- Fatal injury at Suncor worksite near Fort McMurray.
- Suncor conducted an internal investigation of the incident under the supervision of internal and external counsel.
- OHS demanded that Suncor produce its investigation file. Suncor asserted privilege.
- OHS brought an application to compel production of the investigation file.

## Key Issues:

- Does litigation privilege attach to all documents collected in an internal investigation?
- Is uncontroverted evidence that the dominant purpose of an internal investigation is preparation for litigation sufficient to establish litigation privilege over information and material created or collected during the investigation?

## The Decisions:

- The Chambers Decision
  - The dominant purpose of Suncor's investigation was in contemplation of litigation, so all material "created and/or collected" during that investigation is privileged
  - Despite recognizing the dominant purpose of the investigation, a referee was appointed to review the documents and assess the claims of privilege
- The Court of Appeal Decision
  - Chambers judge erred in finding that the dominant purpose of Suncor's investigation was in contemplation of litigation
  - Chambers judge erred in finding that the documents were sufficiently described to allow an assessment of the privilege claims
  - Chambers judge properly invoked the referee process, but erred in failing to grant OHS the right to make submissions to the referee

## Court of Appeal:

- Even if the dominant purpose of the internal investigation as a whole is in contemplation of litigation, this does not mean that every document “created and/or collected” during the investigation is litigation privileged. Privilege must be established on a document-by-document basis.
- “Arguably”, none of the material that is *collected* during an investigation (and pre-dates the incident) can attract litigation privilege.

## Court of Appeal (continued):

- Parties must describe documents in a way that indicates the basis for their claim, and must independently distinguish the type of privilege that applies to each document or bundle of documents
  - To support a claim of solicitor-client privilege, must describe the documents in a manner that indicates communications between a client and legal advisor relating to seeking or receiving legal advice
  - To support a claim of litigation privilege, must describe documents with enough particularity to indicate whether the dominant purpose for their creation was in contemplation of litigation

## Commentary:

- Collected documents may not be privileged. Litigants can expect challenges to privilege claims over collected documents.
- Companies intent on maintaining a privilege claim over an internal investigation will increasingly involve counsel so that solicitor-client privilege claims can be made more broadly.
- Application for leave to appeal to SCC denied.
- Matter proceeding before referee and may give rise to further appeals.

# CLASS ACTIONS

## *Araya v Nevsun Resources Ltd*

- 2016 BCSC 1856 (Abrioux J.)
- 2017 BCCA 401 (Newbury, Wilcock and Dickson JJ.A)
- Leave to appeal to SCC granted



## Facts:

- Representative action against Nevsun on behalf of Eritrean citizens in BC Courts
- The plaintiffs allege that they were conscripted into the Eritrean military and forced to work on a mine owned by Nevsun (60%) and Eritrean state companies (40%)
- Central allegation against Nevsun: it was complicit in – or aided and abetted – human rights abuses (forced labour, slavery, torture, etc.)
- Claim based on:
  - Private law torts
  - Breaches of customary international law

## Key Issue:

- Various interlocutory applications by Nevsun to dispose of Action
  - Forum Application
  - Evidence Application
  - Act of State Application
  - Customary International Law Application

## The Decision:

- The BC courts were an appropriate forum for the Action; plaintiffs were unlikely to get a fair/impartial proceeding in Eritrea
  - Secondary reports were admissible to provide background/context to the social facts underpinning the Forum Application
- The Act of State doctrine did not apply; allegations were limited to Nevsun's alleged complicity in the alleged wrongs
- Claims based on customary international law not "bound to fail" because international law is "in flux" on mechanisms for addressing human rights violations

## Commentary:

- Canadian courts are becoming more willing to address and investigate public international law issues
- A decision of particular interest to Canadian corporations with operations in a foreign state
- Foreign nationals may be able to bring actions in Canadian courts against Canadian corporations based on alleged breaches of customary international law
  - Even where state actors are primary tortfeasors and corporate wrongs are “derivative” or “accessory”

# **CORPORATE GOVERNANCE & SHAREHOLDER RIGHTS**

## ***Brookdale International Partners LP v. Legacy Oil & Gas Inc.***

- 2017 ABQB 131 (Nixon J.)
- 2018 ABCA 221 (Martin, Slatter and Khullar JJ.A.)

## Facts:

- Shareholders of Legacy Oil & Gas dissented from a Plan of Arrangement between Legacy and Crescent Point.
- Shareholders did not have a business presence in Canada.
- Following the transaction, Legacy sent the shareholders an offer as required under the ABCA. Offer was 1% less than transaction value.
- Legacy rejected the offer, commenced an action for fair value, and sought an interim payment pursuant to ABCA s. 191(12)(c)

## Key Issue:

- Should the Court order an interim payment be made pending trial of the issue of fair value?



## The Decision:

- Transaction essentially an expropriation which suggests that shareholder should be paid at the earliest opportunity. Current wait for trial dates weighs in favour of interim payments.
- *Business Corporations Act* provides express right to interim payment unless the payment would jeopardize the solvency of the corporation.
- Event arbitrage is normal in the stock market; arbitrageurs should not be treated differently.
- Cannot treat foreign shareholders differently from domestic shareholders.
- Security can be required when corporation adduces genuine evidence of a risk of overpayment.

## ***RFG Private Equity Limited Partnership No. 1B v. Value Creation Inc.***

- 2016 ABQB 391 (Romaine J.)
- 2018 ABCA 85 (Berger, Schutz and O’Ferral JJ.A (dissenting))
- Leave to appeal/cross-appeal to SCC pending

## Facts:

- Under threat of imminent default to syndicate of lenders, VCI entered into a Plan of Arrangement transaction whereby it sold a significant stake in its largest oil sands asset to BP.
- BP's investment involved an up front payment plus a future obligation to pay for the development of the property (the "BP Contribution").
- Certain shareholders exercised dissent rights under the Plan of Arrangement and sought payment of fair value of their shares.

## Key Issues:

- Should VCI be valued on a distress basis because the transaction was to avoid an imminent default?
- Should the BP Offer, which was accepted, be considered when assessing the fair value of VCI shares as of the valuation date?
- Should the BP Contribution be included in the fair value of VCI shares as of the valuation date?

## The Decision:

- As a general rule, dissenting shareholders are not entitled to benefit from the transaction dissented from.
- QB held that the value of the BP offer could be factored into the valuation because at the valuation date the transaction was certain to close.
- QB held that the value of the BP Contribution could not be factored into the valuation because the trial judge found that it was part of a business plan, no part of which was implemented on the valuation date.
- QB held that VCI was no longer in distress as at the time of the valuation date because the transaction was certain to close and, therefore, should be valued on a going concern basis.

## The Decision (continued):

- CA upheld the QB decision dismissing the dissenting shareholders' appeal and VCI's cross-appeal.
- CA held that value from the BP Contribution was too speculative as at the valuation date and not yet an "operative reality".
- CA held that VCI was not in financial distress at the valuation date because it was certain that the BP transaction would be approved.
- O'Ferrall JA dissented and held that the BP Contribution should be included in the valuation because it was a component of the consideration paid by BP and is indicative of value.

## Commentary:

- Leave to appeal to SCC sought by some dissenting shareholders; leave to cross appeal also sought by VCI.
- CA highlighted that the circumstances of this case were unusual and the conclusion was highly fact-specific.
- CA decision casts some uncertainty on the general rule that dissenting shareholders cannot benefit from the transaction dissented from.

ABORIGINAL & CONSTITUTIONAL



*Clyde River (Hamlet) v Petroleum Geo-Sciences Inc;*  
*Chippewas of the Thames First Nation v Enbridge Pipelines*  
*Inc.*

- National Energy Board Decision No. OH-002-2013 (March 6, 2014); National Energy Board Decision no. 5554587 (June 26, 2014)
- 2015 FCA 179 (Nadon, Dawson and Bovin JJ.A); 2015 FCA 222 (Ryer, Webb and Rennie JJ.A (dissenting))
- 2017 SCC 40; 2017 SCC 41 – Karakatsanis and Brown JJ (McLachlin C.J. and Abella, Moldaver, Wagner, Gascon, Côté, Brown and Rowe JJ. concurring)

## Facts:

- Companion decisions involving applications for judicial review (or appeals) of NEB decisions on the basis of allegedly inadequate Crown consultation
  - Clyde River
    - NEB approved an application by two seismic companies to conduct offshore seismic testing for oil and gas resources
    - The seismic testing had the potential to negatively affect the harvesting rights of the Inuit of Clyde River
  - Chippewas of the Thames
    - NEB approved an application by Enbridge for a modification of Enbridge's Line 9, which would reverse the flow of part of the pipeline, increase its capacity and enable it to carry heavy crude
    - The pipeline crossed the traditional territory of the Chippewas of the Thames First Nation

## Key Issue:

- The Crown's duty to consult with Indigenous peoples before a regulatory agency (such as the NEB) authorizes a project that could affect their rights

## The Decisions:

- *Clyde River*
  - The Federal Court of Appeal concluded that the Crown's duty to consult had been triggered, and that it had been satisfied by the NEB's processes; it dismissed the Inuit of Clyde River's judicial review application
  - The Supreme Court of Canada held that the Crown's consultation and accommodation efforts were inadequate; the NEB authorization was quashed
- *Chippewas of the Thames*
  - The Federal Court of Appeal (majority) dismissed the appeal, concluding that the NEB was not required to determine whether the Crown had a duty to consult, or whether it had fulfilled this duty
  - The Supreme Court of Canada held that the Crown's duty to consult and accommodate had been fulfilled through the NEB's process; the appeal was dismissed

## The Decisions (continued):

- The Supreme Court of Canada set out the following general principles
  - First, the NEB approval process constitutes Crown conduct that may trigger the duty to consult
  - Second, while the Crown owes the duty to consult, it can rely on regulatory processes to partially or completely fulfill this duty
  - Third, the NEB must determine whether consultation was constitutionally sufficient if the issue is properly raised before it (typically in written reasons)
  - Fourth, where the Crown's duty to consult remains unfulfilled, the NEB must withhold project approval (or decision should be quashed)

## Commentary

- The companion decisions clarify the scope of the Crown's duty to consult with Indigenous peoples for resource projects where a regulatory agency is the final decision-maker
- The decisions largely confirm previously established duty to consult principles – but clarify the role of the NEB
- Duty to consult cases remain highly fact-dependent; however, the SCC provided guidance on the factual circumstances in which consultation will be adequate, or where it may fall short

## *Ktunaxa Nation v British Columbia*

- 2014 BCSC 568 (Savage J.)
- 2015 BCCA 352 (Lowry, Bennett and Goepel JJ.A.)
- 2017 SCC 54 – Joint Reasons for Judgment: McLachlin C.J. and Rowe J. (Abella, Karakatsanis, Wagner, Gascon and Brown JJ. concurring); Partially Concurring Reasons: Moldaver J. (Côté concurring)

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## Facts

- Ktunaxa sought judicial review of BC Minister's approval of a ski resort development
- Lengthy regulatory process – 20+ years with extensive consultation
- Ktunaxa raised concerns about impact of resort on Qat'muk – a place of spiritual significance (Grizzly Bear Spirit)
  - Ktunaxa took eleventh-hour position that accommodation was impossible; a ski resort would drive Grizzly Bear Spirit from Qat'muk and irrevocably impair their religious beliefs and practices
- BC Minister ultimately approve the resort, concluding that reasonable consultation had occurred

## Key Issue:

- Whether BC Minister erred in approving a ski resort development, in face of:
  - Alleged breach of the Ktunaxa's freedom of religion (s. 2(a) of *Charter*)
  - Alleged breach of duty to consult and accommodate (s. 35 of *Constitution Act, 1982*)

## The Decision:

- BC Courts and SCC dismissed the Ktunaxa's judicial review application
- SCC was split on the *Charter* claim
  - Majority: the right to freedom of religion was not triggered; *Charter* protects the freedom to worship; not the spiritual focal point of worship
  - Minority: the approval of the resort breached s. 2(a) because it rendered the Ktunaxa's religious beliefs devoid of all spiritual significance; however, approval was reasonable because it reflected a proportionate balancing between s. 2(a) and the Minister's statutory objectives
- SCC unanimous in finding that the BC Minister reasonably concluded that duty to consult/accommodate had been met

## Commentary:

- Decision affirms well-established principle that duty to consult does not give Indigenous groups a “veto” over development
- Driving factor for decision: the Ktunaxa’s “novel claim” would give it a significant property interest in Qat’muk (namely, the power to exclude others)
- Significant criticism of majority’s approach: potential for disproportionate impact on Indigenous belief systems
  - Unlike Judeo-Christian faiths (where the divine is considered supernatural), Indigenous religions are often tied to the sacredness of specific places

## Other Decisions of Interest:

- *Bigstone Cree Nation v NOVA Gas Transmission Ltd*, 2018 FCA 89
  - Unsuccessful application by First Nation for judicial review of Order in Council approving the 2017 NGTL System Expansion Project
- *Tsleil-Waututh Nation v Canada (Attorney General)* (Court File No. A-78-17)
  - Consolidated judicial review proceedings on the TMX Project
- *Squamish Nation v British Columbia (Environment)*, 2018 BCSC 844; *Vancouver (City) v. British Columbia (Environment)*, 2018 BCSC 843
  - Unsuccessful applications for judicial review of the BC Environmental Assessment Certificate for the TMX Project
- *Burnaby (City) v Trans Mountain Pipeline ULC*, 2017 BCCA 132
  - Last (?) in series of division of powers cases before NEB, FCA and BC courts regarding application of Burnaby bylaws to TMX Project
- *Reference re Proposed Amendments to the Environmental Management Act*
  - Submitted by Province of BC to BC Court of Appeal

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Thank you.