

Recent Judicial Decisions of Interest to Energy Lawyers (2018)

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I. CONTRACT

In the last year, there have been a number of decisions regarding the appropriate standard of review in contract cases. Specifically, the courts have grappled with the issue of whether to follow: (i) *Sattva Capital Corp v Creston Moly Corp*,¹ which applied a deferential standard of review; or, (ii) *Ledcor Construction Ltd v Northbridge Indemnity Insurance Co*,² which applied a correctness standard of review for cases involving standard form contracts. This issue arises frequently in the oil and gas context, where there are a number of potential standard form contracts, including: (i) master services contracts; (ii) contracts incorporating Canadian Association of Petroleum Landmen (“CAPL”) operating procedures; and, (iii) contracts based on model agreements, such as those developed by the Petroleum Joint Venture Association and other CAPL agreements. Indeed, parties will be more willing to appeal trial-level decisions in contractual interpretation cases, if they believe that the appeal courts will apply a correctness standard of review. As a result, we expect to see a growing body of caselaw that interprets standard form oil and gas contracts, which will be of considerable precedential value in future disputes.

We are also seeing more litigation over the appropriate meaning of terms commonly used in the oil and gas industry. For instance, last year’s paper discussed *IFP Technologies (Canada) Inc v EnCana Midstream and Marketing*,³ in which the Alberta Court of Appeal (“ABCA”) decided that the term “working interest” is a legal term of art with a specific meaning in the oil and gas industry (*i.e.*, it constitutes the percentage of ownership that an owner has to explore, drill and produce minerals from the lands in question). This year, we consider *Canadian Natural Resources Limited v Wood Group Mustang (Canada) Inc (IMV Projects Inc)*⁴ (which considered the appropriate meaning of the term “blowout”) and *Canlin Resources Partnership v Husky Oil Operations Limited*⁵ (which interpreted the phrase “wells producing to the facility”).

A. *ENCANA OIL & GAS PARTNERSHIP v ARDCO SERVICES LTD*⁶

1. BACKGROUND

The issue in *Encana* was whether an indemnity clause in a standard form services contract covered third-party claims arising from a contractor’s negligent operation of a vehicle, while driving that vehicle on his own personal time and for his own personal use. This case also addressed the standard of review applicable to the interpretation of standard form contracts.

¹ 2014 SCC 53 [*Sattva*].

² 2016 SCC 37 [*Ledcor*].

³ 2017 ABCA 157, 53 Alta LR (6th) 96 [*IFP v Encana*].

⁴ 2017 ABQB 106, [*CNRL v Wood Group*].

⁵ 2018 ABQB 24 [*Canlin*].

⁶ *EnCana Oil & Gas Partnership v Ardco Services Ltd*, 2017 ABCA 401 [*Encana*].

2. FACTS

Encana Oil and Gas Partnership, Encana Corporation (collectively, “Encana”) and Ardco Services Ltd. (“Ardco”) entered a Master Service and Supply Agreement (the “Master Agreement”) whereby contract operators employed by Encana were migrated onto Ardco’s payroll. The Master Agreement included an indemnity clause, which indemnified and held Encana harmless from, among other things, 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 Agreement or its related services.

Rupert Cardinal was a contractor with Encana migrated onto Ardco’s payroll. Cardinal was driving an Encana-owned vehicle when he was involved in an accident. The accident resulted in Cardinal’s death and serious injury to his two passengers. At the time of the accident, Cardinal was off-duty and driving the Encana vehicle for personal use. Cardinal’s estate and the passengers settled their claims against Encana.

The issue at trial was whether the Master Agreement obligated Ardco to indemnify Encana for the amounts Encana paid to the third parties as a result of the motor vehicle accident. The trial judge found that under the Master Agreement, Ardco agreed to indemnify Encana against the negligent or tortious actions of Ardco’s personnel. As such, the trial judge found that the indemnity clause was triggered, and Ardco was therefore required to indemnify Encana.

3. DECISION

Two key issues arose on appeal: (i) the applicable standard of review; and, (ii) the appropriate interpretation of the indemnity clause in the Master Agreement.

With respect to the standard of review, the majority followed the Supreme Court of Canada’s (“SCC’s”) decision in *Ledcor* and applied the correctness standard of review.⁷ The majority concluded that the Master Agreement was a standard form contract within the meaning of *Ledcor*, as “the parties themselves treated the [Master Agreement] as a standard form of contract”.⁸ In addition, the majority referred to: (i) a letter stating that Encana could refuse to sign the agreement if any changes were made; (ii) an admission made in questioning that the Master Agreement constituted a “standard form document”;⁹ and, (iii) the broad wording of the indemnity clause.¹⁰ The majority acknowledged that a standard form contract can and does allow for a certain amount of limited negotiation between the parties.¹¹

With respect to the interpretation of the Master Agreement, the majority concluded that the indemnity clause did not cover situations such as Cardinal’s motor vehicle accident. Rather, the indemnity clause only applied “in connection with, related to or arising out of the performance, purported performance or non-performance of the [Master Agreement] or Services”.¹² For the indemnity clause to apply, there had to be a connection between the event for which Encana was

⁷ *Ibid* at paras 3, 8.

⁸ *Ibid* at para 7.

⁹ *Ibid* at para 6.

¹⁰ *Ibid* at para 7.

¹¹ *Ibid* at para 4.

¹² *Ibid* at para 18.

indemnified, and the performance of the Master Agreement.¹³ That is, Cardinal had to have been doing something related to the work performed by Ardco.¹⁴ Since Cardinal had been driving the vehicle during his personal time, for a personal matter not related to Encana or Ardco official business, the accident was not covered under the indemnity clause. Therefore, Ardco was not obligated to indemnify Encana for the accident in question.

In dissent, Schutz J.A. would have dismissed the appeal. Schutz J.A. disagreed that the Master Agreement was a standard form contract within the meaning of *Ledcor*. Rather, she would have applied the deferential standard of review set out in *Sattva*.¹⁵ In her view, the court below did not err in finding that Cardinal fit within the definition of “Personnel” in the Master Agreement, and that the broadly-worded indemnity clause was therefore triggered in favour of Encana

4. COMMENTARY

Encana demonstrates the willingness of appellate courts to intervene and impose their own interpretation of “standard form contracts”. Such an approach may be taken where, as here: (i) the indemnified party drafts the contract; (ii) the contract appears, on its face, to be a standard form contract; and, (iii) there is little to no negotiation of the terms.

Finally, it is important to note the rationale for imposing a correctness standard of review in the interpretation of standard form contracts; namely, that there is a greater need to “get it right” in standard form contract cases due to their potential precedential value. Indeed, the majority’s interpretation of the indemnity clause at issue in *Encana* will likely be applied in respect of other master service agreements containing similar indemnity language. This means that it will be difficult for parties to rely on these types of indemnity clauses in cases where the operator of a company vehicle is acting outside the scope of the master services agreement.

B. NORTHROCK RESOURCES v EXXONMOBIL CANADA ENERGY¹⁶

1. BACKGROUND

Northrock involved the interpretation and application of certain Rights Of First Refusals (“ROFRs”) over oil and gas interests in Saskatchewan. In *Northrock*, the Saskatchewan Court of Appeal (“SKCA”) considered: (i) the appropriate role for appellate courts in contractual interpretation cases; and, (ii) the scope of the duty of good faith in the context of a ROFR.

2. FACTS

Northrock Resources (“Northrock”) and ExxonMobil Canada Energy (“ExxonMobil”) were parties to various agreements, where each had ROFRs over certain of the other’s oil and gas interests in Saskatchewan. The ROFRs permitted transfer of such interests to affiliates, but did not address the subsequent sale of shares in those affiliates to third parties.

ExxonMobil disposed of its Saskatchewan oil and gas interests, some of which (the “Interests”) were subject to the ROFRs granted to Northrock. ExxonMobil offered the Interests for sale either

¹³ *Ibid* at para 24.

¹⁴ *Ibid* at para 24.

¹⁵ *Sattva*, *supra* note 1.

¹⁶ *Northrock Resources v ExxonMobil Canada Energy*, 2017 SKCA 60 [*Northrock*].

under a straight-up asset sale or a busted-butterfly-structured transaction. The busted-butterfly-structured sale involved ExxonMobil first assigning the Interests to its affiliates, and then selling its outstanding shares in the capital stock of its affiliates to the successful bidder. ExxonMobil understood the busted-butterfly structure would achieve a favourable tax result, and that it would not trigger the ROFRs. A third party outbid Northrock for the Interests.

Northrock claimed ExxonMobil's failure to first offer the Interests to Northrock constituted, *inter alia*, a breach of contract and the duty of good faith.

The trial judge dismissed all of Northrock's claims.¹⁷ He found that ExxonMobil had not breached the ROFRs. Moreover, ExxonMobil had not breached its duty of good faith because it had neither lied to nor misled Northrock, and it had not structured the transaction to avoid triggering the ROFRs.

Northrock appealed the decision, alleging that the trial judge: (i) incorrectly applied the principles of contractual interpretation; and, (ii) improperly focused on the stated motives for using a busted-butterfly structured transaction, instead of considering its design and effect.

3. DECISION

The SKCA upheld the trial judge's findings, and dismissed all of Northrock's claims against ExxonMobil, its affiliates and the third party.

The SKCA first considered the appropriate standard of review. Following *Sattva*,¹⁸ the SKCA held that the interpretation of a contract is a question of mixed fact and law. As such, and except in rare circumstances, the standard to be applied is "palpable and overriding error".¹⁹ However, the SKCA noted that there are some readily extricable questions of law. That is, whether the trial judge identified or applied an incorrect principle of law; and whether the trial judge failed to consider a required element of a legal test, or a relevant factor.²⁰ The standard of review for such questions is correctness.²¹

Next, the SKCA considered Northrock's argument that the trial judge erred in concluding that ExxonMobil did not breach the ROFRs, because the agreements did not explicitly prohibit busted-butterfly structure transactions. In essence, Northrock argued that a ROFR is "tantamount to a legal term of art", and is understood to be a "blanket prohibition on all dealings with its subject matter except in accordance with the right".²² The SKCA disagreed, recognizing that the first-level rights are those of the property-owner. In other words, the property-owner *starts* with unrestricted freedom to deal with its own property as it chooses. A ROFR is a bargain with the property-owner to *restrict* that freedom. If the property-owner does not wish to restrict its ownership rights in a particular way, it need not do anything by way of contract; it may remain silent.

¹⁷ *Northrock Resources v Exxonmobil Canada Energy*, 2016 SKQB 188 [*Northrock*]. The trial judge's decision was discussed in last year's paper: Kevin Kerr, Ben Rogers & Marita Zouravlioff, "Recent Judicial Decisions of Interest to Energy Lawyers" (2017) 55:2 Alta L Rev 499 at 514 [*Kerr*].

¹⁸ *Sattva*, *supra* note 1.

¹⁹ *Northrock*, *supra* note 16 at para 7.

²⁰ *Ibid* at para 8.

²¹ *Ibid* at para 8.

²² *Ibid* at para 15.

Finally, the SKCA considered Northrock's submissions regarding the duty of good faith. Northrock asserted that ExxonMobil breached its duty of good faith because it entered into transactions that specifically undermined the terms of the ROFRs. On appeal, Northrock argued that the trial judge erred by focusing on ExxonMobil's intention of implementing the busted-butterfly structured transaction, rather than the effect of the implementation. The SKCA found that the issue was a question of law that asked whether the trial judge failed to consider either a required element of a legal test, or a relevant factor.²³

Following *Bhasin*,²⁴ the SKCA set out the organizing principle of good faith contractual performance as the common law duty to act honestly in the performance of contractual obligations.²⁵ However, the SKCA noted that, as a general organizing principle, the duty of good faith must be applied and adapted to the factual circumstances of each particular case.²⁶ The SKCA agreed with the trial judge's conclusions regarding the duty of good faith in the context of a ROFR, agreeing that: (i) a breach of a duty of good faith may be established where a party is shown to have lied to or misled the other party; and, (ii) if a structure has been chosen for reasons other than to avoid a ROFR, then the choice of that structure does not constitute a breach of a duty of good faith.²⁷

Finally, the SKCA agreed with the trial judge that ExxonMobil had not breached its duty of good faith, because it had neither lied to nor misled Northrock, and it had not used a busted-butterfly structured transaction for the sole purpose of avoiding the ROFRs. The SKCA rejected Northrock's assertion that the *effect* of the transaction was the determinative factor in assessing the duty of good faith.

4. COMMENTARY

As noted last year, in respect of the Saskatchewan Court of Queen's Bench ("SKQB") decision, *Northrock* confirms a line of case law that holds there is no breach of good faith obligations if a chosen structure defeats a ROFR, as long as the structure was not chosen for the purpose of defeating the ROFR.²⁸

Northrock also affirms the deferential standard of review that will typically apply in contractual interpretation cases (i.e., cases not involving standard form contracts). Indeed, the SKCA noted that Northrock's allegations of error were chiefly expressions of disagreement over how the trial judge evaluated and weighed the evidence before him; specifically, how he applied the principles of contractual interpretation to the words of the ROFRs, considered in light of the factual matrix.²⁹ Such allegations invoke inherent questions of fact or mixed fact and law, and are subject to a deferential standard of review. As such, *Northrock* confirms that it will be difficult to appeal a trial decision on a contractual interpretation issue that engages the factual matrix.

²³ *Ibid* at para 27.

²⁴ *Bhasin v Hrynew*, 2014 SCC 71 [*Bhasin*].

²⁵ *Northrock*, *supra* note 16 at para 28.

²⁶ *Ibid* at para 29.

²⁷ *Ibid* at para 30.

²⁸ *Kerr*, *supra* note 17. The ABQB decision cites *GATX Corp v Hawker Siddeley Canada Inc* (1996), 27 BLR (2d) 251 (Ont Ct J); *Glimmer Resources Inc v Exall Resources Ltd* (1997), 35 BLR (2d) 297 (Ont Ct J); *Best Pacific Resources Ltd v Eravista Energy Corp*, 2002 ABCA 286.

²⁹ *Northrock*, *supra* note 16 at para 8.

It is also significant that the SKCA rejected Northrock's argument that a ROFR is a legal term of art, and that a ROFR imposes a blanket prohibition on dealing with property subject to such ROFR.³⁰ Rather, the SKCA affirmed that a property owner has the unrestricted freedom to alienate their asset in whatever way they choose, and only through explicit bargaining does that freedom diminish. *Northrock* affirms and protects a corporation's rights to deal with property interests that are subject to a ROFR.

Finally, *Northrock* is yet another decision in which the courts have limited the application of the duty of good faith between contracting parties. Indeed, the SKCA reiterated Cromwell J.'s caution in *Bhasin* that "the duty of good faith must not be used to circumvent the plain language of a contract because that would result in *ad hoc* judicial moralism and undermine the principle of certainty in contract".³¹ In addition, the SKCA confirmed that the duty of good faith must be adapted to the factual circumstances of each case.³²

C. CANADIAN NATURAL RESOURCES LIMITED v WOOD GROUP MUSTANG (CANADA) INC (IMV PROJECTS INC)³³

1. BACKGROUND

The nearly 90-page decision in *CNRL v Wood Group* is factually dense and touches on many different legal issues. This commentary focuses on what we consider to be the two most interesting legal issues: (i) the impact of two key parties – the construction contractor, Flint Field Services Ltd. ("Flint") and the insulation designer/manufacturer, Shawcor Ltd. and related parties ("Shawcor") – settling on the eve of trial by way of a *Pierringer* Agreement; and, (ii) the issues of contractual interpretation involving the exclusion clause and indemnity in the contract between the engineers (Wood Group Mustang (Canada) Inc., formerly IMV Projects Inc. ("Wood Group/IMV") and Canadian Natural Resources Limited ("CNRL")).

2. FACTS

This case involved the failure of a 32 km buried and insulated, high temperature bitumen pipeline at CNRL's Primrose East Plant. The pipeline went into service in October 2008.³⁴

In early January 2009, bitumen was observed on the surface, near one of the well pads at the Primrose East Plant.³⁵ The Alberta Energy Regulator ("AER") directed CNRL to reduce pressure in the reservoir to reduce the flow of bitumen to the surface.³⁶ CNRL reduced the reservoir pressure by stopping steaming and flowing bitumen emulsion through the pipeline, which occasionally resulted in temperatures exceeding the design rating for the pipeline.³⁷

³⁰ The SKCA's decision can be contrasted with the Alberta Court of Appeal's recent decision in *IFP v Encana*, *supra* note 3. In *IFP v Encana*, the Court concluded that the term "working interest" is a legal term of art in the oil and gas industry; as such, there is no need to define what such terms mean in contracts: *IFP v Encana*, at para 61.

³¹ *Northrock*, *supra* note 16 at paras 42, 47.

³² *Ibid* at para 29.

³³ *CNRL v Wood Group*, *supra* note 4.

³⁴ *Ibid* at para 1.

³⁵ *Ibid* at para 27.

³⁶ *Ibid* at para 27.

³⁷ *Ibid* at para 28.

A short time later, CNRL discovered areas of melted snow above the pipeline, which indicated that heat was escaping from the pipeline and suggested that the pipeline's insulation may have failed at some locations.³⁸

Shawcor and Flint settled with CNRL shortly before trial commenced, by way of a *Pierringer* Agreement.³⁹ A *Pierringer* Agreement is a tool that allows one or more defendants in multi-party litigation to settle with the plaintiff, in situations where at least one of the remaining defendants is determined to proceed to trial.

3. DECISION

The trial judge found that each of Flint, Shawcor, and Wood Group/IMV were negligent in their respective areas of responsibility.⁴⁰ The trial judge further found that CNRL was negligent in its operation of the pipeline.⁴¹

A key evidentiary issue was whether the Memorandum of Agreement between CNRL and Wood Group/IMV (the "MOA") barred recovery. Wood Group/IMV pleaded that the MOA contained a limitation of liability of \$50,000. The MOA was 10 pages long, with several attachments. The \$50,000 liability limit was included in Wood Group/IMV's General Conditions Agreement ("GCA"), which was attached to Wood Group/IMV's rate sheet.

Multiple copies of the MOA were produced in the litigation; some with the GCA attached, and some without. Wood Group/IMV took the position that because CNRL produced a copy of the MOA that included the GCA, it must be deemed to be the true contract between the parties. The trial judge rejected this submission and instead looked to evidence regarding the formation of the contract and the dealings between the parties. CNRL produced a witness who was involved in the drafting of the MOA in 2003; Wood Group/IMV could not. The CNRL witness testified that he had never seen the GCA prior to preparing for trial and that he would not have agreed to a limitation of liability, as it was inconsistent with other terms in the MOA. The trial judge found that there was no evidence that CNRL ever agreed to the GCA.

Wood Group/IMV then argued that it was relieved from liability by an indemnity clause. The indemnity clause provided that CNRL indemnified Wood Group/IMV "against liability for reservoir loss or damage, property damage ... arising from a well blowout...". Wood Group/IMV argued that the leak of bitumen to the surface that prompted the AER to require CNRL to reduce pressure on the reservoir was a "blowout" within the meaning of the indemnity clause and, accordingly, Wood Group/IMV was indemnified for the subsequent damage that occurred to the pipeline.

The trial judge heard expert evidence on the industry understanding of the meaning of the term "blowout" and considered the AER's (and its predecessors') evolving definitions of the term "blowout".⁴² The trial judge found that at the time of the drafting of the MOA, the parties did not intend to use the term "blowout" in a technical sense.⁴³ The parties were merely referring to an

³⁸ *Ibid* at para 29.

³⁹ *Ibid* at para 2.

⁴⁰ *Ibid* at paras 294, 483.

⁴¹ *Ibid* at para 490.

⁴² *Ibid* at paras 373-394.

⁴³ *Ibid* at para 398.

uncontrolled well event, resulting in bitumen coming to the surface.⁴⁴ Despite accepting a broad definition of the term “blowout”, the trial judge found that the indemnity did not apply because the damage to the pipeline did not arise from the blowout itself.⁴⁵ The trial judge explained that CNRL’s negligence in operating the pipeline, as the reservoir was depressurized, was the cause of damage to the pipeline, not the blowout.⁴⁶

4. COMMENTARY

CNRL v Wood Group illustrates some of the challenges after some parties have settled by way of a *Pierringer* Agreement. Indeed, a key element of Wood Group/IMV’s defence was to cast blame on the settling defendants, Shawcor and Flint. This was a challenge, given that, with those parties settling, the only way for Wood Group/IMV to access the evidence of Shawcor and Flint witnesses was to call those witnesses. Similarly, Wood Group/IMV’s ability to enter Shawcor and Flint documents was limited by those parties’ non-participation, absent a decision to call Shawcor and Flint witnesses. Wood Group/IMV sought the right to cross-examine Shawcor witnesses and to enter into evidence Shawcor records for the truth of their contents. The trial judge declined to allow such cross-examination without a demonstration that the Shawcor witnesses were uncooperative. However, the trial judge did allow use of a limited number of Shawcor records, where it was clear that they had been provided to the other parties and were represented to be true.

In addition, *CNRL v Wood Group* demonstrates that the evidence (and subsequent factual findings) can be important in unexpected ways, in determining whether contractual exclusions apply.

D. CANLIN RESOURCES PARTNERSHIP v HUSKY OIL OPERATIONS LIMITED⁴⁷

1. BACKGROUND

In *Canlin*, the Alberta Court of Queen’s Bench (“ABQB”) considered whether the applicant, Canlin Resources Partnership (“Canlin”), was entitled to a ROFR on the sale of an interest in a gas facility and, if so, whether to order specific performance of the ROFR. The core issue was the interpretation of a ROFR clause taken from a model agreement developed by the Petroleum Joint Venture Association (the “Model Agreement”).

2. FACTS

Canlin, Husky Oil Operations Limited (“Husky”) and CNRL were joint venture participants in the Erith Dehydration and Flow Splitter Facility (the “Facility”) and successor parties to the Construction, Ownership and Operation Agreement (the “CO&O Agreement”) that governed the Facility.⁴⁸

The CO&O Agreement provided Canlin with a ROFR if any of the joint venture parties wished to sell their interest in the Facility. However, an exception in s. 902(d) of the CO&O Agreement allowed an owner to transfer all or a part of its interest in the Facility, without providing a ROFR,

⁴⁴ *Ibid* at para 398.

⁴⁵ *Ibid* at para 405.

⁴⁶ *Ibid* at paras 406-407.

⁴⁷ *Canlin*, *supra* note 5.

⁴⁸ *Ibid* at para 3.

in circumstances of “[a] disposition made by an Owner of all or substantially all ... of its petroleum and natural gas rights in wells producing to the Facility”.⁴⁹

Between 2014 and 2016, Husky shut down and decommissioned the dehydrator unit of the Facility and blinded and bypassed the inlet separation and flow splitter unit. Husky installed a jumper pipeline in order to bypass the inlet separation and flow splitter unit. The jumper pipeline took inlet gas from the inlet pipes at the Facility and flowed the gas to an outlet pipeline that connected to a different gas plant. As such, no gas had been separated, split or dehydrated at the Facility since 2016. The gas that was previously processed at the Facility was being flowed to and processed at another facility.⁵⁰

In 2017, Husky gave notice to Canlin of its intention to sell certain of its assets to Ikkuma Resources Corp (“Ikkuma”), including its interest in the Facility. Husky took the position that the exception set out in s. 902(d) applied to the sale, and Canlin was not entitled to a ROFR. Husky argued that the words “wells producing to the Facility” should be interpreted as meaning “wells associated with the Facility”, and that the term “associated” means “tied in”. As such, the fact that gas still flowed through the Facility entitled Husky to take advantage of the exception.⁵¹

3. DECISION

The ABQB held that: (i) the exception set out in s. 902(d) of the CO&O Agreement did not apply to the sale; (ii) Canlin was entitled to a ROFR notice; and, (iii) specific performance was an appropriate remedy.⁵²

The ABQB noted two factors that affected the contractual interpretation exercise in this case: (i) neither Husky nor Canlin was a original signatory to the CO&O Agreement; and, (ii) the CO&O Agreement was based on the Model Agreement.⁵³

In support of its interpretation of the CO&O Agreement, Husky relied on an affidavit from an individual who had been employed in the oil and gas industry since 1970, and who had been involved in the Petroleum Joint Venture Association’s development of model agreements.⁵⁴ He gave evidence regarding the context, purpose and intentions behind the inclusion of s. 902(d) in the Model Agreement. He noted that, before the development of the Model Agreement, many operating agreements had ROFR clauses that became problematic when companies chose to divest all of their interests in wells and facilities in a given area.⁵⁵ The problem was that, with corporate transfers of interests in rights and wells, the sale of facility interests could be frustrated by parties exercising ROFRs, which would leave a new owner without adequate gathering and processing facilities to handle production.⁵⁶ Husky argued that Canlin’s ROFR challenge was the “exact mischief” that the initial signatories sought to avoid when they chose the option of s. 902(d). It

⁴⁹ *Ibid* at para 3.

⁵⁰ *Ibid* at para 3.

⁵¹ *Ibid* at paras 3-4.

⁵² *Ibid* at para 58.

⁵³ *Ibid* at para 12.

⁵⁴ *Ibid* at para 23.

⁵⁵ *Ibid* at paras 23-25.

⁵⁶ *Ibid* at para 24.

argued that the initial signatories intended that large asset sales, such as the Ikkuma transaction, should not be burdened with ROFR notices.⁵⁷

However, the ABQB noted that the Facility was not an operating facility, and even with the Facility decommissioned, the gas produced from the area where Ikkuma had purchased wells was still able to be processed and get to market. As such, the potential mischief (*i.e.*, that the exercise of a ROFR could leave a new owner without adequate gathering and processing facilities) did not arise here.⁵⁸

The ABQB further rejected Husky's argument that the words "wells producing to the Facility" should be read as "wells associated with the Facility" on the basis of the language in the annotations to the Model Agreement. The Court held that Husky's theory was backwards: the language of the annotations did not prevail over the language of the contract. Rather, the references to "associated wells" must be interpreted through the lens of the actual contractual language "wells producing to the Facility".⁵⁹

Husky also argued that the term "associated wells" had a specific meaning in the oil and gas industry and meant wells tied-in to the Facility.⁶⁰ The ABQB rejected this submission for two reasons. First, there was no obligation for the owners to flow production from particular wells through the Facility, and no specific wells were listed in or dedicated to the CO&O Agreement. Second, these were not the words used in s. 902(d) of the CO&O Agreement.⁶¹

Ultimately, the ABQB concluded that the words "wells producing to the Facility", in their ordinary and grammatical sense, must mean wells that are being processed by the dehydrator and inlet separation and flow splitter units of the Facility.⁶² As no wells were producing to the Facility, the exception in s. 902(d) did not apply to the Ikkuma transaction.

With respect to the appropriate remedy, the Court noted that specific performance should only be granted where there is evidence that the property in question is unique to the extent that its substitute would not be readily available. In this case, Canlin had established that the Facility was unique, as it provided a critical link between Canlin's wells and infrastructure owned partly or wholly by Canlin, and was therefore of critical importance to Canlin. Specific performance was found to be an appropriate remedy in the circumstances.⁶³

4. COMMENTARY

Canlin provides guidance on how the courts will interpret contractual language based on model agreements in wide use in the oil and gas industry in Alberta. Indeed, the Court's interpretation of the CO&O Agreement is likely to have strong precedential value for the interpretation of other agreements based on the Model Agreement, as it will be untenable for this provision to be given different interpretations in future cases.⁶⁴

⁵⁷ *Ibid* at para 28.

⁵⁸ *Ibid* at para 29.

⁵⁹ *Ibid* at para 33.

⁶⁰ *Ibid* at para 34.

⁶¹ *Ibid* at paras 35, 38.

⁶² *Ibid* at para 41.

⁶³ *Ibid* at paras 50, 58.

⁶⁴ The Court recognizes this concern at para 17 of its decision.

II. EMPLOYMENT AND LABOUR

In the past year, there have been several employment cases dealing with employee drug and alcohol use in safety-sensitive positions. In this paper, we discuss: (i) *Stewart v Elk Valley Coal Corp.*,⁶⁵ which involved a human rights complaint following an employee's termination for drug use; and, (ii) *Suncor Energy Inc v Unifor Local 707A*,⁶⁶ a decision in the ongoing saga regarding Suncor Energy Inc's ("Suncor") drug and alcohol testing policy for its oil sands operations. In general, the courts have been receptive to oil and gas companies' arguments regarding health and safety concerns arising from employee drug and alcohol use, within some limits.

A. *STEWART v ELK VALLEY COAL CORP*

1. BACKGROUND

In *Stewart*, the SCC considered a human rights complaint arising from a workplace drug policy. The complainant tested positive for cocaine following a workplace accident, and was subsequently terminated from his employment for violating the drug policy.⁶⁷ He alleged that he had been discriminated against on the basis of drug dependency.

2. FACTS

Stewart was a loader operator at the Cardinal River coal mine near Hinton, Alberta, and the mine was operated by the Elk Valley Coal Corp. ("Elk Valley"). On October 18, 2005, he was involved in an accident involving his loader and a 170 ton truck. In accordance with Elk Valley's workplace policies, Stewart submitted to a post-incident drug test. The drug test was positive for cocaine. Following the positive test, in a meeting with Elk Valley representatives, Stewart admitted to using crack cocaine on his days off and prior use of crystal methamphetamine and marijuana.⁶⁸

Elk Valley's drug policy allowed employees to voluntarily report drug addiction and receive support and treatment, but provided for dismissal for positive post-accident drug tests, with an opportunity to re-apply for employment in six months upon completion of a treatment program paid 50% by Elk Valley.⁶⁹ Stewart did not voluntarily disclose his drug use pre-accident and only declared his addiction for the first time post-accident. Accordingly, he was terminated.

Stewart filed a complaint with the Alberta Human Rights Commission ("AHRC"), alleging that he had been discriminated against on the basis of drug dependency.⁷⁰ He specifically alleged that reasonable accommodation required that Elk Valley not terminate him, but instead provide him an opportunity to obtain treatment and return to his job immediately upon successful completion of a treatment program. Elk Valley maintained that the strict approach was required to motivate employees to self-report and obtain treatment prior to accidents occurring, thereby promoting

⁶⁵ *Stewart v Elk Valley Coal Corp.*, 2017 SCC 30 [Stewart].

⁶⁶ 2017 ABCA 313, leave to appeal to SCC requested [*Unifor v Suncor*].

⁶⁷ *Ibid* at para 2.

⁶⁸ *Bish v Elk Valley Coal Corporation*, 2012 AHRC 7 ["Bish"] at paras 3-12.

⁶⁹ *Ibid* at para 151.

⁷⁰ *Ibid* at para 1.

workplace safety. The AHRC held that Elk Valley did not discriminate against Stewart and even if there was discrimination, the termination of his employment was justified.⁷¹

The ABQB upheld the AHRC decision, finding that there was no discrimination. However, the ABQB observed that if there had been discrimination, Elk Valley's policies did not reasonably accommodate the disability of drug dependency.⁷²

The majority of the ABCA upheld the AHRC decision in its entirety. In dissent, O'Ferrall J. held that the AHRC had erred because the evidence showed that drug dependency was the real reason for dismissal; accordingly, there was discrimination. He also found that Elk Valley had failed to reasonably accommodate the disability.⁷³

3. DECISION

McLachlin C.J. authored the majority decision. The majority concluded that the AHRC's decision that *prima facie* discrimination was not established was reasonable, and it was therefore unnecessary to consider whether Stewart was reasonably accommodated. As such, the appeal was dismissed.⁷⁴ Moldaver and Wagner J.J. filed joint concurring reasons and Gascon J. filed dissenting reasons on his own behalf.

McLachlin C.J. explained that the law regarding discrimination and reasonable accommodation is well settled and that this case only involved the application of the settled law to a particular set of facts.⁷⁵

She was clear that the nature of the disability – drug dependency – did not raise any novel questions of law. In addition, McLachlin C.J. observed that “[r]eviewing courts generally approach the decisions of tribunals under human rights statutes with considerable deference”.⁷⁶ Accordingly, she explained that the appropriate standard of review was reasonableness, not correctness.⁷⁷

The three part test for *prima facie* discrimination requires complainants to show: (i) a characteristic protected from discrimination by the *Human Rights Act*,⁷⁸ (ii) an adverse impact related to the service (employment in this case); and, (iii) that the protected characteristic was a factor in the adverse impact.⁷⁹ According to McLachlin C.J., only the third criterion was at issue in this case.

A key element of the appeal was the submission that Stewart was in denial regarding his drug addiction. Stewart's state of denial, it was argued, made it unreasonable to expect him to self-report his drug use and avail himself of the benefit of the Elk Valley drug policy. Moreover, his state of denial meant that termination for drug use was effectively discrimination on the grounds of drug dependency. McLachlin C.J. dismissed this argument, relying on the AHRC's finding of fact that Stewart “‘had the capacity to come forward and disclose his drug use’ and ‘did make

⁷¹ *Ibid* at 154.

⁷² *Bish v Elk Valley Coal Corporation*, 2013 ABQB 756.

⁷³ *Stewart v Elk Valley Coal Corporation*, 2015 ABCA 225.

⁷⁴ *Stewart*, *supra* note 65 at para 47.

⁷⁵ *Ibid* at para 22.

⁷⁶ *Ibid* at para 20.

⁷⁷ *Ibid* at para 22.

⁷⁸ *Alberta Human Rights Act*, RSA 2000, c A-25.5.

⁷⁹ *Stewart*, *supra* note 65 at para 24.

rational choices in terms of his drug use”⁸⁰ Accordingly, “[d]enial about his addiction was ... irrelevant in this case.”⁸¹ McLachlin CJ found that there was no discrimination and declined to consider whether Elk Valley’s policy provided reasonable accommodation.⁸²

In dissent, Gascon J. explained that McLachlin C.J. and the AHRC misunderstood the implications of a finding of drug dependency and imported questions of justification into the determination of discrimination. According to Gascon J., once it was found that a protected characteristic existed (drug dependency), it was wrong to separate the characteristic from its inherent consequences (drug use). To find that an individual suffering from drug dependency nevertheless had sufficient control over his drug use as to be expected to self-report undermines the finding of drug dependency. The logic of McLachlin C.J.’s reasons “places a burden on complainants to avoid discrimination, rather than on employers not to discriminate”.⁸³

Gascon J. further held that the AHRC fact findings – despite the conclusion of the AHRC – showed that Stewart’s drug dependence was clearly a factor in his dismissal.⁸⁴ Gascon J. acknowledged the evidence that Stewart retained some control over his drug use, but emphasized that his drug use was a consequence of his drug dependency.⁸⁵ As such, Gascon J. concluded that it could not be said that his termination was entirely a consequence of his drug use or non-compliance with the policy and that his drug dependency was not a factor.⁸⁶

Moldaver and Wagner J.J. adopted Gascon J.’s analysis with respect to the issue of discrimination, but found that the Elk Valley policy reasonably accommodated Stewart. Moldaver and Wagner J.J. were persuaded of the importance of the deterrent effect of the policy given the hazardous work environment. They concluded that the accommodation sought by Stewart “would compromise the employer’s valid objective to prevent employees from using drugs in a way that could give rise to serious harm in its safety-sensitive workplace”.⁸⁷

4. COMMENTARY

Safety is an overriding concern for employers in the energy industry. The safety of employees, individuals residing in areas surrounding industry activity, and of the environment are all dependent on sober workers adhering to best practices. More broadly, safety is important for the public image of the energy industry and for the profitability of industry participants. Not surprisingly, most energy industry participants have strict drug and alcohol policies.

McLachlin C.J.’s extreme deference to the AHRC indicates that there may be unexpressed policy reasons for favouring a different approach to discrimination claims in the context of drug dependency. Whereas there are no adverse consequences arising from correcting most workplace discrimination, returning a drug dependent employee to a role operating heavy machinery places

⁸⁰ *Ibid* at para 38, citing *Bish*, *supra* note 68 at paras 121-122.

⁸¹ *Stewart*, *supra* note 65 at para 38.

⁸² *Ibid* at para 47.

⁸³ *Ibid* at para 99.

⁸⁴ *Ibid* at paras 111, 117.

⁸⁵ *Ibid* at para 118.

⁸⁶ *Ibid* at para 145.

⁸⁷ *Ibid* at para 55.

lives at risk. McLachlin C.J.'s reasons provide energy industry employers an opportunity to adopt strict policies in an effort to deter drug use by employees.

There are warning signs, however, even in McLachlin C.J.'s reasons, that over-zealous policies may fall afoul of the SCC in the future. A case involving a drug dependent employee who did not maintain the measure of control over his behaviour that Stewart did might well lead a court to find that a policy like that of Elk Valley's discriminated against the employee. Moreover, such a fact finding of a lack of control or awareness by the employee might lead a court to follow Gascon J. and find that accommodation predicated on pre-incident self-reporting is not accommodation at all.

B. *SUNCOR ENERGY INC v UNIFOR LOCAL 707A*⁸⁸

1. BACKGROUND

Unifor v Suncor involved an appeal from an arbitral award regarding Suncor's random drug and alcohol testing at its oil sands operations. The saga of Suncor's drug and alcohol testing policy has been before the courts since 2012, and has resulted in numerous reported decisions.⁸⁹

2. FACTS

Suncor's oil sands operations employ approximately 10,000 workers, a significant percentage of whom are unionized.⁹⁰ Both the union, Unifor Local 707A ("Unifor"), and Suncor agree that Suncor's oil sands operations are a dangerous workplace.

Suncor's position is that drug and alcohol use are a significant problem among employees at its oil sands operations. Based on the ABCA's description, Suncor's policy appears more robust than the policy in issue in *Stewart*⁹¹ and includes: "post-incident, reasonable cause, return to work and follow-up drug and alcohol testing; an Employee and Family Assistance Program; and, treatment for employees with dependencies".⁹² Suncor also maintains drug and alcohol free accommodations for employees and has a drug interdiction procedure that uses sniffer dogs at Suncor's oil sands operations.⁹³

In June 2012, Suncor changed its drug and alcohol policy to provide for random drug testing of employees in safety sensitive positions. Unifor took the view that random drug and alcohol testing was contrary to the collective agreement between Unifor and Suncor. Unifor took this issue of random drug testing to arbitration. The majority of the Arbitration panel held that there was insufficient evidence of a drug and alcohol problem within the bargaining unit, to justify the invasion of privacy through random drug testing. The minority found that there was sufficient evidence of a drug and alcohol problem in the workplace to justify random drug testing.

⁸⁸ *Unifor v Suncor*, *supra* note 66.

⁸⁹ *Communications, Energy and Paperworkers Union, Local 707 v Suncor Energy Inc*, 2012 ABQB 627; *Communications, Energy and Paperworkers Union, Local 707 v Suncor Energy Inc*, 2012 ABCA 307.

⁹⁰ *Suncor Energy Inc v Unifor Local 707A*, 2016 ABQB 269 at para 7 [*Suncor ABQB*].

⁹¹ *Stewart*, *supra* note 65.

⁹² *Suncor ABQB*, *supra* note 90 at para 12.

⁹³ *Ibid* at para 12.

On appeal, the ABQB found that the majority of the arbitration panel's analysis of the evidence was unreasonable and, accordingly, its decision was unreasonable. In particular, the ABQB found that the majority applied too high a standard by considering only evidence relating to the seriousness of drug and alcohol issues in the bargaining unit, as opposed to the broader workplace.

3. DECISION

The ABCA affirmed the trial decision to send the dispute back to be heard by a new arbitration panel.

The leading case concerning workplace drug and alcohol testing, *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*,⁹⁴ was released during the Unifor/Suncor arbitration. Abella J., writing for the majority in *Irving*, observed that there are no cases where “an arbitrator has concluded that an employer could unilaterally implement random alcohol or drug testing, even in a highly dangerous workplace, absent a demonstrated problem”.⁹⁵ Abella J. went on to identify two cases, one involving the Imperial Oil Refinery in Strathcona County and the other involving drivers for the Toronto Transit Commission, where sufficient evidence of a drug and alcohol problem had been demonstrated to justify the imposition of random testing.⁹⁶ The clear message of *Irving* is that random drug testing will be considered unreasonable, unless there is reliable evidence that drugs and alcohol are a problem in the workplace.

The key issue before the ABCA in *Unifor v Suncor* was whether *Irving* required the employer to show that there was a drug and alcohol problem in the workplace generally, or that there was a drug and alcohol problem specifically within the bargaining unit.⁹⁷ The ABCA noted that the evidence showed that Suncor's workforce was integrated with unionized and non-unionized employees working together.⁹⁸ The ABCA held that it was unreasonable to refuse to consider evidence of drug and alcohol problems at Suncor's oil sands operations, that did not track data by type of employee (*i.e.*, unionized or non-unionized).⁹⁹ The ABCA held that “[b]y unreasonably narrowing the evidence that it considered when deciding this issue, the tribunal majority effectively asked the wrong question, and therefore applied the wrong legal test”.¹⁰⁰

Following the ABCA decision to remit the matter to a fresh arbitration panel, Unifor brought an injunction application to prohibit implementation of random drug testing while the new arbitration hearing was pending. The ABQB issued the injunction, preserving the *status quo*.¹⁰¹ The ABCA upheld the interim injunction.¹⁰²

4. COMMENTARY

⁹⁴ *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd.*, 2013 SCC 34 [*Irving*].

⁹⁵ *Ibid* at para 37.

⁹⁶ *Ibid* at para 38.

⁹⁷ *Unifor v Suncor*, *supra* note 66 at para 46.

⁹⁸ *Ibid* at para 48.

⁹⁹ *Ibid* at para 40.

¹⁰⁰ *Ibid* at para 49 (citations omitted).

¹⁰¹ *Unifor, Local 707A v Suncor Energy Inc.*, 2017 ABQB 752, *aff'd* 2018 ABCA 75 at para 60.

¹⁰² *Unifor, Local 707A v Suncor Energy Inc.*, 2018 ABCA 75.

Unifor has sought leave to appeal to the SCC. However, the ABCA's decision that evidence of a drug and alcohol problem in the workplace, as opposed to more narrowly within the bargaining unit, is likely correct in the context of an integrated workplace like Suncor's oil sands operations.

The case remitted to arbitration promises to bring some clarity to questions left unanswered by *Irving*. For example, the Court in *Irving* left it unclear how serious the drug and alcohol problem had to be and what kind of evidence would be required to establish the problem.

III. ARBITRATION

The SCC released a significant decision in 2017 on the scope of appellate intervention in commercial arbitration. The case will be of particular interest to oil and gas companies that are required, under the terms of a contract, to submit disputes to arbitration.

A. *TEAL CEDAR PRODUCTS LTD v BRITISH COLUMBIA*¹⁰³

1. BACKGROUND

Teal Cedar addressed two issues regarding the scope of appellate intervention in commercial arbitration: (i) the jurisdiction of appellate courts to interfere in appeals of arbitral awards; and, (ii) the appropriate standard of review to be applied in appellate review of arbitral awards.

2. FACTS

The Province of British Columbia ("BC") and Teal Cedar Products ("Teal Cedar") were unable to settle the amount of compensation BC owed to Teal Cedar under the *Forestry Revitalization Act*.¹⁰⁴

Prior to the enactment of the *Revitalization Act*, Teal Cedar was granted various licenses permitting it to harvest Crown timber. Three of these licenses allowed Teal Cedar to harvest timber and to use improvements, such as roads and bridges, to access the timber.¹⁰⁵ The *Revitalization Act* reduced the allowable harvest previously allowed by these three licenses.

Under the *Revitalization Act*, BC was obligated to provide compensation to those adversely affected, including Teal Cedar.¹⁰⁶ Specifically, s. 6 of the *Revitalization Act* required BC to provide compensation for reductions to harvesting rights (the "Rights Compensation") and for the value of improvements made to Crown land (the "Improvements Compensation").¹⁰⁷ S. 6(6) also required disputes over the amount of compensation owed to be submitted to arbitration.¹⁰⁸

BC and Teal Cedar negotiated the value of the Rights Compensation, but could not agree on the value of the Improvements Compensation.¹⁰⁹ They entered into a Settlement Framework

¹⁰³ *Teal Cedar Products Ltd v British Columbia*, 2017 SCC 32 [*Teal Cedar*].

¹⁰⁴ *Forestry Revitalization Act*, SBC 2003, c 17 [*Revitalization Act*].

¹⁰⁵ *Teal Cedar*, *supra* note 103 at para 7.

¹⁰⁶ *Ibid* at para 8.

¹⁰⁷ *Ibid* at paras 9, 10.

¹⁰⁸ *Ibid* at para 12.

¹⁰⁹ *Ibid* at paras 13, 15.

Agreement to guide their ongoing negotiations, which provided that Teal Cedar would not receive interest on the compensation it was owed.

The parties subsequently signed an amendment to that agreement (the “Amended Agreement”), which provided that disagreements relating to the valuation of compensation be submitted to arbitration.¹¹⁰

There were three issues before the arbitrator: (i) what valuation methods for Improvements Compensation were consistent with the *Revitalization Act* (the “Statutory Interpretation Issue”); (ii) whether Teal Cedar was entitled to interest for compensation submitted to arbitration under the Amended Agreement (the “Contractual Interpretation Issue”), and, (iii) whether Improvements Compensation was owed to Teal Cedar in respect of one of its licenses (the “Lillooet License”) (the “Statutory Application Issue”).¹¹¹

The arbitrator concluded that the depreciation replacement cost method, which calculates compensation by estimating the cost of constructing the improvements from scratch to their current condition, was the only method consistent with the *Revitalization Act*.¹¹² The arbitrator also held that Teal Cedar was entitled to interest on the Improvements Compensation.¹¹³ Finally, the arbitrator concluded that Teal Cedar was not entitled to Improvements Compensation in respect of the Lillooet License.

BC sought leave to appeal the arbitral award to the British Columbia Supreme Court (“BCSC”) under s. 31 of the *BC Arbitration Act*.¹¹⁴ Under s. 31, a party to an arbitration may appeal to the court on a question of law arising out of the award if (i) the parties to the arbitration consent, or, (ii) the court grants leave to appeal.

The application judge upheld the arbitrator’s award, except in connection with the Statutory Application Issue. The British Columbia Court of Appeal (“BCCA”) reversed, finding that the arbitrator had erred on all three issues.

3. DECISION

A split 5/4 decision was rendered by the SCC. The majority allowed the appeal in part and restored the arbitrator’s decision on all three issues.

The majority followed *Sattva*’s three-part framework to guide its analysis on the following: (i) the determination of jurisdiction to review the arbitrator’s award; (ii) the determination of the standard of review; and (iii) the application of the standard of review to the arbitrator’s award.¹¹⁵

First, with respect to jurisdiction, the majority concluded that the Statutory Interpretation Issue raised a question of law; as such, it had jurisdiction to consider that issue. However, the Contractual

¹¹⁰ *Ibid* at para 15.

¹¹¹ A third issue also arose relating to the compensation Teal Cedar was owed relating to the Lillooet Licence: *ibid* at para 17.

¹¹² *Ibid* at para 19.

¹¹³ *Ibid* at para 20.

¹¹⁴ *Arbitration Act*, RSBC 1996, c 55 [*Arbitration Act*].

¹¹⁵ *Teal Cedar*, *supra* note 103 at para 39, referencing *Sattva* at 1.

Interpretation Issue and the Statutory Application Issue each raised questions of mixed fact and law that were not subject to appellate review under the *Arbitration Act*.¹¹⁶

Second, with respect to the standard of review, the majority noted that in the arbitration context, the standard of review is almost always reasonableness. The only exception is where there is a constitutional question or a question of law of central importance to the legal system as a whole and which is outside the adjudicator's expertise. In other words, while the nature of the question (legal, mixed or fact) is dispositive of the standard of review in the civil litigation context, it is not in the commercial arbitration context. Ultimately, the majority held that the standard of review applicable to the Statutory Interpretation Issue was reasonableness.¹¹⁷

Finally, with respect to the application of the standard of review, the majority held that the arbitrator's use of the depreciation replacement method was reasonable, especially considering the broad language in the *Revitalization Act*.¹¹⁸

The minority agreed with the majority that the Contractual Interpretation Issue was not reviewable. However, the minority would have remitted the Statutory Interpretation Issue back to the arbitrator.¹¹⁹

The minority declined to comment on the applicable standard of review that would apply to the Statutory Interpretation Issue because, in its view, there was only one correct interpretation of s. 6.¹²⁰ In other words, while the arbitrator could have chosen any valuation method consistent with the *Revitalization Act*, there was only one such valuation: the "market value" approach. As the arbitrator did not apply this approach, the award could not stand under any standard of review.

4. COMMENTARY

Teal Cedar provides clear direction from the SCC on the limited scope for appellate intervention in arbitral awards. The majority's judgment demonstrates that courts will: (i) be generally unwilling to interfere with an arbitral award unless it is based on an extricable error of law; and, (ii) almost always impose a deferential standard of review in cases involving the appeal of an arbitral award.

In doing so, *Teal Cedar* helps achieve the goals of efficiency and finality in arbitration. However, it also increases the likelihood that a party will be stuck with a bad or poorly reasoned decision (particularly on a contractual interpretation issue). Such a result may ultimately discourage parties from entering into arbitration.

IV. SUMMARY JUDGMENT

Since the SCC issued its landmark decision in *Hryniak v Mauldin*,¹²¹ we have seen the courts struggle with deciding when it is appropriate to grant summary judgment prior to trial. This past

¹¹⁶ *Ibid* at para 52.

¹¹⁷ *Ibid* at paras 74-76.

¹¹⁸ *Ibid* at para 84.

¹¹⁹ *Ibid* at paras 106-107.

¹²⁰ *Ibid* at paras 106, 108, and 119.

¹²¹ 2014 SCC 7 [*Hryniak*].

year has been no exception. Indeed, the following cases show the ongoing tension between a chamber judge's obligation to: (i) decide disputes in the most efficient and cost effective manner; and, (ii) reach a fair and just decision on the record before him or her. As demonstrated below, this tension is particularly acute in complex commercial cases involving multiple parties.

A. *TALISMAN ENERGY INC v QUESTERRE ENERGY CORPORATION*¹²²

1. BACKGROUND

Talisman Energy Inc. ("Talisman") sought summary judgment for drilling and completion costs allegedly owed to it by Questerre Energy Corporation ("Questerre") under a farmout agreement (the "Farmout Agreement"). The application turned on whether a "collateral" agreement between the parties altered the provisions of the original Farmout Agreement.

2. FACTS

Talisman and Questerre were parties to the Farmout Agreement. The Farmout Agreement incorporated the CAPL operating procedure, which provided that Talisman could maintain an action for any unpaid accounts without such actions being subject to any set-off or counterclaim.¹²³

Talisman invited Questerre to participate in the drilling of two wells in Québec. When first approached, Questerre refused to participate because Talisman's original proposal contemplated only drilling wells and not their completion.¹²⁴ While Talisman eventually agreed to complete the wells in exchange for Questerre's participation (the "Second Agreement"), this agreement was not captured in the Authorization for Expenditures signed by the parties. Ultimately, Talisman withdrew from Québec and left the two wells unfinished.¹²⁵

Talisman brought a claim against Questerre to recover its drilling and completion costs regarding the two unfinished wells, as well as four other wells.¹²⁶ Questerre defended and counterclaimed for both drilling costs and the completion costs, relying on the Second Agreement. Talisman sought summary judgment for all its claims, relying on the fact that the CAPL operating procedure prohibits set-off or counterclaim.¹²⁷

The Master granted summary judgment in favour of Talisman on the drilling costs issue, but did not grant summary judgment in relation to the completion costs.¹²⁸ Questerre's appeal was allowed by the chambers judge, who found that the terms of the Second Agreement needed to be established at trial, because it affected the terms of the Farmout Agreement.¹²⁹

3. DECISION

¹²² *Talisman Energy Inc v Questerre Energy Corporation*, 2017 ABCA 218 [*Talisman*].

¹²³ *Ibid* at para 3.

¹²⁴ *Ibid* at para 5.

¹²⁵ *Ibid* at para 8.

¹²⁶ *Ibid* at para 9.

¹²⁷ *Ibid*.

¹²⁸ *Ibid* at para 12.

¹²⁹ *Ibid* at para 14.

The ABCA dismissed Talisman's appeal and denied summary judgment.¹³⁰ The ABCA rejected each of Talisman's four grounds of appeal.¹³¹

First, the ABCA concluded that the chambers judge correctly applied the modern test for summary judgment. The test requires a court to consider whether there is any issue of merit that genuinely requires a trial. In this case, the chambers judge found that the matter could not be determined summarily because even if one were to accept the existence of the Second Agreement, it would still be necessary to determine the nature of that agreement and determine its effect (if any), on the Farmout Agreement. In other words, he concluded that there was an issue of merit that genuinely required a trial.¹³²

Second, the ABCA held that the chambers judge did not err in assuming that the Second Agreement was a "collateral agreement", as he was not using the term "collateral" in the unique sense known to contract law.¹³³

Third, the ABCA concluded that the chambers judge did not err in finding that the Second Agreement could possibly affect the Farmout Agreement. In doing so, the ABCA rejected Talisman's argument that the Second Agreement was not enforceable because it directly contradicted the Farmout Agreement (including CAPL operating procedures).¹³⁴ The ABCA noted that Talisman had conceded that a trial was necessary to determine the nature and scope of the Second Agreement as it pertained to Questerre's counterclaim, and the facts necessary to determine the counterclaim were the same facts Questerre relied on to defend Talisman's claim.¹³⁵ Further, since it was unclear whether the Second Agreement existed, the Court could not accept Talisman's submission that its likelihood of success on the merits was high. As such, a trial was necessary to determine the nature and scope of the Second Agreement, and summary judgment could not be granted on the Farmout Agreement alone.¹³⁶

Fourth, the ABCA held that the four other wells would typically be subject to summary judgment as a result of the CAPL operating procedures. However, because Talisman confirmed that it would maintain liens on the four wells until the dispute with Questerre was resolved, those wells were brought within the ambit of the litigation. If Talisman changed its position regarding the liens, it could then pursue a separate summary judgment application on the four wells.¹³⁷

4. COMMENTARY

Talisman demonstrates that summary judgment, or even partial summary judgment, is not appropriate in many complex commercial cases. As long as a trial judge can find "an issue of merit" that "genuinely" requires a trial, summary judgment will be denied.

In this case, while the chambers judge stated that he "very much appreciate[d] the Supreme Court's urging of [trial judges] to be more open to using the summary judgment rules as it did in *Hryniak*

¹³⁰ *Ibid* at para 29.

¹³¹ *Ibid* at para 15.

¹³² *Ibid* at para 19.

¹³³ *Ibid* at para 20.

¹³⁴ *Ibid* at para 21.

¹³⁵ *Ibid* at paras 22-24.

¹³⁶ *Ibid* at paras 25-26.

¹³⁷ *Ibid* at paras 27-29.

v Mauldin ...”,¹³⁸ he also emphasized that the process of adjudication must be fair and just.¹³⁹ The ABCA went on to cite its prior decision in *Condominium Corp No 0321365 v Cuthbert*,¹⁴⁰ in which it held that “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 issues that are unsettled, complex or intertwined with facts”.¹⁴¹

Talisman demonstrates that in Alberta, an applicant still faces significant hurdles to summary judgment in complex commercial litigation, where the law is often complex and intertwined with messy facts. In such circumstances, a court may well determine that it cannot reach a “fair and just” result in a summary process. The continuing uncertainty around the availability of summary judgment only contributes to the accessibility issues facing our courts.

B. PRECISION DRILLING CANADA LIMITED PARTNERSHIP v YANGARRA RESOURCES LTD¹⁴²

1. BACKGROUND

Precision Drilling considered whether an exclusion clause in a no-fault contract can protect against liability for fraudulent misrepresentation. The issue was whether summary judgment was appropriate where one party raised a fraudulent misrepresentation defence and counterclaim.

2. FACTS

Yangarra Resources Ltd. (“Yangarra”) and Precision Drilling Canada Limited Partnership (“Precision”) entered into a “knock for knock” or “no-fault” contract (the “No-Fault Agreement”). Under the No-Fault Agreement, each party bore the risk of damage to its own assets including in cases of negligence or fault of the other party (the “Exclusion Clauses”).¹⁴³

While carrying on its duties pursuant to the No-Fault Agreement, a Precision employee mistakenly mixed an incorrect ingredient into its drilling mud. The mistake was not communicated to Yangarra until the next day, when the spoilt mud was used for drilling. During drilling, the drill became stuck, rendering the equipment useless and ultimately causing the abandonment of the well. It was only after the drill became stuck that Precision notified Yangarra of the mistake.¹⁴⁴

Precision subsequently sued Yangarra for the drill work it had performed for the abandoned well, as well as for the equipment it provided. Yangarra defended itself by alleging that Precision had breached its contractual commitment to drill the well in a good and workmanlike manner, in accordance with good drilling practices. Yangarra further alleged negligence, gross negligence, and fraudulent misrepresentation, as Precision had failed to warn Yangarra of the spoilt mud mixture, and counterclaimed on the same grounds.¹⁴⁵

¹³⁸ *Hryniak*, *supra* note 121.

¹³⁹ *Talisman*, *supra* note 122 at para 13.

¹⁴⁰ 2016 ABCA 46 [*Cuthbert*].

¹⁴¹ *Talisman*, *supra* note 122 at para 18, citing *Cuthbert*, *ibid* at paras 25-30.

¹⁴² *Precision Drilling Canada Limited Partnership v Yangarra Resources Ltd*, 2017 ABCA 378 [*Precision Drilling*].

¹⁴³ *Ibid* at para 2.

¹⁴⁴ *Ibid* at paras 3-4.

¹⁴⁵ *Ibid* at paras 5-6 .

The master granted Precision's summary judgment application, concluding that Yangarra's set-off defence and counterclaim were barred by the Exclusion Clauses. Yangarra's appeal was unsuccessful; the chambers judge agreed that the Exclusion Clauses excluded the type of damage claimed by Yangarra. The chambers judge found that while fraud may not have been excluded under the No-Fault Agreement, there was no evidence to support a fraudulent misrepresentation claim.¹⁴⁶

Yangarra appealed to the ABCA on two grounds: that the chambers judge erred in: (i) finding that Yangarra's claims for fraudulent misrepresentation did not require a trial; and (ii) applying the law regarding interpretation of exclusion clauses (*i.e.*, determining whether the No-Fault Agreement excluded fraud).¹⁴⁷

3. DECISION

The majority allowed the appeal on the fraudulent misrepresentation issue, and deliberately refrained from addressing the contractual interpretation issue.¹⁴⁸ It held that summary judgment was not appropriate to determine the fraudulent misrepresentation claims; rather, such claims required a trial.¹⁴⁹ The majority noted that credibility would be a particularly important part of the assessment, given the allegation of fraud, and the various witnesses involved in the events giving rise to the litigation.¹⁵⁰

The majority concluded that it was a palpable and overriding error for the chambers judge to conclude that there was no evidence of fraud. The majority found that the record suggested not only a failure to disclose, but also active steps to deceive, or at the very least, recklessness with regard to the mud mixing error.¹⁵¹ This was an issue that had to be established at trial.

In addition, the majority found that the chambers judge erred in failing to identify and apply the proper test for fraud.¹⁵² This error resulted from the chamber judge's: (i) suggestion that *intention* was a necessary component of the test for fraud; and, combined with (ii) a failure to include the element of recklessness as a possible pathway to fraud.¹⁵³

Finally, the majority considered public policy issues surrounding the Exclusion Clauses. It noted that if the No-Fault Agreement effectively barred a fraudulent misrepresentation claim (which it expressly refrained from deciding), then the issue was whether the court could intervene in the name of public policy to nullify that exclusion, if a party had a plausible claim of fraud. The majority agreed with the chambers judge that, even if the parties crafted their contract to explicitly release each other from a claim in fraud, public policy imperatives could require courts to intervene and give no effect to such language. In any event, the majority found that a trial judge would be in the best position to assess whether the evidence with respect to the allegations of fraud warrant the

¹⁴⁶ *Ibid* at paras 7-8 .

¹⁴⁷ *Ibid* at para 9.

¹⁴⁸ *Ibid* at para 11.

¹⁴⁹ *Ibid* at para 26.

¹⁵⁰ *Ibid*.

¹⁵¹ *Ibid* at paras 23-24.

¹⁵² *Ibid* at para 21, citing *Bruno Appliance and Furniture Inc v Hryniak*, 2014 SCC 8 at para 21.

¹⁵³ *Precision Drilling*, *supra* note 142 at para 29.

intervention of public policy in this matter.¹⁵⁴ Any such determination would have to occur after the factual record is established at trial.¹⁵⁵

In dissent, Paperny J.A. concluded that the chambers judge's assessment of the evidence, and his conclusion that the evidence was not sufficient to merit a trial on the fraud issue, were: (i) owed deference; and, (ii) reasonable based on the evidence before him. She would have dismissed the appeal.¹⁵⁶

4. COMMENTARY

Precision Drilling again demonstrates the reluctance of Alberta courts to grant summary judgment in cases that are factually complex, or that turn on the credibility of witnesses. Where one party raises a credible allegation of fraud, it is particularly unlikely that a court will be willing to grant summary judgment. In such circumstances, courts are unlikely to find that they can reach a "fair and just" resolution of the matter on a written record.

This case also limits the circumstances in which sophisticated commercial parties will be able to rely on their no-fault agreements, particularly where one party raises a plausible claim of fraud. The majority's decision leaves it open to a contracting party to argue that no-fault agreements should: (i) be interpreted to exclude fraudulent misrepresentation claims; and/or, (ii) be nullified for public policy reasons. In doing so, *Precision Drilling* calls into question the allocation of risks and liabilities agreed to by the drilling contractor (in this case, Precision) and the operator (in this case, Yangarra). Put another way, *Precision Drilling* suggests that the Alberta courts may be more interventionist in these types of standard industry "knock for knock" contracts. The decision could also have a wider application to exclusion of liability clauses in other types of contracts, for example, in purchase and sale agreements that limit a party's liability to a threshold amount of money or to claims commenced within a specific period of time.

C. *STONEY TRIBAL COUNCIL v CANADIAN PACIFIC RAILWAY*¹⁵⁷

1. BACKGROUND

In *Stoney*, the ABCA considered and applied the summary judgment test set out in Rule 7.3 of the *Alberta Rules of Court*.¹⁵⁸ *Stoney* involved an application by Canadian Pacific Railway ("CPR") to summarily dismiss a claim by the Stoney Tribal Council to recover petroleum, natural gas and related hydrocarbons that it alleged belonged to the Stoney Nakoda Nations.

2. FACTS

¹⁵⁴ *Ibid* at para 47.

¹⁵⁵ *Ibid* at para 46.

¹⁵⁶ *Ibid* at para 73.

¹⁵⁷ *Stoney Tribal Council v Canadian Pacific Railway*, 2017 ABCA 432 [*Stoney*].

¹⁵⁸ *Alberta Rules of Court*, Alta Reg 124/2010.

The Stoney Nakoda Nations hold reserve land near Morley, Alberta.¹⁵⁹ In the late 1800s, CPR constructed a transnational railway across the reserve lands.¹⁶⁰ Between 1893 and 1917, Canada transferred to CPR portions of the reserve lands for railway purposes.¹⁶¹

In 1940, the Stoney Nakoda Nations surrendered their mineral rights in the reserve lands to Canada.¹⁶² Since CPR owned the surface rights to the railway lands at this time, it was unlikely that the 1940 surrender included the railway lands.¹⁶³

In the 1960s, CPR transferred its mineral title interest to Canadian Pacific Oil and Gas Limited, a predecessor of Encana.¹⁶⁴ Encana is the current registered owner of the mines and minerals underlying the right of way and the ballast pit lands.¹⁶⁵

The Stoney Tribal Council commenced an action against CPR and Canada in 1999, and added Encana's predecessor, PanCanadian Petroleum ("PanCanadian"), as a defendant in 2001.¹⁶⁶ The plaintiff sued CPR and Encana for trespass and conversion.¹⁶⁷ It claimed that either the conveyance to CPR of the petroleum, natural gas and related hydrocarbons underlying the railway lands was not effective at law, or that the title to same reverted to the reserve lands when the railway lands ceased to be used for railway purposes.¹⁶⁸ Accordingly, the Stoney Nakoda Nations claimed to be the lawful owner of the petroleum, natural gas and related hydrocarbons.¹⁶⁹ The plaintiff sought both damages and the return of the *in situ* petroleum, natural gas and related hydrocarbons.¹⁷⁰

CPR and Encana both applied for summary dismissal.¹⁷¹ The case management justice, Jeffrey J., granted CPR's application, and dismissed Encana's application.¹⁷² He concluded that CPR had no current interest in the petroleum, natural gas and related hydrocarbons, so any claim against it for recovery of same was pointless.¹⁷³ The remaining claims against CPR for damages were out of time and therefore without merit.¹⁷⁴ With respect to the claim against Encana, Jeffrey J. concluded that the factual record was insufficient to allow the fair and just resolution of the issues before him.¹⁷⁵

With respect to the plaintiff's claims against CPR, Jeffrey J. found that there was no merit to the claim for the return of the *in situ* petroleum, natural gas and related hydrocarbons, because CPR did not currently have title to them.¹⁷⁶ Either CPR took title to those rights and then transferred

¹⁵⁹ *Stoney*, *supra* note 157 at para 36.

¹⁶⁰ *Ibid* at para 38.

¹⁶¹ *Ibid* at para 39.

¹⁶² *Ibid* at para 46.

¹⁶³ *Ibid* at para 47.

¹⁶⁴ *Ibid* at paras 48-52.

¹⁶⁵ *Ibid* at para 52.

¹⁶⁶ *Ibid* at para 62.

¹⁶⁷ *Ibid* at para 63.

¹⁶⁸ *Ibid*.

¹⁶⁹ *Ibid*.

¹⁷⁰ *Ibid* at paras 63-64.

¹⁷¹ *Ibid* at para 65.

¹⁷² *Ibid* at para 66; see also *Stoney Nakoda Nations v Canada*, 2016 ABQB 193 [*Stoney QB*].

¹⁷³ *Stoney QB*, *supra* note 172 at para 317.

¹⁷⁴ *Ibid*.

¹⁷⁵ *Ibid* at para 318.

¹⁷⁶ *Stoney*, *supra* note 157 at para 68.

them, or it never had title to begin with.¹⁷⁷ Neither of these possibilities provided CPR with the ability to return the *in situ* petroleum, natural gas and related hydrocarbons.¹⁷⁸ This aspect of the claim therefore had “no hope of succeeding”.¹⁷⁹

Jeffrey J. also found that the actions against CPR for damages were statute-barred under the two-year and six-year limitations periods.¹⁸⁰ He found that the plaintiff knew, or ought to have known, about the material facts giving rise to the cause of action by 1982, at the latest.¹⁸¹

3. DECISION

The ABCA unanimously upheld Jeffrey J’s order granting summary judgment in favour of CPR.¹⁸² It found no palpable and overriding error in his analysis and conclusion.¹⁸³

However, the ABCA was divided on the appropriate test for summary judgment under Rule 7.3 of the Alberta Rules of Court. The majority noted that while there have been several recent decisions from the ABCA that attempt to clarify that test, they “tend to have the opposite effect and muddy the waters”.¹⁸⁴ The majority then confirmed that the current law in Alberta is set out by the SCC in *Hryniak*, and by the ABCA in *Windsor v Canadian Pacific Railway*.¹⁸⁵ The test requires the court to examine the existing record, to see if a disposition that is fair and just to both parties can be made on that record.¹⁸⁶ The majority expressly rejected other expressions of the test, such as those that call for an assessment of the relative strength of the positions of the moving and non-moving party.¹⁸⁷ It concluded that such expressions of the test add unnecessary gloss to it and risk confusing the issue.¹⁸⁸

The majority also rejected the appellant’s argument that it was not fair, just and proportionate to grant summary judgment to one of three defendants in a complex, multi-party litigation.¹⁸⁹ It held that whether it is just to proceed summarily in a particular situation is not a separate consideration; rather, it is an integral part of the consideration of whether the claim can be justly and fairly determined without a trial.¹⁹⁰

The majority noted that in some circumstances, summary judgment may not be a just and fair resolution where complex, multi-party litigation can be more fairly and expeditiously resolved by

¹⁷⁷ *Ibid* at para 68.

¹⁷⁸ *Ibid*.

¹⁷⁹ *Ibid*.

¹⁸⁰ *Ibid* at para 69.

¹⁸¹ *Ibid*.

¹⁸² *Ibid* at paras 1, 30.

¹⁸³ *Ibid*.

¹⁸⁴ *Ibid* at para 2.

¹⁸⁵ *Ibid* at para 2, citing *Hryniak*, *supra* note 121 and *Windsor v Canadian Pacific Railway*, 2014 ABCA 108 [*Windsor*].

¹⁸⁶ *Stoney*, *supra* note 157 at para 11.

¹⁸⁷ This was the approach taken by the ABCA in *Composite Technologies v Shawcor Ltd*, 2017 ABCA 160 and *Stout v Track*, 2015 ABCA 10, and by the minority judgment in *Stoney*.

¹⁸⁸ *Stoney*, *supra* note 157 at para 12.

¹⁸⁹ *Ibid* at paras 19-23.

¹⁹⁰ *Ibid* at para 20.

having all parties remain in the litigation in order to avoid the possibility of duplicative proceedings or inconsistent findings.¹⁹¹ However, such concerns did not arise in this case.¹⁹²

Ultimately, the majority concluded that it would not be proportionate or fair to require CPR to continue to participate in proceedings where there is no merit to the claims made against it, and when the findings made are expressly stated to be without prejudice to the remaining parties' positions at trial.¹⁹³

4. COMMENTARY

Both the majority and the minority decisions in *Stoney* emphasize the purpose underlying the summary judgment process, and its value to the administration of justice. They both cite the “shift in culture” identified in *Hryniak*, which favours summary judgement if it is a fair process that results in a just adjudication of the dispute. In other words, *Stoney* confirms the SCC’s direction in *Hryniak*, and affirms that judges should be using summary judgment as a tool to screen out unmeritorious claims at an early stage of litigation.

In that regard, *Stoney* also confirms that partial summary judgment may be appropriate in complex, multi-party disputes. However, whether summary judgment will in fact be appropriate must necessarily depend on the circumstances. Indeed, in *Stoney*, it was particularly important that Jeffrey J. had not made any findings that could prejudice the remaining parties at trial. First, he did not make a binding determination on the nature of CPR’s interest in the original grant with respect to mines and minerals, which would have affected the Stoney Tribal Council’s ultimate claim against Encana. Second, his finding that the appellant’s claims against CPR were statute-barred did not require him to make factual findings that could bind the trial judge.

However, while the unique situation in *Stoney* allowed the case management judge to dispose of all claims against one defendant, this may not be the case in other complex, multi-party disputes. Indeed, in many cases, it will be difficult for a chambers judge to dispose of one claim, without making findings of fact that could potentially affect the other parties at trial. In those circumstances, the courts will be less willing to grant summary judgment, and more likely to send the entirety of the dispute to trial.

D. GEOPHYSICAL SERVICE INCORPORATED v ENCANA CORPORATION¹⁹⁴

1. BACKGROUND

GSI v Encana involved cross-applications for summary judgment/dismissal of certain contractual claims involving seismic data licensing agreements made between the Plaintiff, Geophysical Service Incorporated (“GSI”), and the Defendant, Encana. The applications were part of a broader series of summary judgment/dismissal applications brought by and against GSI (the “Sister Applications”) in other actions before the ABQB, all of which were heard by Eidsvik J. Decisions

¹⁹¹ *Ibid* at para 21.

¹⁹² *Ibid* at para 22.

¹⁹³ *Ibid* at para 23.

¹⁹⁴ *Geophysical Service Incorporated v Encana Corporation*, 2017 ABQB 466 [*GSI v Encana*].

in the Sister Applications were filed concurrently with the decision in *GSI v Encana*.¹⁹⁵ Each of GSI and Encana appealed to the ABCA, and the cross-appeals were heard on April 12, 2018.

GSI v Encana also fits into a larger picture of outstanding litigation commenced by GSI in Alberta. GSI has commenced over 25 distinct actions in Alberta alone, regarding the allegedly unlawful use of its seismic data.¹⁹⁶ The ABCA's recent decision on two issues common to all of the actions commenced by GSI in Alberta is also discussed at page 74 below.

2. FACTS

GSI and Encana were parties to three seismic data licensing agreements: (i) a 1998 General Licence Agreement between PanCanadian (Encana's predecessor) and GSI; (ii) a 2001 Master Data License Agreement between PanCanadian and GSI (the "2001 Agreement"); and (iii) a 2002 Master Data License Agreement between Encana and GSI (the "2002 Agreement").¹⁹⁷ The 2001 Agreement and the 2002 Agreement (collectively, the "Licensing Agreements") were the operative agreements.

The Licensing Agreements precluded Encana from knowingly obtaining GSI seismic data from any governmental agency. If Encana obtained any such seismic data, it was required to either: (i) enter into a supplemental licensing agreement at a licensing fee equal to 150% of then current licensing fees; or, (ii) immediately destroy the seismic data.¹⁹⁸

In November 1999, representatives of PanCanadian visited the National Energy Board ("NEB") and borrowed mylars of seismic data related to offshore areas in the Beaufort Sea that had been collected by GSI's predecessor in 1983 and 1984 (the "Beaufort Material").¹⁹⁹

In February 2000, PanCanadian prepared a power point presentation providing an analysis of geological trends and possible prospects for future development in the MacKenzie River Delta and Beaufort Sea. However, management did not pursue any opportunities in the Beaufort Sea. After the PanCanadian/Encana merger in 2002, the Beaufort Material was moved from one floor to another and there was no disclosure or licensing of the Beaufort Material.²⁰⁰

In May 2006, Encana did a "clean-up" of its data. An Encana employee contacted GSI to determine if there was any field data to accompany the paper sections of the Beaufort Material. GSI's representative visited Encana's office and noted that the Beaufort Material was not licensed. He subsequently sent a demand letter and invoice to Encana for \$2,914,351.61 (allegedly representing 150% of the 2005 licensing fees for the Beaufort Material).²⁰¹

¹⁹⁵ *Geophysical Service Incorporated v Plains Midstream Canada ULC*, 2017 ABQB 462; *Geophysical Service Incorporated v Devon ARL Corporation*, 2017 ABQB 463; *Geophysical Service Incorporated v Murphy Oil Company Ltd*, 2017 ABQB 464; and *Geophysical Service Incorporated v Suncor Energy Inc*, 2017 ABQB 465.

¹⁹⁶ *GSI v Encana*, *supra* note 194 at para 96.

¹⁹⁷ *Ibid* at paras 4, 5, and 7.

¹⁹⁸ *Ibid* at para 20.

¹⁹⁹ *Ibid* at para 8.

²⁰⁰ *Ibid* at paras 9-10.

²⁰¹ *Ibid* at para 11.

On August 9, 2006, Encana advised GSI that it had elected to destroy the Beaufort Material. The parties thereafter agreed that the Beaufort Material would not be destroyed, without prejudice to their respective legal positions.²⁰² GSI filed its Statement of Claim on April 19, 2007.²⁰³

GSI subsequently sought partial summary judgment against Encana in relation to only one claim: GSI's allegation that Encana possessed, in violation of the Licensing Agreements, unlicensed seismic data obtained from the NEB in 1999 (the "Accessed Data Claim").²⁰⁴

Encana brought a cross-application seeking to dismiss GSI's entire action. As such, Eidsvik J. had to consider whether to summarily dismiss all of GSI's claims, including its claims that: (i) Encana submitted GSI data or work products to a government agency, without GSI's authorization (the "Submitted Data Claim"); and (ii) Encana created an "Exploration Group" with several other companies in the offshore MacKenzie Delta, and was therefore contractually obligated to indemnify GSI for those other companies' failures to pay licensing fees for the Beaufort Material (the "Exploration Group Claim").²⁰⁵

3. DECISION

Eidsvik J. granted: (i) summary judgment on the liability aspect of the Accessed Data Claim; and, (ii) summary dismissal of the Submitted Data Claim and the Exploration Group Claim.²⁰⁶

First, with respect to the Accessed Data Claim, Eidsvik J. held that Encana breached the Licensing Agreements by being in possession of the Beaufort Material as of the date of the Licensing Agreements, and by not destroying it or licencing it within a reasonable time.²⁰⁷ She rejected Encana's argument that it did not know it was in possession of the Beaufort Material until 2006; instead, she concluded that mere possession was sufficient to trigger the relevant clause of the Licensing Agreements.²⁰⁸

Eidsvik J. further rejected Encana's argument that the Accessed Data Claim was barred by the expiry of the applicable limitation period.²⁰⁹ The evidence showed that GSI had discovered in June 2003 that PanCanadian had accessed the Beaufort Material in 1999.²¹⁰ As such, Eidsvik J. accepted that by June 2003, GSI knew that Encana had accessed its data and it could have assumed that such access likely included copying. However, she did not accept that GSI's knowledge of potential copying should have led it to the knowledge that PanCanadian/Encana were in breach of the Licensing Agreements by virtue of their continued possession of the copied Beaufort Material.²¹¹ Eidsvik J. noted that: (i) there was some evidence to suggest that PanCanadian represented to GSI that it did not possess any unlicensed seismic material in 2001; and, (ii) Encana

²⁰² *Ibid* at para 12.

²⁰³ *Ibid* at para 38.

²⁰⁴ *Ibid* at para 1.

²⁰⁵ *Ibid* at para 2.

²⁰⁶ *Ibid* at paras 96, 98.

²⁰⁷ *Ibid* at para 36.

²⁰⁸ *Ibid* at para 34.

²⁰⁹ *Ibid* at para 53.

²¹⁰ *Ibid* at para 41.

²¹¹ *Ibid* at para 43.

had contractual obligations to disclose that it had unlicensed material in its possession.²¹² As such, Eidsvik J. was satisfied that the limitation period did not bar GSI's action.²¹³

However, Eidsvik J. concluded that it was not possible to fairly determine damages on the existing record.²¹⁴ The damages assessment for the Accessed Data Claim was therefore left to be determined at trial.²¹⁵

Second, with respect to the Submitted Data Claim, Eidsvik J. noted that GSI had plead and relied on the wrong contractual provision.²¹⁶ The relevant clause of the Licensing Agreements, unlike other agreements between GSI and its clients, did not require Encana to obtain GSI's approval before submitting data to a government board. It simply required that: (i) the disclosure be required by Canadian law; and, (ii) Encana immediately inform GSI upon receipt of any request or demand for disclosure.²¹⁷ The Submitted Data Claim was summarily dismissed on this basis.

Nonetheless, Eidsvik J. went on to consider the parties' arguments as to whether the submission of certain seismic data was required by Canadian law. The data in question involved: (i) various applications for allowable expenditure credits (the "Credit Applications"); and, (ii) a seismic interpretation report.²¹⁸ Eidsvik J. agreed that the Credit Applications were required by law to obtain certain credits against the deposits Encana made with the government for exploration licenses.²¹⁹ With respect to the report, Eidsvik J. agreed that its submission was required by the governing regulations, and thus required by law. As such, even if properly pleaded, Eidsvik J. would have summarily dismissed the Submitted Data Claim.²²⁰

Third, with respect to the Exploration Group Claim, Eidsvik J. agreed that the parties in question were not an "Exploration Group", as defined in the Licensing Agreements.²²¹ An "Exploration Group" only included those companies that joined together to participate or develop areas of interests "covered by or within five (5) miles of any Seismic Data or the Reprocessed Seismic Data".²²² GSI conceded that the Beaufort Material was not within 5 miles of the area of interest.²²³

Finally, Eidsvik J. granted summary dismissal of GSI's remaining claims for damages arising from breach of copyright and breach of confidence. She held that these claims failed as a result of her decision in the "common issues trial" (discussed at page 74 below).²²⁴

4. COMMENTARY

GSI v Encana, and the decisions in the Sister Applications, demonstrate that partial summary judgment can be a useful and appropriate tool in complex commercial cases. Indeed, these

²¹² *Ibid* at paras 44, 47.

²¹³ *Ibid* at para 53.

²¹⁴ *Ibid* at para 59.

²¹⁵ *Ibid* at para 61.

²¹⁶ *Ibid* at para 65.

²¹⁷ *Ibid* at para 67.

²¹⁸ *Ibid* at para 69.

²¹⁹ *Ibid* at para 90.

²²⁰ *Ibid* at para 91.

²²¹ *Ibid* at para 96.

²²² *Ibid* at para 93.

²²³ *Ibid* at para 94.

²²⁴ *Ibid* at para 97.

decisions demonstrate that partial summary judgment can: (i) help identify the real issues in dispute; and, (ii) ensure that claims can be fairly and justly resolved in a timely and cost-effective way. Indeed, as a result of the summary process, the myriad of factual and legal issues raised in *GSI v Encana* have been distilled into a single issue that genuinely requires a trial; namely, the damages associated with the Accessed Data Claim.

However, the decision in *GSI v Encana* can be contrasted with the decision in *Talisman*²²⁵ (discussed above), and the approach to partial summary judgment more generally in Ontario. For instance, in *Butera v Chown, Cairns LLP*,²²⁶ the Ontario Court of Appeal (“ONCA”) declined to grant partial summary judgment in a professional negligence action. The ONCA identified a number of problems with partial summary judgment, including: (i) the danger of duplicative or inconsistent findings; (ii) the delay in the resolution of the main action; (iii) the significant expense associated with partial summary judgment; (iv) the judicial resources required to hear and prepare comprehensive written reasons on issues that do not dispose of an action; and, (v) the limited record available on a partial summary judgment motion as compared to the record at trial. The ONCA directed moving parties to consider these factors in assessing whether a partial summary judgment motion is advisable in the context of the litigation as a whole. It noted that a partial summary judgment motion should be a “rare procedure that is reserved for an issue or issues that may be readily bifurcated from those in the main action and that may be dealt with expeditiously and in a cost effective manner”.

Ultimately, the decisions in *GSI v Encana* and *Stoney*, on the one hand, and *Talisman* and *Butera*, on the other hand, demonstrate an ongoing tension in the post-*Hryniak* landscape. Judges must weigh and balance: (i) the SCC’s direction that summary judgment rules be interpreted broadly and used to screen out unmeritorious claims at an early stage of proceedings; and, (ii) the summary judgment test, which requires judges to reach a fair and just determination on the record before them. As a result of this tension, many judges remain reluctant to grant summary judgment, or partial summary judgment, in complex, multi-party commercial litigation.

V. PRIVILEGE ISSUES

In this paper, we discuss two important decisions regarding the scope of: (i) common interest privilege in the transactional context; and, (ii) litigation privilege over records gathered in an internal corporate investigation. These cases show the ongoing tension between the need to: (i) protect privileged information from disclosure and (ii) prevent overbroad claims of privilege. The cases also demonstrate some ongoing confusion in the courts’ interpretation and application of these two types of privilege.

A. *IGGILLIS HOLDINGS INC v CANADA (NATIONAL REVENUE)*²²⁷

1. BACKGROUND

Iggillis addressed the scope of common interest privilege in the transactional context. The Federal Court of Appeal (“FCA”) heard an appeal from a controversial 2016 decision, in which the Federal

²²⁵ *Supra* note 122.

²²⁶ *Butera v Chown, Cairns LLP*, 2017 ONCA 783.

²²⁷ 2018 FCA 51 [*Iggillis*].

Court (“FC”) decided that sharing privileged communications during the course of transaction planning amounted to a waiver of privilege.²²⁸

2. FACTS

Abacus Capital Corporations Mergers and Acquisitions structured a series of transactions under which one its entities acquired shares held by Iggillis Holdings Inc. and Ian Gillis.²²⁹ In the course of planning these transactions, a memorandum discussing the tax implications of each step of the proposed transactions was jointly prepared by the transacting parties’ respective counsel.²³⁰

The Minister of National Revenue (the “MNR”) subsequently served requirements on both parties under s. 231.2(1) of the *Income Tax Act* to produce the memorandum.²³¹ The parties declined to do so, asserting common interest privilege.²³²

The FC found that the memorandum was not protected by common interest privilege and had to be disclosed to the MNR.²³³ While it acknowledged that transactional common interest privilege is widely recognized across Canada and in common law systems around the world, the FC held that sharing the memorandum among the parties to a proposed transaction had resulted in a waiver of privilege.²³⁴

3. DECISION

In a unanimous decision, the FCA allowed the appeal and dismissed the MNR’s application to require production of the memorandum.

The FCA agreed with the FC that the memorandum was protected by solicitor-client privilege.²³⁵ However, it found that common interest privilege was not waived when the memorandum was shared between the transacting parties.²³⁶

The FCA disagreed with the FC on two points. First, the FC had held that transactional common interest privilege had the undesirable effect of shielding relevant evidence from the court.²³⁷ The FCA rejected this conclusion because, to the extent the memorandum contained the parties’ opinions regarding the legal effect of the transactions, such opinions were irrelevant and inadmissible. The failure to disclose such documents would not constitute a loss of evidence.²³⁸

Second, the FCA noted that the MNR’s purported right to require disclosure of the memorandum rested on specific provisions of the *Income Tax Act*.²³⁹ Based on those provisions, the question was whether the memorandum would be privileged in the superior court of the province where the

²²⁸ *Ibid* at para 1.

²²⁹ *Ibid* at para 3.

²³⁰ *Ibid* at para 4.

²³¹ *Income Tax Act*, RSC 1985, c 1 (5th Supp).

²³² *Iggillis Holdings Inc v Canada (National Revenue)*, 2016 FC 1352 at para 4.

²³³ *Iggillis*, *supra* note 227 at para 1.

²³⁴ *Ibid* at para 12.

²³⁵ *Ibid* at paras 18-19.

²³⁶ *Ibid* at para 19.

²³⁷ *Ibid* at paras 23-24.

²³⁸ *Ibid* at para 27.

²³⁹ *Ibid* at para 29.

“matter arises” (in this case Alberta or BC).²⁴⁰ Since the memorandum would be considered privileged in Alberta and BC, the MNR had no right to insist that it be produced.²⁴¹

The FCA went on to note that the recognition of transactional common interest privilege is consistent not only with the law of Alberta and BC, but also with previous decisions of the FC and other provinces and also supported by leading commentary on the law of evidence in Canada. The FC’s reliance on American jurisprudence to overturn established Canadian case law was incorrect.²⁴²

The FCA also rejected the FC’s suggestion that transactional common interest privilege is a tool to hide suspect transactions. On the contrary, the FCA noted that sharing privileged communications may well lead to efficiencies in concluding transactions, especially when dealing with complex statutes such as the *Income Tax Act*, and therefore serve the interests of all parties.²⁴³

4. COMMENTARY

The FCA has restored a significant measure of clarity and certainty concerning the ability of parties to share privileged communications in furtherance of a proposed commercial transaction. The decision realigns the federal courts with provincial superior courts by confirming that common interest privilege serves a legitimate purpose, and can be validly asserted in the transactional context. Accordingly, *Iggillis* provides great relief to commercial energy practitioners and transacting parties.

B. ALBERTA v SUNCOR INC²⁴⁴

1. BACKGROUND

Alberta v Suncor considers whether a company can claim privilege over records created or collected during an internal investigation of an employee fatality.

2. FACTS

On April 20, 2014, there was a fatal accident at a Suncor site near Fort McMurray. Almost immediately following the accident, Suncor formed an investigation team under the supervision of internal Suncor legal counsel working together with external legal counsel and commenced an internal investigation.²⁴⁵ The primary purpose of the internal investigation was to prepare for contemplated litigation and anticipated regulatory proceedings. An additional purpose of the Suncor internal investigation was to comply with s. 18(3)(a) of the *Occupational Health and Safety Act*, which requires employers to conduct an investigation.²⁴⁶ The Suncor internal investigation, though concerned with safety issues, followed practices common to corporate internal

²⁴⁰ *Ibid* at para 30.

²⁴¹ *Ibid* at para 42.

²⁴² *Ibid* at paras 32-40.

²⁴³ *Ibid* at para 41.

²⁴⁴ 2017 ABCA 221, leave to appeal to SCC refused, 37777 (3 May 2018) [*Alberta v Suncor*].

²⁴⁵ *Alberta v Suncor Energy Inc*, 2016 ABQB 264 at para 6 [*Alberta v Suncor QB*].

²⁴⁶ *Occupational Health and Safety Act*, RSA 2000, c O-2 [OHSA].

investigations generally. The investigation team was instructed to track all records created or collected, and to mark all such records as privileged.²⁴⁷

Alberta Occupational Health and Safety (“OHS”) issued a stop-work order on the day of the accident and commenced its own investigation pursuant to s. 18.1 of *OHSA*.²⁴⁸ As part of its investigation, OHS conducted interviews of 15 Suncor employees and gathered documents.²⁴⁹ OHS subsequently demanded that Suncor produce: (i) copies of all materials created or collected by the Suncor investigation team; (ii) all photographs/videos relevant to the incident; and (iii) copies of all witness statements and interviews conducted by the Suncor investigation team.²⁵⁰ In addition, OHS sought to interview members of Suncor’s investigation team. Suncor produced a number of documents, but maintained claims of solicitor-client and litigation privilege over materials created or collected by the internal investigation team.

A key issue before the chambers judge was whether the *OHSA* requirements to conduct an investigation and produce a report to OHS negated privilege claims. Perhaps anticipating the SCC decisions in *Lizotte v. Aviva Insurance Company of Canada*²⁵¹ and *Alberta (Information and Privacy Commissioner of Canada) v University of Calgary*,²⁵² the chambers judge held that the *OHSA* requirements did not prevent Suncor from claiming privilege.²⁵³ The chambers judge went on to hold that the dominant purpose of Suncor’s internal investigation was in contemplation of litigation.²⁵⁴ He concluded that, “[t]his finding ... leads to the collateral finding that ... the information and documents created and/or collected during the internal investigation ... are integrally covered by litigation privilege”.²⁵⁵ Curiously, despite this conclusion, the chambers judge appointed a referee to review the documents over which Suncor claimed privilege, to make a determination whether each individual document was privileged.²⁵⁶

3. DECISION

With the SCC’s decisions in *Lizotte* and *University of Calgary* having been decided prior to the ABCA hearing this matter, the issue of whether the *OHSA* requirements to investigate and produce a report obviated claims of privilege was not seriously contested.²⁵⁷ The ABCA focussed instead on two questions: (i) whether litigation privilege can be established on a global basis with respect to an internal investigation, or whether it must be established on a document-by-document basis; and (ii) whether documents collected during an internal investigation may be subject to litigation privilege.

The ABCA held that the chambers judge’s formulation of litigation privilege was “overbroad”. It held, “[e]ven if the dominant purpose of the internal investigation as a whole was in contemplation of litigation, this does not mean that every document ‘created and/or collected’ during the investigation assumes the mantle of that overarching dominant purpose so as to be clothed with

²⁴⁷ *Alberta v Suncor*, *supra* note 244 at para 5.

²⁴⁸ *Alberta v Suncor QB*, *supra* note 245 at para 5.

²⁴⁹ *Ibid* at para 9.

²⁵⁰ *Ibid* at para 7.

²⁵¹ 2016 SCC 52 [*Lizotte*].

²⁵² 2016 SCC 53 [*University of Calgary*].

²⁵³ *Alberta v Suncor QB*, *supra* note 245 at para 46.

²⁵⁴ *Ibid* at para 68.

²⁵⁵ *Ibid*.

²⁵⁶ *Ibid* at para 97.

²⁵⁷ *Alberta v Suncor*, *supra* note 244 at paras 38, 42.

legal privilege”.²⁵⁸ The ABCA, citing its earlier decision in *Canadian Natural Resources Limited v ShawCor Ltd*, explained that privilege must be established document-by-document.²⁵⁹

The ABCA then held, in somewhat unclear terms, that documents collected during the course of an investigation cannot be privileged. The ABCA listed a range of pre-existing documents that might be collected during the course of an internal investigation (surveillance video, policies, schedules, etc.), but that are not created for the dominant purpose of litigation.²⁶⁰ It went on to observe that the dominant purpose test, as stated in *ShawCor*, requires that the party claiming privilege establish “the purpose for preparing or creating the material, not the purpose for obtaining it”.²⁶¹ The ABCA then muddled its conclusion by observing, “material created in the ordinary course of business and later collected for the investigation file, may arguably not be covered by litigation privilege”.²⁶²

The ABCA, like the chambers judge, referred the matter to a referee for review on a document-by-document basis. A key reason why the ABCA referred the matter to the referee was its conclusion that the privileged records were inadequately described and that because there were overlapping claims of solicitor-client privilege and litigation privilege existed. The ABCA went on to note that to succeed, Suncor must particularize its privilege claims as follows: (i) for solicitor-client privilege claims, documents must be described so that it is clear that they are “communications between a client and a legal advisor related to seeking or receiving legal advice”²⁶³; and, (ii) for litigation privilege claims, documents must be described “with enough particularity to indicate whether the dominant purpose for their *creation* was in contemplation of litigation”.²⁶⁴

Suncor sought leave to appeal the ABCA decision to the SCC, which was denied.²⁶⁵

4. COMMENTARY

Anyone advising a corporation in the conduct of an internal investigation – internal and external counsel – should be mindful of the risks posed by the reasons in *Alberta v Suncor*. A carefully crafted investigation protocol, followed faithfully by an investigation team, with a view to being privileged, may not be sufficient to protect the investigation file from disclosure. The threat to the investigation file comes from two places. First, the reasons in *Alberta v Suncor* suggest that greater description of privilege claims is required, which in itself threatens to reveal the nature of the privileged information. Second, pre-existing documents gathered by an investigation team – something that can reveal the strategy and mindset of counsel – are likely not privileged given the ABCA’s reasons. Perhaps the greatest risk is that the ABCA seemed unconcerned by the way in which OHS framed its demand for information – *i.e.*, seeking essentially the investigation team’s entire file.

²⁵⁸ *Ibid* at para 28.

²⁵⁹ *Canadian Natural Resources Limited v ShawCor Ltd*, 2014 ABCA 289 [*ShawCor*]; *Alberta v Suncor*, *supra* note 244 at paras 26, 29.

²⁶⁰ *Alberta v Suncor*, *supra* note 244 at para 32.

²⁶¹ *Ibid* at para 35.

²⁶² *Ibid* at para 49.

²⁶³ *Ibid* at para 47.

²⁶⁴ *Ibid*.

²⁶⁵ *Supra*, note 244.

Alberta v Suncor is also representative of a troubling trend of courts avoiding deciding privilege issues on principled grounds and deferring decision-making to court-appointed referees. The unintended effect of this approach may be to invite more privilege challenges, resulting in appeals of referee decisions and more issues coming back to the courts for determination. *Alberta v Suncor* remains a case to watch, as the effect of the denial of leave to appeal to the SCC means that privilege issues in this case will be decided on a document-by-document basis by the referee appointed by the presiding ABQB justice. Depending on the decisions of the referee, this case may yet result in meaningful guidance from the courts regarding privilege in the context of internal investigations, particularly the applicability of litigation privilege to documents gathered.

VI. CORPORATE GOVERNANCE AND SHAREHOLDER RIGHTS

The following discussion concerns two cases on the valuation and payment of the fair value of a dissenting shareholders' shares. The cases demonstrate that there is still some confusion as to how to value a dissenting shareholder's shares, and whether interim payments are appropriate.

A. ***RFG PRIVATE EQUITY LIMITED PARTNERSHIP NO. 1B v VALUE CREATION INC***²⁶⁶

1. BACKGROUND

In *RFG*, the ABCA addressed important and increasingly common concerns about how shares will be valued when shareholders exercise their dissent rights under s. 191 *Business Corporations Act* (Alberta),²⁶⁷ or equivalent legislation. The valuation issue was especially complex in *RFG*, as it arose in the context of a near-insolvency. *RFG* is also noteworthy, as it is rare for a case involving dissent rights to reach the appellate level.²⁶⁸ Indeed, the appellant has now sought leave to appeal the ABCA decision to the SCC.

2. FACTS

The appellants in this case (collectively, "RFG") were the shareholders of the respondent, Value Creation Inc. ("VCI"). VCI was facing default under a \$474 million credit facility and entered into an agreement with the lenders to extend the maturity date of the loan to February 15, 2010 (or to March 31, 2010 if certain conditions were met by VCI on or before February 15, 2010). VCI also executed a consent receivership order that the lenders were entitled to file, if VCI did not repay the loan by the maturity date.²⁶⁹

After engaging financial advisors to assist with raising sufficient funds for repayment of the credit facility, VCI received several offers, including one by BP Canada Energy Company ("BP"). BP offered \$500 million for a 75% interest in VCI's non-operating Terre de Grace ("TdG") oil sands leases, as well as a covenant to invest an additional \$1.6 billion over a defined period towards capital costs.²⁷⁰ Part of BP's offer was that, if it did not pay the additional amounts by March 15,

²⁶⁶ 2018 ABCA 85 [*RFG*].

²⁶⁷ RSA 2000, c B-9 [*BCA (Alberta)*].

²⁶⁸ On May 4, 2018, a number of the appellants filed an application for leave to appeal portions of the Alberta Court of Appeal's judgment to the Supreme Court of Canada.

²⁶⁹ *RFG*, *supra* note 266 at para 1.

²⁷⁰ *Ibid* at para 56.

2017, it would be obligated to pay an amount of \$400 million, plus interest, to VCI (the “BP Contribution”).²⁷¹

VCI entered into an agreement with BP in January 2010 (the “BP Transaction”) and sought shareholder approval in March 2010. RFG exercised its dissent rights and sued for determination of the “fair value” of its shares in VCI as of March 11, 2010 (the “Valuation Date”).²⁷²

The trial judge found that even though the BP Transaction had not closed on the Valuation Date (instead closing four days later on March 15, 2010), there was only a theoretical possibility as at the Valuation Date that it would not proceed.²⁷³ As such, she was of the view that the initial \$500 million payment was value properly included in the fair value of VCI as at the Valuation Date²⁷⁴. However, the trial judge excluded any value attributable to the BP Contribution, as she held that any value it had only arose from the execution of a business plan that was not yet implemented on the Valuation Date.²⁷⁵

RFG appealed the trial judge’s decision to exclude the value of the BP Contribution from the fair value of VCI as at the Valuation Date. VCI cross-appealed the trial judge’s decision on the basis that no value attributable to the BP Transaction should have been included in her determination of fair value – neither the initial payment nor the BP Contribution. In VCI’s submission, the trial judge should have valued VCI on a distressed basis as if the BP Transaction had not closed on the Valuation Date. VCI further submitted that certain discounts and notional taxes should have been included by the trial judge in her valuation.²⁷⁶

3. DECISION

The majority of the ABCA dismissed RFG’s appeal and VCI’s cross-appeal.²⁷⁷

The majority found that two issues determined the outcome of the appeal. The first was whether the dissenting shareholders were entitled to benefit from the transaction dissented from, and if so, to what extent. The second was whether VCI should be valued wholly on a distressed basis, or partly on a distressed and partly on a non-distressed basis. The main point of contention between the parties was whether the BP Contribution should be characterized as a benefit, or a synergistic benefit, of the BP Transaction, and therefore excluded from the fair value of RFG’s shares.²⁷⁸

The majority held that the necessary inquiry was “whether the gains from a transaction are impermissibly speculative or whether they were ‘defined in a binding written agreement, entered into before the merger date’”. As part of this inquiry, the majority noted that: (i) the factual matrix is critical; and, (ii) the potential financial benefits are speculative, constitute future enhancements to value created by operational synergies, and should not be included in fair value calculations.²⁷⁹

²⁷¹ *Ibid* at para 2.

²⁷² *Ibid* at para 3.

²⁷³ *Ibid* at para 7.

²⁷⁴ *Ibid* at para 10.

²⁷⁵ *Ibid* at para 29.

²⁷⁶ *Ibid* at para 12.

²⁷⁷ *Ibid* at para 13.

²⁷⁸ *Ibid* at paras 14-15.

²⁷⁹ *Ibid* at paras 20, 22.

The majority then noted that “any potential gains must be an ‘operative reality’ prior to the valuation date, and not contingent on the closing of the transaction dissented from”. The Court found that the \$500 million cash payment made by BP had been implemented and was operative at the Valuation Date. However, the BP Contribution was properly excluded because it had not been implemented at the Valuation Date. The majority was careful to note, however, that fixing the fair value of a transaction is fact-specific, and will be unique to each case.²⁸⁰

Ultimately, the majority agreed with the trial judge’s approach to determining fair value and upheld her findings that: (i) VCI was no longer in financial distress by the Valuation Date, as it was “virtually certain” that the company would receive the \$500 million cash payment;²⁸¹ (ii) the BP Transaction should be included in the valuation, since the value of BP’s offer was known at the time and was seen as evidence of the asset’s market value;²⁸² and, (iii) the BP Contribution should not be included in the valuation, because it was not implemented at the Valuation Date.²⁸³

In dissent, O’Ferrall JA agreed with the majority’s conclusion on the cross-appeal, but would have allowed RFG’s appeal. In his view, the entire value of the BP offer should have been included in the valuation of VCI’s shares at the Valuation Date, including the BP Contribution. Otherwise, the valuation did not reflect the value that was what was actually paid for VCI’s asset.²⁸⁴

4. COMMENTARY

The split decision in *RFG* creates some uncertainty in determining the fair value of shares post-transaction. The majority’s decision is easy to apply, as it simply requires the courts to consider the factual context at the valuation date. On the other hand, the lengthy and well-reasoned dissent points out some practical concerns in a modern world where complicated financings are a reality. Ultimately, the determination of “fair value” remains fact specific, and will turn on the unique circumstances of each case.

RFG also represents a departure from some earlier Canadian case law, which held that, as a general rule, a dissenting shareholder cannot benefit from an increase in underlying share value created by a corporate transaction from which that shareholder dissented.²⁸⁵ Such a rule makes sense from a policy perspective, as a dissenting shareholder should not be entitled to have its cake and eat it too; in other words, a dissenting shareholder cannot reap the benefits of the transaction without accepting any of the risk.²⁸⁶ That said, *RFG* is the first case to address the application of the general rule in a situation where the company is in financial distress. Ultimately, *RFG* remains a case to watch, as it will be interesting to see if the SCC decides to weigh in on this unique valuation issue.

B. BROOKDALE INTERNATIONAL PARTNERS, LP v LEGACY OIL & GAS INC²⁸⁷

1. BACKGROUND

²⁸⁰ *Ibid* at paras 31-33.

²⁸¹ *Ibid* at paras 36-37.

²⁸² *Ibid* at paras 36, 38.

²⁸³ *Ibid* at paras 36, 39.

²⁸⁴ *Ibid* at para 70.

²⁸⁵ *Ibid* at para 25.

²⁸⁶ *Ibid* at para 21, citing *Brant Investments Ltd v Keeprite Inc*, [1991] OJ No 683 (ONCA).

²⁸⁷ 2017 ABQB 131 [*Brookdale*].

In *Brookdale*, the ABQB considered whether to order an interim payment in the context of the shareholder's right of dissent under s. 191(12)(c) of the *BCA (Alberta)*. This provision is unique to Alberta.²⁸⁸

2. FACTS

In April and May 2015, Brookdale International Partners, L.P. and Brookdale Global Opportunity Fund (collectively, "Brookdale") purchased common shares in Legacy Oil & Gas Inc. ("Legacy"). Shortly afterwards, another company, Crescent Point Energy Inc. ("Crescent Point") entered into a plan of arrangement with Legacy, pursuant to which Crescent Point would acquire all of Legacy's shares. Under the plan of arrangement, 0.095 of a Crescent Point share was exchanged for one Legacy share. Although a right of dissent was not required under the arrangement, one was included and confirmed in an interim order.²⁸⁹

Brookdale exercised its right of dissent in respect of the arrangement. It sued for determination of the fair value of the Legacy shares under s. 191(6) of the *BCA (Alberta)*. The valuation date of the shares was June 29, 2015 (the "Valuation Date"). Approximately one month later, Legacy sent Brookdale a without prejudice offer of \$2.415 per share, representing an amount considered to be fair by the directors (the "Statutory Offer"). Brookdale rejected the Statutory Offer and sought a determination of the fair value.²⁹⁰

On August 6, 2015, Brookdale requested an interim payment in an amount equal to the Statutory Offer (with an undertaking to repay overpayments). Legacy rejected this request, stating that it would not pay before trial. A month later, Brookdale filed an application seeking an order that Crescent Point make the interim payment pursuant to s. 191(12)(c) *BCA (Alberta)*. At the time of the hearing, no payment had been made by Legacy.²⁹¹

3. DECISION

The ABQB dismissed Brookdale's application for an interim payment.

The ABQB first considered the law applicable to the application. It noted that s. 191(12)(c) provides it with a unique authority to make an interim payment to a dissenting shareholder. The provision is discretionary and highly fact-driven.²⁹² The ABQB then reviewed *Orman v Canadian Mountain Minerals Ltd*, in which the ABQA ordered an interim payment under s. 191(12)(c) in the context of an amalgamation of two companies.²⁹³

The ABQB then turned to apply the law to the facts. Brookdale's four main arguments were that: (i) the interim payment would provide a minimum fairness to it; (ii) the Statutory Offer was below value; (iii) Crescent Point's financial condition had deteriorated; and, (iv) it had suffered losses.²⁹⁴

²⁸⁸ In contrast, see the dissent rights set out in s. 190 of the *Canada Business Corporations Act*, RSC 1985, c C-44 and s. 185 of the *Ontario Business Corporations Act*, RSO 1990, c B.16 as interpreted in *Ford Motor Co of Canada v OMERS*, [2006] OJ No 27, leave to appeal refused, [2006] SCCA No. 77.

²⁸⁹ *Brookdale*, *supra* note 287 at paras 5-7.

²⁹⁰ *Ibid* at paras 8-12.

²⁹¹ *Ibid* at paras 13-16.

²⁹² *Ibid* at paras 27-28.

²⁹³ (2000), 268 AR 338; 86 Alta LR (3d) 307.

²⁹⁴ *Brookdale*, *supra* note 287 at para 46.

With respect to the “minimum fairness” argument, the ABQB noted that there was no dispute that Brookdale was owed fair value for its Legacy shares. However, the dissent rights in this case were volunteered by Legacy because the underlying transaction did not trigger s. 191(1) of the *BCA (Alberta)*. Ultimately, the ABQB rejected this argument for two reasons. First, the evidence suggested that the Statutory Offer and the value of the consideration received by the continuing shareholders were reasonably close; as such, Crescent Point had acted fairly. Second, the ABQB found there was a risk that the payor would not be able to recover any overpayment, as Brookdale had no presence in Canada.²⁹⁵

The ABQB then considered Brookdale’s argument that the Statutory Offer was below value because it was lower than two thresholds. The Court made several technical calculations and found that the “modest difference” of approximately 1% between the Statutory Offer and the value provided under the arrangement was within the reasonable range of values that a competent valuator would have reached in calculating the Statutory Offer.²⁹⁶

Next, the ABQB rejected Brookdale’s third argument that Crescent Point’s financial condition had deteriorated. The ABQB distinguished *Orman* because the Statutory Offer was not at the low end of the fair value judgment. Further, the ABQB noted that, unlike in *Orman*, (i) Brookdale had no presence in Canada and offered no security to give substance to the undertaking; and (ii) there was no evidence that Crescent Point would be unable to satisfy a fair value judgment.²⁹⁷

Finally, the ABQB rejected Brookdale’s argument that an interim payment should be made because it had suffered damages from losing the ability to reinvest the value of the Legacy shares. First, Brookdale provided no evidence that it had suffered any damages, other than opportunity costs. Second, Brookdale did not in fact claim damages. Third, provisions of the *BCA (Alberta)* already addressed the time value of money. Finally, the ABQB noted that Brookdale was a sophisticated investor that chose to exercise its dissent rights; it should have known that it would lose the ability to sell the Legacy shares on the stock exchanges.²⁹⁸

The ABQB also offered a number of additional reasons for distinguishing *Orman*. Unlike in *Orman*, Legacy made its Statutory Offer on a timely basis. Legacy and Crescent Point both acknowledged Brookdale’s right to dissent, and the Statutory Offer was clear and free of any discount. Additionally, in *Orman*, the matter was set for trial quickly, while Brookdale did not move the matter along, resulting in delays. Finally, the ABQB acknowledged that the value Brookdale was claiming was a “trifling fraction” of Crescent Point’s working capital in a situation where its business will ultimately remain the same.²⁹⁹

4. COMMENTARY

Prior to *Brookdale*, the informal practice in Alberta had been to order interim payments. *Brookdale* represents a change in direction, and provides a new framework specific to Alberta regarding availability of interim payments in relation to shareholder dissent rights. The case clearly

²⁹⁵ *Ibid* at paras 55-61.

²⁹⁶ *Ibid* at paras 71-72.

²⁹⁷ *Ibid* at paras 77-81.

²⁹⁸ *Ibid* at paras 82-89.

²⁹⁹ *Ibid* at para 94.

demonstrates the highly fact-specific nature of these applications. As shareholders continue more actively to engage in the corporation's activities, such cases are likely to become more prevalent.

VII. CLASS ACTIONS

In this paper, we discuss a recent case from the BCCA: *Araya v Nevsun Resources Ltd.*³⁰⁰ In *Nevsun*, the Court allowed a class action to proceed against a Canadian mining corporation that was operating in Eritrea, where the claim was: (i) based on events that occurred in Eritrea; and, (ii) involved allegations of human rights abuses against Eritrean state actors. The allegations against the mining corporation were based, in part, on alleged breaches of customary international law. *Nevsun* followed a similar decision from the BCCA in *Garcia v Tahoe Resources Inc.*³⁰¹, which was discussed in last year's paper. In *Garcia*, the British Columbia Court of Appeal allowed an action against Tahoe Resources Inc. ("Tahoe") for events that occurred in Guatemala. Specifically, the plaintiffs in *Garcia* were individuals who had been shot at and injured by private security personnel while protesting outside of a Guatemalan mine operated by Tahoe.

A. *ARAYA v NEVSUN RESOURCES LTD*³⁰²

1. BACKGROUND

The plaintiffs sought to bring a representative action on behalf of citizens of Eritrea against Nevsun Resources Ltd. ("Nevsun"), a publicly-held BC corporation, in the BCSC. The plaintiffs assert that they were conscripted into the Eritrean military and forced to work on a mine that was owned in part by Nevsun (60%) and in part by Eritrean state companies (40%). The plaintiffs allege that Nevsun was complicit in, or aided and abetted, the use of forced labour, slavery, torture, inhuman or degrading treatment and crimes against humanity at the mine.³⁰³ The claim was based on both private law torts and alleged breaches of customary international law.³⁰⁴

Nevsun involved a number of interlocutory applications by Nevsun, including applications to: (i) deny the proceeding the status of a common law representative action (the "Representative Action Application"); (ii) strike certain evidence tendered by the plaintiffs (the "Evidence Application"); (iii) have the action stayed in BC, on the basis that Eritrea was the *forum conveniens* (the "Forum Application"); (iv) have the action struck on the basis of the act of state doctrine (the "Act of State Application"); and (v) have the causes of action based on customary international law struck (the "CIL Application" and together with the Representative Action Application, the Evidence Application, the Forum Application and the Act of State Application, the "Preliminary Applications").³⁰⁵

2. FACTS

The plaintiffs alleged that Nevsun entered into a commercial venture with Eritrea for the development of a large mine in the country, and engaged the Eritrean military to build the mine

³⁰⁰ 2017 BCCA 401 [*Nevsun*].

³⁰¹ 2017 BCCA 39, 407 DLR (4th) 651 [*Garcia*].

³⁰² *Nevsun*, *supra* note 300.

³⁰³ *Ibid* at paras 3-4.

³⁰⁴ *Ibid* at paras 6-7.

³⁰⁵ *Ibid* at para 18.

and related infrastructure. For this purpose, the military deployed or provided forced labour with persons conscripted under Eritrea's National Service Program. The representative plaintiffs were among those conscripted into the military and forced to work at the mine in inhuman conditions and under constant threat of physical punishment, torture and imprisonment.³⁰⁶ The issue was whether Nevsun was complicit in, or aided and abetted the use of forced labour, slavery, torture, inhuman or degrading treatment, and crimes against humanity.³⁰⁷

The motion judge granted the Representative Action Application, but dismissed the remainder of the Preliminary Applications.

First, with respect to the Evidence Motion, the motion judge admitted various "secondary reports" sought to be adduced by the plaintiffs concerning the Eritrean government and its legal system. These reports were admitted for the limited purpose of providing a social, historical and contextual framework to the remaining evidence.³⁰⁸

Second, with respect to the Forum Application, the motion judge found that Nevsun failed to establish that Eritrea was the more appropriate forum. This was due in large part to the unlikelihood that the plaintiffs would receive a fair trial in Eritrea. As such, the BCSC was able to assume jurisdiction over the proceeding.³⁰⁹

Third, with respect to the Act of State Application, the motion judge declined to strike the plaintiffs' claims on the basis of the act of state doctrine.³¹⁰ He concluded that it was simply not possible to decide this complex issue on a preliminary application in Nevsun's favour.³¹¹

Finally, with respect to the CIL Application, the motion judge declined to strike the plaintiffs' claims founded on customary international law, on the basis that whether a corporation can be subject to customary international law was a difficult and novel question of law that should be allowed to proceed to trial.³¹²

Nevsun did not appeal the Representative Action Application; however, it appealed the chambers judge's findings in each of the other Preliminary Applications to the BCCA. Nevsun asserted that the motion judge erred in law in: (i) holding that the plaintiffs' claims were not barred by the act of state doctrine; (ii) declining to strike the plaintiffs' claims founded on customary international law; and, (iii) refusing to decline jurisdiction on the basis of the "secondary reports" admitted into evidence.³¹³

3. DECISION

The BCCA dismissed Nevsun's appeal on all grounds.

³⁰⁶ *Ibid* at paras 2-3.

³⁰⁷ *Ibid* at para 4.

³⁰⁸ *Ibid* at para 28.

³⁰⁹ *Ibid* at paras 29-48.

³¹⁰ The Act of State doctrine is founded upon the equality of sovereign states and the principle of international comity, where the legal validity of sovereign acts of foreign states occurring within their own territory is not justiciable by any state other than the home state. See *Ibid* at para 15.

³¹¹ *Ibid* at paras 58-72.

³¹² *Ibid* at para 83.

³¹³ *Ibid* at para 84.

First, the BCCA agreed that the BCSC was the appropriate forum. In making this decision, the BCCA upheld the motion judge's decision to admit "secondary reports" for the limited purpose of providing background or context relevant to the "social facts" forming the context of the Forum Application. Ultimately, the BCCA concluded that the motion judge was right to prefer the jurisdiction in which the plaintiffs could assert their claims in a fair and impartial proceeding, over a jurisdiction in which justice seemed unlikely to be done.³¹⁴

Second, the BCCA found that the act of state doctrine did not apply, because the plaintiffs challenged neither the foreign State's legislation or other laws, nor the effect of a foreign state's executive in relation to events in Eritrea.³¹⁵ Instead, the plaintiffs' challenged Nevsun's complicity in the alleged wrongs.³¹⁶ Where torture, forced labour and slavery are contrary to norms of both international and domestic law, Nevsun could not rely on the act of state doctrine to claim immunity from the consequences of violating such fundamental norms.³¹⁷

Finally, with respect to the CIL Application, the BCCA noted that the plaintiffs faced significant legal obstacles in pursuing claims under customary international law, including legitimate concerns about comity and equality and the role of the judiciary as opposed to that of the legislature.³¹⁸ However, the BCCA did not find that the plaintiffs' claims were "bound to fail", as international law is "in flux" and developing, particularly in connection with human rights violations that are not effectively addressed by traditional international mechanisms. As such, the plaintiffs customary international law claims should proceed in BC, as pleaded.³¹⁹

4. COMMENTARY

Nevsun considered the "overarching question" of whether Canadian courts should be more willing to address and investigate the conduct of foreign states and issues of public international law.

Nevsun answered this question in the affirmative. It opened the door for foreign nationals to bring actions in Canadian courts against Canadian corporations based on alleged breaches of customary international law. *Nevsun* confirms that such actions may be brought even in cases where state actors are the primary tortfeasors, and the alleged corporate wrongs are merely "derivative" or "accessory" to the actions of those state actors.

Thus, this case is important for the energy industry and any Canadian corporation that has operations in a foreign state. Such companies may face litigation in domestic courts for alleged breaches of customary international law (including human rights abuses) that occur in relation to their foreign operations.

VIII. ABORIGINAL

In the past year, there have been a number of significant Aboriginal law decisions, including several decisions from the SCC. In this paper, we focus on the decisions regarding: (i) the Crown's

³¹⁴ *Ibid* at paras 118-122.

³¹⁵ *Ibid* at para 172.

³¹⁶ *Ibid* at para 173.

³¹⁷ *Ibid* at para 169.

³¹⁸ *Ibid* at para 196.

³¹⁹ *Ibid* at para 197.

duty to consult in respect of major resource projects; (ii) the scope of the right to religious freedom in respect of sacred sites; (iii) the Crown's fiduciary obligations vis-à-vis reserve interests; and, (iv) injunctions sought by Indigenous groups to preclude development.

While the decisions help clarify and delineate the framework applicable to these types of claims, we do not expect to see any decrease in litigation on Aboriginal law issues. Indeed, the increasing opposition to new resource projects means that we are likely to continue seeing significant litigation in this space. We expect that future challenges to project approvals will typically be based on an alleged breach of the Crown's duty to consult, using the framework either: (i) set out by the FCA in *Gitxaala Nation v Canada* (in cases where the final decision-maker is federal Cabinet); or, (ii) set out by the SCC in the *Chippewas/Clyde River* decisions (discussed below) (in cases where the final decision-maker is a regulatory tribunal, such as the NEB).

A. CLYDE RIVER (HAMLET) v PETROLEUM GEO-SERVICES INC³²⁰

1. BACKGROUND

Clyde River is the companion decision to *Chippewas* (discussed below). Both decisions involve the Crown's duty to consult with Indigenous peoples before a regulatory agency authorizes a project that could affect Aboriginal or treaty rights.³²¹

2. FACTS

The NEB approved an application by two seismic companies – made pursuant to s. 5(1) of the *Canada Oil and Gas Operations Act*³²² – to conduct offshore seismic testing for oil and gas resources in the Clyde river region. It was undisputed that the seismic testing could negatively impact the Inuit of the Clyde river's harvesting rights with respect to marine mammals.³²³ The Crown did not directly consult with the Inuit of Clyde River, but instead relied on the NEB process to discharge its duty to consult. The Inuit of Clyde River brought an application for judicial review, alleging that the consultation was insufficient.

3. DECISION

The SCC concluded that – in the circumstances of this particular case – the Crown's consultation and accommodation measures were inadequate; as such, the NEB authorization was quashed.³²⁴ The SCC then outlined the following consultation principles that apply when the NEB is the final decision-maker in respect of a project that could affect Aboriginal or treaty rights.

First, the SCC confirmed that the NEB approval process is itself Crown conduct that can trigger the duty to consult.³²⁵ As a statutory body holding responsibilities under s. 5(1) of *COGOA*, the NEB acts on behalf of the Crown when making a final decision on a project application. In other

³²⁰ 2017 SCC 40 [*Clyde River*].

³²¹ *Ibid* at para 1. This paper uses the term "Indigenous" to refer globally to First Nations, Inuit and Metis. It also refers to "existing [A]boriginal and treaty rights", which are recognized and affirmed in s. 35 of the *Constitution Act, 1982*.

³²² RSC 1985, c O-7 [*COGOA*].

³²³ *Clyde River*, *supra* note 320 at para 3.

³²⁴ *Ibid* at para 53.

³²⁵ *Ibid* at para 27.

words, the NEB is the vehicle through which the Crown acts.³²⁶ As such, the duty to consult was triggered in respect of the project application.³²⁷

Second, the SCC concluded that the Crown may rely on steps undertaken by a regulatory agency to fulfill its duty to consult in whole or in part and, where appropriate, accommodate. Whether the Crown is capable of doing so depends on whether the agency's statutory duties and power enable it to do what the duty requires in the circumstances.³²⁸ The Court noted that the NEB has: (i) considerable institutional expertise and is well suited to oversee consultations and assess risks where the effects of a proposed project on Aboriginal or treaty rights substantially overlaps with the project's environmental impacts; (ii) the procedural powers necessary to implement consultation; and, (iii) the remedial powers to, where necessary, accommodate affected Indigenous interests. As such, its process can be relied on by the Crown to partially or completely fulfill its duty to consult.³²⁹

The SCC went on to clarify the Crown's role in cases where a regulatory tribunal has final decision-making authority in respect of a project. While the Crown always holds ultimate responsibility for ensuring that consultation is adequate, this does not mean that the Crown must give explicit consideration in every case as to whether the duty to consult has been satisfied, or must directly participate in the process of consultation. However, where the regulatory process being relied upon does not achieve adequate consultation or accommodation, the Crown must implement further measures to satisfy its duty.³³⁰ Furthermore, if the Crown intends to rely on a regulatory process to fulfill its duty, then it should be made clear to affected Indigenous groups that the Crown is so relying.³³¹

Third, the SCC concluded that a tribunal empowered to consider questions of law (such as the NEB) must determine whether such consultation was constitutionally sufficient if the issue is properly raised before it.³³² The Court clarified that this does not mean that the NEB is always required to review the adequacy of Crown consultation by applying a formulaic *Haida* analysis,³³³ nor will explicit reasons be required in every cases.³³⁴ However, when affected Indigenous peoples have squarely raised concerns about Crown consultation, the NEB must usually address those concerns in reasons, particularly in respect of project applications requiring deep consultation.³³⁵

Fourth, the SCC held that where the Crown's duty to consult an affected Indigenous group with respect to a project remains unfulfilled, the NEB must withhold project approval.³³⁶ Where the

³²⁶ *Ibid* at para 29.

³²⁷ *Ibid* at para 26.

³²⁸ *Ibid* at para 30.

³²⁹ *Ibid* at paras 33-34.

³³⁰ *Ibid* at para 22.

³³¹ *Ibid* at para 22.

³³² *Ibid* at para 36.

³³³ See *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 [*Haida*]. *Haida* is the seminal SCC decision regarding the duty to consult and accommodate prior to proof of Aboriginal claims.

³³⁴ *Clyde River*, *supra* note 320 at para 42.

³³⁵ *Ibid* at para 41. For another recent decision addressing the importance of written reasons in decisions respecting Aboriginal rights or land claims, see *Kainaiwa/Blood Tribe v Alberta (Energy)*, 2017 ABQB 107.

³³⁶ *Ibid* at para 39.

NEB fails to do so, its approval decision should be quashed on judicial review, as the duty to consult must be fulfilled prior to the action that could adversely affect the right in question.³³⁷

In applying these principles to the facts in *Clyde River*, the SCC concluded that the Crown's consultation fell short in several respects. First, the NEB focused on the environmental effects of the project, while the consultative inquiry should have considered the impact on the right at issue.³³⁸ Second, the Crown's reliance on the NEB process was not made clear to the Inuit of Clyde River.³³⁹ Finally, and most importantly, the NEB process did not fulfill the Crown's duty to conduct deep consultation, as limited meaningful opportunities for participation and consultation were made available.³⁴⁰ The SCC was particularly critical of the proponents, as they: (i) could not answer a number of basic questions posed by the Inuit of Clyde River; and, (ii) subsequently attempted to answer such questions in a roughly 4,000-page document that was difficult to access and largely in English and not translated into Inuktitut.³⁴¹ Further, unlike in *Chippewas*, there was no oral hearing and no access to participant funding.³⁴² While the SCC clarified that such procedural safeguards are not always necessary, it held that their absence in this case significantly impaired the quality of consultation.³⁴³

4. COMMENTARY

In *Clyde River*, the SCC clarified the scope of the Crown's duty to consult with Indigenous peoples for projects where a regulatory agency is the final decision-maker on new project applications. The SCC reaffirmed the basic principle that the Crown may rely on regulatory processes to partially or completely fulfill the duty to consult.³⁴⁴ Further, the SCC confirmed that the substance of the duty to consult does not change when a regulatory agency, such as the NEB, holds final decision-making authority in respect of a project.³⁴⁵

While *Clyde River* largely confirms previously established legal principles, it provides clear guidance on the specific factual circumstances in which consultation may fall short, putting a project approval at risk of being quashed on judicial review. As such, it provides a useful precedent to both project proponents and regulators in considering the adequacy of a consultation record.

However, one commentator has identified some remaining challenges that project proponents and regulators may face in applying these decisions; namely, it may be difficult to ascertain: (i) the circumstances in which a regulatory agency will be able to discharge the Crown's duty; (ii) what types of "further measures" the Crown must take to meet its duty in circumstances where the regulatory process being relied upon does not achieve adequate consultation or accommodation; (iii) whether and how the principles in *Clyde River* and *Chippewas* will apply in cases where the

³³⁷ *Ibid.*

³³⁸ *Ibid* at para 45.

³³⁹ *Ibid* at para 46

³⁴⁰ *Ibid* at para 47.

³⁴¹ *Ibid* at para 49.

³⁴² *Ibid.*

³⁴³ *Ibid.*

³⁴⁴ *Ibid.*

³⁴⁵ *Ibid.*

regulatory agency is not the final decision maker; and, (iv) what will constitute adequate reasons.³⁴⁶

Some of these questions have now been answered by the FCA in its recent decision in *Bigstone Cree Nation v NOVA Gas Transmission Ltd., et al.*³⁴⁷ *Bigstone* involved an application for judicial review of an Order in Council that authorized the construction and operation of the 2017 NGTL System Expansion Project in northern Alberta. The final-decision maker in *Bigstone* was the Governor in Council (the “GIC”), not the NEB. Nonetheless, the FCA cited and applied the general principles set out in both *Chippewas/Clyde River* and in *Gitxaala*.

The sole issue in *Bigstone* was whether the Crown had discharged its duty to consult and, if necessary, accommodate Bigstone Cree Nation (“Bigstone”) in relation to the project.³⁴⁸ The FCA dismissed the application, concluding that the Crown had adequately fulfilled its duty to consult Bigstone. In doing so, the FCA reviewed the Crown’s Phase IV consultations (*i.e.*, the Crown consultation that occurred after the NEB hearing but before the Order in Council was issued). During Phase IV, the Crown: (i) held direct meetings with Bigstone; (ii) provided funding to Bigstone; and, (iii) prepared a Crown Consultation and Accommodation Report (“CCAR”), with an Appendix specific to Bigstone’s concerns, and gave Bigstone an opportunity to review and comment on it.³⁴⁹ While not directly on point, the analysis of the Crown’s Phase IV consultation in *Bigstone* provides some guidance as to the types of “further measures” the Crown could take in cases where a regulatory process is deemed insufficient to discharge the duty to consult.

In addition, the FCA included a lengthy discussion on the requirement to provide reasons.³⁵⁰ The FCA concluded that the GIC was not required to provide its own reasons on each and every issue raised by the parties, and could rely on and adopt the report of other administrative actors. Accordingly, it was sufficient for the Order in Council to cite and adopt both the NEB’s report and the CCAR. In the circumstances, the FCA held that it could not reasonably be argued that the GIC failed to give adequate reasons.

B. CHIPPEWAS OF THE THAMES FIRST NATION v ENBRIDGE PIPELINES INC³⁵¹

1. BACKGROUND

Chippewas is the companion decision to *Clyde River*. As noted above, both decisions involve the Crown’s duty to consult with Indigenous peoples before a regulatory agency authorizes a project that could affect their rights.³⁵²

³⁴⁶ Nigel Banks, “*Clyde River* and *Chippewas of the Thames*: Some Clarifications Provided But Some Challenges Remain”, ABlawg (August 4, 2017), online: <<https://ablawg.ca/2017/08/04/clyde-river-and-chippewas-of-the-thames-some-clarifications-provided-but-some-challenges-remain/>>; see also Nigel Banks, “Clarifying the Parameters of the Crown’s Duty to Consult and Accommodate in the Context of Decision-Making by Energy Tribunals” (2018) 36:2 J Energy & Natural Resources L 163.

³⁴⁷ 2018 FCA 89 [*Bigstone*].

³⁴⁸ *Ibid* at para 22.

³⁴⁹ *Ibid* at para 17.

³⁵⁰ *Ibid* at paras 64-71.

³⁵¹ 2017 SCC 41 [*Chippewas*].

³⁵² *Ibid* at para 1.

2. FACTS

Enbridge applied to the NEB under s. 58 of the *National Energy Board Act*³⁵³ for a modification of its Line 9, to reverse the flow of part of the pipeline, increase its capacity and enable it to carry heavy crude oil.³⁵⁴ The NEB is the final decision maker on s. 58 applications.³⁵⁵

The pipeline crossed the traditional territory of the Chippewas of the Thames First Nation (the “Chippewas”), who were concerned that the project would increase the risk of pipeline ruptures and spills along Line 9. The Chippewas requested Crown consultation before NEB approval, but the Crown indicated that it was relying on the NEB’s process to discharge its duty to consult.³⁵⁶

Following a public hearing, in which the Chippewas participated as an intervenor,³⁵⁷ the NEB approved the project and imposed conditions.³⁵⁸ The Chippewas appealed the decision, arguing that the NEB had no jurisdiction to approve the Line 9 modification in the absence of Crown consultation.³⁵⁹

3. DECISION

The SCC reiterated and applied the duty to consult principles set out in *Clyde River*, including the principle that the Crown may rely on regulatory processes to partially or completely fulfill its duty to consult.³⁶⁰ For the reasons that follow, the SCC concluded that consultation had been adequate in the circumstances of this case.³⁶¹

First, the NEB provided the Chippewas with an adequate opportunity to participate in the decision-making process.³⁶² It held an oral hearing, provided early notice of the hearing process to potentially affected Indigenous groups and sought their formal participation. The Chippewas participated in the hearing as an intervenor and were provided with participant funding.³⁶³ As an intervenor, the Chippewas were able to pose formal information requests to Enbridge and to make closing oral final argument to the NEB.

Second, the SCC concluded that the NEB sufficiently assessed the potential impacts on the rights of Indigenous groups and found that the risk of negative consequences was minimal and could be mitigated.³⁶⁴

Third, in order to mitigate potential risks to the rights of Indigenous groups, the SCC held that the NEB provided appropriate accommodation through the imposition of conditions on Enbridge.³⁶⁵ The Court rejected the Chippewas’ argument that such accommodation measures were inadequate

³⁵³ RSC 1985, c N-7 [*NEB Act*].

³⁵⁴ *Chippewas*, *supra* note 351 at para 4.

³⁵⁵ *Ibid* at para 28.

³⁵⁶ *Ibid*.

³⁵⁷ *Ibid* at para 18.

³⁵⁸ *Ibid* at para 20.

³⁵⁹ *Ibid* at para 25.

³⁶⁰ *Ibid* at para 5.

³⁶¹ *Ibid* at para 43.

³⁶² *Ibid* at para 51.

³⁶³ *Ibid* at para 52.

³⁶⁴ *Ibid* at paras 54-56.

³⁶⁵ *Ibid* at paras 57.

because the NEB focused on balancing the Chippewas' rights against a number of economic and public interest factors. Rather, the SCC confirmed that in developing accommodation measures, the decision-maker must balance competing societal interests with Aboriginal and treaty rights.³⁶⁶

Finally, the SCC concluded that the NEB's written reasons for approving the project were sufficient to satisfy the Crown's obligation. Here, unlike in *Clyde River*, the NEB's reasons were not subsumed within an environmental assessment. Instead, the NEB reviewed the written and oral evidence of numerous Indigenous intervenors and identified - in writing - the rights and interests at stake. It then assessed the risks the project posed to those rights and concluded they were minimal. Nonetheless, it provided written and binding conditions of accommodation to adequately address the potential negative impacts on the asserted rights from the project.³⁶⁷

4. COMMENTARY

Chippewas demonstrates that duty to consult cases remain highly fact-dependent. While the SCC applied the same governing principles it set out in *Clyde River*, it reached the opposite conclusion. As a result, *Chippewas* provides some further guidance on the circumstances in which a regulatory approval process will be sufficient to discharge the Crown's duty to consult. In that regard, *Chippewas* affirms that conditions imposed by a tribunal on a project proponent can constitute appropriate accommodation measures.

Chippewas further confirms that the duty to consult has meaningful content, but is limited in scope; it is not about resolving historical grievances or broader claims that transcend the scope of the proposed project.³⁶⁸ However, the SCC recognized that it may be impossible to understand the seriousness of the impact of a project on Aboriginal and treaty rights without considering the larger context. As such, cumulative effects of an ongoing project, and historical context, may inform the scope of the duty to consult.³⁶⁹

Ultimately, the decision in *Chippewas* can also be understood in relation to the type of project approval at issue. Indeed, the fact that the NEB was considering the reversal of an existing pipeline likely affected the SCC's views regarding the scope and extent of consultation that was required.

C. ***KTUNAXA NATION v BRITISH COLUMBIA (FORESTS, LANDS AND NATURAL RESOURCE OPERATIONS)***³⁷⁰

1. BACKGROUND

The issue in *Ktunaxa* was whether the BC Minister of Forests, Lands and Natural Resource Operations (the "BC Minister") erred in approving a ski resort development, despite claims by the Ktunaxa Nation (the "Ktunaxa") that the development would breach their constitutional right to freedom of religion and to protection of Aboriginal interests under s. 35 of the *Canadian Charter of Rights and Freedoms*.³⁷¹

³⁶⁶ *Ibid* at paras 58-60.

³⁶⁷ *Ibid* at para 64.

³⁶⁸ *Ibid* at paras 2, 41.

³⁶⁹ *Ibid* at paras 41-42.

³⁷⁰ 2017 SCC 54 [*Ktunaxa*].

³⁷¹ Part 1 of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (UK), 1982 c 11 [*Charter*].

2. FACTS

The respondent sought to build a year-round ski resort in an area the Ktunaxa call Qat'muk, which is located on the Ktunaxa's traditional territory.³⁷²

The regulatory process was a protracted matter, involving a number of cascading processes and taking more than 20 years to complete.³⁷³ The Ktunaxa actively participated in all phases of the process.³⁷⁴

Early in the process, the Ktunaxa raised concerns about the impact of the proposed development, asserting that Qat'muk was a place of spiritual significance. Specifically, the Ktunaxa asserted that Qat'muk is home to an important population of grizzly bears and to the Grizzly Bear Spirit, a principal spirit within Ktunaxa beliefs.³⁷⁵ Consultation ensued, leading to significant changes to the original proposal.³⁷⁶ For example, as a result of the consultation that occurred during the regulatory process: (i) the resort plan was significantly reduced in scope; (ii) safeguards for the grizzly bear population and the spiritual interests of the Ktunaxa were put in place; and, (iii) economic and interest-based issues, including compensation, were discussed.³⁷⁷

Towards the end of the process, the BC Minister advised the Ktunaxa that, in his opinion, a reasonable consultation process had occurred and that most of the outstanding issues were primarily interest-based rather than legally driven by asserted Aboriginal rights and title claims. Accordingly, the BC Minister was of the view that approval for the resort could be given. The BC Minister expressed his intention to continue negotiating a benefits agreement with the Ktunaxa.³⁷⁸

Although it seemed that an agreement with the Ktunaxa was imminent, the Ktunaxa adopted a new and uncompromising position that accommodation was impossible because a ski resort would drive Grizzly Bear Spirit from Qat'muk and irrevocably impair their religious beliefs and practices.³⁷⁹ After fruitless efforts to revive the consultation process, the BC Minister decided that reasonable consultation had occurred and approved the project.³⁸⁰

The Ktunaxa brought a petition for judicial review, seeking to overturn the BC Minister's approval of the ski resort on two grounds: (i) that the project would violate the Ktunaxa's freedom of religion under s. 2(a) of the *Charter*; and, (ii) that the Crown breached its duty to consult and accommodate. The chambers judge dismissed the petition, and the BCCA affirmed his decision.³⁸¹ The Ktunaxa appealed to the SCC.

3. DECISION

The SCC dismissed the Ktunaxa's appeal, although it was split on its reasons for doing so. The majority concluded that: (i) the claim did not engage the right to freedom of expression and

³⁷² *Ktunaxa*, *supra* note 370 at paras 4, 11.

³⁷³ *Ibid* at para 13.

³⁷⁴ *Ibid* at paras 14, 41.

³⁷⁵ *Ibid* at para 5.

³⁷⁶ *Ibid* para 6.

³⁷⁷ *Ibid* para 41.

³⁷⁸ *Ibid* at para 31.

³⁷⁹ *Ibid* at paras 41-43.

³⁸⁰ *Ibid* at para 6.

³⁸¹ *Ibid* at para 7.

religion; and, (ii) the BC Minister, while under a duty to consult with the Ktunaxa, did not act unreasonably in concluding that the requirements of s. 35 of the *Constitution Act, 1982* had been met.³⁸²

With respect to the *Charter* claim, the majority concluded that the Ktunaxa's claim did not fall within the scope of s. 2(a) because neither the Ktunaxa's freedom to hold their beliefs, nor their freedom to manifest those beliefs, was infringed by the BC Minister's decision.³⁸³ As such, there was no need to consider whether the decision represented a proportionate balance between freedom of religion and other considerations.³⁸⁴ The majority also noted that the Ktunaxa were in the same position as any non-Aboriginal claimant with respect to the s. 2(a) claim.³⁸⁵

The majority held that the state's duty under s. 2(a) is not to protect the *object* of beliefs, such as Grizzly Bear Spirit. Rather, the state's duty is to protect everyone's freedom to hold such beliefs and to manifest them in worship and practice or by teaching and dissemination. In short, the *Charter* protects the freedom to worship; it does not protect the spiritual focal point of worship. As such, the majority rejected the Ktunaxa's novel claim. The Ktunaxa could not use s. 2(a) to protect Grizzly Bear Spirit itself and the meaning they derived from it.³⁸⁶

In dissent on this issue, Moldaver J. (Côté J. concurring) concluded that the Ktunaxa's right to religious freedom had been infringed. In his view, where a person's religious beliefs no longer provide spiritual fulfillment, or where the person's religious practice no longer allows him or her to foster a connection with the divine, that person cannot act in accordance with his or her religious beliefs or practices, as they have lost all religious significance.³⁸⁷ In other words, where state conduct renders a person's sincerely held religious beliefs devoid of all religious significance, it infringes that person's right to religious freedom.³⁸⁸ The BC Minister's decision to approve the resort would render the Ktunaxa's religious beliefs devoid of any spiritual significance, as the Ktunaxa would be unable to perform songs, rituals or ceremonies in recognition of Grizzly Bear Spirit in a manner that had any religious significance for them. This amounted to a s. 2(a) breach.

In reaching this conclusion, Moldaver J. noted that, unlike in Judeo-Christian faiths where the divine is considered to be supernatural, the spiritual realm in the Indigenous context is inextricably linked to the physical world.³⁸⁹ As such, he held that courts must be alive to the unique characteristics of each religion in order to ensure that all religions are afforded the same level of protection under s. 2(a).³⁹⁰

However, Moldaver J. went on to find that the Minister proportionately balanced the Ktunaxa's s. 2(a) right with the relevant statutory objective to administer Crown land and dispose of it in the public interest.³⁹¹ Moldaver J. noted that granting the Ktunaxa a power to veto development over the land would effectively give the Ktunaxa a significant property interest in Qat'muk; namely,

³⁸² *Ibid* at para 8.

³⁸³ *Ibid* at para 70.

³⁸⁴ *Ibid* at para 75.

³⁸⁵ *Ibid* at para 58.

³⁸⁶ *Ibid* at para 71.

³⁸⁷ *Ibid* at para 124.

³⁸⁸ *Ibid* at para 118.

³⁸⁹ *Ibid* at para 127.

³⁹⁰ *Ibid* at para 128.

³⁹¹ *Ibid* at para 119.

the right to exclude others from constructing permanent structures on public land.³⁹² This right of exclusion was not a minimal or negligible restraint on public ownership. Moldaver J. concluded that it was implicit in the BC Minister's decision that such a result would undermine the objectives of administering Crown land and disposing of it in the public interest; as such, it was inconsistent with the BC Minister's statutory mandate.³⁹³ Moldaver J. therefore concurred in the result that the s. 2(a) *Charter* claim ought to be dismissed.

With respect to the duty to consult claim, the SCC unanimously held that the duty to consult and accommodate had been discharged.³⁹⁴ In doing so, the SCC confirmed the principle that where adequate consultation has occurred, a development may proceed without the consent of an Indigenous group.³⁹⁵

The SCC went on to note that the Ktunaxa were improperly asking the courts, in the guise of a judicial review application, to pronounce the validity of their claim to a sacred site and associated spiritual practices. The SCC confirmed that Aboriginal rights cannot be established as an incident of administrative law proceedings; to permit this would invite uncertainty and discourage final settlement of alleged rights through the proper processes.³⁹⁶ Administrative decision makers cannot themselves declare the existence or scope of Aboriginal rights.³⁹⁷

The SCC then concluded that, on its face, the record supported the reasonableness of the BC Minister's conclusion that the obligation of consultation and accommodation had been met: (i) the Ktunaxa spiritual claims to Qat'muk had been acknowledged from the outset; (ii) negotiations spanning two decades and deep consultation had taken place; and, (iii) many changes had been made to the project to accommodate the Ktunaxa's spiritual claims.³⁹⁸

The SCC rejected each of the Ktunaxa's specific attacks on the adequacy of consultation, concluding that the consultation record did not support any of these contentions.³⁹⁹ The SCC also confirmed that the s. 35 right to consultation and accommodation is a right to a process, not a right to a particular outcome.⁴⁰⁰ In other words, the Ktunaxa could not insist on a particular accommodation, namely, the rejection of the ski resort project.

4. COMMENTARY

This case is important in demonstrating that a s. 2(a) *Charter* claim is unlikely to preclude a project approval. Similarly, the SCC re-affirmed the well-established principle that the duty to consult does not give Aboriginal groups a veto right over development. The decision further clarifies the principles governing resource development projects subject to the duty to consult, and is of particular interest to proponents engaged in multi-stage regulatory approval processes. *Ktunaxa* is

³⁹² *Ibid* at para 150.

³⁹³ *Ibid* at para 149.

³⁹⁴ *Ibid* at para 117.

³⁹⁵ *Ibid* at para 83.

³⁹⁶ *Ibid* at para 84.

³⁹⁷ *Ibid* at para 85.

³⁹⁸ *Ibid* at paras 87-88.

³⁹⁹ *Ibid*.

⁴⁰⁰ *Ibid* at para 114.

yet another example of the factual circumstances in which the courts may conclude that consultation on a project was adequate.

The SCC's analysis in *Ktunaxa* can be understood in relation to the proprietary nature of the Ktunaxa's novel claim. As noted above, if its arguments had been successful, the Ktunaxa would have been entitled to claim a significant property right in the land in the power to exclude others.⁴⁰¹ Such a result worried the SCC for two reasons. First, adjudicating Aboriginal land claims in the context of judicial review proceedings is inappropriate; such claims must instead be resolved in a full (and often lengthy and complex) trial. Second, as one commentator noted, the majority did "not want the religious freedom right, exercisable against the state, to be transformed into a kind of property right, exercisable against all".⁴⁰² As such, *Ktunaxa*: (i) confirms the role of administrative decision makers in assessing unproven Aboriginal claims; and, (ii) limits the scope of the religious freedom right so that it does not grant property rights to sacred land in traditional territories.

The SCC also seemed troubled by the Ktunaxa's adoption of an uncompromising position late in the process. Indeed, the Ktunaxa only took this position after the Minister advised of his view that the only outstanding issues were interest-based, including the negotiation of a benefits agreement. As noted elsewhere, this change in position may have led the Court to question (at least implicitly) the sincerity of the Ktunaxa's religious freedom claim.⁴⁰³

Some have criticized the majority's conclusion on the Ktunaxa's *Charter* claim because it will have a disproportionate impact on Aboriginal belief systems, which are typically tied to the sacredness of specific places.⁴⁰⁴ In other words, the majority's approach creates a "religious freedom right that works better for some religions than others".⁴⁰⁵ As such, several commentators have indicated a preference for the approach taken by the dissent.⁴⁰⁶ Indeed, such an approach is: (i) consistent with principles of reconciliation between Canada and Indigenous peoples;⁴⁰⁷ and, (ii) in line with jurisprudence in other jurisdictions.⁴⁰⁸

D. *PROPHET RIVER FIRST NATION v CANADA (ATTORNEY GENERAL)*⁴⁰⁹

1. BACKGROUND

⁴⁰¹ *Ibid* at para 150.

⁴⁰² Howard Kislowicz & Senwung Luk, "Ktunaxa Nation: On the "Spiritual Focal Point of Worship" Test", ABlawg (November 7, 2017), online: <<https://ablawg.ca/2017/11/07/ktunaxa-nation-on-the-spiritual-focal-point-of-worship-test/>> [*Spiritual Focal Point*]. However, other commentators have noted that economic and property rights are not protected by the Charter in the same way that religious freedom rights are protected: see Natasha Bakht and Lynda Collins, "The Preservation of Indigenous Sacred Sites in Canada" (2017) 62:3 McGill LJ 777 [*Bakht*].

⁴⁰³ *Ibid*.

⁴⁰⁴ *Ibid*. See also Kristopher Kinsinger, "Ktunaxa Nation v British Columbia (Part 1): Religious Freedom and Objects of Worship", TheCourt.ca (November 16, 2017), online: <<http://www.thecourt.ca/ktunaxa-nation-v-british-columbia-part-1/>>.

⁴⁰⁵ *Spiritual Focal Point*, supra note 402.

⁴⁰⁶ *Ibid*; *Bakht*, supra note 402.

⁴⁰⁷ *Ibid*.

⁴⁰⁸ *Bakht*, supra note 402 at 794.

⁴⁰⁹ 2017 FCA 15 [*Prophet River*]; leave to appeal refused, 2017 CarswellNat 2965 (SCC).

Prophet River involved an application for judicial review of a decision by the GIC to approve a hydroelectric dam project in BC. The FCA considered the interplay between: (i) the GIC's determination of whether likely significant adverse environmental effects from a project are "justified in the circumstances" under s. 52(4) of the *Canadian Environmental Assessment Act, 2012*;⁴¹⁰ and, (ii) the "justification test" set out in *R v Sparrow*.⁴¹¹

2. FACTS

BC Hydro proposed to take up Treaty 8 lands for a hydroelectric dam project on the Peace River.⁴¹² The project was subject to review for environmental effects under both the federal *CEAA 2012* and the provincial legislation in BC. The governments of Canada and BC entered into an agreement for a harmonized environmental assessment process, including the establishment of a Joint Review Panel ("JRP").⁴¹³ In its report, the JRP concluded that the project would likely cause significant adverse effects on fishing opportunities and practices, hunting and non-tenured trapping, and other traditional uses of the land. It found that the effects on fishing hunting and trapping could not be mitigated, nor could some of the effects on traditional uses of the land.⁴¹⁴

Following the JRP's report, the federal Minister of Environment (the "Environment Minister") was required to make her decision on the project within 174 days. Under s. 54(2) of *CEAA 2012*, if the Environment Minister concluded that the project was likely to cause significant adverse environmental effects, then the GIC had to determine whether those effects were justified in the circumstances.⁴¹⁵ Ultimately, the Environment Minister: (i) determined that the project was likely to cause significant adverse environmental effects; and, (ii) established conditions with which BC Hydro was required to comply.⁴¹⁶ The GIC decided that, although the project would likely cause significant adverse environmental effects, including adverse effects on Indigenous peoples' use of lands and resources for traditional purposes, these effects were justified in the circumstances pursuant to s. 52(4) of *CEAA 2012*. As such, the project was issued federal authorization to proceed.⁴¹⁷

The Prophet River First Nation and the West Moberly First Nations (collectively, the "First Nations") challenged the project approval on judicial review.⁴¹⁸ The FC dismissed the application, concluding that the Crown had met its duty to consult, and that the GIC was not required to determine either the First Nations' treaty rights or whether the project unjustifiably infringed such rights pursuant to the analysis in *Sparrow*.⁴¹⁹ The First Nations appealed on the infringement issue; they did not challenge the adequacy of consultation before the FCA.⁴²⁰

⁴¹⁰ SC 202, c 19 s 52 [*CEAA 2012*].

⁴¹¹ *Prophet River*, *supra* note 409 at para 1, referencing *R v Sparrow* [1990] 1 SCR 1075 [*Sparrow*].

⁴¹² *Ibid* at para 4.

⁴¹³ *Ibid* at para 8.

⁴¹⁴ *Ibid* at para 13.

⁴¹⁵ *Ibid* at para 14.

⁴¹⁶ *Ibid* at para 18.

⁴¹⁷ *Ibid* at paras 5, 19.

⁴¹⁸ *Ibid* at para 20.

⁴¹⁹ *Ibid*.

⁴²⁰ The First Nations also brought an application for judicial review of the provincial decision to approve the hydroelectric project: see *Prophet River First Nation v British Columbia (Environment)*, 2015 BCSC 1682. The BCSC dismissed the First Nations' application, and that decision was upheld on appeal: see *Prophet River First*

3. DECISION

The FCA first considered the appropriate standard of review of a GIC decision under s. 52(4). It noted that such decisions are the result of a highly discretionary, policy-based and fact-driven process.⁴²¹ Judicial review of a GIC decision aims to ensure that the GIC's exercise of power delegated by Parliament is reasonable and remains within the framework established by the statutory regime. As such, the FCA concluded that the FC did not err in finding that the appropriate standard of review to be applied to the GIC decision was reasonableness.⁴²²

The FCA went on to note that, prior to 2004 and the seminal SCC decisions in *Haida* and *Taku River*, Indigenous peoples were required to prove their rights in often time-consuming litigation. The approach at the time had been set forth in *Sparrow*: if Indigenous peoples were successful in proving their rights as well as a *prima facie* infringement, the analysis moved to the issue of justification. At that stage, the burden was on the Crown to justify the legislative or regulatory infringement by establishing: (i) a valid legislative objective; and, (ii) a legislative scheme consistent with the honour of the Crown, the special trust relationship and the responsibility of the Crown vis-à-vis Indigenous peoples.⁴²³ However, with *Haida* and *Taku River*, the SCC moved away from the *Sparrow*-based infringement approach to instead impose on the Crown a duty to consult and accommodate, if necessary, in the event a project might have a significant impact on asserted Aboriginal rights.⁴²⁴

By asserting that claimed rights or treaty rights ought to be adjudicated by the GIC every time an infringement is alleged by an Aboriginal group, the First Nations invited the FCA to revert to the pre-*Haida* case law. The FCA rejected this invitation; it found no justification for such a reversion. The FCA noted that by importing the duty to consult, the SCC had emphasized that negotiation is the preferred way of reconciling Indigenous and Crown interests. The FCA noted that the approach advocated by the First Nations, if accepted, would considerably weaken the application of the duty to consult and re-introduce the *Sparrow*-oriented approach.⁴²⁵

Ultimately, the FCA concluded that s. 52(4) of *CEAA 2012* does not confer on the GIC the power to determine infringement of treaty rights.⁴²⁶ Section 52(4) could not be read as reflecting an intention on the part of Parliament to convert the GIC into an adjudicative body. The GIC lacks the necessary hallmarks associated with adjudicative bodies (public hearings, ability to summon witnesses/production of documents, and the receipt of submissions by interested parties).⁴²⁷ The GIC's role as decision-maker is not adjudicative in nature but rather focuses on a variety of polycentric considerations, thereby seeking to balance a variety of interests. As such, determining whether an Aboriginal or treaty right infringement is justified pursuant to the *Sparrow* analysis is not within the realm of the GIC.⁴²⁸

Nation v British Columbia (Environment), 2017 BCCA 58. Leave to appeal to the SCC was denied: *Prophet River First Nation v Minister of the Environment, et al.* [2017], BCWLD 1283.

⁴²¹ *Prophet River*, *supra* note 409 at para 30.

⁴²² *Ibid* at para 30.

⁴²³ *Ibid* at para 33.

⁴²⁴ *Ibid* at para 34.

⁴²⁵ *Ibid* at para 57.

⁴²⁶ *Ibid* at para 69.

⁴²⁷ *Ibid* at para 70.

⁴²⁸ *Ibid* at para 71.

Finally, the FCA agreed that judicial review is not the proper forum to determine whether the appellants' rights were unjustifiably infringed.⁴²⁹ A judicial review is a summary proceeding and, generally, the only material considered by the court is what was before the decision-maker. In this case, in order to determine the infringement issue, a full discovery, examination of expert evidence, as well as historical testimonial and documentary evidence would be necessary and could not be provided through an application for judicial review.⁴³⁰

4. COMMENTARY

This case is important in clarifying the role of the GIC when it approves a major resource project. The GIC is not required to determine treaty rights or whether a project unjustifiably infringes those treaty rights under the *Sparrow* analysis. Rather, under s. 52(4) of *CEAA 2012*, the GIC must simply determine whether significant adverse environmental effects are justified in the circumstances, taking into account a multitude of polycentric interests (including potential impacts to Aboriginal and treaty rights and how they are avoided or reduced). The decision also limits the adjudicative function of the GIC, and ensures the timely assessment of major resource projects.

In addition, *Prophet River* confirms that the duty to consult, as articulated in *Haida* and *Taku River*, is the applicable analysis where a major resource project may have a significant impact on Aboriginal or treaty rights. As such, the decision clarifies the constitutional framework that will apply on judicial review of a project approval decision.

E. COLDWATER INDIAN BAND v CANADA (INDIAN AND NORTHERN AFFAIRS)⁴³¹

1. BACKGROUND

Coldwater considered the extent of the Crown's fiduciary obligation when taking or using reserve lands or an interest in reserve lands.

2. FACTS

A pipeline right-of-way easement was granted for the Trans Mountain Pipeline in 1955, which allowed the Trans Mountain Oil Pipe Line Company ("TM") to construct, operate and maintain a pipeline through portions of ten reserves located in BC, including the Coldwater Indian Reserve No. 1.⁴³² The easement indenture prevented TM from assigning the rights granted to it under the easement without the written consent of the responsible minister.⁴³³

The Coldwater Indian Band ("Coldwater") agreed to both the proposed right-of-way and associated compensation in a Band Council Resolution dated April 22, 1952.⁴³⁴ Coldwater therefore received \$1,292, plus \$1,125.09 in compensation for its damages and loss of timber.⁴³⁵

⁴²⁹ *Ibid* at para 80.

⁴³⁰ *Ibid* at para 78.

⁴³¹ 2017 FCA 199 [*Coldwater*].

⁴³² *Ibid* at para 1.

⁴³³ *Ibid* at para 2.

⁴³⁴ *Ibid* at para 11.

⁴³⁵ *Ibid* at para 14.

Coldwater continues to receive income each year by levying and collecting property taxes on the easement.⁴³⁶

Between 2002 and 2007, TM underwent a series of corporate changes that left the Trans Mountain Pipeline under the management and control of Kinder Morgan. Both the NEB and the GIC approved the transfer of pipeline assets, including the easement indenture, and the required certificates of public convenience and necessity were issued to Kinder Morgan.⁴³⁷

On December 19, 2014, the Minister of Indian Affairs and Northern Development (the “Minister of Indian Affairs”) consented to the assignment of the easement indenture from one affiliate of Kinder Morgan to another.⁴³⁸ The Minister of Indian Affairs considered the grantee’s legal capacity, corporate track record, operational track record, financial capacity, and overall capability to fulfill the terms of the easement.⁴³⁹ No conditions were attached to the Minister of Indian Affairs’ consent and the terms of the easement indenture were unchanged.⁴⁴⁰ The Minister of Indian Affairs’ consent was granted notwithstanding that Coldwater had indicated that it was not in its interests for the Minister to consent to the assignment of the easement indenture.⁴⁴¹

Coldwater’s application for judicial review of the Minister of Indian Affairs’ decision was dismissed by the FC.⁴⁴² On appeal, Coldwater argued that the FC erred in: (i) determining the appropriate standard of review; and, (ii) concluding that the Minister of Indian Affairs had acted in accordance with the fiduciary duty owed to Coldwater.⁴⁴³ Coldwater’s argument was premised on its assertion that the terms of the easement indenture were “outdated, improvident, and ill-suited to current and future use of Coldwater’s lands for oil transmission pipeline purposes for the indefinite future”. It argued that the Minister of Indian Affairs had the discretion and duty to exercise power in relation to the easement by requiring negotiations towards a renewed easement agreement as a condition of any consent to the assignment.⁴⁴⁴

The Minister of Indian Affairs and Kinder Morgan argued that the easement indenture simply required the Minister to satisfy himself that the proposed assignee had the capacity to comply with its obligations under the indenture, and that the Minister’s fiduciary duty was coextensive with this requirement.⁴⁴⁵ Further, or in the alternative, they asserted that because the Minister of Indian Affairs knew that adequacy of consideration was a concern to Coldwater, it should be inferred that he directed his mind to this issue and decided that it was unnecessary or inappropriate to seek additional compensation.⁴⁴⁶

3. DECISION

With respect to the standard of review, Coldwater argued that the FC erred by importing the standard of review from the duty to consult context and concluding that: (i) the existence of a

⁴³⁶ *Ibid* at para 31.

⁴³⁷ *Ibid* at para 15.

⁴³⁸ *Ibid* at para 3.

⁴³⁹ *Ibid* at para 17.

⁴⁴⁰ *Ibid* at para 28.

⁴⁴¹ *Ibid* at para 3.

⁴⁴² *Coldwater First Nation v Canada (Indian Affairs and Northern Development)*, 2016 FC 595.

⁴⁴³ *Coldwater*, *supra* note 431 at para 5.

⁴⁴⁴ *Ibid* at para 66.

⁴⁴⁵ *Ibid* at para 69.

⁴⁴⁶ *Ibid* at para 70.

fiduciary duty and the content of the duty are questions of law, reviewable on the standard of correctness; and, (ii) the discharge of the fiduciary duty is reviewable on the standard of reasonableness.⁴⁴⁷ Coldwater argued that the discharge of the fiduciary duty is reviewable on the standard of correctness because it raised the issue of the jurisdiction of the Minister of Indian Affairs to act as he did in consenting to the assignment.⁴⁴⁸ The FCA rejected this argument and held that the FC did not err in concluding that the discharge of the fiduciary duty will be reviewed on the standard of reasonableness.⁴⁴⁹ However, the FCA observed that the fiduciary obligations imposed on the Minister of Indian Affairs serve to constrain his discretion, narrowing the range of reasonable outcomes.⁴⁵⁰

On the fiduciary issue, the majority began its analysis from the fundamental principle that the content of the Crown's fiduciary duty towards Indigenous peoples varies with the nature and importance of the interest at issue. The majority determined that the case involved an issue of central importance; namely, Coldwater's use and enjoyment of its land.⁴⁵¹ In the circumstances, the Crown was under a continuing duty to preserve and protect Coldwater's interest in the reserve land from an exploitative or improvident bargain.⁴⁵² However, the majority acknowledged that the Crown is no ordinary fiduciary, and the content of its fiduciary duty may vary to account for its other, broader obligations. Nonetheless, the Crown was still required to act in Coldwater's best interest when deciding whether to consent to the assignment.⁴⁵³

In this case, the fiduciary duty required the Minister of Indian Affairs to have regard to Coldwater's current and ongoing best interests as well as the interests of all affected parties in the continued operation of the pipeline.⁴⁵⁴ As a fiduciary, the Minister of Indian Affairs was required to exercise his discretion in a manner consistent with his obligations of loyalty and good faith and to act in what he reasonably and with diligence regarded as Coldwater's best interest while being mindful of the public interest in the pipeline's continued operation. Put another way, the Minister of Indian Affairs must act as a person of ordinary prudence managing his own affairs while not defeating the public interest in the pipeline's continued operation by imposing conditions so onerous as to defeat the public interest.⁴⁵⁵

Ultimately, the majority held that the Minister of Indian Affairs had not considered Coldwater's concerns about compensation and the terms of the easement indenture, instead confining his consideration to the corporate capacity of the assignee to carry out the terms of the original indenture.⁴⁵⁶ While the majority agreed that this consideration was a relevant factor, it rejected arguments that it was the only factor to be considered.⁴⁵⁷ The majority noted that the Minister of Indian Affairs is obliged to look to the best interests of Coldwater and to see that the use and enjoyment of its land are minimally impaired.⁴⁵⁸ While the majority did not find that the

⁴⁴⁷ *Ibid* at paras 42-43.

⁴⁴⁸ *Ibid* at para 43.

⁴⁴⁹ *Ibid* at para 44.

⁴⁵⁰ *Ibid* at para 47.

⁴⁵¹ *Ibid* at para 51.

⁴⁵² *Ibid* at para 52.

⁴⁵³ *Ibid* at para 53.

⁴⁵⁴ *Ibid* at para 54.

⁴⁵⁵ *Ibid* at para 60.

⁴⁵⁶ *Ibid* at para 85.

⁴⁵⁷ *Ibid* at paras 86-89.

⁴⁵⁸ *Ibid* at para 89.

compensation originally received by Coldwater was improvident, it concluded that the Minister of Indian Affairs was required to consider if his consent to the assignment would continue an allegedly improvident bargain.⁴⁵⁹

Ultimately, the majority held that the Minister of Indian Affairs' failure to assess the current and ongoing impact of the continuation of the easement on Coldwater's right to use and enjoy its lands rendered his decision unreasonable.⁴⁶⁰ As such, the decision was set aside and returned for redetermination in accordance with the majority's reasons.⁴⁶¹

In dissent, Webb J.A. concluded that the decision to approve the assignment of the easement was reasonable in the circumstances. In his view, it was important to focus on the particular impact that refusing or granting consent would have on the right of Coldwater to use and enjoy its lands.⁴⁶² Since the easement would remain in place and the assignee would continue as the operator of the pipeline regardless of whether the Minister of Indian Affairs consented to the assignment, it was difficult to determine how the use and enjoyment by Coldwater of this particular piece of land would be different if consent was granted or refused.⁴⁶³ As a result, Webb J.A. would have concluded that the Minister's decision to approve the assignment of the easement was reasonable, and dismissed the appeal.⁴⁶⁴

4. COMMENTARY

Coldwater clarifies the scope of the Crown's fiduciary duty when dealing with reserve lands, even when making relatively routine decisions with respect to those lands. Importantly, the majority emphasized that the Crown must consider its other, broader obligations to the general public, in discharging its fiduciary duty to Indigenous groups. As such, the test adopted by the majority requires that the Crown consider and balance Indigenous interests against any public interest in the decision at issue.

In addition, *Coldwater* demonstrates that project proponents cannot assume that routine transfers of rights will escape judicial scrutiny. As such, project proponents may wish to structure their affairs to minimize fetters on transfers of rights.

F. YAHEY v BRITISH COLUMBIA⁴⁶⁵

1. BACKGROUND

In *Yahey*, the BCSC considered an application by the Blueberry River First Nations ("BRFN") for an interlocutory injunction. BRFN sought to enjoin BC from allowing further industrial development – including oil and gas development – in segments of its traditional territory pending trial of its action over alleged infringements of treaty rights.⁴⁶⁶

⁴⁵⁹ *Ibid* at para 92.

⁴⁶⁰ *Ibid* at para 95.

⁴⁶¹ *Ibid* at para 96.

⁴⁶² *Ibid* at para 98.

⁴⁶³ *Ibid* at para 117.

⁴⁶⁴ *Ibid* at para 119.

⁴⁶⁵ 2017 BCSC 899 [*Yahey*].

⁴⁶⁶ *Ibid* at para 3.

2. FACTS

BRFN filed a notice of civil claim in March 2015.⁴⁶⁷ The underlying action deals with the alleged infringement of certain rights under Treaty 8 by the provincial Crown. Specifically, BRFN alleged that the Crown, by allowing industrial development at an extensive scale in its traditional territory – has effectively deprived BRFN of substantive treaty rights. Specifically, BRFN argued that the cumulative effects of industrial development have compromised the meaningful exercise of its rights to hunt, fish and trap.⁴⁶⁸ The trial of the underlying action was set for March 2018 for over 90 days.⁴⁶⁹

In July 2015, BRFN sought a more limited injunction to prevent BC from proceeding with a planned auction of 15 licenses to permit logging of approximately 1,690 hectares of merchantable timber within BRFN’s traditional territory.⁴⁷⁰ Its application was dismissed by Smith J., who nonetheless held that BRFN “may be able to persuade the court that a more general and wide ranging hold on industrial activity is needed to protect its treaty rights until trial”.⁴⁷¹

In August 2016, BRFN filed a broader injunction application, seeking an interlocutory order enjoining BC from: permitting oil and gas activities; disposing of interests in land; permitting water use or withdrawal for purposes related to oil and gas activities; granting rights to harvest; and engaging in “further industrial activities”.⁴⁷² BRFN argued that by limiting its application to “further industrial activities”, the injunction would spare current projects that already had Crown permits, dispositions and grants in place and thus would not affect the third-party holders of those rights.⁴⁷³

3. DECISION

The BCSC dismissed BRFN’s application for an interlocutory injunction. It concluded that the balance of convenience did not support granting such a wide-ranging injunction.⁴⁷⁴

The BCSC applied the analytic frameworks in both *RJR-MacDonald* and *B.C. (A.G. v. Wale)*, which set out a two-pronged test, requiring the applicant to establish: (i) there is a fair question to be tried as to the existence of the right which he alleges and a breach thereof, actual or reasonably apprehended; and, (ii) the balance of convenience favours the granting of an injunction.⁴⁷⁵ Under this framework, irreparable harm is a factor to be considered as part of the balance of convenience.⁴⁷⁶

With respect to the first part of the test, the Court concluded that there was a serious issue for trial in BRFN’s action, namely, whether the cumulative effect of all industrial development in the

⁴⁶⁷ *Ibid* at para 4.

⁴⁶⁸ *Ibid* at para 20.

⁴⁶⁹ *Ibid* at para 4.

⁴⁷⁰ *Yahey v British Columbia*, 2015 BCSC 1302.

⁴⁷¹ *Ibid* at para 64.

⁴⁷² *Yahey*, *supra* note 465 at para 25.

⁴⁷³ *Ibid* at para 26.

⁴⁷⁴ *Ibid* at para 124.

⁴⁷⁵ *Ibid* at paras 34-36.

⁴⁷⁶ *Ibid* at paras 35-36.

BRFN's traditional territory has become so extensive that it amounts to a breach of treaty rights under Treaty 8.⁴⁷⁷ As such, BRFN had shown a fair question to be tried.⁴⁷⁸

With respect to the balance of convenience, the Court first considered whether BRFN would suffer irreparable harm from the denial of the injunction. While the BCSC noted that there were conflicts in the expert scientific evidence, it concluded that there was sufficient admissible evidence from BRFN members to establish that: (i) the extent of industrial activity has had a detrimental effect on their treaty rights; and, (ii) the unique cultural importance of the identified critical areas.⁴⁷⁹ In doing so, the BCSC imposed a relatively low standard of proof of irreparable harm. It held that the appropriate assessment of harm is on the basis of evidence that assists in predicting the likely outcome rather than a guaranteed outcome of harm.⁴⁸⁰ Ultimately, the BCSC concluded that BRFN had established irreparable harm based on the evidence from their members.⁴⁸¹

However, the BCSC went on to consider other factors within the balance of convenience, and concluded that those factors weighed in favour of the Province.⁴⁸² Specifically, the BCSC considered the evidence of: (i) economic harm to the Province through lost revenues, such as bonuses paid to the Province, annual rent and royalties; and (ii) adverse effects on third parties in terms of business losses and job losses in a region already hard hit by an industry's down turn.⁴⁸³

In addition, the BCSC considered the clarity and breadth of the relief sought. The BCSC largely agreed with the Province's arguments regarding the lack of clarity and precision in the sought orders enjoining "further" permitting of industrial activity.⁴⁸⁴ Indeed, the BCSC concluded that even a halt to all future authorizations would in fact capture pre-existing projects, as these require regular re-authorization at many levels throughout their lifespans. In some cases, the BCSC noted that maintenance for safety would be halted, which is obviously not in the public interest.⁴⁸⁵

Finally, the BCSC noted that the trial was set to commence in March 2018, which was a significant factor that tipped the balance of convenience in favour of BC.⁴⁸⁶ In the event the trial was delayed, then BRFN was at liberty to renew their application for an injunction.⁴⁸⁷

4. COMMENTARY

Yahey is particularly noteworthy for its analysis of irreparable harm in the context of an action for alleged treaty infringement. Indeed, the BCSC adopted a low threshold for irreparable harm, which was based entirely on evidence from BRFN's members. The BCSC determined that it did not need to resolve conflicts in the scientific/expert evidence to make a finding of irreparable harm. As such, *Yahey* means that it is more likely that courts will find irreparable harm in future cases. However,

⁴⁷⁷ *Ibid* at para 42.

⁴⁷⁸ *Ibid* at para 45.

⁴⁷⁹ *Ibid* at para 86.

⁴⁸⁰ *Ibid* at para 87.

⁴⁸¹ *Ibid* at para 93.

⁴⁸² *Ibid* at para 98.

⁴⁸³ *Ibid* at paras 99-105. See also *Namgis First Nation v Canada (Fisheries, Oceans and Coast Guard)*, 2018 FC 334, in which the FC confirmed that prejudice to operators and project proponents is a basis to refuse otherwise meritorious interlocutory injunctive relief.

⁴⁸⁴ *Ibid* at paras 106-110.

⁴⁸⁵ *Ibid* at para 111.

⁴⁸⁶ *Ibid* at para 122.

⁴⁸⁷ *Ibid* at para 123.

the BCSC was careful to balance irreparable harm against a number of other factors, including the overall public interest and the effect of the injunction on third parties. Those factors mitigated against a wide-ranging injunction that would impact both current and future projects in BC.

IX. CONSTITUTIONAL

Over the last several years, there have been a number of interesting cases on the division of powers, all of which have arisen in the context of the City of Burnaby's opposition to the Trans Mountain Expansion Project (the "TMX Project"). The cases consider whether the NEB has jurisdiction to determine that municipal bylaws are invalid, inapplicable or inoperable to the extent they conflict with a proponent's powers under s. 73 of the *NEB Act*. In this paper, we discuss one of the more recent decisions from the BCCA, and some further developments.

A. *BURNABY (CITY) v TRANS MOUNTAIN PIPELINE ULC*⁴⁸⁸

1. BACKGROUND

The issue in this case was whether the NEB had jurisdiction to resolve constitutional conflicts between the provisions of the *NEB Act* and Burnaby's municipal bylaws. The dispute arose in the context of the TMX Project, and is one of several disputes that has arisen between Burnaby and Trans Mountain Pipeline ULC ("Trans Mountain") in respect of the same.

2. FACTS

Trans Mountain moves petroleum products through Alberta and BC through an existing pipeline routed through Burnaby to a terminal on the shoreline of the Burrard Inlet. In December 2013, Trans Mountain applied to the NEB for approval of the TMX Project.⁴⁸⁹ The TMX Project involves work on the existing Trans Mountain right-of-way and new locations in Burnaby, including the Burnaby Mountain Conservation Area ("Burnaby Mountain").⁴⁹⁰

To assess Trans Mountain's preferred corridor for the TMX Project, the NEB required Trans Mountain to conduct field studies on Burnaby Mountain. Those studies required Trans Mountain to cut down trees, clear vegetation, drill boreholes, and operate heavy machinery, which triggered the application of several of Burnaby's bylaws. Burnaby relied on these bylaws to make Trans Mountain's preliminary work on the Project difficult, if not impossible, to undertake.

Trans Mountain applied to the NEB for a ruling confirming its right to do the studies under s. 73(a) of the *NEB Act*.⁴⁹¹ The NEB issued Ruling 28, confirming that s. 73(a) of the *NEB Act* authorized Trans Mountain to enter onto Crown or private land on the intended route of its pipeline to make surveys and examinations to provide the NEB with the information it required to assess the TMX Project. The NEB also confirmed that Trans Mountain could enter Burnaby's land without Burnaby's consent.⁴⁹² While Burnaby did not appeal Ruling 28, it issued notices of bylaw

⁴⁸⁸ 2017 BCCA 132 [*Burnaby*].

⁴⁸⁹ *Ibid* at para 2.

⁴⁹⁰ *Ibid* at para 3.

⁴⁹¹ *Ibid* at para 5.

⁴⁹² *Ibid* at para 6.

violations to Trans Mountain when Trans Mountain started the engineering studies on Burnaby Mountain.⁴⁹³

Trans Mountain applied to the NEB again, this time for an order directing Burnaby to give it access to city lands to complete the required studies.⁴⁹⁴ The NEB was asked to resolve the constitutional question of whether the NEB had legal authority to determine that Burnaby's bylaws were inapplicable, invalid, or inoperative in the context of Trans Mountain's exercise of its powers under s. 73 of the *NEB Act*. In Ruling No. 40, the NEB essentially answered "yes" to the constitutional question.⁴⁹⁵ Burnaby's application for leave to appeal Ruling No. 40 to the FCA was denied.⁴⁹⁶

In the meantime, Burnaby filed a notice of civil claim with the BCSC, seeking: (i) an injunction to restrain Trans Mountain from continuing work on Burnaby lands in contravention of its bylaws, (ii) a declaration that Ruling 28 could not override Burnaby's bylaws, and (iii) a declaration that the NEB did not have jurisdiction to issue an order that limits Burnaby in the enforcement of its bylaws.⁴⁹⁷ The BCSC dismissed Burnaby's application for an interlocutory injunction, on the basis that the matter was properly before the NEB.⁴⁹⁸ Burnaby's application for leave to appeal this ruling was denied, on the basis that it amounted to a collateral attack on Ruling No. 40 and an abuse of process. Burnaby's further application to vary the order denying leave to appeal was also dismissed.⁴⁹⁹

Burnaby nonetheless proceeded with the constitutional issues by way of a summary trial before the BCSC.⁵⁰⁰ Ultimately, the trial judge declined to exercise his jurisdiction to hear the constitutional issues, on the basis that Burnaby's application amounted to an abuse of process.⁵⁰¹ Nonetheless, he addressed the constitutional question and concluded that the NEB had jurisdiction to address the constitutional issues and that it had correctly determined that Burnaby's bylaws were inapplicable or inoperative with respect to Trans Mountain's work under s. 73 of the *NEB Act*.⁵⁰²

3. DECISION

The BCCA dismissed Burnaby's appeal; it agreed with the trial judge that the NEB had jurisdiction to resolve the constitutional conflict between Burnaby's bylaws and the *NEB Act*.⁵⁰³

Burnaby raised two arguments on appeal. First, it argued that the recent SCC decision in *Windsor (City) v Canadian Transit Co*⁵⁰⁴ stood for the proposition that only provincial superior courts have jurisdiction to adjudicate conflicts between municipal bylaws and federal undertakings. The BCCA rejected this argument.⁵⁰⁵ It distinguished *Windsor* on the basis that it did not involve a

⁴⁹³ *Ibid* at para 7.

⁴⁹⁴ *Ibid* at para 8.

⁴⁹⁵ *Ibid* at para 10.

⁴⁹⁶ *Ibid* at para 11.

⁴⁹⁷ *Ibid* at para 8.

⁴⁹⁸ *Ibid* at para 9.

⁴⁹⁹ *Ibid* at para 12.

⁵⁰⁰ *Ibid* at para 13.

⁵⁰¹ *Ibid* at para 14.

⁵⁰² *Ibid* at para 15.

⁵⁰³ *Ibid* at para 36.

⁵⁰⁴ 2016 SCC 54 [*Windsor*].

⁵⁰⁵ *Burnaby*, *supra* note 488 at para 20.

company seeking to exercise a right granted by federal statute that brought it into conflict with a municipal bylaw. Rather, the argument was that the FC had jurisdiction to hear the dispute simply because it involved a federal undertaking.⁵⁰⁶ As such, the BCCA concluded that *Windsor* did not assist Burnaby in challenging the NEB's jurisdiction or the validity of the FCA's decision to deny leave to appeal.⁵⁰⁷

Second, Burnaby argued that there was no jurisprudence recognizing the authority of a federal tribunal to declare municipal laws invalid.⁵⁰⁸ The BCCA rejected this argument as being without merit.⁵⁰⁹ The BCCA relied on the trial judge's analysis of *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*,⁵¹⁰ where the SCC said that while an administrative tribunal cannot issue a formal declaration of invalidity, it can treat any impugned provision as invalid for the purposes before it.⁵¹¹ That was precisely what occurred here: the NEB did not make a general declaration that Burnaby's bylaws were invalid, inapplicable or inoperative. Rather, it made a limited declaration in relation to the matter before it, determining that the bylaws did not apply to Trans Mountain's work under s. 73 of the *NEB Act*.⁵¹²

4. COMMENTARY

Burnaby provides greater certainty regarding the NEB's jurisdiction over federally regulated pipelines, including in circumstances where federal laws conflict with municipal bylaws and dual compliance is impossible.

Furthermore, *Burnaby* provides a precedent for future disputes regarding the TMX Project. The BCCA predicted as much, stating that "[a]lthough the initial dispute over the work on Burnaby Mountain has concluded, the question of the NEB's jurisdiction with respect to Burnaby's bylaws will likely be an ongoing issue as the various steps in the [TMX Project] proceed."⁵¹³

Indeed, a similar dispute subsequently arose in respect of Burnaby's zoning bylaws and tree cutting bylaws. On October 26, 2017, Trans Mountain filed a motion with the NEB seeking relief from the requirement to comply with certain Burnaby's bylaws, as they applied to its work. This dispute involved the same constitutional issue discussed in Ruling No. 40 and *Burnaby*; namely, whether the NEB had jurisdiction to order that Burnaby's specific bylaws are inapplicable, invalid, or inoperative in the context of Trans Mountain's exercise of its powers under s. 73 of the *NEB Act*. In line with Ruling No. 40 and the decision in *Burnaby*, the NEB concluded that it had jurisdiction to decide the constitutional question, and it granted the relief sought by Trans Mountain.⁵¹⁴ The NEB concluded that Burnaby had applied its bylaws in a manner that was not reasonable, resulting in unreasonable delay to the Project.

⁵⁰⁶ *Ibid* at para 24.

⁵⁰⁷ *Ibid* at para 27.

⁵⁰⁸ *Ibid* at para 19.

⁵⁰⁹ *Ibid* at para 34.

⁵¹⁰ [1991] 2 SCR 5.

⁵¹¹ *Burnaby*, *supra* note 488 at para 34.

⁵¹² *Ibid* at para 35.

⁵¹³ *Ibid* at para 18.

⁵¹⁴ Order No. MO-057-2017 (6 December 2017), and Reasons for Decision (18 January 2018), Hearing MH-081-2017.

Burnaby and the Attorney General of BC both sought leave to appeal the NEB's ruling to the FCA pursuant to s. 22 of the *NEB Act*. The FCA dismissed both leave applications, with costs, on March 23, 2018. Burnaby has sought leave to appeal the FCA's leave decision to the SCC.

X. ENVIRONMENTAL AND REGULATORY

In this paper, we discuss two very different ABQB cases of interest involving environmental and regulatory issues. First, we discuss a case in which the ABQB enforced an AER direction to prohibit the removal of equipment from an insolvent junior oil and gas producer's sites. Second, we discuss a case that considered whether to extend the limitations period on a stale contaminated property claim.

A. ALBERTA ENERGY REGULATOR v LEXIN RESOURCES LTD⁵¹⁵

1. BACKGROUND

Lexin involved an application to the ABQB under s. 19(2) of the *Responsible Energy Development Act*.⁵¹⁶ In the application, the AER sought to enforce the terms of a direction issued to Lexin Resources Limited ("Lexin").

2. FACTS

The AER applied for an order under s. 19(2) *REDA*, requiring Lexin to comply with the terms of an Equipment Direction it issued on October 27, 2016. The Equipment Direction prohibited the removal of equipment from Lexin's oil and gas pipelines, facilities or site without the prior approval of the AER or by court order.⁵¹⁷ An interim order was granted to the AER on February 15, 2017.

The specific issue before the ABQB was whether the Court should exercise its discretion under s. 19(2) *REDA* to order that Lexin, its employees and agents, and all other persons be prohibited from removing equipment from Lexin's licensed sites.⁵¹⁸

However, it must be noted that the AER's application was made in the context of numerous other regulatory and legal challenges regarding Lexin's operations. Indeed, the AER had issued a number of regulatory orders to Lexin, including an order closing Lexin's AER licensed wells, facilities and pipelines. According to the AER, Lexin had failed to: (i) comply with previous AER orders and (ii) pay various fees and levies. Ultimately, a receiver was appointed for Lexin on the application of the AER, which was an unprecedented move for the regulator. In addition, there had been widespread reports in the media of significant health and safety concerns at Lexin's sites.⁵¹⁹

3. DECISION

⁵¹⁵ 2017 ABQB 219 [*Lexin*].

⁵¹⁶ SA 2012, c R-17.3 [*REDA*].

⁵¹⁷ *Lexin*, *supra* note 515 at para 3.

⁵¹⁸ *Ibid* at para 23.

⁵¹⁹ Heather Lilles, "Upholding the Lexin Equipment Order – The AER Wins the Battle, But Most Likely Will Lose the War", ABlawg (April 20, 2017), online: <https://ablawg.ca/2017/04/20/upholding-the-lexin-equipment-order-the-aer-wins-the-battle-but-most-likely-will-lose-the-war/> [Lilles].

In determining whether it should exercise its discretion under s. 19(2), the ABQB considered three statutes relevant to the AER's mandate: (i) the *REDA*, (ii) the *Oil and Gas Conservation Act*,⁵²⁰ and, (iii) the *Pipeline Act*.⁵²¹ When reading these statutes together, the ABQB concluded that: (i) the AER's mandate includes ensuring that the oil and gas industry is conducted in a safe manner with respect to humans and the environment; and, (ii) public health, safety, and the environment are integral to this mandate.⁵²² To exercise its discretion, the Court had to be satisfied that the AER's mandate required the issuance of the order.⁵²³

The AER argued that Lexin had a history of non-compliance with the AER's orders, and asked that the ABQB grant its application given the significant health and safety risks associated with non-compliance.⁵²⁴ In response, Lexin indicated that the AER had not proven that the removal of equipment engaged such risks and stated that in fact, equipment had been removed since the AER issued the Equipment Direction on October 27, 2016.⁵²⁵

In granting an order in favour of the AER, the ABQB concluded that safety risks were clearly engaged, adding that Lexin had admitted it could not maintain its own sour gas wells, and had on four occasions removed equipment from its sites without AER approval. An AER field inspector attended on site on three of these occasions.⁵²⁶ The ABQB accepted that the removal of equipment engaged various safety hazards, including fires, explosions, chemical spills, and electric shock and acknowledged other significant consequences that may arise, including the possibility of a blowout.⁵²⁷

Finally, the ABQB concluded that it had the power to grant an order with respect to all persons (not just Lexin), subject to the condition that an affected person could apply to vary the order if it was overbroad.⁵²⁸ The Court indicated that such an order respected the language of s. 19(2), while addressing public safety, health, and environmental concerns.

4. COMMENTARY

Lexin demonstrates the willingness of the courts to assist the AER in its enforcement of regulatory orders, particularly where such orders trigger public safety, health, and environmental concerns. As Heather Lilles notes, "the people of Alberta are better off not having unknown persons tinkering with and removing equipment from oil and gas wells facilities – regardless of their hydrogen sulfide content".⁵²⁹

Ms. Lilles also notes that there are economic implications of *Lexin*, given that Lexin had been petitioned into bankruptcy. Indeed, by preventing the removal of equipment with significant value, *Lexin* helps to preserve some value for Lexin's creditors (including the AER/Orphan Well Association, who will likely be required to carry out and pay for the bulk of the abandonment costs

⁵²⁰ RSA 2000, c O-7.

⁵²¹ RSA 2000, c P-15

⁵²² *Lexin*, *supra* note 515 at para 30.

⁵²³ *Ibid* at paras 25, 54.

⁵²⁴ *Ibid* at para 39.

⁵²⁵ *Ibid* at para 40.

⁵²⁶ *Ibid* at paras 44-48.

⁵²⁷ *Ibid* at paras 50, 52.

⁵²⁸ *Ibid* at paras 66-67.

⁵²⁹ *Lilles*, *supra* note 519.

of Lexin's sites). Furthermore, by ensuring that equipment remains in place, *Lexin* provides some comfort to working interest partners who may assume operatorship of Lexin's sites.⁵³⁰

B. *BROOKFIELD RESIDENTIAL (ALBERTA) LP (CARMA DEVELOPERS LP) v IMPERIAL OIL LIMITED*⁵³¹

1. BACKGROUND

In *Brookfield*, Imperial Oil Limited ("Imperial") sought summary judgment on a contaminated property claim, on the basis that it was statute barred by the *Limitations Act*.⁵³² The issue was whether the limitations period for the claim should be extended pursuant to the *Environmental Protection and Enhancement Act*.⁵³³

2. FACTS

Brookfield Residential (Alberta) LP's ("Brookfield") predecessor, Carma Developers (Ltd.) ("Carma"), purchased a piece of property on February 10, 2004. Prior to the close of the deal, Carma retained a third party to conduct an environmental site assessment and issue a report, which concluded that further environmental investigation was unnecessary.⁵³⁴

While Brookfield was preparing the site for residential development, hydrocarbons and salt contamination were discovered in the soil at levels requiring site remediation.⁵³⁵ Brookfield brought an action against Imperial, alleging that the contaminated soil on the property arose from an oil well drilled by Imperial in 1949 under a well license.

Imperial applied for summary dismissal on the basis that the limitations period under the *Limitations Act* had expired, and that it did not owe a duty of care to Brookfield. Brookfield cross-applied under s. 218 of the *EPEA* to extend the limitations period for its claim against Imperial.

3. DECISION

The ABQB declined to extend the limitations period pursuant to s. 218 *EPEA*, and granted Imperial's application for summary dismissal.⁵³⁶

Section 218 *EPEA* gives the court discretion to extend the limitations period where it is alleged that an adverse effect has resulted from the release of a substance into the environment. The Court can consider: (i) when the effect allegedly occurred; (ii) whether due diligence was exercised; (iii) if the defendant would experience prejudice; and, (iv) any other criteria.⁵³⁷

In this case, the ABQB held that: (i) there was insufficient evidence to determine when the adverse effect occurred;⁵³⁸ (ii) Brookfield had exercised due diligence by relying on the advice of a

⁵³⁰ *Ibid.*

⁵³¹ 2017 ABQB 218 [*Brookfield*].

⁵³² RSA 2000 c L-12.

⁵³³ RSA 2000, c E-12 [*EPEA*].

⁵³⁴ *Brookfield*, *supra* note 531 at para 13-14.

⁵³⁵ *Ibid* at para 24.

⁵³⁶ *Ibid* at paras 122, 124, and 126.

⁵³⁷ *Ibid* at para 31.

⁵³⁸ *Ibid* at paras 62-64.

qualified expert prior to the close of the purchase;⁵³⁹ and, (iii) Imperial would suffer prejudice if the limitations period was extended.⁵⁴⁰ Ultimately, the ABQB concluded that “permitting an action to go ahead more than 60 years after [Imperial] last was involved ... would be an abuse”.⁵⁴¹

4. COMMENTARY

Brookfield provides greater certainty regarding the interplay between the *Limitations Act* and the *EPEA* in contaminated property claims. Indeed, it confirms the usual limitations period will not be extended in circumstances where it will prejudice the defendant. As such, it provides comfort that defendants will, in some circumstances, be able to defeat stale contamination claims at an early stage of proceedings.

XI. PUBLIC UTILITIES

There has been a significant amount of litigation in Alberta in recent years over the termination of Power Purchase Arrangements (“PPAs”). Certain of that litigation has now ended, with the Government of Alberta agreeing to withdraw ENMAX Energy Corporation (“ENMAX”) from the PPA litigation initiated in 2016.⁵⁴² In this paper, we limit our discussion on public utilities litigation to a recent case on the issue of whether arbitral decisions made under a PPA are subject to appeal.

A. ***ENMAX ENERGY CORPORATION v TRANSALTA GENERATION PARTNERSHIP***⁵⁴³

1. BACKGROUND

In *TransAlta*, the ABQB considered whether arbitral decisions made under PPAs are appealable on errors of law.

2. FACTS

TransAlta Generation Partnership (“TransAlta”) and ENMAX were parties to a PPA in relation to the Keephills Power Plant.⁵⁴⁴ The wording of all PPAs are determined by Regulation.⁵⁴⁵

A dispute arose between the parties, which also affected the Balancing Pool. In accordance with article 19 of the PPA, the parties submitted the dispute to arbitration, and the arbitrators rendered a decision.⁵⁴⁶

ENMAX and the Balancing Pool sought leave to appeal the arbitral decision on various grounds, including errors of law. TransAlta applied to strike out the parts of the leave applications alleging

⁵³⁹ *Ibid* at paras 66-67, 88.

⁵⁴⁰ *Ibid* at para 99-100.

⁵⁴¹ *Ibid* at para 102.

⁵⁴² See Nigel Bankes, “Power Purchase Arrangement Litigation Comes to an End”, ABLawg (March 14, 2018), online: <https://ablawg.ca/2018/03/14/power-purchase-arrangement-litigation-comes-to-an-end/>.

⁵⁴³ 2018 ABQB 142 [*TransAlta*].

⁵⁴⁴ *Ibid* at para 2.

⁵⁴⁵ *Ibid* at para 3. The wording is determined by the the *Power Purchase Arrangements Determination Regulation*, Alta Reg 175/2000.

⁵⁴⁶ *Ibid* at para 5.

errors of law, on the basis that there was no right of appeal.⁵⁴⁷ The Balancing Pool and ENMAX disagreed, arguing the *Arbitration Act*⁵⁴⁸ and the inherent jurisdiction of the courts both allow for appeals on errors of law.⁵⁴⁹

3. DECISION

The ABQB held that the PPA does not allow for appeals of arbitral decisions on errors of law.⁵⁵⁰

The ABQB noted that while the general requirements and processes in the *Arbitration Act* apply, the PPA expressly states that arbitral decisions are “final, binding and non-appealable” and that there are no grounds for appeal of any arbitration decision.⁵⁵¹ The ABQB held that this express language prevails over the *Arbitration Act*, which allows for appeals on questions of law with the court’s permission, even if the parties have contracted out of the right of appeal.⁵⁵²

Further, the ABQB noted that it was inappropriate to apply the presumption of coherence to read PPAs as allowing for a right of appeal. Doing so would require the court to disregard the clear intentions of the legislature.⁵⁵³ However, the ABQB noted that parties can still seek court rulings on questions of law during PPA arbitrations, but before a decision is rendered.⁵⁵⁴

4. COMMENTARY

In this decision, the ABQB examined the interplay between a mandatory arbitration clause in the PPA and the provisions of the *Arbitration Act*. As noted by the Court, its interpretation of the PPA vis-à-vis the *Arbitration Act* helps promote finality in arbitration.⁵⁵⁵

XII. PROPERTY

In this paper, we discuss two recent cases of interest that discuss the nature, scope and extent of a gross overriding royalty interest or gross royalty trust agreement.

A. *THIRD EYE CAPITAL CORPORATION v RESSOURCES DIANOR INC*⁵⁵⁶

1. BACKGROUND

The central issue in *Dianor* was whether a gross overriding royalty constituted an interest in land within the meaning of the law set out by the SCC in *Bank of Montreal v Dynex*.⁵⁵⁷

2. FACTS

⁵⁴⁷ *Ibid* at paras 6-7.

⁵⁴⁸ RSA 2000, c A-43.

⁵⁴⁹ *TransAlta*, *supra* note 543 at para 8.

⁵⁵⁰ *Ibid* at para 20.

⁵⁵¹ *Ibid*.

⁵⁵² *Ibid* at paras 10, 25-26.

⁵⁵³ *Ibid* at paras 39-41.

⁵⁵⁴ *Ibid* at para 28.

⁵⁵⁵ *Ibid* at paras 34-38.

⁵⁵⁶ 2018 ONCA 253 [*Dianor*].

⁵⁵⁷ *Ibid* at para 11; 2002 SCC 7 [*Dynex*].

Dianor Resources Inc. (“Dianor”) was insolvent, and a receiver was appointed under s. 243 of the *Bankruptcy and Insolvency Act*.⁵⁵⁸

Dianor’s main asset was a group of mining claims, which it obtained under a Crown Land Agreement and a Patented Land Agreement (together, the “Land Agreements”).⁵⁵⁹ The Land Agreements: (i) imposed a gross overriding royalty (“GOR”) in favour of 2350614 Ontario Inc (“235Co”) and (ii) stated that the parties intended the GORs to create an interest in and to run with the land.⁵⁶⁰

The supervising judge made an order approving a bid process for the sale of Dianor’s mining claims. It generated two bids, both containing a condition that the GORs be terminated or significantly reduced. Third Eye Capital Corporation (“Third Eye”) was the successful bidder.⁵⁶¹

The motion judge approved the sale of the mining claims to Third Eye and granted a vesting order that purported to extinguish the GORs. 235Co did not oppose the sale, but asked that the property vested in Third Eye be subject to the GORs.⁵⁶² The motion judge determined that the GORs did not run with the land or grant the holder an interest in the lands. He found that neither the expression of the parties’ intent to do so in the Land Agreements, nor the registration of the GORs, was sufficient to convey any interest in the land.⁵⁶³

235Co appealed to the ONCA and sought an order: (i) setting aside the motion judge’s order and (ii) declaring that the GORs constitute an interest in land.⁵⁶⁴

3. DECISION

The ONCA held that the GORs were interests in land that ran with the land and were capable of binding the claims in the hands of a purchaser.⁵⁶⁵ However, it required additional submissions on whether the motion judge had jurisdiction to vest out the GORs in the sale to Third Eye and, if not, whether 235Co was entitled to a remedy.⁵⁶⁶

The ONCA noted that *Dynex*, which changed the common law to permit a GOR to achieve status as an interest in land, was the governing precedent.⁵⁶⁷ According to *Dynex*, a “royalty interest” or “overriding royalty interest” can be an interest in land if: (i) the language used in describing the interest is sufficiently precise to show that the parties intended the royalty to be a grant of an interest in land, rather than a contractual right to a portion of the oil and gas substances recovered from the land; and (ii) the interest, out of which the royalty is carved, is itself an interest in land.⁵⁶⁸

⁵⁵⁸ *Dianor*, *supra* note 556 at para 1; *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [BIA].

⁵⁵⁹ *Ibid* at paras 2, 26.

⁵⁶⁰ *Ibid* at paras 26-27.

⁵⁶¹ *Ibid* at para 3.

⁵⁶² *Ibid* at para 4.

⁵⁶³ *Ibid* at para 56.

⁵⁶⁴ *Ibid* at para 8.

⁵⁶⁵ *Ibid* at para 9, 65.

⁵⁶⁶ *Ibid* at para 9.

⁵⁶⁷ *Ibid* at para 30.

⁵⁶⁸ *Ibid* at para 51.

Applying the *Dynex* test, the ONCA determined that the second element of the test was met because Dianor's interests in the claims were working interests or *profits à prendre*, which the common law unquestionably recognized as interests in land.⁵⁶⁹

Further, the ONCA concluded that the first element of the test was also met.⁵⁷⁰ The Land Agreements expressly stated that the parties intended the GORs to create an interest in land and to run with the land. Moreover, the surrounding context confirmed the mutual intention to constitute the GORs as interests in land, as the royalty rights-holder took care to register the interests on title.⁵⁷¹

The ONCA held that the motion judge erred because: (i) he did not examine the parties' intentions from the Land Agreements as a whole, along with the surrounding circumstances;⁵⁷² (ii) he held that in order to qualify as an interest in land, the Land Agreements had to give the appellant the right to enter the property to explore and extract diamonds or other minerals; and, (iii) he held that the interest out of which the royalty was carved was not an interest in land because it was expressed in the Land Agreements as only a right to share in the revenues produced from diamonds or other minerals extracted from the lands. The ONCA noted that the latter two errors arose as a result of the motion judge's misapprehension of the *Dynex* test.⁵⁷³

With respect to the motion judge's jurisdiction to issue a vesting order that extinguished the GORs, the ONCA required further submissions. The ONCA therefore required an additional argument before the panel to determine whether and under what circumstances and limitations a superior court judge has jurisdiction to extinguish a third party's interest in land using a vesting order under s. 100 of the *Courts of Justice Act*⁵⁷⁴ and s. 243 of the *BIA*, where s. 65.13(7) of the *BIA*; s. 36(6) of the *Companies' Creditors Arrangement Act* ("CCAA");⁵⁷⁵ ss. 66(1.1) and 84.1 of the *BIA*; or s. 11.3 of the *CCAA* do not apply.⁵⁷⁶

Finally, the ONCA noted that the parties did not fully address what the court should do by way of remedy if it were to allow the appeal.⁵⁷⁷ In any event, the ONCA raised two difficulties with providing a remedy. First, there was no information before the ONCA on whether an innocent third party acquired an interest from Third Eye after the vesting order was registered, which would bar a remedy.⁵⁷⁸ Second, Third Eye had raised the argument that it was not open to the motion judge to impose additional terms on the transaction that were not agreed to by the parties. It was not clear to the ONCA whether Third Eye wanted to press this argument.⁵⁷⁹ As such, additional submissions were required on the appropriate remedy.⁵⁸⁰

4. COMMENTARY

⁵⁶⁹ *Ibid* at para 60.

⁵⁷⁰ *Ibid* at para 61.

⁵⁷¹ *Ibid* at para 63.

⁵⁷² *Ibid* at para 66.

⁵⁷³ *Ibid* at para 67.

⁵⁷⁴ RSO 1990, c C.43.

⁵⁷⁵ RSC 1985, c C-36 [CCAA].

⁵⁷⁶ *Dianor*, *supra* note 556 at para 121.

⁵⁷⁷ *Ibid* at para 123.

⁵⁷⁸ *Ibid* at para 127.

⁵⁷⁹ *Ibid* at para 128.

⁵⁸⁰ *Ibid* at para 129.

In *Dianor*, the ONCA clarified the scope and application of the SCC's decision in *Dynex*. In doing so, the ONCA sought to rectify a "serious misapprehension in the application of *Dynex* in some cases, including some of those relied on by the motion judge".⁵⁸¹ *Dianor* effectively overrules a couple of cases that were rendered subsequent to *Dynex*, which held that a GOR could not be an interest in land unless it granted rights to enter and do something on the lands. No GOR would ever do that because they are passive by definition. As such, *Dianor* properly rejected the argument.

In finding that a GOR can constitute an interest in land and run with the land, *Dianor* also acknowledged and affirmed the commercial realities that led the SCC to change the common law in *Dynex*. In particular, the ONCA noted that the law prior to *Dynex* posed commercial challenges to holders of working interests that needed to secure financing sources for the exploitation of mining rights.⁵⁸² Further, as the ABCA noted in *Dynex*, investors often prefer an interest in land rather than a contractual right against the lessee, because this allows for investments in a particular piece of property rather than a particular operator or company.⁵⁸³ Consequently, even before *Dynex*, the ONCA noted that parties often drafted royalty agreements with the intention of granting the royalty holder an interest in land.⁵⁸⁴

Ultimately, *Dianor* gives effect to the parties' intention that the GORs create an interest in land. In doing so, it provides a result that is in step with the commercial and practical realities of the oil and gas industry.

B. CHESTERWOLD HOLDINGS LTD v COMPUTERSHARE TRUST COMPANY OF CANADA⁵⁸⁵

1. BACKGROUND

Chesterwold is a wills and estates case. The testator directed that all of the mineral rights in his real estate be retained for a reasonable time and that the money realized therefrom be divided equally among his children.⁵⁸⁶ The trial judge had to: (i) interpret the will at issue and (ii) consider whether subsequent gross royalty trust agreements ("GRTAs") and a patch agreement were valid and enforceable with respect to the mineral rights. The GRTAs at issue in *Chesterwold* were of the same type reviewed by the ABCA in *Guaranty Trust Co of Canada v Hetherington*.⁵⁸⁷

2. FACTS

In his 1949 will (the "Will"), Manley Hugo Unland gifted various tracts of land to his wife and three of his ten children. The Will provided that all the oil rights or other mineral rights in any of the real estate would be retained for a reasonable time and all monies that may be realized therefrom would be divided equally among all his children.⁵⁸⁸

⁵⁸¹ *Ibid* at para 68.

⁵⁸² *Ibid* at para 37.

⁵⁸³ *Ibid* at paras 40-41.

⁵⁸⁴ *Ibid* at para 42.

⁵⁸⁵ 2017 ABQB 43 [*Chesterwold*].

⁵⁸⁶ *Ibid* at para 61.

⁵⁸⁷ *Ibid* at para 47; 1989 ABCA 113 [*Hetherington*].

⁵⁸⁸ *Ibid* at para 3.

Prior to his death, Unland executed a lease with Rio Bravo Oil Ltd. (the “Rio Bravo Lease”), granting all the petroleum and natural gas and related hydrocarbons (except coal and valuable stone over certain tracts of land), subject to the Will. The Rio Bravo Lease was for a term of 10 years and so long thereafter as leased substances were produced from the lands.⁵⁸⁹ The Rio Bravo Lease provided that Unland was entitled to a gross royalty of 12.5% of the leased substances produced from the lands. However, there was never a producing well on the lands.⁵⁹⁰

Shortly after Unland’s death, the three executors of his Will executed two GRTAs with Prudential Trust Company Limited (“Prudential”).⁵⁹¹ The GRTAs covered the lands subject to the Rio Bravo Lease, and assigned the 12.5% gross royalty to Prudential. Pursuant to the GRTAs, two caveats were registered on the affected lands.⁵⁹²

In 1975, the executors determined that they would divide the mineral titles into ten fractional interests and award each of the ten children one fractional interest.⁵⁹³

A supplementary agreement was signed by several of Unland’s children in 1993 (the “Patch Agreement”). The Patch Agreement identified the mineral owners as the registered owners of the mineral rights to the lands. The Patch Agreement named Central Guaranty Trust Company – a predecessor trustee to Computershare Trust Company of Canada (“Computershare”) – as trustee.⁵⁹⁴

The applicant, Chesterwold Holdings Ltd. (“Chesterwold”), sought an order declaring that: (i) the GRTAs had expired and (ii) the associated caveats be discharged.⁵⁹⁵ Chesterwold further argued that the Patch Agreement could not save the GRTAs and rendered valid trust instruments, effective in perpetuity.⁵⁹⁶

3. DECISION

The trial judge granted Chesterwold’s application and declared that the GRTAs and the Patch Agreement had terminated.⁵⁹⁷ In addition, he ordered that the caveats protecting Computershare’s interest in the GRTAs and the Patch Agreement be discharged.⁵⁹⁸

The trial judge’s decision turned on his interpretation of the Will, which stated that “all the oil rights or other mineral rights in any of the real estate was to be retained for a reasonable time and all monies that may be realized from them be equally divided among all his children”.⁵⁹⁹ As stated by the trial judge, “the true intent of the testator is found within the provisions of his Will”.⁶⁰⁰ Therefore, determining and giving effect to the testator’s intentions must be based on the wording of the will itself. In this case, Unland directed the mineral rights to be retained for a reasonable

⁵⁸⁹ *Ibid* at para 4.

⁵⁹⁰ *Ibid* at paras 4-5.

⁵⁹¹ *Ibid* at para 7.

⁵⁹² *Ibid* at para 11.

⁵⁹³ *Ibid* at para 29.

⁵⁹⁴ *Ibid* at paras 16-17.

⁵⁹⁵ *Ibid* at para 46.

⁵⁹⁶ *Ibid* at para 48.

⁵⁹⁷ *Ibid* at para 84.

⁵⁹⁸ *Ibid* at para 90.

⁵⁹⁹ *Ibid* at para 61.

⁶⁰⁰ *Ibid* at para 72.

time, at the conclusion of which the mineral titles to the lands at issue were to be transmitted or conveyed to the four named beneficiaries.⁶⁰¹

The trial judge also found that the GRTAs were validly executed, but that they expired with the expiration of the Rio Bravo Lease through effluxion of the primary term of that Lease. As such, the royalty assigned under each GRTA was limited to the royalty payable under the Rio Bravo Lease to Rio Bravo. Each GRTA did not bind subsequent petroleum and natural gas leases the same mineral rights.⁶⁰²

The trial judge expressly rejected Computershare's argument that there was new evidence that the GRTAs intended to create a perpetual interest in mineral rights. Rather, the trial judge concluded that the mineral rights were to be held by the estate for a definitive time (reasonable) and were not to be held in perpetuity by the creation of trust agreements.⁶⁰³ As such, the executors had no authority or power to divide the mineral rights in 1975 into ten fractional interest; rather, they had the duty and obligation to transfer the title to the four named beneficiaries.⁶⁰⁴

The trial judge also found that the Patch Agreement was invalid because it was executed by persons who were not the correct mineral owners, and therefore could not have extended the GRTAs.⁶⁰⁵

Finally, the trial judge rejected Computershare's arguments regarding s. 62 of the *Land Titles Act*,⁶⁰⁶ on which it relied as authority for the entitlement of the mineral title owners who executed the Patch Agreement to the mineral rights. Computershare specifically argued that because the ten mineral title owners were listed on the certificate of title, they were the rightful legal title holders to the mineral rights. The trial judge noted that the four named beneficiaries received their title from the testator who was the holder of a prior certificate of title compared to the certificate of title granted to the ten holders in the Patch Agreement. The four beneficiaries were therefore deemed to claim under the prior certificate of title.⁶⁰⁷

4. COMMENTARY

As noted by Nigel Bankes, *Chesterwold* may call into question the efficacy of other patch agreements that were intended to revive or extend GRTAs affected by the decision in *Hetherington*.⁶⁰⁸

These same commentators also questions the trial judge's findings with respect to s. 62 of the *Land Titles Act*. The concern is that if a party is entitled to rely on s. 62, then it should not have to make inquiries behind the title as to the efficacy of the patch agreement. Otherwise, it would undermine the fundamental "mirror and curtain" principles of the Torrens title system. In this case, it may well have been correct for the trial judge to conclude that Computershare was not entitled to rely on s. 62, since a caveat does not cure an invalidity or improve the efficacy of a flawed document

⁶⁰¹ *Ibid* at para 72.

⁶⁰² *Ibid* at para 71.

⁶⁰³ *Ibid* at paras 75-76, 82.

⁶⁰⁴ *Ibid* at para 83.

⁶⁰⁵ *Ibid* at para 84.

⁶⁰⁶ RSA 2000, c L-4.

⁶⁰⁷ *Chesterwold*, *supra* note 585 at paras 86-87.

⁶⁰⁸ Nigel Bankes, "GRTAs, Patch Agreements, Indefeasible Title and Collapse Orders", *Ablawg* (September 29, 2017), online: <<https://ablawg.ca/2017/09/29/grtas-patch-agreements-indefeasible-title-and-collapse-orders/>>.

(i.e., the Patch Agreement). However, it was not necessary for the trial judge to rely on the “prior certificate of title” exception (such exception being available only in limited circumstances).⁶⁰⁹

XIII. INTELLECTUAL PROPERTY

As already noted in this paper, there is a significant amount of pending litigation in Alberta commenced by a former seismic company (GSI). In this section of the paper, we consider a recent decision from the ABCA (from which leave to appeal to the SCC was denied), which delineated the scope of GSI’s intellectual property rights in its seismic data. For additional commentary on the pending GSI litigation, see our discussion above at page 26.

A. GEOPHYSICAL SERVICE INCORPORATED v ENCANA CORPORATION⁶¹⁰

1. BACKGROUND

This case involved an appeal of a “common issues trial”, an innovative process used to address two common legal issues arising in at least 25 distinct actions commenced by GSI in Alberta. At issue on appeal was the interpretation of various Canadian federal and provincial statutes and regulations governing GSI’s seismic data acquisition and reporting requirements (i.e., the “regulatory regime”).⁶¹¹

2. FACTS

GSI conducted offshore seismic surveys in the Canadian Atlantic and Arctic.⁶¹² Under the regulatory regime, in exchange for permission to conduct surveys, GSI was required to obtain operating licenses and authorizations from a number of regulators including the NEB, the Canada-Newfoundland and Labrador Offshore Petroleum Board, and the Canada-Nova Scotia Offshore Petroleum Board (collectively, the “Boards”).⁶¹³

The regulatory regime required GSI to provide its seismic data to the Boards.⁶¹⁴ However, once certain privilege periods expire, the Boards permitted third parties to access and copy submitted seismic data in the Boards’ possession.⁶¹⁵ GSI challenged this practice, alleging that the Boards wrongfully permitted third parties to acquire data without licensing it from GSI, contrary to the *Copyright Act*.⁶¹⁶

GSI sued the Boards, oil and gas companies, commercial copying companies, and data resellers in approximately 25 Actions in Alberta, alleging breach of contract, conversion, breach of confidence, and contractual interference.⁶¹⁷ By case management order dated June 2, 2015, the

⁶⁰⁹ *Ibid.*

⁶¹⁰ 2017 ABCA 125 [*Geophysical Service Appeal*]; leave to appeal refused, 2017 CarswellAlta 2545 (SCC).

⁶¹¹ 2016 ABQB 230 [*Geophysical Service Trial*].

⁶¹² *Geophysical Service Appeal*, *supra* note 610 at para 3.

⁶¹³ *Ibid* at para 5.

⁶¹⁴ *Ibid.*

⁶¹⁵ *Ibid* at para 6.

⁶¹⁶ *Ibid* at paras 7-8; RSC 1985, c C-45.

⁶¹⁷ *Ibid* at para 9.

trial judge was directed to decide two issues common to all the GSI actions: (i) whether copyright can subsist in seismic data and (ii) the effect of the regulatory regime on GSI's claims.⁶¹⁸

On April 21, 2016, the trial judge released her decision in the common issues trial. She found that copyright can exist in seismic data, but that the regulatory regime permits disclosure of GSI's seismic materials by the Boards following a defined period of time.⁶¹⁹ GSI appealed the trial judge's finding on the regulatory regime issue to the ABCA; there was no cross-appeal on the copyright issue.

The main issue on appeal was the proper interpretation of s. 101 of the *Canada Petroleum Resources Act*,⁶²⁰ and whether that statute overrode the *Copyright Act* as it relates to seismic data.⁶²¹ GSI argued that its vested rights under the *Copyright Act* could not be divested by the regulatory regime.⁶²²

3. DECISION

GSI's appeal was dismissed; the ABCA concluded that the trial judge's finding of fact and statutory interpretation were rational and correct, and revealed no error warranting appellate intervention.⁶²³ Leave to appeal to the SCC was denied.⁶²⁴

In particular, the ABCA held that the trial judge properly took into account the purpose of the legislative provisions and all relevant context, as required by the modern approach to statutory interpretation. Further, she was correct in determining that the plain and obvious intention of the legislators was to identify, weigh and balance a variety of disparate interests to achieve two policy objectives: (i) attract investment by companies with the capacity to acquire geophysical data about petroleum resources in the challenging frontier and offshore and (ii) regulate dissemination of geophysical data at a pace that would broadly encourage interest and study by the resource and investments industries and academia, in frontier and offshore resource exploration and development for the benefit of all Canadians.⁶²⁵

The ABCA agreed that the regulatory regime confers on the Boards the unfettered and unconditional legal right after expiry of the privilege period to disseminate as they see fit all materials acquired from GSI and collected under the regulatory regime.⁶²⁶ The ABCA expressly rejected GSI's argument that the Boards' statutory right to "disclose" such information after expiry of the privilege period did not include the right to copy such information.⁶²⁷ Instead, the statutory right to "disclose" such information also conferred on these Boards the legal right to grant to others

⁶¹⁸ *Ibid* at para 10.

⁶¹⁹ *Geophysical Service Trial*, *supra* note 611 at para 319.

⁶²⁰ RSC 1985, c 36 (2nd Supp).

⁶²¹ *Geophysical Service Appeal*, *supra* note 610 at para 30. While different statutes were at play in the federal and provincial legislative regimes, the trial judge held that the same policy considerations were involved in drafting those statutes and regulations; as such, her statutory interpretation findings as to s. 101 of the CPRA applied equally to the provincial statutes and regulations. This approach was not challenged on appeal (at para 19).

⁶²² *Ibid* at para 32.

⁶²³ *Ibid* at para 98.

⁶²⁴ 2017 CarswellAlta 2545 (SCC).

⁶²⁵ *Geophysical Service Appeal*, *supra* note 610 at para 81.

⁶²⁶ *Ibid* at para 102.

⁶²⁷ *Ibid* at para 101.

the right to copy and re-copy all materials acquired from GSI and collected under the regulatory regime.⁶²⁸

Finally, the ABCA determined that the trial judge correctly concluded that the *CPRA* is both more specific and more recent legislation than the *Copyright Act*. To the extent there is a conflict between those two statutes, there exists a rational and *intra vires* basis for that conflict.⁶²⁹ GSI's exclusivity to its seismic data ends for all purposes, including the *Copyright Act*, at the expiry of the mandated privilege period.⁶³⁰

4. COMMENTARY

The decision affirms the existing understanding in the oil and gas industry that once the privilege period over seismic data governed by the regulatory regime expires, the owner loses exclusive rights to control the public dissemination of that data. The decision provides certainty to oil and gas companies who obtain seismic data from the Boards, third legal party commercial copy companies, or data resellers. The decision also finally resolves one significant issue arising in a large number of outstanding actions commenced in Alberta.

XIV. BUILDERS' LIENS

Here, we discuss a recent decision from the SKCA, which confirmed that builders' liens do not take priority over other types of security interests, even where registered first. This decision will be of particular interest to those companies that have filed builders' liens, or otherwise hold security interests in, property owned by insolvent oil and gas companies.

A. *NATIONAL BANK OF CANADA v KNC HOLDINGS LTD*⁶³¹

1. BACKGROUND

National Bank considered the priority of certain liens relative to a security interest held by National Bank of Canada ("National Bank"). The liens were filed against the assets of Coast Resources Ltd. ("Coast Resources"), an oil and gas company in receivership, pursuant to s. 22(2) of *The Builders' Lien Act*.⁶³²

2. FACTS

National Bank provided Coast Resources with various loans, amounting to approximately \$5,400,000, plus interest and other charges. It received and registered security interests in Coast Resource's personal and real property in return.⁶³³

⁶²⁸ *Ibid* at para 102.

⁶²⁹ *Ibid* at para 103.

⁶³⁰ *Ibid* at para 104.

⁶³¹ 2017 SKCA 57 [*National Bank*].

⁶³² *Ibid* at para 1; SS 1984-85-89, c B-7.1 [*BLA*].

⁶³³ *Ibid* at paras 6-8.

In March 2014, FTI Consulting Canada Inc. (“FTI”) was appointed as receiver and manager over the assets, undertakings and property of Coast Resources pursuant to the *BIA*.⁶³⁴

FTI was subsequently made aware of several builders’ liens validly registered against the property of Coast Resources.⁶³⁵ It determined that three of these liens, totaling \$142,302, had priority over National Bank’s security because they had been registered first.⁶³⁶

On January 8, 2015, FTI was granted an approval and vesting order which, among other things, ordered the sale of property, including petroleum and natural gas rights and various depreciable assets for \$1,960,000 (the “Order”). The Order provided that the value of the liens (\$490,388.00) be held back pending this determination of priority.⁶³⁷

One of the lienholders brought an application for an order determining the priorities among the parties to the lien fund to the SKQB. The chambers judge concluded that the lienholders’ interests had priority over those of National Bank. The chambers judge considered himself bound by the decision in *Canada Trust Co v Cenex Ltd*,⁶³⁸ which interpreted *The Mechanics’ Lien Act*,⁶³⁹ the predecessor to the *BLA*.⁶⁴⁰

3. DECISION

The SKCA allowed the appeal, finding that s. 22 of the *BLA* did not confer priority on the lienholders over National Bank.⁶⁴¹

The SKCA began its analysis by examining the statutory language of ss. 22(1) and 22(2) of the *BLA*. It found nothing to suggest that s. 22 was concerned with the priority of builders’ liens vis-à-vis other kinds of security interests. Rather, s. 22 reads like an “attachment” provision, not a priorities provision.⁶⁴²

The SKCA then noted that its interpretation of s. 22 was further supported by the overall scheme and organization of the *BLA*, which is broken up into nine parts. S. 22 is found in Part III of the *BLA*, which is entitled “The Lien”. Part VI of the *BLA* is entitled “Priorities”.⁶⁴³

The SKCA expressly declined to follow *Cenex* with respect to s. 22 of the *BLA*, concluding that the case had been wrongly decided. The SKCA disagreed that the legislature should be taken to have endorsed *Cenex* and carried its interpretation of the words of s. 12 of the *MLA* to s. 22 of the *BLA*. It held that in the absence of very clear indication that the legislature intended otherwise, s. 22 should be read as meaning what it says (*i.e.*, it should be read as clarifying the nature of the

⁶³⁴ *Ibid* at para 8.

⁶³⁵ *Ibid* at para 9.

⁶³⁶ *Ibid* at para 10.

⁶³⁷ *Ibid* at para 12.

⁶³⁸ [1982] 2 WWR 361 (SK CA) [*Cenex*]; leave to appeal refused, 1982 CanLII 2664 (SCC).

⁶³⁹ RSS 1978, c M-7 (repealed) [*MLA*].

⁶⁴⁰ *National Bank*, *supra* note 631 at para 2.

⁶⁴¹ *Ibid* at para 4.

⁶⁴² *Ibid* at para 31, 33.

⁶⁴³ *Ibid* at paras 34-35.

assets to which builders' liens attach, not as establishing priorities between builders' liens and other kinds of securities).⁶⁴⁴

4. COMMENTARY

National Bank clarifies the priority between builders' liens and other kinds of security. It confirms that builders' liens will not take priority over other types of security merely because the builders' lien was registered first. In doing so, the SKCA expunged a clearly incorrect precedent and brought Saskatchewan back into line with the other provinces.

XV. BANKRUPTCY AND INSOLVENCY

Finally, we discuss a number of recent bankruptcy and insolvency cases of interest. As one may expect, this has been a particularly active area of litigation in Alberta in the last year. In particular, we will discuss several cases that deal with the rights and obligations of an oil and gas company placed into receivership where that company jointly owns or operates certain of its assets.

A. *SPYGLASS RESOURCES CORP v BONAVISTA ENERGY CORPORATION*⁶⁴⁵

1. BACKGROUND

Spyglass Resources Corp ("Spyglass") and Bonavista Energy Corporation ("Bonavista") jointly owned and operated a sour gas plant, compressors and a series of pipelines and wells in Alberta. Their relationship was governed by a number of agreements, accounting procedures, and operating procedures. Bonavista was the operator under several of these agreements.⁶⁴⁶

Ernst and Young ("E&Y") was appointed as receiver of Spyglass in 2015. E&Y filed an originating application with the ABQB seeking: (i) a declaration that Bonavista was not entitled to claim a right of set-off and withhold funds otherwise due to Spyglass, and (ii) judgment for payment of the withheld funds.⁶⁴⁷

2. FACTS

Spyglass and Bonavista jointly owned and operated a sour gas plant, compressors and a number of pipelines and 57 gas wells in Alberta's West Liege (Fort Mackay) region. Spyglass and Bonavista were parties to a number of agreements, including three joint operating agreements ("JOAs") created in 1986, 1987, and 1997 and governed by the CAPL and the Petroleum Accountants Society of Western Canada ("PASWC"), procedures in place at those relevant times. Bonavista was the operator under all three JOAs.⁶⁴⁸

On May 10, 2011, the AER issued an interim decision directing the shut-in of a number of wells in areas where gas extraction would compromise underlying bitumen reserves (the "Interim Order"). The *Natural Gas Royalty Regulation, 2009*⁶⁴⁹ granted owners of natural gas wells that are

⁶⁴⁴ *Ibid* at para 49.

⁶⁴⁵ 2017 ABQB 504 [*Spyglass*].

⁶⁴⁶ *Ibid* at para 3.

⁶⁴⁷ *Ibid* at para 1.

⁶⁴⁸ *Ibid* at para 3.

⁶⁴⁹ Alta Reg 221/2008.

ordered to be shut-in due to the fact that they are close to bitumen reserves certain gas-over-bitumen royalty credits (“GOB Credits”). Bonavista took action immediately after the Interim Order was issued and completed shut-in of the wells by the end of May 2011. It then prepared and submitted a decommission plan on February 18, 2014. The plan was approved on January 16, 2015.⁶⁵⁰

Since the shutting in of the wells, Bonavista had been receiving GOB Credits. The GOB Credits were provided to operators as a credit against its Crown royalty invoice once abandonment work was complete, rather than in the form of cash. The GOB Credit entitlement was based on Bonavista’s other producing assets.

Bonavista issued a joint interest bill (“JIB”) to Spyglass for all expenses related to the joint operation and detailed the amount of the GOB Credit on the invoice. Bonavista also sent Spyglass a number of mail ballots outlining motions for approval relating to the abandonment costs, to each of which it received no response. The requested under JIBs for decommissioning, reclamation and abandonment costs totaled \$1,342,309.07 between January 2014 and November 2015 (the “Abandonment Costs”). Spyglass disputed these costs and did not pay them.⁶⁵¹

After not receiving payment for any of the Abandonment Costs, Bonavista filed applications with the AER pursuant to s. 30 of the *Oil and Gas Conservation Act*,⁶⁵² requesting that the AER determine the Abandonment Costs and allocate Spyglass its proportionate share. The AER provided this determination.⁶⁵³

E&Y was subsequently appointed as receiver for Spyglass. Counsel for E&Y sent Bonavista a letter demanding payment of the portion of GOB Credits that Bonavista had received in relation to Spyglass’ share in the joint operations (Bonavista had netted \$826,855 in GOB Credits against Abandonment Costs at that point).⁶⁵⁴

On June 3, 2016, the AER issued Abandonment Costs Order No. 2016-01 and later, a re-issued order to Spyglass to pay abandonment costs of \$923,273.27 and a penalty of \$230,818.31. At the time of the decision, Bonavista had not entered the AER’s re-issued order as a judgment at the ABQB.⁶⁵⁵

3. DECISION

E&Y submitted several arguments for the ABQB to consider, and Jones J. rejected each one in turn. As such, the ABQB dismissed E&Y’s application with costs.⁶⁵⁶

The first argument was that Spyglass was not liable for the Abandonment Costs, either because Bonavista failed to get Spyglass’ approval for incurring them or because Bonavista was not required at law to incur them.⁶⁵⁷ The ABQB found that although Bonavista had ignored Spyglass’

⁶⁵⁰ *Spyglass*, *supra* note 645 at para 3.

⁶⁵¹ *Ibid.*

⁶⁵² RSA 2000, c O-6 [*OGCA*].

⁶⁵³ *Spyglass*, *supra* note 645 at para 3.

⁶⁵⁴ *Ibid.*

⁶⁵⁵ *Ibid.*

⁶⁵⁶ *Spyglass*, *supra* note 645 at paras 119-122.

⁶⁵⁷ *Ibid* at para 4.

attempts to organize a meeting to discuss the abandonment program, the costs were nevertheless valid and did not become Bonavista's sole responsibility.⁶⁵⁸ Further, Spyglass had not indicated an intention not to pay the Abandonment Costs in its email communications with Bonavista. The ABQB found that Spyglass did not require the explanation it sought for the expenses prior to becoming liable to pay them.⁶⁵⁹ Finally, the ABQB found that Bonavista did not require Spyglass' approval, as it normally would under one of the agreements, because compliance with regulatory obligations trumped this requirement.⁶⁶⁰

Next, E&Y argued that Bonavista was not required by law to incur the Abandonment Costs. E&Y argued that Spyglass had a contractual right to meet with Bonavista to discuss the abandonment program and that Bonavista should have requested an extension to file the decommission plan with the AER until this happened.⁶⁶¹ The Receiver also argued that Bonavista was not required to decommission and reclaim all assets under the JOA, particularly the booster compressor under the First Functional Unit or some of the pipelines.⁶⁶² Bonavista, however, argued that there was a regulatory requirement to decommission and reclaim these assets, and that even though there was no prescribed regulatory deadline for doing so, the work was not discretionary.⁶⁶³ The ABQB found that Bonavista was entitled, within reason, to decide how best to achieve regulatory compliance and that under the circumstances, Bonavista had acted reasonably.⁶⁶⁴

E&Y then argued that Bonavista was precluded from netting GOB Credits against Abandonment Costs because it had chosen to proceed under the *Oil and Gas Conservation Act*. This was inconsistent with set-off as Bonavista could not receive both remedies.⁶⁶⁵ Bonavista argued that the Abandonment Costs Order merely had the effect of determining that the costs were reasonably incurred and confirming Spyglass' share. It did not preclude Bonavista from exercising contractual rights of recovery. The ABQB agreed with Bonavista.⁶⁶⁶

Next, E&Y argued that Bonavista had no right to contractual set-off of GOB Credits against Abandonment Costs under the CO&O. According to Spyglass, only sums under the CO&O could be set-off against each other, which did not include the GOB Credits.⁶⁶⁷ The ABQB found that while certain clauses under the CO&O limited set-off amounts, they did not prohibit Bonavista from netting receipts and disbursements in connection with the joint operation. The ABQB felt that it would not make sense to not allow parties with numerous agreements governing their operations at play to net costs under the different agreements. Allowing netting in this case gave "business efficacy" to the agreements.⁶⁶⁸

Finally, E&Y argued that Bonavista was not entitled to legal set-off. It argued that the GOB Credits were issued in trust in favour of Spyglass and therefore could not be set-off against the Abandonment Costs. The Court disagreed and stated that while clauses under the relevant

⁶⁵⁸ *Ibid* at para 23.

⁶⁵⁹ *Ibid* at para 24.

⁶⁶⁰ *Ibid* at paras 25-26.

⁶⁶¹ *Ibid* at para 29.

⁶⁶² *Ibid* at para 33.

⁶⁶³ *Ibid* at para 37.

⁶⁶⁴ *Ibid* at para 46.

⁶⁶⁵ *Ibid* at para 49.

⁶⁶⁶ *Ibid* at paras 54-56.

⁶⁶⁷ *Ibid* at para 61.

⁶⁶⁸ *Ibid* at paras 79-81.

agreements and operating procedures referred to money accruing to the joint account as “trust monies”, this did not mean they could only be applied to benefit the non-operator. Rather, the reference to “trust monies” meant that the funds were intended to be protected from potential confiscation by creditors.⁶⁶⁹ The ABQB found that Bonavista had met the test for legal set-off and that Spyglass’s debt had crystallized when it did not make payments in a reasonable time period.⁶⁷⁰ Further, the ABQB found that Bonavista had met the test for equitable set-off as well, as the claim and the counterclaim were “intimately connected.”⁶⁷¹

4. COMMENTARY

This case outlines step-by-step the court’s approach to dealing with arguments over payment and liability under JOAs. As we have seen, energy companies dealing with economic problems in a struggling economy have looked to disclaim liability whether under JOAs, relating to orphaned wells or by cancelling a PPA and deferring it to the Balancing Pool. However, the Court in *Spyglass* was not prepared to let Spyglass escape its obligations under the JOA merely on an administrative technicality. The expenses were valid and although the ABQB commented that Bonavista could have taken better or additional steps to meet with Spyglass to discuss abandonment obligations, this did not suddenly render Bonavista liable for all expenses.

The ABQB also confirmed the interaction of operating procedures, like CAPL or PASWC procedures, legislation, and general contractual remedies, like set-off. It affirmed Bonavista’s argument that by taking action under an operating procedure or statute, it did not disclaim its ability to claim set-off. Additionally, set-off could not become disqualified simply because costs were not precisely aligned under one agreement. According to *Spyglass*, courts must look at the bigger picture of interactions between the parties and consider whether set-off is reasonable in the context of multiple complex agreements and operating procedures.

B. CANSEARCH RESOURCES LTD v REGENT RESOURCES LTD⁶⁷²

1. BACKGROUND

The applicant, Cansearch Resources Ltd. (“Cansearch”), sought a declaration that it had a first priority claim to proceeds from the sale of Regent Resources Ltd.’s (“Regent”) interest in a jointly owned oil and gas facility property. The property was held in trust by the respondent receiver, E&Y. Cansearch also sought an order directing E&Y to distribute proceeds in the amount of Regent’s outstanding indebtedness to it.

Cansearch had initially claimed that it was entitled to these funds under an operator’s lien, but later abandoned that claim and asserted that it was entitled under a possessory lien under the *Possessory Liens Act*.⁶⁷³

2. FACTS

⁶⁶⁹ *Ibid* at para 95.

⁶⁷⁰ *Ibid* at para 102.

⁶⁷¹ *Ibid* at para 115.

⁶⁷² 2017 ABQB 535 [*Cansearch*].

⁶⁷³ *Ibid* at para 2; RSA 2000, c P-19.

Cansearch and Regent jointly owned an oil and gas facility (the “Joffre Facility”). The Joffre Facility was governed by an operating agreement (the “Operating Agreement”), which incorporated the 1999 Petroleum Joint Venture Association Operating Procedure and the 1996 PASC Accounting Procedure.⁶⁷⁴

Cansearch was the operator under the Operating Agreement held a 70.85% interest in each “Functional Unit” of the Joffre Facility, while Regent held a 29.15% interest. “Functional Unit” indicated a “separate component of the facility” and where that was not discernable, all real and personal property of every kind in connection with the operation.⁶⁷⁵ The Operating Agreement also gave Cansearch an operator’s lien for any unpaid expenses relating to Regent’s interest in the Joffre Facility. At no point did Cansearch register this interest under the *Personal Property Security Act*.⁶⁷⁶

Alberta Treasury Branches (“ATB”) extended a mortgage of approximately \$28,000,000 to Regent and the parties entered into a general security agreement (the “GSA”). Cansearch was not a party to the GSA. Regent subsequently stopped making payments to Cansearch and at the time of the hearing, owed \$91,683.64. Regent was then placed into receivership under ATB.⁶⁷⁷

On December 19, 2016, Cansearch brought an application with the ABQB, claiming that it had an operator’s lien over the proceeds from the Joffre Facility, which gave it priority over all other creditors. This application was dismissed and an interim payment of \$15 million was later made to ATB.⁶⁷⁸

On April 20, 2017, E&Y sold Regent’s interest to a third party and held the proceeds of the sale pending a second interim distribution application to ATB.⁶⁷⁹ Cansearch then filed its application seeking to have the ABQB confirm its first priority claim and order the Receiver to satisfy the unpaid expenses out of the proceeds funds realized from the April 20 sale.⁶⁸⁰

3. DECISION

The ABQB dismissed Cansearch’s application, finding that Cansearch had failed to establish that it had a possessory lien over Regent’s ownership interest.⁶⁸¹

Cansearch conceded that its operator’s lien was subordinate to other validly registered security under the *PPSA*. As such, the ABQB quickly dispensed with that issue. The ABQB did, however, comment that operator’s liens are governed by s. 35 *PPSA* and although registration under the *PPSA* is not standard in Alberta, it is possible and advised.⁶⁸² The first-in-time requirements to prove a claim were not met here and Cansearch’s claim was subordinated.⁶⁸³

⁶⁷⁴ *Ibid* at para 6.

⁶⁷⁵ *Ibid* at para 9.

⁶⁷⁶ *Ibid* at paras 11-12; RSA 2000, c P-7 [*PPSA*].

⁶⁷⁷ *Ibid* at paras 16, 18.

⁶⁷⁸ *Ibid* at paras 21-22.

⁶⁷⁹ *Ibid* at para 23.

⁶⁸⁰ *Ibid* at para 24.

⁶⁸¹ *Ibid* at para 3.

⁶⁸² *Ibid* at paras 37, 42.

⁶⁸³ *Ibid* at para 72.

The ABQB then considered Cansearch's claim to a possessory lien due to the nexus between certain of the on-site component equipment at the Joffre Facility and its role as operator. The ABQB considered the rules applicable to possessory liens and found that, unlike an operator's lien, a possessory lien is a non-consensual lien that attaches to specific chattel due to a party's time, effort or money that has enhanced the chattel. The normal priority rules pursuant to s. 32 *PPSA* therefore do not apply to the possessory lien. As such, if Cansearch could establish a possessory lien, then it would likely have priority.⁶⁸⁴

Cansearch argued that it had expended the requisite money, labour and skill in maintaining the Joffre Facility and that the facility had always been under its control. The ABQB did not accept this argument for a number of reasons. First, it found that Cansearch had not pointed to specific chattels to which the lien applied, and that it had also attempted to demonstrate that the lien applied to the Joffre Facility's real property as well. The ABQB found that Cansearch could not demonstrate that it had a lien over every chattel in the Joffre Facility.⁶⁸⁵ Additionally, Cansearch had provided a broad list of what it felt the lien applied to, but there was no evidence to show what was actually inside the Joffre Facility. There was also insufficient evidence to show what was a chattel versus a fixture or an improvement.⁶⁸⁶ Finally, the ABQB found that Cansearch did not appear to consider that their claim for a possessory lien would not cover unpaid expenses, which was what they were claiming in the first place.⁶⁸⁷

4. COMMENTARY

Cansearch confirmed that it is important for operators to register operators' liens under the *PPSA*, even if they are not required to do so. Indeed, it is both possible and advisable in Alberta to register a lien so that it has priority over other security interests that come after it.

Another takeaway is that the scope of a possessory lien must be fully understood if a party is intends to rely on it. As the Court indicated, a possessory lien must be linked to chattel that can be clearly and specifically identified. A party must be able to show why it has a strong claim to that chattel through time, effort or funds expended. As such, a party must ensure that it has gathered sufficient evidence before making a possessory lien claim.

Finally, as noted by others, there is another challenge for operators not discussed in *Cansearch*. Cansearch and Regent were in possession of all the property at all times by virtue of co-ownership. This is not the standard situation for which possessory liens were designed for, whereby A takes possession of B's goods in order to effect improvements. Accordingly, this analysis may not be effective when the two parties are not co-owners.⁶⁸⁸

⁶⁸⁴ *Ibid* at paras 53-54.

⁶⁸⁵ *Ibid* at para 63.

⁶⁸⁶ *Ibid* at paras 64-65.

⁶⁸⁷ *Ibid* at para 68.

⁶⁸⁸ Nigel Bankes, "An Operator of Gas Processing Facilities Does Not Have a Possessory Lien Under the Possessory Liens Act", *Ablawg* (September 20, 2017), online: <<https://ablawg.ca/2017/09/20/an-operator-of-gas-processing-facilities-does-not-have-a-possessory-lien-under-the-possessory-liens-act/>>.

C. FIRENZE ENERGY LTD v SCOLLARD ENERGY LTD⁶⁸⁹

1. BACKGROUND

Firenze involved an application by Firenze Energy Ltd. (“Firenze”) to lift a stay of proceedings in a receivership order. Firenze sought to lift the stay to issue a notice with respect to a change of operatorship of various oil and gas wells, licences and related facilities (the “Joint Facilities”) in which each of Firenze and Scollard Energy Ltd. (“Scollard”) each held a working interest.⁶⁹⁰

2. FACTS

Firenze and Scollard were joint working interest owners in the Joint Facilities. Their relationship was governed by a joint operating, farm-out and royalty agreement, which incorporated the 2007 CAPL Operating Procedure (“CAPL 2007”).⁶⁹¹ Scollard was the operator of the Joint Facilities.⁶⁹²

FTI was appointed as receiver of Scollard. FTI had been marketing Scollard’s working interests in the Joint Facilities, and there was an outstanding third-party offer for certain of the Joint Facilities.⁶⁹³

Firenze asserted that, under clause 2.02A(a) of CAPL 2007, it had the right to replace Scollard as operator due to Scollard’s insolvency. The clause was triggered by service of a notice on the other working interest holders. Firenze therefore asked the ABQB to lift the stay so that it could serve the required notice. Firenze also sought to be named as operator of the Joint Facilities, and a direction that FTI deliver to Firenze all records pertaining to the Joint Facilities.⁶⁹⁴

3. DECISION

The ABQB declined to lift the stay so that Firenze could serve its notice under clause 2.02A(a) CAPL 2007; however, it did lift the stay so that Firenze could serve notice(s) to remove Scollard as operator under clauses 2.02A(g), 2.06 and/or 2.09 CAPL 2007. Firenze was therefore entitled to assume operatorship of all Joint Facilities in which it had a greater than 40% working interest, subject to providing proper notice. FTI was also required to deliver the relevant records pursuant to CAPL 2007.⁶⁹⁵

The ABQB noted that the existence of the contractual right of transfer upon insolvency was not in itself a sufficient basis to lift a stay.⁶⁹⁶ Rather, there must be sound reasons to relieve against a stay imposed pursuant to a receivership order. The court must be satisfied that the party applying to lift the stay is likely to be materially prejudiced by the stay, or that it would be equitable to lift the stay on other grounds.⁶⁹⁷

⁶⁸⁹ 2018 ABQB 126 [*Firenze*].

⁶⁹⁰ *Ibid* at para 1.

⁶⁹¹ CAPL, 2007 CAPL Operating Procedure, online: CAPL
<www.landman.ca/landman_tools/operating_procedure2007.php> [CAPL 2007].

⁶⁹² *Firenze*, *supra* 689 at para 2.

⁶⁹³ *Ibid* at para 4.

⁶⁹⁴ *Ibid* at para 5.

⁶⁹⁵ *Ibid* at para 6.

⁶⁹⁶ *Ibid* at para 12.

⁶⁹⁷ *Ibid* at para 13.

The ABQB found that the determinative factor in this case was that, under CAPL 2007, Firenze had an unconditional right to assume operatorship of the Joint Facilities in which it held more than 40% of the working interest (regardless of the operator's insolvency). Thus, any transfer by FTI of Scollard's interest could not include a transfer of the right to operatorship.⁶⁹⁸ If this were permitted, FTI would be placed in a better position than Scollard, and FTI would be conveying more than the debtor had the right to convey before the receivership.⁶⁹⁹

With respect to the four wells and associated Joint Facilities for which Firenze did not hold more than a 40% working interest, the ABQB was not persuaded that Firenze would be materially prejudiced, or that the other equitable factors merited transferring operatorship to Firenze. Rather, the balancing of those considerations in this case tipped towards maintaining the stay.⁷⁰⁰

4. COMMENTARY

Firenze provides a precedent for future non-operating working interest owners who are faced with operators being placed into receivership and who wish to take over operatorship. As noted by Nigel Banks, *Firenze* therefore challenges the proposition that it will be difficult to replace an operator under CAPL procedures once a receivership order is in place.⁷⁰¹

However, in our view, the ABQB's finding that Firenze was entitled to assume operatorship of all properties in which it held at least a 40% interest was an error. Indeed, *Firenze* is problematic because: (i) Firenze's application did not make any reference to ss. 2.02A(g), 2.06 or 2.09 of CAPL 2007; (ii) the parties did not argue the point; and, (iii) there was no evidence that the operator (or the receiver standing in its shoes) had "assigned or attempted to assign" the powers in respect of operatorship. Accordingly, the triggering event which would permit the exercise of 2.02A(g) had not occurred.

The ABQB appears to have come to this conclusion on the basis that it believed that FTI was "marketing the operatorship" and that Scollard's working interests had been "marketed in a manner that suggests that the right of operatorship would flow to the purchaser". The ABQB concluded that the mere fact that the assets were being marketed for sale subject to all of the contractual rights and obligations which the debtor had was sufficient basis for concluding that FTI was "attempting to assign" operatorship to a third party, thereby justifying the lifting of the stay so as to permit the enforcement of clauses 2.02A(g).

Based on the ABQB's finding that FTI was assigning or attempting to assign Scollard's interest merely by marketing the assets for sale, the ABQB then looked to s. 2.06 of CAPL 2007 for the process required to effect a change of operatorship when the operator is disposing of its working interest (other than to an affiliate) and wishes the purchaser to become the operator. Section 2.06 provides that, in such a scenario, the working interest owners have the right to vote on who will become operator, subject to (among other things), the right of the non-selling owner to become operator if there are only two joint owners and the non-selling owner holds more than a 40%

⁶⁹⁸ *Ibid* at paras 18-21.

⁶⁹⁹ *Ibid* at paras 21, 23.

⁷⁰⁰ *Ibid* at para 46.

⁷⁰¹ Nigel Banks, "Lifting the Stay to Allow the CAPL Operator Replacement Provisions to Run their Course", *Ablawg* (March 9, 2018), online: <<https://ablawg.ca/2018/03/09/lifting-the-stay-to-allow-the-capl-operator-replacement-provisions-to-run-their-course/comment-page-1/>>.

working interest. Based on this language, the ABQB concluded that Firenze had the right to become operator of the assets in which it owned more than a 40% interest.

For receivers and their counsel, in future similar cases (and assuming there is no intention to try and assign rights of operatorship to a third-party purchaser against the wishes of the non-operating working interest owners), the evidence filed on such an application should be very clear that: (i) the receiver is only marketing the operator's interests in the property; (ii) those interests include all of the contractual rights and obligations that the operator has under the applicable joint operating agreement and any other contracts to which the operator is a party; and (iii) the receiver is not marketing or attempting to assign any rights that the operator does not have. It will be interesting to see in future cases what use is made of the decision in *Firenze* if the evidence is clear that the receiver has not (to use the language from CAPL 2007) "assigned or attempted to assign its general powers and responsibilities of supervision and management as operator" under the joint operating agreement to a third-party purchaser.