CELF 2022 Recent Judicial Decisions of Interest to Energy Lawyers

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The second year of the COVID-19 pandemic continued to impact the Canadian economy, commercial activity and the legal system in general. Courts, tribunals, legislatures, law firms, corporations and workers all learned to adapt to remote working, remote hearings, and new ways of living. Within the crisis came opportunities to modernize systems and think about new ways of accessing justice.

This paper summarizes a number of recent judicial decisions of interest to energy lawyers. The authors review key caselaw from several broad areas, including: Indigenous and First Nations law, Contractual interpretation, Environmental law, Tax law, Corporate and Securities law, Bankruptcy and Insolvency, and Constitutional law. In each area of law, the authors will provide insight on the significance and potential implications of these decisions on the Canadian energy industry.

The authors will also canvas more specific topics, such as: economic interests and the Crown's duty to consult; the Canada Revenue Agency's priority ranking in the restructuring process; the ability of Receivers to disclaim an agreement in the bankruptcy process and unilaterally impose go-forward terms on a secured party; the priority of builder's liens in the face of abandonment and reclamation obligations; the application of set-off in relation to joint-interest holdings; the evolution of the "reverse vesting order"; and Provincial control over resources.

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INDIGENOUS & FIRST NATIONS

Indigenous law issues continue to arise on multiple fronts in Canada – in proceedings at Federal Court, at the Provincial Courts, and in front of Regulatory Tribunals. This past year saw some interesting decisions arising from the special consideration given to Indigenous economic interests and developments affecting Indigenous land. Additionally, the Supreme Court of Canada ("**SCC**") opened the door to allow pre-judgment funding for impecunious First Nations who wish to pursue their rights through lengthy and costly litigation.

Yahey v British Columbia, 2021 BCSC 1287

Background[2]

Yahey marked the first time a court has found treaty infringement based on the cumulative effects of development within a First Nation's territory. In answering the question of infringement, the British Columbia Supreme Court (the "**BCSC**") was required to consider whether the impacts caused by the cumulative effects of multiple projects could ground a treaty rights infringement action.

Facts

Treaty 8 was made between the Crown and Indigenous signatories in 1899, and the ancestors of the plaintiff First Nation, Blueberry River First Nations ("**Blueberry**"), adhered to Treaty 8 in 1900. Although the province of British Columbia ("**BC**") was not a signatory to Treaty 8, it holds the same duties and benefits of the treaty along with Canada.[3]

Blueberry argued that, over the course of time, the cumulative impacts from multiple provincially-authorized industrial developments in the territory, including forestry, agriculture and oil & gas developments, breached Treaty 8 and infringed its rights.[4] Blueberry argued these cumulative effects had impacts on moose populations,[5] polluted their land and water,[6] affected food sources, and limited its peoples' ability to move freely in Blueberry's traditional territory, among other things.[7]

Both parties agreed *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*[8] ("***Mikisew***") identified the relevant test for alleged treaty right infringements but were at odds as to its interpretation and application.[9] Blueberry's position was that the test merely requires establishing there is no *meaningful* right remaining, not whether no meaningful rights remain *at all*,[10] whereas the effect of BC's position was that establishing treaty infringement requires demonstrating that *no* rights remain at all.[11] BC also forwarded an argument to the effect that exercising its duty to consult could be relied on to avoid a finding of infringement.[12]

Decision

The Court rejected BC's position on both fronts, stating that "[i]t cannot be that the consultation duty outlined in *Mikisew* precludes a First Nation from bringing an infringement claim in appropriate

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[2] 2021 BCSC 1287 [*Yahey*].
[3] *Ibid* at paras 19-20.
[4] *Ibid* at para 3.
[5] *Ibid* at para 357.
[6] *Ibid* at para 358
[7] *Ibid* at para 359.
[8] 2005 SCC 69 [*Mikisew*].
[9] *Yahey, supra* note 2 at paras 446-447.
[10] *Ibid* at para 491.
[11] *Ibid* at paras 494-498, 503.
[12] *Ibid* at paras 497-498.

circumstances, or that it has to wait until it has no ability to exercise rights to do so… [BC's] reliance on the duty to consult, and its insistence that an action for infringement requires proof of *no* meaningful right to hunt, fish or trap, does not address circumstances where impacts are at a 'tipping point' beyond which the right to meaningfully exercise treaty rights is lost."[13] Rather, a more nuanced and contextual approach is required.[14]

Speaking specifically to the cumulative effects of development on treaty rights infringements, the Court pointed to the SCC's decision in *Mikisew* as well as the Alberta Court of Appeal's ("**ABCA**") decision in *Fort McKay First Nation v Prosper Petroleum Ltd*[15] for the notion that cumulative effects of previous developments must be considered in the determination.[16] If such cumulative effects build to a "tipping point", after which the exercise of treaty rights either becomes less meaningful or impossible, treaty right infringement may be found.[17] Further, when considering the alleged infringement, the governmental scheme can be considered as a whole, as well as the history of development on the lands and historical use and allocation of the resources and the impacts this has caused.[18]

The Court canvassed several prior decisions dealing with treaty rights infringements in determining the requisite degree of cumulative effects necessary to establish infringement, holding that, in its view, all these cases were "trying to get at the idea of rights being diminished in a meaningful or significant way. [The Court found] it appropriate to consider whether there has been an infringement of Blueberry's treaty rights by considering if there has been a significant or meaningful diminishment of the rights".[19]

Ultimately, the Court accepted data evidencing that, as of 2016, 84% of Blueberry's traditional territory was within 500 meters of an industrial disturbance and, as of 2018, 91% of its traditional territory was disturbed when a 500-metre buffer was applied. This data was noted as important contextual information in the determination.[20] The Court thus declared, among other things, that the extent of BC's causing and/or permitting the above cumulative impacts of industrial development on Blueberry's treaty rights resulted in insufficient and inappropriate lands in its traditional territory to allow for the meaningful exercise of its treaty rights. Since BC did not advance a justification defence, BC thus infringed Blueberry's treaty rights to "meaningfully diminish" Blueberry's ability to exercise such rights in its traditional territory.[21]

Shortly after this decision, BC indicated it will not appeal, but rather intends to work and consult with Blueberry moving forward.[22]

Commentary

Blueberry's success in preventing future industrial development authorizations in its territory in the *Yahey* decision is particularly important for businesses operating in the natural resource development sphere on treaty lands. Not only has it lowered the threshold to establish treaty rights infringements, the *Yahey* decision is a firm statement that such businesses must not only consider the isolated impacts of their individual projects on treaty rights, but also the cumulative effects their individual projects may have when added to the aggregate of other historical developments in the same area up to that point in time. A necessary consideration also flowing from this judicial development is the importance of the duty to consult and accommodate. That said, BC did not provide a justification of infringement, and Blueberry had received several million dollars through Resource Management Agreements with BC from 2006-

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[13] *Ibid* at paras 501-502.
[14] *Ibid* at para 515.
[15] 2019 ABCA 14.
[16] *Yahey, supra* note 2 at paras 516 and 520.
[17] *Ibid* at para 517.
[18] *Ibid* at para 521.
[19] *Ibid* at para 529.
[20] *Ibid* at paras 905-906.
[21] *Ibid* at para 1884.
[22] "Attorney general's statement on Yahey v. British Columbia" (July 28, 2021), online: *Government of British Columbia* <https://news.gov.bc.ca/releases/2021AG0117-001488>.

2013,[23] so it is likely we will see developments in defences to justify treaty rights infringements moving forward.

***Ermineskin Cree Nation v Canada*, 2021 FC 758**

Background[24]

The *Ermineskin* decision was a Federal Court ("**FC**") case concerning the Crown's duty to consult in the context of a Designation Order affecting a project proponent's natural resource development project, where said proponent was also party to an impact benefits agreement (an "**IBA**") with an interested Indigenous group.

Specifically, the Court was required to consider whether an IBA containing a provision "compensating" the Indigenous group signatory for negatively impacted economic interests was capable of triggering the Crown's duty to consult.

Facts

The Minister of Environment and Climate Change (the "**Minister**") issued a designation order (the "**Designation Order**") under section 9(1) of the federal *Impact Assessment Act* (the "***IAA***"),[25] which designated certain phases of a coal mine expansion project and underground test mine (the "**Coal Mine Project**"), proposed by Coalspur Mines (Operations) Ltd. ("**Coalspur**").[26]

Previously, Ermineskin Cree Nation ("**Ermineskin**") entered into two IBAs respecting the Coal Mine Project with Coalspur, under which Coalspur was to provide valuable economic, community and social benefits to Ermineskin. Both IBAs were intended to compensate Ermineskin for potential impacts caused by natural resource development on the ability of Ermineskin members to exercise Indigenous rights in their traditional territory.[27]

The Designation Order had the immediate effect of prohibiting Coalspur from doing anything in connection with carrying out the phases of the Coal Mine Project subject to the Designation Order.[28] Further, the Minister did not consult with or even give notice to Ermineskin before making the Designation Order.[29]

Ermineskin applied for judicial review seeking to quash the Designation Order, arguing it would adversely impact Indigenous and treaty rights including economic opportunities created through its contractual relationship with Coalspur under the IBAs. Specifically, Ermineskin argued the Designation Order would "delay, lessen, or eliminate Ermineskin's economic interest" in the Coal Mine Project phases.[30] The Minister's position was that such loss or economic, social and community benefits are not an adverse impact related to an Indigenous or Treaty right and also do not relate to Indigenous title to the land that may be developed, nor to the ownership of the coal resource.[31]

Decision

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[23] *Yahey, supra* note 2 at para 1213.
[24] 2021 FC 758 [*Ermineskin*].
[25] SC 2019, c 28, s 1 [*IAA*].
[26] *Ermineskin, supra* note 24 at para 1.
[27] *Ibid* at para 5.
[28] *Ibid* at paras 16-18, 76.
[29] *Ibid* at para 10.
[30] *Ibid* at para 6.
[31] *Ibid* at para 6.

The FC granted Ermineskin's application and disagreed with the Minister's position that economic loss is not an adverse impact related to Indigenous or Treaty rights. The FC held that a generous and purposive approach must be given to the constitutional doctrine of honour of Crown and its corresponding duty to consult.[32]

One of the most significant holdings coming out of the *Ermineskin* decision is that, in the FC's view, the IBAs and, more specifically, the "valuable" economic rights and benefits contained therein, were closely related to and derivative from Indigenous rights.[33] Specifically, the FC noted a "key issue" in arriving at this result was whether the Minister had a duty to consult with Ermineskin, which is subject to the three prong test identified in *Haida Nation v British Columbia (Minister of Forests)*[34] ("***Haida Nation***").[35] The Minister argued the Designation Order did not trigger the third prong of the duty to consult test articulated in *Haida Nation*, which asks whether there is a "possibility that the Crown conduct may affect the Indigenous claim or right.[36]

The FC disagreed with the Minister, stating "…jurisprudence says the duty to consult may be engaged when broader economic interests may be adversely impacted". The FC concluded the IBAs were examples of such "economic interests" closely related to and derivative from Indigenous and Treaty rights,[37] as they were designed to "compensate" Ermineskin for the loss of its Indigenous and Treaty rights.[38] Not only was there a possibility of these interests being impacted in the present instance, but the FC held the negative impact already occurred.[39] The FC ultimately concluded the Minister breached its duty to consult with Ermineskin, as it had not provided notice of nor had the benefit of any consultation before the Designation Order was issued. The matter was remanded for reconsideration.[40] The decision is now under appeal to the Federal Court of Appeal ("**FCA**").

Commentary

The *Ermineskin* decision dispels any lingering notion that Indigenous rights must be in conflict with a project proponent's interests to trigger the duty. The Crown's duty to consult extends beyond merely those Indigenous stakeholders opposed to resource development, but also to those who stand to benefit from such projects. *Ermineskin* also affirms that negatively impacted economic interests of First Nations stakeholders in natural resource development projects can trigger the Crown's duty to consult. More importantly, *Ermineskin* has expanded the basis for establishing a negative impact on economic interests to contractual IBAs with project proponents.

What this means practically is that industry proponents subject to regulatory permits, licences, approvals, orders, etc. will be wise to consider how any existing or prospective IBAs entered into relating to their resource develop projects may factor into the ultimate validity of such regulatory instruments. This is especially true where said IBAs contain "economic interest" compensation clauses and where Indigenous group signatories have not been given notice or consulted in relation to the same.

***Anderson v Alberta*, 2022 SCC 6**

Background[41]

[32] *Ibid* at paras 7-8.
[33] *Ibid* at para 9.
[34] 2004 SCC 73 [*Haida Nation*].
[35] *Ermineskin, supra* note 24 at para 94.
[36] *Ibid* at paras 100-103.
[37] *Ibid* at para 107.
[38] *Ibid* at para 105.
[39] *Ibid* at para 106.
[40] *Ibid* at paras 132-133.
[41] 2022 SCC 6 [*Anderson*].

In the *Anderson* decision, the SCC clarified the “impecuniosity requirement” of the advance costs test when dealing with First Nation governments. The impecuniosity requirement, generally speaking, requires a First Nation to “genuinely” demonstrate that it is unable to pay for the proposed litigation – this clarification by the SCC may have widespread impacts on access to justice for First Nation communities.

Facts

Beaver Lake Cree Nation ("**Beaver Lake**") is a First Nation located near Lac La Biche, Alberta. Beaver Lake brought forward a claim against the Government of Canada ("**Canada**") and the Government of Alberta ("**Alberta**") pursuant to section 35 of the *Constitution Act, 1982*[42] alleging that Canada and Alberta had improperly allowed Beaver Creek's traditional lands to be "taken up" for industrial and resource development and thereby compromised Beaver Creek band members' ability to pursue their traditional way of life. During the litigation, Beaver Creek brought an application for advanced costs.[43]

In order to be awarded advanced costs, an applicant must demonstrate impecuniosity, present a *prima facie* meritorious case, and raise issues of public importance. The parties agreed that the latter two requirements were met in this case; however, they disagreed on whether Beaver Lake should be considered "impecunious." Although Beaver Lake had access to more than $3 million in unrestricted funds and ongoing revenue that could be used to pay for its legal fees, Beaver Lake argued that these funds had to be used to address other pressing needs within the community and therefore, it should still be considered impecunious.[44]

The initial case management judge determined that Beaver Lake had met the test for impecuniosity. She noted that although Beaver Lake had access to funds, the First Nation experienced "substantial deficits in house and infrastructure and (…) high levels of unemployment and social assistance."[45] She found that there were pressing needs that required Beaver Lake's existing funding and the First Nation should therefore be considered impecunious. The ABCA reversed the case management judge's decision, noting that the fact that Beaver Lake had more than $3 million in unrestricted funds alone meant that it did not meet the legal test. The ABCA found that only spending on "basic necessities" could cause an applicant to be deemed impecunious despite having access to funds. The ABCA found there was no evidence suggesting that Beaver Lake would have been forced to choose between spending on basic necessities and pursuing the litigation.[46]

Decision

In deciding this appeal, the SCC established the following rule: in assessing whether a First Nation government has sufficient resources to pay for litigation after meeting its pressing needs, a court must be able to (1) identify the applicant's pressing needs; (2) determine what resources are required to meet those needs; (3) assess the applicant's financial resources; and (4) identify the costs of funding the litigation.[47] The applicant bears the onus to prove that it cannot afford to pay its legal fees due to other pressing needs.[48]

The SCC found that pressing needs should not be confined to only the bare necessities of life, such as adequate housing, a safe water supply, or basic health and education services – instead, the requirement should be interpreted from the perspective of a First Nation government. Courts should consider the context in which a First Nation government sets priorities and make financial decisions, recognizing that a First Nation government is best situated to assess the needs of their community. Spending to improve standards of living, to provide enhanced health and education services, or to promote cultural survival

[42] S 35, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.
[43] *Anderson, supra* note 41 at para 2.
[44] *Ibid* at para 6.
[45] *Ibid* at para 13.
[46] *Ibid* at para 14.
[47] *Ibid* at para 41.
[48] *Ibid* at para 42.

could all potentially qualify. The SCC noted that even allocating funds to construct a skating rink, for instance, could potentially be considered a pressing need if the First Nation adduces evidence of how an urgent youth crisis in the community has led it to promote physical health and outdoor activities.[49]

An applicant must adduce evidence of the cost of meeting its pressing needs and it must also adduce evidence showing that existing resources are indeed being spent on addressing the pressing needs. An applicant must demonstrate that it made sufficient efforts to obtain alternative funding. Additionally, they must also submit a detailed litigation plan so that the court is able to assess the costs the applicant will incur in pursuing litigation.[50]

Applying this to the case at hand, the SCC determined that the case management judge had erred in her impecuniosity analysis. The SCC noted that the case management judge did not make findings regarding the estimated costs of Beaver Lake's pressing needs, or the extent to which those costs were not covered by Beaver Lake's existing financial resources. There was also no evidence as to how those resources were being applied to meet those pressing needs. The SCC further noted that Beaver Lake had access to several other potential revenue streams that it had not sufficiently proven it could not access to meet its pressing needs.[51] As a result, the SCC found that the appeal should be allowed and the matter should be remitted back to the Alberta Court of Queen's Bench ("**ABQB**") for consideration in light of the clarification offered in this decision.[52]

Commentary

Anderson clarifies the test for impecuniosity when dealing with First Nation applicants and arguably lowers the threshold that an applicant must meet. By determining that, in the context of First Nation governments, "pressing needs" can be interpreted to mean more than the "basic necessities of life," it is reasonable to expect that there will be an increase in the number of applications for advance costs and that these applications will have a greater likelihood of success. Parties dealing with potentially impecunious First Nations will have to factor the possibility of advance costs being awarded into their litigation cost analyses.

Enbridge Gas Inc., Re, **2021 CarswellOnt 13677**

Background[53]

The Ontario Energy Board (the "**OEB**") considered whether carbon pricing charges can be charged to Indigenous customers purchasing natural gas.

Facts

The federal *Greenhouse Gas Pollution Pricing Act*[54] created a fuel charge payable by Enbridge Gas Inc. ("**Enbridge**") on the amount of natural gas delivered to its customers, as well as carbon pricing obligations related to Enbridge's own use of natural gas. The OEB responded by ordering that Enbridge customers be billed charges based on the volume of their gas consumption as well as charges to recover the carbon pricing costs associated with Enbridge's use of natural gas. These two charges are referred to collectively as the Federal Carbon Pricing Program Charges (the "**FCPP Charges**").[55] The Chiefs of Ontario and Anwaatin Inc. (collectively, the "**Indigenous Applicants**") challenged the application of the

[49] *Ibid* at paras 43-44.
[50] *Ibid* at paras 45-46, 50-51.
[51] *Ibid* at paras 54, 57, 64-66.
[52] *Ibid* at para 70.
[53] 2021 CarswellOnt 13677 [*Enbridge*].
[54] SC 2018, c 12, s 186 [*Indian Act*].
[55] *Enbridge, supra* note 53 at paras 1-2.

FCPP Charges to Indigenous customers, raising arguments based on the *Indian Act*[56] and section 35 of the *Constitution Act, 1982*.[57]

Decision

The OEB did not accept the Indigenous Applicants' arguments and found that Indigenous customers should not be exempt from the FCPP Charges. First, the OEB found that the FCPP Charges are not taxes, but regulatory charges and are therefore not covered by section 87 of the *Indian Act* which provides that "the interest of an Indian or a band in reserve lands or surrendered lands" and "the personal property of an Indian or a band situated on a reserve" are exempt from taxation.[58]

Second, the OEB also found that there was no existing treaty or Indigenous right that was infringed by collection of the FCPP Charges. Receiving natural gas service from a regulated utility is not an ancestral practice or tradition, and neither is receiving such a service at a particular price.[59]

Lastly, the OEB found that additional arguments raised by the Indigenous Applicants related to section 89 of the *Indian Act*, the honour of the Crown, the United Nations Declaration of the Rights of Indigenous Peoples, and the OEB's mandate to fix just and reasonable rates, do not support the exemption of Indigenous customers.[60]

Commentary

This decision highlights the important distinction between a "tax" and a "regulatory charge." The *Indian Act* will not serve to insulate First Nations people from being subject to valid regulatory charges. This clarification from the OEB will reduce costs for gas suppliers subject to this regulatory scheme, as well as for any other companies that may become subject to comparable regulatory schemes in the future.

[56] RSC 1985, c I-5.
[57] S 35, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.
[58] *Enbridge, supra* note 53 at paras 53-60; *Indian Act*, *supra* note 54, s 87.
[59] *Enbridge, supra* note 53 at paras 73-80.
[60] *Ibid* at paras 60-62, 89-93, 101, 106-109.

BANKRUPTCY, INSOLVENCY & RECEIVERSHIP

After a rush of insolvency filings early in the pandemic, corporate insolvency filings slowed in 2021. Nevertheless, many important cases worked their way up through the appellate Courts, including some highly anticipated decisions dealing with tax and priority issues, set-off and the increasingly popular restructuring vehicle known as the Reverse Vesting Order. We are still seeing the ripple effects of the 2019 SCC decision in *Orphan Well Association v Grant Thornton Ltd.*[61] ("***Redwater***"), as Courts continue to deal with abandonment and reclamation obligations left behind by insolvent companies.

***Yukon (Government of) v Yukon Zinc Corporation*, 2021 YKCA 2**

Background[62]

The Government of Yukon assessed a mining company with a $35 million security deposit to cover future abandonment costs. When the mine was subsequently put into receivership, the Court-Appointed Receiver had to determine priorities between a secured lender, and the government's claim. The Yukon Court of Appeal (the "**YKCA**") considered the priority issues surrounding environmental claims, and the ability of the Receiver to issue a "partial disclaimer" of a master equipment lease.

Facts

The Wolverine Mine, a zinc-silver-lead mine owned by Yukon Zinc Corporation ("**YZC**") came into operation in 2012, but only operated for 3 years until closing and filing for creditor protection under the *Companies Creditors Arrangement Act (*the *"**CCAA**").*[63] In 2017, a significant flood occurred at the inactive mine, causing the government to increase a security deposit for reclamation costs from $10.5 million to $35 million. In 2018, Welichem Research General Partnership ("**Welichem**") loaned the company $8.5 million, the proceeds of which were used (in part) to buy out a lease of mining and construction equipment, which equipment was then leased back to YZC under a Master Lease Agreement. The Yukon Government subsequently obtained an order for a Court-Appointed Receiver.[64]

The Receiver reviewed the mine's assets and determined that only 79 pieces of equipment were necessary for the care and maintenance of the mine. The Receiver subsequently issued a notice of disclaimer with respect to the Master Lease Agreement, carving out the 79 pieces of equipment they deemed essential. The Receiver's disclaimer notice stated that the Receiver retained the right to use the specified equipment at a specified monthly rental rate.[65]

The Chambers Judge ruled that the disclaimer provisions in the *Bankruptcy and Insolvency Act*[66] (the "***BIA***") and in the Receivership Order had a binary choice: to either disclaim or affirm the contract in question. In essence, the Receiver was attempting a "partial disclaimer", which was framed as a permissible carve out of its general disclaimer powers. The Court determined that the Receiver was entitled to keep the essential pieces of equipment through its general powers under section 243 of the *BIA* to "take any other action the Court considers advisable" and to "preserve and protect" the assets. Welichem appealed this decision.[67]

The Chambers Judge also held that the Yukon Government's claim for unpaid security deposits did not meet the standard of a "provable claim" under insolvency statutes. Finally, the Chambers Judge concluded that the Yukon Government's claim did not meet the definition of a "secured claim" under

[61] 2019 SCC 5 [*Redwater*].
[62] 2021 YKCA 2 [*Yukon Zinc*].
[63] RSC 1985, c C-36.
[64] *Yukon Zinc, supra* note 62 at paras 11-16.
[65] *Ibid* at paras 20-22.
[66] RSC 1985, c B-3.
[67] *Yukon Zinc, supra* note 62 at paras 33-37.

section 14.06(7) of the *BIA* and that the mineral claims in question could be considered "real property" for the purpose of that analysis. The Yukon Government appealed these rulings.[68]

Decision

The YKCA confirmed that the Yukon Government's claim was not a "claim provable" under the insolvency statutes, as the abandonment costs had not yet been incurred, and there was no collection mechanism to enforce payment.[69] Similarly, section 14.06(7) of the *BIA* was not applicable to create a secured claim over the assets. It was incorrect to apply a "sufficiently certain" analysis to this provision – on its plain reading, the section only applied to costs which had already been incurred on the date of bankruptcy.[70] The YKCA did overturn the Chambers Judge's decision with respect to whether the security interest created by 14.06(7) applied to mineral leases. In the view of the appellate Court, the relevant mineral leases are only "interests in land" and not "real property", a distinction which is relevant due to the specific wording of this provision.

With respect to the partial disclaimer issue, the YKCA affirmed there was no partial disclaimer in this case – it was a full disclaimer, coupled with an appropriation by the Receiver of certain essential leased items for its use.[71] The YKCA found that this "appropriation" by the Receiver was inappropriate, and beyond the scope of its powers. The general powers given to a Receiver do not generally extend to appropriation of third-party property. Although the Court had sympathy for the Receiver's position, it noted that "receivership is not a licence to ignore rules and insolvency professionals are bound by and must comply with valid provincial laws during receivership."[72]

Commentary

The Yukon Government sought leave to appeal this decision to the SCC, which leave was denied on November 4, 2021. As a result, the Yukon Government is an unsecured creditor with respect to it's claim for the unpaid security deposit and has lost its priority battle with the secured lender. This is a rather surprising result, given the SCC's elevation of abandonment and reclamation obligations in the 2019 *Redwater* decision, but is primarily based on the wording of the Yukon *Mining Ac*t and the definition of a "provable claim" under the *BIA.*

With respect to the disclaimer issue, this decision is an important statement on the extent of a Receiver's powers, especially when dealing with third party rights.

***Canada v Canada North Group Inc.,* 2021 SCC 30**

Background[73]

In this highly anticipated and closely decided ruling, the SCC confirmed that in the context of a *CCAA* restructuring, the Canada Revenue Agency's (the "**CRA**") claims for statutory deemed trusts arising from unremitted source deductions cannot trump Court-ordered security interests.

Facts

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[68] *Ibid* at paras 28-32.
[69] *Ibid* at paras 66-68.
[70] *Ibid* at paras 77-85.
[71] *Ibid* at para 140.
[72] *Ibid* at para 144.
[73] 2021 SCC 30 [*Canada North*].

Canada North Group Inc. (“**Canada North**”) had a business of supplying remote work camp facilities, largely to the oil and gas industry in Alberta. In 2017, it filed for creditor protection under the *CCAA*. As is regularly done in insolvency proceedings, the ABQB granted certain “super-priority” charges over the assets of Canada North, in priority to existing secured interests. These “super-priority” charges, or “priming charges” included a charge in favour of Business Development Bank of Canada, who provided Debtor-in-Posession (“**DIP**”) interim financing to Canada North during the restructuring, and a charge to secure the fees of the Monitor and legal counsel. At the time of the *CCAA* filing, Canada North owed the CRA over $1 million for unremitted source deductions.[74]

The *Income Tax Act*[75] (and other fiscal statutes) contains a provision by which unremitted source deductions are subject to a “deemed trust”. The CRA argued that their deemed trust rights took them outside the regular priority scheme for creditors, and in fact, they were not a creditor at all, but held a property interest outside the insolvency estate. Therefore, their deemed trust claims trumped the rights of all other creditors, and of any priming charges.

The Chambers Judge dismissed the CRA’s application and confirmed the priority of the priming charges. On appeal, the ABCA upheld the Chamber’s Judge decision, but with a strong dissent opinion from Justice Wakeling, which relied on a plain reading of the relevant statutes which state that the CRA is the “beneficial owner” of amounts subject to a deemed trust.[76]

The CRA appealed to the SCC and several intervenors were granted status to make submissions at the hearing. The respondents and intervenors argued that without a confirmed priority for “priming charges”, it would be difficult to successfully restructure insolvent corporations.

Decision

By a slim majority, and with four separate reasons, a 5-4 majority of the SCC dismissed the CRA’s appeal. In the first set of reasons, Justice Côté noted the broad, remedial purpose of the *CCAA*, and held that the deemed trust claims are neither a property interest nor a security interest but had to be understood on their own terms. The deemed trust claims could be subordinated to priming charges under the general powers of the Court in section 11 of the *CCAA*. The power to subordinate a deemed trust claim to priming charges must be exercised sparingly, and only in appropriate circumstances (i.e., if a professional or lender will not act without a priming charge, or when the *CCAA* proceedings are not simply a liquidation process).[77]

In the second set of reasons, Justice Karakatsanis concurred with Justice Côté in the dismissal of the CRA appeal and expanded on the circumstances in which it would be appropriate for a Court to grant priming charges ahead of the CRA’s deemed trust claim.[78]

Two dissenting opinions noted the clear wording of the relevant statutes which give absolute priority to deemed trusts over all security interests, notwithstanding the *CCAA*.[79]

Commentary

This case was closely followed by the insolvency community, as the fear was that if the CRA could assert a deemed trust claim ahead of all other priming charges (including professional fees and interim lending), it could create a chilling effect on restructurings in Canada. Unremitted source deductions are sometimes seen as a “piggy bank” for insolvent corporations who collect, but do not remit from their payroll, in order to temporarily solve some of their cash flow issues. Directors and officers can be personally liable for

[74] *Ibid* at paras 5-6.
[75] RSC 1985, c 1 (5th Supp).
[76] *Canada North, supra* note 73 at paras 9-11, 13-15.
[77] *Ibid* at paras 17-74.
[78] *Ibid* at paras 96-182.
[79] *Ibid* at paras 183-265.

failure to make such remissions. The CRA has aggressively asserted its rights under the relevant statutes, and there had been mixed caselaw as to whether such rights are in the nature of a "property right" or a "security interest".

Although the CRA may have (narrowly) lost this battle, this ruling only applied to restructurings under the *CCAA*, and not other types of restructurings, such as proposals under the *BIA*. It remains to be seen how the CRA continues to assert their claims, and how Courts respond when granting priming charges in the face of a CRA deemed trust. Counsel are cautioned to make sure that the CRA is properly notified and served with any application seeking priming charges, even if it is not clear at the time whether there are any unremitted source deductions.

***Manitok Energy Inc (Re),* 2022 ABCA 117**

Background[80]

The 2019 *Redwater* decision continues to be reviewed and interpreted in order to determine the priorities between creditors and stakeholders in an insolvency scenario. This case specifically dealt with the priority battle between builder's liens and the Alberta Energy Regulator's ("**AER's**") claims for abandonment and reclamation obligations.

Facts

Manitok Energy Inc.'s ("**Manitok's**") Receiver (the "**Receiver**"), who had been appointed prior to the release of the *Redwater* decision, applied to the ABQB for directions in an uncertain post-sale situation – it had sold some of the assets under a sale approval and vesting order ("**SAVO**"), and held the sale proceeds (subject to a holdback for the lienholders). However, the Receiver could not distribute those proceeds as it did not know who had priority rights to the funds – the AER, or the builders' lien claimants.

The respondent, Prentice Creek Contracting, provided equipment and services to Manitok related to the reclamation and cleanup of certain oil and gas well sites. The respondent, Riverside Fuels, provided fuel and lubricants to Manitok. Both filed builders' liens for their unpaid work prior to Manitok's bankruptcy on February 20, 2018.

Manitok had some assets that had remaining value, but it also had many assets with no remaining net value. After identifying some of the valuable assets, the Receiver arranged for their sale. Despite the various sales made by the Receiver, Manitok's end-of-life obligations still exceeded the proceeds of its estate. The Receiver intended to "disclaim" those assets so that any reclamation obligations would fall on the Orphan Well Association.

The Chambers Judge distinguished the facts of *Manitok* from those in *Redwater* on the basis that the AER had not taken any steps to issue an Abandonment Order until *after* the assets had been sold.[81] Therefore, the Receiver was not required to use sale proceeds to fulfill the end-of-life obligations because they were no longer part of the Manitok estate, and the new licensee assumed the obligations. The ABQB ruled in favour of the builders' lien claimants and held that they were entitled to be paid out of the proceeds of the sale in priority to other claims. The AER appealed the decision.

Decision

The ABCA disagreed with the lower court's decision. It found that unless the sale proceeds of the valuable assets are available to satisfy the abandonment and reclamation obligations, they can never be

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[80] 2022 ABCA 117 [*Manitok ABCA*].
[81] *Manitok Energy Inc (Re)*, 2021 ABQB 227.

satisfied.[82] It noted that the "whole point of *Redwater*, however, is that the proceeds of the sale of the valuable assets must be applied towards reclamation of the worthless orphaned assets."[83]

The ABCA confirmed that assets in the estate do not cease to be available to discharge end-of-life obligations because they are sold by the Receiver and converted to cash,[84] and that the sale proceeds were part of the Manitok estate, even though they were held in an interest-bearing trust account.[85] Under the SAVO, the proceeds were to specifically stand in place of the physical assets that had been sold, without affecting in any way the priorities and claims of various claimants.

The ABCA held that there is no distinction to be made between various kinds of assets in the bankrupt estate; all assets of an oil and gas company are to be treated as a "package".[86] It then clarified that end-of-life obligations are inherent in oil and gas properties from the minute extraction of the resources commences.[87] The ABCA explained that the public duty on the Receiver to use the assets of the estate to discharge the obligations are imposed by statute on all licensees and exist independently of any enforcement action taken by the AER.[88]

As such, the appeal was allowed, and the ABQB decision was set aside. The ABCA ruled that although the quantum of the two builders' lien claims was relevant to setting the quantum of the holdback, the end-of-life obligations must be satisfied by the Receiver from Manitok's estate in preference to the builders' lien claims.[89]

Commentary

Manitok ABCA clears up some of the uncertainty arising from the *Redwater* decision and reaffirms the priority of abandonment and reclamation obligations of a licensee. A builders' lien is a powerful tool used by many companies in the oilfield services sector. However, the priority of a valid registered lien may still be defeated by claims from the AER for abandonment and reclamation. Oilfield suppliers and service companies should carefully consider the extent of their lien rights, especially when working on lands which are subject to abandonment and reclamation obligations.

***Harte Gold Corp. (Re),* 2022 ONSC 653**

Background[90]

Over the last two years, Reverse Vesting Orders ("**RVOs**") have become increasingly popular in insolvency proceedings. This decision is the new leading case on RVOs and sets out the legal test for when it is appropriate for a Court to grant approval of such a process.

Facts

Harte Gold Corp. ("**Harte Gold**") operated the Sugar Loaf gold mine near Sault Ste. Marie, Ontario, with assets valued at over $163 million, and liabilities exceeding $166 million. Since 2019, it had worked with its lenders and restructuring advisors to find new capital through a potential sale. In late 2021, its priority

[82] *Manitok ABCA, supra* note 80 at para 29.
[83] *Ibid* at para 30.
[84] *Ibid* at para 32.
[85] *Ibid* at paras 42 & 44.
[86] *Ibid* at paras 28-29; *Redwater, supra* note 61 at para 18.
[87] *Manitok ABCA, supra* note 120 at para 38; *Redwater, supra* note 61 at para 29.
[88] *Manitok ABCA, supra* note 120 at paras 38-41.
[89] *Ibid* at paras 45-47.
[90] 2022 ONSC 653 [*Harte Gold*].

secured lender had lost patience, and proposed a restructuring to take over the assets by way of credit bid, using a share subscription agreement mechanism.[91]

Harte Gold filed for *CCAA* protection in late 2021 and obtained a Court order for an expedited sales and solicitation process ("**SISP**"). The priority secured creditor submitted its stalking horse bid and was ultimately deemed the successful bidder.[92] In a traditional insolvency sale, the SISP is formalized with an agreement for purchase and sale of assets, and effected by way of a vesting order, transferring the purchased assets into the hands of the purchaser free and clear. Following completion of the asset sale, any excluded assets and liabilities are left in the debtor company, which either falls into bankruptcy, or files a Plan of Arrangement for voting by its creditors.

In an RVO scenario, there is no asset sale effected by a vesting order, and no Plan to be voted on by creditors. Instead, assets are transferred between corporations within a corporate group such that the “good” assets are put into the hands of new shareholders, and the “unwanted” assets and liabilities are left behind or transferred into newly formed entities (ResidualCos). There are some distinct advantages to avoiding asset sales in certain circumstances – for example, if the asset in question is not able to be easily transferred to a new purchaser without government approval (i.e., permits, intangibles, licences, etc.).

Decision

The authority for granting a RVO in *CCAA* proceedings can be found under the general powers of the Court described in section 11 of the *CCAA*. Justice Penney of the Ontario Superior Court of Justice (“**ONSC**”) noted that the use of RVOs should involve close scrutiny by the Courts and should not become the norm for restructurings. The Court needs to apply the relevant statutory test for sale approval, and also consider why it is necessary in each case, whether it produces an economic result which is just as favourable as another viable alternative, if any stakeholder is worse off than they would be under another alternative structure, and whether the consideration being paid fairly reflects the value of the assets preserved under the RVO structure.[93]

In *Harte Gold*, the RVO was approved, as it allowed for a going-concern transfer of ownership, while preserving the many permits and licences required to operate a gold mining operation. The ONSC used the Ontario *Business Corporations Act*[94] to justify the cancellation and issuance of new shares and granted broad releases to the company’s directors and officers.[95]

Commentary

RVOs have become increasingly popular in recent years, and it is easy to see why. By completing the transfer of assets through a corporate and share transaction within a corporate group, it allows for easy transfer of intangible assets, and avoids the cost and uncertainty of presenting a Plan of Arrangement to vote by the creditors. This case marks an attempt by the Courts to put some standards and restraints around the use of RVOs. We have seen RVOs used in cannabis, mining, and other cases involving licences, leases and permits, and tax pools. We expect the use of these structures to continue in the years ahead.

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[91] *Ibid* at paras 3-10.
[92] *Ibid* at paras 10-11.
[93] *Ibid* at paras 36-38.
[94] RSO 1990, c B.16.
[95] *Harte Gold, supra* note 90 at paras 61-62.

***Montréal (City) v Deloitte Restructuring Inc.,* 2021 SCC 53**

Background[96]

SM Group was a consulting engineering firm who was part of a scandal involving construction contracts with the City of Montreal ("**Montreal**"). Montreal alleged that SM Group had committed collusion and fraud, giving rise to a damages claim. When SM Group later went insolvent, Montreal refused to pay for services rendered, claiming a right of setoff.

Facts

The Province of Quebec had conducted a lengthy investigation into schemes involving collusion and corruption in the awarding and management of public contracts. Following that investigation, it entered into a settlement agreement with SM Group (on behalf of the municipality) as part of a "voluntary reimbursement program" for recovery to the government of amounts improperly paid. Montreal also launched its own civil lawsuit against SM Group, alleging collusion in relation to a call for tenders for a water meter project. Before the case came to trial and the monies could be repaid, SM Group became insolvent and filed for creditor protection under the *CCAA*. While under *CCAA* protection, it continued to do work for Montreal, which created post-filing accounts payable which Montreal refused to pay. Instead, Montreal sought to set off debts owed to them prior to the *CCAA* order against post-filing payables.[97]

The Monitor sought a declaration from the Courts that Montreal could not assert set-off and must pay for services rendered post-filing. The Superior Court of Quebec granted the Monitor's request, which ruling was upheld at the Quebec Court of Appeal (the "**QCCA**"). Montreal appealed to the SCC.

Decision

Generally speaking, it is not allowable to set off pre-filing debt against post-filing debt. Insolvency legislation creates a "freeze" of creditor's status and rights on the date of an insolvency filing. A stay of proceedings is put into place which prohibits any creditors from taking further collection action in order to ensure a level playing field, where all creditors are treated in accordance with priorities as set out in legislation and Court orders. As a result, set-off rights are strictly construed, and are generally only allowed when both obligations occur before the date of insolvency.[98]

However, the Court retains a broad discretion pursuant to section 11 of the *CCAA*, and that discretion can be exercised to lift a stay of proceedings in appropriate circumstances. In exceptional circumstances, it may be possible for a stay to be lifted to allow for pre-filing debt to be set off against post-filing debt. The supervising Judge must consider:

1. The appropriateness of the order being sought, assessed against the remedial purposes of the *CCAA*;
2. Whether the applicant proceeded with due diligence; and
3. The good faith of the applicant.[99]

One consideration the Court may look to is whether the pre-filing debt is one which involves fraud and is therefore outside the general stay provisions pursuant to section 19(2)(d).

The SCC upheld the QCCA's decision that set off was not permitted in this case. Participation in the Voluntary Repayment Program was not an admission of fraud, and the claim was not one which fit within

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[96] 2021 SCC 53 [*Deloitte*].
[97] *Ibid* at paras 6-7.
[98] *CCAA*, *supra* note 63, s 21.
[99] *Deloitte, supra* note 96 at para 85.

the definition of section 19(2)(d). There were no “exceptional circumstances” in this case needed to break the general prohibition against pre-post set-off.[100]

Commentary

Set-off is a powerful remedy, which can be used to provide recovery to unsecured creditors who would otherwise have to wait for a *pro rata* distribution with other unsecured creditors. A good example in the energy context is joint operating agreements, where joint venture partners can continually balance and set-off obligations. This SCC decision confirmed that the scope of section 11 of the *CCAA* is wide enough to allow for the possibility of pre-post set-off, in the appropriate circumstances.

[100] *Ibid* at paras 88-95.

CIVIL PROCEDURE & REMEDIES

Civil procedure rules are the weapons by which Courtroom battles can be won or lost. This past year saw a FC decision on interim orders to temporarily block a corporate merger and an SCC decision on a sealing order arising from a notorious estates case. Additionally, the ABCA provided guidance on the principle of *res judicata* in the context of private arbitrations and subsequent administrative proceedings.

Canada (Commissioner of Competition) v Secure Energy Services Inc., **2022 FCA 25**

Background[101]

The FCA confirmed that the Competition Tribunal has the jurisdiction to issue "interim interim" orders (ie. intervening relief obtained prior to the granting of an "interim order") that temporarily block contested mergers and proposed transactions in urgent circumstances.

Facts

On March 12, 2021, Secure Energy Services and Tervita Corporation (the "**Respondents**") submitted to the Commissioner of Competition (the "**Commissioner**") a pre-merger notification (the "**Proposed Transaction**") pursuant to subsection 114(1) of the *Competition Act*. The Commissioner issued a Supplementary Information Request, which was answered by the Respondents on May 31, 2021 and included a production of approximately 396,000 documents. In accordance with s. 123 of the *Competition Act*, the Proposed Transaction could close 30 days later. On June 28, 2021, the Respondents provided 72 hours' notice of their intention to close the Proposed Transaction.[102]

On June 29, 2021, the Commissioner responded by filing two applications with the Competition Tribunal (the "**Tribunal**") under the *Competition Act*. The applications sought various forms of relief, including: (1) an injunction under s. 92 of the *Act* to prevent the Proposed Transaction from closing based on its competitive impact; and (2) an interim order under s. 104 of the *Act* to prevent the Proposed Transaction from closing until a verdict was reached on the s. 92 application; and (3) an "interim interim" order to also prevent the Proposed Transaction from closing until the s. 104 application could be heard. The Commissioner requested an emergency case-management conference to discuss the application for an "interim interim" order, which was heard by the Tribunal on June 30, 2021.[103]

The Tribunal found that it lacked jurisdiction to grant the temporary relief requested by the Commissioner and dismissed the Commissioner's applications. Shortly after the Tribunal's decision, the Respondents closed the Proposed Transaction.[104] The Commissioner appealed.

Decision

As the Proposed Transaction had already closed, the substantive issue before the FCA was whether the Tribunal had the jurisdiction to grant "interim interim" relief to delay a proposed merger until an application for interim relief under section 104 of the *Competition Act* had been heard and decided.[105] Subsection 104(1) contemplates the issuing of "any interim order" the Tribunal considers appropriate, and this broad scope is only limited by reference to "principles ordinarily considered by superior courts when granting

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[101] 2022 FCA 25 [*Secure Energy*].
[102] *Ibid* at paras 3 and 4.
[103] *Ibid* at para 5.
[104] *Ibid* at para 6.
[105] *Ibid* at para 46.

interlocutory or injunctive relief".[106] The FCA found that the wording of s. 104(1) did not preclude the type of interim interim relief sought by the Commissioner.[107]

The FCA went on to assert that there was nothing in the context of section 104 that suggested the broad power of the Tribunal to issue "any interim order that it considers appropriate" should be read more narrowly than a plan textual reading suggests.[108] The intent of the merger review scheme provided for in the *Competition Act*, including in s. 104, is to ensure that proposed mergers can be reviewed and, if necessary, challenged *before* they close.[109] The Tribunal maintains the role of deciding whether relief is fair and appropriate in the circumstances of each case and may refuse to grant relief where it is inappropriate.[110]

Having considered the text, context, and purpose of s. 104, the FCA concluded that the Tribunal has jurisdiction, in the proper circumstances, to grant both interlocutory relief (as that term is typically used in superior courts) pending a decision on application under section 92, and interim relief (again, as that term is typically used in superior courts) pending a decision on whether to grant interlocutory relief.[111]

Commentary

Although the relief granted in this circumstance was moot because the Proposed Transaction had already closed, the FCA's decision clarified the Tribunal's ability to prevent transactions from closing when the Competition Bureau is conducting merger reviews. Notably, the Competition Bureau issued a press release following the decision welcoming the ruling and stating it would "continue to use all of the tools at its disposal in keeping with its mandate to protect competition and the public interest". Parties should keep this decision in mind when considering their strategy in dealing with the Competition Bureau and determining the timing of closing a reviewable transaction under the *Competition Act.*

***Sherman Estate v Donovan*, 2021 SCC 25**

Background[112]

Wealthy philanthropists Barry and Honey Sherman were found dead in their home in December 2017. The resulting criminal investigation and legal proceedings attracted intense media scrutiny. The Trustees of their estates sought sealing orders over the Court files related to the probate of their estates. This case was the first time the SCC has had an opportunity to refine the test for the granting of sealing orders, and to consider the extent to which privacy concerns interact with the principles of free speech and open court.

Facts

Justice Dunphy of the ONSC granted the sealing order, sealing the Court files for 2 years, with a possibility of renewal. A journalist and the newspaper investigating the murders appealed, arguing that the sealing orders violated the constitutional rights of freedom of expression and freedom of the press, as well as the open court principle.[113] Since 2002, the legal test for sealing orders has been set out in the SCC decision in *Sierra Club of Canada v Canada (Minister of Finance)*[114] ("*Sierra Club*"):

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[106] *Ibid* at para 56.
[107] *Ibid.*
[108] *Ibid* at para 63.
[109] *Ibid* at para 64.
[110] *Ibid* at para 66.
[111] *Ibid* at para 67.
[112] 2021 SCC 25 [*Sherman Estate*].
[113] *Ibid* at para 12.
[114] 2002 SCC 41 [*Sierra Club*].

1) The order is necessary to prevent a serious risk to an important interest, including a commercial interest, because alternative measures would not prevent the risk; and
2) The positive effects of the order outweigh the negative effects, including the public interest in open court proceedings.[115]

Ontario Court of Appeal Decision

The journalist and newspaper appealed the sealing order to the Ontario Court of Appeal (the "**ONCA**"), who overturned Justice Dunphy's decision. The ONCA noted that the privacy interest in question was simply a "personal concern" and "lacked a public interest quality", where there was no evidence of a real risk to anyone's personal safety.[116]

SCC Decision

The Trustees appealed to the SCC, who denied the appeal. The central issue considered is whether the privacy of the affected individuals and their physical safety amounts to important public interests that are of such a serious risk that the file should be sealed. The SCC stated that the *Sierra Club* test should be reformulated as follows, so that three core prerequisites are required:

1) Court openness poses a serious risk to an important public interest;
2) The order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and
3) As a matter of proportionality, the benefits of the order outweigh its negative effects.[117]

In the *Sherman* case, the Trustees wanted to seal information like names and addresses, identity of estate administrators, the extent of assets dealt with within the estates, and the identities of beneficiaries. The SCC confirmed that this type of information did not involve the core biographical data which would have justified a sealing order, and a less onerous order (like a publication ban) would have been sufficient to mitigate any risk.[118]

Commentary

Since the *Sierra Club* decision in 2002, sealing orders have been regularly granted by the Alberta Courts, often to protect commercial interests. For example, sealing orders are routinely granted where assets are being sold in a Court supervised sales process under insolvency statutes. Sellers and purchasers are able to obtain the benefit of a Court vesting order, while having their confidential pricing structures, customer lists, and other commercially sensitive information sealed by Court Order. These orders are designed to protect the public interest in ensuring the integrity of a Court supervised sale process. Private economic harm is not generally considered an important enough public interest to justify a sealing order. The *Sherman Estate* case, which reformulates the *Sierra Club* test, is an indicator that the Courts are increasingly giving greater scrutiny to sealing order requests, and the ABQB are now requiring that specific electronic notices to media accompany each sealing order request.

[115] *Ibid* at para 53.
[116] *Sherman Estate, supra* note 112 at para 4.
[117] *Ibid* at para 38.
[118] *Ibid* at para 89.

***TransAlta Corporation v Alberta (Utilities Commission)*, 2022 ABCA 37**

Background[119]

In this appeal revolving around the decommissioning costs of a power plant, the ABCA reviewed the principle of *res judicata* and found that it cannot be used to overturn interlocutory decisions, nor used to bind administrative bodies to the decisions of private arbitrations. The ABCA also dealt with standard of review and possibly signalled a widening of the scope of review for correctness.

Facts

This appeal relates to TransAlta Corporation's ("**TransAlta**") application to the Alberta Utilities Commission (the "**AUC**") for payment from the Balancing Pool of costs to decommission two generating units, namely Sundance A Generating Units 1 and 2 (the "**Sundance A Units**"), specifically whether costs related to decommissioning the associated Highvale Mine (the "**Mine**") can be included.

Pursuant to section 5 of the *Power Purchase Arrangements Regulation*[120] (the "***PPA Regulation***"), the owner of a "generating unit" can recover the costs of decommissioning a power plant. Generating unit is defined in the *Electric Utilities Act*,[121] the *PPA Regulation*'s enabling statute, as including "associated facilities" such as "fuel and fuel handling equipment" that is "necessary for the safe, reliable and economic operating of the generating unit, which may be used in common with other generating units."[122] TransAlta asserted that the Mine is an associated facility and therefore the decommissioning costs should also include a portion of the costs to decommission the Mine proportionate to the amount of Mine product that was used as fuel for the Sundance A Units.

Prior to TransAlta's Decommissioning Application for the Sundance A Units, TransAlta and the Balancing Pool had participated in a private arbitration pursuant to the *Arbitration Act*[123] dealing with the Balancing Pool's obligation to pay the decommissioning costs of other generating units at the Sundance Power Plant (the "**Arbitration**"). In the Arbitration, it was decided that the Mine was an associated facility of the Sundance B and C generating units. In its Decommissioning Application for the Sundance A Units, TransAlta filed an application seeking an order that the issue of whether the decommissioning costs of the Mine should be included in the decommissioning costs of the Sundance A Units was *res judicata*, therefore meaning that the AUC would be bound by the findings from the Arbitration. This application was refused by the AUC.

Decision

The ABCA affirmed the AUC's decision to refuse the application. First, the Court noted that the AUC's refusal of TransAlta's application was an interlocutory ruling in an unfinished proceeding. By refusing the application, the AUC had not decided to completely dismiss the findings of fact from the Arbitration, but had instead indicated that it would decide the issue of decommissioning costs at the end of the process.[124] Because the AUC may still ultimately agree with the findings from the Arbitration, the Court found that it was premature to find that the AUC had erred by not adhering to said findings. "(T)he Court would be doing so on a premise of inevitable future 'error' which the law does not assume."[125]

Second, it was noted that the AUC was not bound by the legal conclusions arising from the Arbitration as the Arbitration and the application were decided in different contexts under different enactments.[126] The

[119] 2022 BCA 37 [*TransAlta*].
[120] Alta Reg 167/2003.
[121] SA 2003, c E-5.1.
[122] *Ibid*, s 1(1)(u).
[123] RSA 2000, c A-43.
[124] *TransAlta*, *supra* note 119 at paras 33-36.
[125] *Ibid* at para 42.
[126] *Ibid* at paras 45-46.

Court balked at the idea that a regulatory tribunal could be bound by the findings from a private arbitration, specifically stating that, "(i)t is inconceivable that the Legislature would intend that a socially important legislative responsibility with polycentric characteristics and with the public interest at its heart (as given to an expert tribunal) could be sidelined by private arbitral dealings between interested parties, even if those dealings are allowed under the same overall legislative scheme."[127]

Commentary

In *TransAlta*, the ABCA emphasizes that parties must typically exhaust their remedies within the tribunal system before the Courts will intervene. The Courts are wary to step on the toes of administrative bodies especially in a situation where an issue has not yet been decided finally, and the Courts are unlikely to step in and review. The Court also firmly stated that arbitral awards cannot form the basis for *res judicata* claims in subsequent administrative proceedings.

Of note, the ABCA decided that the applicable standard of review in this situation was that of correctness. This was based on *Canada (Minister of Citizenship and Immigration) v Vavilov*[128] ("***Vavilov***") and *Northern Regional Health Authority v Horrocks*[129] which established that correctness is the appropriate standard of review when dealing with jurisdictional lines between two administrative bodies. However, the Arbitration was not conducted by an administrative body making a statutorily-authorized decision. As noted in Justice O'Ferrall's concurring reasons, "(t)he *Arbitration Act* is simply a private law statute intended to provide parties with a process for settling their disputes if they so choose."[130] It is possible that this decision signals an expansion of the standard of review principles post-*Vavilov*.

[127] *Ibid* at para 48.
[128] 2019 SCC 65.
[129] 2021 SCC 42.
[130] *TransAlta*, *supra* note 119 at para 133.

CLASS ACTIONS

Class actions can arise from multiple sources, including environmental claims and consumer protection legislation. The Courts in BC and Alberta recently dealt with two such cases, one alleging price manipulation of retail gasoline as an “unconscionable transaction” under BC’s consumer protection legislation, and the other alleging pure economic loss arising from the loss of use of waterways affected by a pipeline spill.

Pantusa v Parkland Fuel Corporation, **2022 BCSC 322**

Background[131]

In this case regarding the retail price of gasoline, the BCSC clarified the limits to the doctrine of unconscionability under the *Business Practices and Consumer Protection Act*[132] (the "***BPCPA***").

Facts

The plaintiff sought an order certifying his action as a class proceeding on behalf of all those who purchased retail gasoline in British Columbia for personal, family or household purposes, from January 1, 2015 to present. The plaintiff alleged that the defendants breached section 9 of the *BPCPA* which prohibits suppliers from committing or engaging in an "unconscionable act or practice in respect of a consumer transaction."[133] It was alleged that this provision was breached because the defendants had been abusing their position of control over the wholesale gasoline market by overcharging their wholesale customers, who then sold to consumers, resulting in "inordinately high" retail gasoline prices.[134]

The defendants, a consortium of refiners and wholesale marketers of gasoline, sought to have the plaintiff's claim dismissed on summary judgment.[135]

Decision

The BCSC granted summary judgment, finding that there were no genuine issues for trial.[136] In doing so, the BCSC outlined the limits to the doctrine of unconscionability under the *BPCPA*. It was found that a consumer transaction is not unconscionable simply because the sellers operate in an oligopoly that allow them to charge higher prices than in a perfectly competitive market.[137] It was also found that benchmark pricing is not an inherently unconscionable practice.[138] Lastly, the BCSC stated that the Court will not regulate prices under the *BPCPA* as such issues are matters of public policy and are best left to the government to consider.[139]

Commentary

This decision provides important benchmarks for the doctrine of unconscionability under the *BPCPA*. It demonstrates the high standard needed to prove unconscionability and shows the general unwillingness of the Courts to step into a regulatory role and interfere with the pricing decisions made by sophisticated companies such as the refiners and wholesale gasoline marketers concerned in this case.

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[131] 2022 BCSC 322 [*Pantusa*].
[132] SBC 2004, c 2 [*BPCPA*].
[133] *Pantusa, supra* note 131 at para 2; *BPCPA*, supra note 132, s 9.
[134] *Pantusa, supra* note 131 at para 7.
[135] *Ibid* at para 4.
[136] *Ibid* at paras 134-135.
[137] *Ibid* at paras 114-115, 131.
[138] *Ibid* at paras 116-119.
[139] *Ibid* at para 132.

***Rieger v Plains Midstream Canada ULC*, 2022 ABCA 28**

Background **[140]**

The *Rieger* decision provides insight for tort-based environmental class actions and reaffirms the SCC's recent decision in *16888782 Ontario Inc. v. Maple Leaf Foods et al.*[141] ("***Maple Leaf***") concerning pure economic loss claims.

Facts

In *Plains Midstream,* Suzanne and Darin Rieger (the "**Riegers**") sought to have a class action certified arising from a ruptured pipeline owned and operated by Plains Midstream Canada ULC ("**Plains**"). Plains accepted responsibility for the spill and, prior to the commencement of the class proceedings, had proactively settled with approximately 517 landowners, residents and business owners who were directly impacted by the spill. Those settlements totaled approximately $40,000,000.[142] Interestingly, the Riegers who commenced the class action sustained no physical damage to their lands or to them personally. Accordingly, the Rieger's claim was for pure economic loss only, which included: (1) damages for loss of use of Gleniffer Lake and Red Deer River; and (2) diminution of their property value.[143]

On application for certification, the chambers judge rejected Plain's argument that there was no cause of action for pure economic loss and certified the class proceeding. The judge found that, while the plaintiffs would face challenges making out their claim, it was not hopeless because the area of law concerning pure economic loss was unsettled.[144] Notably, the chambers judge's decision was released prior to *Maple Leaf.*

Plains appealed this decision to the ABCA on the basis that the chambers judged erred in law finding that the claim of the Riegers for relational economic loss might succeed, which led him to grant certification when it should have been refused. In the alternative, the chambers judge erred in: (1) certifying the class with no relational or objective connection to the causes of action plead; and (2) failing to apply the proper legal test concerning certification of common issues pursuant to s. 5 of the *Class Proceedings Act*[145] (the "***CPA***").

Decision

The ABCA overturned the certification order on two grounds. First, the ABCA held that, in light of *Maple Leaf,* the Riegers' claim for relational economic loss could not succeed. The SCC in *Maple Leaf* clarified that "there is no general right in tort, protecting against the negligent or intentional infliction of pure economic loss". The SCC went on to state that, what matters in determining liability is, "whether the parties were at the time of the loss in a sufficient proximate relationship".[146] The ABCA found that the Riegers' physical proximity to the pipeline and Glennifer Lake was not enough to establish a sufficiently proximate relationship and therefore were unable to show that a novel duty of care existed between the parties. As a result, the ABCA stated that Riegers had no cause of action against Plains, as required by Section 5 of the *CPA*, and the proceeding could not be certified as a class proceeding.[147]

Second, the ABCA found that the class definition proposed by the Riegers was too large and arbitrary to be certified.[148] The geographical area, approximately 1400kms, was too large and would likely be

[140] 2022 ABCA 28 [*Plains Midstream*].
[141] 2020 SCC 35 [*Maple Leaf*].
[142] *Plains Midstream, supra* note 140 at paras 4-5.
[143] *Ibid* at paras 2-5.
[144] *Ibid* at para 6.
[145] *Ibid at* para 12.
[146] *Maple Leaf, supra* note 141 at para 22.
[147] *Ibid* at paras 50 and 64.
[148] *Ibid* at para 77.

overinclusive. Additionally, the ABCA noted that those proposed class members who were directly impacted by the spill had already signed releases after agreeing to settle with Plains. In the circumstances, a class action was not the preferable method of litigation as there was a risk that "the class will become fragmented and that individual issues will dominate the proceeding".

Commentary

While *Maple Leaf* was decided in the context of product liability, it is clear that its impact will extend far beyond its subject matter as we have seen in *Plains Midstream.* Going forward, those seeking damages environmental torts will need to establish a sufficiently proximate relationship in order to certify class actions, or otherwise. In the class proceeding context, the ABCA's application of *Maple Leaf* in *Rieger* reinforces the Court's gatekeeper function in class proceedings and highlights importance for hopeless claims to be screened out at an early stage. Moreover, it begs the question of whether the Courts "low bar" for certifying class proceedings should remain as it presently stands.

CONTRACTS

Contracts are the core of an energy lawyer's work, and even boilerplate clauses can attract judicial scrutiny in the right circumstances. The SCC released an important decision with respect to releases/limitation of liability clauses, the British Columbia Court of Appeal ("**BCCA**") examined the meaning of the phrase "best efforts", and the ONSC considered whether the pandemic could constitute a Material Adverse Effect in the context of a failed mega-merger.

Corner Brook (City) v Bailey, **2021 SCC 29**

Background[149]

The SCC reviewed the current state of the law governing the interpretation of releases and the extent of limitations on liability. Specifically, the SCC had an opportunity to consider whether previous jurisprudence continues to establish a strict rule that releases are always limited to those things specifically contemplated by the words in the release or whether a more flexible, purposive approach is more appropriate.

Facts

While operating her husband's vehicle, a third-party civilian ("**Bailey**") struck a City of Corner Brook ("**Corner Brook**") employee who was performing road work (the "**Incident**"). The employee sued Bailey for injuries he had sustained in the incident by way of a Statement of Claim.[150]

In a separate action, Bailey and her husband sued Corner Brook for injuries and damage sustained in relation to the Incident. Bailey and her husband later settled with Corner Brook and released Corner Brook from liability relating to the Incident and discontinued their action (the "**Release**").[151] Among other things, the Release purported to release Corner Brook for: "…*all demands and claims of any kind or nature whatsoever* arising out of or relating to [the Incident] which occurred on or about March 3, 2009, *and without limiting the generality of the foregoing from all claims raised or which could have been raised* in the [Bailey Action].".[152]

Years after entering the Release, Bailey brought a third-party claim against Corner Brook for contribution or indemnity in the action brought by the Corner Brook employee. Corner Brook responded by bringing a summary trial application, on the basis that the release barred the third-party claim. Bailey maintained that the Release did not bar the third-party claim, because the third-party claim was not specifically contemplated by the parties when they signed the release.[153]

The application judge concluded the release barred Bailey's third-party claim against Corner Brook and stayed the claim. The Court of Appeal of Newfoundland and Labrador unanimously allowed the appeal and reinstated the third-party notice.[154] Corner Brook appealed to the SCC.

Decision

The SCC allowed the appeal, holding the Release did bar Bailey's third-party claim through use of the words "any and all claims" in relation to the Incident, and the order of the application judge was reinstated.[155]

[149] 2021 SCC 29 [*Corner Brook*].
[150] *Ibid* at para 2, 5 and 6.
[151] *Ibid* at paras 5-7.
[152] *Ibid* at para 7.
[153] *Ibid* at paras 8 and 9.
[154] *Ibid* at paras 10-13.

The SCC held that Courts should no longer refer to the rule set out in *South Western Railway v Blackmore*[156] ("***Blackmore***") that the general words in a release are limited always to those things which were specifically in the contemplation of the parties at the time of the release. Rather, the *Blackmore* rule has been entirely subsumed by the principles set out in the SCC's decision in *Sattva Capital Corp v Creston Moly Corp*[157] ("***Sattva***") and Courts are to read a contract broadly as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of the formation of the contract.[158]

In coming to its conclusion, the SCC rejected the notion that explicit language is *always* required to prove that a release surrenders rights and claims that the releasing party was unaware of.[159] It is a sensible approach for parties to consider wording that makes it clear whether the release will cover unknown claims and whether the claims must be related to a particular area or subject matter. Further, the SCC suggested that releases that are narrowed to a particular time frame or subject matter are less likely to give rise to tension between the words of the release and what the surrounding circumstances indicate the parties objectively intended.[160] Courts should consider releases in the context of the dispute itself, with the dispute serving as a limiting factor to the breadth of wording found in the release.[161]

However, a release can be found to cover unknown claims without particularizing with precision the *exact claims* that fall within its scope.[162] In the present case, even though the parties had not explicitly turned their minds to the possibility of a third-party claim, it was their mutual intent to cover *all types of claims relating to the accident*. As such, the release covered the third-party claim.[163]

Commentary

The *Corner Brook* decision serves as a reminder of the omnipresence of *Sattva's* requirement that surrounding circumstances should always be considered in interpreting contracts and such contracts are always read purposively, with words given their ordinary and grammatical meaning. *Corner Brook* also dismisses any uncertainty over the continued application of the *Blackmore* rule, holding in no uncertain terms that the rule has been entirely subsumed by *Sattva.*

Practically, *Corner Brook* provides a few key insights relevant for those involved in drafting and interpreting enforceable releases. Most notably, the reasoning of the SCC in *Corner Brook* means it is unnecessary to provide an exhaustive list of all possible claims in releases. Language such as "any and all claims" can be taken on its face to encompass all possible claims. In fact, providing a list of claims and forgetting to use language such as "including but not limited to" may inadvertently restrict the applicability and coverage of the release only to those mentioned.

Sutter Hill Management Corporation v Mpire Capital Corporation, **2022 BCCA 13**

Background[164]

In *Sutter*, the BCCA interprets the meaning of contractual terms regarding using "commercially reasonable best efforts" to obtain regulatory approval "as soon as possible."

Facts

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[155] *Ibid* at para 59.
[156] (1870), LR 4 HL 610 [*Blackmore*].
[157] 2014 SCC 53 [*Sattva*].
[158] *Corner Brook, supra* note 149 at paras 20-34.
[159] *Ibid* at para 48.
[160] *Ibid* at para 41.
[161] *Ibid* at para 36.
[162] *Ibid* at para 27.
[163] *Ibid* at para 54.
[164] 2022 BCCA 13 [*Sutter*].

On January 14, 2016, the parties entered into an agreement regarding the purchase and sale of a care home in British Columbia that required the respondent to obtain regulatory approvals from the Fraser Health Authority (the "**FHA**"). On July 31, 2017, the parties entered into an Amended and Restated Purchase Agreement that included a term that stated, "the Purchaser shall use commercially reasonable best efforts to satisfy the condition precedent set out in this Section 2.5 as soon as possible," the condition precedent being obtaining regulatory approval from the FHA.[165]

On November 8, 2017, FHA sent three agreements to the respondent for review and comment that were to be executed as part of the final approval process. From November 8 to November 20, 2017, the respondent's counsel did nothing with these agreements. On November 20, 2017, the respondent's Ontario solicitor advised the respondents that he lacked expertise to advise about the agreements, stating that they should find British Columbia legal counsel to review them. By November 27, 2017, the agreements had yet to be returned to the FHA. The appellants gave notice of default, stating that the aforementioned clause in the Amended and Restated Purchase Agreement had been breached. The respondents nonetheless indicated their desire to complete the transaction, but by December 14, 2017, the agreements still had yet to be returned to the FHA.[166]

Decision

The question before the BCCA was whether the respondents had used "commercially reasonable best efforts" to obtain approval from FHA "as soon as possible." The BCCA applied the *Sattva* rules of contractual interpretation that state that a contract must be interpreted with a "practical, common-sense approach" and should not be "dominated by technical rules of construction."[167] The overriding concern is to determine "the intent of the parties and the scope of their understanding."[168] The chambers judge decided to interpret the terms "commercially reasonable best efforts" and "as soon as possible" separate from each other; the BCCA found this to be a mistake of law. The clause must be considered in its totality, using a contextual approach to determine what the parties intended.[169]

The BCCA disagreed with the chambers judge that the word "best" does not add anything to the phrase "commercially reasonable best efforts." "Commercially reasonable efforts" typically means making choices based on sound judgement, however, given the surrounding circumstances and the desire to obtain regulatory approval "as soon as possible," the addition of the word "best" must indicate a desired standard that falls somewhere between "commercially reasonable efforts" and "best efforts," a standard that implies no stone is to be left unturned.[170] The BCCA concluded that by inserting this clause, the parties intended that "the purchaser would do everything it reasonably could to obtain the necessary approvals as soon as possible, excepting only such steps as would be commercially unreasonable."[171]

Based on this interpretation, the BCCA went on to find that the respondents had not met this standard and were therefore in breach of the contract. They had not done everything they reasonably could do to obtain the necessary approvals as soon as possible.[172] The BCCA also rejected the respondent's position that much of the delay was caused by their legal counsel and that such delay could not be attributed to them. As an agent of the respondent, it is trite law that the delay caused by the respondent's solicitor must be attributed to the respondent.[173]

Commentary

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[165] *Ibid* at paras 2, 15.
[166] *Ibid* at paras 18-21.
[167] *Ibid* at para 30.
[168] *Sattva, supra* note 157 at para 47; *Sutter, supra* note 164 at para 30.
[169] *Sutter, supra* note 164 at para 32.
[170] *Ibid* at paras 39-40.
[171] *Ibid* at para 41.
[172] *Ibid* at para 107.
[173] *Ibid* at para 97.

Sutter serves as important reminder about being cautious and precise in choosing language to include in a contract. Parties should be careful about deviating from standard contractual terms and using language that has not been widely interpreted by the Courts, such as "commercially reasonable best efforts… as soon as possible." Better yet, parties are well-advised to use precise terms that specify a specific time period, as opposed to comparatively vague terms such as "best efforts" and "commercially reasonable efforts."

If parties choose to use such terminology, they should be aware that "best efforts" represents a high standard that requires parties to "leave no stone unturned," "commercially reasonable efforts" represents a lower standard that allows parties to exercise their business judgment, and "commercially reasonable best efforts… as soon as possible" represents a middle ground that requires parties to fulfil their duties as soon as possible, excepting any steps that would be commercially unreasonable.

Additionally, *Sutter* shows the importance of retaining local counsel when engaged in multi-jurisdictional transactions. Any delays caused by a party's counsel getting up to speed or by searching for local counsel will ultimately be attributed to that party.

***Cineplex Inc. v Cineworld Group PLC*, 2021 ONSC 8016**

Background [174]

The *Cineplex* decision out of the ONSC considers the interpretation of Material Adverse Effect ("**MAE**") and "ordinary course" operating covenant clauses in Canada, particularly in the context of a worldwide pandemic.

Facts

Cineplex, Canada's largest movie theatre operator, and Cineworld, a U.K.-based movie theatre operator, entered into an arrangement agreement (the "**Arrangement Agreement**"), which was to proceed by statutory plan of arrangement, in December 2019 where Cineworld would acquire all the shares of Cineplex for CAD $34/share. The transaction was valued at approximately CAD $2.8 billion. The deal would close no later than June 30, 2020.[175]

As the COVID-19 pandemic intensified in March 2020, all theatres in Canada were required to close.[176] On June 12, 2020, Cineworld purported to give Cineplex notice that it was terminating the Arrangement Agreement.[177] Cineplex proceeded to sue for breach of contract.[178] Cineworld did not negotiate a "break fee" in the Arrangement Agreement to allow it to walk away from the transaction.[179]

Two provisions were particularly important in this decision: the "operating covenant" clause, requiring Cineplex to operate its business in the "ordinary course and in accordance with Laws" between signing the Arrangement Agreement and closing (the "**Operating Covenant**");[180] and the MAE clause, which provided that Cineworld could refuse to close if a MAE occurred, except if it was caused by, among other things, "…outbreaks of illness or other acts of God.".[181]

Decision

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[174] 2021 ONSC 8016 [*Cineplex*].
[175] *Ibid* at para 1.
[176] *Ibid* at para 30.
[177] *Ibid* at para 39.
[178] *Ibid* at para 4.
[179] *Ibid* at para 185.
[180] *Ibid* at para 41-43.
[181] *Ibid* at para 45.

The ONSC rejected Cineworld's argument that Cineplex had failed to abide by the Operating Covenant's requirement to operate in the "ordinary course" by closing theatres. It had no choice but to shut its theatres when required to do so by the government under various public health orders.[182] Additionally, the ONSC found that none of Cineplex's actions during the pandemic were so drastic so as to alter its business to the extent it was outside of the "ordinary course".[183]

The ONSC was also persuaded that by carving out "outbreaks of illness" from the definition of Material Adverse Effect, the parties allocated the risk of a pandemic to Cineworld.[184] A clause requiring a company to operate in the "ordinary course of business" has to be read in the context of risks transferred to the buyer.[185] Cineworld assumed this risk and could not transfer it back to Cineplex as if COVID-19 did not exist.

The ONSC ultimately awarded damages to Cineplex based on the "loss of synergies"[186] that Cineplex would have gained by merging with Cineworld: approximately CAD $1.24 billion. The ONSC stated that "although the ultimate benefit of the synergies would have accrued to Cineworld as shareholder of Cineplex…. it [did not] change the fact that these synergies would have been realized by the corporate entity, Cineplex".[187]

Commentary

The *Cineplex* case serves as a reminder of the importance of negotiating seemingly boilerplate clauses such as MAEs or "ordinary course of business" clauses in transactional contracts, including in the natural resource development industries. Specifically in today's uncertain and unpredictable state, ensuring that contracting parties are carving out exceptions to allow an avenue to escape a mired transaction will mitigate against suffering the same fate as Cineworld.

More importantly, though, is the Court's discussion of the interaction between "ordinary course" covenants and MAE exclusions, and how these provisions must be read in the context of how risk is transferred to the purchaser. Drafters of similar agreements should be cognizant of these findings and draft agreements with these concepts front of mind.

It is also prudent to note that the Court's interpretation of MAE clauses was consistent with the interpretation adopted in *Fairstone Financial Holdings Inc v Duo Bank of Canada*,[188] in which the ONSC held an MAE is "an unknown event, a threat to the overall earnings potential of the business, and of durational significance.".[189]

Cineworld has since appealed the ONSC's decision, so further developments on the principles above may be forthcoming.

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182 *Ibid* at paras 122-123.
183 *Ibid* at paras 124-125.
184 *Ibid* at para 126.
185 *Ibid* at para 107.
186 *Ibid* at para 174.
187 *Ibid* at para 176, 190.
188 2020 ONSC 7379 [*Fairstone]*.
189 *Cineplex, supra* note 211 at para 105.

CORPORATE

In most cases, boardroom battles are held behind closed doors, but this past year saw two cases where the battles spilled into the courtrooms, including the highly publicized battle for control of Rogers Communications. Additionally, the Courts looked at the thorny issue of whether directors can be held accountable for fraudulent or improper transfers under the "corporate attribution" doctrine.

***Baylin Technologies Inc. v Gelerman*, 2021 ONCA 45**

Background[190]

The Toronto Stock Exchange (the "**TSX**") Manual requires issuers to establish a majority voting policy where said issuer does not have a majority shareholder, for purposes of electing and removing directors from issuers' board. The ONCA was asked to determine the interpretation and application of such a voting policy.

Facts

Pursuant to an asset purchase agreement (the "**APA**"), the appellant Baylin Technologies Inc. ("**Baylin**") acquired various assets from the respondent Spacebridge Inc. ("**Spacebridge**"). The individual respondent David Gelerman ("**Gelerman**") founded Spacebridge. Under the APA, Baylin agreed to nominate Gelerman for election to its board of directors for the 2018 and 2019 annual general meeting of the shareholders.

Baylin was listed on the TSX. The TSX's majority voting policy at section 461.3 of the TSX Manual states that every issuer listed on the TSX that does not have a majority shareholder must establish a majority voting policy requiring that directors be elected by 50% +1 of votes cast, or else resign, absent exceptional circumstances (the "**Majority Voting Policy**"). As a result of a separate Baylin acquisition in 2018, Baylin ceased to have a majority shareholder and was therefore required to adopt the Majority Voting Policy, which was adopted in March 2019.[191]

Baylin's Majority Voting Policy provided that if a director received more withheld votes than "for" votes at any shareholders meeting where shareholders vote on the uncontested election of directors, the director must immediately submit their resignation to the Board. However, there were also 3 carveouts in Baylin's Majority Voting Policy which provided for limited exceptional circumstances for not accepting a director's resignation.[192] Baylin's Majority Voting Policy also did not expressly include an "exceptional circumstance" for non-compliance with commercial agreements regarding the composition of the Board (the "**Commercial Agreements Exception**"), which is an express example of an exceptional circumstance for not accepting a director's resignation provided by the TSX for these policies.[193]

Difficulties arose between Gelerman and the Chairman of the Board of Baylin. In March 2019, Baylin wrote to Gelerman advising that he would be nominated for election, but its largest shareholder did not intend to vote in his favour.[194] At the annual general meeting, Gelerman only received 29% of eligible votes for his re-election and 71% were withheld. Gelerman never submitted his resignation as required by Baylin's Majority Voting Policy, so the Baylin board never considered whether it would accept his resignation.[195]

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[190] 2021 ONCA 45 [*Baylin*].
[191] *Ibid* at para 15.
[192] *Ibid* at paras 16-17.
[193] *Ibid* at para 18.
[194] *Ibid* at paras 19-21.
[195] *Ibid* at para 22.

The Application Judge held, in part, that Baylin's Majority Voting Policy did not comply with the TSX majority voting policy in three ways: "(1) The TSX Requirement refers to the majority of votes cast at the meeting whereas the [Baylin Majority Voting Policy] is not based on votes cast but rather on "withheld votes"; (2) the TSX Requirement does not limit what might constitute "Exceptional Circumstances" which the board must find to not accept the resignation and allow the director to continue whereas the [Baylin Majority Voting Policy] restricts the Board's determination of Exceptional Circumstances to consideration of three circumstances only; and (3) in restricting the Exceptional Circumstances to the three enumerated circumstances, the [Baylin Majority Voting Policy] excludes the TSX's specific example of exceptional circumstances concerning "commercial agreements regarding the composition of the Board".[196] Baylin appealed.

Decision

The ONCA allowed Baylin's appeal. In concluding that the application judge erred in finding Baylin's Majority Voting Policy did not comply with TSX's requirements, the ONCA stated the TSX policy is clear that withheld votes count against a director, pointing to the express stated purpose of these majority voting policies being to provide "a meaningful way for security holders to hold directors accountable and remove underperforming or unqualified directors." Considering votes withheld as votes against a director accomplishes this purpose.[197]

The ONCA held the lower Court's findings regarding the legality of limiting "Exceptional Circumstances" was also flawed. There is nothing in the TSX policy precluding a corporation from stipulating, in advance, what it will or will not consider as exceptional circumstances. In fact, the TSX specifically intended such circumstances to be dealt with on a case-by-case basis.[198] The specific examples provided by the TSX were to assist members in applying the TSX majority voting policy.[199]

Finally, the ONCA stated that the lower Court's finding that Baylin's Majority Voting Policy did not meet TSX requirements for failing to provide the Commercial Agreements Exception, suffered from the same flaw outlined above.[200]

Commentary

The *Baylin* decision provides a few key takeaways relevant in interpreting and applying the TSX's requirement for issuers subject to the TSX Manual's section 461.3 to establish a majority voting policy.

Firstly, withheld votes at such elections count as votes "against" the election of a director. They are not to be discarded. This enables shareholders to hold directors accountable when they are underperforming or unqualified for the role, in furtherance of the TSX's stated purpose of these policies.

Secondly, although issuers must adhere to TSX's requirements, they are afforded a certain degree of latitude in establishing their own majority voting policy. Those examples of "exceptional circumstances" provided by the TSX are only meant to be used as a guide and are not prescribed requirements. Issuers have the freedom to tailor these exceptional circumstances to their own circumstances as long as the policy meets the TSX's stated purpose: to provide a meaningful way for security holders to hold directors accountable and remove underperforming or unqualified directors. Further to this point, issuers are not precluded from expressly stipulating, in advance, what they will consider as exceptional circumstances.

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[196] *Ibid* at para 26.
[197] *Ibid* at paras 36-38.
[198] *Ibid* at para 40 and 43.
[199] *Ibid* at para 41.
[200] *Ibid* at para 45.

***Ernst & Young Inc. v Aquino*, 2022 ONCA 202**

Background[201]

For the first time, the ONCA considered the common law doctrine of corporate attribution as it applies to transfers under value under s. 96 of the *BIA.* Previously, Canadian Courts have considered the corporate attribution test in the context of civil and criminal matters to impose liability on a corporation where the corporation benefited from a directing mind's fraudulent conduct. This decision reframed the test for corporate attribution in the bankruptcy and insolvency realm to better protect creditors' interests.

Facts

Bondfield and Forma-Con were part of the Bondfield Group, a full-service group of construction companies that carried on business in the Greater Toronto Area and Southern Ontario starting in the mid-1980s.[202] Prior to its insolvency, the Bondfield Group was run by the Aquino family.[203] Both companies began to experience financial strain in 2018 and were subsequently placed into bankruptcy protection under the *CCAA* with a Monitor being appointed for Bondfield and a Trustee appointed for Forma-Con.[204]

After investigation, the Monitor and Trustee discovered that Bondfield and Forma-Con had illegally paid tens of millions of dollars to John Aquino, the son of Bondfield Group's founder, and others through a false invoicing scheme.[205] The Monitor and Trustee brought applications before the ONSC's Commercial List for various forms of declaratory relief – the Monitor sought relief under a combination of s. 36.1 of the *CCAA* and s. 96 of the *BIA,* and the Trustee sought relief under the latter only.[206] Each asserted that the false invoicing schemes were implemented by means of "transfers at undervalue" by which John Aquino "intended to defraud, defeat or delay a creditor" under s. 96 of the *BIA*.[207] The application Judge granted the declarations sought by the Monitor and the Trustee, which required the Bondfield parties to repay $21,807,693 and the Forma-Con parties to repay $11,366,890 on a joint and several liability basis (other than those whose specific liability was limited).[208]

The Appellants, John Aquino and others, appealed the application Judge's decision to the ONCA. The principal question on appeal was whether the Appellants could be held liable under s. 96 of the *BIA* to repay the money they had received through the fraudulent invoicing scheme by virtue of the corporate attribution doctrine. This involved an assessment of John Aquino's intentions (as directing mind of Bondfield and Forma-Con).

Decision

In its unanimous decision, the ONCA recognised that the corporate attribution doctrine had traditionally been applied in the fields of criminal and civil liability and had not yet been considered in the bankruptcy and insolvency context under s. 96 of the *BIA,* which made this a case of first impression.[209] The ONCA held that the corporate attribution doctrine is grounded in public policy and that the underlying question in its application, regardless of legal subject matter, is: "who should bear responsibility for impugned actions of a corporation's directing mind?".[210]

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[201] 2022 ONCA 202 [*Aquino*].
[202] *Ibid* at para 7.
[203] *Ibid* at para 7.
[204] *Ibid* at para 8.
[205] *Ibid* at para 9.
[206] *Ibid* at para 9.
[207] *Ibid* at paras 3
[208] *Ibid* at paras 10-12 and 13-16.
[209] *Ibid* at para 70.
[210] *Ibid* at para 72.

The ONCA also recognised that the traditional application and principles of the corporate attribution test – to criminal and civil matters – were different in the bankruptcy and insolvency context. Accordingly, the ONCA reframed the test for corporate attribution in the bankruptcy context as: “who should bear responsibility for the fraudulent acts of a company’s directing mind that are done within the scope of his or her authority – the fraudsters or the creditors?”. The ONCA concluded that permitting fraudsters to get a benefit at the expense of creditors would be perverse. In order to avoid this outcome, the ONCA attached the fraudulent intentions of John Aquino to Bondfield and Forma-Con in order to achieve the social purpose of providing proper redress to creditors, which is the core aim of s. 96 of the *BIA.* The appeals were dismissed with costs.

Commentary

As a result of *Aquino*, the fraudulent intent of the directing mind of a debtor corporation can now be attributed to that corporation for the purpose of obtaining remedies pursuant to the “transfers at undervalue” scheme under the *BIA*. It is anticipated this decision will be influential in other areas of the law, including fraudulent preferences under section 95 of the *BIA*, and other provisions requiring an element of intent.

***Rogers v Rogers Communications Inc.,* 2021 BCSC 2184**

Background[211]

The boardroom battle at Rogers Communications Inc. found its way into Court when Edward Rogers, Board Chair, applied for a Court order affirming the validity of a consent resolution to remove and replace five Board members.

Facts

Rogers Communications Inc. (“**RCI**”) is a large public telecommunications and media company operating throughout Canada and incorporated under the British Columbia *Business Corporations Act* (the "***BCA***"). RCI had a dual class structure, with Class A voting shares and Class B non-voting shares.

In 2007, Ted Rogers established the Rogers Control Trust (the “**RCT**”) for the benefit of the Rogers family as the means by which control of RCI would be exercised. Since Ted Roger’s passing, his son Edward Rogers has acted as the Control Trust Chair of the RCT; Melinda Rogers-Hixon (Edward Roger’s sister) is the Control Trust Vice-Chair.[212]

The RCT is the controlling shareholder of RCI and, either directly or through private Rogers family companies controlled by the RCT, the RCT beneficially owns 97.5% of the issued and outstanding Class A Voting Shares and approximately 10% of the outstanding Class B Non-Voting shares of RCI.[213] The remainder of the Class A and Class B shares are widely held. Effectively, the RCT owns or controls approximately 29% of RCI, and Edward Rogers, as the Control Trust Chair, is able to direct the voting of the RCT’s Class A voting shares at his discretion[214]

RCI had entered into a massive deal to purchase Shaw Communications Inc., and Edward wanted to replace RCI’s CEO and President in advance of that deal. Divisions and disagreements between Board members ensued, leading up to a consent resolution whereby Edward proposed to remove and replace five directors on the Board.

[211] 2021 BCSC 2184 [*Rogers*].
[212] *Ibid* at para 27.
[213] *Ibid* at para 30.
[214] *Ibid* at paras 31-32.

As Control Trust Chair of the RCT, Edward took a number of steps to replace the Independent Directors by means of the Consent Resolution.[215] The matter came before Madame Justice Shelley Fitzpatrick of the BCSC, where the singular legal issue to be decided was whether the Consent Resolution is valid and effective in accordance with the *BCA*.[216]

Decision

In determining the validity and effectiveness of the Consent Resolution, the court considered both the provisions of the articles of RCI (the "**Articles**") and the *BCA*. The provisions were read in their grammatical and ordinary sense, harmoniously with the scheme and object of the *BCA* and the intention of the Legislature. The ordinary meaning of the words was a “dominant” consideration.[217]

When RCI was incorporated, it did so in accordance with the British Columbia *Company Act*. Under s.130(3) of the *Company Act*, directors could be removed and replaced despite anything in the company memorandum or articles.[218] In March 2004, the *Company Act* was repealed and replaced by the *BCA*. Notably, the provisions of the *BCA* concerning the removal and replacement of directors are unique in contrast to other corporate legislation in Canada, both federal and in other provinces.[219]

The main issue was whether the Articles require a meeting of shareholders to remove and replace directors, rather than the abbreviated process of a consent resolution.[220]

Edward argued that both the Articles and the *BCA* provide that directors of RCI may be removed by way of an ordinary resolution passed by the Class A shareholders, as they are the only shareholders that carry the right to vote at general meetings.[221]

Both the *BCA* and the Articles define “special majority” as a two thirds majority, and an ordinary resolution may be passed by the registered Class A shareholders holding at least a “special majority” of the votes entitled to be cast on the resolution and submitted to the other registered Class A shareholders entitled to vote.[222] Accordingly, Edward submitted that an ordinary resolution here is a “consent resolution”, defined as a written resolution consented to in writing by registered Class A shareholders holding at least a “special majority” of the votes entitled to be cast on the resolution and submitted to the other shareholders entitled to vote.

The Court stated there is no rational reason why a “meeting” could not include either an actual meeting or a “deemed meeting”. The Act provides for a “legal fiction” in that the effect thatthe Consent Resolution is as if an actual meeting had taken place to both remove and replace directors, as contemplated by Article 3.4.[223] Furthermore, it was sufficient to ‘submit’ the Consent Resolution to shareholders by mailing it, and it was not necessary for the mail to have come directly from RCI.

The Court concluded that the process by which Edward Rogers obtained the Consent Resolution was available to him under the Articles and the *BCA*, and in accordance with the Articles and the *BCA*, was deemed to be valid and enforceable.[224]

Commentary

[215] *Ibid* at para 63.
[216] *Ibid* at para 79.
[217] *Ibid* at para 84.
[218] *Ibid* at para 127.
[219] *Ibid* at para 129.
[220] *Ibid* at para 132.
[221] *Ibid* at para 146.
[222] *Ibid* at para 150.
[223] *Ibid* at para 179.
[224] *Ibid* at para 237.

The Court adopted a largely black-letter analysis in approaching the wording of both the Articles and the *BCA*, confirming this approach even if that analysis appears to contradict current corporate governance trends and concepts of shareholder democracy. The holder or holders of voting control will be able to unilaterally determine the make-up of the board, and independent directors and senior officers effectively serve at the discretion of the controlling shareholder

The decision also re-affirms that BC and the *BCA* remain the most controlling-shareholder friendly jurisdiction for dual-class and similar ownership structures in Canada.

ENVIRONMENTAL

Environmental law cases pose a challenge to the Courts – they must balance polarizing views on natural resource exploration with the statutory frameworks that govern energy industry operations. In this section, we discuss two cases – one in which the BCCA was asked to opine on whether climate change should be considered a relevant factor when granting a mine permit; and a consideration of the effect an injunction order has on the reputation of the Courts.

G. Highlands District Community Association v British Columbia (Attorney General), 2021 BCCA 232

Background[225]

Concerns respecting climate change impacts are considered in the context of an application for mine permits under the British Columbia *Mines Act*.

Facts

The *Highlands* decision was an appeal from the dismissal of an application for judicial review of a Mines Inspector's decision to issue a permit to operate a rock quarry. The only issue on appeal was whether the decision was unreasonable because the Mines Inspector failed to consider the climate change impacts of the proposed quarry.[226]

The facts underpinning the *Highlands* decision concern the same parties and rock quarry project in the decision of *O.K Industries Ltd. v District of Highlands*.[227] OKI purchased 66 acres of vacant lands with the intention of creating a rock quarry (the "**Project**"). The lands are located in the District of Highlands on Vancouver Island (the "**District**"). The lands were not zoned for industrial or commercial uses, and the company was unsuccessful in its rezoning application. However, despite significant opposition by the Appellant, Highlands District Community Association ("**HDCA**"), as well as the District and the Capital Regional District, OKI successfully applied for a Mine Permit to operate a rock quarry pursuant to B.C.'s *Mines Act*.[228]

A senior Mines Inspector found there were no health, safety, economic or environmental grounds significant enough to deny the permit, which was granted subject to numerous and extensive conditions relating to environmental protection. In his response to HDCA's concern respecting the Project's impact on global climate change, the Mines Inspector stated, in part: "[w]hile this is an important issue and Canada has passed a non-binding motion to declare a national climate emergency in Canada, climate change is not relevant under the *Mines Act*.".[229]

HDCA's appeal to the BCSC was rejected, which led to it further appealing to the BCCA, which allowed the question concerning climate change impacts. The HDCA's position was that the Mines Inspector's failure to investigate and consider climate change impacts constituted a failure to discharge his duty to conduct a thorough assessment of the environmental impact of the project, whereas OKI argued the Mines Inspector properly considered environmental impacts of the Project within the scope of the legislative scheme.

Decision

[225] 2021 BCCA 232 [*Highlands*].
[226] *Ibid* at para 1.
[227] 2022 BCCA 12 [*OKI*].
[228] RSBC 1996, c 293 [*Mines Act*].
[229] *Highlands, supra* note 225 at para 9.

The BCCA dismissed the HDCA's appeal, concluding broadly that the submission sought a legislative response to a problem of global magnitude, but provided no basis for the present court to be required to intervene.[230] In coming to this conclusion, the Court first noted that the environmental protection and reclamation considerations under the *Mines Act* are narrower than those to be considered under the more expansive environmental assessment required under British Columbia's *Environmental Assessment Act*[231] (the "***EAA***"), which includes consideration of greenhouse gas emissions.[232] The Project was not of the size or scope to bring its permitting process under the ambit of the *EAA* regime.

Additionally, the Court was satisfied that the Mines Inspector, though not obligated to do so, nevertheless endeavoured to consider climate change impacts in the initial application process.[233] The Court further held that, despite his overly broad language regarding the relevance of climate change, the Mines Inspector's interpretation of factors he was required to consider in an application for permit under section 10 of the *MA* was reasonable. He exercised his broad discretion in compliance with language, rationale, and purview of the applicable statutory scheme.[234]

After a review of the relevant legislative scheme and the reasoning provided by the Mines Inspector, the Court concluded that climate change is not a key element in the text or purpose of the statutory scheme under the *Mines Act*, nor is it a required factor of consideration in the context of the permitting process for rock quarry projects of the same size and scope as the Project.[235]

HDCA subsequently sought leave to appeal this decision to the SCC, but leave was refused late in 2021.[236]

Commentary

As a threshold consideration, it is important to note that the Project's size in the *Highlands* decision was not large enough to bring it under the more expansive ambit of the *EAA* and its Regulations, which would have required consideration of greenhouse gas emissions. As such, the applicability of this decision to future projects may only be marginally assistive to mining projects with annual production capacity under 250,000 tonnes.[237]

However, the *Highlands* decision is an interesting development in the natural resource development industry as it highlights the increasing relevancy of climate change concerns for these types of commercial projects. This case serves as a reminder of the importance of taking proactive steps to address climate change, whether it be in taking steps to mitigate emissions, adapting investment strategies to mitigate climate change impacts, publicly disclosing climate related risks and, of course, ensuring full compliance with all relevant regulatory obligations.

As technology advances and we become more sophisticated in tracking individual businesses' carbon footprints, the prevalence of tort claims against corporations in resource development industries may see an uptick. That said, the pendulum can also swing in the other direction, as technology advances in this area provide an equal opportunity for organizations to respond to and mitigate climate change impacts in its operations.

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[230] *Ibid* at paras 61 and 62.
[231] SBC 2018, c 51 [*EAA*].
[232] *Highlands, supra* note 225 at paras 16, 44 and 46.
[233] *Ibid* at para 38.
[234] *Ibid* at para 40
[235] *Ibid* at paras 46 and 47.
[236] See 2021 BCCA 232.
[237] *Highlands*, *supra* note 225 at para 16; see also the *Reviewable Projects Regulation,* BC Reg 243/2019 at Part 3, Table 6 – Mine Projects.

***Teal Cedar Products Ltd. v Rainforest Flying Squad*, 2022 BCCA 26**

Background[238]

In *Teal Cedar*, a case concerning logging protests in British Columbia, the BCCA clarified what can be considered by the Courts when deciding whether to grant an injunction. The BCCA specifically addressed the availability of remedies other than injunctive relief and the effect that granting an injunction has on the reputation of the Courts.

Facts

Teal Cedar Products Ltd. ("**Teal Cedar**") is a logging company engaged in logging on Vancouver Island. The Rainforest Flying Squad is a group of protestors that engaged in dangerous criminal behaviour to prevent Teal Cedar from conducting its logging operations, including digging trenches in roads, chaining themselves into "sleeping dragon" devices, constructing barricades on roads, placing objects on helicopter land pads, suspending themselves over roadways, occupying "tree sits," and more.[239] On April 1, 2021, Justice Verhoeven granted an injunction enjoining the blockades, stating that Teal Cedar would suffer irreparable harm if the injunction was not granted. On September 14, 2021, Teal Cedar appeared before the Court again to seek a one-year extension of the injunction.[240]

The judge declined to grant the extension. In doing so, he referenced the well-known *RJR-MacDonald Inc. v Canada (Attorney General)*[241] test for the granting of injunctions which establishes that, in order to grant an injunction, there needs to be a serious issue to be tried, the applicant must be facing irreparable harm if the injunction is not granted, and the balance of convenience must favour granting the injunction. The judge concluded that the first two requirements were met but the third requirements was not. He found that the balance of convenience favoured refusing the injunction. Of note, the judge stated that the availability of recourse via the *Criminal Code*[242] and provincial laws and the strong public interest in maintaining the court's reputation both weighed in favour of not granting an injunction. He found that these factors outweighed the public interest in upholding the rule of law.[243]

Decision

The BCCA allowed the appeal and extended the injunction until September 26, 2022. Specifically, the BCCA found that the judge had erred in considering both of these factors in deciding not to grant an injunction.

Regarding the availability of charges under the *Criminal Code*, the BCCA found that this was not a relevant consideration in determining whether to grant an injunction. A private applicant has no power to force the police and prosecutors to pursue criminal law proceedings.[244] Therefore, the possibility that charges might be laid is of no relevance in this situation. However, the BCCA noted that the availability of other means, such as provincial statutory offences, for instance, could potentially be relevant in certain situations. If the alternative enforcement methods were actually being used in a way that caused protestors to stand down, then that would be relevant to whether an applicant could establish irreparable harm.[245] The availability of other options is of particular importance when it is government seeking an injunction because, unlike a private applicant, government has the ability to access and enforce alternative remedies.[246] The BCCA further found that the judge had erred in finding that the criminal law

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[238] 2022 BCCA 26 [*Teal Cedar*].
[239] *Ibid* at para 5.
[240] *Ibid* at para 17.
[241] [1994] 1 SCR 311.
[242] RSC 1985, c C-46.
[243] *Teal Cedar, supra* note 238 at para 26.
[244] *Ibid* at para 34.
[245] *Ibid* at para 40.
[246] *Ibid* at para 40.

would be used in this case to prevent ongoing harm to Teal Cedar – there was nothing in the record that supported the judge's inference that the police and BC Prosecution Service would employ the criminal law to stop the unlawful conduct.[247]

The BCCA also ruled that the judge erred by considering potential harm to the court's reputation in his analysis. It is wrong to say that the court's reputation is being harmed by its obligation to uphold the rule of law. The enjoinment of unlawful conduct by the Courts is a necessary and fundamental aspect of civil society and the rule of law.[248] The court's reputational interest lies in its legitimacy and effectiveness, which requires the court to be independent and impartial. The popularity of its decisions with the public is not relevant.[249] Furthermore, the BCCA rejected the judge's finding that police misconduct had a negative impact on the reputation of the court. The RCMP answer to the executive branch of government, not the Courts; the two bodies are constitutionally independent of each other. In the context of Teal Cedar's application to extend the injunction, police conduct should not have been a central focus.[250]

Commentary

Teal Cedar is important because it clarifies that both the availability of other recourse and the potential for public scrutiny should not act as barriers to a party seeking an injunction. This ensures that parties will continue to have access to this important and timely remedy and it serves as a strong statement from the Court that it will continue to issue injunctions in order to uphold the rule of law and protect private rights from unlawful interference.

[247] *Ibid* at para 47.
[248] *Ibid* at para 62.
[249] *Ibid* at para 60.
[250] *Ibid* at paras 64-66.

GOVERNMENT RELATIONS

The past year witnessed two topical decisions – one related to the constitutionality of Alberta's *Preserving Canada's Economic Prosperity Act*[251] (the "***PCEP Act***") and the other a finding that the *Impact Assessment Act*[252] and *Physical Activities Regulations*[253] is in violation of Canada's constitutional division of powers. Additionally, an interesting decision was rendered by the ONSC which considered whether the Government of Ontario had destroyed evidence relating to a developer's application to construct an offshore windfarm.

Alberta (Attorney General) v British Columbia (Attorney General), 2021 FCA 84

Background[254]

Alberta (Attorney General) concerns an unsuccessful challenge by the Province of British Columbia ("**BC**") of Alberta's *PCEP Act*.

Facts

Alberta introduced the *PCEP Act* which authorized the Minister of Energy to establish a licensing regime for the export of natural gas, crude oil and refined fuels. In the legislative debates prior to the passing of the *PCEP Act*, members of the BC legislature made statements suggesting that the *PCEP Act* was political retaliation that would allow Alberta to restrict the flow of natural resources to BC in response to BC's opposition to the Trans Mountain pipeline expansion.[255]

BC commenced an action in the FC pursuant to section 19 of the *Federal Courts Act*[256] (the "***FC Act***") seeking a declaration that the *PCEP Act* was unconstitutional. Alberta brought a motion asking the FC to strike BC's action because it disclosed no reasonable cause of action. The FC dismissed Alberta's motion to strike and granted BC's motion for an injunction.[257]

Decision

Writing for the majority of the FCA, Justice LeBlanc stated that the appeal should be allowed. Although he found that the FC has jurisdiction pursuant to section 19 of the *FC Act* to hear matters of this nature, he found that BC had not met the legal test for granting declaratory relief, largely due to the fact that, at the time the appeal was heard, no licensing scheme had actually been enacted and, therefore, there was no dispute requiring declaratory relief.[258]

Section 19 of the *FC Act* states that if the legislature of a province has passed an Act agreeing that the FC has jurisdiction in cases of *controversies* between Canada and that province, or between that province and any other province(s) that has passed a similar Act, the FC has jurisdiction to determine the controversies.[259] Justice LeBlanc concluded that this provision is broad enough to encompass interprovincial controversies that raise questions related to the constitutional validity of provincial legislation. In reaching this conclusion, he noted the following three points.

First, the language used in section 19 contemplates controversies between provinces without specifying the kinds of legal interests that can be asserted. Justice LeBlanc found that the fact that a particular

[251] SA 2021, c P-21.51.
[252] SC 2019, c 29, s 1.
[253] SOR/2019-285.
[254] 2021 FCA 84 [*Alberta (Attorney General)*].
[255] *Ibid* at paras 2-3.
[256] RSC 1985, c F-7 [*FCA*].
[257] *Alberta (Attorney General), supra* note 254 at para 10.
[258] *Ibid* at paras 112-113.
[259] *FCA*, s 19; *Alberta (Attorney General), supra* note 254 at para 13.

subject matter may give rise to private claims is not fatal to a finding of FC jurisdiction, so long as the requirements of section 19 are otherwise met.[260]

Second, Justice LeBlanc states that legislation granting jurisdiction to the FC should be interpreted generously and liberally. In interpreting the *FC Act*, he noted that the fact that it creates a regime for notifying the Attorney General of Canada and their provincial counterparts that an issue of constitutional validity is before the FC is compelling evidence that Parliament has given the FC the power to rule on the constitutional validity of provincial legislation.[261]

Lastly, Justice LeBlanc found that the limited caselaw dealing with section 19 does not set out the complete scope of the provision and therefore does not act as an obstacle to a broad interpretation of the kinds of "controversies" that may be considered pursuant to section 19.[262]

However, Justice LeBlanc nonetheless declined to grant declaratory relief on the basis that BC had not met the *Ewert v Canada*[263] test which requires that (i) the court have jurisdiction over the subject matter; (ii) the dispute be real and not theoretical; (iii) the party raising the issue have a genuine interest in its resolution; and (iv) the responding party have an interest in opposing the declaration sought.[264] The primary barrier to granting declaratory relief arose at the second part of the test which requires the dispute be real; because Alberta had not established a regulatory framework for enforcing the *PCEP Act*, any dispute arising from the *PCEP Act* was entirely theoretical.[265]

Commentary

Although the FCA did not rule on the constitutional validity of the *PCEP Act*, this case added clarity to constitutional issues surrounding control of provincial resources and the scope of the federal Courts. The Court has clarified that federal Courts have jurisdiction to decide on the validity of provincial legislation if it can be considered to be a controversy between two or more provinces. It also clarified that legislation such as the impugned *PCEP Act* cannot form the basis of a dispute unless there is a system in place that allows action to be taken – without a regulatory scheme allowing for enforcement, legislation such as the *PCEP Act* does not cause any dispute for the Courts to rule on.

***Trillium Power Wind Corp. v Ontario*, 2021 ONSC 6731**

Background[266]

The Government of Ontario took certain actions which indirectly resulted in the failure of a wind farm developer's application to construct an offshore windfarm. The developer sued the government, alleging various causes of action.

Facts

During the Dalton McGuinty administration in Ontario, that government initiated a policy of subsidizing wind projects in the province pursuant to the *Green Energy Act, 2009*.[267] This policy included a "feed in tariff," or "FIT" program, which guaranteed developers a high price for electricity. Some years later, it was clear that the policy had caused economic turmoil and it was cancelled. In the meantime, Trillium Power Wind Corp. ("**Trillium**") was in the midst of obtaining authorization to operate a wind farm in Lake Ontario. The proposal was premised on ultimately bringing the project into the FIT program, which would have

[260] *Alberta (Attorney General), supra* note 254 at paras 132, 156.
[261] *Ibid* at paras 133, 160.
[262] *Ibid* at para 134.
[263] 2018 SCC 30 [*Ewert*].
[264] *Ibid* at para 81; *Alberta (Attorney General), supra* note 254 at para 174.
[265] *Alberta (Attorney General), supra* note 254 at paras 181, 186-187.
[266] 2021 ONSC 6731 [*Trillium*].
[267] SO 2009, c 12.

made the project economically feasible. The provincial government then announced a moratorium on consideration of any offshore windfarm projects which effectively terminated Trillium's approval application. The date of the announcement coincided with the closing date for Trillium's financing of its proposed project. As a result of the change of policy, Trillium's financial institution withdrew funding.[268]

Trillium filed a Statement of Claim alleging various claims for damages against the government. The ONCA struck most of Trillium's claims but left open the possibility that Trillium could proceed on the basis of allegations that the government's actions were targeted to stop Trillium's offshore wind project before Trillium's financing was in place in order to deprive Trillium of the resources to contest the government's decision to cancel the wind projects.[269] As a result, Trillium moved forward with this claim in the ONSC.

In light of information about the McGuinty government's practice of destroying all electronic communications of departed personnel, Trillium also amended their claim to add the tort of spoliation stating that but for the destruction, or spoliation, of relevant documentation, it would have been in a position to succeed in the claim that the ONCA left open.[270]

Decision

Regarding the financing claim, the ONSC started by noting that for the government to stop the project before Trillium's financing was in place, the government would have to know when that financing was to take place. The only way that the government could have known when the financing deal was to close was through "courtesy notices" that Trillium allegedly sent.[271] A representative of Trillium explained that a lobbyist retained by Trillium sent voicemail messages to two government officials alerting of the closing. However, the representative had no direct knowledge of whether the messages were sent or what they contained and the lobbyist was not called by Trillium to testify, nor did she submit an affidavit.[272] Furthermore, the government included affidavits of the two alleged recipients of the messages which stated that neither of them had received any voicemails.[273] The ONSC found that the dearth of evidence proffered by Trillium precluded it from being able to advance this claim.

It was also noted that Trillium would have to prove that had the financing closed it would have changed the litigation outcome. However, as the Court pointed out, Trillium had no trouble bringing forward this litigation without the funding and no amount of money would have allowed it to present better arguments than it already did.[274] The ONSC further found that it was highly unlikely that Trillium's proposed project would have been economically feasible – without the now-cancelled FIT subsidy, Trillium could only possibly prove that the government's actions denied it a money-losing business venture.[275]

Regarding the spoliation claim, the ONSC remarked that spoliation as a self-standing cause of action is a novel claim – in the past, it has been recognized as an evidentiary rule. The evidentiary rule is that where there has been destruction of evidence by a party who reasonably anticipated litigation in which that evidence would play a part, then a rebuttable presumption arises that the evidence would have been unfavorable to the party who destroyed it.[276] The ONSC did not address whether spoliation could stand on its own as a newly recognized tort because it found that regardless of whether it was approached as a tort or an evidentiary rule, the basic elements of spoliation were not satisfied by Trillium. Any presumption against the government due to its intentional destruction of records was rebutted by the evidence that demonstrates that the normal recordkeeping practice at the time was to purge email accounts for departing employees. There was no evidence that any of the records were deleted in an attempt to

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[268] *Trillium, supra* note 266 at paras 6-13.
[269] *Ibid* at para 17.
[270] *Ibid* at paras 23-26.
[271] *Ibid* at para 34.
[272] *Ibid* at paras 35-36.
[273] *Ibid* at para 38.
[274] *Ibid* at para 46.
[275] *Ibid* at paras 47-48.
[276] *Ibid* at paras 50-51.

influence this litigation.[277] As a result, the ONSC found that neither Trillium's financing claim, nor its spoliation claim had any hope of success.

Commentary

Trillium is an interesting case that looks into controversial energy and communication policies from Ontario's former McGuinty government. However, even in the face of these controversial and, as the ONSC put it, "undemocratic," practices, Trillium's claims against the government were still ultimately unsuccessful.

Trillium also leaves open the possibility that the tort of spoliation will be recognized in Canada. If recognized, this will give parties facing unscrupulous action from opposing parties one more available tool to access recourse.

***Reference re Impact Assessment Act,* 2022 ABCA 165**

Background[278]

In this case, the ABCA found the *Impact Assessment Act* and *Physical Activities Regulations* (collectively, the "***IAA***") to be unconstitutional, finding that Parliament had overstepped its jurisdiction and intruded on areas of exclusive provincial jurisdiction.

Facts

The *IAA* sets out a comprehensive impact assessment process geared towards assessing the "effects" of certain physical activities carried out in Canada, including any environmental, economic, social, cultural or heritage effects caused by the activity. Those physical activities include those deemed to be "designated projects." Although ostensibly crafted to address various impacts from an assortment of physical activities, the *IAA* was viewed by many as the federal government creating a veto for projects with high greenhouse gas emissions. In fact, in the legislative debates surrounding the *IAA*, the federal government acknowledged that the criteria for deeming designated projects should include" an environmental threshold, including greenhouse gas emissions"[279] and that projects should fit within the government's climate change action plan.[280] Many of the activities deemed to be designated projects involve intra-provincial activities which fall under exclusive provincial jurisdiction. For example, construction of *in situ* oil sands extraction facilities, intra-provincial highways, or hydroelectric generating facilities are all intra-provincial activities that are covered by the *IAA* assessment regime. Under the *IAA*, once the federal government determines that a designated project causes effects on areas of federal jurisdiction that are contrary to the “public interest”, then the project proponent is prohibited from proceeding with that project.

Alberta challenged the validity of this legislation as it pertains to intra-provincial activities deemed to be designated projects, arguing that the IAA intrudes impermissibly into provincial jurisdiction by regulating intra-provincial activities that do not fall within Parliament’s jurisdiction.[281] Canada, on the other hand, defended the validity of the IAA, arguing that it only regulates matters that fall squarely within federal jurisdiction because it focuses merely on the “adverse effects within federal jurisdiction."[282]

Decision

[277] *Ibid* at paras 52-53.
[278] 2022 ABCA 165 [*Reference re IAA*].
[279] *Ibid* at para 204.
[280] *Ibid*.
[281] *Ibid* at para 34.
[282] *Ibid* at para 39.

The majority held the *IAA* to be unconstitutional as it undermines Canada's constitutional division of powers. They noted that under the *Constitution Act, 1867*[283] (the "***Constitution***"), the environment is not listed as a head of power assigned to either the federal or provincial governments and in order to introduce legislation regulating the environment, the legislation must be "linked to the appropriate head of power" falling within the specific government's jurisdiction. The majority relied on the principle of subsidiarity – which is that "law-making and implementation are often best achieved at a level of government that is not only effective, but also closest to the citizens affected and thus most responsive to their needs, to local distinctiveness, and to population diversity"[284] – to hold that provincial jurisdiction should be favoured.

In reviewing the validity of the legislation, the ABCA used the well-established two-stage analytical approach. The first stage involves characterizing the "pith and substance" of the legislation. The second stage involves classifying the legislation under the federal and provincial heads of power as set out in the *Constitution*.

After reviewing intrinsic evidence such as the title, preamble and statutory purposes of the *IAA*, and extrinsic evidence such as the legislative debates surrounding the introduction of the *IAA*, the majority found that the "pith and substance" of the *IAA* is properly characterized as "the establishment of a federal impact assessment and regulatory regime that subjects all activities designated by the federal executive to an assessment of all their effects and federal oversight and approval."[285]

Canada argued that Parliament had jurisdiction over the subject matter by virtue of several different heads of power. The majority found that the subject matter of the legislation does not properly fall under any of the proposed federal heads of power. Instead, the Court found that the application of the *IAA* to intra-provincial designated projects falls squarely within several heads of provincial jurisdiction, stating that "Parliament's claimed power to regulate all environmental and other effects of intra-provincial designated projects improperly intrudes into industrial activity, resource development, local works and undertakings and other matters within provincial jurisdiction."[286]

Commentary

The potential impacts of this decision are far-ranging. Under the *IAA*, the federal government is essentially given a veto over various intra-provincial resource development projects. The *IAA* being deemed unconstitutional and therefore invalid will return significant autonomy to provinces and territories over the development of natural resources and will remove red tape for proponents of such projects. However, the true impact of this decision remains uncertain as the decision is expected to be appealed to the SCC.

[283] (UK), 30 & 31 Vict, c 3, s 91, reprinted in RSC 1985, Appendix II, No 5.
[284] *Reference re IAA*, *supra* note 278 at para 149.
[285] *Ibid* at para 372.
[286] *Ibid* at para 421.

LIMITATION PERIODS

Undoubtedly, as lawyers one of our most common concerns is an impending (or potentially missed) limitation period. Below, we canvas two cases which provide further context for lawyers with respect to the requirement of "discoverability" when assessing limitation periods.

Grant Thornton LLP v New Brunswick, 2021 SCC 31

Background[287]

In *Grant Thornton*, the SCC sets a new standard for when claims become discoverable for the purpose of tolling a limitation period.

Facts

New Brunswick filed a statement of claim against Grant Thornton LLP ("**Grant Thornton**") seeking damages for negligence. Grant Thornton argued that the claim should be dismissed as it was outside of the two-year statutory limitation period.[288]

The negligence claim arose out a loan deal whereby on April 24, 2009, New Brunswick agreed to guarantee loans from the Bank of Nova Scotia (the "**Bank**") to Atcon Group of Companies ("**Atcon**") on the condition that an external review be conducted by Grant Thornton. On May 19, 2009, Grant Thornton reported to New Brunswick that Atcon's financial statements fairly presented in all material respects Atcon's financial position in accordance with Generally Accepted Accounting Principles ("**GAAP**"). As a result, New Brunswick guaranteed Atcon's loans on June 30, 2009. By October 2009, Atcon had run into financial difficulty and the Bank called on New Brunswick to pay out the loan guarantee in March 2010. In June 2010, New Brunswick retained RSM Richter Inc. ("**Richter**") to perform a second audit on Atcon's financial statements. Richter released a report on February 4, 2011, showing that Atcon's financial statements did not actually conform with GAAP and that there were many material errors in the statements. New Brunswick commenced its claim against Grant Thornton on June 23, 2014.[289]

Decision

In interpreting New Brunswick's *Limitation of Actions Act*,[290] the SCC found that sections 5(1)(a) and (2) codify the common law discoverability rule and therefore "a claim is discovered when the plaintiff has knowledge, actual or constructive, of the material facts upon which a plausible inference of liability on the defendant's part can be drawn."[291] A plaintiff has constructive knowledge when the evidence shows that the plaintiff ought to have discovered the material facts by exercising reasonable diligence.[292] A "plausible inference of liability" denotes a degree of knowledge that is more than a mere suspicion or speculation, but less than certainty of liability or "perfect knowledge."[293]

For example, the SCC noted that a plaintiff does not need to know the exact extent or type of harm it has suffered, or the precise cause of its injury, in order for a limitation period to run. For a claim in negligence, a plaintiff does not need knowledge that the defendant owed it a duty of care or that the defendant's act or omission breached the applicable standard of care.[294]

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[287] 2021 SCC 31 [*Grant Thornton*].
[288] *Ibid* at para 1.
[289] *Ibid* at paras 5-16.
[290] SNB 2009, c L-8.5.
[291] *Grant Thornton, supra* note 287 at para 3.
[292] *Ibid* at para 29.
[293] *Ibid* at para 46.
[294] *Ibid* at paras 46, 48.

Applying these findings to the facts, the SCC determined that New Brunswick discovered its claim on February 4, 2011. By that date, New Brunswick knew that it had suffered a loss and knew or ought reasonably to have known that the loss was caused or contributed to by an or omission of Grant Thornton.[295] This is the date Richter released its report. Although Richter did not comment directly on Grant Thornton's audit results, Richter's conclusions stood in stark contrast with the conclusions drawn by Grant Thornton.[296] As a result, New Brunswick's claim was outside of the limitation period.

Commentary

Grant Thornton outlines a new standard for discoverability of claims. While decided in the context of New Brunswick's *Limitation of Actions Act*, the standard will likely be applicable in Ontario, Alberta and Saskatchewan as well, since, as stated in the case, all three of those provinces have also codified the common law rule regarding discoverability.

Grant Thornton also sets a lower standard for the level of knowledge of a claim required in order to start the clock on any limitation period. It is not required that a plaintiff have knowledge of all of the constituent elements of a claim in order to have "discovered" it. Parties who become aware of the possible existence of a claim should consult with legal counsel as soon as possible in order to ensure that they do not fall outside the limitations period under this new standard.

Thermal Exchange Service Inc. v Metropolitan Toronto Condominium Corporation No. 1289, **2022 ONCA 186**

Background[297]

The ONCA considered when a creditor may rely on assurances made by a debtor to rebut the statutory presumption that the limitation period begins when non-payment first occurred.

Facts

From 2002 to 2015, the respondent, Thermal Exchange Service Inc. (“**Thermal Exchange**”) serviced the HVAC units in the appellant, Metropolitan Condo Corp.’s (the “**Condo Corp**.”), building at 168 Simcoe St. in Toronto.[298] Thermal Exchange received work orders from the Condo Corp.’s property manager, Helen Da Ponte, and would invoice the Condo Corp. after performing the work that was requested. Each of Thermal Exchange's invoices stated that payment was due within 30 days from the date of the invoice, however, the Condo Corp. typically made payment much later than this – often 300 days later. Thermal Exchange continued to provide services on request and tendered fresh invoices for the same.[299]

From 2008 forward, Thermal Exchange stopped sending individual invoices for each work order, and began sending a single, semi-annual “batch invoice”. The trial judge made no findings as to who initiated the change in billing practice but found that the indebtedness of the Condo Corp. was in the nature of a running account.[300]

Conflicting evidence arose at trial as to what arrangements, if any, had been made between Thermal Exchange and Ms. Da Pointe regarding payment. The evidence of Mr. Pintaric, representative of Thermal Exchange, was that he had several conversations with Ms. Da Ponte about the non-payment of invoices, and she would tell him that she was busy and unable to attend to the matter immediately but was

[295] *Ibid* at para 51.
[296] *Ibid* at para 57.
[297] 2022 ONCA 186 [*Thermal Exchange*].
[298] *Ibid* at para 2.
[299] *Ibid* at para 6.
[300] *Ibid* at para 8.

"working on" the invoices.[301] The trial judge found that her assurances led Thermal Exchange to believe that the problem could and would be remedied without the need for court intervention.[302] The trial judge accepted Mr. Pintaric's evidence that by October 2015, he thought a demand letter from his lawyer might stir Ms. Da Ponte to process the invoices.

Thermal Exchange's understanding was that it was contracting with the Condo Corp. rather than the individual unit owners and at trial, the Condo Corp. conceded the contractual relationship, accepting that but for the limitations defence, it would be liable to pay the invoices.[303] At all relevant times, however, Ms. Da Pointe operated on a different and mistaken understanding of the nature of the Condo Corp.'s contractual obligation to Thermal Exchange.[304] Thermal Exchange first became aware of this in November 2016, when Ms. Da Pointe advised Mr. Pintaric via email that the Condo Corp. was not responsible for paying the invoices and was only obligated to pay if and when it was able to collect payment from the unit owners on whose behalf the work was done.[305]

On August 17, 2017, Thermal Exchange filed its statement of claim, seeking damages for services supplied, breach of agreement, and unjust enrichment in the amount of $122,105.34. By the time of trial, the amount outstanding had been reduced to $86,055.49.[306] The central issue at trial was discoverability: specifically, when Thermal Exchange first determined that a proceeding would be an appropriate means to remedy its claim, per s.5(1)(a)(iv) of the *Limitations Act.*[307]

Decision

The ONCA found that the Condo Corp. created a barrier to Thermal Exchange receiving payment (it would not pay unless it first received payment from the unit owners, was not taking any steps to getting the unit owners to pay), prevented Thermal Exchange from understanding the nature of the problem, and led Thermal Exchange to believe that it would take care of the problem.[308]

The ONCA held that it was not until the November 4, 2016, email from Ms. Da Pointe, that Thermal Exchange became aware of the nature of the problem and became conscious that a proceeding would be an appropriate means to seek to remedy that problem.[309]

The Trial Judge's finding that the Condo Corp. had a running account with Thermal Exchange was supported by the evidence of Mr. Pintaric and the practice of batch invoicing.[310] Additionally, while the Trial Judge did not address the Condo Corp.'s defence of laches, the ONCA held that the argument could not have succeeded given the Trial Judge's findings that it was reasonable for a person in the position of Thermal Exchange to rely on the assurances of the property manager and hold off commencing an action. Having made that finding, a laches defence was not available.[311] The ONCA concluded that Thermal Exchange's action was not barred by Ontario's two-year limitation period.

Commentary

In Ontario (and most of Canada), the general rule is that most civil actions must be commenced within two years from the date that the claim was "discovered", which is presumed to be the date that the injury, loss, or damage occurred. As highlighted in this decision, one way a claimant can rebut this presumption is found under section 5(1)(a)(iv) of the *Limitations Act* which provides that a claim is not "discovered"

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[301] *Ibid* at para 11.
[302] *Ibid.*
[303] *Ibid* at para 3.
[304] *Ibid* at para 10.
[305] *Ibid* at para 10.
[306] *Ibid* at para 13.
[307] *Ibid* at para 14.
[308] *Ibid* at para 23.
[309] *Ibid* at para 26.
[310] *Ibid* at para 28.
[311] *Ibid* at para 31.

until a reasonable person in the claimant's position first knew that a proceeding would be the appropriate means to remedy the claim. Here, the property managers assurances that she was "working on" payment of the invoices, was enough for Thermal Exchange to reasonably believe that a proceeding was not the appropriate means to seek a remedy. There was nothing to suggest they could not or would not pay.

SECURITIES

Securities regulators enforce legislation designed to protect investors in the capital markets. The provincial *Securities Acts* create fines and penalties for those who misrepresent public company information, and also create statutory causes of action upon which class actions can be based. The ONCA considered whether a press release reporting on a spill from a tailings pond constituted public correction, and the ABCA considered whether a wrongdoer can escape fines and penalties by filing for bankruptcy

***Baldwin v Imperial Metals Corporation*, 2021 ONCA 838**

Background[312]

In *Baldwin*, the ONCA considered the role and scope of "public correction" in a shareholders proposed class action for misrepresentation in the secondary securities market under Ontario's *Securities Act.*

Facts

The respondent, Imperial Metals Corporation ("**Imperial**"), is a reporting issuer in Ontario whose shares trade on the TSX.

On August 4, 2014, Imperial issued a press release reporting that the tailings storage facility (the "**TSF**") at its Mount Polley gold and copper mine in British Columbia had been breached, releasing an "undetermined amount of water and tailings."[313] The press release stated that the cause of the breach was unknown.[314] Following the disclosure, Imperial's share price declined by 40% and the company lost about $500 million in market capitalization.[315]

Baldwin, a shareholder acting as class representative, sought leave to commence an action pursuant to s.138.3 of the *Securities Act*, which creates a cause of action for misrepresentation in the secondary securities market. Section 138.3(1) provides the remedy to anyone who "acquires or disposes of the issuers security during the period between the time when the document [containing the misrepresentation] was released and the time when the misrepresentation contained in the document was publicly corrected."[316]

Section 138.8(1) contains a screening mechanism: no action may be commenced under s.138.3 without leave of the court and the court shall only grant leave where it is satisfied that: (a) the action is being brought in good faith; and (b) there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff.[317]

The Chambers Judge denied leave to commence the action. He ruled that in order to obtain leave under the *Securities Act*, the plaintiff must allege not only a misrepresentation but also *some discrete* and *identifiable public correction*. That correction must be reasonably capable of revealing to the market the existence of an untrue statement of material fact or an omission to state a material fact.[318]

In this case, the press release on August 4 could not be a public correction as it said nothing more than: (i) the TSF had been breached; (ii) the cause of the breach was unknown; and (iii) the company was

[312] 2021 ONCA 838 [*Baldwin*].
[313] *Ibid* at para 8.
[314] *Ibid* at para 8.
[315] *Ibid* at para 9.
[316] *Ibid.*
[317] *Ibid* at para 14.
[318] *Ibid* at para 23.

working with authorities to assess the damage.[319] There was nothing to indicate that the breach was caused by deficient design, defective construction, or problems in operations.[320]

Decision

The primary issue on appeal was whether the Chambers Judge took an impermissibly narrow approach to determining whether the alleged misrepresentations were publicly corrected.[321]

The ONCA was of the view that the Chambers Judge set the bar too high by requiring that the public correction be express and directly linked to a specific misrepresentation.[322] The public correction need not be a "mirror image" of the alleged misrepresentation or a "direct admission that a previous statement is untrue".[323] There need only be some linkage or connection, and the public correction need not be issued by the company itself; it can emanate from third parties.[324]

At the leave stage, the overarching question concerning a public correction is whether it was reasonably capable of being understood in the secondary market as correcting what was misleading in the impugned statement. The analysis of a public correction in this regard requires going beyond the text of the alleged correction and examining: (i) the surrounding context in which the alleged correction was made; and (ii) how the alleged public correction would have been understood in the secondary market.

The ONCA concluded that, taking into account all the evidence, the press release could be understood by the market as corrective and there was a reasonable possibility that the action would be resolved in favour of the plaintiff at trial.[325] The appeal was therefore allowed, and the plaintiff was granted leave to commence the action.

Commentary

This decision lowers the threshold required to obtain leave under the *Securities Act*, potentially widening the scope of liability for disclosures made in the secondary market.

The ONCA, in keeping with its earlier ruling in *Drywall Acoustic Lathing and Insulation Local 675 Pension Fund v Barrick Gold Corporation,*[326] confirmed that while public correction is an important part of the statutory scheme, its role, at least at the leave stage, is a modest one.[327] It remains an open question whether public correction is a necessary element of the statutory cause of action, or simply a time-post to identify and delimit the members of the class.

***Alberta Securities Commission v Hennig*, 2021 ABCA 411**

Background[328]

In 2008, the Alberta Securities Commission (the "**ASC**") levied an administrative penalty against Mr. Hennig based on breaches of the *Securities Act*.[329] Rather than paying the fines and penalties, Mr. Hennig went bankrupt, but the ASC continued attempts to collect the debt, relying on an exemption in the

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[319] *Ibid* at para 27.
[320] *Ibid.*
[321] *Ibid* at para 40.
[322] *Ibid* at para 48.
[323] *Ibid* at para 54.
[324] *Ibid* at paras 54-55.
[325] *Ibid.*
[326] 2021 ONCA 104.
[327] *Baldwin, supra* note 312 at para 51.
[328] 2021 ABCA 411 [*Hennig*].
[329] RSA 2000 c S-4.

BIA for a "fine, penalty or restitution order" or "debts arising from false pretenses or fraudulent misrepresentation".[330]

Facts

Mr. Hennig was the CFO of various publicly traded corporations and faced charges from the ASC for improper financial disclosure, misrepresentation, undisclosed financial benefits, market manipulation and failing to report insider trading. After a 38-day hearing, the ASC levied an administrative penalty of $400,000 and a costs award of $175,000. The penalty and costs award was filed with the ABQB, and had the same force and effect as a judgment. Mr. Hennig unsuccessfully appealed, and then filed an assignment into bankruptcy. He was discharged from bankruptcy in 2015, but the ASC continued to pursue collection, and applied to renew their judgment and obtain a declaration that their debt survived the bankruptcy discharge on certain statutory exemptions in section 178 of the *BIA*. Firstly, the ASC argued that the debt was in the nature of a "fine, penalty, restitution order or other order similar in nature to a fine, penalty or restitution order imposed by a court in respect of an offence, or any debt arising out of a recognizance or bail". Alternatively, the ASC argued that the debt arose from "obtaining property or services by false pretenses or fraudulent misrepresentation, other than a debt that arises from an equity claim".[331]

The Chambers Judge hearing the matter at first instance agreed with the ASC's submissions and made a declaration that the debt survived bankruptcy discharge. Mr. Hennig appealed to the ABCA.[332]

Decision

The ABCA began by noting that the *BIA* has two main purposes – to provide for the general distribution of a bankrupt's assets between creditors, and to facilitate a bankrupt's financial rehabilitation. The *BIA* is intended to provide the honest and unfortunate debtor with a fresh start. As such, most debts are discharged through the bankruptcy process, with only certain debts designated by the legislature as "survivable" – for example, spousal and child support, student loan debt (for the first seven years after graduation), debts arising from fraud, etc.[333]

The Court took a purposive analysis and noted that the ASC had not specifically alleged that Mr. Hennig had committed fraud, nor had they chosen to prosecute him under the more serious quasi-criminal sections of the *Securities Act*. Although he may have committed, broadly speaking, acts which could be considered reprehensible, dishonest or immoral, his actions did not fit within the narrow definitions of the provisions of section 178. Not all monetary charges imposed by a regulator in the public interest will fall within the exceptions in section 178. The proper analysis is not to look at the underlying conduct and consider if it is "just as bad" as the conduct underlying criminal fine and penalties. The *BIA* provisions reflect the underlying divisions of authority between the criminal and civil legal systems. An administrative penalty and costs order does not meet the standard of a penalty or fine, because it is not imposed as punishment for offences against the state in criminal or quasi-criminal proceedings.[334]

With respect to the exemption for debts arising from "false pretenses or fraudulent misrepresentation", the ABCA noted that no specific allegations of fraud were made at the original ASC hearing, even though his conduct with respect to the financial statements was found to be "deceptive and despicable".[335] Furthermore, Mr. Hennig's misrepresentations with respect to the financial statements were not made to

[330] *Ibid*, s 178(1); *Hennig, supra* note 328 at para 1.
[331] *Hennig, supra* note 328 at paras 3-13.
[332] *Ibid* at paras 12-13.
[333] *Ibid* at paras 16-26.
[334] *Ibid* at paras 41-55.
[335] *Ibid* at paras 56-78.

the ASC, but to investors and the capital markets generally. For section 178(1)(e) to apply, the misrepresentation must be made directly to the creditor complaining of the conduct.[336]

As a result, the ABCA granted the appeal, and held that Mr. Hennig's ASC debts were eliminated through his 2015 bankruptcy discharge.

Commentary

Hennig confirms that administrative penalties imposed under the *Securities Act* (or similar regulatory authority) can be discharged through bankruptcy, even though it may involve behaviour which could be described as "deceptive and dishonourable" or involving "deception, concealment and manipulation". Based on this ruling, an administrative penalty can be eliminated through bankruptcy unless it arises in criminal or quasi-criminal proceedings, or unless it meets the strict test for fraudulent pretenses or fraudulent misrepresentation. Securities regulators who wish to make sure their penalties have "teeth" should be sure to specifically allege fraud and prosecute under quasi-criminal proceedings where appropriate. The result of this decision may be that securities regulators take a more aggressive approach in their charges and prosecutions.

[336] *Ibid* at para 79.

TAX

Taxes are inevitable, as is judicial scrutiny of the vehicles created to minimize those taxes. The SCC weighed in on the applicability of avoidance rules to a capital gain arising from an entity created to take advantage of a Luxembourg tax treaty, and whether a parent company's injection of capital into a foreign subsidiary prevented the application of a tax exemption.

Canada v Alta Energy Luxembourg S.A.R.L, 2021 SCC 49

Background[337]

This decision marked the first time the SCC has ruled on the application of the general anti-avoidance rule (the "**GAAR**") to tax treaties. In a 6-3 majority ruling, the SCC found that the Minister of National Revenue (the "**MNR**") did not prove abusive tax avoidance.

Facts

In 2012, a restructuring of Alta Energy Partners Canada Ltd. ("**Alta Canada**") took place. As part of the restructuring, Alta Luxembourg was incorporated under the laws of Luxembourg to hold interests in Luxembourg and foreign companies. The shares of Alta Luxembourg were issued to a new Canadian partnership formed in Alberta, Alta Energy Canada Partnership.

In 2013, Alta Luxembourg sold its shares of Alta Canada to Chevron Canada Ltd. for approximately $680 million, creating a capital gain exceeding $380 million. Alta Luxembourg claimed an exemption from Canadian income tax on the basis that the gain was not included in its "taxable income earned in Canada" under section 115(1)(b) of the *Income Tax Act*[338] (the "***ITA***") because the shares were "treaty-protected property" under articles 13(4) and (5) of the *Convention between the Government of Canada and the Government of the Grand Duchy of Luxembourg for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital* (the "***Treaty***").[339]

The sole issue before the FCA was whether GAAR applied to void the exemption because there had been an abuse of the *ITA* or the *Treaty.*[340] Writing for a unanimous court, Webb JA found that the object, spirit and purpose of the relevant provisions of the *Treaty* is reflected in the words chosen by Canada and Luxembourg.[341] Since the provisions had operated as they were intended to, there was no abuse. The MNR appealed to the SCC.

Decision

The Court recognized that if the Minister can establish abusive tax avoidance under the GAAR, s.245 of the *ITA* will apply to deny the tax benefit even where the tax arrangements are consistent with a literal interpretation of the relevant provisions.[342]

Applying GAAR involves a three-part process meant to determine: (i) whether there is a tax benefit arising from a transaction; (ii) whether the transaction is an avoidance transaction; and (iii) whether the avoidance transaction is abusive.[343] Since Alta Luxembourg did not dispute that there was a benefit and

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[337] 2021 SCC 49 [*Alta Energy*].
[338] RSC 1985, c 1 (5th Supp).
[339] *Alta Energy*, *supra* note 337 at paras 13-15.
[340] *Ibid* at para 23.
[341] *Ibid* at para 24.
[342] *Ibid* at para 30.
[343] *Ibid* at para 31.

an avoidance transaction, the only element in dispute before the Supreme Court was the abusive nature of the transaction.[344]

To determine whether a transaction is abusive, the Court set out a two-step inquiry in *Canada Trustco Mortgage Co. v R.*[345] Under the first step, the provisions relied on for the tax benefit are interpreted to determine their object, spirit, and purpose. The second step is to undertake a factual analysis to determine whether the avoidance transaction at issue is consistent with or frustrates the object, spirit, and purpose of the provisions.[346]

Abusive tax avoidance occurs "when a taxpayer relies on specific provisions of [the *ITA*] in order to achieve an outcome that those provisions seek to prevent" or when a transaction "defeats the underlying rationale of the provisions that are relied upon."[347]

The objective of tax treaties, broadly stated, is to govern the interactions between national tax laws in order to facilitate cross-border trade and investment.[348] One of the most important operational goals is the elimination of double taxation, where the same source of income is taxed by two or more states without any relief. If left unchecked, double taxation risks creating barriers to international trade and investment, which are vital in a globalized economy.[349]

Another important consideration is the dual nature – contractual and statutory – of tax treaties. Consideration of the contractual element is crucial to the application of the GAAR as it focuses the analysis on whether the particular tax planning strategy is consistent with the compromises reached by the contracting states.[350]

The business property exemption is a carve-out from source-based capital gains tax and applies where a capital gain is realized on the sale of shares whose value is derived principally from immovable property in which a business was carried on.[351] As noted by the Court, only a very small number of the world's tax treaties include the carve-out, thereby signaling that its inclusion in the *Treaty* was intentional on Canada's part.[352]

The Court also considered whether the use of conduit corporations in this context perverts the bargain struck between Canada and Luxembourg. The Court concluded that it does not, as the GAAR was enacted to catch unforeseen tax strategies, and the use of conduit corporations was not an unforeseen tax strategy at the time of the *Treaty.*[353]

Alta Luxembourg was created as part of a restructuring of activities to take advantage of the carve-out provided for in art. 13(4) of the *Treaty*. It conceded that this tax benefit was derived from a transaction not arranged primarily for a *bona fide* purpose other than to obtain this benefit. However, this avoidance transaction was not abusive.[354] From the moment Alta Luxembourg realized a gain on the disposition of its shares of Alta Canada, the laws of Luxembourg applied and Canada's interest in the gain ceased.[355] As a result, Alta Luxembourg's status fell squarely within the object, spirit, and purpose of arts. 1 and 4(1)

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[344] *Ibid* at para 28.
[345] 2005 SCC 24.
[346] *Alta Energy, supra* note 337 at para 31.
[347] *Ibid* at para 32
[348] *Ibid* at para 35.
[349] *Ibid.*
[350] *Ibid* at para 36.
[351] *Ibid* at para 76.
[352] *Ibid* at para 78.
[353] *Ibid* at paras 79-80.
[354] *Ibid* at para 91.
[355] *Ibid* at para 92.

of the *Treaty.*[356] As a result, the CRA's appeal was dismissed, and the capital gains were not taxable in Canada.

Commentary

Some corporate reorganizations are tax-driven, or designed to take advantage of certain provisions, treaties or rules which will result in favorable tax treatment. The SCC has made it clear that tax avoidance is not tax evasion, and should not be conflated with abuse. There must be more than simple tax avoidance in order to meet the "abusive" requirements under GARR and tax treaties. It should be noted that the Canadian government has pledged to renegotiate many of its tax treaties and modernize the GARR regime, so these types of structures may become less common in the future.

***Canada v Loblaw Financial Holdings Inc.*, 2021 SCC 51**

Background[357]

The SCC confirmed that income earned by a Barbados bank subsidiary of Loblaw Financial Holdings Inc. ("**Loblaw Financial**") was not foreign accrual property income and therefore not taxable in Canada.

Facts

In 1992, Loblaw Financial, a member of the Loblaw Group of Companies (the "**Loblaw Group**") incorporated a subsidiary in Barbados, which was later renamed Glenhuron Bank Limited ("**Glenhuron**"), regulated under the laws of Barbados.

Between 1992 and 2000, the Loblaw Group made several capital investments in Glenhuron, and Glenhuron was able to grow its asset base to $700 million by the end of 2010. Loblaw Financial did not include income earned by Glenhuron in its Canadian tax returns as foreign accrual property income ("**FAPI**") because it claimed that Glenhuron's activities were covered by the financial institution exception (the **"Exception**") in the FAPI rules.[358] The CRA re-assessed the taxpayer for the years 2001-2005, 2008 and 2010, and the taxpayer appealed.

For the Exception to apply, four requirements must be met: (i) the controlled foreign affiliate ("**CFA**") must be a foreign bank, or another financial institution listed in the exception provision; (ii) its activities must be regulated under foreign law; (iii) the CFA must employ more than five full time employees in the active conduct of its business; and (iv) its business must be conducted principally with persons with whom it deals at arm's length.[359]

Before the SCC, the sole issue was whether Glenhuron conducted business principally with persons with whom it was dealing at arm's length during the taxation years in issue.[360]

Decision

The Court noted that where the words of a statute are "precise and unequivocal", their ordinary meaning will play a dominant role; and in the taxation context, a "unified textual, contextual and purposive" approach continues to apply. The Court should also consider the *Duke of Westminster*[361] principle (that

[356] *Ibid.*
[357] 2021 SCC 51 [*Loblaw*].
[358] *Ibid* at para 11.
[359] *Ibid* at para 11.
[360] *Ibid* at para 27.
[361] *Inland Revenue Commissioners v Westminster (Duke of)*, [1936] AC 1 (HL).

taxpayers are entitled to arrange their affairs to minimize the amount of tax payable) in order to assess the broader purpose of the scheme.

In this case, the dispute surrounds the meaning of “business conducted principally with” within the arm’s length requirement, and specifically whether a parent corporation’s injection of capital or corporate oversight amounts to conducting business with a foreign affiliate.[362]

The Court held that while raising capital is a necessary part of any business and enables business to be conducted, one would not generally speak of capitalization itself as the conduct of the business.[363] The grammatical and ordinary meaning of the words “business conducted”, read in the context and in light of the purpose of the FAPI regime, clearly shows that Parliament did not intend capital injections to be considered.[364]

With respect to corporate oversight by a parent, the Court noted that while a corporation’s business may be conducted using money provided by shareholders or in accordance with policies adopted by the board of directors on behalf of the shareholders, this does not change the fact that the corporation is a separate legal entity and remains the one conducting its own business.[365]

Once corporate oversight and the capital investments received by Glenhuron were excluded, only its investment activities remained to be considered for the application of the arm’s length requirement. Since the vast majority of these activities were conducted with arm’s length persons, the Court concluded that the arm’s length requirement was met and Loblaw Financial was entitled to rely on the Exception.[366]

Commentary

Many tax cases involve statutory interpretation of the complex provisions of the *ITA.* While this case involved a technical exception for foreign subsidiary banks, it confirms that Courts will enforce clear language where appropriate. It also clarifies the meaning of “conduct business” by distinguishing income-earning activities from other activities (for example, capitalization, oversight and co-ordination within a corporate group).

[362] *Loblaw*, *supra* note 357 at para 43.
[363] *Ibid* at para 46.
[364] *Ibid* at para 61.
[365] *Ibid* at para 64.
[366] *Ibid* at para 67.