CELF 2021 Recent Judicial Decisions of Interest to Energy Lawyers

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Last year's submission canvassed judicial decisions that were released prior to, and post implementation of COVID-19 restrictions. The advent of COVID-19 caused unprecedented economic and social disruption and no industry or social institution was immune to its effect. Alberta was already attempting to manage one of the highest unemployment rates among the provinces when the COVID-19 pandemic exacted its multi-faceted toll. One aspect being a serious decline in the demand for oil which further impacted oil prices, and the very manner in which energy industry participants would operate in the near and longer terms. The judiciary, and the broader legal system, suffered no less an impact and extraordinary measures were taken in order to maintain the rule of law and preserve meaningful access to justice.

Notwithstanding the extraordinary circumstances all have endured since March, 2020, many reported decisions of significance to energy industry participants have been released by Canadian courts over the past year. This article summarizes a selection of key decisions covering developments in Canadian contract law, energy, environmental, insolvency, aboriginal, employment and labour, minority shareholder's rights and developments in civil litigation procedure. In each topic area the identified cases are reviewed with respect to their facts, a summary of the decision, and a brief commentary as to the implications or general significance of the case.

[1] The authors would like to extend a special thank-you to the following Summer Students who contributed significantly to this paper: Emma Aspinall, Shyrose Aujla, Vivan Esmailzadeh, Carly Kist, Charles Lewis and Brenden Roberts.

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CONTRACT LAW

Overview

This year, the Supreme Court of Canada released two decisions which relate to and expand upon the duty of honest contractual performance, first articulated in *Bhasin v Hrynew*, 2014 SCC 71 ("***Bhasin***"). In *CM Callow Inc v Zollinger*, 2020 SCC 45 ("***Callow***"), the Court expanded upon the doctrine and clarified that the contents of the duty go beyond simply refraining from actively lying or knowingly misleading a counterparty. In *Wastech Services Ltd v Greater Vancouver Sewerage and Drainage District,* 2021 SCC 7 ("**Wastech**"), the Court considered the related duty to exercise contractual discretion in good faith, which itself incorporates the duty of honest contractual performance.

Bhasin caused much discussion and commentary amongst energy lawyers as they grappled with the consequences arising from the decision in terms of contractual performance. *Callow* and *Wastech* serve to clarify the principle of good faith contractual performance but neither decision provides guidance as to what contractual duties derived from the good faith principal can, by agreement amongst sophisticated parties, be relaxed and which contractual duties remain unassailable.

In "Honour Among Business People: The Duty of Good Faith and Contracts in the Energy Sector" (see attached article) the authors speculate that certain provisions in energy sector agreements are more likely than others to form the basis of good faith litigation claims. Specifically those authors identify that contractual provisions with the following elements are likely fodder for such litigation: 1) an imbalance of information 2) the vulnerability of one party to abuse of discretion by the other party 3) the potential for the evisceration of rights despite technical compliance with the express provisions of the subject agreement, and 4) an express disclosure obligation (See Finkelstein at page 374). As was the case with *Bhasin*, *Callow* and *Wastech* will have a profound impact on Canadian contract law and challenge energy lawyers on how they advise clients to best adhere to good faith performance in existing agreements and how to draft agreements that best manage the manner in which clients are to perform under agreements going forward.

A number of the decisions discussed in this year's contracts update are cases which dealt with issues related to the doctrine of frustration, and force majeure clauses. In some of these cases, the issues arose as a result of the COVID-19 pandemic. The onset of COVID-19 caused clients and lawyers alike to train their focus on whether COVID-19 itself could constitute force majeure, or whether the impacts of the pandemic rendered the performance of contractual obligations impossible. The jurisprudence advises that whether a particular event triggers force majeure will always be defendant upon the words chosen by the contracting parties, and the unique circumstances or context in which a contractual dispute arises.

This year's update also includes a number of cases which dealt with contractual interpretation disputes where the existence of parallel agreements and non-contractual communications between the parties were relevant to the interpretation of the contract. For example, in *ABB Inc. v Canadian National Railway Co.*, 2020 FC 817, the Court was tasked with resolving the issue of two conflicting limitation of liability clauses where one was contained in the contract at issue between the parties, and the other was contained in a persisting "framework agreement" between the parties.

CM Callow Inc v Zollinger[2]

Background

In *Callow,* the Supreme Court of Canada ("**SCC**") clarified the contents of the duty of honest contractual performance which was first set out in *Bhasin*[3]. In particular, *Callow* dealt with the relationship between the duty of honest performance and an apparently unfettered, unilateral termination clause.

Facts

The plaintiff was hired by the defendant condominium corporation ("**Baycrest**") to do winter/summer maintenance work over a two year term.[4] The contract stipulated that Baycrest could terminate the contract if the plaintiff failed to give satisfactory service according to the terms of the contract. However, it also stated that 'if for any other reason [the plaintiff's] services are no longer required… then [Baycrest] may terminate this contract upon giving ten (10) days' notice in writing to [the plaintiff]."[5]

After the first year of the 2 year term was completed, the evidence showed that the plaintiff performed his duties diligently and to a satisfactory level (despite some tenant complaints regarding snow removal, which was brought to the plaintiff's attention, and resolved in a satisfactory manner).[6] In the spring following the first year of the contract, a new property manager for Baycrest advised a committee of the board of directors (the "**Committee**") that they should terminate the plaintiff's contract early, prior to the start of the second winter term. The Committee, shortly thereafter, voted to terminate the winter maintenance agreement. This decision was not communicated to the plaintiff.[7]

During the summer, the plaintiff performed his summer maintenance obligations diligently, and began negotiations with the president of Baycrest to renew their maintenance contracts for a further 2 years. The evidence established that after their conversations, the plaintiff was made to believe that his contract would be renewed following the completion of the current contract.[8] Baycrest was aware of the plaintiff's mistaken belief, but still did not notify him of their intention to terminate the contract early.[9] The evidence also showed that prior to the termination of the contract, the plaintiff performed duties above and beyond his obligations under the summer maintenance contract, as a way to incentivize Baycrest to renew his contract for a further 2 years.[10]

In September 2013, the plaintiff's contract was prematurely terminated, upon 10 days' notice.[11] The plaintiff then filed a statement of claim alleging that Baycrest acted in bad faith by accepting free services, knowing that the plaintiff was only offering the services in order to maintain the parties' future contractual relationship.[12] Furthermore, the plaintiff alleged that in reliance of the representations made by Baycrest, he did not tender bids on

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[2] 2020 SCC 45 **[*Callow*]**.

[3] *Bhasin v Hrynew,* 2014 SCC 71 at para 58 **[*Bhasin*]**.

[4] *Callow* at para 6.

[5] *Ibid* at para 8.

[6] *Ibid* at para 9.

[7] *Ibid* at para 10.

[8] *Ibid* at paras 11-12.

[9] *Ibid* at para 13.

[10] *Ibid* at para 12.

[11] *Ibid* at para 14.

[12] *Ibid* at para 15.

other winter maintenance contracts, and as a result suffered damages for loss of opportunity.[13] Finally, the plaintiff alleged that Baycrest was unjustly enriched by the free services rendered.[14]

The trial judge first rejected Baycrest's argument that the plaintiff's work failed to meet the requisite standards required by the contract.[15] Second, the trial judge found that this case was not a simple contractual interpretation case, and that the organizing principles of good faith performance and the duty of honest performance set out in *Bhasin* were engaged.[16] The trial judge found that Baycrest actively deceived the plaintiff from the time the termination decision was made to the time the notice was given and awarded the plaintiff damages accordingly for the breach of contract.[17]

The Ontario Court of Appeal unanimously allowed Baycrest's appeal, finding that the duty of honesty set out in *Bhasin* did not impose a duty of loyalty or of disclosure or to require a party to forego the advantages flowing from a contract.[18] Further, the Court of Appeal found that, while Baycrest's actions may not have been honourable, its conduct did not rise to the high level required to establish ab reach of the duty of honest performance.[19] In any event, the Court of Appeal found that any deception on the part of Baycrest related to a new contract, not yet in existence, and therefore the deception could not be directly linked to the performance of the contract at issue.[20]

The plaintiff appealed to the SCC.

Decision

The majority of the Court found that Baycrest had breached its duty to perform the contract honestly by knowingly misleading the plaintiff to believe that the winter contract would not be terminated. The ruling of the trial judge to award expectation damages was reinstated.

The majority of the Court confirmed that on application of *Bhasin*, it was clear that even an apparently unfettered contractual right to terminate an agreement must be exercised in accordance with the duty to act honestly.[21] In determining whether dishonestly is connected to a given contract, the relevant question to ask is whether a right or obligation under the contract was performed dishonestly.[22] If someone is led to believe that their counterparty is content with their work, and their ongoing contract is likely to be renewed, it is reasonable for that person to infer that the ongoing contract is in good standing and will not be terminated early.[23] Therefore, the Court found that the alleged deception related directly to the contract at issue and not a future contract.[24]

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[13] *Ibid.*

[14] *Ibid*.

[15] *Ibid* at para 19.

[16] *Ibid* at para 20.

[17] *Ibid* at paras 21-24.

[18] *Ibid* at para 26.

[19] *Ibid* at para 27.

[20] *Ibid* at para 28.

[21] *Ibid* at para 37.

[22] *Ibid.*

[23] *Ibid.*

[24] *Ibid;* in further support of its finding that the dishonest conduct related directly to the existing contract, the Court undertook a thorough review of Quebec Civil Law and the applicability of the "abuse of rights" doctrine, see paras 56-75.

While the duty of honest performance is not to be equated with a positive obligation of disclosure, in circumstances where a party lies to, or knowingly misleads another, a lack of a positive obligation of disclosure does not preclude an obligation to correct the false impression created through its own actions.[25]

The Court explained that it is a “requirement of justice” that contracting parties have appropriate regard to the legitimate contractual interests of their counterparty.[26] This requirement of justice reflects the notion that the bargain (i.e. the rights and obligations agreed to) is the first source of fairness between parties to a contract, but, as directed by the organizing principle, the obligations must be exercised and performed honestly and reasonably, and not capriciously or arbitrarily.[27]

No contractual right, including a termination right, may be exercised dishonestly and contrary to the requirements of good faith.[28] However, the Court clarified that the dishonest or misleading conduct must be directly linked to the performance of the contract. Otherwise, there would simply be a duty not to tell a lie, with little to limit the potentially wide scope of liability.[29]

Focusing on the *manner* in which a right was exercised should not be confused with *whether* the right could actually be exercised. The plaintiff in *Callow* did not allege that Baycrest had no right to terminate the contract, rather it was alleged that Baycrest exercised its right of termination dishonestly and in breach of their duty as set out in *Bhasin*.[30]

Finally, the Court dealt with the "standard of honesty" associated with the duty of honest performance. After reviewing the applicable law, the Court held that whether or not a party has “knowingly misled” its counterparty is a highly fact-specific determination.[31] It can include lies, half-truths, omissions, and even silence, depending on the circumstances. However, this is not a closed list, and it merely exemplifies that dishonest or misleading conduct is not confined to direct lies.[32]

In the result, the Court found no error in the trial judge's decision where she found that Baycrest knowingly misled the plaintiff as to the standing of the contract between them, and thus wrongfully exercised its right of termination,[33] and accordingly allowed the appeal and restored the trial judgment.[34]

Commentary

In *Callow,* the SCC clarified the contents of the duty of honest performance. It is now clear that the duty can be breached even in the absence of outright lies or misrepresentations. Depending on the circumstances, even silence can amount to a breach of the duty. In *Callow*, the plaintiff was under a misapprehension as to the reality of the state of affairs, the defendant was aware of this misapprehension, the defendant did nothing to correct the misapprehension, and indeed, the defendant benefited from the misapprehension. Furthermore, the defendant in *Callow* appeared to be the source of the misapprehension, albeit not by way of an explicit misrepresentation. The combination of these factors made it easy for the majority of the Court to find in favour of the plaintiff. However, as

[25] *Ibid* at para 38.

[26] *Ibid* at para 47 citing; *Bhasin* at paras 63-64.

[27] *Ibid* at para 47.

[28] *Ibid* at para 48.

[29] *Ibid* at para 49.

[30] *Ibid* at para 55.

[31] *Ibid* at para 91.

[32] *Ibid*.

[33] *Ibid* at para 92.

[34] *Ibid* at para 120.

the Court emphasized, determining whether a party "knowingly misled" its counterparty is a highly fact-specific determination.[35]

Would the result in *Callow* have been the same if, for example, the plaintiff did not perform additional services as a result of his misapprehension, or if the plaintiff had, notwithstanding his misapprehension, bid on other winter maintenance contracts such that the non-renewal of his contract with the defendant would not have caused him damages? These factors would impact the plaintiff's measure of damages, however, based on the Court's reasoning in *Callow*, the cause of action in principle would likely survive.

The critical factor in *Callow* appears to be the fact that the defendant was, in part, responsible for the misapprehension of the plaintiff. As the Court confirmed, the duty of honest performance does not include a positive obligation of disclosure, however, where a party lies to, or knowingly misleads another, a lack of a positive obligation of disclosure does not preclude an obligation to correct the false impression created through its own actions.[36]

Wastech Services Ltd v Greater Vancouver Sewerage and Drainage District[37]

Background

In *Wastech*, the Supreme Court of Canada ("**SCC**") revisited the duty to exercise contractual discretion in good faith. The issue was placed before the Court in the context of an appeal from an arbitral award. Ultimately, the SCC considered whether the exercise of an apparently unfettered contractual discretion could amount to a breach of the duty to exercise contractual discretion in good faith if the exercise of that discretion resulted in the substantial evisceration of the benefit bargained for by the counterparty to the contract.

Facts

Wastech was a waste disposal business that had contracted with Metro, the entity responsible for administering waste removal on behalf of the Greater Vancouver Sewage and Drainage District. The parties' contractual relationship was complex. Of relevance was the fact that the contract included a term which set out a target operating ratio ("**OR**") which expressed the ratio between operating costs and revenue. . Under the target OR, Wastech stood to make 11% profit. The contract also specified three possible locations to which Wastech could haul waste. If Wastech hauled waste to the furthest of the three locations it would make more money. Of critical relevance was the fact that the contract gave Metro the "absolute discretion" to effectively set the amount of waste to be hauled to each of the three locations.

In one year, Metro significantly reduced the amount of waste to be hauled to the furthest location, and increased the amount of waste to be hauled to the nearest location. As a result, the actual OR of Wastech was such that it operated at a loss (although, due to certain adjustment provisions in the contract, the parties split the burden of the difference between the target OR, and the actual OR, resulting in a 4% profit for Wastech in that year). The parties contract provided that any disagreement was to be determined by way of arbitration.

The arbitral award was favourable to Wastech. The arbitrator determined that while Metro had the absolute discretion to determine the amount of waste to be hauled to a particular location it could not exercise that discretion in a way that negatively impacted Wastech's ability to achieve the target OR. On appeal the British Columbia

[35] *Ibid* at para 91.

[36] *Ibid* at para 38.

[37] 2021 SCC 7 **[*Wastech*]**.

Supreme Court, and then subsequently the British Columbia Court of Appeal and the SCC were all in agreement that the arbitrator's award should be set aside.

Decision

At the SCC, the Court provided significant guidance on the meaning of the duty to exercise contractual discretion in good faith. First, the Court rejected the 'appropriate regard for legitimate contractual interests of the counterparty' test because "appropriate regard is a broad phrase that covers a variety of different levels of conduct depending on the circumstances".[38] Then the Court confirmed that the duty of honest contractual performance also applies to exercise of discretion, in that if discretion was exercised in the context of one party lying or misleading the other, then the duty would be breached.[39]

Moving onto the content of the duty of good faith, the Court first confirmed that the duty to exercise contractual discretion in good faith is well established in the common law, including in *Bhasin.* The Court held that the "standard" which underpins this legal doctrine "is that parties must perform their contractual duties, and exercise their contractual rights, honestly and reasonably, and not capriciously or arbitrarily".[40] The Court further explained that, therefore, a discretionary power, even if unfettered, is constrained by good faith.[41]

In considering what constraints the duty of good faith places on the exercise of discretion, the Court first considered the line of authorities which held that good faith performance meant "reasonable" performance.[42] Ultimately, the Court held that reasonableness, in this context meant the exercise of discretion which is honest, and reasonable in light of the purposes for which the discretion was conferred.[43] To answer the question of whether a discretion was properly exercised, the Court should ask whether the exercise of the discretion was unconnected to the purpose for which the discretion was granted, if yes, then the party exercising the discretion has breached its obligation of good faith.[44]

> "…the measure of fairness is what is reasonable according to the parties' own bargain. Where the exercise of the discretionary power falls outside of the range of choices connected to its underlying purpose – outside the purpose for which the agreement the parties themselves crafted provides discretion – it is thus contrary to the requirements of good faith."[45]

What a court considers to be an unreasonable exercise of discretion will depend heavily on the context of the case, and ultimately "upon the intention of the parties as disclosed by their contract".[46] Demonstrating a breach of the good faith duty will therefore necessarily centre on an exercise of contractual interpretation.[47]

As an aside, the Court noted that the range of reasonable outcomes will depend on the matter to be decided by the discretion. Where the matter to be decided is readily susceptible to objective measurement, such as matters relating to "objective fitness, structural completion, mechanical utility or marketability", the range of reasonable outcomes

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[38] *Ibid* at para 52.

[39] *Ibid* at paras 54-55.

[40] *Wastech* at para 62 citing; *Bhasin* at paras 63-64.

[41] *Ibid*.

[42] *Ibid* at paras 64-67.

[43] *Ibid* at para 68.

[44] *Ibid* at para 69.

[45] *Ibid* at para 71.

[46] *Ibid* at para 76.

[47] *Ibid*.

will be relatively narrow.[48] Conversely, where the matter is not readily susceptible to objective measurement, such as matters relating to "taste, sensibility, personal compatibility or judgement", the range of reasonable outcomes will be relatively large.[49]

The Court then considered whether the sometimes cited "substantial nullification" or "evisceration" test was appropriate.[50] The thrust of this test is that the good faith duty will be breached where the party's conduct substantially nullifies, or eviscerates the benefit or objective that was bargained for by the counterparty. The Court found that this was not the appropriate standard.[51]

> "The fact that a party's exercise of discretion causes its contracting partner to lose some or even all of its anticipated benefit under the contract should not be regarded as dispositive, in itself, as to whether the discretion was exercised in good faith."[52]

However, the Court went on to say that the fact that an exercise of discretion substantially nullified or eviscerated the benefit of the contract could well be relevant to showing that the discretion had been exercised in a manner that was unconnected to the relevant contractual purposes.[53]

The Court's final comment on the content of the duty was that it prevents discretion from being exercised capriciously or arbitrarily.[54]

The Court also considered the source of the duty. It held that the duty to exercise contractual discretion in good faith is a doctrine of contract law, is not an implied term, and operates irrespective of the intentions of parties.[55]

In applying it's newly set out law to the facts of the case, the Court found that Metro had not breached its duty of good faith. Having regard to the contract as a whole, it was clear that the purpose of the discretion conferred upon Metro was to allow it the flexibility necessary to maximize efficiency and minimize costs of the operation.[56] Furthermore, the fact that the discretion existed alongside the adjustment provisions contradicted the idea that the parties intended the discretion to be exercised to provide Wastech with a certain level of profit.[57] The duty to exercise contractual discretion in good faith did not require Metro to subordinate its interests to those of Wastech.[58] The parties were aware of the risk that the exercise of discretion represented and chose, notwithstanding long negotiations and a detailed agreement, not to constrain the discretion in the way that Wastech now sought.[59] Wastech was asking for a benefit that it did not bargain for.[60] It is true that the eventuality of the origin of the

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[48] *Ibid* at para 77.
[49] *Ibid.*
[50] *Ibid* at paras 80-84.
[51] *Ibid* at para 82.
[52] *Ibid* at para 83.
[53] *Ibid* at para 84.
[54] *Ibid* at paras 86-87.
[55] *Ibid* at para 94.
[56] *Ibid* at para 99.
[57] *Ibid*.
[58] *Ibid* at para 101.
[59] *Ibid*.
[60] *Ibid*.

dispute was thought by both parties to be unlikely, but together they saw the risk, and together they turned away from it, leaving the discretion in place.[61]

Commentary

Wastech is the SCC's most recent and thorough examination of the content of the duty to exercise contractual discretion in good faith. The Court placed significant emphasis on the purpose for which the discretion was granted.[62] The purpose will act as a canon in judging whether the discretion was exercised reasonably, and in accord with the duty of good faith.

***ABB Inc v Canadian National Railway Co*[63]**

Background

In *CNR*, the Federal Court dealt with the applicability of two inconsistent limitation of liability clauses. In particular, the Court had to decide whether to apply the limitation of liabilities clause contained in an annually renewing "framework agreement", which set out certain exceptions for the applicability of the limitation, or the limitation of liabilities clause contained in a newer, stand alone agreement, which did not contain any exceptions for the applicability of the limitation.

Facts

The plaintiff, ABB Inc. ("**ABB**"), a Canadian manufacturer of electrical equipment contracted with one of the defendants, Canadian National Railway Company ("**CN**"), to transport heavy and large equipment that required special arrangements. The contract was for the transportation by rail of an electrical transformer from Quebec to a customer in Kentucky. CN's rail network did not go all the way to Kentucky so it retained CSXT's services for the American part of the transportation by rail.[64] CSXT's software failed to identify the insufficient height of a bridge on the route, the electrical transformer hit the bridge and was severely damaged.[65]

In 2011, ABB and CN signed a "Confidential Transportation Agreement" (the "**2011 Agreement**") which contained a limitation of liability clause that limited CN's liability to USD $25,000 unless negligence is proven, for the carriage of certain types of cargo ("**Dimensional Loads**").[66] The electrical transformer was a Dimensional Load. The 2011 Agreement automatically renewed yearly, and was still in force at the material times.[67]

In 2014, ABB contacted CN for a quote for the transportation of the electrical transformer to Kentucky. CN issued a "Dimensional Services Proposal" that contained a clause for "Limited Liability of USD $25,000".[68] In March 2015, ABB issued a purchase order to CN with the price from the quote provided in CN's proposal (the "**2015**

[61] *Ibid* at para 103.

[62] *Ibid* at paras 68-78.

[63] 2020 FC 817 **[*CNR*]**.

[64] *Ibid* at para 10.

[65] *Ibid* at para 13.

[66] *Ibid* at para 8.

[67] *Ibid.*

[68] *Ibid* at para 9.

Agreement").[69] The 2011 Agreement's limitation of liability was qualified with the wording "unless negligence is proven", but the 2015 Agreement did not contain this language.

After the electrical transformer was damaged, ABB sued CN and CSXT for damages. CN denied liability since it delivered the electrical transformer to CSXT without any damages. CSXT denied liability based on having no direct contractual relationship with ABB.[70]

Decision

The Federal Court disagreed with CN's argument that the 2015 Agreement was a separate agreement entirely from the 2011 Agreement. CN contended that the limitation of liability of the 2015 Agreement superseded the one in the 2011 Agreement. The Court found that the 2011 and 2015 Agreements were related and had to be analyzed together.[71]

The Court found that when the parties entered into the 2011 Agreement, they set certain terms for their future contractual relationships and part of this includes defined parameters of the limitation of liability.[72] There was no supporting evidence for the argument that the parties had intended to makes the limitation of liability wording from the 2011 Agreement inapplicable.

The Court relied on articles of the Civil Code of Quebec and Quebec case law for the interpretation of the agreements. It found that since the 2015 Agreement provided for a limitation of liability without defining its parameters, the recourse had to be that the 2011 Agreement defined them.[73]

The interpretation the Court favored was that when CN offered to carry the electrical transformer subject to its "limited liability", CN was referring to the standard limitation of liability clause that the parties had previously agreed to in 2011.[74] This standard limitation of liability contained an exception for when the negligence of the carrier is proven.

CSXT argued that there was no contractual relationship between them and ABB. The Federal Court rejected this argument and the matter fell to be decided according to Quebec law. Under Quebec law, as a successive carrier, CSXT becomes a party to the contract between ABB and CN.[75] The Court found that by accepting to carry the transformer, CSXT became a party to the contract and the terms governing the relationship between ABB and CSXT are the same as those between ABB and CN.[76] Therefore, the limitation of liability, subject to the same exceptions, also applied to CSXT. CSXT was found to be negligent and liable under the agreement.[77]

In the result, the Federal Court held that both CN and CSXT were jointly liable to ABB for damages in an amount of $1.5 million.[78]

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[69] *Ibid*.

[70] *Ibid* at para 14.

[71] *Ibid* at para 54.

[72] *Ibid*.

[73] *Ibid* at para 60.

[74] *Ibid* at para 61.

[75] *Ibid* at para 107.

[76] *Ibid* at para 113.

[77] *Ibid* at para 116.

[78] *Ibid* at para 128.

Commentary

CNR may raise concerns over the application of Quebec law to multimodal carriage contracts.[79] Given the proliferation of transporting petroleum and other energy products by rail, shippers should ensure that the choice of law provisions in their carriage contracts meet their expectations.

The Court in *CNR* considered CN and ABB's long-term, repetitive contractual relationship. In such a relationship, parties may enter a formal "framework agreement" intended to govern certain aspects of their ongoing contractual practices,[80] as the Court determined was the case when ABB and CN entered into the 2011 Agreement. Parties that will be working in a long-term, repetitive contractual relationship should be careful and consider whether they have or have not set up a "framework agreement" that will be applied to ongoing and future contracts. The existence of such an agreement could impact the parties' rights and obligations with respect to their future contractual dealings.

Interfor Corp v Mackenzie Sawmill Ltd[81]

Background

In *MSL,* the British Columbia Supreme Court considered the effect of events triggering a "force majeure" clause in an agreement between the parties on the parties' continuing rights and obligations under the contract. Specifically, the Court needed to decide, under the force majeure clause at issue, whether a triggering event terminated the parties' obligations under the contract outright, or whether the triggering event merely suspended the parties' obligations under the contract.

Facts

Mackenzie Sawmill Ltd ("**Mackenzie**") entered into a commercial contract (the "**CSA**") with Interfor Corporation ("**Interfor**") agreeing to supply wood chips to Interfor from its sawmill in Surrey British Columbia.[82] Between 2010 and 2014, there were three fires at the Mackenzie sawmill, which halted production and ruined the mill.[83] The result was that Mackenzie stopped producing the wood chips for Interfor, which was permitted under a "force majeure" clause in the CSA.

Mackenzie did not rebuild the mill. Other companies, related to the owners of Mackenzie, built a new mill on the same site and started production of wood chips.[84] The new mill was selling wood chips to third parties at higher prices than what would have been the prices under the CSA between Mackenzie and Interfor.[85]

When Interfor learned of the new mill selling wood chips at a higher price, it brought an action alleging that the contract between it and Mackenzie was still in effect after the fires, and that the new mill owners were contractually bound to supply wood chips under the CSA.[86]

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[79] Marcos Cervantes Laflamme, " Federal Court of Canada Applies Québec Civil Code to Rail Cargo Damage Occurring in the United States" (20 October 2020), online(blog) : Canadian Transport Lawyers Association < https://ctla.ca/home/f/abb-inc-v-canadian-national-railway-company-2020-fc-817 >.

[80] *CNR* at para 56.

[81] 2020 BCSC 1572 **[*MSL*]**.

[82] *Ibid* at para 2.

[83] *Ibid* at paras 17-20.

[84] *Ibid* at para 5.

[85] *Ibid*.

[86] *Ibid* at para 6.

Mackenzie argued that the contract came to an end based on either the force majeure clause or the common law doctrine of frustration. Mackenzie also sought a court order confirming that it was discharged from all its obligations under the CSA based on the fires that ruined the mill and ended the business.[87]

Decision

The Court found that article 8.5 (the force majeure clause) provided for the suspension of Mackenzie' contractual obligations under the CSA and not for its termination.[88] The Court held that the defendants could not rely on the force majeure clause to claim the fires were sufficient to terminate the contract. The fact that the mill could be rebuilt and wood chips could again be produced from it made it difficult to see how the suspension of obligations under the force majeure clause could become a termination of the contract.[89]

In regards to frustration of the contract, the Court found that the fires that ruined the mill did not frustrate Mackenzie's obligations under the CSA.[90] This is because the destruction of the mill by the fire did not totally affect the nature, meaning, purpose, effect, and consequences of the CSA for the parties. The court clarified that the contract was for Interfor to secure a supply of wood chips made by the mill, to the extent that wood chips were being made.[91] Since Mackenzie had to stop making wood chips, its obligations were suspended but not terminated since there was a possibility of rebuilding. The court rejected Mackenzie's argument that the result of the fire was a radical change in the obligation imposed on them under the CSA,[92] and held that Mackenzie's obligations under the contract did not end.

Commentary

The defendants' argument in *MSL* was based on the assumption that some fires are so serious that they would give rise to permanent consequences and a termination of the contract, while other fires might only have temporary effects. However, there was nothing in the text of article 8.5 to support that the legal effect of the clause would be different depending on the seriousness of the fire and no guidance could be drawn from the CSA regarding where that line would be drawn.[93] The lack of guidance for the assumption meant that Mackenzie was not dismissed of their contractual obligations under the CSA.

MSL demonstrates that parties should carefully construe the force majeure clauses in their contracts before prematurely concluding that their obligations under the contract are at an end. In *MSL*, the wording of the force majeure clause at issue clearly indicated that the triggering events only suspended the parties' obligations under the contract, and did not terminate the contract outright.

[87] *Ibid* at para 7.
[88] *Ibid* at para 55.
[89] *Ibid* at para 54.
[90] *Ibid* at para 65.
[91] *Ibid* at para 66.
[92] *Ibid* at para 70.
[93] *Ibid* at para 53.

***Donaldson v Swoop Inc*[94]**

Background

In *Donaldson*, the Federal Court heard a certification application for a class action lawsuit regarding the form of refunds that airline companies owed to customers as a result of the service interruptions to air travel caused by the COVID-19 pandemic. The primary issue in the case was whether the Federal Court had jurisdiction to hear the proposed claim.

Facts

The plaintiff sought certification as the representative plaintiff in a proposed class action against multiple airlines including Swoop Inc, for a refund of the original forms of payment for airfare contracts allegedly frustrated by the COVID-19 pandemic.[95]

The plaintiff had booked air travel with WestJet and instead of receiving a refund in the form of payment; she received a future credit against travel. The plaintiff sought to represent a class of individuals "residing anywhere in the world who, before March 11, 2020 had a confirmed booking for travel" on a flight operated by one of the named defendant airlines (the "**Class**").[96]

On March 11, 2020 the World Health Organization declared COVID-19 a global pandemic and in response to this, the Canadian government issued a travel advisory against non-essential travel.[97]

The plaintiff relies on the contracts of carriage (Tariffs) as the source of the defendant's obligations. The plaintiff claimed that under the doctrine of frustration of contract, the Class is entitled to a refund in their original form of payment.[98] Alternatively, the plaintiff claimed that the express or implied terms of the Tariffs give the Class a consumer right to a refund for unused air tickets when a defendant cannot provide the services within a reasonable time.[99]

The defendants argued that the dispute was nothing more than a breach of contract claim between private parties and that the Federal Court did not have jurisdiction to hear the claim.[100]

Decision

The Court held that since Federal Court is a statutory court, it has jurisdiction to hear claims that are specifically set out in the *Federal Courts Act*.[101] The Court outlined the conditions that must be met in order for it to have jurisdiction over the matter: (1) there must be a statutory grant of jurisdiction by the federal Parliament, (2) there

[94] 2020 FC 1089 **[*Donaldson*]**.
[95] *Ibid* at para 4.
[96] *Ibid* at para 2.
[97] *Ibid* at paras 7-8.
[98] *Ibid* at para 4.
[99] *Ibid.*
[100] *Ibid* at para 28.
[101] *Ibid* at para 25.

must be an existing body of federal law which is essential to the disposition of the case, and (3) the law on which the case is based must be "a law of Canada".[102]

The Court explained that in order for the Federal Court to take jurisdiction, the claim or remedy sought must be recognized or created by federal law.[103] However, the Court found that no federal statute at issue in the proceeding granted jurisdiction to the Federal Court to hear the matter. Similarly, no existing regulatory framework granted jurisdiction nor did the federal common law.[104]

The Court found that it lacked the jurisdiction to hear the proposed class action on COVID-19 airfare refunds and struck the plaintiff's Statement of Claim without leave to amend.[105]

Commentary

The Court as a statutory court has seen its jurisdiction evolve and has not been limited through the inherent jurisdiction doctrine.[106] However, this case was not one where the evolution continued to stretch the court's jurisdiction. This case clearly articulates the Federal Court's jurisdictional limits in the realm of aeronautics and clarifies what types of disputes the Court will hear.[107] Counsel seeking to bring or defend claims in the Federal Court should consider whether a claim is challengeable on jurisdictional issues.

***Dow Chemical Canada ULC v NOVA Chemicals Corp*[108]**

Background

In *Dow Chemical,* the Alberta Court of Appeal heard the appeal of a long drawn out contractual interpretation dispute between two large petrochemical processors. *Dow Chemical* dealt with various issues related to the operation of a joint venture project. Specifically, the interpretation of the operator's obligations under the joint venture agreements, and, for the purpose of an exclusion of liability clause, whether certain actions taken by the operator could be in its capacity as a "co-owner" and not an operator.

Facts

NOVA Chemicals Corp. ("**Nova**") owned a large petrochemical complex in Alberta. The complex contained three ethane crackers (E1, E2, and E3).[109] The E3 facility was originally constructed in 1997 under a joint venture agreement between Nova and Union Carbide. At the time, Union Carbide was a new entrant to the Alberta ethane processing market and not a serious competitor of Nova. Under the joint venture agreement, Nova agreed to supply

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[102] *Ibid* at para 31.

[103] *Ibid* at para 33.

[104] *Ibid* at para 37.

[105] *Ibid* at para 59.

[106] *Ibid* at para 55.

[107] Shaun Foster, "Federal Court Lacks Jurisdiction Over Class Action On Covid-19 Airfare Refunds" (27 Nov 2020), online(blog): Alexander Holburn Beaudin + Lang LLP < https://www.ahbl.ca/federal-court-lacks-jurisdiction-over-class-action-on-covid-19-airfare-refunds/ >.

[108] 2020 ABCA 320 **[*Dow Chemical*]**.

[109] *Ibid* at para 2.

ethane to operate E3, and Union Carbide agreed not to buy ethane in competition with Nova.[110] Under the joint venture agreement, the parties would share the ethylene produced by the E3 plant.[111]

In 2001, Dow Chemical Canada ULC ("**Dow**") took over Union Carbide's position in the joint venture agreement as a result of a corporate merger between the two entities.[112] However, this created significant problems because while Union Carbide was not a serious competitor of Nova, Dow was.[113] Nova became concerned about sharing sensitive commercial information with Dow, and objected to the merger.[114]

Notwithstanding Nova's objection, the merger was completed, and Nova and Dow became co-owners of the E3 plant with each owning an equal interest in the plant.[115] Nova and Dow also became parties to a Co-Owners Agreement ("**COA**") and an Operating and Services Agreement ("**OSA**"). Under the COA, the parties agreed that certain decisions regarding the E3 plant could only be made with the unanimous consent of the Management Committee created under the COA.[116] Under the OSA, Nova became the "Operator" of the E3 plant and was required to aggregate the purchases of ethane for each of E1, E2, and E3 into an "Ethane Pool".[117]

Due to a shortage of ethane in 2000, the amount of ethane in the Ethane Pool could not always feed the E1, E2, and E3 plants to their full operating capacities, although there was always enough ethane in the Ethan Pool to feed E3 to its full operating capacity.[118] Dow took the position that Nova was contractually obligated to operate E3 at full capacity, notwithstanding the ethane shortage.[119] Nova took the position that each of the three plants ought to "share the pain" caused by the shortages.[120]

In 2001, Nova implemented an "ethane allocation" strategy, whereby the Ethane Pool would be allocated to the three plants in proportion to their notional "nameplate capacities".[121] These nameplate capacities were the levels of production that the plants were designed to achieve.[122] However, E3 could actually operate at greater than its nameplate capacity.[123] Furthermore, under the "ethane allocation", some of the ethylene produced by the E3 plant was deemed to be produced by the E1, and E2 plants (to which Nova had an exclusive entitlement). The E3 Management Committee never approved Nova's "ethane allocation".[124]

Under Nova's "ethane allocation", Dow received less than 50% of the actual ethylene produced at the E3 plant as a result of the deeming features of the "ethane allocation".[125] Upon considering its legal entitlement to the ethylene

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[110] *Ibid* at para 3.
[111] *Ibid.*
[112] *Ibid* at para 4.
[113] *Ibid*.
[114] *Ibid*.
[115] *Ibid* at para 6.
[116] *Ibid.*
[117] *Ibid* at para 7.
[118] *Ibid* at para 8.
[119] *Ibid* at para 10.
[120] *Ibid*.
[121] *Ibid* at para 9.
[122] *Ibid*.
[123] *Ibid*.
[124] *Ibid* at para 10.
[125] *Ibid* at para 11.

produced from the E3 plant, Dow claimed a right to the greater of: (1) 50% of E3's nameplate capacity, or (2) 50% of E3's actual production. In 2006, Dow filed its statement of claim.[126]

Nova issued a counter-claim, alleging that Dow was in breach of a restrictive covenant contained in the joint venture agreement, whereby Dow was prohibited from purchasing ethane from within the "Pool Area" in competition with Nova.[127]

At trial, the Court focused on two main issues with respect to Dow's claim against Nova:

a. Did Nova convert to its own use, part of the ethylene produced at E3 that was contractually owned by Dow? (the "**Allocation Claim**"); and

b. Did Nova fail to run E3 to its productive capacity, and was it required to do so under the joint venture agreements? (the "**Optimization Claim**")[128]

The trial judge decided that Nova was in breach of the OPA with respect to both the Allocation Claim and the Optimization Claim.[129] The trial judge also found that Dow's ability to recover for the breaches was not constrained by any limitation of liability clauses.[130]

With respect to Nova's counter-claim, the trial judge found that the restrictive covenant was unenforceable for being an unreasonable restriction on competition, and that performance of the covenant would result in breaches of the *Competition Act*.[131]

Nova appealed with respect to the trial judge's findings regarding, *inter alia*, the Optimization Claim, the limitation of liability clauses, and the dismissal of Nova's counter-claim.[132]

Decision

The Court of Appeal allowed the appeal in part.[133]

Regarding the first issue of whether Nova was obligated to maximize ethylene production under the OSA, Nova argued that operating E3 at capacity simply meant “nameplate” capacity, not actual operating capacity.[134] This argument relied on the wording of the OSA under the provisions that control “nomination procedure.”[135] The Court of Appeal held that this interpretation was inconsistent with the interpretation placed on the agreement as a whole by the trial judge, which reflected no reviewable error.[136] The Court of Appeal upheld the trial judge’s interpretation of

[126] *Ibid* at para 12.
[127] *Ibid*.
[128] *Ibid* at para 13.
[129] *Ibid* at paras 14-15.
[130] *Ibid* at para 16.
[131] *Ibid* at para 19.
[132] *Ibid* at para 20.
[133] *Ibid* at para 168.
[134] *Ibid* at para 31.
[135] *Ibid* at para 31.
[136] *Ibid* at para 34.

the agreement, which required Nova to operate E3 “at capacity” not “at capacity but subject to a limit of Ethylene Nameplate Capacity”.[137]

Nova argued that the trial judge’s interpretation was unfair and could lead to commercially unreasonable results. However, the Court found that there is nothing “commercially unreasonable about the arrangement.”[138] The Court explained that even though the structure of the agreement resulted in Dow paying a proportionally smaller amount of the Ethane Fixed Costs, this was the agreement the parties had agreed to, and the fact that it did not favour Nova did not make it unfair.[139] The Court held that Nova failed to identify any reviewable errors in the trial judge’s findings regarding the maximization of ethylene production under the OSA.[140]

Turning to the exclusion of liability clause issue, Nova argued that it was shielded from liability by certain exclusion clauses in the OSA.[141] Within this argument, Nova asserted that the trial judge erred in using “special rules to interpret the exclusion clauses, in concluding that Nova was not acting as the Operator, and in characterizing the damages claimed as being “direct”.”[142] The Court of Appeal explained that the main consideration in addressing this issue was whether or not the damages claimed by Dow fall within the definition of Excluded Damages in the agreement.[143] When interpreting the exclusion clause, the trial judge found that Nova engaged in different duties, dividing up its roles into “Nova as Co-owner” and “Nova as Operator.”[144] The trial judge found that Nova’s imposition of the "ethane allocation" and failure to optimize production did not arise from Nova’s role as Operator because these actions resulted in accumulating profits, and that it was Nova as Co-owner that was responsible for these actions.[145] The trial judge found that this meant “Nova as Operator” could not rely on the exclusion clause.[146]

The Court of Appeal held that it was a palpable and overriding error for the trial judge to decide that Nova was not acting “as Operator” when executing its functions in the operation of E3.[147] The Court explained that under the trial judge's interpretation, Nova would “not only be liable for damages caused by Wilful Misconduct or Gross Negligence, but also for any operational error that accrued to the ultimate benefit of Nova.”[148] The Court found that it was contrary to industry expectations to think that while making operational decisions, the operator would sometimes be the operator, but sometimes not the operator.[149]

As a result of the Court's conclusion with respect to the limitation of liabilities clause, the appeal with respect to the calculation of damages was thus allowed in part.[150] The calculation of direct damages as a result of the ethylene shortages was referred back to the trial court for redetermination.[151] The Court held that the trial judge erred in

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[137] *Ibid* at para 34.
[138] *Ibid* at para 39.
[139] *Ibid*.
[140] *Ibid* at para 42.
[141] *Ibid* at para 43.
[142] *Ibid* at para 45.
[143] *Ibid* at para 51.
[144] *Ibid* at para 88.
[145] *Ibid.*
[146] *Ibid.*
[147] *Ibid*.
[148] *Ibid* at para 89.
[149] *Ibid*.
[150] *Ibid* at para 101.
[151] *Ibid*.

applying a “strict” interpretation to the exclusion clause and that the meaning of "indirect and consequential" in the exclusion clause was not to be found in the test set out in *Hadley v Baxendale*.[152]

Finally, while the Court of Appeal dismissed the appeal with respect to the counterclaim, it did refer the covenant regarding the remedial effect of the illegality of the performance of Ethane Pooling back to the trial level.[153] It found that the proposed remedy of “reading down” the now illegal covenant was a reviewable error.[154] Although the appropriate remedy was not fully argued on appeal, the Court found that the "reading down" remedy was not a reasonable solution.[155] It found that a more appropriate remedy may be through severance, but that the remedy should not be applied in a way that gives one party a windfall, and imposes an unjust burden on the other.[156]

Commentary

In *Dow Chemical,* the Alberta Court of Appeal showed that it supports the practical objectives of exclusion clauses. *Dow Chemical* provides insight into the distinction between direct damages, which are generally recoverable, and indirect or consequential damages, which are usually excluded from recovery based on the contract.[157]

This case highlights that when resolving disputes about exclusionary clauses, Courts are likely to interpret them based on the purpose of the terms in its commercial context and the intention of the parties.

When drafting exclusionary clauses in agreements, careful consideration should be put into the risk allocation process and how the exclusion of damages as indirect or consequential can assist in risk mitigation.

***Grasshopper Solar Corp v Independent Electricity System Operator*[158]**

Background

In *GSL*, the Ontario Court of Appeal considered the contractual rights and obligations of parties to a contract where the appellants claimed that the respondent was estopped from terminating the agreement based on the contents of an information bulletin circulated by the respondents. In particular, the Court considered the necessary elements for establishing estoppel by convention.

Facts

The appellants were renewable energy suppliers who entered into Feed in Tariff (“**FIT**”) contracts with the respondent, the Independent Electricity System Operator (the “**IESO**”), in 2016.[159] The contracts were for the construction of solar facilities that would provide energy to the Ontario electricity grid.

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[152] *Ibid*.

[153] *Ibid* at para 168.

[154] *Ibid* at para 162.

[155] *Ibid* at para 165.

[156] *Ibid* at para 164.

[157] Warren P. Foley, “Dow Chemical Canada Ulc V Nova Chemical Corporation: Limiting Liability Contractually” (29 October 2020), online: Gowling WLG < https://gowlingwlg.com/en/insights-resources/articles/2020/limiting-liability-contractually/ >.

[158] 2020 ONCA 499 **[*GSC*]**.

[159] *Ibid* at para 5.

The contracts required the appellants to achieve commercial operation by the specified “Milestone Date” which was in September 2019.[160] The contract also established that “time is of the essence” and that if the suppliers failed to achieve commercial operation by the Milestone Date, the respondents would terminate the FIT contracts.

In 2013, the predecessor entity to the IESO published an information bulletin, advising that it would not act on its termination rights in FIT contracts if a supplier did not achieve commercial operation by the Milestone Date.[161] But, the 2013 bulletin also stated that it was for “informational purposes only and shall not be relied on by suppliers” and that the "information does not constitute a waiver of any actual or potential default, nor does it amend the FIT Contract.”[162]

The respondent sent a letter to the suppliers in March 2019 reminding them of the September 2019 Milestone Date for commercial operation.[163] This letter made it clear that the respondent would terminate the FIT contracts with any suppliers that did not meet the deadline of the Milestone Date.

The appellants applied to have their contractual rights determined by the court. The appellants argued that there was a communicated shared assumption that the respondent would not terminate the FIT contracts if a supplier did not achieve commercial operation by the Milestone Date. The appellants also argued that the FIT contracts did not permit termination based on a Supplier Event of Default without compensation.

The appellants argued that the failure to achieve commercial operation by the Milestone Date was not an Event of Default since it was not specifically listed in the default provision.[164] The application judge rejected this argument. This interpretation would mean that no default would rise to the level of a Supplier Event of Default. The application judge noted that this interpretation would render the time is of the essence provision and the force majeure provision irrelevant, as a provision which provides relief from failure to achieve commercial operation is only needed if such obligation otherwise exists.[165]

With respect to the shared assumption argument, the application judge found that there was no shared assumption given that: the 2013 bulletin made it very clear that the IESO still retained the right to terminate the FIT contracts for a failure to reach commercial operation by the Milestone Date; the bulletin was for informational purposes only; the bulletin did not constitute a waiver of any actual or potential default under the agreements; and the FIT contracts remained in full force and effect.[166]

The appellants appealed.

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[160] *Ibid* at para 6.

[161] *Ibid* at para 8.

[162] *Ibid*.

[163] *Ibid* at para 9.

[164] *Ibid* at para 12.

[165] *Ibid*.

[166] *Ibid* at para 17.

Decision

The Ontario Court of Appeal dismissed the appeal.

The Court found that the fatal flaw in the appellants' interpretation of the contract was its failure to give effect to the provision "time is of the essence" which provided that strict compliance with the Milestone Date was required.[167]

The appellants relied on the argument that the respondent was estopped from terminating the contract under estoppel by convention or promissory estoppel. The appellants took the position that the 2013 bulletin informed a shared assumption between the parties that the IESO would not terminate the FIT contract even if the appellants failed to meet the Milestone Date.[168]

The Court rejected the argument for estoppel by convention and found that the bulletin was for informational purposes only, and that the respondent's bulletin clearly informed suppliers to *not* make the very assumption that the appellants argued was a shared assumption.[169] Similarly, the Court rejected the appellants' promissory estoppel argument and found that there was no promise made,[170] and in any event, it certainly could not be said that the respondent intended for the 2013 bulletin to be relied on.[171] Furthermore, even if estoppel could be established, the letter sent in March 2019 was sufficient provided reasonable notice of IESO's intention to change its position.[172]

In the result, the Court of Appeal upheld the lower court's decision and noted that "the doctrine of estoppel has the potential to undermine the certainty of contract and must be applied with care."[173]

Commentary

GSL highlights the danger of assuming that a counterparty will not assert its contractual rights.[174] In these situations, it may be wise for the party receiving an apparent representation from its counterparty to confirm with the counterparty, in writing or in an amendment to the contract, the legal effect of the representation.

The appellants in *GSL* appeared argued that even if there was no shared assumption, they satisfied the second and third requirements of the test (reliance and detriment) set out in *Ryan v Moore,* 2005 SCC 38, and should be granted equitable relief. The court rejected this view and held that a shared assumption is not just one of the three elements required, but the essential element that is required to assert a need for equitable relief.[175] This is important because if only reliance and detriment were required to establish estoppel by convention, then parties could effectively ignore the terms of the contract by relying on any investments it has already committed to the contractual venture. This result would lead to perverse incentives for uneconomic investments. By holding that a shared assumption is

[167] *Ibid* at paras 37-38.

[168] *Ibid* at para 15.

[169] *Ibid* at para 60.

[170] *Ibid* at para 69.

[171] *Ibid* at para 70.

[172] *Ibid* at para 74.

[173] Ibid at para 54.

[174] Christopher Petrucci, "Dangerous Assumptions: Estoppel by Convention in Construction Projects" (17 November 2020), online(blog): Bennett Jones LLP < https://www.bennettjones.com/Blogs-Section/Dangerous-Assumptions-Estoppel-by-Convention-in-Construction-Projects >.

[175] *GSL* at para 57.

essential in the three requirements of estoppel, the Court of Appeal suppressed such perverse incentives from arising.[176]

NEP Canada ULC v MEC Op LLC[177]

Background

In *NEP*, the Alberta Court of Queen's Bench considered the sufficiency of disclosure with respect to regulatory compliance issues in a share purchase transaction. Specifically, the Court was required to decide whether a disclosure of the fact that there were "potential instances of non-compliance", amounted to a disclosure of the fact that there were known, extant, issues regarding regulatory non-compliance.

Facts

The plaintiff was formed from an amalgamation between NEP Canada ULC ("**NEP**") and MEC Operating Company ("**MEC**") following a share purchase transaction where NEP purchased the shares of MEC, a wholly owned subsidiary of Merit ULC (Merit). Schedule “D” to the share purchase agreement purported to disclose all potential regulatory non-compliance issues concerning the transaction assets. The vendor’s contractual representations and warranties included that Schedule “D” disclosed all material violations or defaults of any laws or regulations.

After the closing of the transaction, NEP discovered several regulatory non-compliance issues with the transaction assets.[178] When NEP disclosed these issues to the Alberta Energy Regulator, it discovered that employees of the defendants had been aware of the non-compliance issues for years and that the regulatory issues had been brought to the attention of Merit’s management team prior to and during the drafting of Schedule “D”.[179]

As a result, NEP started an action against the defendants alleging that they failed to meet their disclosure obligations with respect to the transaction assets, specifically, the regulatory compliance issues. NEP sued for breach of contractual representation and warranty, deceit and breach of the duty of good faith and honest performance.

Schedule “D” of the share purchase agreement itemized a number of "potential instances of non-compliance".[180] The defendants argued that these references to "potential instances of non-compliance" encompassed all instances of non-compliance that were known and unknown and that therefore it had disclosed the regulatory non-compliance issues.[181]

The share purchase agreement also contained a limitation of liability clause which provided that no party would be liable for consequential, indirect or punitive damages, including loss of anticipated profits, business interruptions or any special or incidental loss of any kind.[182] The defendants also relied on the limitation of liability clause in defence of the plaintiff's claim.

Decision

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[176] Edward Conway, “Estoppel: the latest ONCA case (with an economic argument)” (11 August 2020), online(blog): CanLII Connects < https://canliiconnects.org/en/commentaries/71779 >.

[177] 2021 ABQB 180 **[*NEP*]**.

[178] *Ibid* at para 234.

[179] *Ibid* at para 151.

[180] *Ibid* at para 569.

[181] *Ibid* at para 638.

[182] *Ibid* at para 1068.

The Court rejected Merit's argument of the interpretation of the word "potential" and found this word to mean possible but not extant instances of non-compliance.[183] This does not include known and existing instances of non-compliance.[184] The Court also found that Merit and MEC were aware of a significant number of existing non-compliance issues and by purposefully using "opaque language" Merit did not give proper disclosure of these issues.[185] Based on these findings, the Court held that the defendants breached the contractual representations and warranties. The Court also found the defendants conduct amounted to deceit. While a party negotiating a contract has no general duty of disclosure, if it does as Merit elected to make a disclosure in Schedule "D", it must then ensure that such representation and warranty is accurate. If the disclosing party allowed the other party to proceed based on a half-truth, then an actionable fraudulent misrepresentation arises. The Court held that the half-truths and positive misrepresentations used by Merit amounted to fraudulent misrepresentation and deceit in respect of the share purchase agreement.[186]

In regards to the limitation of liability clause, the court applied the test from *Tercon Contractors Ltd v British Columbia (Transportation and Highways)*, 2010 SCC 4, to determine whether the clause was applicable in the circumstances.[187] The Court found that the clause applied and was not unconscionable;[188] but that where a party makes fraudulent misrepresentations to induce another to enter a contract, they may not rely on limitation clauses in that very contract to protect themselves from their wrongful conduct.[189]

The Court awarded the plaintiff approximately $185 million in damages,[190] which included approximately $120 million for the loss of opportunity despite a limitation of liability clause that barred liability for consequential loss of profits.[191]

Commentary

NEP demonstrates that parties cannot contract out of liability for deceitful or fraudulent conduct. While parties may try, exclusion clauses will not likely operate to exclude liability for fraudulent representations that induced the making of the contract.[192]

NEP also demonstrates that courts will not take kindly to parties using opaque language in their disclosure documents as an attempt to conceal information which ought to have been fully and plainly disclosed.[193] Parties drafting disclosure documents should be aware that the artful use of ambiguous language will not relieve the party of its disclosure obligations under contract.

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[183] *Ibid* at para 819.

[184] *Ibid* at para 642.

[185] *Ibid* at para 749.

[186] *Ibid* at para 924.

[187] *Ibid* at para 1069.

[188] *Ibid* at para 1070.

[189] *Ibid* at para 1075.

[190] *Ibid* at para 1269.

[191] *Ibid* at para 1233.

[192] Michael A Marion, "Court rules party cannot rely on exculpatory clause to avoid liability for deceit" (4 May 2021), Online(Blog): Borden Ladner Gervais LLP ("**BLG**") < https://www.blg.com/en/insights/2021/05/court-rules-party-cannot-rely-on-exculpatory-clause-to-avoid-liability-for-deceit >.

[193] *Ibid* at para 749.

Re Rifco Inc[194]

Background

In *Re Rifco*, the Court was faced with an application to approve a plan of arrangement. The application was brought by one of the parties to an arrangement agreement, but the counterparty opposed on the grounds that the agreement was effectively terminated pursuant to a 'Material Adverse Effects' clause, with the triggering event being the global COVID-19 pandemic.

Facts

Rifco Inc. ("**Rifco**") entered into an Arrangement Agreement with ACC Holdings Inc. ("**ACC**") to acquire Rifco's shares on behalf of ACC's parent company CanCap Management Inc. (CanCap).[195] CanCap announced in February 2020 that it was going to purchase the shares of Rifco for $25.5 million. The transaction was proceeding by way of a plan of arrangement and so it required court and shareholder approval.

However, in late March 2020, ACC claims to have terminated the agreement. ACC invoked article 8.2 of the Arrangement Agreement, which permitted the purchaser to terminate if a Material Adverse Effect ("**MAE**") occurred after the execution of the Arrangement Agreement but before the Effective Time. ACC's basis for invoking article 8.2 was that the COVID-19 pandemic and the fall in oil prices gave rise to a MAE.[196]

On March 27, 2020, CanCap notified Rifco through a letter that it was going to terminate the arrangement because of recent global events, which they claim triggered the MAE clause of the agreement.[197]

ACC argued that the Arrangement Agreement had been terminated because notice had been given and so there was no longer an "Arrangement" for the court to approve.[198]

Rifco argued that in order for the notice to be effective, ACC had to first demonstrate that a MAE actually occurred within the meaning of the Arrangement Agreement, and further that ACC and CanCap bore the burden of establishing that an MAE had occurred.[199]

Decision

The Court was not prepared to find that the Arrangement Agreement had been validly terminated and rejected ACC and CanCap's submission that the delivery of a notice of termination was sufficient to terminate the agreement.[200] However, the Court concluded that there were substantial facts in dispute and that it could not make a just determination of whether to grant the declaratory relief sought by Rifco based on the evidence before the Court.[201]

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[194] 2020 ABQB 366 **[*Re Rifco*]**.

[195] *Ibid* at para 1.

[196] *Ibid* at para 4.

[197] *Ibid* at para 3.

[198] *Ibid* at para 13.

[199] *Ibid* at para 15.

[200] *Ibid* at para 19.

[201] *Ibid* at para 51.

The Court noted that a Material Adverse Effect contains exclusions, but that there was no specific exclusion for a pandemic or disease in the agreement.[202] There were ongoing disputes about whether COVID-19 and other reasons listed as MAEs fell within the exclusions. The Court further noted that there was no evidence about how the MAE events would affect the industry as a whole compared to how it would specifically affect Rifco.[203] The court held that Rifco's application for approval of the arrangement could not be resolved until the validity of ACC's termination was determined, and that it was premature to so.[204]

In the result, the application was dismissed with a suggestion from the Court that the parties attend a case conference to determine further steps.[205]

Commentary

This case demonstrates that from now on, vendors and purchasers who are negotiating a purchase and sale agreement should consider adding language to the MAE clause that directly addresses how the COVID-19 risk and any future pandemics will be treated.[206] Moving forward, negotiations for a purchase agreement should entail an analysis of the MAE clause in the context of the specific transaction, the industry, and the language that should be specifically included.

[202] *Ibid* at para 46.

[203] *Ibid* at para 48.

[204] *Ibid* at para 58.

[205] *Ibid* at para 63.

[206] Derek Bell, "Canadian and UK courts engage on whether COVID-19 is a "material adverse effect" in M&A transactions" (25 March 2021), online(article): CanLII Connects <https://canliiconnects.org/fr/commentaires/73755 >.

ENVIRONMENT

Overview

This year, trial courts were faced with several actions involving alleged breaches of *Charter* rights by governments at both the Federal and Provincial levels. In this section, we discuss three of these case. In two of the cases, *La Rose v Canada,* 2020 FC 1008 and *Misdzi Yikh v Canada,* 2020 FC 1059, the courts were faced with the plaintiffs' allegations that Canada's climate change policy as a whole was causing breaches of their section 7 and 15 *Charter* rights. In the third, *Mathur v Ontario*, the plaintiffs alleged that specific provincial legislation and governmental action was the cause of their breached rights. These three cases continue the development of Canadian *Charter* jurisprudence with respect to the imposition of positive obligations by the *Charter* on government actors.

Also this year, the Ontario Court of Justice issued the largest fine ever imposed in Canada for an environmental infraction in *R v Volkswagen AG*, 2020 ONCJ, 398.

***La Rose v Canada*[207]**

Background

In *La Rose,* the Federal Court dealt with whether the Government of Canada has an obligation to protect specific environmental resources for the public from being damaged by climate change. Additionally, it considered whether sections 7 and 15 of the *Canadian Charter of Rights and Freedoms* ("***Charter***") could be infringed as a result of inaction by the Government in regard to Climate Change Policy. Section 7 of the *Charter* guarantees the right to life, liberty and security of the person and applies to every person in Canada. Section 15 of the *Charter* guarantees equals right to all without discrimination, regardless of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Facts

15 children ("**the Plaintiffs**") from across Canada brought an action against the Government of Canada ("**the Government**") alleging that the Government's conduct caused, contributed to, and continues to allow green house gas ("**GHG**") emissions to exist that are incompatible with a "Stable Climate System."[208] This conduct also included actively supporting fossil fuel industries and the acquisition of the Trans Mountain Pipeline System.[209]

The plaintiffs sought an order declaring that the Government had unjustifiably infringed their section 7 and 15 rights of the *Charter*, as well as the section 7 and 15 rights of all children in the Country, both present and future.[210] The plaintiffs also sought an order declaring that the Government had breached its obligation to protect and preserve the integrity of "public trust resources", mainly navigable waters, the foreshores and territorial sea, as well as the atmosphere and permafrost.[211] The Government applied for a motion to strike these claims, arguing that they formed no reasonable cause of action as it would require the Court to intervene in Canada's climate change policy, which has no legal standard and were not appropriate matters for the Court to adjudicate.[212]

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[207] 2020 FC 1008 **[*La Rose*]**.

[208] *Ibid* at paras 2,6.

[209] *Ibid* at para 9.

[210] *Ibid* at para 7.

[211] *Ibid* at para 12.

[212] *Ibid* at para 1.

Decision

The Court found that justifiability relates to the subject matter of a dispute, and asks whether it is appropriate for a court to adjudicate the matter and whether a court has to ability to do so.[213] The Court noted that while the claims are certainly novel, complex, and important, these factors will not affect whether the Court possesses the required legitimacy to adjudicate the matters.[214] Additionally, the fact that the questions are political and policy based was not said to restrict the Court's jurisdiction over matters *per se*, but the matters still must be resolvable by the application of law.[215] However, in order for the court to review policy decisions, they must be translated into law or state action.[216]

The Court held that the section 7 and 15 *Charter* claims involved alleged actions that were too broad and unquantifiable to be reviewed under the *Charter*.[217] Although the Plaintiffs were only asking the Court to review the cumulative effects of GHG emissions, and not each and every law related to them, the Court noted that this is problematic as a *Charter* review is attached to specific laws or state action.[218] As a result of this, the Court clarified that the Plaintiffs were seeking judicial involvement in Canada's overall policy response to climate change – the Court found that policy is better left for the other branches of government as it involves important societal issues which attract a variety of social, political, scientific, and moral reactions.[219] Therefore, although the Court agreed that the Government was responsible for addressing climate change, the claims brought by the Plaintiffs were simply not something the court had the power to address, since no specific laws or action formed its basis, the *Charter* was not engaged.[220] Furthermore, the remedies sought suffered the same defect – no specific laws were being relied upon, the claims were too vague, and since the *Charter* was not invoked, its remedies could not be either.[221]

Even if justifiability was not a concern, the Court still noted that it would have struck the claims for failing to disclose a reasonable cause of action.[222] With respect to the section 7 claim, the Court found that it failed to disclose a reasonable cause of action because the alleged conduct was too broad and vague and was not challenging a specific law,[223] however the Court did reject the defendant's argument that the claim should be struck on the grounds that it sought a recognition of positive rights under section 7.[224] The section 15 claim was struck for the same reasons.[225]

Finally, with respect to the alleged public trust doctrine – the idea that the Government has an ongoing obligation to actively protect certain public environmental resources – the Court found that the question of whether the doctrine existed was clearly a legal and therefore justiciable question which did not involve political or policy considerations

[213] *Ibid* at paras 27, 29.
[214] *Ibid* at para 32.
[215] *Ibid* at paras 33-34.
[216] *Ibid* at para 40.
[217] *Ibid.*
[218] *Ibid* at para 43.
[219] *Ibid* at para 44.
[220] *Ibid* at para 48.
[221] *Ibid* at paras 51-54.
[222] *Ibid* at para 59.
[223] *Ibid* at para 62.
[224] *Ibid* at paras 65-72.
[225] *Ibid* at para 79.

like the other claims.[226] However, the Court proceeded to find that the claim still failed to disclose a reasonable cause of action, and thus should be struck down.[227]

The breadth of the plaintiffs' claim under the alleged public trust doctrine and the lack of material facts to support it suggested that the claim was reflective of an "outcome" in search of a "cause of action". Furthermore, the obligations proposed by the plaintiffs were extensive in scope and "without definable limits".[228] The Court concluded that such an obligation has been consistently struck down by Canadian courts, and does not currently exist.[229] The Court also found that no material facts were pleaded to support the doctrine as an unwritten constitutional principle.[230]

Commentary

La Rose is a recent example of the courts failing to recognize the Public Trust Doctrine due to a lack of legal basis. Additionally, this is yet another case dealing with the question of whether positive rights exist under the *Charter*. Notably however, the Court specifically emphasized that the claim was not being struck because of the positive right argument, and that the door remains open for positive rights to exist under section 7 of the *Charter.*[231] In any event, the Court recognized that the plaintiffs' claim involved an allegation that the Government's inaction deprived them of a Stable Climate System, and therefore was not prepared to find that the plaintiffs' claim only engaged positive rights.[232] Additionally, the Court seemed to indicate that newer case law may be moving in the direction of finding a positive rights under section 7.[233]

The Court in *La Rose* did not outright turn down the idea that damage resulting from government climate change policy and practices could infringe an individual's section 7 and 15 rights, it merely noted that in this case no specific laws or actions were referred to.[234] Finally, the Court noted that if a network of laws and state action were to be specifically relied upon as the basis for a section 7 or 15 infringement, the Court would have been prepared to consider it.[235] As a result, this case will likely have important implications for how climate change actions are structured in the future.

***Misdzi Yikh v Canada*[236]**

Background

In *Misdzi,* the Federal Court dealt with a similar issue to the one addressed in *La Rose* – whether alleged *Charter* breaches in relation to climate change inaction by the Federal Government constituted a reasonable cause of action. Additionally, the Court considered whether a positive duty to enact legislation to prevent climate change existed under section 91 of the *Constitution*'s Peace, Order, and Good Government ("**POGG**") power.

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[226] *Ibid* at paras 57-58.
[227] *Ibid* at para 59.
[228] *Ibid* at para 88.
[229] *Ibid* at paras 93-94.
[230] *Ibid* at para 98.
[231] *Ibid* at para 72.
[232] *Ibid* at para 68.
[233] *Ibid* at paras 69-72.
[234] *Ibid* at para 63.
[235] *Ibid*.
[236] 2020 FC 1059 **[*Misdzi*]**.

Facts

Two Wet'sunwet'en Chiefs issued a Statement of Claim alleging that Canada's greenhouse gas ("**GHG**") reduction policies aiming to reduce such emissions by 2030 are insufficient.[237] Specifically, they alleged that Canada has failed its duty to enact stringent legislation to keep GHG emissions low under the POGG power, and have thereby infringed on their constitutional rights.[238] The Chiefs claimed that they had seen the effects of climate change through forest insect infestations, wildfires, and a decline in forest food animals and salmon in their territory, and that these will only worsen with further climate change.[239] As a result, they alleged their section 7 rights have been violated via increased risk of death and injury from global warming, air pollution, vector-borne disease, limits on where they can live on their territories due to climate change making certain areas inaccessible, and an increased risk of psychological harm and social trauma.[240]

Additionally, they alleged their section 15(1) rights had been violated through the denial to younger and future generations of equal protection and benefit from the law due to global warming.[241] Finally, the two Chiefs claimed Canada failed to uphold its duty under section 91 of the *Constitution Act, 1867* by not making laws under its respective powers.[242] Remedies sought included declaratory, mandatory, and supervisory orders that Canada keep mean global warming between 1.5 – 2 degrees Celsius above pre-industrial levels by reducing Canada's GHG emissions.[243]

Decision

The Court first considered whether or not the POGG claim was justiciable – meaning if it was an appropriate issue for the Court to adjudicate.[244] This issue focused on whether the issue at hand was something that is properly decided by a court of law.[245] The Court noted that political issues are not necessarily not justiciable; they just simply must be translated into a law or state action for the Court to be able to preside over them.[246] In determining whether the issue at hand was justiciable, the Court first considered section 91 and the POGG power. The POGG power allows the Government to make laws for the "Peace, Order, and good Government of Canada", however it does not create an obligation to do so, only the ability.[247] The Court explained that generally, this power is used for either provincial issues of national concern, issues that do not fall neatly into the powers of the federal government or the provincial government, or issues during emergencies such as wartime.[248] The Court specifically held that a positive duty to create laws would not be imposed under the POGG power of Canada by international obligations, as this is not how the power was intended to be used.[249] Finally, the Court held that what the claim was attempting to do was ask the judicial branch to tell the legislative branch to create specific laws.[250]

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[237] *Ibid* at para 3.
[238] *Ibid* at paras 4-5.
[239] *Ibid* at para 10.
[240] *Ibid* at para 12.
[241] *Ibid* at para 14.
[242] *Ibid* at para 10.
[243] *Ibid* at para 6.
[244] *Ibid* at para 17.
[245] *Ibid* at para 19.
[246] *Ibid* at paras 20-21.
[247] *Constitution Act,* 1982, s 91, being Schedule B to the Canada Act 1982 (UK), 1982, c 11; *Ibid* at para 27.
[248] *Ibid* at paras 33-35.
[249] *Ibid* at para 46.
[250] *Ibid* at para 47.

Next, the Court considered the justiciability of the section 7 and 15(1) claims. A main issue with these claims was that no specific laws or actions were being relied upon as breaching the rights of the plaintiffs.[251] This was a problem because without an identification of a specific impugned law or action by the state, the Court was not capable of undertaking a section 1 justification analysis.[252] As a result, the claims were not justiciable as no law or action was being called into question as being responsible for the breaches, and the positive obligations to act were too vague.[253]

When considering the remedies sought, the Court explained that the plaintiffs were asking the Court to assume a supervisory role to ensure that adequate laws were passed.[254] However, this remedy was not appropriate as it would require the Court to take on a regulatory role, which was not the role of the Court.[255] Therefore, neither the claims alleged nor the remedies sought were justiciable as they lacked a sufficient legal component to render the Court's interference appropriate, and were better served by other branches of government.[256]

Finally, even absent the justiciability issue, the Court found that the claims would still have been struck for failing to disclose a reasonable cause of action.[257] The Court held it was plain and obvious that the POGG claim, as well as the sections 7 and 15(1) claims would fail, as again, no positive duty to enact laws exists in this realm, and no specific laws or actions by the state were pointed to.[258] Additionally, although the parties agreed that climate change was a real threat and that a causal relationship did exist between GHG emissions and climate change, proving a causal link between specific Canadian laws and the effects of climate change would be near impossible, particularly given that no specific laws were pled.[259] The Court would not allow a causal relationship to be defined by a "material contribution" as this has never been recognized in *Charter* claims.[260] Finally, the claims lacked a factual basis to conclude the emissions constituted as a material contribution to the alleged *Charter* breaches.[261]

Commentary

Misdzi is similar to *La Rose* in that the Court once again refused to consider climate changed based claims in regard to section 7 and 15(1) breaches.[262] A primary reason for the refusal was the same in both cases, that being that the plaintiffs were unable to point to specific laws or action by the Government which caused the complained of breaches. Similar to *La Rose*, the Court in *Misdzi* did not take issue with the subject of the claim, even indicating that it would consider the argument had specific legislation or government actions been pointed to.[263]

The Court in *Misdzi* once again showed that courts will be hesitant to interfere in the very complicated and political issue that is climate change.

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[251] *Ibid* at para 50.
[252] *Ibid* at para 55.
[253] *Ibid* at paras 58, 60.
[254] *Ibid* at para 64.
[255] *Ibid* at para 64.
[256] *Ibid* at para 72.
[257] *Ibid* at para 79.
[258] *Ibid* at paras 84, 91.
[259] *Ibid* at para 89.
[260] *Ibid* at paras 97-98.
[261] *Ibid* at para 99.
[262] *La Rose*.
[263] *Ibid* at para 102.

***Mathur v Ontario*[264]**

Background

In *Mathur*, the Ontario Superior Court of Justice considered whether a section 7 and 15 claim related to harm caused by climate change had a reasonable prospect of success in the context of an application to strike under the Ontario *Rules of Civil Procedure*. In this case, the Court reconsidered progressing case law from similar Federal Court decisions earlier in the year regarding section 7 and 15 claims, as well as whether a positive obligation could be found in the constitution to act against climate change.

Facts

Ontario residents, between the ages of 12 and 24 brought an application on behalf of future generations challenging Ontario's cancellation of the *Climate Change Act*, which had been cancelled in favour of Ontario's own environmental plan.[265] However, Ontario's plan offered more lenient targets.[266] Therefore, the applicants alleged that the section 7 and 15 rights of future and younger generations had been unjustifiably infringed by increasing the risk of suffering, death, and infringing of their right to a stable climate system capable of providing a sustainable future.[267]

The Ontario government responded to the application by moving to strike it in its entirety for failing to disclose a reasonable cause of action.[268] The Court noted that four questions had to be determined: (1) are the targets and the plan reviewable by the court, (2) are the claims capable of being proven, (3) do the *Charter* claims have a reasonable prospect of success, and (4) does the application depend on the Province possessing a positive obligation.[269]

Decision

When considering whether the targets of the plan and the plan itself were reviewable by the courts, the Court held that the current application did not require a conclusion on whether the plan and targets were actual law.[270] The Court then concluded that the preparation of the targets and the plan was government action reviewable by the courts.[271] In particular, both were mandated by the legislature and were cabinet decisions, something reviewable by the courts, and also had the force of law as the plan allowed orders to be made to meet its guidelines and targets.[272] Additionally, both were regarded as quasi legislation as they guided policy-making decisions, and Ontario had consistently indicated that it intended on meeting the obligations within the plan.[273]

Next, the Court considered whether the claims within the application were capable of being proven. Although not arguing that climate change itself was speculative, Ontario argued that the impact of the green house gas ("**GHG**") targets on climate change in the future would be uncertain as other factors are involved besides Ontario's GHG

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[264] 2020 ONSC 6918 **[*Mathur*]**.

[265] *Ibid* at paras 24, 30; *Climate Change Mitigation and Low-carbon Economy Act, 2016, SO* 2016, c 7.

[266] *Ibid* at paras 22, 29.

[267] *Ibid* at para 31; *Charter* s 7, Part I of the *Constitution Act*, *1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 7, 15. .

[268] *Ibid* at para 32.

[269] *Ibid* at para 43.

[270] *Ibid* at para 59.

[271] *Ibid* at para 61.

[272] *Ibid* at paras 63, 68.

[273] *Ibid* at paras 65, 66.

emissions.[274] The applicants argued that Ontario's position was flawed because if it were correct, no policy surrounding climate change would be reviewable until it is too late because future events are always involved.[275] The Court found that for the purposes of a motion to strike, the applicants' pleadings only need to plead facts that are *capable* of scientific proof; whether the applicants will succeed in proving those facts is a matter for a trier of fact.[276] The Court found that the applicants' pleadings did contain facts capable of scientific proof and that the appropriate levels of global GHG emissions, in the context of the climate change issue, could be established through scientific evidence.[277] In the result, the Court was satisfied that the applicants' claims were not "manifestly incapable of being proven".[278]

On the issue justiciability, the Court held that because the targets and plan could be classified as cabinet decisions, they were reviewable by the Court and thus justiciable.[279] Furthermore, it was held that these decisions were not purely policy based, and specific legislation and action by the government was being challenged which had been turned into law, unlike previous cases in 2020 which attempted to challenge Canada's policy to climate change as a whole.[280]

Having found that the issues raised by the applicant's claim were reviewable and justiciable, the Court proceeded to consider whether the claims had a reasonable prospect of success. The Court found that the section 7 claim engaged the life, liberty, and security interests of the applicants because of the pleaded impacts on risk of death, serious physiological harm, mental distress, as well as limitations on where to live.[281] The Court also found that the breaches of the principles of fundamental justice of arbitrariness and gross disproportionally were properly pled.[282]

With respect to the section 15 claims, the applicants argued that Ontario's actions with regard to the targets set, and the plan surrounding the targets, would have a disproportionate impact on youth and future generations by putting them at an increased risk of health problem due to their age and inability to vote.[283] The Court indicated that although proving whether the law would have adverse effects on individuals because of their age would be difficult, this did not need to be answered at the current stage, and thus the Court could not conclude that the claims had no prospect of success.[284]

Finally, the Court concluded that it was not clear at the current stage that Ontario was not constitutionally obliged to take positive steps to prevent the future harms of climate change.[285] Particularly, the issue of whether positive obligations can be found under the *Charter* had not yet been explicitly decided.[286] Additionally, because Ontario has translated its climate change policy into actual law and state action, it must comply with the *Charter*.[287] Therefore the Court held that it was unable to find that the applicants' claim had no reasonable prospect of success.[288]

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[274] *Ibid* at para 89.
[275] *Ibid* at para 92.
[276] *Ibid* at paras 95-96.
[277] *Ibid* at para 96.
[278] *Ibid* at paras 96, 102.
[279] *Ibid* at para 126.
[280] *Ibid* at para 132.
[281] *Ibid* at paras 150, 153, 156.
[282] *Ibid* at para 162.
[283] *Ibid* at para 189.
[284] *Ibid.*
[285] *Ibid* at para 225.
[286] *Ibid* at para 225.
[287] *Ibid* at para 226.
[288] *Ibid* at para 237.

Furthermore, the issue surrounding the standing of younger and future generations was not clear enough to warrant the claims being struck at this stage.[289]

In the result, the motion of the respondents to strike the applicants' claim was dismissed.[290]

Commentary

In *Mathur*, the Ontario Superior Court made a finding contrary to the findings in both *La Rose,* and *Misdzi*. Particularly, the driving force for the different result in *Mathur* was that the applicants identified and challenged specific government action and legislation, unlike *La Rose* and *Misdzi,* which challenged Canada's climate change policy as a whole. The Court's decision in *Mathur* reflects a progression of some of the ideas set out in *La Rose.*[291] In *Mathur,* the Court indicated that as long as specific legislation or state action was targeted, not only could climate change harm potentially form the basis of a *Charter* claim, it could also potentially invoke a constitutional positive obligation to act to reduce these harms. Importantly, this was the first case where a Canadian court found that these types of claims should not be struck for failing to disclose a reasonable cause of action. The outcome of this claim has the potential to set ground-breaking precedent in regard to *Charter* claims involving harm from climate change, as well as whether a positive obligation can arise from the *Charter* generally, and particularly in sections 7 and 15 to act against climate change. Both of these questions will have serious impacts on government action regarding climate change in the future.

***R v Volkswagen*[292]**

Background

In *VW*, the court dealt with the sentencing of Volkswagen for knowingly creating a device with the intent to deceive emission standards testing and thereby increase marketability of its produced line of vehicles for import to the North American market. The court imposed a precedent setting fine of substantial magnitude.

Facts

Volkswagen Aktiengesellschaft ("**VW AG**"), a German-based car manufacturer, pled guilty to 58 counts of unlawfully importing vehicles into Canada that did not conform to the prescribed vehicle emissions standards under the *Canadian Environmental Protection Act 1999* ("**CEPA**").[293] Guilty pleas were also entered with respect to two additional counts of providing misleading information under the CEPA.[294] VW AG was ordered to pay a fine of $196,500,500, a fine 26 times larger than the largest fine previously imposed for environmental infractions in Canada.[295]

CEPA prohibits the import of vehicles into Canada for sale unless they conform to the nitrogen oxide ("**NOx**") standards set out in the On-Road Vehicle and Engine Emission Regulations (the "**Regulations**"), which harmonized Canadian standards with those set out by the U.S. *Environmental Protection Agency* ("**EPA**").[296] The Regulations

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[289] *Ibid* at para 249.

[290] *Ibid* at para 268.

[291] *La Rose* at paras 63, 68-69.

[292] 2020 ONCJ 398 **[*VW*]**.

[293] *Canadian Environmental Protection* Act, *1999*, SC 1999, c 33, s 154 **[*CEPA*]**; *VW* at para 1.

[294] *CEPA supra* at para 272(1)(k); *Ibid* at para 1.

[295] *Ibid* at para 2.

[296] *Ibid* at para 10.

require each new light-duty vehicle in Canada, from model year 2009-2016, to be certified by its manufacturer that its emissions are in line with the relevant standards.[297] The sale of any light-duty vehicle of the applicable model year in the United States with an EPA certificate of conformity could be used as evidence that the vehicle was in compliance with the emission standards of the Regulations.[298] These certificates needed to be submitted to Environment and Climate Change Canada ("**ECCC**"), and were obtained by manufacturers after having their model years tested for NOx emissions, among others.[299] Additionally, descriptions were required of all emission control systems, including Auxiliary Emission Control Devices ("**AECD**").[300] These are devices that detect the vehicles' parameters such as temperature and speed, and adjust any part of the emission control system accordingly.[301] If an AECD reduced the effectiveness of emission control systems and were not required to protect the vehicle from damage or an accident, it would be considered a "defeat device", and the vehicle would not be certified in the U.S. or allowed to be imported into Canada.[302]

Around 2006, while developing a new diesel engine specifically for use in North America, VW AG supervisors realized that they would not be able to design a diesel engine that could both comply with emission standards and be an attractive option to consumers.[303] As a result, some supervisors directed employees to create a defeat device to evade emission detection.[304] The engines were designed to recognize when they were being tested for emissions, and perform in a mode different than what it would perform in when it was not being tested, sometimes resulting in a 27 times higher output than when being tested.[305] This software was then installed in the new 2.0 litre vehicles imported for sale in North America.[306] A similar software was also installed into the 3.0 litre vehicles by AUDI AG for the same purpose – increasing emission output to increase marketability.[307] Both lines of vehicles ultimately obtained certifications in the U.S., which included employees of VW AG misrepresenting that the vehicles complied with emission standards, and as a result the vehicles were subsequently imported into Canada.[308] Additionally a second line of these vehicles was created with the same defeat device, and imported into North America in 2011.[309] Approximately 130,000 vehicles had these devices installed in them in total from 2008 - 2015.[310]

The defeat device began to cause issues in the vehicles in 2012, and as a result the defeat device was upgraded and expanded to solve this problem, and installed into all applicable models upon maintenance at a dealership.[311]

Around March 2014, a study commissioned by the International Council on Clean Transportation (the "ICCT study") discovered discrepancies in the NOx emissions of the vehicles in question and worked with VW AG to determine the cause.[312] Instead of disclosing the existence of the defeat devices, VW AG employees concealed them

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[297] *Ibid* at para 12.
[298] *Ibid* at para 14.
[299] *Ibid* at para 16.
[300] *Ibid.*
[301] *Ibid* at para 17.
[302] *Ibid* at paras 17, 19.
[303] *Ibid* at paras 31-32.
[304] *Ibid* at para 32.
[305] *Ibid* at para 33.
[306] *Ibid* at para 35.
[307] *Ibid* at paras 36-37.
[308] *Ibid* at paras 38-41.
[309] *Ibid* at para 42.
[310] *Ibid* at para 56.
[311] *Ibid* at paras 44-45.
[312] *Ibid* at paras 48-49.

further, until ultimately admitting to the devices existence in September of 2015 for the 2.0 litres, and November for the 3.0 litres.[313]

Decision

The gravity of the offence was rooted in the sentencing principles listed in section 287.1 of CEPA.[314] Notably, section 287.1(a) states that the fine should be increased for every aggravating factor associated with the offence.[315] In particular, the aggravating factors that were found to apply were that the offence caused damage or risk of damage to the environment and to human health, it was committed with intent, responsibility was not taken for it despite being financially able to, it was committed to increase revenue, and finally it was concealed and the mitigation strategies were meant to prolong the program.[316]

The applicable mitigating factors were a lack of prior infractions, a willingness to enter into settlement discussions to avoid taking up trial time, and the provision of a remedial action program providing benefits and compensation of up to $2.39 billion to consumers to remediate the affected vehicles or remove them off the road.[317]

The Court considered all of the relevant factors and accepted the joint submission for a $196,500,000 fine put forth by the prosecution and defence, with part of the money going towards the Environmental Damages Fund to help implement projects and programs to combat the effects of the NOx emissions across the country.[318]

Commentary

The judge in this case was clear – this was not a simple plan, it was highly sophisticated illegal scheme, well orchestrated, and carried out on a global scale.[319] It involved complex technology, and prolonged deception.[320] The impacts of this case will usher Canada into a new era of fines for environmental infractions by large corporations. Although lower than the fines ultimately paid in the United States and Germany, this case still paves the way for corporations to be held accountable for similar schemes involving deceit and environmental harm. The outcome of this case will likely have long-lasting and far-reaching impacts on future cases regarding damage to the environment for consumer products.

[313] *Ibid* at paras 49-52.

[314] *CEPA supra* at s 287.1.

[315] *Ibid* at s 287.1(a).

[316] *VW supra* at paras 64, 69.

[317] *Ibid* at paras 60, 67.

[318] *Ibid* at paras 74-76.

[319] *Ibid* at para 66.

[320] *Ibid.*

ENERGY

***References Re Greenhouse Gas Pollution Pricing Act*[321]**

Background

In 2021, the Supreme Court of Canada ("**SCC**") released their judgment on the constitutionality of the federal *Greenhouse Gas Pollution Pricing Act* ("**GGPPA**") following appeals from the decisions of the Ontario Court of Appeal ("**ONCA**"), Saskatchewan Court of Appeal ("**SKCA**") and Alberta Court of Appeal ("**ABCA**").[322] The three appeals were heard together with the SCC ultimately concluding that the GGPPA is constitutionally valid under the national concern branch of the federal peace, order and good government power ("**POGG**"). The SCC ruling affirmed the decisions of the ONCA and SKCA, both of which had found that the GGPPPA was a valid exercise of federal power. The decision of the ABCA was reversed by the SCC, as the ABCA had held that POGG could not support such a broad subject matter without significantly infringing into provincial jurisdiction.

Facts

The GGPPA was enacted in 2018 by Parliament as part of Canada's effort to address the global climate change crisis.[323] The GGPPA aims to curb emissions through a 2-Part carbon pricing scheme that sets minimum greenhouse gas ("**GHG**") reduction standards nationally. Part 1 addresses fuel consumption by imposing a fee on producers, distributors and importers of fuels that cause GHG emissions. Part 2 targets large emitters through an output-based GHG pricing system. Provinces that have legislated equal, or more stringent, reduction targets are not caught by the federal carbon pricing legislation. Provinces with insufficient GHG emissions legislation are caught by one or both parts of the GGPPA and required to meet the federal standards set out within.

Decision

Like the appellate courts, the SCC applied the standard division of powers framework, first characterizing the subject matter of the GGPPA and then applying the subject matter to applicable federal or provincial heads of power under section 91 and 92 of the *Constitution Act, 1867*.[324]

The SCC determined that the true subject matter of the GGPPA is to establish minimum national standards of GHG price stringency to reduce GHG emissions.[325] The SCC noted that the pith and substance of legislation should capture the law's essential character in terms that are as precise as the law will allow.[326] It is also permissible in some circumstances for courts to refer to the legislative choice of means in the definition of the pith and substance of a statute, however courts must remain committed to the goal of finding the true subject matter of the challenged statute.[327] Further, the SCC highlighted that in the characterization stage of the analysis, the pith and substance of a statute must be identified without regard to the legislative heads of power.[328] The SCC considered intrinsic and

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[321] *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 **[*SCC Reference*]**.

[322] *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40; *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544; *Reference re Greenhouse Gas Pollution Pricing Act*, 2020 ABCA 74.

[323] *Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12 s 186.

[324] *SCC Reference Supra* at para 47.

[325] *Ibid* at para 57.

[326] *Ibid* at para 52.

[327] *Ibid* at para 53.

[328] *Ibid* at para 56.

extrinsic evidence, as well as the practical and legal effects of the GGPPA in concluding that its pith and substance was to establish minimum national standards of GHG price stringency, aimed at reducing GHG emissions.

Next the SCC conducted a classification analysis of the national concern doctrine. It concluded that the proposed matter of establishing minimum national standards of GHG price stringency to reduce GHG is of clear concern to Canada as a whole and the conditions necessary to invoke the national concern doctrine have been met. The SCC reached their decision through a three step analysis: (1) the threshold question; (2) the singleness, distinctiveness and indivisibility analysis; and (3) the scale of impact analysis.[329] At the first step, the SCC determined that the matter was of sufficient concern to Canada as a whole to warrant consideration under the national concern doctrine.[330] At the second step, the Court determined that GHG are a specific, identifiable matter, and that provinces alone are unable to create the uniform standard necessary to curb GHG emissions.[331] At the third step, the SCC found the impact on provincial jurisdiction is limited and reconcilable given the irreversible harm that will ultimately occur if emissions are not addressed.[332]

The SCC also addressed Ontario's argument that the fuel and excess emissions charges imposed by the GGPPA do not have a sufficient nexus with the regulatory scheme to be considered regulatory charges. The SCC determined that the GGPPA does create a regulatory scheme. The levies imposed by the GGPPA cannot be characterized as taxes, rather they are regulatory charges with the purpose of altering behaviour in accordance with the GGPPA. Ultimately, a sufficient nexus was found to exist.[333]

Commentary

This decision is impactful as it creates a greater degree of regulatory certainty across the Country with regard to GHG emissions. Provinces that did not previously have sufficiently stringent carbon pricing plans in place will now be caught by one or both parts of the GGPPA. Businesses operating in these jurisdictions may see an increase in costs due to the fuel charges and emissions output pricing system, however increased regulatory certainty allows businesses to adjust, plan, and implement operational practices that align and comply with emission standards. While this decision affirms federal discretion for implementing the GGPPA schemes, the power is limited to carbon pricing and does not provide Parliament a general authority over GHG emissions. This may lead to future challenges if Parliament alters or expands the GGPPA beyond the strict purpose identified by the SCC of creating minimum national standards of GHG price stringency.

PricewaterhouseCoopers Inc v Perpetual Energy Inc[334]

Background

In 2021, the Alberta Court of Appeal ("**ABCA**") released the decision relating to claims brought by PricewaterhouseCoopers Inc., the trustee in bankruptcy (the "**Trustee**") for Sequoia's assignment in bankruptcy. The ABCA reversed in part the decision of the Alberta Court of Queen's Bench ("**ABQB**") on the matter.[335] The Trustee had brought claims to the ABQB concerning an asset transaction. The Trustee alleged that the transaction

[329] *Ibid* at para 141.

[330] *Ibid* at para 167.

[331] *Ibid* at paras 173, 181.

[332] *Ibid* at para 206.

[333] *Ibid* at para 219.

[334] *PricewaterhouseCoopers Inc v Perpetual Energy Inc*, 2021 ABCA 16 **[*PWC*]**.

[335] *PricewaterhouseCoopers Inc v Perpetual Energy Inc*, 2020 ABQB 6.

was undervalued, violating s.96 of the *Bankruptcy and Insolvency Act,* RSC 1985, c B-3 (“***BIA***”)[336]. Further claims included corporate oppression, public policy, and breach of director duties. The ABQB summarily dismissed or struck out many of claims, leading to the appeal heard by the ABCA.

Facts

The transaction challenged by the Trustee was part of a larger disposition of oil and gas assets that occurred in 2016 involving the Perpetual Energy group of companies.[337] Prior to the 2016 transfers, the Perpetual Operating Trust (“**POT**”) held the beneficial interests in 3 categories of assets: (1) the “KeepCo Assets”; (2) the “Retained Assets”, which are subset of the KeepCo Assets; and (3) the “Goodyear Assets”.[338] The sole beneficiary of the assets held by POT was Perpetual Energy Inc. (“**Perpetual**”), the parent company of the Perpetual Energy group of companies. The legal titles and regulatory licences to all the assets were held by Perpetual Energy Operating Corp (“**PEOC**”). The Goodyear assets, which were shallow natural gas assets, were operating with a negative cash flow and were associated with significant future Abandonment and Reclamation Obligations (“**AROs**”).[339]

Perpetual agreed to sell the Goodyear Assets for $1.00 to Kailas Capital Corp (“**Kailas**”), leading to the multi-step transaction that occurred in 2016, collectively called the Aggregate Transaction.[340] During the Aggregate Transaction: (1) POT transferred the beneficial interest in the Goodyear Assets to PEOC, which is the challenged “Asset Transaction”; (2) Perpetual Operating Corporation (“**POC**”) was created to be the new trustee for POT, and PEOC transferred the legal title of the KeepCo Assets to POC; (3) Perpetual sold all the shares of PEOC to a numbered company incorporated by Kailas and PEOC changed its name to Sequoia at this point; (4) Ms. Rose, who had been the sole director of PEOC resigned from the position and signed a Resignation & Mutual Release; and (5) the beneficial interest in the Retained Assets was transferred from Sequoia to POC. All the steps in the Aggregate Transaction occurred within minutes.

Sequoia operated the Goodyear Assets for approximately 18 months following the Aggregate Transaction before it assigned itself into bankruptcy in 2018.[341] PricewaterhouseCoopers Inc. was appointed as the trustee in Bankruptcy and asserted that as a result of the Asset Transaction, Sequoia obtained only $5.67 million in assets but assumed over $223 million in obligations.[342]

Decision

Three appeals were brought to the ABCA and argued together.[343] The first appeal was commenced by the Trustee, challenging the portions of the decision that struck out or summarily dismissed various parts of the claim. The second appeal was commenced by the Perpetual Energy group relating to the parts of the claim that were not struck out or dismissed. The third appeal was commenced by the Trustee, challenging the subsequent ruling on costs and the substantial award given to Ms. Rose in the original action on a solicitor-client basis.

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[336] RSC 1985, c B-3.

[337] *PWC supra* at para 3.

[338] *Ibid* at para 4.

[339] *Ibid* at para 5.

[340] *Ibid* at para 7.

[341] *Ibid* at para 12.

[342] *Ibid* at para 11.

[343] *Ibid* at para 56.

The ABCA rejected the ABQB's proposition that the *Orphan Well Association v Grant Thornton Ltd* ("***Redwater***")[344] decision meant that AROs were not a real liability.[345] The ABCA found that that AROs are inevitable.[346] Even if AROs are not a current liability, they are a real liability or obligation.[347] Therefore, AROs are continuing obligations of a bankrupt company owed to the public, which cannot be ignored by trustees.[348] As a result, the ABCA held that no claims should have been struck out for failing to disclose a cause of action or for lacking merit on the incorrect basis that *Redwater* nullified AROs.[349] The ABCA also noted that when considering if pleadings should be struck, consideration should be given to whether flaws can be cured by amendment or by the provision of particulars.[350]

The ABCA determined that a number of issues will need to be decided at trial. First, determining whether the Asset Transaction is void for being undervalued requires a determination of whether the Asset Transaction was done at arm's length. Because the Asset Transaction occurred between Perpetual, POC and PEOC, which are related companies, there is a presumption that they were not acting at arm's length.[351] Therefore, the determination of whether the presumption can be rebutted will need to occur at trial.[352] The ABCA held that the ABQB erred in striking out the oppression claim on grounds that the Trustee was not a 'proper person' and therefore the oppression claim should be brought to trial.[353] Furthermore, the ABCA held that the extent of the director's duty would need to be decided at trial as there was no basis on which the claim could be struck for failing to disclose a cause of action.[354] Finally, the ABCA found that the enhanced cost award given to Ms. Rose on a solicitor-client costs was not justified. The claim against Ms. Rose was arguable, the Trustee does not have to meet administrative law requirements of fairness, and there is no independent duty to investigate that is owed to third parties.[355]

Commentary

This decision is significant as it relates to the environmental obligations associated with abandoned wells. It provides a strong rebuke to the idea that ARO's are not real liabilities, making it clear that companies should be careful to consider their obligations and liabilities even if the AROs of certain assets may be in the future. Even where a company is bankrupt, a duty is still owed the public regarding AROs. Leave to appeal applications have since been filed with the SCC.[356]

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[344] *Orphan Well Association v Grant Thornton Ltd*, 2019 SCC 5.

[345] *PWC supra* at para 83.

[346] *Ibid* at para 86.

[347] *Ibid* at para 87.

[348] *Ibid* at para 95.

[349] *Ibid* at para 97.

[350] *Ibid* at para 81.

[351] *Ibid* at para 99.

[352] *Ibid* at para 111.

[353] *Ibid* at para 135.

[354] *Ibid* at para175

[355] *Ibid* at para 226.

[356] *Rose v PriceWaterhouseCoopers Inc*, 2021 CarswellAlta 1061; *Perpetual Energy Inc v PriceWaterhouseCoopers Inc*, 2021 CarswellAlta 1062.

INSOLVENCY

Overview

During this year, with the rise of COVID-19 we saw a financial market rocked by uncertainty. It was a very interesting year for the area of insolvency, which saw clarifications on certain terms and items in restructurings as well as the utilization of exciting tools such as the reverse vesting order that will be sure to be used more and more to create the best results for restructuring debtors.

Re Quest University Canada[357]

Background

This case involved the granting of a reverse vesting order notwithstanding significant objections from an impacted creditor. The Court approved the RVO and a separate entity was brought into the CCAA proceedings, while the original debtor exited. The assets of the original debtor were sold and all liabilities, contracts, etc. remained with the debtor entity in the proceedings following the original debtor's exit.

Facts

On January 16, 2020, Quest University entered CCAA proceedings pursuant to an Initial Order.[358] On November 3, 2020, Quest applied for various orders in the CCAA proceedings, which included the approval of a sale transaction with Primacorp Ventures Inc. ("**Primacorp**").[359] At the November 3, 2020 application, a claims process order and meeting order was granted, and a Primacorp Break Up Fee and charge to secure that amount was granted, but the Transaction Approval and Vesting Order ("**TAVO**") part of the application was adjourned to allow opposing parties to prepare necessary materials.[360] Southern Star Developments Ltd. ("**Southern Star**") opposed the TAVO.[361] The TAVO subsequent to the adjournment changed into a "reverse vesting order" ("**RVO**") and opposition by Southern Star increased with other parties joining their opposition.[362]

Quest's assets included lands in Squamish BC.[363] Quest leased certain university residences on these lands from Southern Star.[364] The residences sat vacant due to the COVID-19 pandemic and Quest attempted to defer payment of the substantial lease payments, which the Court denied in a prior proceeding.[365]

Quest's goals in its CCAA proceedings was to find a partner/investor to purchase the lands and/or an academic partner that would permit Quest to continue as a post-secondary institution.[366] Quest had an extensive sale and partner search process (SISP) and all proposals were reviewed and Quest received an LOI from Primacorp.[367] Quest and Primacorp negotiated the definitive documents toward completing a transaction and later Quest and Primacorp

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357 *2020 BCSC 1883* ***[Quest University]***.

358 *Ibid* at para 7.

359 *Ibid* at para 1.

360 *Ibid* at para 3.

361 *Ibid* at paras 4.

362 *Ibid* at paras 4-5.

363 *Ibid* at para 10.

364 *Ibid* at para 11.

365 *Ibid* at para 12.

366 *Ibid* at para 13.

367 *Ibid* at para 18.

executed a Purchase and Sale Agreement.[368] The transaction was subject to a number of significant conditions including 1) Quest disclaim four Southern Star subleases of the residences or enter into an agreement with Southern Star (Quest disclaimed these subleases); 2) obtain Court approval of the transaction; 3) obtain creditor approval of Quest's Plan under the CCAA; and 4) obtain court approval of the Plan under the CCAA.[369] At the adjourned application, Quest argued that the TAVO was beneficial in many respects; as it maximized the value of Quest's assets, offered the greatest benefit to stakeholders, had a high likelihood of completing and had the highest likelihood that Quest would continue to operate with its academic model post CCAA proceedings.[370] The Monitor agreed and acknowledged there were only two viable proposals for the assets and Primacorp's was the superior one.[371]

Decision

The Court reviewed and determined subsidiary issues in the first instance including issues regarding the disclaimer of subleases then turned to the approval of the Primacorp transaction. It was a condition precedent of the Primacorp transaction that Quest disclaim the subleases or Primacorp and Southern Star enter into an agreement to its satisfaction.[372] Primacorp and Southern Star did enter into negotiations but a mutually acceptable agreement was not reached.[373] Southern Star brought an application disallowing any disclaimer.[374] The Court reviewed the significance of disclaimers in CCAA proceedings and Quest's submissions that the disclaimers were necessary to pursue and complete the Primacorp transaction.[375] The Court agreed that the disclaimers would enhance the prospect of Quest making a viable compromise or arrangement.[376] The Court acknowledged that Southern Star would face hardship if the disclaimers were permitted however; they noted that if the Primacorp transaction did not occur there would be no transaction and Quest did not have the financial means to continue. The disclaimers were granted.

At the November 3, 2020 application, Quest sought the TAVO and to uphold the disclaimers, which would place Southern Star in a position to be a substantial unsecured creditor of the estate who likely would not vote in favour of the Plan.[377] The Monitor stated there was a high probability of Southern Star's claim being so large it would control the value of the votes at the Creditor Meeting and essentially be able to veto a Plan.[378] Quest solved the issue that Southern Star would block the Plan by revising the TAVO into the RVO.[379] The condition precedents requiring creditor and court approval of the Plan were deleted and the only condition precedent left remained granting of the RVO to close the Primacorp transaction.[380] The RVO provided that a wholly owned subsidiary of Quest, Quest Guardian Properties Ltd. ("**Guardian**") would be added to the proceedings, the assets of Quest excluded from the purchase would be transferred to Guardian, the claims and liabilities of Quest shall be transferred to Guardian, Primacorp would pay the secured charges and secured claims and all of Quest's rights and titles in the purchased assets would vest in Guardian free and clear of any security interests, claims and liabilities, and Quest would cease

[368] *Ibid* at para 19.
[369] *Ibid* at para 22.
[370] *Ibid* at para 23.
[371] *Ibid* at para 24.
[372] *Ibid* at para 90.
[373] *Ibid* at para 90.
[374] *Ibid* at para 94.
[375] *Ibid* at paras 95-96.
[376] *Ibid* at para 95.
[377] *Ibid* at para 104.
[378] *Ibid* at para 118.
[379] *Ibid* at para 121.
[380] *Ibid* at para 121.

to be a petitioner in the CCAA proceedings leaving Guardian as the sole Petitioner.[381] The Monitor supported the RVO.[382] The Court found that the RVO achieved what Quest originally sought, a sale of certain assets and the continuance of Quest as an academic institution.[383]

The Court acknowledged its authority to grant an RVO coming from section 11 of the CCAA.[384] Quest and the Monitor submitted that the Primacorp transaction satisfied section 36 of the CCAA and the Court should grant the RVO pursuant to sections 11 and 36.[385] The Court found that Quest was not seeking to bar Southern Star from voting on the Plan given that Guardian would be submitting its own Plan[386] (there is no provision in the CCAA that prohibits a RVO structure)[387], the court must however ensure that the relief is "appropriate" in the circumstances and that all stakeholders are treated fairly and reasonably as the circumstances permit[388] and there was no other transaction that emerged to deal with Quest's restructuring.[389] The Court found that if the Primacorp transaction did not move ahead, Quest would likely face receivership, liquidation of bankruptcy.[390]

The Court found that in reference to *Callidus*[391] the situation at hand was a complex and unique situation where it was appropriate to exercise its discretion to allow the RVO structure. Quest was behaving in good faith, acting with due diligence for the best outcome for all stakeholders and considered the balance between competing interests at play.[392] The RVO was granted.

Commentary

Reverse vesting orders continue to be a powerful tool in restructuring proceedings under the CCAA. The Courts will examine the RVO to determine if it is the best option to grant, and will look at whether a party has acted in good faith when coming to its RVO proposal, whether a company has considered its stakeholders, whether there has been an extensive sales process to market the assets and if the debtor and Monitor determined that the RVO is the best option.

***Re Bellatrix Exploration Ltd*[393]**

Background

In this case the Court determined that the exception to the debtor's right to disclaim an Eligible Financial Contract ("**EFC**") set out in section 34(7)(a) of the CCAA does not create an obligation for the debtor to continue to perform the EFC throughout the insolvency.

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[381] *Ibid* at para 123.
[382] *Ibid* at para 122.
[383] *Ibid* at para 124.
[384] *Ibid* at para 127.
[385] *Ibid* at para 149.
[386] *Ibid* at para 156.
[387] *Ibid* at para 157.
[388] *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60 at para 70.
[389] *Ibid* at para 158.
[390] *Ibid* at para 159.
[391] *9354-9186 Quebec Inc v Callidus Capital Corp*, 2020 SCC 10.
[392] *Ibid* at para 172.
[393] 2020 ABQB 809 **[*Bellatrix*]**

Facts

Bellatrix and BP were parties to a GasEDI Base Contract for the short-term sale and purchase of natural gas and a Special Provisions for GasEDI Base Contract.[394] Bellatrix delivered natural gas to an agreed delivery point and BP would purchase and take title to the natural gas pursuant to the GasEDI Contract.[395] BP was not provided with a security interest in respect of Bellatrix's obligations under the contract.[396]

On October 2, 2019, the Court granted Bellatrix protection under the CCAA.[397] On November 25, 2019, Bellatrix (with the approval of the Monitor) sent a Disclaimer Notice in regards to the GasEDI Contract pursuant to section 32(1) of the CCAA which was valid in 30 days.[398] BP responded to the Notice setting out that the GasEDI Contract was an ECF and therefore could not be disclaimed.[399] Bellatrix stopped delivering gas to BP.[400] Bellatrix later offered to resume delivery of the natural gas under the GasEDI Contract during the disclaimer period if BP would agree not to withhold revenue owed to Bellatrix.[401] BP demanded that Bellatrix resume performance under the contract and even if the GasEDI Contract was not an EFC, Bellatrix was required to perform the contract until the expiry of the disclaimer notice period.[402]

BP and the Monitor entered into an agreement wherein BP paid a December payment to the Monitor in trust pending resolution relating to the disclaimer.[403] BP filed an application seeking declaration the GasEDI Contract was an EFC within the CCAA and the additional relief enjoining Bellatrix from unilaterally suspending delivery of gas under the agreement.[404] Due to time constraints the application was only heard on the single issue of disclaimer. The Justice held the agreement was an EFC (decision under appeal).[405] BP wrote to Bellatrix that given the EFC determination, Bellatrix was to resume performance of the GasEDI Contract.[406] Bellatrix responded that the EFC decision did not address whether Bellatrix was required to perform its obligations under the GasEDI Contract.[407] Later, the Court granted an Approval and Vesting Order for the sale of substantially all of Bellatrix's assets with the GasEDI Contract not being assumed by the new purchaser.[408] Pursuant to a credit agreement and certain security granted, Bellatrix had First Lien Lenders which registered security interests in all of Bellatrix's present and after-acquired personal property and a floating charge on the present and after-acquired real property.[409] Bellatrix was indebted to the First Lien Lenders in an amount over $44.5MM.[410] The First Lien Lenders sought declaration they had first priority interest in all property of Bellatrix.[411]

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[394] *Bellatrix* at para 3.
[395] *Ibid* at para 5.
[396] *Ibid* at para 5.
[397] *Ibid* at para 6.
[398] *Ibid* at para 7.
[399] *Ibid* at para 8.
[400] *Ibid* at para 9.
[401] *Ibid* at para 10.
[402] *Ibid* at para 11.
[403] *Ibid* at para 13.
[404] *Ibid* at para 14.
[405] *Ibid* at paras 14-15.
[406] *Ibid* at para 16.
[407] *Ibid* at para 17.
[408] *Ibid* at para 25.
[409] *Ibid* at para 26.
[410] *Ibid* at para 28.
[411] *Ibid* at para 29.

Decision

The ABQB determined a non-insolvent party to an EFC has certain options under the CCAA including, its ability to terminate the EFC and crystallize its loss which is a protection not afforded to other creditors.[412] Another protection is allowing set-off if the EFC agreement permits, the protections however do not compel a CCAA debtor to continue to perform an EFC that has not been terminated, nor does the CCAA provide the non-insolvent counterparty with any priority for its claim, apart from the protection of the exemption.[413] BP never terminated the contract therefore its claim was as an unsecured creditor in the CCAA proceedings.

Commentary

During CCAA proceedings, it is common to see disclaimers of contracts to better and further the debtor's goals of restructuring. If a debtor party was forced to perform an EFC then this may hinder the goals of the CCAA. Debtors should recognize that a non-insolvent party to an EFC may terminate the agreement and crystallize its losses. Similar to other creditors any net claims after termination are subject to a stay of proceedings.

***Re Accel Canada Holdings Limited*[414]**

Background

In this case, the Court considered whether Gross Overriding Royalties could be classified as interests in land or security interests, and elaborated on the factors considered in making this classification.

Facts

ARC Resources Ltd ("**ARC**") sold certain assets (the "**Redwater Assets**") under an Asset Purchase and Sale Agreement (the "**APA**") to Accel Holdings ("**Holdings**") for $154M.[415] Rather than paying the entirety of the purchase price, Holdings granted ARC a Gross Overriding Royalty ("**GO**R") under a Gross Overriding Royalty Agreement ("**ARC GOR**") with royalty payments by Holdings to ARC that would be triggered by certain future events.[416] The Amount paid was financed by Holdings with money borrowed from Third Eye Capital Corporation ("**TEC**"), secured by a first ranking security interest in all of Holding's property, and including the assets purchased from ARC and the assets underlying the ARC GOR.[417] TEC's first ranking security was acknowledged in the APA between Holdings, TEC, and ARC, and was defined in an Agreement ("**Acknowledgement**").[418].

B.E.S.T. Active 365 Fund LP, B.E.S.T. Total Return Fund Inc., and Tier One Capital Limited Partnership (collectively known as "**BEST**"), entered into Royalty Purchase Agreements and GOR agreements with Accel Energy and Holdings, which stated that if either Energy or Holdings repurchased the Royalty by a set date for a certain amount, the GOR would terminate. The amounts had not been paid by either on the set dates.[419] If this

[412] *Ibid* at para 38.
[413] *Ibid* at para 39.
[414] 2020 ABQB 182 **[*Re Accel 1*]**
[415] *Re Accel 1* at para 4.
[416] *Ibid* at para 4.
[417] *Ibid* at para 5.
[418] *Ibid* at para 8.
[419] *Ibid* at paras 3, 9.

amount was unpaid, then the BEST GORs were payable by the appropriate Accel entity until a certain royalty amount was reached.[420]

Accel Energy and Holdings entered insolvency proceedings, and thus the priority concerns of the stakeholders needed to be determined.[421] The Monitor had been granted an Order Approval Sale and Investment Solicitation ("**SISP**") and requested that the Court accelerate its determination of the issues related to the GORs to help assist Accel entities and potential purchasers of the assets.[422] The Court was asked to determine whether or not the GORs held by ARC and BEST (1) were interests in land or contractual security for payment, and (2) could be vested off title pursuant to a Sale Approval/Vesting Order.[423]

Decision

The Court first considered whether or not the royalties in question could be properly classified as interests in land. This was dependent on the language used to describe the interest, and whether or not the parties intended the royalty to be a grant of an interest in land, determined on an objective basis.[424] To do this the Court had to consider the whole contract, evidence known to both parties, as well as take into account surroundings circumstances, which will vary from case to case.[425]

Regarding the ARC GOR, the Court found that the contract pointed both in the direction of the GORs being an interest of land, and being a security interest.[426] The Court held that taking the contract in its entirety, as well as the surrounding circumstances such as correspondence between the parties, it was clear that the ARC GOR was intended as a security interest, and not an interest in land.[427] This was particularly because a significant feature of a security interest is that the debtor/grantor retains a right of redemption, and the APA allowed the ARC GOR to be redeemed before a certain date or after that date with notice of the GEA.[428] Therefore, the ARC GOR was subordinate to the TEC security interests.[429]

In dealing with an argument by BEST that their GORs were in fact interests in land, and not security interests, the Court noted that the real question was whether the transactions granted to BEST were an interest in land, or a contractual right to a portion of the Petroleum Substances recovered from the land by way of security for the payment to it of a certain amount.[430] The Court found that when all the agreements in question and the surrounding circumstances of the transactions were considered, the BEST GORs were properly found to be security interests. As a result of finding that the GORs were security interests and not interests in land, the Court was able to vest the interests.[431]

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[420] *Ibid* at para 10.
[421] *Ibid* at para 37.
[422] *Ibid* at para 11.
[423] *Ibid* at paras 2-3.
[424] *Ibid* at paras 14, 25-26.
[425] *Ibid* at paras 17, 20.
[426] *Ibid* at paras 50-51.
[427] *Ibid* at paras 54, 59, 63.
[428] *Ibid* at para 53.
[429] *Ibid* at para 59.
[430] *Ibid* at para 86.
[431] *Ibid* at para 93.

Given that all three GORs were not interests in land, there was no need to go into an analysis of whether the Court can or cannot vest off the interests as it can.[432]

Finally, the Court addressed the priority concerns surrounding the registration of the GORs in question. Although TEC registered its security interests against Holdings at the Personal Property Registry before ARC and BEST, TEC and BEST both had multiple first in time registrations at Alberta Energy regarding Holdings' Crown mineral leases under the *Mines and Minerals Act* ("**MMA**").[433] The Court held that both the *Law of Property Act* ("**LPA**") and the *MMA governed* the registration process for the security interests at issue.[434] However, the *LPA* stated that priority under an interest registered under the *LPA* or *MMA* is determined by the *MMA* and by date of registration, and thus TEC was found to hold first in time registration in the Redwater Assets with respect to the ARC GOR.[435] The same was held true with regard to the BEST GORs.[436]

Commentary

This case added to the jurisprudence regarding the determination of interests in land and the test the courts will look at to determine whether something is in fact and interest in land. It allowed the Court to consider if GORRs should be found to be interests in land, or security interests. The Court stressed the fact-driven nature of this analysis, which includes consideration of the surrounding circumstances and the object intentions of the parties. Additionally, the Court was able to clarify how registration of such interests works.

***Re Accel Canada Holdings Limited*[437]**

Background

In this case, the Court determined whether certain agreements prior to a CCAA filing were a preference under the *BIA***.**

Facts

Accell Canada Holdings Limited and Accel Energy Canada Limited (collectively "**Accel**" and separately "**Holdings**" and "**Energy**") applied for an Order in proceedings under the *BIA*, to continue under the *Companies' Creditors Arrangement Act*.[438] The application was brought forward by Third Eye Capital Corporation ("**TEC**") and was opposed by four other parties.[439] An order was sought that TEC had a valid and enforceable claim against Energy for $12M, an enforceable security interest in all Energy's assets pursuant to a Fixed and Floating Charge Debenture (the "**Debenture**"), that TEC's interests rank in priority to the rest of the creditors, and that the Debenture be rectified to reflect the intent of the parties to provide a fixed and floating charge debenture to secure the obligations under the agreement (the "**Term Sheet**").[440]

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[432] *Ibid* at para 93.

[433] *Ibid* at para 102.

[434] *Ibid* at para 103; *Law of Property Act,* RSA 2000, c L-7; *Mines and Minerals Act*, RSA 2000, c M-17.

[435] *Re Accel 1 supra* at paras 110, 120.

[436] *Ibid* at para 135.

[437] 2020 ABQB 204 **[*Re Accel 2*]**.

[438] *Re Acccel 2* at para 2; *BIA*; *Companies' Creditors Arrangement Act,* RSC 1985, c C-36.

[439] *Re Accel 2 supra* at para 3.

[440] *Ibid* at para 4.

TEC was the primary secured lender of Holdings, and entered into the Term Sheet with Energy, providing them with $800,000 to satisfy Accel's emergency payroll obligations.[441] In exchange, Energy undertook additional obligations to provide mandatory payments specified within the Term sheet.[442] TEC was claiming a payment of $4.4M and $7.3M that was supposed to be paid under Energy's obligations in the Term Sheet, as well as the initial $800,000.[443] TEC and Energy had entered into a Debenture, and TEC claimed that it provided security against Energy for the obligations arising under the Term Sheet and as a result, TEC registered a security agreement and land charge against Energy's property.[444]

The Standstill agreement, referenced in the Term sheet, indicated that TEC would not exercise its rights and remedies from the debt documents during the specific period.[445] However, Energy did not sign the agreement nor have any obligations to TEC under the Term Sheet.[446] Additionally, the agreement stated that Holdings would authorize its customers, marketers and production settlement payors to provide TEC with $4M monthly to resolve Holdings debt, the entirety of which would be due if the payments were not made properly.[447] As a result of this, Holdings issued an irrevocable direction to pay ("**IDP**") to BP Canada Energy Group ULC ("**BP Canada**") however, the funds were paid to Holdings instead of TEC.[448] This money was then transferred to another company, Regent Holdings LLC ("**Regent**"), in regard to other agreements.[449] These agreements functioned to assign Stream Asset Financial Winterfresh LP and Stream Asset Financial Sega LP (collectively "**Stream**") status as primary secured creditor to Regent.[450] Stream also received a Gross Overriding Royalty which could cause Regent to purchase back for $90M by exercising its "Put Option."[451] If done, Energy agreed to guarantee Regent's obligation to pay the $90M it would owe Stream if this option was exercised, which it was, before which Stream assigned Energy's debt to it to Regent.[452]

Decision

The Court considered whether TEC had an enforceable claim against Energy that would give rise to a security interest in Energy's assets by way of the Term Sheet and Debentures (collectively, the "**Agreements**").[453] In doing this, the Court had to determine if (a) the Agreements giving rise to TEC's claim were enforceable and (b) whether the Agreements were voidable as a reviewable transaction under the *BIA*.[454] The Court noted that even if the Agreements were found to be enforceable, they could still be voided under the *BIA*. Thus, it had to be determined if the transaction (the Agreements) created a preference to TEC over other creditors, something voidable under sections 95 (for improper preference) or 96 (for transfer undervalue) of the *BIA*, as Energy was insolvent when the transaction was created, and TEC was dealing with Energy and Regent at arm's length.[455]

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[441] *Ibid* at para 5.
[442] *Ibid* at para 6.
[443] *Ibid* at para 7.
[444] *Ibid* at para 9.
[445] *Ibid* at para 10.
[446] *Ibid* at paras 10-11.
[447] *Ibid* at para 12.
[448] *Ibid* at paras 13-14.
[449] *Ibid* at para 15.
[450] *Ibid* at para 16.
[451] *Ibid*.
[452] *Ibid* at para 16.
[453] *Ibid* at para 18.
[454] *Ibid* at para 19.
[455] *Ibid* at paras 30-33; *BIA supra* at s 95.

TEC alleged that the Agreements did not create a preference, but rather a trust, by virtue of the IDP issued to BP by Holdings.[456] The Court held that an IDP does not necessarily create a trust agreement, and the particular circumstances need to be considered in each individual case.[457] Regarding the IDP in question, it was held that it did not create a trust as there was no intention to do so in the IDP, the Standstill Agreement, or the surrounding circumstances.[458] TEC simply agreed not to enforce any debt owed to it by Holdings as long as it received regular payments as effected by the IDP Holdings sent.[459] Furthermore, the Standstill Agreement contemplated the fact that payments may not be made despite the IDPs, which then would allow TEC to enforce its rights to the funds.[460] The Court found that this is not akin to a trust relationship.[461] Finally, there was no indication that BP was intending to act in the role of a trustee.[462] As a result, no trust relationship was created, only a simple commercial agreement.[463]

Since a trust was not created, the Court held that the Agreements gave TEC a security interest in preference to other creditors. Following this point, section 95(2) of the *BIA* applied, which presumes this was done to give the creditor preference.[464] TEC argued that the presumption was rebutted because the transaction was entered with the *bona fide* expectation that it would help the debtor continue in business, rather than create a preference.[465] The Court however, held that the Agreements, including the initial $800,000, were not for keeping Energy in business.[466] The intent of such Agreements was to provide immediate funding to Accel to pay its employees, in an effort to avoid their losses, which would render Accel's assets untended and liable to theft and environmental issues.[467] Additionally, Accel was experiencing financial difficulties for an extended period, but undertook over $12M of secured debt in exchange for $800,000 to provide one more pay period to its employees.[468] The Agreements created a preference to TEC over other creditors and were void under section 95(1) of the *BIA*.[469] Although not required, the Court would also have found the intent to delay or defeat a creditor within section 96(1) of the *BIA*, and that the transfer of money was undervalued and intended to give preference to TEC over the interests of other creditors, rendering it void.[470]

The Court determined that the appropriate remedy was to set aside the Term Sheet and Debenture, resulting in TEC not having a valid and enforceable claim against Energy arising from the Agreements, as of the date the repayment of the $800,000 loan was made by Energy to TEC.[471]

Commentary

Lenders should be wary of entering into agreements with debtors prior to insolvency. The *BIA* grants the powers to review these types of transactions and they may be voidable when creating preferences over other creditors. This case exemplified that when a preference is given to one creditor over another, the *BIA* presumes that it was intended

[456] *Re Accel 2 supra* at para 32.
[457] *Ibid* at para 40.
[458] *Ibid* at para 42, 49.
[459] *Ibid* at para 49.
[460] *Ibid* at para 50.
[461] *Ibid.*
[462] *Ibid* at para 52.
[463] *Ibid* at para 55.
[464] *Ibid* at para 58; *BIA supra* at s 95(2).
[465] *Re Accel 2 supra* at para 60.
[466] *Ibid* at para 69.
[467] *Ibid* at para 63.
[468] *Ibid* at paras 67-68
[469] *Ibid* at para 70; *BIA supra* at s 95(1).
[470] *Re Accel 2, supra* at paras 76-77, 82-83; *BIA supra* at s 96.
[471] *Re Accel 2, supra* at para 92.

to do so. This may be rebutted, by showing that the transaction occurred with the intention of continuing the business.

Re Accel Energy Canada Limited[472]

Background

In this case, the Court determined the priority of creditors in relation to an irrevocable direction to pay. Accel argued that TransAlta was an unsecured creditor with no right to payment, while TransAlta argued that BP Canada Energy Group ULC breached its irrevocable direction to pay.

Facts

TransAlta Energy Marketing Limited and ACCEL Energy Canada Limited ("**ACCEL**"), as well as ACCEL's other creditors, became engaged in a priority dispute over $1.4M (the "**Disputed Funds**") held by the Monitor of ACCEL.[473] The disputed funds were part of the net proceeds payable by BP Canada Energy Group ULC ("**BP**") pursuant to contracts between BP and ACCEL.[474]

The debt related to a judgment TransAlta obtained earlier that year, where TransAlta agreed to stop enforcement proceedings against ACCEL if ACCEL issued two Irrevocable Directions to Pay ("**IDP**").[475] At issue was one of the IDPs, through which ACCEL directed BP to pay TransAlta any net funds BP owed to ACCEL under contract, after set-off.[476] BP complied with the IDP until it was told that TransAlta and ACCEL had agreed that the next payment would be extended.[477] Additionally, BP was given notice that ACCEL would pay TransAlta the money directly rather than BP.[478] For these reasons, BP did not make the payment to ACCEL, however, it later received conflicting instructions from ACCEL and its other creditors, and ultimately made the payment.[479]

BP was emailed a month after the payment stating that it was released from performance of any previous IDPs by ACCEL, but not by TransAlta.[480] Later that month, the court ordered BP to pay ACCEL all the funds it owed and was holding for ACCEL.[481] BP paid the amount, however, TransAlta then demanded payment from BP under the IDP, and applied to have the order set aside.[482] ACCEL filed a Notice of Intention to make a Proposal under the *BIA*.[483] A month later, the Disputed Funds were put into trust pursuant to an order of the court, pending the determination of the priority dispute.[484] ACCEL then commenced proceedings under the *Companies' Creditors*

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[472] 2020 ABQB 652 **[*Re Accel 3*]**.
[473] *Re Accel 3* at para 1.
[474] *Ibid* at para 2.
[475] *Ibid* at para 4.
[476] *Ibid* at para 3.
[477] *Ibid* at para 5.
[478] *Ibid.*
[479] *Ibid* at para 6.
[480] *Ibid* at para 7.
[481] *Ibid* at para 8.
[482] *Ibid* at para 9.
[483] *Ibid* at para 10; *BIA*.
[484] *Re Accel 3 supra* at paras 12, 15.

Arrangement Act and an order directed BP to deposit $1.4M with the Monitor in trust, preserving any obligations to TransAlta under the IDP, until further order of the Court.[485]

Decision

TransAlta argued that the IDP irrevocably assigned the funds that made up the Disputed Funds to TransAlta, in the form of the payments that were supposed to take place.[486] Thus, the Court began by looking at the language of the IDP; however, it determined that no language existed indicating an assignment.[487] Additionally, it was held that both ACCEL and TransAlta were sophisticated parties capable of including language indicating an assignment if such was intended.[488] While the IDP used the term "irrevocable", this was insufficient to create an assignment, and only created a simple commercial agreement for funds to be paid from BP to TransAlta.[489] Additionally, an equitable assignment did not exist as the IDP had nothing that could be equitably assigned.[490] Finally, ACCEL had emailed BP instructing that it was released from all IDPs.[491] As a result, nothing in the IDP gave TransAlta priority over ACCEL's claim to the Disputed Funds.[492]

The Court found that because an IDP is not a form of security, TransAlta is an unsecured creditor.[493] Therefore, paying the Disputed Funds to TransAlta would violate the principle of equality among unsecured creditors and offend the priority scheme established by the *BIA*.[494] Interpreting the IDP to allow TransAlta to be paid ahead of the secured creditors or without sharing with them would also violate the fraud on the bankruptcy law principle by altering the scheme of distribution of creditors.[495] As a result, the Disputed Funds were held to become part of ACCEL's estate in insolvency and paid out according with established priorities.[496]

The Court determined that TransAlta had no independent obligation in relation to the IDP as it cannot pursue BP because it lost a priority dispute to the Disputed Funds, and this was exactly what the Court in *Accel Canada Holdings Limited, Re* stated would be unfair.[497] The Court then held that the communication between the lawyers of BP and TransAlta did not create a contract between BP and TransAlta to be bound by the IDP as any discussion of the IDP was only to ensure that the wording of such was clear.[498] The fact that BP's lawyer stated that BP would follow the IDP did not create an agreement that BP would pay the amounts set out if ACCEL did not, as no consideration was included.[499]

The IDP was held to be no more than a direction to pay and laid no obligations on BP, and, TransAlta's claim was against ACCEL, not BP.[500] As well, BP did not breach the IDP as by the time BP received a copy of the revised

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[485] *Ibid* at para 15; *Companies' Creditors Arrangement Act,* RSC 1985, c C-36.

[486] *Re Accel 3 supra* at para 20.

[487] *Ibid* at para 23.

[488] *Ibid.*

[489] *Ibid* at paras 30-31.

[490] *Ibid* at paras 32-33.

[491] *Ibid* at para 35.

[492] *Ibid* at para 36.

[493] *Ibid* at para 39.

[494] *Ibid.*

[495] *Ibid* at para 40.

[496] *Ibid* at para 41.

[497] *Ibid* at paras 42-43; *Re Accel 2.*

[498] *Re Accel 3 supra* at para 51.

[499] *Ibid* at paras 52-53.

[500] *Ibid* at para 57.

payment agreement and instructions from ACCEL, the IDP was no longer in force.[501] The court concluded that TransAlta failed to establish that the IDP imposed an enforceable independent obligation on BP, and thus BP was not required to pay the withheld funds twice – once due to the court orders and once again to TransAlta.[502]

The Court found that TransAlta's claim in the CCAA proceedings was that of an unsecured creditor, and the Disputed Funds formed part of Energy's estate and were to be administered through the CCAA Court's Direction.

Commentary

The Court in this case failed to recognize an IDP as creating a binding obligation to pay based on its existence alone. The Court indicated that such an obligation depends upon the particular wording of the IDP in question. Additionally, the Court emphasized the sophisticated nature of the parties, and that if they intended to create a binding obligation they should have included such language. Finally, the Court took into account principles of fairness under the *BIA* amongst creditors when determining the priority of payment for disputed funds.

[501] *Ibid* at para 58.

[502] *Ibid* at para 61.

ABORIGINAL LAW

***Baffinland Iron Mines Corp v Inuavak*[503]**

Background

This case involves a protest by Inuit peoples on Baffin Island against the development of an Iron Mine project. The Defendant protestors set up camp sites on the road leading to the mine site and on the mine site itself. The company running the mine, Baffinland Iron Mines Corp ("**BIM**"), sought an injunction to remove the protestors from protesting at the mine site.

Facts

BIM operated an iron ore mine known as the Mary River project on northern Baffin Island. Materials were produced at the mine site and subsequently transported to another location where they were loaded on to ships and brought to open water for further transport.

The issues in this case resulted from BIM's application to expand its mining operation. Members of some local communities were unhappy with the proposed expansion and proceeded to set up protests at the mine site, at the sites only airstrip and on roads leading to the mine site.

The operation of the mine effectively stopped due to the location of the protests.[504] At one point in time, 700 employees were unable to leave due to the blockade on the airstrip[505]. An interim order was issued so the Defendants would retreat from the project site to allow the employees to leave[506]. Despite the interim order, BMI applied for an interlocutory injunction and brought action against the Defendants for trespass, unlawful interference with economic interests, and mischief[507].

The Defendants asserted their Aboriginal rights pursuant to s. 35 of the *Constitution Act of 1982* as a defence to the action taken by BIM.[508]

Decision

The Court granted Baffinland Iron Mines Corporation an interlocutory injunction prohibiting the Defendants, including members of the north Baffin communities of Pond Inlet, Arctic Bay, Clyde River, Iglooik, and Sanirajuk, from blockading or obstructing its mining operations at the Mary River site on northern Baffin Island, Nunavut[509]. The interlocutory injunction was granted subject to the following terms:

a. The Defendants were prohibited from accessing the lands authorized for use by Baffinland Iron Mines Corp in certain ways. The lands included the the mine site, the airstrip, the Tote Road, and any other lands and facilities of the project. The Defendants were unable to access the lands in any manner contrary to the authorized land use activities and operations of the project;

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[503] *Baffinland Iron Mines Corp v Inuavak*, 2021 NUCJ 11.

[504] *Ibid* at para 8.

[505] *Ibid* at para 10.

[506] *Ibid* at para 9.

[507] *Ibid* at para 13.

[508] 1982 being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, reprinted R.S.C. 1985, App. II, No. 44.

[509] *Ibid* at para 7.

b. The Defendants were not to obstruct or impede the use and operations of the airstrip or the Tote Road at the Mary River project in any way by occupying them, or by placing any snowmobiles, qamutiks, tents, or other things on them;

c. The RCMP were authorized to enforce this Order, including removing and detaining to the extent necessary, persons who have knowledge of this Order and who are obstructing or impeding access as provided for in this Order; and

d. The Defendants may apply on two days' notice to the Plaintiff to vary or set aside this Order.

The court denied the Defendants' s. 35 Aboriginal rights argument stating that it fell beyond the Nunavut context, where the legislation of the *Nunavut Land Claims Agreement* (**"NCLA"**) is more applicable[510]. The NCLA is a modern treaty that encompasses the largest land claim settlement in Canada, and the process for resource development is set out in the NCLA. The Court found that BIM complied with the necessary requirements under the NCLA and any regulatory and legislative requirements.

The Court found the balance of convenience favored the granting of injunctive relief, as BIM suffered a loss of significant revenue because of the inability to transport iron ore from the mine site to the port[511]. The Court stated that the complete blockade of a lawful business strongly suggests irreparable harm for the purposes of an injunction[512].

The Court notes that the issues raised by the Defendants were not related to a duty to consult and engage the Aboriginal communities, but instead with the approval process for the expansion of the mining project.[513]

Commentary

This is an interesting decision in the context of injunctions, resource development and protests and blockades. In this case, the Court distinguishes between asserted Aboriginal rights and the settled NCLA. The Court explained that if the Defendants were protesting BIM's application to expand mining operations, the appropriate remedy would be to apply for judicial review. The Court clarifies that the injunctive relief granted in this case does not prohibit the Defendants from carrying out protests in other locations within the territory.

Gamlaxyeltxw v British Columbia (Minister of Forests, Lands & Natural Resource Operations)[514]

Background

This case considers the duty to consult in relation to undefined Aboriginal rights in a modern treaty. The Crown has a duty to consult and accommodate in cases where the Crown has knowledge of a potential Aboriginal right and is aware of conduct that could interfere with the exercise of those Aboriginal rights.

[510] *Ibid* at para 44.

[511] *Ibid* at para 50.

[512] *Ibid* at para 51.

[513] *Ibid* at paras 45-46.

[514] *Gamlaxyeltxw v British Columbia (Minister of Forests, Lands & Natural Resource Operations)*, 2020 BCCA 215.

Facts

The Applicants in this case are eight hereditary chiefs of the Gitanyow Nation in British Columbia. The Applicants are challenging two decisions made by the Ministry of Forests, Lands and Natural Resource Operations that related to moose hunting in a particular area covered by the Nations modern treaty, known as the Nisga'a Treaty.

The Nisga'a Treaty established a hunting area known as the Nass Wildlife Area where the Nisga'a had non-exclusive rights to hunt[515]. The Gitanyow people (who are non-Nisga'a) had an outstanding claim for s.35 Aboriginal rights in an area that overlapped with the Nass Wildlife Area, and had requested the Minister accommodate their interests in hunting moose[516].

The Appellants argued, first, that the Minister should have accommodated their interests by reducing the allocation of moose to Nisga'a hunters as promised in the Nisga'a treaty, and second, that the Minister should have consulted them regarding the annual management plan for the hunting season. The plan had the potential to adversely affect their interests, and the Appellants referred to the *Haida* test in argument. The *Haida t*est is codified in Section 35 of the *Constitution Act*[517], and it requires the Crown consult with a First Nation where the Crown has knowledge of the potential existence of an Aboriginal right and contemplates conduct that might adversely affect it[518].

The Chambers j=Judge concluded that the annual management plan decision did not have the potential to adversely affect the Appellants' s. 35 rights, and therefore did not trigger the duty to consult[519]. In coming to its decision, the chambers judge opted to modify the *Haida* test to include a fourth step, which was to consider whether consultation would negatively impact a First Nation's rights under treaty[520].

Decision

The appeal was dismissed. The Court of Appeal found that it was unnecessary to modify the *Haida* test, and that the potential impact of consultation on another Nation's treaty rights should not prevent the Crown from consulting with a First Nation with a credible claim to their s. 35 rights[521]. The Court found that the Chambers Judge was correct in concluding that the plan presented in 2016 did not have the potential to adversely affect the Appellants' rights. The annual management plan was directed to Nisga'a hunters and was expressly not applicable to non-Nisga'a hunters such as the Appellants[522]. Overall, there was nothing in the plan that would trigger a right to consult the Appellants. Any potential impact on the Appellants' rights arising from the methods and timing of the Nisga'a hunt would be insufficient to meet the *Haida* test[523].

The Court also stated that any such impact on treaty rights are more appropriately considered in the context of accommodation, which is a separate inquiry that only arises after consultation has begun, at which stage the extent of accommodating the First Nation will be limited by another First Nation's treaty rights[524].

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[515] *Ibid* at para 2.

[516] *Ibid* at para 3.

[517] 1982 being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, reprinted R.S.C. 1985, App. II, No. 44.

[518] *Gamlaxyeltxw v British Columbia (Minister of Forests, Lands & Natural Resource Operations)*, 2020 BCCA 215 at para 4.

[519] *Ibid* at para 7.

[520] *Ibid* at para 9.

[521] *Ibid* at para 70.

[522] *Ibid* at para 97.

[523] *Ibid* at para 130.

[524] *Ibid* at para 72.

Commentary

This cases demonstrates some resistance on behalf of the Court to stray beyond the *Haida* test as it currently stands. The Court considers the test in relation to the duty to consult in a modern treaty setting, but opposes the change put forward by the lower Court. This case establishes that modern treaty rights do not necessarily prevail over the duty to consult a non-treaty First Nation.

***R v Desautel*[525]**

Background

This case considers hunting rights in the traditional territory of the Sinixt people of British Columbia, for a member of the Lakes Tribe in Washington State. The case looks at the extent Aboriginal rights cross national borders, the modern interpretation of those rights and the application of section 35 of the *Constitution Act* of 1982.

Facts

Mr. Desautel, the defendant in this case, entered Canada legally and shot an elk within the ancestral territory of the Sixinct people.[526] Shooting an elk in this manner was contrary to the provincial wildlife rules of British Columbia. Mr. Desautel is a member of the Lakes Tribe of the Coville Confederated Tribes, which is a successor group of the Sinixt people.[527] Mr. Desautel was charged with hunting without a licence contrary to s. 11(1) of the British Columbia *Wildlife Act* (the "**Act**"), and hunting big game as a non-resident of the province, contrary to s. 47(a) of the *Act*.[528] Mr. Desautel was acquitted of both charges, as the trial judge found that he was exercising an Aboriginal and constitutional right to hunt. The trial judge also maintained that Desautel's rights were unjustifiably infringed by the *Wildlife Act.*[529]

The British Columbia Superior dismissed the Crown's appeal. The Court found that Mr. Desautel's right to hunt was not incompatible with Canadian sovereignty, and that border control issues had nothing to do with the issues in this case regarding historical rights to hunt. Similarly, the British Columbia Court of Appeal found that the Washington State tribe with roots in the territory of the Sixinct people could claim Aboriginal rights under s. 35(1) of the *Constitution Act*.[530]

Decision

This decision is a further appeal by the Crown to the Supreme Court of Canada ("**SCC**"). The Crown argued that rights under s. 35(1) of the *Constitution Act* only apply to Aboriginal peoples located in Canada. The Crown's appeal was dismissed by the SCC.

The decision took into account the purpose of s. 35(1), which is to recognize the prior occupation of Canada by Aboriginal societies, and to work towards the greater goal of reconciliation with Aboriginal peoples. Thus, the wording of 'aboriginal peoples of Canada' in s. 35(1) included the modern-day successors of Aboriginal societies

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[525] 2021 SCC 17 [***Desautel***].

[526] *Desautel* at para 3-5.

[527] *Ibid* at para 4.

[528] *Wildlife Act*, RSBC 1996, c.488.

[529] *Desautel* at para 9.

[530] *Constitution Act*, 1982 being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, reprinted R.S.C. 1985, App. II, No. 44; *Desautel* at para 12.

that occupied Canadian territory at the time of European contact.[531] The fact that the Lakes Tribe were a modern successor of the Sinixt meant that Desautel was within his Aboriginal rights. The trial judge was correct in finding the test in *R v Van der Peet*[532] was satisfied,[533] meaning that the relevant provisions of the *Wildlife Act* were of no force and effect given the establishment of Aboriginal rights.[534]

Commentary

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

[531] *Ibid* at para 47.

[532] *[1996]* 2 SCR 507.

[533] The test in *Van Der Peet* considers the historic practices of Aboriginal societies in Canada prior to European contact, and recognizes those practices as modern day Aboriginal rights for the successors to the historic Aboriginal societies.

[534] *Desautel supra* at para 50.

LABOUR AND EMPLOYMENT

***Matthew Maharajh v Atlantic Offshore Medical Services Limited*[535]**

Background

Matthew Maharajh involved a complaint to the Newfoundland and Labrador Human Rights Commission stemming from the application of a pre-employment drug test. The complainant's official test results were verified as negative; however, given his use of medical marijuana, Mr. Maharajh was flagged as a potential safety risk.[536] As a result, he was denied access to work on an Alberta oil sands project, and therefore, he alleged discrimination on the basis of disability.

Facts

The complainant, Mr. Maharajh ("**Maharajh**"), was a registered nurse diagnosed with Ewing's Sarcoma in 1999. Treatment modalities in the form of surgery, chemotherapy and radiation, and a medication regimen of morphine, codeine, and OxyContin were all utilized to combat his bone cancer. In 2013 Maharajh was prescribed medical marijuana for chronic pain, insomnia and anorexia.[537]

During the summer of 2014, the complainant pursued employment at Atlantic Offshore Medical Services Ltd. ("**AOMS**"), which provided remote worksites with medical personnel. During this time, Husky Energy Inc. ("**Husky**") contracted with AOMS to provide personnel to work on their Sunrise Oil Sands Project ("**Sunrise Site**") in Alberta. In turn, AOMS offered the Senior Occupational Health Nurse position at the Sunrise Site to Maharajh and advised him to attend the AOMS offices for training and completion of a pre-employment drug screen.[538]

Upon arriving at the AOMS office, the complainant disclosed his use of medical marijuana and provided his Medical Marijuana Access Program license. Maharajh then informed an AOMS representative of his intention to refrain from using the medication while on the Sunrise Site. After Maharajh's test came back non-negative for THC, the test results were delivered to the Medical Review Officer at AOMS.[539]

The function of the Medical Review Officer was that of a gatekeeper who legitimized the results of company drug testing. Although the Officer verified Maharajh's test results as negative, AOMS proceeded to inform Husky that the complainant had been flagged as a safety risk. As a result, Husky denied Maharajh access to their Sunrise Site.[540]

Maharajh submitted a complaint to the Human Rights Commission alleging that the conduct of AOMS violated the *Human Rights Act*, that he was discriminated against, and that AOMS failed to accommodate him to the point of undue hardship.[541] Since the complainant was applying for a safety sensitive position, AOMS argued that they were under a duty to disclose any safety risks given its contract and Husky's drug and alcohol policy.[542]

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[535] *Matthew Maharajh v Atlantic Offshore Medical Services Limited* (2020), 2021 CLLC 230-004.

[536] *Ibid* at para 26.

[537] *Ibid* at para 19.

[538] *Ibid* at para 20.

[539] *Ibid* at paras 22-25.

[540] *Ibid* at paras 29, 37.

[541] *Ibid* at para 42.

[542] *Ibid* at para 41.

Decision

The Board first addressed whether chronic pain met the definition of a disability under the *Human Rights Act, 2010*. The Board found that since 1999, the complainant had suffered from persistent chronic pain, and that chronic pain constituted a physical disability under the meaning of the *Act*.[543] The Board also concluded that Maharajh met his burden of proof and established a prima facie case of discrimination. This conclusion came after the Board determined that but for Maharajh's prescription, he would not have been treated differently, nor would he have been denied employment.

After concluding that Maharajh had established a prima facie case of discrimination, the onus shifted to the respondent to prove that the discriminatory standard was a bona fide occupational requirement. The three-step *Meiorin* test guides this determination and requires an employer to establish on a balance of probabilities that (1) the standard is rationally connected to the performance of the job; (2) the standard was adopted in a honest and good faith belief that it was necessary to the fulfilment of that purpose; (3) the standard is reasonably necessary to the accomplishment of that legitimate purpose, which requires demonstrating that it is impossible to accommodate the employee without imposing undue hardship on the employer.[544]

In applying the test, the Board found a rational connection between AOMS disclosing potential safety risks and maintaining a safe workplace at Sunrise Site. The standard was adopted in a good faith and honest belief that it was necessary to achieve its core purpose of safety.[545] However, the Board determined that AOMS failed to discharge their burden under part 3 of the *Meiorin* test. Specifically, AOMS failed to establish the position was safety-sensitive; it failed to establish Husky's drug and alcohol policy required disclosing Maharajh's flagged safety status or that such disclosure was the only avenue to a safe workplace. AOMS also failed to conduct an individual assessment to determine if Maharajh could have performed the requisite duties of the Occupational Health Nurse position. Finally, AOMS could not show they conducted any investigation into a possible accommodation for the complainant, nor did they show such an investigation would have caused undue hardship.[546]

Commentary

There is often tension between the rights employees receive under legislation and the numerous legislative obligations imposed on employers. Specifically, an employer's duty to provide a safe work environment and an employee's right to be free from discrimination.

The rights and obligations imposed on parties in an employment relationship require careful and calculated balancing. With a growing number of Canadians turning to medical cannabis as an alternative to traditional medicine, a new layer to achieving this balance has been added. What remains clear is that, although the world of medicine continues to evolve, accommodation up to the point of undue hardship remains central to any employer's duty.

***International Brotherhood of Electrical Workers, Local 1620 v Lower Churchill Transmission Construction Employers' Association Inc*[547]**

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[543] *Ibid* at paras 43-48.

[544] *Ibid* at paras 76-77.

[545] *Ibid* at paras 80, 89.

[546] *Ibid* at para 94.

[547] *International Brotherhood of Electrical Workers, Local 1620 v Lower Churchill Transmission Construction Employers' Association Inc.*, 2020 NLCA 20.

Background

In *International Brotherhood of Electrical Workers, Local 1620* a disabled worker, Mr. Tizzard, failed a pre-employment drug test after being prescribed medical cannabis for his pain. The Newfoundland and Labrador Court of Appeal considered the parameters of an employer's duty to accommodate in the context of safety-sensitive positions and cannabis impairment.

Facts

The grievor, Mr. Tizzard ("**Tizzard**"), applied for employment with Valard Construction LP ("**Valard**"), a major contractor working on the Lower Churchill hydroelectric project. In 2008, after being diagnosed with osteoarthritis and Crohn's Disease, Tizzard struggled to find an effective treatment to combat the pain he was suffering.[548] Following a series of unsuccessful treatment measures involving conventional medication and therapies, Tizzard was referred to the Cannabinoid Medical Clinic in 2016. Tizzard was prescribed medical cannabis at the clinic; his prescription limited both the grams and THC content he could receive per month.[549]

In November 2016, Tizzard pursued a job for foundation formwork at Valard. After being referred for the vacant position by the Union, he was accepted for employment by Valard, subject to a satisfactory drug and alcohol test. Tizzard disclosed his cannabis use to the Union and was advised to bring his card to the test. Tizzard arrived at the testing agency and produced his medical cannabis card; however, the technician informed him that such cards were not accepted, nor was he likely to pass his test.

A week later, Tizzard had not received any news about his referral and, after contacting Valard, was asked to provide a doctor's note confirming his prescription. Tizzard quickly produced the requested document but was told it was inadequate and asked to furnish further medical information. During the time Tizzard spent gathering satisfactory medical documents, his original labour position had been cancelled. As such, in February 2017, he applied for an Assembler position at Valard but was turned down once again.

The disappointing and challenging process culminated when, in an effort to get work, Tizzard stopped taking his prescription. Following five weeks of suffering from the same pain the medication was designed to prevent, he passed a drug test and received employment with another subcontractor on the project, Pennecon. After being told to report to work, he received a follow-up call that he could not report for work. Pennecon informed Tizzard that Nalcor, who owned the project, had "red-flagged" him for employment and instructed every contractor on the project to refrain from hiring him.

The Union filed a grievance on Tizzard's behalf, asserting, among other things, that the employer failed to accommodate his disability. The employer argued that given their obligation to provide a safe workplace and because each position was safety-sensitive, allowing Tizzard to work impaired was prohibited by law. Further, they stated the risk of work impairment from cannabis and the lack of any practical way to measure such impairment brought them to the point of undue hardship.[550]

The Arbitrator determined the two positions were safety-sensitive, and the employer had a duty to conduct an individual assessment for accommodation. Ultimately, the Arbitrator found that since the grievor's daily evening cannabis use could not be facilitated by a monitoring process, the employer could not manage the risk, and therefore,

[548] *Ibid* at para 10.

[549] *Ibid* at paras 64-65.

[550] *Ibid* at paras 2-4.

undue hardship existed.[551] The Union then applied for judicial review of the decision, but the application judge rejected all of their arguments, finding the Arbitrator's decision reasonable.[552]

Decision

Justice Welsh, applying the standard of reasonableness, found that in the absence of a scientific or medical test or standard, for an employer to show the accommodation would amount to undue hardship, they needed to demonstrate that assessing Tizzard for impairment by some other means daily or periodically would constitute undue hardship. In other words, the absence of a test or standard does not mean that there is no method to gauge whether an employee who consumes cannabis is incapable of performing a job, even one considered safety-sensitive.[553]

In her opinion, Justice Welsh was clear about the danger in treating impairment by medically authorized cannabis based on the class of individuals who access the treatment. Instead, because of the individual nature of accommodations, the proper analysis requires assessing the alternatives investigated by the employer, which could have made individual testing of the grievor possible.[554] Ultimately, the employer failed to address such options, nor did they provide evidence sufficient to discharge their onus of showing that accommodating Tizzard individually would have resulted in undue hardship. [555]

In her concurring opinion, Justice Butler opined that the arbitration decision focused on the ability to reliably measure possible impairment instead of Tizzard's ability to perform the duties or modified duties while taking his prescribed cannabis. In turn, the shift in focus effectively required the grievor to establish a reliable means to measure possible side effects, erroneously shifting the onus of proof for a BFOR defence from employer to grievor.[556] Justice Butler stated that the discrimination, in this case, was not the refusal to hire Tizzard for the positions, rather the refusal to permit him from even attempting to demonstrate his situation could be accommodated without jeopardizing the employers' goal of a reasonably safe worksite.[557]

In dissent, Justice Hoegg viewed the Arbitrator's decision as reasonable. Since there was evidence demonstrating the risk that Tizzard could report to work still impaired from his nightly cannabis vaping, along with the inability to measure such impairment, there was no reasonable or practical accommodation available.[558] As a result, requiring the employer to take on safety risks to gauge the grievors ability to work without accident would cause the employer undue hardship. Additionally, given the attention afforded to Tizzard's condition, prescription, timing and method of ingestion, it cannot be said he was not individually assessed.[559]

Commentary

Not every ailment will meet the definition of a disability, only those significant and ongoing limitations will qualify. However, this case and many other recent cases shows that chronic pain likely qualifies as a disability in most

[551] *Ibid* at para 6.
[552] *Ibid* at para 7.
[553] *Ibid* at para 34.
[554] *Ibid* at para 35.
[555] *Ibid* at para 36.
[556] *Ibid* at para 68.
[557] *Ibid* at para 85.
[558] *Ibid* at para 96.
[559] *Ibid* at para 108.

jurisdictions. With a growing number of Canadians turning to medical cannabis as an alternative to traditional medicine, an employer's obligation to provide a safe work environment has received a new set of challenges.

The bona fide occupational requirement defence permits an employer to discriminate based on a prohibited ground if there is a legitimate reason for doing so and it is connected to the ability to perform the job. Although the BFOR defence is used extremely often, it requires meaningful assessment from an employer.

United Steelworkers Local 222 v Algoma Steel Inc[560]

Background

United Steelworkers Local 222 considered whether an employer policy requiring its workers to isolate for 14-days upon entry into Canada over the United States border was reasonable in light of the Covid-19 pandemic.

Facts

Mr. Gendron ("**Gendron**") was a machinist apprentice at Algoma Steel Inc. ("**Algoma**") in Sault St. Marie, Ontario. Gendron was a dual-citizen domiciled in Michigan's Chippewa County who crossed the border each day for work. To mitigate the effects of the Covid-19 pandemic, the federal government used its authority under s. 58 of the *Quarantine Act* to enact an emergency order. Under the order, persons entering Canada from the United States are required to self-isolate for a period of 14-days. However, exemptions to the self-isolation period were enacted, namely, for individuals who crossed the border to attend their regular place of employment. Since Gendron qualified for this exemption, he was not required to self-isolate.[561]

Although Gendron met the government exemption, his employer subsequently implemented a 14-day isolation policy of their own. Algoma cited their duty under the *Occupational Health and Safety Act* to take every reasonable precaution to protect their workers as the underlying rationale for the policy. For Gendron, the consequences of the policy were significant; he had two young children at home who were unable to cross the border. Furthermore, pursuant to a custody order, Gendron had his children on off days. As a result, Gendron was left to decide between maintaining access to his children and residing in Canada for work and ultimately chose his children.[562]

As of the first day of the hearing, there had only been 6 known cases in Northern Michigan's Chippewa County and 19 cases in Sault Ste. Marie. However, given the pandemic's unpredictability and Michigan having doubled Ontario in cases despite being two-thirds the size, the situation was fluid.[563] The Union argued that Algoma did not have the authority to institute the impugned policy since Gendron qualified for an exemption under the federal regulations. The Union asserted that the application of the policy was not reasonable as at least one employee was permitted to work while living with someone who crossed into the United States for work. Finally, the Union argued that Algoma failed to accommodate the grievor by allowing him to work the less crowded night shift or other isolated situations.[564]

Algoma asserted the policy was reasonable in the circumstances and conformed to the management rights provisions of the collective agreement. Algoma employed 2850 workers at its Sault Ste. Marie worksite, many of whom shared in the collective anxiety brought by the Covid-19 pandemic. In an effort to keep their worksite "Covid free,"

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[560] *United Steelworkers Local 222 v Algoma Steel Inc.*, 2020 ON LA.

[561] *Ibid* at para 3.

[562] *Ibid* at paras 4-5.

[563] *Ibid* at para 6.

[564] *Ibid* at paras 11-12.

Algoma created protocols for onsite entry, cleaning and sanitizing, and personal protective equipment. As a result of these policies, the employer had yet to report a Covid-19 case. Further, Algoma noted that even machinists working at stations distant from other workers still used the shared toolbox, washrooms and breakrooms.[565]

Decision

At the time of the case, the United States was experiencing some of the highest infection rates globally, so the Arbitrator found it was reasonable for an employer to take precautions to safeguard its employees. The Arbitrator classified the policy as an emergency pre-condition to work and opined that if Gendron failed to meet a reasonable pre-condition, reasonably applied, there would be no violation of the collective bargaining agreement.[566] However, even if the policy was generally reasonable and complied the collective agreement, it was unreasonable to apply it without accommodation in certain circumstances. Consequently, the Arbitrator found that it was unreasonable forcing Gendron to choose work or family without determining if permitting him to work from Michigan could be accommodated.[567] In fact, under s. 5(1) of the *Ontario Human Rights Code*, employers are required to analyze accommodations in such circumstances.

The Arbitrator determined that to balance Gendron's rights with the obligations of Algoma, Gendron be authorized to work without self-isolation. To facilitate Gendron's return to work, Algoma was free to assign him to the night shift. Additionally, special social distancing measures, increased mask usage, and US travel restrictions could also be leveraged. Although the employer had concern over shared common surfaces, such concerns were mitigated by their enhanced cleaning protocols.[568]

Commentary

The ever-evolving Covid-19 pandemic has left employers across Canada with the difficult task of balancing health and safety obligations with the rights afforded to their employees under human rights legislation. For many employers, this has meant implementing policies on the fly and over the course of many highs and lows the pandemic has created.

Arbitrator Jesin's decision to allow the grievance serves to remind employers that the pandemic has not reduced or altered their duty to accommodate. Equally important, any accommodation should be conducted having regard to the circumstances of the individual employee. It is no secret that any attempt to predict the trajectory of the pandemic is challenging; however, what remains clear is the duty imposed on employers to accommodate employees up to the point of undue hardship.

***Phillips v Westcan*[569]**

Background

In *Phillips*, the Alberta Court of Queen's Bench considered the enforceability of an employment contract which subjected employees to random drug and alcohol testing.

[565] *Ibid* at paras 7-10.

[566] *Ibid* at para 15.

[567] *Ibid* at para 16.

[568] *Ibid* at paras 15-16.

[569] *Phillips v Westcan*, 2020 ABQB 764.

Facts

Mr. Phillips ("**Phillips**") was a long-distance truck driver who hauled dangerous goods at Westcan Bulk Transport Ltd. ("**Westcan**"). Since 1999 or earlier, Westcan had conducted random drug and alcohol testing of its employees in safety-sensitive positions. When Phillips began his employment at Westcan in December 2013, the testing policy was brought to his attention. Less than two years later, Phillips ended his employment with Westcan.[570]

In the fall of 2015, Phillips sought re-employment with his former employer and, as part of his application, was required to sign an "Expectation Agreement." The content of the Expectation Agreement advised Phillips that if his application were successful, he would be subject to the alcohol and drug testing policy, including random drug and alcohol testing, as a condition of his employment.[571] Phillips agreed to this.

After a successful application for employment, an offer letter delineated the terms of Phillips's employment. The letter required Phillips to agree to be bound by the company policies, notably, the drug and alcohol testing policy.[572] Upon commencing his second stint at Westcan, Phillips then applied for a permanent injunction to prevent his employer from conducting the random testing.

Decision

The Alberta Court of Queen's Bench held that Phillips was bound by the terms of his employment contract, which included random drug and alcohol testing. When he accepted Westcan's employment offer in 2015, not only did Phillips know about the random testing from his prior employment, but the Expectation Agreement he subsequently signed informed him of the testing.[573]

Upon determining that Phillips was subject to random testing under the terms of the employment contract, the Court then considered whether the term was enforceable. Phillips did not advance an argument under human rights legislation or an employment standards code; rather, he argued the term was unenforceable on the grounds of unconscionability.[574]

In order for the term to be considered unconscionable, the Court stated it would need to be "sufficiently divergent from community standards of commercial morality." Given the nature of Phillips employment, a truck driver who traveled through remote Canadian communities hauling dangerous goods, the contractual terms in no way diverged from standards of commercial morality. Therefore, the Court found the random drug and alcohol testing provision enforceable.[575]

In an effort to provide a more fulsome analysis, the Court considered whether Westcan could have unilaterally imposed the random testing regime without an express agreement.

The Court found that given the hazardous and explosive materials hauled and potential catastrophe inattention behind the wheel could cause, the nature of the work was inherently dangerous. The Court then considered the workplace, noting the few alternative testing options available to Westcan. With the majority of work taking place on the road, far removed from Westcan terminals, workers often spent weeks or months on the road without any

[570] *Ibid* at para 4.
[571] *Ibid* at paras 16-18.
[572] *Ibid* at paras 19-20.
[573] *Ibid* at para 24.
[574] *Ibid* at paras 30-31.
[575] *Ibid* at paras 33-34.

direct contact. The ability to observe common signs of impairment such as slurred speech or staggered walking patterns was difficult. Since trucking often leads drivers through remote and isolated areas, in the event of an accident, the time required to place a Westcan representative on the scene for post-accident testing reduced the efficacy of any testing.[576]

Finally, after assessing both the nature of work and the workplace, the Court looked at Westcan's workforce, concluding an issue with drug and alcohol use was present. From 2014 and 2019, the rate of positive results from random testing was between 0.44% and 1.79%. The Court found the positivity rate of 1.79% in 2019 compared to the 2.7% cited by the Supreme Court of Canada in *Irving* as "an example of a demonstrated problem with alcohol use in a dangerous workplace."[577]

The Court concluded that Westcan's evidence demonstrated that random testing was a proportionate response. Therefore, even if there was no enforceable contractual term, the Court would have upheld a unilaterally imposed random testing regime in these circumstances.[578]

Commentary

For employers in a non-unionized setting wishing to conduct random drug and alcohol testing, this case exemplifies that the best practice is to incorporate such a policy into each employment contract and ideally drawn to the employee's attention at the outset of the employment relationship.

Alcohol and drug addictions can be considered a disability, so company policies or practices that adversely impact workers can conflict with human rights statutes. For employers, care must be used when implementing any policy which may have an indirect and adverse impact on disabled employees.

This decision also serves as a reminder that random testing may be justified if it can be considered a proportionate response to demonstrable safety concerns. Courts are more likely to defer to a random testing policy when the nature of the work is dangerous, remote, and unsupervised.

***Fraser v Canada (Attorney General)*[579]**

Background

In *Fraser*, the Supreme Court of Canada considered whether a job-sharing program with significant pension consequences had an adverse impact on women with children.

Facts

The claimants were three retired RCMP officers who had taken maternity leave in the 1990s. After returning to work and resuming full-time service, the claimants struggled to balance their childcare responsibilities with their work obligations. In 1997, the RCMP instituted a job-sharing program that permitted multiple employees to split the duties of one full-time position, thus working fewer than full-time hours.[580]

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[576] *Ibid* at paras 37-42.

[577] *Ibid* at para 45.

[578] *Ibid* at para 46.

[579] *Fraser v Canada (Attorney General)*, 2020 SCC 28.

[580] *Ibid* at paras 7-8.

The claimants, along with numerous other RCMP members with children, enrolled in the program with the expectation that job-sharing would be eligible for full pension credit. Under the RCMP pension plan, gaps in full-time service, such as leave without pay, were treated as fully pensionable. Equally important, members returning to work were able to "buy back" their lost service and corresponding pension benefits. However, the claimants were subsequently informed that they would not be able to purchase full-time pension credit for their job-sharing service.[581]

The claimants proceeded to bring an application in the Federal Court, arguing that the pension consequences of the job-sharing program had an adverse impact on women and violated s. 15(1) of the *Charter*. The application judge found that job-sharing is part-time work for which full-time pension credit cannot be obtained. Since there was insufficient evidence that job-sharing was disadvantageous compared to unpaid leave, the application judge held that this outcome did not violate s. 15(1). The Federal Court of Appeal subsequently dismissed the claimants' appeal.[582]

Decision

The majority decision, written by Justice Abella, concluded that full-time RCMP members who job-share surrendered pension benefits because of a temporary reduction in work hours, which had a disproportionate impact on women and perpetuated their historical disadvantage.[583]

A prima facie violation of s. 15(1) is established if claimants can prove (1) that the impugned law or state action, on its face or in its impact, creates a distinction based on enumerated or analogous grounds, and (2) imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage.[584]

Under the first part of the s. 15(1) test, Justice Abella found that using an employee's temporary reduction in working hours as a basis for imposing negative pension consequences had an adverse impact on women.[585] The evidence showed that members who participated in the job-sharing program were overwhelmingly women with young children. Further evidence showed that the disadvantages women faced in balancing professional and domestic obligations resulted in less stable employment conditions. The totality of the evidence demonstrated a clear link between gender and fewer, less regular working hours. As such, the first part of the s. 15(1) test was met.[586]

Under part two of the test, the majority concluded that the negative pension consequences of job-sharing perpetuated a long-standing source of female disadvantage. For instance, gender bias within pension plans, traditionally reserved for "middle and upper-income employees with long service, typically male."[587] Since the program represented a continuation of a historical source of economic female disadvantage, the second stage of the test was satisfied, and therefore, there was a prima facie breach of s. 15 based on the enumerated ground of sex.[588]

The Attorney General was unable to show that classifying full-time employees who entered job-sharing as part-time workers and precluding them from full-time pension credit achieved a compelling state objective. In fact, Justice

[581] *Ibid* at paras 10-15.
[582] *Ibid* at paras 21-23.
[583] *Ibid* at para 5.
[584] *Ibid* at para 27.
[585] *Ibid* at para 98.
[586] *Ibid* at para 106.
[587] *Ibid* at para 108.
[588] *Ibid* at para 113.

Abella opined that the limitation of the program and buy-back provisions completely departed from its purpose of improving the position of female members on leave with childcare responsibilities.[589]

Commentary

Justice Abella's opinion serves as another reminder that an employer who intentionally applies different rules or policies to its employees is not the only avenue to a finding of discrimination. This is because a rule or requirement that treats every employee the same on its face can still indirectly discriminate on some employees because of a personal characteristic.

***Matthews v Ocean Nutrition Canada Ltd*[590]**

Background

In *Matthews*, the Supreme Court of Canada considered whether an employee who was constructively dismissed and entitled to 15 months notice was also entitled to a bonus payout that was triggered following the sale of his former company.

Facts

Mr. Matthews ("**Matthews**") was an experienced chemist who held several senior management positions during his 14-year career at Ocean Nutrition Canada Limited ("**Ocean**"). As a senior executive, Matthews qualified as a payee under a long term incentive plan ("**LTIP**"). The LTIP was a contractual arrangement which entitled him a bonus payment in the event the company was sold.[591]

In 2007, Ocean hired a new Chief Operating Officer, Edmond, who quickly commenced a "campaign" to marginalize Matthews in the company. Although Matthews was well venerated and highly regarded, Edmond did not consider him a valuable asset. Since Edmond was in charge of allocating responsibilities to Matthews, it was not long before Matthews had his role along with the people who reported to him vastly reduced. Edmond went further, lying to Matthews about his future at the company and refusing requests to speak about the reduced role Matthews found himself in.[592]

In June 2011, after failing to negotiate a potential exit strategy, Matthews departed from Ocean. In July 2012, about 13 months after Matthews left Ocean, the company was sold for $540 million. The sale was significant, in that, it constituted a "Realization Event" under the LTIP, triggering bonus payments to employees who qualified. Had Matthews remained an Ocean employee, he would have been entitled to collect $1.1 million. Matthews proceeded to file an application, alleging among other things, that he was constructively dismissed and entitled to the bonus.[593]

The Supreme Court of Nova Scotia determined that Matthews was constructively dismissed and entitled a reasonable notice period of 15 months. Relying on *Paquette v. TerraGo Networks Inc.* and *Lin v. Ontario Teachers' Pension Plan Board*, the trial judge held that Matthews was entitled to damages equivalent to what he would have received under the LTIP because the applicable two-step legal test was satisfied.[594] First, his 15 month reasonable

[589] *Ibid* at para 126.
[590] 2020 SCC 26.
[591] *Ibid* at paras 9, 15.
[592] *Ibid* at para 11.
[593] *Ibid* at paras 17-19.
[594] *Ibid* at para 23.

notice encompassed the sale which occurred 15 months after he left the company. As such, had he not been constructively dismissed, he would have been a full-time employee when the bonus triggering event took place. Second, the wording of the LTIP was insufficient to limit Matthews' common law right to compensation for a loss of payout thereunder.[595]

The Nova Scotia Court of Appeal agreed that Matthews was constructively dismissed and entitled to 15 months notice. However, the majority held that since Matthews left his employment with Ocean, he was precluded from recovering under the LTIP by the plain wording of the agreement. The majority also deferred to the trial judge's ruling that Ocean did not act in bad faith.[596]

Decision

The Supreme Court of Canada restored the judgment of the Supreme Court of Nova Scotia. The Court articulated the two-part test for evaluating whether reasonable notice damages should include bonus payments. First, would the employee have been entitled to the bonus of benefit as part of their compensation during the reasonable notice period? Second, if so, do the terms of the employment contract or bonus plan unambiguously take away that right?[597]

In assessing the first part of the test, the Court found that Matthews was prima facie entitled to receive compensation for the lost bonus. Since no appeal was made on the lower court's finding that Matthews was constructively dismissed and entitled to 15 months notice, the Court said it was uncontested that the Realization Event occurred during the notice period. Further, the purpose of damages in lieu of reasonable notice is to place the employee in the position they would have been in had they continued to work until the end of the notice period. Consequently, but for the dismissal, he would have received payment under the LTIP during that period.[598]

In regard to the second part of the test, the Court determined that the relevant terms of the LTIP did not unambiguously limit or remove Matthews' common law right. In framing the assessment, the Court stated that the question is not whether the terms are ambiguous but whether the wording of the plain language unambiguously limits or removed the employees common law rights. The Court noted that since the parties did not negotiate the terms of the LTIP, it was a unilateral contract. As such, application of the principle of contractual interpretation that clauses limiting or excluding liability will be strictly construed applied.[599] To this end, the Court found the clause requiring an employee to be "full-time" or "active" insufficient to preclude an employee's common law right to damages. Additionally, the clause which purported to remove an employee's common law right to damages upon termination "with or without cause" was also found insufficient. Ultimately, the Court concluded that the LTIP did not unambiguously limit or remove Matthews' common law right to damages for the lost bonus payment.[600]

Commentary

At the heart of every employment contract is the pay, benefits and bonuses an employee receives. The decision in *Matthews* demonstrates that long-term incentive plans or bonus plans that occur within the notice period are recoverable in a wrongful dismissal or constructive dismissal case. As such, employers wishing to reward or

[595] *Ibid* at paras 23-24.
[596] *Ibid* at paras 28-30.
[597] *Ibid* at paras 49, 52.
[598] *Ibid* at paras 56-60.
[599] *Ibid* at paras 61-65.
[600] *Ibid* at paras 65-67.

incentivize employees with similar plans should ensure the terms of the contract are clearly drafted if they want to remove the employees' common law right of recovering within the notice period.

Kosteckyj v Paramount Resources Ltd[601]

Background

In *Kosteckyj*, the Alberta Court of Queen's Bench considered a company instituted cost reduction program which included wage reductions, bonus cancellations and the suspension of RRSP contributions. In light of the economic downturn in the Alberta oil and gas industry, the company made further cut-backs by dismissing 15% of its staff without notice.

Facts

Ms. Kosteckyj ("**Kosteckyj**") was employed as a Senior Integrity Engineer at Apache Canada Ltd. ("Apache"). In August 2017, Paramount Resources Ltd. ("**Paramount**"), a publicly-traded energy company, took over Apache's Canadian business. Kosteckyj's employment continued with Paramount at the same base salary, with her benefits and bonuses structured under Paramount's programs.[602]

In March 2020, Paramount unveiled a new company-wide "Cost Reduction Program" which included diminution of employee and director salaries, suspension of a RRSP Contribution Program, and a cancellation of the 2019 Bonus Program. As a result of the Program, Kosteckyj had her salary reduced by $15,000, Paramount contributions to her RRSP ceased, and her bonus status was unknown. Despite the significant cutbacks, Kosteckyj never agreed to or rejected any of the changes instituted by the Program.[603]

In April 2020, the reductions were taken a step further when, in an attempt to trim its workforce by 15%, Paramount terminated Kosteckyj and several other employees without cause.[604] Kosteckyj then commenced an action seeking damages for her wrongful termination.

Decision

In determining whether Kosteckyj was constructively dismissed, the Court relied on the two-branch test set out in *Potter*. Under the first branch, the Court determines whether the employer breached an express or implied term of the contract and, if so, whether the breach substantially changed an essential term of the contract. Under the second branch, constructive dismissal exists when the conduct of the employer, viewed in light of all the circumstances, would lead a reasonable person to conclude that the employer no longer intended to be bound by the terms of the contract. A finding constructive dismissal exists with satisfaction of either branch.[605]

In applying the test, the Court found that the Cost Reduction Program was a unilateral change to the employment contract and the compensation reduction it imposed on Kosteckyj was detrimental. The Court then determined that the effect of the Cost Reduction Program significantly affected Kosteckyj compensation in the range of 16.65% to

[601] 2021 ABQB 225 **[*Kosteckyj*]**.

[602] *Ibid* at paras 1-2.

[603] *Ibid* at para 3.

[604] *Ibid* at para 4.

[605] *Ibid* at para 33.

20%. Consequently, the Court found that the implementation of the Cost Reduction Program caused Kosteckyj's constructive dismissal.[606]

The Court then assessed the length of notice Kosteckyj was entitled to receive. As set out in *Bardal*, the reasonableness of the notice must be decided with reference to each case, having regard to the character of employment, the length of service, the age of the employee, and the availability of similar employment.[607] The Court determined that Kosteckyj did not occupy a supervisory or management position, she was 47 years old with 6 ½ years of service. She was dismissed in the midst of an economic downturn in the Alberta oil and gas industry and during the Covid-19 pandemic. Although the job prospects in the province were bleak, the Court reiterated that the availability of similar employment is not to be given undue importance in determining the notice period. Ultimately, Kosteckyj was entitled to 9 months notice.[608]

The Court further determined that Kosteckyj was entitled to her RRSP and benefits during her notice period. However, although Kosteckyj was entitled to a bonus as part of her compensation during her notice period, the language of the Paramount's bonus plan extinguished her right to receive any such bonus.[609]

Commentary

It is no secret that the prosperity of Alberta's oil and gas industry is subject to frequent change given the nature of the market. Kosteckjy provides another example that Courts applying the *Bardal* factors will continue to consider the economic conditions of the market in determining reasonable notice. However, although an economic downturn or pandemic will be used in the assessment, it will not receive undue weight.

[606] *Ibid* at paras 39-41.

[607] *Ibid* at para 42.

[608] *Ibid* at para 57.

[609] *Ibid* at paras 77-78.

SHAREHOLDER RIGHTS AND OPPRESSION

***Haack v Secure Energy (Drilling Services) Inc*[610]**

Background

This case provided clarity on the use of the oppression remedy by a minority shareholder. The oppression remedy is applied both in the context of a claim against both a company and the individual directors of the company for breach of a Unanimous Shareholder Agreement (USA).

This case addressed employment issues related to a wrongful dismissal, the breach of the duty of good faith, and the improper exercise of a penalty clause resulting in a share buyback. This case demonstrated that a finding of wrongful conduct alone is not enough to justify a punitive damages award and that behavior must be extraordinarily bad to qualify a plaintiff for punitive damages.

Facts

The Defendants, Marquis Alliance[611], claimed that the Plaintiff, Mr. Haack, the Vice President Finance and Accounting for Marquis Alliance, made financial and accounting errors that justified termination for cause. Mr. Haack was terminated for cause. According to the USA, termination for cause triggered the penalty clause, allowing Marquis Alliance to buy-back Mr. Haack's shares for $1.00, with approval from the remaining shareholders.

Shortly after his termination, Mr. Haack began legal action for wrongful dismissal. He argued the directors of the company breached the USA by triggering the penalty clause and that the directors of Marquis Alliance acted oppressively, in contravention of s. 242 of the *Business Corporations Act*.[612]

Decision

Justice Woolley found that Marquis Alliance wrongfully dismissed Mr. Haack, breached the duty of good faith and honest performance, and violated the terms of the USA. The Court found that the individual directors acted oppressively towards Mr. Haack and awarded compensatory damages for wrongful dismissal and breach of the USA.

Punitive Damages and Malicious Intent

Wrongful conduct was found in this case, but was not enough to justify a punitive damages award.[613] Wrongful conduct is sufficient in some cases to garner punitive damages, but only in exceptional circumstances.[614] Those exceptional cases entail conduct that is, "harsh, vindictive, reprehensible, malicious conduct."[615] While Justice Woolley found the defendants acted badly, the conduct was not bad enough to warrant punitive damages, and in her words, "Theirs was an ordinary failing to do what is right, rather than an extraordinary one."[616]

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[610] 2021 ABQB 82 **[*Haack*]**.

[611] The predecessor of Secure Energy (Drilling Services).

[612] RSA 2000, c B-9.

[613] *Haack* at para 662.

[614] *Elgert v Home Hardware Stores Limited*, 2011 ABCA 112 at para 79.

[615] *Ibid* at para 85.

[616] *Haack* at para 662.

Oppression Remedy

Wrongful dismissal claims do not automatically form the basis for an oppression remedy claim, but in this case, the circumstances of Mr. Haack's termination contributed to the Court's finding of oppression because his dismissal was used as leverage to invoke the penalty clause.

The USA created "reasonable expectations" Mr. Haack's shares would not be taken, but instead, that he would be treated as a Withdrawing Shareholder, as defined in the USA, and not have his shares taken punitively.[617] Mr. Haack reasonably expected the directors of Marquis Alliance to act in accordance with the USA, to avoid putting the company in breach of the USA. Mr. Haack expected the company to investigate allegations of poor performance and wrongdoing used to justify his termination. Finally, Mr. Haack did not reasonably expect his wrongful termination to be used as a tool to justify invoking the penalty clause in the USA, thereby taking back his shares for $1.00.

The conduct of both Marquis Alliance and the individual directors breached Mr. Haack's expectations in an oppressive and unfairly prejudicial way, "The false and misleading statements, the carelessness and indifference to the truth, and the recommendation to shareholders that they direct Marquis Alliance to take Mr. Haack's shares, was abusive and in bad faith."[618]

Business Judgment Rule

In some circumstances, business judgement can be used to gain deference from the court in responding to oppression claims, however, Justice Woolley dismissed the business judgment claim in this case.[619] The business judgment explanation does not allow directors to abandon responsible decision-making.[620] In this case, the directors' made decisions imprudently, in bad faith, and involved, "an abdication of their responsibilities."[621] Specifically in regards to the individual liability for oppression, they did not investigate the allegations against Mr. Haack.

Remedy

A remedy against both Marquis Alliance and the individual named Defendants is appropriate in the circumstances. The individual Defendants were acting in their capacity as officers of the company, as the company's President, two Executive Vice Presidents and one of its Vice Presidents. The actions of the named Defendants are inextricably linked with their roles in Marquis Alliance and eventually Secure Energy (Drilling Services).[622]

A remedy against individual directors was appropriate in the circumstances because the directors received a personal benefit from the cancellation of Mr. Haack's shares. The personal benefit to each individual director was sufficient to ground a personal liability claim in this case. The benefits to each individual director along with the dishonest conduct exhibited by them in failing to investigate the allegations against Mr. Haack supports personal liability. Justice Woolley states, "They were wrongs done by them as individuals with economic and legal power, to a person who relatively had none."[623] A remedy in these circumstances would correct the wrongs done against Mr. Haack.

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[617] *Ibid* at para 531.

[618] *Ibid* at para 533.

[619] *Ibid* at para 536.

[620] *PWC* at para 157.

[621] *Haack* at para 536.

[622] *Ibid* at para 561.

[623] *Ibid* at para 556.

Compensatory damages in the amount of $115, 866.21 were awarded for Mr. Haack's wrongful termination and for the loss of shares. The value of lost shares based on the date of termination was $957,994.60.[624] Mr. Haack was awarded full solicitor-clients costs based on the Courts findings of oppression and the breach of the duty of good faith.

Marquis Alliance was found by the Court to be liable for damages resulting from Mr. Haack's wrongful termination, breach of the duty of good faith and honest performance and the individual named Defendants were jointly and severally liable for damages resulting from the $1.00 buy back of Mr. Haack's shares.

Commentary

This case provides an example of how a minority shareholder can advance a successful oppression remedy claim against the individual directors and a company. The approach the Court took in determining share value, based on the date of termination, is also useful for those pursuing or facing similar litigation.

[624] *Ibid* at para 594.

CIVIL PROCEDURE

Overview

In the past year, the Alberta Court of Appeal has released several decisions dealing with the issue of costs awards in civil litigation. In two of the decisions, *McAllister v Calgary (City)*, 2021 ABCA 25 and *H2S Solutions Ltd v Tourmaline Oil Corp*, 2020 ABCA 201, the Court provided guidance on the principles governing costs awards which should assist trial and appellate courts alike when they exercise their discretion to make a costs award at the conclusion of legal proceedings. In a third case, *Borgel v Pointearth (Subdivision and Development Appeal Board)*, 2020 ABCA 321, the Court considered the circumstances under which it would be appropriate to order costs against a tribunal like body when the conduct of the tribunal resulted in procedural unfairness.

Also in the past year, the Supreme Court of Canada definitively ruled on whether "waiver of tort" was a valid cause of action in *Atlantic Lottery Corp Inc v Babstock*, 2020 SCC 19. This question has frequently plagued judges in class action certifications and summary dismissal applications. Prior to the Supreme Court's ruling in *Babstock*, Canadian courts have only gone as far as *refraining* from ruling that it was plain and obvious that the "waiver of tort" cause of action *did not* exist. The Court's decision in *Babstock* provides some much needed clarity for litigants who wish to plead "waiver of tort" as a cause of action moving forward.

This section also includes a discussion of cases where courts have dealt with the issues of delay and limitations periods in the context of the current COVID-19 pandemic.

***McAllister v Calgary (City)*[625]**

Background

In *McAllister,* the Alberta Court of Appeal considered the level of indemnification that a successful party to protracted litigation should receive in costs from the losing party. The costs award at issue in *McAllister* were typical costs meant to "partially indemnify the successful party", and not an exceptional costs award to be used as an instrument of policy to discourage unnecessary steps taken in the litigation, to sanction obstructive behaviour, or to encourage settlement.[626] In particular, the Court in *McAllister* considered the role of Schedule C to the Alberta *Rules of Court*, RSA 124/2010 (the "**Rules**") in making such costs awards.

Facts

Following a trial where the appellant plaintiff was successful in establishing liability against the City of Calgary for injuries he sustained from an assault on a Plus-15 outside a C-Train station, the trial judge rendered a costs decision.[627] In that decision, she found that absent out-of-the-ordinary circumstances, costs should be awarded pursuant to the Tariff of Recoverable Fees (Schedule C) of the Rules, without regard to the actual legal costs incurred by the appellant in the litigation.[628]

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[625] 2021 ABCA 25 **[*McAllister*]**.

[626] *Ibid* at para 2.

[627] *Ibid* at para 5.

[628] *Ibid* at para 6.

The appellant incurred legal fees in the amount of $389,711.78, and was awarded $70,294.70 in costs pursuant to Schedule C.[629] Although the Schedule C costs were adjusted for inflation, the amount awarded represented only 17% of the total legal fees incurred by the appellant to take the matter through to trial.

The appellant appealed the trial judge's cost award and argued that it failed to properly indemnify him for the costs he incurred. On appeal, he sought to recover $175,711.78, or 45% of the legal costs he incurred.[630]

Decision

The Alberta Court of Appeal allowed the appeal and remitted the costs decision back to the trial judge for reconsideration.

Although the Court recognized that costs are awarded on a discretionary basis and that trial judges have a wide discretion to award costs under the Rules,[631] it nonetheless found that appellate intervention is warranted where there is a misdirection as to the applicable law, a palpable error in the assessment of the facts, or an unreasonable exercise of the discretion.[632]

After reviewing the applicable Rules, the Court emphasized that the Rules expressly provide that "all or part of reasonable and proper costs" may be ordered, "with or without reference to Schedule C", and that the court is provided with a menu of orders from which it can make a costs award.[633] Of the choices available to the court, a costs award based on Schedule C is only one option.[634] The trial judge viewed Schedule C as the default rule, absent misconduct or complexity, for making cost awards. The Court of Appeal found that the Rules did not support that characterization.[635]

In considering what amounted to "reasonable and proper costs", the Court first considered the purpose of costs awards. It held that the primary purpose of a costs award is to indemnify the successful party in respect of the expenses sustained in either defending a claim that proved to be unfounded (in the case of a defendant), or in pursuing a valid legal right (in the case of a plaintiff).[636] It found that indemnification was the "essence" of an award of party and party costs.[637] Although, the Court did recognize that in certain circumstances, where costs awards are employed as an instrument of policy, indemnification may not be the primary purpose.[638]

Next, the Court considered what level of indemnification was appropriate. It found that full indemnification should normally not be provided, and that the typical costs award should seek to partially indemnify a litigant for the expenses to which the litigant has been put as a result of litigation.[639] After reviewing the case law, the Court found that a 40-50% indemnification was appropriate to partially indemnify a successful litigant.[640] The Court also

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[629] *Ibid* at para 7.
[630] *Ibid*.
[631] *Ibid* at para 17.
[632] *Ibid* at para 18.
[633] *Ibid* at para 25.
[634] *Ibid* at para 27.
[635] *Ibid* at para 28.
[636] *Ibid* at para 33.
[637] *Ibid* at para 34.
[638] *Ibid* at para 35.
[639] *Ibid* at para 37.
[640] *Ibid* at paras 39-42.

highlighted the fact that in developing Schedule C, the Schedule C Committee aimed to provide 40-50% indemnity in the typical case.[641]

The Court endorsed the 40-50% partial indemnification guideline as striking a balance between fully compensating successful parties who through no fault of their own had to engage in legal proceedings on the one hand, and the chilling effect on parties bringing or defending claims if the unsuccessful party has to bear too heavy a costs burden on the other.[642]

The Court then concluded with a discussion of the role of Schedule C in making costs awards. The Court found that Schedule C was a "very crude method by which to assess costs" which did not discourage unnecessary steps in litigation.[643] Schedule C arbitrarily selects certain steps in a lawsuit and compensates parties for taking them, but omits to compensate parties for other steps which can be just as significant for advancing the litigation.[644] Schedule C was not better at allowing parties to measure the risk of costs than a percentage based costs award; in both cases, the costs must be reasonable and proper.[645] However, the Court expressed that it should not be taken as questioning the utility of Schedule C.[646] Schedule C may be appropriate in the "common stream of litigation", and particularly useful and efficient in high volume interlocutory matters such as chambers applications.[647] Furthermore, in cases where there is a significant imbalance of power and means between the parties, a percentage based costs award may impede access to justice.[648]

In the result, the Court found that the ultimate task before a trial judge is to achieve a reasonable and proper costs award,[649] and that the trial judge misdirected herself as to the applicable law when she failed to consider whether costs determined in accordance with Schedule C provided an appropriate level of indemnification to the successful plaintiff.[650]

Commentary

McAllister is the most recent case in a line of Alberta Court of Appeal authorities establishing that, where indemnification is the primary purpose of a costs award, 40-50% indemnity of the costs incurred by the successful litigant is appropriate.[651]

Particularly in cases where litigation is protracted and ends in a trial, *McAllister* is strong authority for the proposition that Schedule C costs will not be appropriate if, absent misconduct or unnecessary steps taken in the litigation by the parties, the costs do not achieve a reasonable and proper costs award.

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[641] *Ibid* at paras 43-44.

[642] *Ibid* at para 45.

[643] *Ibid* at para 54.

[644] *Ibid* at para 55.

[645] *Ibid* at para 56.

[646] *Ibid* at para 58.

[647] *Ibid* at para 59.

[648] *Ibid* at para 60.

[649] *Ibid* at para 62.

[650] *Ibid* at para 65.

[651] See also *Weatherford Canada Partnership v Artemis Kautschuk und Kunstoff-Technik GmbH,* 2019 ABCA 92; *Hill v Hill,* 2013 ABCA 313.

Schedule C costs remain available as a tool for trial judges to use in the appropriate circumstances, including in the "common stream of litigation" or in high-volume interlocutory matters such as chambers applications.[652] However, when advising clients, counsel should be aware that now the risk of a costs award may not be limited to Schedule C costs on a regular basis.

***H2S Solutions Ltd v Tourmaline Oil Corp*[653]**

Background

In *H2S*, the Alberta Court of Appeal considered the effect of a formal offer to settle made by the respondent to an appeal on the costs awarded to the respondent after the appeal was dismissed. In particular, *H2S* dealt with the issue of what constitutes a genuine offer to settle such that the double costs rules in the Alberta *Rules of Court*, RSA 124/2010 (the "**Rules**") would be triggered.

Facts

The relevant chronology of the appeal and offer to settle were as follows:

a. July 20, 2018: the appellants appealed the summary disposition of their claim;

b. August 9, 2018: the respondent served its formal offer;

c. October 9, 2018: the respondent's formal offer expired;

d. January 15, 2019: the appellants filed their factum and authorities;

e. March 15, 2019: the respondents filed their response appeal materials;

f. October 2, 2019: the appeal was heard; and

g. October 8, 2019: the appeal was dismissed.[654]

Effectively, the only terms of the respondent's settlement offer (the "**Offer**") were that the appellants would discontinue their appeal, and that the respondent would not seek its costs in relation to the appeal proceedings.[655]

The result of the appeal was that the respondent was successful, making it presumptively entitled to its costs of the appeal. The sole question before the Court in *H2S* was whether the respondent was entitled to double costs under the applicable Rules.[656]

Decision

The Court found that the Offer was not a genuine offer, and therefore the respondent was only entitled to one set of its costs under column 3 of Schedule C.

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[652] *McAllister* at para 59.

[653] 2020 ABCA 201 **[*H2S*]**.

[654] *Ibid* at para 7.

[655] *Ibid* at para 8.

[656] *Ibid* at para 11.

Rule 14.59 provides that when a party makes a formal offer to settle an appeal and obtains a judgment equal to or more favourable than the offer, appeal costs must be awarded on double the scale of fees under the applicable column of Schedule C.[657] However, the Alberta Court of Appeal has mandated that an offer must be a "genuine offer" of sufficient compromise at the time it was served and remained open for acceptance in order for it to trigger the double costs Rule.[658]

The Court found that the respondent's offer did not demonstrate an identifiable and sufficient compromise, and was in effect, an offer of nothing.[659] The respondent did not incur any compensable costs within the time period that the offer remained open.[660] The offer was a "think again" offer, which does not trigger the double costs Rule.[661]

In deciding the issue, the Court first reviewed the cases where a doubling of costs was and was not awarded.[662] After reviewing the cases where a doubling of costs was awarded, the Court found that at least one of the following factors was present:

a. The timing and circumstances of the offer suggested it was not made simply to trigger costs consequences;

b. The party making the offer had a relatively strong position on appeal;

c. The appeal required extensive preparation or a considerable amount was at stake;

d. The offer was to forego significant costs already incurred, or costs were accumulated *after* the notice of appeal was filed but before the offer expired; or

e. The party making the offer agreed to forego a cross-appeal.[663]

The Court further found that a unifying theme in the cases where a doubling of costs was awarded was that the Court was able to recognize the existence of an identifiable and sufficient compromise embedded within the offer.[664]

After reviewing the cases where a doubling of costs was not awarded, the Court found that the following factors were emphasized as reasons why the double costs rule did not apply despite the existence of a formal offer:

a. The formalistic "think again" offer, where the *only* options were to continue with or abandon the appeal, will rarely be considered genuine;

b. Parties with a *bona fide* perception of the law or facts contrary to that of the other party should not be discouraged from pursuing the matter; and

c. The offer was made before the parties incurred substantial costs.[665]

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[657] *Ibid* at para 12.
[658] *Ibid* at para 13.
[659] *Ibid* at para 14.
[660] *Ibid* at para 40.
[661] *Ibid* at paras 41-42.
[662] *Ibid* at paras 15-17.
[663] *Ibid* at para 20.
[664] *Ibid* at para 21.
[665] *Ibid* at para 22.

The Court concluded with a discussion on the principled application of the double costs rules on appeal. First, the Court explained that the timing of the offer is important in determining whether it is a genuine offer.[666] Whether costs were actually accumulated during the currency of the unaccepted offer is often an important factor to consider.[667] Second, where the offer amounts to a no-risk "think again" offer, where the offeror is essentially offering nothing, the double costs rules will not be triggered because the offer contains no identifiable and sufficient compromise.[668] Third, the identifiable compromise must be beyond *de minimus*. For example, an offer to pay $1.00 is a *de minimus* offer, and will not trigger the double costs rules.[669] Finally, the Court explained that it will always possess a residual and overarching discretion to disallow double costs, even where the rules are triggered, by reason of the "special circumstances" provision in Rule 4.29(4)(e).

In the result, the Court found that the respondents failed to establish that it had incurred any costs within the time period in which its offer remained open.[670] Therefore, the double costs rules were not triggered because the respondent's offer was an offer of nothing, and did not contain an identifiable and sufficient compromise.[671]

Commentary

Although the Alberta Court of Appeal's decision in *H2S,* strictly speaking, only dealt with formal offers and the double costs rules on appeal, there is no reason why the principles discussed in *H2S* would not apply to litigation at the trial stage. The double costs rules which apply to appeal costs, Rule 14.59(4), incorporates the double costs rules for the trial level, Rule 4.29.

The point emphasized by the Court in *H2S* was that in order for a formal offer to trigger the double costs rules, it must be a genuine offer which contains an identifiable and sufficient compromise.[672] In practice, what constitutes a genuine offer containing an identifiable and sufficient compromise must be determined on the facts of each case.

The Court gave some examples of what would, and what would not be considered a genuine offer capable of triggering double costs consequences. For example, the Court explained that an offer of $1.00, without more, would be considered *de minimus* and would not trigger the double costs rules.[673] However, in the right circumstances, even an offer of $107,000.00 would not be considered an offer of a sufficient compromise.[674]

In *Allen*, the respondents offered to settle the appeal by accepting what it was awarded at trial less $107,000.[675] The majority of the Alberta Court of Appeal found that this was not a genuine offer in the circumstances. Although the offer to settle technically contained $107,000 worth of value, that amount only reflected 5% of the respondents' recovery at trial.[676] Furthermore, the respondents were risking substantial liability for costs if the appellants were successful on appeal.[677] Given that the appellants' arguments were seriously arguable, the majority of the Court

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[666] *Ibid* at para 29.
[667] *Ibid* at para 31.
[668] *Ibid* at para 33.
[669] *Ibid* at para 34.
[670] *Ibid* at para 40.
[671] *Ibid* at paras 41-42.
[672] *Ibid* at para 27.
[673] *Ibid* at para 34.
[674] *Ibid* at para 22 citing; *Allen (Next Friend of) v University Hospital Board*, 2006 ABCA 101 **[*Allen*]**.
[675] *Allen* at para 7.
[676] *Ibid*.
[677] *Ibid* at para 18.

characterized the offer as a no-risk litigation tactic intended for the sole purpose of doubling costs in the event that the appeal was dismissed.[678]

Borgel v Paintearth (Subdivision and Development Appeal Board)[679]

Background

In *Borgel,* the Alberta Court of Appeal considered the costs application of the appellants after a successful appeal of a Subdivision and Development Appeal Board ("**SDAB**") decision. In the main appeal, the Court found that procedural fairness was breached by the SDAB when it failed to hear the appellant's full submissions regarding the granting of permits for various windfarm projects.[680] The primary issue in *Borgel* was whether the successful appellants could recover costs as against the SDAB.[681]

Facts

The parties to the main appeal were the 11 landowner appellants, and the respondents, Paintearth County (the "**County**"), the SDAB, and Capital Power Generation Services. The appellants sought costs of $9,238.96 against the County, and full indemnity costs in the amount of $179,979.50 against the SDAB.[682] Various arguments were advanced by the County regarding its costs liability, but ultimately the Court found that the main question to be decided in both costs claims was whether the SDAB was liable for any costs, and if so, on what scale.[683]

Decision

The Court of Appeal held that, in the circumstances of this case, costs could not be justified against the SDAB.[684] There were several factors that contributed to this conclusion, including the fact that SDAB was not acting as a control and discipline body in this case, such as the Alberta Securities Commission, where costs are authorized by law.[685] Rather, the SDAB in this case was acting as a feature of local democratic governance that involved broader concepts of land use and design.[686] Furthermore, the Court found that, on the record before it, there was no reason to impose costs against the SDAB, let alone solicitor-client costs.[687]

In reaching its decision, the Court had regard for: (a) the overall legislative scheme and its applicable characteristics and objectives; and (b) the role and participation of the SDAB as decision maker in the proceedings.[688] Regarding the role the SDAB actually played, the record showed that the SDAB stood back from any sort of adversarial position in the matter in the court; the SDAB simply "sat and watched and waited for questions or instructions" as a respondent under the appellants' pleadings.[689]

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[678] *Ibid* at paras 18-19.

[679] *Borgel v Paintearth (Subdivision and Development Appeal Board)*, 2020 ABCA 321 **[*Borgel*]**.

[680] *Ibid* at para 2.

[681] *Ibid* at para 16.

[682] *Ibid* at paras 17, 28.

[683] *Ibid* at para 27.

[684] *Ibid* at para 38.

[685] *Ibid* at para 39.

[686] *Ibid*.

[687] *Ibid* at para 40.

[688] *Ibid* at para 41.

[689] *Ibid*.

Although at the hearing before the SDAB, the SDAB was premature in concluding that the appellants would not be able to say anything material at the second phase of the two-step appeal process, which resulted in a hearing that was procedurally unfair, the Court was satisfied that the SDAB was attempting to be fair by exploring what, if anything, was left to be addressed with respect to the impugned permits.[690] Furthermore, there was no evidence that this was willful, nor was there any animus against the appellants.[691]

The Court noted that where adversarial initiative is taken by a tribunal in an appeal, costs may be awarded.[692] However, costs in those situations typically occur under statute.[693] In any event, the Court was satisfied that the SDAB had not taken a position in support of itself on appeal, as evidenced by the fact that the SDAB did not make oral or written submissions in the appeal.[694] The Court explained that the general rule is, absent misconduct or extraordinary circumstances, "an administrative tribunal that is involved in proceedings to review its decisions neither receives nor pays costs."[695] The Court explained further that costs against a tribunal are unusual and exceptional, and “only apply where the tribunal does not act in good faith and acts “capriciously” or the like.”[696] The Court provided two examples of circumstances that may be considered exceptional, justifying an award of costs against a tribunal: (1) misconduct or perversity in the proceedings before the tribunal; or (2) the tribunal argues the merits of a judicial review application rather than its own jurisdiction.[697]

In the result, the Court found that nothing done by the SDAB in the main appeal attracted the imposition of any costs against it, let alone costs on an enhanced scale. The appellants' application for costs against the SDAB was therefore dismissed.[698]

Commentary

Borgel is a case which highlights the difficulty in obtaining costs against a tribunal on an appeal of the tribunal's decision. Even where the tribunal's decision results in procedural unfairness, as long as the tribunal was acting in good faith and attempted to reach a fair decision, a costs award will likely not be ordered against it on appeal.

Atlantic Lottery Corp Inc v Babstock[699]

Facts

The plaintiffs applied for certification of a class action proceeding against Atlantic Lottery Corporation Inc. ("**ALC**") and sought a gain-based remedy quantified by the profit generated by ALC in its licensing of video lottery terminal games ("**VLTs**") by relying on three causes of action: waiver of tort, breach of contract and unjust enrichment.[700] The remedy sought was an example of disgorgement, defined as “awards that are calculated exclusively by reference to the defendant's wrongful gain, irrespective of whether it corresponds to damage suffered

[690] *Ibid* at para 42.
[691] *Ibid* at para 43.
[692] *Ibid.*
[693] *Ibid*.
[694] *Ibid* at para 44.
[695] *Ibid* at para 47.
[696] *Ibid* at para 50.
[697] *Ibid* at para 51 citing; *Lang v. British Columbia (Superintendent of Motor Vehicles)*, 2005 BCCA 244.
[698] *Ibid* at para 54.
[699] 2020 SCC 19 **[*Babstock*]**.
[700] *Ibid* at para 2.

by the plaintiff and, indeed, irrespective of whether the plaintiff suffered damage at all."[701] Regarding waiver of tort, the plaintiffs alleged that ALC breached its duty to warn of the inherent dangers relating to VLTs.[702] The claim for breach of contract was based on an alleged contract arising from ALC's offer of VLT's to the public. The plaintiffs suggested that, as an implied term of the contract, ALC was required to provide a safe gaming experience and to act in good faith but breached these terms by "supplying deceptive VLTs."[703]

At the Supreme Court of Newfoundland and Labrador, there were two applications before the certification judge.[704] In the first application, the ALC applied to strike the plaintiff's claim on the grounds that it disclosed no reasonable cause of action. The second application was the plaintiffs' certification application under the *Class Actions Act* (the "**Act**").[705] The certification judge found that the plaintiffs had satisfied the requirements necessary for certification under the Act and dismissed ALC's application.[706] At the Newfoundland and Labrador Court of Appeal, the certification judge's decision was substantially upheld by the majority, allowing the claims of waiver of tort, breach of contract and unjust enrichment to proceed to trial.[707] The ALC appealed to the Supreme Court of Canada. The plaintiff's reliance on the doctrine of waiver of tort became the central issue addressed by the Supreme Court of Canada, because no Canadian authority had recognized waiver of tort as an independent cause of action for disgorgement prior to the Court of Appeal's decision.[708]

Decision

The majority for the Supreme Court of Canada allowed the appeal. The Court set aside the certification order, and struck the plaintiffs' claims in their entirety, finding that there was no reasonable chance of success for any of the pleaded claims.[709]

With respect to the certification application, the plaintiffs relied on a line of certification decisions which *refrained* from finding that it was plain and obvious that a waiver of tort action *does not* exist.[710] However, the majority of the Court found that recent developments in the law of restitution and unjust enrichment, as well as the distinguishing features in *Babstock* made it possible from them to decide the issue.[711] In particular, the Court felt that failing to definitively address the issue of whether an independent cause of action for waiver of tort existed would continue to perpetuate an undesirable state of uncertainty in the law.[712]

The majority of the Court held that the term "waiver of tort" was confusing, and should be abandoned.[713] The Court explained that rather than being an independent cause of action in itself, "waiver of tort" was simply a choice between possible remedies.[714] The Court further explained that there are two related but distinct gain-based

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[701] *Ibid* at para 23.
[702] *Ibid* at para 3.
[703] *Ibid* at para 4.
[704] *Ibid* at para 7.
[705] *Ibid* at para 7; *Class Actions Act*, S.N. 2001, c. C-18.1.
[706] *Babstock* at para 14.
[707] *Ibid* at para 9.
[708] *Ibid* at para 15.
[709] *Ibid* at para 72.
[710] *Ibid* at para 15.
[711] *Ibid* at paras 16-22.
[712] *Ibid* at para 21.
[713] *Ibid* at para 23.
[714] *Ibid* at para 29.

remedies, restitution for unjust enrichment, and disgorgement for wrongdoing.[715] Disgorgement requires only that the defendant gained a benefit (without the need to prove a depravation to the plaintiff), while restitution is awarded in response to a causative event of unjust enrichment, where there is a correspondence between the defendant's gain and the plaintiff's deprivation.[716]

The plaintiffs in *Babstock* were seeking disgorgement, not restitution.[717] However, disgorgement is properly viewed as an alternative remedy for certain forms of wrongful conduct, not as an independent cause of action.[718] Therefore, to be successful in a claim for disgorgement, a plaintiff must first establish actionable misconduct.[719]

By pleading disgorgement as an independent cause of action, the plaintiffs in *Babstock* were seeking to create an entirely new category of wrongful conduct – one that was akin to negligence, but which did not require proof of damages.[720] The Court found that it would be a far leap to find that disgorgement, without proof of damage, is available as a general proposition in response to a defendant's negligent conduct, and that to determine the appropriate remedy for negligence, before liability is even established, would be futile and even nonsensical.[721]

The availability of gain-based relief lies in "aligning the remedy with the *injustice* it corrects".[722] Therefore, the Court found it necessary to consider what it was that made a defendant's negligence wrongful. It explained that a defendant in an action for negligence is not a wrongdoer at large, rather, he is a wrongdoer only in respect of the damage which he actually causes to the plaintiff.[723] Granting disgorgement for negligence without proof of damage would result in a remedy "arising out of legal nothingness".[724] It followed that the novel cause of action proposed by the plaintiffs had no reasonable chance of succeeding at trial.[725]

The plaintiffs also claimed that the VLTs contravened the *Criminal Code*. Their allegation in this regard served two purposes. First, the plaintiffs argued that the presence of criminal conduct warranted exceptional relief for their breach of contract claim, specifically punitive damages and disgorgement. Secondly, the plaintiffs argued that if ALC's conduct was criminal, there would be no juristic reason for ALC's enrichment at the plaintiffs' expense.[726] After reviewing the relevant provisions of the *Criminal Code* and the legislative history of the provisions,[727] the Court found that the *Criminal Code* provisions did not apply to the VLTs, and therefore, the plaintiffs' claim in this regard also had no reasonable change of success.[728]

Regarding the breach of contract claim, the plaintiffs only sought *non-compensatory* remedies, namely disgorgement and punitive damages.[729] Whether the plaintiffs' claim disclosed a reasonable cause of action must therefore be

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[715] *Ibid* at para 24.
[716] *Ibid* at para 24.
[717] *Ibid* at para 25.
[718] *Ibid* at para 27.
[719] *Ibid* at para 30.
[720] *Ibid* at para 31.
[721] *Ibid* at para 32.
[722] *Ibid*.
[723] *Ibid* at para 33.
[724] *Ibid*.
[725] *Ibid* at para 35.
[726] *Ibid* at para 39.
[727] *Ibid* at paras 40-47.
[728] *Ibid* at para 48.
[729] *Ibid* at para 49.

considered in light of the remedies sought.[730] Regarding disgorgement, the majority of the Court found that it was only available where, at a minimum, other remedies are inadequate.[731] Therefore, the plaintiffs' claim for disgorgement under breach of contract was doomed to fail.[732] Likewise, the plaintiffs' claim for punitive damages also had no reasonable chance of success.[733] Punitive damages for a breach of contract requires an independent actionable wrong.[734] Having found that the alleged contract between the plaintiffs and the defendant was not of the kind to give rise to an implied duty of good faith, and having found that all of the plaintiffs' other claims were bound to fail, the punitive damages claim was also bound to fail.[735]

Finally, the majority of the Court considered the plaintiffs' claim for unjust enrichment *simpliciter*.[736] The claim required the plaintiffs to establish that the defendant was enriched, that the plaintiffs suffered a corresponding deprivation, and that the benefit and deprivation occurred in the absence of any juristic reason.[737] Having found that the plaintiffs' own pleadings alleged a contract between the plaintiffs and the defendant, the Court found that the defendant was justified in retaining the benefit.[738]

In the result, each of the plaintiffs' claims were bound to fail because they disclosed no reasonable cause of action. The appeals were allowed, and the plaintiffs' statement of claim was struck in its entirety.[739]

Commentary

This case includes an extensive discussion on remedies, specifically disgorgement, related to the plaintiff's causes of action. The Supreme Court of Canada confirms in this case that disgorgement for breach of contract is only available in exceptional circumstances and where other remedies are inadequate.[740] It also notes that there has been ambiguity surrounding waiver of tort and states that in order to make out a claim for disgorgement for waiver of tort, a plaintiff must first established actionable misconduct.[741] As a gain-based remedy, the Court states that disgorgement should be seen as an alternative remedy for certain kinds of wrongful conduct, but not as an independent cause of action.[742] That said, some exceptions to this rule are discussed, including breach of fiduciary duty, where disgorgement is available without proof of damage.[743] This precedent should be kept in mind when determining whether disgorgement is an appropriate remedy for corporations.

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[730] *Ibid*.
[731] *Ibid* at para 59.
[732] *Ibid.*
[733] *Ibid* at para 66.
[734] *Ibid* at para 63.
[735] *Ibid* at paras 64-66.
[736] *Ibid* at paras 69-71.
[737] *Ibid* at para 69.
[738] *Ibid* at para 71.
[739] *Ibid* at para 72.
[740] *Ibid* at para 61.
[741] *Ibid* at para 30.
[742] *Ibid* at para 27.
[743] *Ibid* at para 32.

Li v Morgan[744]

Background

In *Li,* the Alberta Court of Appeal considered the application of an appellant to restore their struck appeal. Although the appeal would typically have been deemed 'abandoned' for a failure to revive it within the 6 month period set out in the Alberta *Rules of Court*, the relevant Rule did not apply as a result of a Ministerial Order issued in response to the COVID-19 pandemic, which suspended the operation of limitations periods. Nonetheless, the Court in *Li* had to consider whether it was appropriate to restore the appellant's struck appeal.

Facts

The appellant was the plaintiff in a claim for damages arising out of a motor vehicle accident.[745] At trial, the action was dismissed. The trial judge found that the appellant was responsible for the accident, and that in any event, there was no evidence of any damages.[746] The plaintiff commenced his appeal on April 11, 2019.[747] On October 16, 2019, the plaintiff's appeal was struck for a failure to file his factum before the deadline mandated in the Alberta *Rules of Court*.[748] Exactly 6 months after the appeal was struck, the appellant applied to restore his appeal.

Decision

In normal circumstances, the appellant's appeal would have been deemed to be abandoned on April 16, 2020 pursuant to Rules 14.47 and 14.65(3).[749] However, due to Ministerial Order M.O. 27/2020, the appellant was saved from the effects of Rule 14.65(3).[750] Nonetheless, the Court found that the appellant's application was still unacceptably late.[751]

The Court confirmed that it has the discretion under Rules 13.5(2) and 14.2(3) to extend most deadlines, including the six month deadline at issue here.[752] While no one factor is determinative, the test for restoring an appeal after the six month deemed abandonment deadline includes the following:

a. An explanation for the delay that caused the appeal to be struck in the first place;

b. An explanation for the delay in applying to restore the appeal;

c. A continuing intention to proceed with the appeal;

d. A lack of prejudice to the respondent; and

e. The arguable merit of the appeal.[753]

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[744] 2020 ABCA 186 **[*Li*]**.
[745] *Ibid* at para 2.
[746] *Ibid.*
[747] *Ibid*.
[748] *Ibid* at para 1.
[749] *Ibid* 1.
[750] *Ibid* at para 11.
[751] *Ibid* at para 13.
[752] *Ibid* at para 10.
[753] *Ibid* at para 8.

The Court of Appeal noted that once the six month deadline has been passed, the components of the test are stricter.[754] Appling the factors to the case before it, the Court held that the appellant's appeal should not be restored.[755]

Regarding an explanation for the delay, the Court was dissatisfied with the appellant's explanation. It noted that the appellant's main explanation for the delay was that he was preparing an application for fresh evidence, but there was no "satisfactory explanation [for] why he could not complete this task before the deadline."[756] The Court also noted that the appellant waited until the last minute before applying to restore the appeal, and that an appellant who seeks to restore a struck appeal must act promptly.[757] The Court found that none of the appellants' explanations for the delay were compelling, and in fact, they merely demonstrated that perfecting the appeal was not a priority.[758]

Although the Court found that there was no indication that the appellant ever intended to abandon his appeal,[759] the final factor also weighed against the granting of the application. Regarding the merits of the appeal factor, the Court explained that the appellant did not identify any errors of law.[760] The appellant seemed to rely on anticipated evidence which formed the basis of his fresh evidence application.[761] The appeal was essentially directed at the credibility and factual findings of the trial judge, and the standard of review for such an appeal is high.[762] Furthermore, even if the new evidence were allowed, the fact that there was still a complete absence of evidence of any damage meant that there was nearly no arguable merit to the appeal.[763] Taken together, the factors did not establish that the appeal should be restored.[764]

Commentary

This case is an example of an application that played out during the Ministerial Order M.O. 27/2020, made under Section 52. 1(2) of the *Public Health Act* that temporarily suspended limitation periods in response to the COVID-19 pandemic.[765] While the Court of Appeal still found that the application is unacceptably late with a weak excuse, the appeal could have been saved by the Ministerial Order if the merits of appeal had been stronger.[766] *Li* demonstrates that even if a party's claim is not barred by a limitations period, there is no guarantee that it will be permitted to proceed if there are other significant procedural defects.

[754] *Ibid* at para 19.
[755] *Ibid* at para 17.
[756] *Ibid* at para 12.
[757] *Ibid* at para 13.
[758] *Ibid* at para 14.
[759] *Ibid* at para 15.
[760] *Ibid* at para 17.
[761] *Ibid.*
[762] *Ibid.*
[763] *Ibid.*
[764] *Ibid* at para 18.
[765] *Ibid* at para 11; *Public Health Act*, R.S.A. 2000, c. P-37.
[766] *Ibid* at paras 13, 17.