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Recent Judicial Decisions of Interest to Energy Lawyers

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Bankruptcy & Insolvency

Orphan Well Association v. Grant Thornton Ltd., 2019 SCC 5

- **Issue:**
  - Do end-of-life obligations of an oil and gas licensee survive bankruptcy?
- **Decision:** Yes
  - In a 5-2 split decision, the Supreme Court of Canada confirmed that:
    - abandonment and reclamation obligations of a debtor licensee are binding upon the Trustee in Bankruptcy as included as the licensee under the applicable provincial statutes; and
    - these obligations are neither "creditor" claims nor "claims provable in bankruptcy" - they do not conflict with the general priority scheme in the *Bankruptcy and Insolvency Act.*
  - This decision is addressed in more detail in the next presentation: "Richard Riegert Memorial Lecture: Addressing End of Life Obligations Post Redwater"

Bankruptcy & Insolvency

Regent Resources (Re), 2018 ABQB 669

- **Facts:**
  - Regent held oil and gas properties in Cardston County (amongst elsewhere). At the time of its insolvency, its property taxes were in arrears to the County. The receiver disclaimed these assets on the basis that they had no value.
  - The County registered a special lien over all of Regent's lands/property, wherever situated. A special lien takes priority overall claims except the Crown (*MGA* s. 348).
- **Issue:**
  - Can special liens be applied to property outside the municipality?
- **Decision:** No
  - This broad application could lead to properties around the world being subject to competing municipal liens (a logistical nightmare for potential buyers).
- **Implications:**
  - Provides significant clarity to buyers that their lands are not encumbered by invisible "special liens" imposed by other municipalities. Uncertainty remains within the municipality though.

Bankruptcy & Insolvency

Alberta Energy Regulator v Lexin Resources Ltd., 2019 ABQB 23

- **Facts:**
  - Lexin and Exxon Mobil Energy Canada owned three facilities operated by Lexin. The governing agreements contained provisions providing for a change of operator in case of insolvency.
  - These facilities were shut-in pursuant to an order of the AER. Lexin was placed into receivership shortly thereafter.
  - In July 2017, the Receiver began marketing Lexin's interest in the assets, and identified Lexin as the operator.
  - Exxon Mobil sold its interests in the facility to Midstream Canada in February 2018.
  - Midstream sought to lift the stay to take over as operator in order to recommence operations.
- **Issue:**
  - Was this an appropriate case in which to lift the stay of proceedings?

Bankruptcy & Insolvency

Alberta Energy Regulator v Lexin Resources Ltd., 2019 ABQB 23

- **Decision:** No
  - The applicant must show that it would be treated differently, unfairly, or would suffer worse harm than other creditors if the stay was not lifted.
  - The inability to enforce contractual rights (e.g. the change of operator provision) is insufficient to lift the stay - all creditors lose all or part of their contractual benefit with the debtor.
  - Change in operatorship clauses are not enforceable against the receiver in any event, as there is no risk of the insolvent operator commingling funds or putting the non-operator's revenue share at risk.
  - It may have been appropriate to lift the stay if the assets were operating and actively producing, as the receiver's investment/operational decisions might differ from the non-operator's long-term interests.

Bankruptcy & Insolvency

Alberta Energy Regulator v Lexin Resources Ltd., 2019 ABQB 23

- **Decision continued:**
  - The prejudice to the Receiver outweighed the prejudice to Midstream, which had notice of advertising of operatorship at time of purchase. Lifting the stay would:
    - Potentially lead to significant capital and operating expenditures if operations recommenced; and
    - Lead to uncertainty in the sales process, given that operatorship highlighted in the sales offer.
- **Implications:**
  - If you are in an agreement which provides for transfer of operatorship on insolvency – exercise that right prior to the appointment of a receiver.
  - Highlights the difficult position non-operator can be in on receivership of the operator. Lifting the stay in order to exercise contractual rights will be nearly impossible absent exceptional circumstances.

Competition Law

Dow Chemical Canada ULC and Dow Europe GmbH v NOVA Chemicals Corporation, 2018 ABQB 482

- **Facts:**
  - NOVA and Union Carbide Canada Inc. (**UCCI**) entered into a suite of agreements for the construction and operation of an ethylene manufacturing facility (**E3**). UCCI later merged with Dow Canada.
  - The Operating and Services Agreement (**OSA**) provided that "only the operator shall acquire ethane from the Pool Area..." (s. 5.1(a)).
  - If UCCI (Dow) acquired Ethane from the "Pool Area", NOVA was entitled to object if it did not consider those acquisitions to be in its best interests as a "Pool User" (s. 5.15). UCCI was then required to provide particulars of its ethane acquisition, make a cash payment to NOVA, and dispose of the contract objected to.
- **Issue:**
  - Were these provisions unenforceable as being anti-competitive or as a restraint on trade?

Competition Law

Dow Chemical Canada ULC and Dow Europe GmbH v NOVA Chemicals Corporation, 2018 ABQB 482

- **Decision:**
  - When objecting under s. 5.15 by NOVA was constrained by the general principle of good faith and the duty of honest performance. The court relied both on the terms of the agreements, as well as *Bhasin.*
  - Section 5.1(a) was interpreted to mean that NOVA was the sole buying agent for E3, and did not preclude Dow from making its own ethane purchases (i.e. Dow was only precluded from buying ethane for E3).
    - As such, no competition or restraint of trade issues arose.

Competition Law

Dow Chemical Canada ULC and Dow Europe GmbH v NOVA Chemicals Corporation, 2018 ABQB 482

- **Decision in the alternative cont'd:**
  - The clauses were unenforceable as a restraint on trade using the following test:

    (a) Does the covenant restrain trade?

    (b) Is the restraint against public policy and therefore void?

    (c) Can the restraint of trade be justified as reasonable in the interests of the parties?

    (d) Are the restrictions contrary to the public interest?

NRF

Competition Law

Dow Chemical Canada ULC and Dow Europe GmbH v NOVA Chemicals Corporation, 2018 ABQB 482

- **Decision in the alternative cont'd:**
  - The clauses were also in breach of the *Competition Act*, as they constitute an agreement to prevent or lessen competition (ss. 45 and 90.1).
  - Important comments related to the *Competition Act*:
    - The assessment per s. 45 is not limited to the time of contract as it is a continuing offence.
    - Prior approval of the project agreements and UCCI/Dow Canada merger by the Competition Bureau did not bind the Court of Queen's Bench.
    - The defence of ancillary restraint (i.e. restraint was directly related to, and necessary to give effect to a broader agreement) was not available given the minimum 80 year term of the agreements.
- **Implications:**
  - While under appeal, decision highlights that companies must remain diligent post-contract in identifying potential competition or restraint of trade concerns.

Damages/Limitations on Liability

Exclusion Clauses

- ***Dow Chemical Canada ULC and Dow Europe GmbH v NOVA Chemicals Corporation*, 2018 ABQB 482**
  - s. 14.1 of the OSA provides that the Operator shall have no liability for "Excluded Damages", including "indirect or consequential damages (including without limitation loss of profits…)"
- ***Atos IT Solutions v Sapient Canada Inc.*, 2018 ONCA 374**
  - Subcontract provided that: "NEITHER SUBCONTRACTOR NOR SAPIENT WILL BE LIABLE TO THE OTHER FOR INDIRECT, SPECIAL, CONSEQUENTIAL OR PUNITIVE DAMAGES OR FOR LOSS OF PROFITS (COLLECTIVELY, "EXCLUDED DAMAGES"), EVEN IF THE PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.
- **Issue:**
  - To what extent are lost profits excluded based on provisions such as these?

Damages/Limitations on Liability

Exclusion Clauses

- **Decisions:**
  - These clauses are only intending to exclude indirect or consequential lost profits; not all lost profits.
  - Both cases relied in part on *Hadley v. Baxendale*, which divided damages into:
    - those naturally arising from a breach of contract, which would have been contemplate by both parties at the time of contract (i.e. direct damages);
    - those which the defendant would not have contemplated but for the plaintiff advising of special circumstances (i.e. indirect/consequential damages).
  - The interpretation of terms such as “consequential” or “indirect” damages did not amount to an extricable question of law *(Atos*).
- **Implications:**
  - Carefully consider what you want when excluding lost profits – do not lump with consequential losses if intending to exclude all lost profits.

Taxation

Tusk Exploration Ltd. v Canada, 2018 FCA 121

- **Facts:**
  - The *Income Tax Act* (***ITA***) allows oil and gas companies to deduct Canadian Exploration Expenses (**CEE**) incurred in a year. A company may also choose to renounce those expenses through a flow-through share to arm's length shareholders. This gives the shareholder a deduction, though some taxes are charged to the company under s. 211.91 of the *ITA*.
- **Issue:**
  - What happens when a company renounces its CEE to non-arm's length shareholders, as occurred in the case of Tusk Exploration?
- **Decision:**
  - Shareholder is not entitled to a deduction.
  - The company was still liable to pay the additional tax, regardless of whether the renunciation was valid or not.

Torts

Scott & Associates Engineering Ltd. v Ghost Pine Windfarm LP, 2019 ABCA 2

- **Facts:**
  - Scott and Finavera worked together on a bid to purchase a windfarm. Finavera completed the purchase without involving Scott. Finavera later sold a portion of the project to Ghost Pine Windfarm. Scott sued Ghost Pine, alleging that it received and benefitted from Scott's confidential information.
- **Issue:**
  - Can a third party be liable for breach of confidence?
- **Decision:** Yes
  - If Ghost Pine knowingly received Scott's confidential information from Finavera and used that information in a manner not authorized by Scott, it would amount to a breach of confidence.
- **Implications:**
  - Do not assume it is safe to utilize confidential information where you have no direct connection to the source of that information – you may still be liable for breach of confidence.

Alternative Dispute Resolution

Heller v Uber Technologies Inc., 2019 ONCA 1

- **Facts:**
  - Mr. Heller commenced a proposed class action, seeking among other things, a declaration that those using the Uber's Driver App in Ontario were employees of Uber, (rather than contractors), were governed by the *Employment Standards Act,* and that the mandatory arbitration clause in their contracts was void and unenforceable.
- **Issue:**
  - Was the mandatory arbitration clause requiring all disputes be referred to private arbitration in Amsterdam and subject to Netherlands law valid?

Decision:

- Arbitration clause invalid because:
  - Illegal contracting out of the ESA; and
  - Unconscionable in any event because of the cost of overseas mediation and arbitration, relative to the driver's salary

Alternative Dispute Resolution

Heller v Uber Technologies Inc.

- **Implications**

  - Arbitration clauses allow parties to specify the location and applicable laws to a dispute, but care should be taken to consider potential arguments of unconscionability, especially in an employment context.

  - On May 23, 2019, the SCC granted leave to appeal.

Alternative Dispute Resolution

PQ Licensing S.A. v LPQ Central Canada Inc.

- **Issue:**
  - When mediation is required prior to arbitration, when does the limitations clock start to run?

- **Decision**:
  - After mediation. Either Party could have started the limitations clock by requesting mediation pursuant to the Franchise Agreement.

- **Implications:**
  - Drafters must consider limitation periods, especially when including multi-tier arbitration clauses. In this case, the issue arose in 2009. In , the arbitrator found that the limitations period began at the conclusion of the mediation, and not when the dispute first arose. Upheld by ONSC and ONCA.

Contract

Churchill Falls (Labrador) Corp. v Hydro-Quebec

- **Facts**:
  - In 1969, the Churchill Falls (Labrador) Corporation Limited and Hydro-Québec (HQ) signed a contract for the construction and operation of a hydroelectric plant (the **Contract**).
  - HQ agreed to purchase most of the electricity from the plant, whether or not it needed it.
  - Churchill agreed to sell the electricity to HQ at a fixed price for the entire term of the Contract (65 years).
  - After about 50 years, the fixed price set out in the Contract was significantly below market prices, resulting in huge profits for HQ.
  - Churchill sought an Order that the Contract be renegotiated and that its benefits be reallocated.
- **Issue:**
  - Does good faith require renegotiation of a contract when “unforeseen” market fluctuations change the landscape?

Contract

Churchill Falls (Labrador) Corp. v Hydro-Quebec

- **Decision**:
  - SCC dismissed Churchill's appeal 7:1.
    - HQ had no obligation to renegotiate the Contract to redistribute the windfall profits it obtained.
- **Implications:**
  - This decision serves as an important reminder that parties will be held to the terms of their agreement, even where events arising post-contract radically alter the magnitude of the benefits envisioned at the time of contract.
  - Those entering into long-term arrangements must carefully consider if aspects of their contract (such as pricing) should be subject to periodic review or renegotiation as circumstances change if they wish to avoid the risk.

Contract

Rosas v Toca

- **Facts**:
  - In January 2007, Ms. Rosas won approximately $4 million in the lottery and loaned $600,000 of these winnings to Ms. Toca. In July 2014, Ms. Rosas commenced an action against Ms. Toca seeking repayment of the loan.
  - Ms. Rosas asserted that the parties entered into multiple forbearance agreements to extend the repayment date. Specifically, each year, Ms. Toca would ask for another year to pay back the debt, with Ms. Rosas accepting the extension. However, as no additional consideration was provided.
  - At trial, forbearance agreements were found to be invalid, and Ms. Rosas' claim statute-barred.
- **Issue:**
  - Are the forbearance agreements valid?
  - Is Ms. Rosa's claim statute barred?

Contract

Rosas v Toca

- **Decision:**
  - A majority of the Court of Appeal overturned the trial judgment, finding that the variations to the payment date were enforceable regardless of a lack of consideration.
- **Test:**
  - When parties to a contract agree to vary its terms, the variation should be enforceable without fresh consideration, absent duress, unconscionability, or other public policy concerns, which would render an otherwise valid term unenforceable. A variation supported by valid consideration may continue to be enforceable for that reason, but a lack of fresh consideration will no longer be determinative. In this way the legitimate expectations of the parties can be protected. To do otherwise would be to let the doctrine of consideration work an injustice (para 4).

Contract

GSI v Encana Corporation & GSI v Murphy Oil Company Limited

- The saga continues…
- **EnCana**:
  - Confirmed GSI's obligation to make reasonable inquiries about its rights to avoid Limitations.
  - "required by law" included applications for allowable credit expenditures
- **Murphy:**
  - "supersede" = replace

Indigenous

Tsleil-Waututh Nation v Canada (Attorney General)

- **Facts:**
  - In 2013, Trans Mountain submitted an application to the NEB to proceed with the expansion of the Trans Mountain pipeline system.
  - Following an extensive review and public hearing process by the NEB under its enabling legislation and the *Canadian Environmental Assessment Act*, cabinet accepted the NEB's recommendation and issued a Certificate of Public Convenience and Necessity approving the Project, subject to conditions.
  - The Governor in Council stated its satisfaction with Canada's consultation process, finding it to be consistent with the honour of the Crown and further finding that the Indigenous concerns had been appropriately accommodated.
  - A number of First Nations, two cities, and two non-governmental organizations commenced applications for judicial review challenging cabinet's decision to approve the Project.

Indigenous

Tsleil-Waututh Nation v Canada (Attorney General)

- **Decision**:
  - Federal Court of Appeal quashed the approval of the project and remitted it to the Governor in Council for redetermination on the basis that the Governor in Council failed by unreasonably relying on the NEB's report, which incorporated a "critical error" at the Project scoping stage by unjustifiably excluding the potential increase in tanker traffic from the scope of its review of the Project.
  - The Court held that Canada failed to adequately discharge its duty to consult and accommodate.
  - The Court explained that, although Canada could rely on the NEB's process to fulfil the Crown's duty to consult, it could not do so unwaveringly. When real concerns were raised about the hearing process or the NEB's findings, Canada was required to dialogue meaningfully about those concerns.
  - SCC denied leave to appeal.

Indigenous

Mikisew Cree First Nation v Canada (Governor General in Council)

- **Facts**:
  - In April 2012, the Minister of Finance introduced two pieces of omnibus legislation, Bills C-38 and C-45, that altered Canada's environmental protection regime.
  - Mikisew brought an application for judicial review in Federal Court, arguing that, as the legislation was developed by a cabinet member and could adversely affect Mikisew's treaty rights, Mikisew should have been consulted about the legislation.
- **Decision**:
  - 4/7 Majority Justices held that while courts have the power to nullify enacted legislation that is inconsistent with Canada's Constitution and quash executive decisions based on that legislation, courts cannot rule on challenges to the process by which that legislation is formulated, introduced or enacted.
  - 3/7 Majority Justices held that, simply because the duty to consult doctrine is inapplicable in the legislative sphere, does not mean the Crown is absolved of its obligation to conduct itself honourably.

Indigenous

Mikisew Cree First Nation v Canada (Governor General in Council)

- **Implications:**
  - The Supreme Court of Canada's split decision in Mikisew Cree has left uncertainty with respect to whether remedies are available as against the legislature.
  - While 7 of 9 Justices agreed that the duty to consult is not triggered during the law-making process, a separate majority contemplated court challenges where the enactment of legislation is inconsistent with the honour of the Crown.

Summary Dismissal

Weir-Jones Technical Services Incorporated v. Purolator Courier Ltd

a) **Genuine Issue for Trial**: Having regard to the state of the record and the issues, is it possible to fairly resolve the dispute on a summary basis, or do uncertainties in the facts, the record or the law reveal a genuine issue requiring a trial?

b) **Standard of Proof:** Has the moving party met the burden on it to show that there is either “no merit” or “no defence” and that there is no genuine issue requiring a trial? At a threshold level the facts of the case must be proven on a balance of probabilities or the application will fail, but mere establishment of the facts to that standard is not a proxy for summary adjudication.

c) **Shifting Burden:** If the moving party has met its burden, the resisting party must put its best foot forward and demonstrate from the record that there is a genuine issue requiring a trial. This can occur by challenging the moving party’s case, by identifying a positive defence, by showing that a fair and just summary disposition is not realistic, or by otherwise demonstrating that there is a genuine issue requiring a trial. If there is a genuine issue requiring a trial, summary disposition is not available.

d) **Judicial Discretion:** In any event, the presiding judge must be left with sufficient confidence in the state of the record such that he or she is prepared to exercise the judicial discretion to summarily resolve the dispute.

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