RECENT JUDICIAL DECISIONS OF INTERST TO ENERGY LAWYERS

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The past year was a busy one for the energy industry, with many reported decisions of significance. Key decisions regarding constitutional jurisdiction, duty to consult and judicial review kept the industry in a pattern of optimism and hesitancy. This article summarizes a number of recent judicial decisions and provides commentary on their significance to Canada's energy industry. In particular, decisions reviewed in this article cover subjects including constitutional division of powers, the Crown's duty to consult, oil and gas leases and purchase and sale agreements, environmental remediation and liability, insolvency, intellectual property, tax, remedies and injunctive relief, class actions, conflict of laws, arbitration and judicial review. In each case, the facts, a summary of the decision, and commentary on the outcomes and future implications for energy lawyers and the industry are canvassed.[3] With the past year of decisions finishing with COVID-19 restrictions, the energy industry saw some of the most drastic change in recent memory. The industry will need to exercise perseverance in these tumultuous times in order to adapt, withstand and recover from the changes of this past year.

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I. CONSTITUTIONAL

Increasing interest by provincial and federal governments to regulate various aspects of the environment and climate change, including oil transportation, greenhouse gas ("**GHG**") emissions regulation, and environmental assessments, has led to a proliferation of division of powers disputes. This past year, the Supreme Court of Canada ("**SCC**") firmly rebuked British Columbia's ("**BC**") attempt to regulate the interprovincial transportation of heavy oil. Additionally, the Quebec Court of Appeal ("**QCCA**") reaffirmed important principles related to the jurisdiction of environmental assessments while also adding some clarity to the often murky doctrine of interjurisdictional immunity ("**IJI**"). Finally, three appeal Courts rendered decisions on the carbon tax, with all but the Alberta Court of Appeal ("**ABCA**") holding that the law is constitutional. The

SCC is expected to hear this matter in September, 2020.

Reference Re Greenhouse Gas Pollution Pricing Act (Saskatchewan, Ontario, and Alberta)[4]

BACKGROUND

In 2019 and 2020, the Saskatchewan Court of Appeal ("**SKCA**"), the Ontario Court of Appeal ("**ONCA**") and the ABCA released their reference decisions on the constitutionality of the federal *Greenhouse Gas Pollution Pricing Act* ("**GGPPA**").[5] Both the ONCA and SKCA found that the GGPPA was a valid exercise of federal power under the national concern branch of the peace, order, and good government power ("**POGG**"),[6] while the ABCA provided a strong rebuke of this conclusion, holding that POGG could not support such a broad subject matter without significantly infringing into provincial jurisdiction.[7] The case is now before the SCC, which is tasked with resolving a critical division of powers issue between the federal and provincial governments over the regulation of GHG emissions.

FACTS

The GGPPA operates through the imposition of a levy on the use of fossil fuels and sets minimum GHG reduction standards nationally. Provinces may either elect to fall under the GGPPA, or enact their own legislation with equal, or more stringent, reduction targets. The GGPPA is targeted at both: (1) fossil fuel consumption generally by imposing a monetary charge to businesses that produce or import fuels that cause GHG emissions; and (2) industrial emitters by pricing GHG emissions on an output-based system.

DECISIONS

In each reference, appeal courts applied the standard division of powers framework to the GGPPA; first characterizing the GGPPA's "pith and substance",[8] and then classifying it within a head of power under sections 91 or 92 of the *Constitution Act, 1867*.[9] The majorities at the ONCA and SKCA characterized the GGPPA's matter narrowly, as the establishment of minimum national standards of price stringency, while the ABCA defined the matter more broadly, as the regulation of GHG emissions generally. These competing characterizations ultimately led to different classifications, causing the ABCA to hold that the GGPPA could not be sustained under a federal head of power, including POGG.

SKCA Reference

The GGPPA was challenged on the grounds that it imposes a tax, the application of which is determined by the Governor in Council ("**GIC**"), and because it offends the *Constitution Act, 1867* by creating a tax authorized by the GIC and not Parliament.[10] The SKCA held that the GGPPA does not create a tax, but instead a regulatory charge as the statute could achieve its ends without

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[4] *Reference Re Greenhouse Gas Pollution Pricing Act (Saskatchewan, Ontario, and Alberta*), 2019 ONCA 544 ["**ONCA Reference"**]; 2019 SKCA 40 ["**SKCA Reference"**]; 2020 ABCA 74 ["**ABCA Reference**"]
[5] *ONCA Reference; SKCA Reference; ABCA Reference, supra.*
[6] *SKCA Reference, supra* at paras 114 – 117; *ONCA Reference, supra* at para 3.
[7] *ABCA Reference, supra* at para 21.
[8] *SKCA Reference, supra* at para 55; *ONCA Reference supra* at paras 67-70; *ABCA Reference, supra* at para 143.
[9] *SKCA Reference, supra* at paras 56-57; ONCA *Reference, supra* at paras 67-70; *ABCA Reference, supra* at para 143.
[10] *SKCA Reference, supra* at para 8.

raising funds and is wholly disinterested in generating revenue.[11]

On the issue of POGG, the SKCA applied the test set out in *R v Crown Zellerbach*[12] and determined that the matter, setting of minimum standards of price stringency for GHG emissions, could be supported by the national concern branch.[13] In doing so, the SKCA emphasized the "singleness, distinctiveness, and indivisibility"[14] prong of the national concern branch to find that, without a concerted provincial effort to address GHG emissions, legislative action in Canada would be conducted in piecemeal fashion and ultimately be ineffective.[15]

ONCA Reference

On the issue of POGG, the ONCA applied similar reasoning, placing considerable weight on provincial indivisibility, holding that "[w]hile a province can pass laws in relation to GHGs emitted within its own boundaries, its laws cannot affect greenhouse gases emitted by polluters in other provinces – emissions that cause climate change across all provinces and territories".[16] The dissent, foreshadowing aspects of the ABCA decision that followed, disputed this argument and held that "[t]here are many things that individual provinces cannot establish, but it does not follow that those things are matters of national concern on that account. If it were otherwise, any matter could be transformed into a matter of national concern simply by adding the word 'national' to it".[17]

ABCA Reference

The ABCA breathed some life into the dissenting opinions from the SKCA and ONCA, holding that the GGPPA represents an unconstitutional "Trojan Horse" that would "forever alter the constitutional balance" between the provinces and territories.[18] The ABCA majority differed from the SKCA and ONCA majorities in three key respects. First, it characterized the GGPPA more broadly as relating to the regulation of GHG emissions generally.[19] Second, it interpreted the scope of POGG more narrowly, holding that "it is not a grand entrance hall into every head of provincial power" and only applies to matters "local and private in nature in a province", which are *not* enumerated in the *Constitution Act.*[20] Third, it held that the provincial inability test does not relate to the *consequences* of provincial inaction but rather provinces' *jurisdictional ability* to enact a challenged scheme on their own. Accordingly, placing the GGPPA under POGG would allow it to "intrude deep into the provinces' exclusive jurisdiction over property and civil rights".[21]

COMMENTARY

Due to COVID-19 hearing suspensions, appeals to the SCC were adjourned to September. Before the SCC will be two different articulations of GGPPA's pith and substance and the proper scope of POGG. At its core, the ABCA's decision represents a strong and robust articulation of provincial rights, interpreting the GGPPA broadly and the scope of POGG narrowly, while the ONCA and

[11] *SKCA Reference*, *supra* at paras 87 and 97.
[12] *R v Crown Zellerbach Canada Ltd*, [1988] 1 SCR 401.
[13] *SKCA Reference*, *supra* at para 125.
[14] *SKCA Reference*, *supra* at paras 153-158.
[15] *SKCA Reference*, *supra* at paras 153-158.
[16] *ONCA Reference*, *supra* at para 117.
[17] *ONCA Reference*, *supra* at para 229.
[18] *ABCA Reference*, *supra* at para 22.
[19] *ABCA Reference*, *supra* at paras 252-256.
[20] *ABCA Reference*, *supra* at paras 166-182.
[21] *ABCA Reference*, *supra* at para 333.

SKCA decisions interpret the GGPPA narrowly and invite a broader application of POGG. If the SCC adopts the reasoning of the ABCA, it will significantly restrict federal ability to regulate GHG emissions, and potentially other environmental matters, under POGG. The lasting implications will be significant for future development of energy projects in Canada, as well as other reference decisions making their way through the courts, including the ABCA's upcoming reference hearing on the constitutionality of the recently enacted *Impact Assessment Act*.[22]

Reference re Environmental Management Act (British Columbia)[23]

BACKGROUND

On January 16, 2020, the SCC unanimously dismissed BC's attempt to regulate the transportation of heavy oil through the province. The nine-member panel delivered a rare oral decision from the bench, stating that it agreed with the British Columbia Court of Appeal's ("**BCCA**") reasons. This strong, unanimous decision provided much needed legal clarity on federal-provincial energy jurisdiction and removed a major potential hurdle for the completion of the Trans Mountain Pipeline Project (the "**TMX Project**").

FACTS

As part of a larger response to the TMX Project, which will considerably increase the flow of heavy oil from Alberta to BC's coast, the BC government proposed changes to the *Environmental Management Act*[24] (the "***EMA***") in April of 2018. The changes would prohibit the possession, charge, or control of heavy oil in BC without a provincial permit. Premier Horgan referred the matter to the BCCA in response to political controversy and concerns over the constitutionality of the proposed amendments.

DECISION

The BCCA unanimously held that the amendments were outside the scope of provincial jurisdiction as they primarily focused on a federal interprovincial undertaking.[25] Largely agreeing with the federal government's position, the BCCA determined that the pith and substance of the amendments related to the regulation of the TMX Project, which is designed to carry heavy oil from Alberta to tidewater.[26] The amendments, therefore, fell outside of provincial jurisdiction. The BCCA further held that the amendments were not a law of general application and effectively only regulated the TMX Project and certain railcars that export heavy oil to tidewater.[27] It further held that the "default position of the law" represented "an immediate and existential threat to a federal undertaking", which could "hardly be described as incidental or ancillary effects".[28]

The BCCA also noted that it would be impractical for "different laws and regulations to apply to an interprovincial pipeline every time it crosses a border", as it would stymie its operation by forcing it to "comply with different conditions governing its route, construction, cargo, safety

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[22] *Impact Assessment Act*, SC 2019, c 28 s 1.
[23] *Reference re Environmental Management Act (British Columbia)*, 2019 BCCA 181 [*"BCCA Reasons*"] leave to appeal denied, 2020 SCC 1 ["*SCC Decision*"].
[24] *Environmental Management Act*, SBC 2003, c 53.
[25] *BCCA Reasons*, *supra* at summary.
[26] *BCCA Reasons*, *supra* at paras 101 and 105.
[27] *BCCA Reasons*, *supra* at para 101.
[28] *BCCA Reasons*, *supra* at para 97.

measures, spill prevention, and the aftermath of an accidental release of oil".[29] Parliament was given exclusive jurisdiction to regulate these matters, "allowing a single regulator to consider interests and concerns beyond those of individual provinces".[30]

The BCCA concluded that "at the end of the day, the National Energy Board ("**NEB**") is the body entrusted with regulating the flow of energy resources across Canada to export markets. Although the principle of subsidiarity has understandable appeal, the TMX project is not only a 'British Columbia project.' The project affects the country as a whole, and falls to be regulated taking into account the interests of the country as a whole".[31]

COMMENTARY

The SCC's affirmation of the BCCA's decision provides legal clarity on regulatory jurisdiction over federal undertakings. In substance, the decision was the strongest possible signal for project proponents, as it agreed with the BCCA's decision that the proposed amendments ought to fall at the validity stage of the division of powers analysis, holding outright that provinces do not have constitutional authority to regulate interprovincial pipelines, without having to apply the complex doctrines of IJI and federal paramountcy. This decision removed a major potential legal obstacle facing the TMX Project, and potentially for other future projects.

Attorney General of Quebec v IMTT-Quebec Inc.[32]

BACKGROUND

This decision applied the IJI doctrine in the context of the provincial environmental assessment process in Quebec for port operations. The case is notable for its commentary on certain aspects of IJI, holding that courts should not be excessively narrow in searching for analogous precedents when determining whether the doctrine applies. While this decision does not directly involve energy, its potential expansion of the doctrine of IJI has implications for federal undertakings, including pipelines and rail.

FACTS

IMTT-Quebec Inc ("**IMTT**") built seven installations on port lands leased from the Quebec Port Authority ("**QPA**") without undergoing a provincial environmental assessment.

As a result, Quebec brought a motion seeking an injunction requiring that the company obtain authorization. The trial judge dismissed the motion on the basis that IMTT's activities were carried out on federal property and closely linked to federal jurisdiction over navigation and shipping. Consequently, the *Environment Quality Act*[33] ("***EQA***") did not apply to IMTT. Quebec appealed the Quebec Superior Court decision ("**QCSC**"). The question on appeal was whether certain provisions of the *EQA* were inapplicable or inoperative with respect to IMTT's operations.

DECISION

The QCCA affirmed the trial judge's finding that IMTT's activities were carried out on federal property and closely linked to matters under federal jurisdiction. Jurisprudence indicated that the

[29] *BCCA Reasons, supra* at para 101.
[30] *BCCA Reasons, supra* at para 101.
[31] *BCCA Reasons, supra* at para 104.
[32] *Attorney General of Quebec v IMTT-Quebec INC.*, 2019 QCCA 1598 ["*IMTT*"].
[33] *Environmental Quality Act,* CQLR, c Q-2

doctrine of IJI applied, such that the authorization process stipulated in the *EQA* did not apply to IMTT to the extent that the company operated installations for navigation and shipping purposes only.[34]

In arriving at this conclusion, the QCCA embarked on a lengthy review of the doctrine of IJI, and in particular, on how provincial environmental assessments interact with federal undertakings. As a starting point, it noted that *Canadian Western Bank v Alberta*[35] provided that IJI should be limited to "situations already covered by precedent".[36] Since IJI operates to protect "core" federal powers against provincial intrusions, the precedent requirements asks courts to locate a precedent identifying a "core" power in question.[37]

This question of precedent has been the source of some confusion and was the subject of debate in various facta before the *BC Reference Case*, discussed above.[38] The QCCA provided some clarification on this point, holding that: (1) "the type of provincial statute…against which [IJI] is raised is not a material factor in seeking out a precedent",[39] (2) it is "possible to obtain a clear answer [as to what constitutes a core power] by analogy between similar situation",[40] and (3) new core powers can be discovered.[41] Accordingly, directly on point precedent is not necessarily required and the task of the court is to "seek out a clear body of jurisprudence regarding the elements comprising the "core of a head of power".[42]

COMMENTARY

From a division of powers perspective, this decision is interesting as it considers to what degree previous precedent is required as a precondition to applying IJI to core federal powers. This requirement is the subject of some confusion and debate, particularly when trying to apply IJI to federal activities where a "core" has not been previously identified in the jurisprudence. This is particularly relevant to federal undertakings such as interprovincial pipelines where much of what comprises the "core" of that federal power has yet to be formally established. While submissions were made on this point in the *BC Reference* decisions, discussed above, the BCCA and SCC had resolved the matter at the validity stage and therefore did not consider IJI. In any event, the decision in *IMTT* may be useful in future interprovincial pipeline litigation as it represents a more flexible view of IJI's application.

II. ABORIGINAL

This past year witnessed important developments and clarifications related to the Crown's duty to consult and the respective responsibilities of the federal and provincial governments, and administrative tribunals and other delegates that hear matters touching upon that duty. The SCC upheld a Federal Court of Appeal ("**FCA**") decision which dismissed certain indigenous legal challenges to the TMX Project, clearing the way for the project to proceed, while reaffirming that

[34] *IMTT*, *supra* at para 4.
[35] *Canadian Western Bank v Alberta* 2007 SCC 22 ["*Canadian Western Bank*"].
[36] *IMTT*, *supra* at para 170.
[37] *IMTT*, *supra* at para 170.
[38] While the proper role of IJI was discussed in various facta, the BCCA and SCC declined to consider the doctrine, having found that the amendments were *ultra vires* at the first stage of the division of powers analysis.
[39] *IMTT*, *supra* at para 172.
[40] *IMTT*, *supra* at para 177.
[41] *IMTT*, *supra* at para 174.
[42] *IMTT*, *supra* at para 178.

the duty to consult does not equate to a veto over projects. Further, both the ABCA and BCCA addressed duty to consult issues related to various resource projects that were being considered by those provinces, further contributing to the growing body of case law on the scope of the duty to consult.

Coldwater Indian Band et al v Attorney General of Canada[43]

BACKGROUND

This case concerned an application for judicial review by several parties that challenged the second approval of the TMX Project. The review related to whether the Crown had adequately addressed deficiencies in its consultation efforts with First Nations prior to the second approval of the TMX Project.

FACTS

In November 2016, Canada approved the TMX Project as being in the public interest; however, several parties launched court challenges alleging that the Crown had failed to adequately discharge its duty to consult. In its 2018 decision, the Federal Court ("**FC**") found that the TMX Project's environmental assessment was deficient and that the Crown failed to fulfil its duty to consult.[44] Accordingly, Canada initiated a reconsideration hearing and continued Indigenous consultations as set out in the 2018 FC decision. The GIC again approved the TMX Project on June 22, 2019. Several parties sought judicial review on the same grounds as those in the initial FC decision. The FCA granted leave to hear the judicial review of the second TMX Project approval.[45]

DECISION

The FCA dismissed the appeal, finding no basis for interfering with the GIC's second authorization of the TMX Project. It noted that all applicants essentially argued that something more than a "specific and focussed [and] brief and efficient" process of consultation was necessary.[46] Rather, the FCA articulated that the focus of the case was not to adjudicate the case but rather to consider whether the GIC could reasonably have concluded that the flaws identified in the 2018 decision were addressed by the renewed consultation.[47]

In reviewing Canada's re-approval of the TMX Project, the FCA considered the empowering legislation, the jurisprudence surrounding the Crown's duty to consult, the relevance of post-approval consultation and the importance of the matter to those impacted by the TMX Project. The FCA held that, in light of the outcome reached on the facts and the law, the GIC's decision was reasonable.

In reaching this decision, the FCA commented that

> "The applicants' submissions are essentially that the Project cannot be approved until all of their concerns are resolved to their satisfaction. If we accepted those submissions, as a practical matter, there would be no end to consultation, the Project

[43] *Coldwater Indian Band et al v Attorney General of Canada*, 2020 FCA 34 ["*Coldwater*"].
[44] *Tsleil-Waututh Nation v Canada (Attorney General),* 2018 FCA 153.
[45] See *Raincoast Conservation Foundation v Canada*, 2019 FCA 224.
[46] *Coldwater, supra* at para 18.
[47] *Coldwater, supra* at para 64.

would never be approved, and the applicants would have a de facto veto right over it."[48]

The FCA added that the Crown's consultation efforts represented "a genuine effort in ascertaining and taking into account the key concerns of the applications, considering them, engaging in a two-way communication, and considering and sometimes agreeing to accommodations, all very much consistent with the concepts of reconciliation and the honour of the Crown".[49]

The SCC denied a leave to appeal application on July 2, 2020.[50]

COMMENTARY

This decision represented a major victory for the TMX Project that has been engaged in years of litigation. The federal government has done much to continue on with the TMX Project, which has now proceeded with construction. This decision also provides some clarity with respect to the Crown's consultation obligations, by emphasizing that Indigenous groups do not have a veto power over projects.

William v British Columbia (Attorney General)[51]

BACKGROUND

The BCCA considered an appeal relating to whether BC had satisfied its duty to consult with respect to its decision to approve an exploratory drilling program ("**Exploratory Drilling**") by Taseko Mines Limited ("**TML**") in traditional Tsilhqot'in territory.

FACTS

The Xeni Gwet'in First Nations Government and the Tsilhqot'in Nation are holders of certain Aboriginal hunting and trapping rights in the area of the Exploratory Drilling. The targeted area may contain some of the world's largest gold and copper deposits in the world.

In 2010, BC released an environmental assessment certificate for the original project. However, the original project was rejected by the federal government due to adverse environmental effects. TML then submitted a revised project to the federal government, which was also denied. TML applied for judicial review of the federal decision.

While this judicial review was underway, TML applied to the province for the Exploratory Drilling. Notwithstanding the federal government's two rejections of the broader project, BC granted approval. The applicants sought judicial review of this decision, arguing that the province had failed to discharge its duty to consult. The trial judge held that BC's decision to approve the Exploratory Drilling was reasonable and that the Crown had discharged its duty to consult.

DECISION

The BCCA was tasked with determining whether the trial judge erred by: (1) concluding that the province did not breach its procedural duty to consult and accommodate; (2) upholding the province's approval based on a purpose which did not form any part of the consultation; and (3) concluding that the province did not breach its substantive duty to consult and accommodate by

[48] *Coldwater, supra* at para 86.
[49] *Coldwater, supra* at para 76.
[50] *Coldwater Indian Band, et all v Attorney General of Canada, et al*, 2020 Carswell Nat 2337.
[51] *William v British Columbia (Attorney General)*, 2019 BCCA 74 ["*Williams*"].

unreasonably approving the Exploratory Drilling.[52]

The BCCA determined at the outset that, given the serious impacts on Indigenous hunting and trapping rights, deep consultations were required to discharge the Crown's duty to consult.[53] Further, it stated that the "crux of the dispute is that the parties are unable to reconcile their differences because of an honest but fundamental disagreement over whether the project should be permitted to proceed."[54]

The BCCA dismissed the first two grounds of appeal, which were procedural in nature, holding that the Senior Inspector took into account the position of the parties, provided a reasonable explanation of why their positions were not accepted, and properly based its decision on the need to inform a future environmental assessment process.

The BCCA also dismissed the provinces' substantive decision to approve the Exploratory Drilling, holding that Senior Inspector's decision was reasonable. In forming this conclusion, the BCCA noted that "in this case, reconciliation cannot be achieved because of an honest disagreement over whether the project should proceed. The process of consultation was adequate and reasonable in the circumstances. The fact that the Tsilhqot'in position was not accepted does not mean the process of consultation was inadequate or that the Crown did not act honourably".[55] This holding was predicated on the important principle that the duty to consult "guarantees a process not a particular result".[56]

On June 13, 2019, the SCC dismissed the application for leave to appeal.[57]

COMMENTARY

Consistent with the FCA's decision in *Coldwater,* discussed above, this decision upholds the principle that a fundamental disagreement between the Crown and aboriginal rights holders does not necessarily indicate that the consultation process was inadequate. The adequacy of the duty to consult may be upheld even where the parties cannot reach agreement. This decision contributes to the growing body of case law etching out the parameters of the duty to consult in the context of reconciliation, while reaffirming the important principle that this duty guarantees a process not a substantive result.

Athabasca Chipewyan First Nation v Alberta[58]

BACKGROUND

In this decision, the ABCA dismissed a judicial review appeal from the Athabasca Chipewyan First Nation ("**ACFN**") regarding a proposed project in Treaty 8 territory.

FACTS

The ACFN filed a statement of concern regarding a proposed pipeline project in Treaty 8 territory. The Aboriginal Consultation Office ("**ACO**") determined that the project did not trigger the

[52] *Williams, supra* at para 2.
[53] *Williams, supra* at para 38.
[54] *Williams, supra* at para 39.
[55] *Williams, supra* at para 56.
[56] *Williams, supra* at para 41.
[57] *Chief Roger William on his own behalf and on behalf of all other members of the Xeni Gwet'in First Nations Government and the Tsilhqot'in Nation v. Attorney General of British Columbia, et al.*, 2019 CarswellBC 1698..
[58] *Athabasca Chipewyan First Nation v Alberta*, 2019 ABCA 401 ["*ACFN*"].

Crown's duty to consult. The ACFN applied for judicial review of that determination. The chambers judge held that the ACO has the authority to decide whether the Crown's duty to consult is triggered, and further held that taking up of land by the Crown in a treaty area does not, in itself, adversely affect treaty rights. The ACFN appealed this decision, thereby raising the following two questions: (1) whether the ACO has any authority in law to make the decision on whether the duty to consult is triggered; and (2) whether the "mere" act of taking up land by the Crown in a treaty area is sufficient to trigger the duty to consult.[59]

DECISION

The ABCA outlined the steps that the project proponents had undertaken with respect to consulting eight First Nations as well as notifying 33 additional First Nations, including the ACFN. Once the ACO was aware of the ACFN's statement of concern, it issued a report to the ACFN and asserted there was no duty to consult with respect to the pipeline project.

The ABCA confirmed that the ACO has the authority to decide when the duty to consult is triggered, stating that the Minister of Indigenous Relations is part of the Crown, and the ACO exercises the Minister's authority with respect to consultation. Accordingly, the ACO fell under the umbrella of the Crown and has the authority to decide if the duty to consult is required, guided by various written policies.[60]

On the second ground of appeal, the ABCA confirmed that merely taking up land in Treaty 8 does not trigger a duty to consult all Treaty 8 Nations. Relying upon *Mikisew Cree First Nation v Canada*,[61] the ABCA found that adverse effects to the rights of all Treaty 8 Nations cannot be presumed simply because the Crown takes up lands anywhere within Treaty 8 lands. Rather, there must be a contextual analysis to determine if the taking up of lands adversely affects a First Nation's right to hunt, fish and trap. If so, the duty to consult is triggered.

COMMENTARY

The ABCA's decision provides clarity and certainty that the ACO, and other Crown delegates, are empowered to administer and discharge the Crown's consultation obligations. The decision further confirms that an adverse effect on aboriginal treaty rights is necessary to trigger a duty to consult, but that the taking up of any land within a treaty area will not necessarily give rise to the duty to consult all First Nations within a given treaty area. In doing so, the ABCA reaffirmed the contextual analysis laid down in *Mikisew Cree.*

Fort McKay First Nation v Prosper Petroleum Ltd.[62]

BACKGROUND

In this decision, the ABCA held that boards and tribunals are responsible for upholding the honour of the Crown where their decisions may affect an aboriginal right, regardless of whether it also assesses Crown-aboriginal consultations. The decision, while unique due to various promises made by the Alberta government, expands the potential scope of considerations for boards and tribunals when adjudicating on questions where negotiations with First Nations or an aboriginal right is asserted.

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[59] *ACFN, supra* at para 30.
[60] *ACFN, supra* at para 52.
[61] *Mikisew Cree First Nation v Canada*, 2005 SCC 69 ["*Mikisew Cree"*].
[62] *Fort McKay First Nation v Prosper Petroleum Ltd.*, 2020 ABCA 163 [*"Fort McKay*"].

FACTS

This decision is an appeal by the Fort McKay First Nation ("**FMFN**") to the ABCA following the Alberta Energy Regulator's ("**AER**") June 2018 approval of Prosper Petroleum Ltd.'s ("**Prosper**") application to build its proposed 10,000 barrel per day Rigel oil sands bitumen recovery project (the "**Prosper Project**") within five kilometres of FMFN Reserves.

For some years prior to the AER's decision, Alberta and the FMFN had been taking part in ongoing negotiations to develop the Moose Lake Access Management Plan ("**MLAMP**") to address the cumulative effects of oil sands development on the First Nation's Treaty 8 rights. The FMFN began negotiations with Alberta in 2001 to develop a plan protecting its traditional lands in the form of the MLAMP. The MLAMP was to be subsumed into the Lower Athabasca Regional Plan ("**LARP**"), and became a legally binding document. The FMFN specifically sought a 10-kilometre buffer zone around their lands from oil sands development as it had already lost 70% of its traditional lands to the development. Alberta initially denied this request, but in 2014 Alberta's then Premier Jim Prentice committed to completing the MLAMP with provisions creating a 10-kilometre buffer zone under the LARP by September 30, 2015.

The principal question before the AER was whether the Prosper Project was in the public interest. The AER panel therefore addressed the Prosper Project's safety, efficiency and its effects on existing aboriginal rights. Given the 10-kilometre buffer zone, the FMFN took issue with the Prosper Project's proximity to its reserve lands. While the AER found that the Prosper Project would disrupt the First Nations' connection to the land, it held this was not an impact on a Treaty 8 right, and there was little real evidence to suggest infringement of an aboriginal right otherwise. Ultimately, the panel found the Prosper Project was in the public interest. In doing so, it declined to consider the MLAMP negotiations and the "Prentice Promise" 10-kilometre buffer zone as the negotiations had not yet concluded. Further, the panel held that the Alberta Cabinet was required to assess the adequacy of project consultations and the honour of the Crown as it was statute-barred from doing so itself.

DECISION

FMFN appealed the decision, arguing the AER committed an error of law or jurisdiction by failing to consider the honour of the Crown and failing to delay approval of the Prosper Project until the FMFN's negotiations with Alberta about the MLAMP were completed.

The ABCA allowed the appeal, finding that while the AER may be statute-barred from assessing the adequacy of Crown-aboriginal consultation, the AER was not relieved of its duty to assess the honour of the Crown.[63] The ABCA held that, where empowered to consider questions of law, and without a clear demonstration that the legislature intended to exclude such jurisdiction, tribunals also have the implied jurisdiction to consider issues of constitutional law as they arise. This is especially so where the board or tribunal is assessing the public interest.[64]

In the context of projects that may affect aboriginal rights and therefore touch on constitutional duties, the ABCA further held that a project clearly cannot be in the public interest if it breaches constitutionally-protected aboriginal rights. While the AER was statute-barred from assessing the adequacy of Crown consultation, it was by no means restricted from assessing the duty to uphold the honour of the Crown, which is a procedural, instead of substantive consideration, and therefore

[63] *Fort McKay, supra* at paras 39-44.
[64] *Fort McKay, supra* at paras 39-44.

broader than consultation.[65]

As the FMFN and Alberta agreed on the letter of intent which created the "Prentice Promise", and MLAMP negotiations were underway, completing the Prosper Project in the zone that was subject to negotiations would serve to directly circumvent, and render ineffectual, the negotiations themselves. This was clearly at odds with the honour of the Crown.

Further, as the AER had deferred the assessment of the adequacy of consultation to the Cabinet, the ABCA also held the AER cannot avoid its statutory duty to assess the public interest by simply deferring to the Cabinet. The requirement of Cabinet approval does not immunize the AER from its requirement to consider the MLAMP negotiations and related issues insofar as they implicate the honour of the Crown. The ABCA therefore held there was no basis by which to decline to address the MLAMP as a consideration in the public interest. The appeal was allowed, the AER decision vacated, and the case was remitted back to the AER to rehear the matter, considering the honour of the Crown and the MLAMP process.

COMMENTARY

This decision requires boards and tribunals to consider and address the honour of the Crown when deliberating on the public interest. That consideration is even more poignant where some level of Crown-aboriginal negotiations are underway that touch on the subject matter of the hearing. Depending on the facts of the case before a board, the honour of the Crown may need to be assessed as a separate item to that of consultation alone. Project proponents and governments should also note that negotiations, governmental promises, letters of intent, or other similar indications may be understood as reflecting on the honour of the Crown in the regulatory context. Further, in some circumstances, this may strengthen governmental promises to the extent that they contemplate some form of action vis-à-vis a First Nation.

III. Environmental Remediation and Liability

A number of decisions were rendered in the previous year dealing with environmental remediation and liability, which demonstrate that parties can benefit from clarity in their private agreements as to who bears the burden of environmental remediation in the context of purchase and sale agreements, indemnities and contracts for service to maintain infrastructure that may cause environmental damage. Further, the courts have confirmed that parties responsible for maintenance on pipelines or other infrastructure that may cause environmental damage ought to diligently abide by the terms of their contract and perform work prudently to avoid liability.

ConocoPhillips Canada Resources Corp v Shell Canada Limited[66]

BACKGROUND

ConocoPhillips concerns a complex dispute over ownership of five abandoned wells in the Mackenzie Delta. Master Hanebury of the Court of Queen's Bench of Alberta ("**ABQB**") applied the principles in last year's *Weir-Jones Technical Services Incorporated v. Purolator Courier Ltd*.[67], holding that it was appropriate to grant the application for summary judgment. The ABQB found that on the terms of the asset purchase agreement, Shell had obtained abandoned oil wells

[65] *Fort McKay*, *supra* at paras 46-58.
[66] *ConocoPhillips Canada Resources Corp v Shell Canada Limited*, 2019 ABQB 727 ["*Conoco*"].
[67] *Weir-Jones Technical Services Incorporated v. Purolator Courier Ltd*., 2019 ABCA 49 ["*Weir-Jones*"].

and associated environmental liabilities in addition to the valuable assets in the area.

FACTS

Two companies, ConocoPhillips Canada Resources Corp. ("**Conoco**") and Shell Canada Limited ("**Shell**"), both argued that the other was the owner responsible for remediation of the wells in question.

Conoco's predecessor, Gulf Canada Resources Ltd. ("**Gulf**"), and Shell entered into a Purchase and Sale Agreement ("**PSA**") and other associated agreements in 1991. Pursuant to the PSA, Gulf transferred its assets on an "as is" basis to Shell. In 2011, Conoco employees, who did not have knowledge of the PSA, discovered the 1991 PSA. Conoco sent a formal letter to Shell advising that there were certain wells with associated environmental liabilities that should be transferred to Shell. In response, Shell replied that it had never intended to take over the impugned wells pursuant to the PSA. Therefore, in 2014, Conoco commenced an action seeking a declaration that Shell was the owner of the wells and sumps, an order for specific performance of the PSA and a declaration that Shell is liable to Conoco for any other damages.

DECISION

The main issue therefore was whether the PSA and associated agreements transferred Gulf's interest in the wells and sumps to Shell. The ABQB ultimately granted Conoco a declaration that Shell owned the wells in question and found that the PSA transferred Gulf's interest in the wells to Shell.[68]

The ABQB found that the wells constituted an asset under the PSA by considering the ordinary meaning of the terms, then considering the PSA as a whole, focusing on clauses relating to environmental liability, to decide the objective intent of the parties.[69] The PSA provided that Shell was liable for environmental liabilities, including well abandonment and reclamation, save for a 180-day period following the closing wherein Gulf was responsible for such liability.[70] The ABQB emphasized that, if the parties intended for the impugned wells to remain with Gulf after closing, Shell would not have agreed to the six-month limitation on environmental liability.[71] The PSA also included a clause where Shell acknowledged that it was acquiring the assets on an "as-is" basis, and acknowledged it was familiar with the condition of the wells.[72]

In response to a counterclaim by Shell, the ABQB found that there was no nexus between the parties sufficient to find that Conoco had a duty to advise Shell of its ownership of the wells, or to advise Shell of any contamination on the sites, or to undertake remediation. It was found that a vendor of land does not owe a duty to warn the purchaser of ongoing liability beyond that contracted for in an agreement.[73]

COMMENTARY

This decision is significant for industry participants who have sold or purchased assets or an interest in land where abandoned wells are present. It is also significant because the ABQB granted

[68] *Conoco, supra* at para 282.
[69] *Conoco, supra* at para 176.
[70] *Conoco, supra* at para 180.
[71] *Conoco, supra* at para 202.
[72] *Conoco, supra* at para 185.
[73] *Conoco, supra* at para 279.

summary judgment on a complex commercial case with contested and lengthy facts from both parties.

This decision ties into the larger trend of judicial consideration of Canada's aging infrastructure. As regulators pursue private parties to remediate abandoned wells, industry participants are being forced to deal with ownership of abandoned oil wells from the 1970s and 1980s. Remediation of failing oil and gas infrastructure carries massive liabilities. A company may mistakenly assume responsibility for remediation if they are unaware of an agreement which transferred assets to another party. This decision sends a strong message that oil and gas companies should promptly investigate ownership issues, particularly regarding abandoned wells.

R v Resolute Forest Products Canada Inc.[74]

BACKGROUND

This decision held that an indemnity, granted by the province of Ontario to two former owners of a pulp and paper mill and their successors and assigns, did not protect subsequent owners of the same property from the costs of complying with a remediation order 26 years later.

FACTS

In 1977, the owner and predecessors of a pulp and paper mill in Dryden, Ontario were sued by certain First Nations who alleged that mercury from the mill contaminated nearby rivers and caused them harm. After the action with the First Nations settled, Ontario granted an indemnity in 1985 to the former owners of the mill, and to their successors and assigns. The indemnity was granted "from and against any obligation, liability, damage, loss, costs or expenses incurred by any of them … as a result of any claim, action or proceeding, whether statutory or otherwise," stemming from "any damage, loss, event or circumstances, caused or alleged to be caused by or with respect to, either in whole or in part, the discharge or escape or presence of any pollutant by [the owner of the mill] or its predecessors, including mercury or any other substance, from or in the plant or plants or lands or premises" ("**Pollution Claims**"). [75]

In 2011, the Director of the Ministry of the Environment and Climate Change issued a remediation order to monitor and maintain the mercury waste disposal site (the "**Director's Order**"). The Director's Order was issued to former owners of the mill, Weyerhaeuser Company Limited ("**Weyerhaeuser**") and Resolute FP Canada Inc. ("**Resolute**"). Weyerhaeuser brought a motion seeking a declaration that it was entitled to indemnification and compensation from Ontario for the costs of complying with the Director's Order. Resolute sought leave to intervene to claim the same. All parties moved for summary judgment.

The chambers judge found that the indemnity covered statutory claims brought by an agent of Ontario, and that Resolute and Weyerhaeuser were entitled to the costs of complying with the Director's Order. Ontario appealed. A 2-1 majority of the ONCA upheld the chambers judge's decision, but only to the extent that it covered first-party claims (i.e. Resolute was not indemnified).

DECISION

The 4-3 majority of the SCC found that the chambers judge made palpable and overriding errors

[74] 2019 SCC 60 ["*Resolute*"].
[75] *R v Resolute Forest Products Canada Inc.*, 2019 SCC 60 ["*Resolute*"].

of fact. One of those errors was the decision that the waste disposal site was continuously contaminating the environment, when there was no evidence of continuing contamination.[76] Rather, the waste disposal site was the solution to the previous contamination and merely held the mercury-contaminated waste. This error led to the conclusion that the indemnity covered the Director's Order, as a different conclusion on those facts would expose them to significant liability.

The SCC stated that the indemnity must be considered as a whole. The indemnity was silent on whether first-parties would be indemnified against other first-parties. Certain paragraphs of the indemnity gave Ontario the right to carry or participate in the defence of any proceeding, and required the parties to cooperate with Ontario in defence of any claim. The SCC concluded that these paragraphs demonstrated that the indemnity was not intended to cover first-party claims.[77]

Other errors included: (1) failing to consider the context of prior indemnities connected to the litigation brought by the First Nations; and, (2) failing to limit the scope of the indemnity to the issues defined in the broader settlement to which the indemnity was a schedule. As such, the SCC allowed Ontario's appeal on summary judgment with costs throughout, and dismissed Resolute and Weyerhaeuser's appeals.

COMMENTARY

With the SCC split at 4-3 and the ONCA split at 2-1, it is clear that the interpretation of indemnification contracts is complex and uncertain, which highlights the importance of clearly addressing all matters in an indemnity contract. For example, this contract would have benefited from clarity on the types of contamination covered, the type of claims covered, and *whose* claims were shielded by the indemnity. This case is required reading for corporations interested in buying polluted sites, notwithstanding standard indemnifications.

ISH Energy Ltd. v Weber Contract Services Inc.[78]

BACKGROUND

In this decision, the ABQB addressed integrity management programs in the context of pipeline maintenance, finding that where plans are inadequate or not followed, liabilities may attach despite pre-existing maintenance deficiencies.

FACTS

On July 17, 2017, five pipeline leaks were discovered in the Desan Field located near Fort Nelson, BC. The owner and licensee of the pipeline, ISH Energy Ltd. ("**ISH**"), had contracted with Weber Contract Services Inc. ("**Weber**") for the operation and maintenance of the pipeline between 2000 and 2007. As part of the contract, Weber was required to conduct regular pigging and to apply certain chemicals such as corrosion inhibitors or biocides to keep the pipeline clean and prevent corrosion. A day before the discovery of the leaks, Weber introduced a pig into the main line that became stuck. To dislodge the pig, Weber introduced 200 psi of pressure into the mainline and closed or "pinched" an inlet valve. After the leak was found, a smart pig was introduced into the mainline, which uncovered internal corrosion. Shortly thereafter, additional leaks were discovered on the gathering lines. As licensee of the pipeline, ISH took steps to remediate the affected areas

[76] *Resolute, supra* at para 28.
[77] *Resolute, supra* at para 33.
[78] *ISH Energy Ltd. v Weber Contract Services Inc.*, 2019 ABQB 221 ["*Weber*"].

and repair the damaged portions of the pipeline.

ISH sued Weber for negligence and breach of contract, alleging that the leaks were caused by a combination of internal pipeline corrosion and a high-pressure event in the pipeline system. Weber filed a defence arguing, among other things, that the corrosion existed prior to its contractual relationship with ISH.

DECISION

The ABQB found that pigging was not completed with the frequency required under the contract.[79] It further found that Webber failed to adhere to the scheduled injection of anti-corrosion chemicals into the pipeline system.[80] Accordingly, Weber was in clear breach of its obligations under the contract and in breach of its duty of care to pig the lines in accordance with the schedule and apply the anti-corrosion chemicals.

Weber argued that, in order to assess whether it complied with the standard of care, ISH needed to proffer expert evidence that demonstrated the efficacy of the maintenance plan. The ABQB found that such expert evidence was not required to assess the standard of care and instead referred to evidence of what constituted an adequate preventative maintenance program in general.[81]

Weber pointed to evidence that corrosion already existed prior to 2000 and that the maintenance plan was not sufficient to prevent corrosion. This argument was rejected, with the ABQB finding that "common sense suggests that had Weber properly implemented the program, at least some of the corrosion damage would have been prevented".[82]

The ABQB awarded ISH damages against Weber for breach of contract and negligence in the amount of $24,372,897.87 comprising $10,712,197.49 in clean up and remediation costs and $13,660,700.38 for repairs to the pipeline.

COMMENTARY

This decision emphasizes the importance of an effective integrity management program and its strict implementation to the pipeline industry, and customers who directly or indirectly may bear some or all of the resulting costs of repairs and environmental remediation.

From this case, it is clear that inadequate implementation of an integrity management program is sufficient to attach environmental and other liability to the person who has the statutory or contractual obligation. It is noteworthy that Weber was found liable despite the pre-existing corrosion prior to its contractual engagement. Therefore, failure to comply with the maintenance program, which could contribute to corrosion, may attract liability.

Further, this decision reaffirmed that expert evidence may not be necessary to establish standard of care in all cases. In this case, the evidentiary record was sufficient to establish a breach of the standard of care.

Bamrah v Waterton Precious Metals Bid Corp.[83]

[79] *Weber, supra* at para 111.
[80] *Weber, supra* at para 87.
[81] *Weber, supra* at para 109.
[82] *Weber, supra* at para 209.
[83] *Bamrah v Waterton Precious Metals Bid Corp.*, 2019 BCSC 258 ["*Bamrah*"].

BACKGROUND

In *Bamrah*, a minority shareholder of Chaparral Gold Corp. ("**Chaparral**") opposed a proposed plan of arrangement through which Waterton Precious Metals Bid Corp. ("**Waterton**") would acquire Chaparral for $0.61 per Chaparral share, on the basis of environmental liabilities of Chaparral. The shareholders of Chaparral had consented to the proposed arrangement. The minority shareholder argued that the proposed consideration of $0.61 was insufficient.[84]

FACTS

During negotiation of the arrangement, potential environmental liability for Chaparral arose regarding contamination at historical smelter sites.[85] Pursuant to securities law disclosure requirements, various documents were publicly disclosed that detailed the potential liability.[86]

Chaparral made a settlement offer to the Environmental Protection Agency ("**EPA**") regarding the potential liability. The EPA disputed the amount, and further stated that it would be pursuing Chaparral for remediation costs.[87] The proceedings were disclosed in a management circular but disputed potential liability had not been resolved at the time of negotiations for the arrangement. Further, the minority shareholder argued that the existing environmental liability dispute essentially forced Chaparral shareholders to sell their shares and listed the dispute as one of his reasons for opposing the arrangement.

DECISION

The British Columbia Supreme Court ("**BCSC**") held that the potential EPA liability did not force Chaparral shareholders to sell their shares. It found that, while the potential liability negatively affected the ultimate value and price paid for the Chaparral shares, the potential liability was not a factor that stripped shareholders of their choice to sell their shares or hold them. The BCSC characterized the potential environmental liability as a material development, which shareholders could weigh in their decision-making in voting for or against the arrangement.[88]

COMMENTARY

Ongoing environmental liabilities in the context of a corporate transaction or arrangement will not necessarily constitute a cause of action for minority shareholders opposing the transaction or arrangement. This case was appealed on the basis that the trial judge erred in his analysis of market factors. The BCCA disagreed with the appellant[89] and adopted the analysis for how courts should set fair value of shares owned by dissenting shareholders from *Carlock v ExxonMobile Canada Holdings ULC*,[90] where Harris JA held that "[t]he behaviour of a real market is better evidence of value than a theoretical market".[91] The BCCA held that the lower Court's analysis was entirely consistent with *Carlock*, and considered the deal price as a starting point and then considered market-based factors. Therefore, it was not an error for the lower Court to prefer the evidence based on the market-based analysis of Waterton instead of the theoretical evidence presented by

[84] *Bamrah, supra* at paras 1-8.
[85] *Bamrah, supra* at para 65.
[86] *Bamrah, supra* at para 67.
[87] *Bamrah, supra* at paras 71-73.
[88] *Bamrah, supra* at para 85.
[89] *Bamrah v Waterton Precious Metals Bid Corp.* 2020 BCCA 122.
[90] 2020 YKCA 4 ["*Carlock*"].
[91] *Carlock v ExxonMobile Canada Holdings ULC*, 2020 YKCA 4 ["*Carlock*"].

Mr. Bamrah's expert. A leave to appeal application has been filed at the SCC.

Brookfield Residential (Alberta) LP (Carma Developers LP) v Imperial Oil Limited[92]

BACKGROUND

This decision touches on section 218 of the *Environmental Protection and Enhancement Act* ("***EPEA***") which allows the ABQB to extend a limitations period where there is an alleged release of a substance into the environment. In 2017, the ABQB summarily dismissed Brookfield Residential's ("**Brookfield**") application to extend that limitations period. Brookfield appealed.

FACTS

Brookfield acquired land for the purposes of developing a residential subdivision which had, intermittently since 1949, been used as a location for an oil and salt water disposal well by various entities including Imperial Oil Limited ("**Imperial**"). In 2010, excavation revealed that hydrocarbon and salt remediation was required. Since Brookfield's claim against Imperial was statute-barred under the ultimate 10-year *Limitations Act* period, its claim was entirely reliant on obtaining a limitations extension under section 218 of the *EPEA*. Section 218 stipulates several factors that must be taken into consideration before granting an application, including: (1) when the alleged adverse effect occurred; (2) whether that effect ought to have been discovered by due diligence efforts; (3) whether extending the limitations period would prejudice the proposed defendant; and (4) any other criteria that courts considers relevant.

The ABQB concluded that this was not an appropriate case for extending the limitations period, finding that "permitting an action to go ahead more than 60 years after the Defendant last was involved in the Well would be an abuse" of a section 218 extension.[93]

DECISION

The ABCA dismissed the appeal, and in doing so, provided important guidance on several important aspects of section 218 applications. First, it overruled *Lakeview Village Professional Centre Corp v Suncor Energy Inc*,[94] which suggests that, under certain circumstances, section 218 decisions should be deferred to trial. The ABCA rejected this approach, stating that it is contrary to the language of section 218 and that deferring the limitations decision to trial "defeats the whole purpose" of limitation periods and would continue to expose the defendant to the "expense and inconvenience of a trial".[95] Second, in considering the fourth factor in the section 218 test, the ABCA provided guidance on the competing policy considerations between both the *Limitations Act* and the *EPEA.* It noted that the *EPEA* reflects the policy objectives of the polluter pays principle and recognition that environmental contamination may be difficult to detect, but in granting an application under this legislation, the fourth factor requires a balancing as against the principles of finality and fairness that underscore the *Limitations Act.*

Ultimately, the ABCA concluded that this was not an appropriate use of a section 218 extension because the long passage of time since the release would prejudice Imperial and make it difficult

[92] *Brookfield Residential (Alberta) LP (Carma Developers LP) v Imperial Oil Limited*, 2019 ABCA 35 ["*Brookfield*"].
[93] *Brookfield, supra* at para 5.
[94] *Lakeview Village Professional Centre Corp v Suncor Energy Inc*., 2016 ABQB 288 ["*Lakeview"*].
[95] *Brookfield, supra* at para 9.

to establish a proper standard of care.

COMMENTARY

This decision overrules the *Lakeview* approach to section 218 extensions by requiring applications to be decided prior to trial. Further, the decision emphasises the court's sensitivity to prejudice caused by the passage of time. Plaintiff applicants should be mindful of this factor in particular when deciding whether or not to pursue a limitations extension under the *EPEA.*

IV. OIL & GAS COMPENSATION

The past year has seen a number of interesting cases related to oil and gas compensation issues stemming from lease and purchase and sale disputes. In particular, the ABQB and SKQB have shed light on interpretation and enforcement of both modern and historic off-set well clauses, one with modern drill, drop, and pay provisions and the other without. Additionally, the ABQB has rendered an interesting decision related to net profit interest agreement and the complex royalties and deductions prescribed by it in the context of a dispute over payments dating back many years.

Whitecap Resources Inc. v Canadian Natural Resources Limited[96]

BACKGROUND

This decision involved the interpretation of various modern offset-well provisions in leases between two oil and gas production and exploration companies. The remedy sought, the return of Whitecap Resources Inc's ("**Whitecap**") compensatory royalties paid under protest to Canadian Natural Resources Limited ("**CNRL**"), largely turned on the interpretation of defensive drilling obligations under the leases.[97]

FACTS

CNRL acquired a lessor's interest from Devon Energy Corporation ("**Devon**") in certain leases held by Whitecap over lands in Saskatchewan. The leases had drill, drop, or pay offset well provisions where, if a well is drilled on contiguous lands, certain actions must be taken to protect the current lessor from the drainage of their formation. CNRL demanded payment from its lessee, Whitecap, in lieu because the offset obligations under the drill, drop, or pay obligations were triggered. Whitecap disagreed, but paid $1.1 million in compensatory royalties under protest to protect its lease from default. Whitecap commenced an action to recover the monies and CNRL counterclaimed for additional royalties.

DECISION

The ABQB allowed the Plaintiff to recover $980,000 and dismissed the Defendant's counterclaim.[98] It determined that, based on the plain language of the lease, the 90-day period to either drill, drop, or pay started upon the date that production commenced on the adjacent lands, and was independent of when the lessor delivered notice of default. The ABQB noted that while there may be evidence of industry practice that the clock starts upon delivery of notice of default, it could not override the plain language of this lease.[99]

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[96] *Whitecap Resources Inc. v Canadian Natural Resources Limited*, 2019 ABQB 698 ["*Whitecap*"].
[97] *Whitecap, supra* at paras 1 and 4.
[98] *Whitecap, supra* at para 104.
[99] *Whitecap, supra* at paras 39-43.

Additionally, a one quarter section of land was leased to Whitecap with the new lease backdated to protect Whitecap from a possible trespass claim. However, between the date it was backdated to and the date of the lease's actual execution, two offsetting wells began to produce. Therefore, at issue was whether Whitecap had an obligation to satisfy the offset obligation with respect to the two offsetting wells. The applicable provision of the lease said the obligation started "at any time subsequent to the date of the Lease".[100] The ABQB considered the conduct of the parties and the unlikelihood that rational commercial operation would require offsetting wells to protect the very minimal amount of production expected (a few hundred dollars worth). Based on these considerations, the ABQB concluded that "date of the lease" meant the date the parties signed the contract and ordered that the royalties paid in protest to CNRL for that period be repaid to Whitecap.[101]

Further, one of Whitecap's leases was a Lease Option Agreement that required Whitecap to drill ten wells during the Earning Periods. Under the Lease Option Agreement, the offset well clauses were suspended until the termination date, which was defined as "at the End of Earning Period 3". CNRL argued the offset well clauses recommenced when the tenth well was drilled. The ABQB disagreed, stating that this position was not supported by the language of the Agreement which clearly defined the "End of Earning Period 3" with a date (i.e. December 31, 2013).[102]

CNRL also argued that, on the End of Earning Period 3, Whitecap had to immediately drill defensively in response to the wells drilled while its offset well clauses were suspended. The ABQB noted the conduct of the parties did not suggest this was their intention. It further noted that requiring otherwise would defeat the purpose and intent of the Lease Option Agreement because it would force wells to be placed strategically during the Earning Periods to meet future defensive drilling obligations, whereas, Whitecap should be allowed to drill wells anywhere during the Earning Periods.[103]

The ABQB also found that, if defensive drilling is required in response to an offset well on laterally *or* diagonally adjoining land, it does not necessarily mean the lessee is to drill on both the laterally *and* diagonally adjoining lands; therefore, Whitecap needed to only defensively drill one well (or pay in lieu).[104] Lastly, it was held that, if an offset well extends into a legal subdivision that is not an adjoining unit, compensation instead of drilling must be proportionate to the substances obtained from only the adjoining unit.

COMMENTARY

This decision canvassed complex and fact-specific drill, drop and pay provisions that are unique to the oil and gas industry. Such leasing provisions are designed to protect lessors from drainage from neighboring properties by providing them with a number of options, such as drilling defensively, dropping the lease, or paying royalties to the lessor in lieu of drilling.[105] This decision is significant as it interprets, applies and clarifies the operation of leases that contain such provisions. Since drill, drop and pay provisions are now commonplace in oil and gas leases, industry participants will benefit from understanding how courts have approached disputes that

[100] *Whitecap, supra* at para 21.
[101] *Whitecap, supra* at para 53.
[102] *Whitecap, supra* at paras 60-63.
[103] *Whitecap, supra* at paras 64-68.
[104] *Whitecap, supra* at para 98.
[105] *Whitecap, supra* at para 12.

engage these types of leases.

Canadian Natural Resources Limited v Lisafeld Royalties Ltd.[106]

BACKGROUND

Lisafeld Royalties provides another example of the application of off-set well provisions. However, unlike in *Whitecap,* the lease in question contained an older version of the off-set well provision, and did not contain modern drill, drop or pay provisions. Accordingly, the lease in question only created the option to either drill or terminate the lease.

FACTS

Lisafeld Royalties Ltd. ("**Lisafeld**") owned the mines and minerals on the east half of a section of land in Southern Saskatchewan (the "**Leased Land**"). The Leased Land was first leased in 194l, and the lessee's interest in the Lease was eventually assigned to CNRL.

The lease required the lessee to drill an offset well if a third party, commercially producing well, was drilled on land adjacent to the Leased Lands. Specifically, upon the adjacent well commencing commercial production, the lessee had nine months to drill the offset well on the Leased Lands to mitigate against the inevitable formation drainage from the new adjacent well. The lease did not provide options to the lessee to pay compensatory royalties or to surrender non-producing formations instead of terminating the lease for a breach or default of any of its terms.

CNRL drilled a horizontal well that began on the Leased Land, but only produced from areas under certain neighboring lands. CNRL took no action to offset this, and the nine months contemplated by the offset provision expired. The horizontal well was shut-in three months after the nine months expired.

Over six months later, Lisafeld sent CNRL a letter demanding fiscal compensation for the failure to drill an offset well. Lisafeld's subsequently sent a formal notice of default to CNRL, which triggered the 90-day remedy period. CNRL maintained there was no default and applied to the Court for a declaration that it neither breached nor defaulted under the Lease to protect its position. Lisafeld applied for summary judgment and dismissal of CNRL's application.

At the summary judgment hearing, CNRL maintained its position claiming the offset well clause was not triggered. If the offset well clause was triggered, CNRL argued that a different well, drilled in 1956, sufficed as an offset well. CNRL further argued that a subsequently negotiated unitization arrangement that included the Leased Lands continued the lease regardless of whether there was cause for termination.

DECISION

The SKQB found the lessee was not obligated to address the offset well until a notice of default was delivered. Lisafeld delayed in delivering the notice of default, and when it did deliver the notice, the horizontal well was no longer producing. As there was no possibility of drainage from Lisafeld's lands to the horizontal well, CNRL had no obligations under the offset clause.[107]

The SKQB found that the previously-drilled 1956 well would have satisfied the offset well obligation.[108] The 1956 well was a vertical well drilled into the same formation as the horizontal

[106] *Canadian Natural Resources Limited v Lisafeld Royalties Ltd.*, 2019 SKQB 201 ["*Lisafeld Royalties*"].
[107] *Lisafeld Royalties, supra* at para 65.
[108] *Lisafeld Royalties, supra* at para 65.

well, which ultimately revealed that the formation was not viable for oil production. It further noted that if the well triggering an offset obligation is a horizontal well, it is sufficient for the lessee to drill a vertical well into the same formation to satisfy the obligation.[109]

The subsequently-negotiated unitization arrangement covering the Leased Lands provided it would supersede any inconsistent provision of an underlying lease. The unitization arrangement stated that any operations in the unit area were deemed an operation on each lease under the arrangement. As the Leased Lands fell under this arrangement, the SKQB accepted CNRL's argument that this arrangement could act to continue the lease in the horizontal well's formation, "so long as unitized substances are being produced and royalties are being paid to Lisafeld under the Plan of Unit Operation."[110]

The SKQB refused to apply the lease's antiquated definitions of "drilling unit" for horizontal wells to the lease's offset well provision because technology had progressed such that the horizontal leg of the well casing could have been in various locations. It further found that the purpose of the provision was to trigger the obligation on the lessee to drill an offset well if there was production on a laterally joining spacing unit. The spirit of this provision was achieved by the drilling of the 1956 well and unitization agreement. As such, the SKQB concluded that the ease was not breached and continued in full force and effect.

COMMENTARY

This decision emphasizes the importance of timing in delivering a notice of default, and concurrent regard to whether the triggering well is producing at the time when the notice is delivered. It also clarifies how offset drilling clauses may apply to horizontal wells, where the lease was made before horizontal wells were developed. Horizontal wells can suffice and satisfy the lease terms even when horizontal wells were not contemplated upon the formation of the lease. The SKQB demonstrated a willingness to examine and ensure the spirit of the provision was achieved, taking a substance over form approach to interpretation and satisfaction. Lastly, this decision is an example of how disputes related to off-set well provisions, without modern drill, drop or pay provisions, are resolved.

Karve Energy Inc v Drylander Ranch Ltd.[111]

BACKGROUND

In *Karve Energy*, the ABQB held that a negotiated compensation term of a surface lease cannot be overruled by the Surface Rights Board (the "**SRB**") unless the agreement conflicts with section 27 of the *Surface Rights Act* (the "***SRA***").

FACTS

In 1994, Drylander Ranch Ltd. ("**Drylander**") and the predecessor to Karve Energy Inc. ("**Karve**") entered into a 25-year surface lease, which contained compensation provisions that permitted Karve, as the operator, to reduce annual compensation upon the removal of surface facilities from the land. In 2016, Karve exercised this contractual right and notified Drylander that annual rent payments would be reduced since the premises had been abandoned.

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[109] *Lisafeld Royalties, supra* at para 53.
[110] *Lisafeld Royalties, supra* at para 73.
[111] *Karve Energy Inc v Drylander Ranch Ltd.*, 2019 ABQB 298 ["*Karve*"].

Drylander responded with an application to the SRB, arguing the reduction in rent was unilateral and contrary to the rental review provisions in section 27 of the *SRA.* The SRB held that Drylander was entitled to full rent under the lease and confirmed that the only two ways compensation provisions can be varied are by mutual party agreement or pursuant to section 27 of the *SRA*.

DECISION

The ABQB found that the SRB made a reviewable error when it held that compensation provisions of the lease conflicted with section 27 of the *SRA*. While the parties cannot contract out of the section 27 compensation review period, they are nonetheless entitled to agree to compensation payable under the lease, or agree to a mechanism for adjustment to the annual rates. According to the ABQB, the parties agreed to a lease which permitted, if certain conditions were present, a reduction in annual rent. In finding that Karve acted unilaterally in reducing the rent, the SRB "ignored the plain language and meaning of the contract", leading to a "commercially unreasonable" result.[112]

The purpose and operation of section 27 of the *SRA* is to "create a mechanism for review of compensation every 5 years", which does not interfere with a party's ability to agree on annual rent adjustments.[113] Further, a "conflict between a private agreement and the [*SRA*] arises only where the two provisions cannot be given their lawful effect but instead are mutually exclusive or irreconcilable".[114]

COMMENTARY

This decision provides important clarification about the SRB's ability to interfere with bilateral agreements respecting annual lease compensation. In particular, parties entering into surface lease agreements should take comfort in knowing that the agreements on pricing mechanisms will be enforced unless there is a clear conflict with section 27 of the *SRA.* This result reinforces the ability of sophisticated parties to negotiate contractual terms and have confidence that such terms will be enforced, all while ensuring compliance with the *SRA.*

Hudson King v Lightstream Resources Ltd.[115]

BACKGROUND

This decision addressed a relatively rare type of contractual relationship found in the oil and gas industry – a net profits interest ("**NPI**"). The ABQB was tasked with interpreting a NPI and the complex royalties and deductions prescribed by it in the context of a dispute over payments reaching back many years. The case was complex, as it also addressed the law of fiduciary duty, the duty of honest performance and the characterization of certain taxes in Saskatchewan.

FACTS

The plaintiffs were the current interest holders under a NPI Agreement entered into in 1977. The agreement provided that the interest holders would receive 50% of all profits derived from oil and gas wells within a certain area in southeast Saskatchewan. The interest holders brought a claim against the corporate counterparty (and its successors) to the NPI Agreement, alleging that certain charges were improperly allocated to the NPI account. The improper charge allocation reduced the

[112] *Karve, supra* at paras 39 and 40.
[113] *Karve, supra* at para 42.
[114] *Karve, supra* at para 42.
[115] *Hudson King v Lightstream Resources Ltd.*, 2020 ABQB 149 ["*Hudson*"].

profits paid out under the Agreement. In finding two breaches of the NPI Agreement, the ABQB directed that the NPI Account be adjusted to remove the improper charges and that any corresponding profits be paid to the plaintiffs.

DECISION

Fiduciary Duty

The plaintiffs argued that the successive corporate counterparties to the NPI Agreement were fiduciaries who had breached their duties to the individual interest holders. Fiduciary relationships have been found in previous oil and gas cases where one party had control of operations, accounting, or both. However, those cases predated the SCC's decision in *Elder Advocates of Alberta Society v Alberta*.[116] To find a fiduciary relationship, *Elder Advocates* imposed a prerequisite that the alleged fiduciary must have given an undertaking to act in the best interests of the beneficiary. The ABQB found that there had been no such undertaking given by any of the corporate counterparties. Rather, the NPI Agreement contemplated that the defendants pursuing their own self-interest in maximizing profits earned from the assets, which would correspondingly benefit the NPI holders.[117] Though the ABQB noted that the plaintiffs were vulnerable to the defendants' exercise of discretionary powers, that power did not affect the "legal and substantial practical interests" of the plaintiffs.[118] The plaintiffs had no separate legal or practical interest other than the right to profits under the agreement, which created contractual, but not fiduciary duties, for the defendants.

Duty of Honest Performance

In performing its contractual duties, the defendants were required to adhere to the duty of honest performance, as initially recognized by the SCC in *Bhasin v Hrynew*.[119] The ABQB recognized that the nature of a net profits interest differs from that of a royalty, in that the owner of the latter can readily track production and thus one's entitlement.[120] A NPI holder, conversely, "relies and depends on the operator's competence, efficiency and honesty" in operations and accounting. The duty of honest performance proscribed that the defendants had to make efforts to ensure their decisions were consistent with what the NPI Agreement required, and they had to communicate candidly with the plaintiffs.[121]

In allocating over $14 million in expenses to the NPI account relating to the acquisition of assets in the NPI area that formed part of a larger acquisition, the ABQB found that the defendants breached the NPI Agreement as well as the duty of honest performance.[122] The agreement provided that they could allocate the "cost and expense incurred" from the asset acquisition to the account. The ABQB found that the defendants did not make a meaningful effort to determine the appropriate "cost and expense" relating to the NPI assets from the broader acquisition; rather, they picked a higher number that advanced their own interests at the plaintiffs' expense.[123] The defendants failed to be honest and candid with the plaintiffs by refusing to provide information

[116] *Elder Advocates of Alberta Society v Alberta,* 2011 SCC 24 ["*Elder Advocates*"].
[117] *Hudson, supra* at para 134.
[118] *Hudson, supra* at para 129.
[119] *Bhasin v Hrynew,* 2014 SCC 71.
[120] *Hudson, supra* at para 122.
[121] *Hudson, supra* at para 122.
[122] *Hudson, supra* at para 155.
[123] *Hudson, supra* at para 539.

regarding the justification for the allocation. The information provided was inaccurate and misleading.

Tax Characterization

The defendants were also found to have breached the NPI Agreement by deducting taxes paid under Saskatchewan's *Corporation Capital Tax Act* ("***CCTA***") from the NPI area revenues. The NPI Agreement only permitted the deduction of taxes on production. The parties disagreed regarding whether the *CCTA* tax was in fact a tax on production, or whether it was a capital tax. The ABQB held that the NPI Agreement permitted the deduction of taxes and other charges directly on production, but not taxes *affected by* production, such as income taxes.[124] In analyzing the language in the statute and its stated purpose, the ABQB found that the tax regime created a tax on corporations producing resources in the province, a tax *affected by* the amount of resources produced, but not a tax *on the resources* themselves. As such, it was not chargeable under the NPI Agreement.

COMMENTARY

This decision is notable both for addressing the practical issues inherent in NPI agreements, and for its discussion on fiduciary duties, the duty of honest performance and the characterization of the *CCTA.* Producers, operators and those in a position of control over shared revenue agreements should take note of this case as the Alberta courts have found that the common law clearly supplements these types of agreements with various duties that, while not necessarily approaching fiduciary levels, remain strict. It clarifies the duty of honest performance that typically accompanies a NPI that would not normally be seen accompanying a royalty given the inability of interested parties to track their entitlement. It is uncertain what, if any, effect this Alberta decision on tax treatment for producers in Saskatchewan.

V. REMEDIES & INJUNCTIVE RELIEF

There were many decisions issued this year regarding remedies and injunctive relief in the context of the energy industry. Some of the highlights include injunctions sought with respect to the Coastal GasLink project ("**Coastal GasLink Project**"), a rare mandatory injunction compelling cabinet to render a timely decision on a resource project, and the issuance of a replevin order for the return of seismic data.

Prosper Petroleum Ltd. v Her Majesty the Queen in Right of Alberta[125]

BACKGROUND

On February 18, 2020, the ABQB granted an injunction directing Alberta to issue a decision in 10 days regarding whether to approve Prosper Petroleum Ltd.'s ("**Prosper**") Rigel Oil Sands Project (the "**Rigel Project**"). Alberta appealed the decision and successfully brought an application to stay the order pending appeal of the injunction shortly thereafter. The appeal has yet to be heard.

FACTS

The Rigel Project is a proposed steam-assisted gravity drainage extraction facility in the Athabasca Oil Sands region, with a designed capacity to produce up to 10,000 bbl/d of bitumen. Prosper

[124] *Hudson, supra* at paras 223-238.

[125] *Prosper Petroleum Ltd. v Her Majesty the Queen in Right of Alberta*, 2020 ABQB 127 ["*Prosper Injunction Decision*"] 2020 ABCA 85 ["*Prosper Stay Decision*"].

initiated the regulatory approval process in 2013 and in 2018, the AER granted approval subject to cabinet approval. However, successive provincial governments had failed to render a final decision. As a result, Prosper claimed that it underwent a period of financial uncertainty and difficulty that included worker layoffs and reduced wages and work hours.

DECISION

The ABQB described the delay as "abusive" and confirmed that the provincial government has a public legal duty under the *Oil Sands Conservation Act*[126] to study project proposals and issue decisions within a reasonable timeframe.[127] It found that the scope of the Crown's discretion did not render it immune from *mandamus*, an order of injunction, or both, and ultimately held that the Alberta government breached its duty by delaying its decision for an unreasonable time. The ABQB rejected the Crown's argument that it did not "give specific reasons for the lengthy delay, citing cabinet confidentiality" and therefore it must be assumed that "cabinet is acting in the public interest with no evidence to support that assumption."[128]

The ABQB then found that Prosper met the test for an interlocutory injunction to be granted. Prosper inquired about the progress of the government's decision on numerous occasions and received no explanation for the delays. Accordingly, it was found that Prosper demonstrated that irreparable harm would result if the relief were not granted, and referenced harm beyond simply financial loss. In issuing the mandatory injunction, the ABQB concluded that "there is a strong public interest in encouraging a timely cabinet decision. The balance of convenience supports an injunction."[129]

However, the ABCA granted a stay pending the appeal of this decision, finding that the appeal raises a serious issue that Alberta would suffer irreparable harm, and that on a balance of convenience the stay should be granted.[130] In particular, the ABQB found that "if a stay was denied the substance of its appeal…is rendered nugatory" and therefore a stay should be granted.[131]

COMMENTARY

If upheld on appeal, this decision reinforces project proponents' rights to obtain finality in regulatory decisions within reasonable timelines and confirms the availability of injunctive relief when governments fail to make decisions in a timely matter. This is a somewhat unconventional remedy and, if upheld, represents a powerful tool for project proponents. The decision is also notable for confirming that citing cabinet confidentiality as a reason for not providing reasons for a project's lengthy review will not create a presumption that the cabinet acted in the public interest.

Coastal GasLink Pipeline Ltd. v Huson[132]

BACKGROUND

In this decision, the BCSC granted an interlocutory injunction and enforcement order restraining the defendants from preventing the plaintiff's access to service roads it used for the Coastal Gaslink

[126] *Oil Sands Conservation Act*, RSA 2000 c O-7.
[127] *Injunction Decision, supra* at para 76.
[128] *Injunction Decision, supra* at para 48.
[129] *Injunction Decision, supra* at para 69.
[130] *Stay Decision, supra* at paras 14-35.
[131] *Stay Decision, supra* at para 32.
[132] *Coastal GasLink Pipeline Ltd. v Huson*, 2019 BCSC 2264 [*"Coastal Gas Link*"].

Project.

FACTS

The plaintiff, Coastal GasLink Pipeline Ltd. ("**Coastal GasLink**") obtained all of its necessary provincial permits and authorizations to construct the Coastal Gaslink Project. However, various First Nations opposed the Coastal Gaslink Project and set up various blockades. Notwithstanding an interim injunction issued by the BCSC, the blockades remained in place until the Royal Canadian Mounted Police attempted to enforce the interim injunction.

Following this injunction, work began but was delayed by additional blockades and obstructions. Coastal GasLink then brought an application for another injunction. The defendants argued that the plaintiffs could not proceed with construction on their traditional territory, as Indigenous law (specifically, Wet'suwet'en law) governed their territory.

DECISION

The BCSC first noted that Indigenous customary laws are not part of Canadian common law, unless there is some process by which the Indigenous customary law is recognized as part of Canadian law, or where Indigenous laws are simply admissible as fact evidence. In this case, the BCSC found there was no such process, so the Indigenous customary law was only relevant as fact evidence.[133]

The BCSC further found that the equities in the case favoured an injunction, as refusing to grant the injunction would cause the plaintiffs and many others "serious and irreparable harm".[134] It noted that the plaintiffs properly acquired the permits in question, and the law did not recognize any right of the defendants to block and obstruct Coastal GasLink from pursuing its activities, which were authorized by law.[135]

Accordingly, the BCSC found that the plaintiff met all three branches of the test for an interlocutory injunction. Further, it ordered enforcement provisions within the injunctive order to inform the public of potential consequences in the event of non-compliance.[136]

COMMENTARY

While this decision reaffirms common principles underlying injunctions, it is notable for its consideration of how Indigenous customary law should factor into an injunction application, with the BCSC holding that such law does not override domestic law. Further, the BCSC also engaged in a lengthy discussion about Indigenous legal structures, including the conflicting roles between elected band officials and hereditary chiefs.[137] This factor was considered in the balance of convenience analysis.[138] This emphasis comes on the heels of increasing interest in the schism that often exists between elected band councils and hereditary chiefs regarding their respective support for various resource projects that affect Indigenous interests. This decision may shed some light on how the existence of parallel and often competing Indigenous political authorities will factor into court proceedings and project approvals in the future.

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[133] *Coastal Gas Link, supra* at paras 127-129.
[134] *Coastal Gas Link, supra* at para 224.
[135] *Coastal Gas Link, supra* at para 225.
[136] *Coastal Gas Link, supra* at para 227.
[137] *Coastal Gas Link, supra* at para 130-139.
[138] *Coastal Gas Link*, supra at para 218.

Enerplus Corporation v Copyseis Ltd.[139]

BACKGROUND

On November 13, 2019, the ABQB granted an order of replevin to the Plaintiff, Enerplus Corporation ("**Enerplus**"), ordering the Defendant, Copyseis Ltd. ("**Copyseis**"), to immediately return seismic data that Copyeis was storing pursuant to a data storage, management and archiving agreement ("the **Data Agreement**"). This decision provides an interesting example of the operation of replevin orders and how the remedy can offer a creative form of short term relief for one party, while preserving the other party's broader claim for determination at trial.

FACTS

Upon termination of the Data Agreement by Enerplus, Copyseis refused to return certain seismic data unless Enerplus paid a $1,000,000 termination fee for data deletion and other services. In response, Enerplus sought a replevin order for the immediate return of the seismic data. Enerplus argued that withholding the data was affecting its core business and that it had established substantive grounds for its claim that there was wrongful detention of the seismic data. On the contrary, Copyseis argued that Enerplus was attempting to use the order to "circumvent the ordinary operation of the parties' contractual obligations under the Data Agreement."[140]

DECISION

The ABQB began by reviewing the test for replevin orders under Rule 6.49 of the *Rules of Court*,[141] which provides that: (1) it must be established there was a wrongful taking or detention of the personal property; (2) the value and the description of the personal property must be established; and (3) the applicant must establish it is the rightful owner or is entitled to lawful possession of the personal property.[142]

The ABQB focussed on whether the Data Agreement permitted Copyseis to retain the seismic data until Enerplus had paid a termination fee. However, it was careful to note that it was not to "embark on a trial of that issue" but rather decide whether Enerplus could establish facts that can provide substantial grounds for its claim.[143]

The ABQB found that Enerplus met the test for a replevin order on the grounds that: (1) it was the owner of the seismic data; (2) prior to termination under the Data Agreement it had unfettered access to the data and relies on such access for its core business; (3) Copyseis is now refusing to return the seismic data unless and until Enerplus pays a termination fee; and (4) Enerplus has shown that there are substantial grounds for its entitlement to lawful possession of the data.[144] On the fourth ground, the ABQB pointed to the fact that the Data Agreement required a 60 day termination notice period for termination and that all outstanding invoices were to be paid in full. It further found that Enerplus paid all outstanding invoices and there was no reference in the agreement that a termination fee for post-termination services was required.[145] The ABQB was

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[139] *Enerplus Corporation v Copyseis Ltd.*, 2019 CarswellAlta 2885 ["*Enerplus*"].
[140] *Enerplus*, *supra* at para 8.
[141] *Alberta Rules of Court*, AR 124/2010 ["*Rules of Court*"].
[142] *Enerplus*, *supra* at para 9.
[143] *Enerplus*, *supra* at para 12.
[144] *Enerplus*, *supra* at paras 12-16.
[145] *Enerplus*, *supra* at paras 17-20.

careful to acknowledge that it may very well be the case that a trial would determine that the Data Agreement provided for a termination fee, but that was not the task at hand in this application.[146]

In the ABQB's view, granting the replevin order "preserved the *status quo* for the parties" by: (1) allowing Enerplus to obtain its seismic data and thus carry on its core business, while (2) crystalizing any potential liability that Enerplus is determined at trial to have to Copyseis.[147] To achieve the latter goal Enerplus provided an undertaking that it will be responsible to pay damages caused as a result of the replevin order if it is not ultimately successful at trial. The ABQB therefore ordered that Enerplus provide a letter of credit in the amount of $1,000,000 in favour of Copyseis.[148]

COMMENTARY

Replevin orders are an extraordinary pre-trial remedy as they allow the return of personal property to a party claiming ownership in an action before the matter has been fully adjudicated. This case demonstrates that the threshold for establishing replevin orders is relatively low and that "the applicant need only establish substantive grounds for its claim".[149] This decision is also significant in that it represents a creative interim solution which allowed the applicant to retrieve the seismic data, and thus carry on its core business, while requiring it to post a letter of credit in favour of the defendant, thereby crystalizing the defendant's claim to the termination fee, which will be determined at trial.

VI. INSOLVENCY

The insolvency decisions of the past year provide insight into the legal landscape and analysis post-*Redwater*,[150] and in particular the ongoing discussion regarding environmental liabilities and abandonment obligations in bankruptcy. Additionally, the ONCA rendered an important decision affirming the jurisdiction of receivership courts to extinguish third-party interests in land by vesting order, while providing a framework for when such orders are appropriate in the context of insolvency proceedings.

PriceWaterhouseCoopers Inc. v Perpetual Energy Inc.[151]

BACKGROUND

The ABQB struck four of the five claims brought by PriceWaterhouseCoopers Inc., the trustee in bankruptcy (the "**Trustee**") for Sequoia Resources Corp. ("**Sequoia**"), related to the sale of certain distressed assets prior to Sequoia's assignment in bankruptcy. The Trustee's claims, which ultimately sought to unwind an asset transaction, were grounded in allegations of (1) an undervalued transfer, violating s. 96 of the *Bankruptcy and Insolvency Act*[152] ("*BIA*"); (2) oppression; (3) a violation of public policy, statutory illegality and other equitable claims; (4) and

[146] *Enerplus*, *supra* at paras 24-25.
[147] *Enerplus*, *supra* at para 26.
[148] *Enerplus*, *supra* at para 27.
[149] *Enerplus*, *supra* at para 10.
[150] *Orphan Well Association v. Grant Thornton Ltd*, 2019 SCC 5.
[151] *PriceWaterhouseCoopers Inc. v Perpetual Energy Inc.*, 2020 ABQB 6 [*"Perpetual*"].
[152] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 ["*BIA*"].

breach of director duties.[153] The defendant, Perpetual Energy Inc. ("**Perpetual Energy**"), moved to strike or summarily dismiss the Trustee's claim.

FACTS

Perpetual Energy holds all the shares in Perpetual Energy Operating Corp ("**PEOC**"). Sequoia was formerly known as PEOC. Perpetual Energy was also the sole beneficiary of another defendant, Perpetual Operating Trust ("**POT**"). Prior to October 1, 2016, PEOC had no assets or operations and was solely the trustee for POT, which held a beneficial interest in certain oil and gas properties and related assets (the "**Trust Assets**"). These Trust Assets included gas wells and other properties in Alberta identified for disposition (the "**Goodyear Assets**"). PEOC, as trustee for POT, held the legal interests and licenses for the assets.

Perpetual Energy and Kailas Capital Corp ("**Kailas Capital**") entered into a letter of intent dated July 7, 2016, which stated that Kailas Capital sought to minimize commodity price risk. Pursuant to the letter of intent, POT sold its beneficial interest in the Goodyear Assets to PEOC through an asset purchase agreement. PEOC transferred legal title to all the remaining POT assets to POC and PEOC changed its name to Sequoia. This transaction (the "**Asset Transaction**") was completed on October 1, 2016, and the parties signed a Resignation & Mutual Release. Sequoia operated the Goodyear Assets until it assigned itself into bankruptcy in March 2018.

The Trustee commenced an action seeking an order declaring the Asset Transaction void as against the Trustee, or in the alternative, judgment for an amount not less than $217,570,800 based on section 96(1) of the *BIA.*

DECISION

The ABQB identified five distinct issues and decided whether the issues could be determined by way of summary dismissal or striking the claim: (1) was the transaction completed at arm's length in accordance with the *BIA*; (2) is the Trustee a complainant entitled to bring an oppression claim under the *BIA*; (3) is the Trustee entitled to relief on the grounds of public policy; (4) is the Release a complete bar to the claims against Ms. Rose, the director and shareholder of Perpetual Energy and director of PEOC prior to October 1 2016; and (5) did Ms. Rose breach her fiduciary duty and duty of care owed to PEOC by approving the asset transaction?[154]

The ABQB declined to summarily dismiss or strike the Trustee's claim that the impugned Asset Transaction was not at arm's length. Pursuant to section 96 of the *BIA*, an undervalue transfer between non-arm's length parties may be challenged within five years of the initial bankruptcy event. The ABQB concluded that the *BIA* claim could not be determined on a summary basis nor could it be struck, due to the necessity of evaluating the credibility of witnesses who were involved in the Asset Transaction's negotiation.[155]

The ABQB struck the remainder of the Trustee's claims. With respect to the Trustee's oppression claim, it found that the claim did not constitute a cause of action and struck it based on Rule 3.68 of the *Rules of Court*. It was found that the Trustee was not a "proper person" to be entitled to relief on the basis of oppression.[156]

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[153] *Perpetual, supra* at para 22.
[154] *Perpetual, supra* at para 5.
[155] *Perpetual, supra* at para 98.
[156] *Perpetual, supra* at paras 201 and 211.

The ABQB disagreed with the Trustee's argument that the abandonment and reclamation obligation ("**ARO**") was a liability that allowed it to be a "proper person" to bring an oppression claim. It noted that the ARO could not constitute a liability or a provable claim at the time of the Asset Transfer because: (1) there was no creditor with respect to the impugned ARO, and absent a creditor, there can be no corresponding liability; and (2) the ARO was a "notional and contingent" obligation, which was insufficient to constitute a liability. Rather, the ARO was a "future burden that has not crystallized into a liability".[157]

The ABQB struck the Trustee's claim that the impugned transactions were void on the basis of public policy, statutory illegality and equitable rescission and, therefore, disclosed no cause of action.[158] It further struck both of the Trustee's claims against Ms. Rose. The *Redwater* decision nullified the Trustee's assertions concerning the mutual release agreement and that Ms. Rose breached her duties. It was determined that there was no evidence that Ms. Rose acted inappropriately in discharging her fiduciary duties in connection to the Asset Transaction. Moreover, the terms of the release stated that the parties considered all factors related to the document's execution and that the Release was a complete bar to the Trustee's claims against Ms. Rose.[159]

COMMENTARY

This post-*Redwater* case contributes to the ongoing discussion in Canadian law regarding environmental liabilities and abandonment obligations in bankruptcy. The Trustee appealed the decision and in response two of the defendants brought an application requesting that the Trustee post security for costs in the amount of $240,000. On January 29, 2020, the ABCA granted the defendants' application.[160] On June 29, leave to appeal was dismissed.[161]

Third Eye Capital Corporation v. Resources Dianor Inc./Dianor Resources Inc.[162]

BACKGROUND

This decision was the second of two appeals regarding whether a gross overriding royalty ("**GOR**") interest was an interest in land.[163] This appeal touched on the jurisdiction of receivership courts and specifically whether those courts have the ability to grant an approval and vesting order ("**AVO**") extinguishing a third-party interest in land.

FACTS

Dianor Resources Inc. ("**Dianor**") was insolvent, and one of its lenders, Third Eye Capital Corporation ("**Third Eye**"), requested the Court to appoint a receiver over Dianor's assets, undertakings and property. Dianor's main asset was a group of mining claims in Ontario and Quebec. One of its agreements provided for the payments of GORs to the appellant, 2350614 Ontario Inc. ("**235Co**"). In 2015, the ONCA made an order approving the sales process for

[157] *Perpetual, supra* at paras 172 and 239.
[158] *Perpetual, supra* at para 281.
[159] *Perpetual, supra* at paras 308-327.
[160] *PricewaterhouseCoopers Inc. v. Perpetual Energy Inc.,* 2020 ABCA 36.
[161] *PricewaterhouseCoopers Inc v. Perpetual Energy Inc* , 2020 ABCA 254.
[162] *Third Eye Capital Corporation v Resources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508 ["*Final Third Eye Decision*"].
[163] The first appeal being *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.,* 2018 ONCA 25 ["*Preliminary Third Eye Decision*"].

Dianor's mining claims. The Receiver accepted Third Eye's bid, conditional on obtaining court approval. The bid contained a condition that the GORs be terminated or impaired.

235Co asked that the property to be vested in Third Eye be subject to its GORs. The Receivership Court held that the GOR did not constitute an interest in land and therefore the vesting order could be made vesting clear title. 235Co appealed the judgment respecting whether the GOR interest could be extinguished by a vesting order granted in a receivership proceeding. The ONCA issues a preliminary decision[164] in 2018 confirming that the GOR was in fact an interest in land, but invited further submissions on whether the Court has jurisdiction to extinguish that interest. At issue in this appeal, therefore, is whether a third-party interest in land was extinguishable by an AVO.[165]

DECISION

The ONCA outlined the history of AVOs as they related to certain provisions of the *BIA*. It held that section 243 of the *BIA* is broad in nature and, in light of its legislative history and purpose, provides receivership courts with jurisdiction to grant AVOs. It further found that a court's jurisdiction under section 243 extended to "the implementation of the sale through the use of a vesting order as being incidental and ancillary to the power to sell".[166]

The ONCA then considered whether it was *appropriate* to vest out 235Co's GORs in the circumstances. In considering whether an interest in land should be extinguished, the ONCA stated that "a court should consider: (1) the nature of the interest in land; and (2) whether the interest holder has consented to the vesting out its interest either in the insolvency process or in agreements reached prior to insolvency".[167]

Focusing on the nature of the interest in land held by 235Co, the ONCA held that interest in land was more than purely monetary and, accordingly, the motion judge erred in granting a vesting order extinguishing an interest in land in the nature of the GORs. However, the ONCA held that 235Co failed to appeal on a timely basis and within the time limits prescribed by the *BIA*. The appeal was therefore dismissed.

COMMENTARY

As a preliminary matter, this decision affirms that receivership courts indeed have jurisdiction to extinguish third-party interests in land by vesting orders. More importantly, however, is the ONCA's guidance on when it is appropriate for courts to vest out certain interests in land in the context of insolvency proceedings. This principled framework provides resource companies with greater certainty and clarity in scenarios where assets, subject to royalty interests, and other potential interests in land, are sold.

VII. STANDARD OF REVIEW

In December of 2019, the SCC addressed the judicial standard of review of administrative decisions in a trilogy of cases heard in short succession. The SCC seized the opportunity to restate the law and provide clarity. In *Vavilov* the SCC reviewed a decision of the Canadian Registrar of Citizenship. In *Bell Canada* and the *National Football League* the SCC rendered decisions in

[164] *Preliminary Third Eye Decision, supra.*
[165] *Final Third Eye Decision, supra*.
[166] *Final Third Eye Decision, supra* at para 77.
[167] *Final Third Eye Decision, supra* at para 109.

favour of the Canadian Radio-television and Telecommunications Commission. With three judgments rendered within a two-day span, the SCC affirmed the presumption of the standard of reasonableness and provided guidance on selecting the correct standard of review.[168]

Canada (Minister of Citizenship and Immigration) v Vavilov[169]

BACKGROUND

This decision revisited the *Dunsmuir*[170] contextual analysis for determining the standard of review in administrative decisions. Pre-*Vavilov*, if the standard of review had not been settled by the jurisprudence, in practice, an advocate typically attempted to convince a court that, based on the contextual analysis and common law factors, the standard of review ought to be correctness. In *Vavilov*, the SCC establishes a presumption that administrative decisions are subject to a standard of review of reasonableness. There are exceptions to this presumption. For example, the standard of review will be correctness if: (1) the statute specifies the standard of review is correctness or if there is a statutory right of appeal on a pure question or law or jurisdiction; or (2) if on judicial review there is a constitutional question, a general question of law of central importance to the legal system, or if the question involves judicial boundaries between administrative bodies. In practice, it is foreseeable that post-*Vavilov* the focus that an advocate's argument will be redirected to trying to convince courts that one of the exceptions to the presumption applies.

FACTS

The SCC was tasked with reviewing a decision of the Canadian Registrar of Citizenship ("**Registrar**") to cancel Alexander Vavilov's citizenship pursuant to s. 3(2)(a) of the *Citizenship Act*.[171] Section 3(2)(a) excludes children of "a diplomatic or consular officer or other representative or employee in Canada of a foreign government" from the 'birth on soil' rule deeming all who are born in Canada to be Canadian citizens. The Registrar cancelled Vavilov's certificate of Canadian citizenship on the basis that he was the child of diplomatic agents. Vavilov appealed to the FCA which found that the Registrar's decision was unreasonable. The Registrar appealed.

DECISION

The SCC unanimously upheld the FCA's decision finding that the Registrar's decision was unreasonable for failing to consider legislative debate, jurisprudence on the subject, and domestic and international law. The SCC found that the exceptions in the *Citizenship Act* were clearly meant for those with diplomatic privilege and immunity, both of which Vavilov never enjoyed. Vavilov's citizenship was therefore reinstated. In doing so, the SCC articulated the following guiding principles for the standard of review.

Step 1 – Presumption of Reasonableness

First, on review of an administrative decision, there is a presumption that the standard of review will be reasonableness.[172] This codifies a long-standing presumption already largely borne out in the law.[173] However, new to the framework are clearly outlined circumstances where the

[168] *Final Third Eye Decision, supra* at paras 10-11.
[169] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*"Vavilov*"].
[170] *Dunsmuir v New Brunswick*, 2008 SCC 9.
[171] RSC 1985, c 29
[172] *Vavilov, supra* at para 16.
[173] *Vavilov, supra* at para 25.

presumption of reasonableness can be rebutted.

Step 2 – Rebutting Reasonableness

The presumption of reasonableness may be rebutted where: (1) the legislated standard of review is correctness or the impugned legislation contains statutory appeal rights to a court; or (2) the rule of law requires the standard of correctness to be applied. The majority noted that, although infrequent, future courts may find other ways the presumption of reasonableness is rebutted.

Legislated Standard of Review and Statutory Appeal Rights

The legislature may alter the presumption of reasonableness.[174] Alternatively, where a statutory appeal mechanism is legislated, the appellate standards of review in *Housen v. Nikolaisen* will apply. Therefore, if by way of a statutory right of appeal, questions of law will be subject to a standard of review of correctness and questions of fact will only be overturned subject to a palpable and overriding error.[175] Should statutory appeals have a leave requirement, the majority held that this does not affect the standard to be applied if leave is granted.

Correctness Review Required by the Rule of Law

Similar to the pre-*Vavilov* jurisprudence, certain circumstances demand that courts review decisions based on a correctness standard to protect the rule of law. The majority made clear that the court reviewing an administrative decision may either uphold the administrative finding, or substitute it with its own.[176] The SCC provided a non-exhaustive list of situations where the law requires a standard of correctness, including: (1) constitutional questions; (2) general questions of importance to the legal system as a whole; and (3) questions concerning jurisdictional boundaries between multiple administrative bodies.[177]

Step 3: Guidance on How to Perform Reasonableness Review

The majority reaffirmed that reasonableness is a single standard "that takes its colour from the context"[178] and that, while a decision need not be held to a standard of perfection, it must contain the hallmarks of intelligibility, transparency, and justification.[179] In assessing reasonableness, the SCC outlined two ways in which decisions may be unreasonable.[180]

First, decisions based on internally incoherent reasoning will be unreasonable. The majority ruled that an administrative body's reasons must be read in light of the record. A decision is unreasonable if the reasons, read holistically, fail to reveal a rational chain of analysis or if they reveal that the decision was based on an irrational chain of analysis. If the decision does not 'add up', or relies on logical fallacies such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise, it may render an impugned decision unreasonable.[181]

Second, decisions where legal or factual constraints are not given consideration may lead to a finding of unreasonableness. The SCC provided other indicia of unreasonableness that may be

[174] *Vavilov*, *supra* at para 33.
[175] *Vavilov*, *supra* at para 37.
[176] *Vavilov*, *supra* at para 54.
[177] *Vavilov*, *supra* at paras 54-69.
[178] *Vavilov*, *supra* at para 54.
[179] *Vavilov*, *supra* at paras 15 and 81.
[180] *Vavilov*, *supra* at paras 73 – 75.
[181] *Vavilov*, *supra* at paras 102 -107.

applied against a decision, which includes: (1) acting beyond the statutory authority granted by the legislature; (2) failing to consider relevant case law; (3) failing to adhere to principles of statutory interpretation;[182] (4) failing to take into account the evidentiary record and general factual matrix;[183] (5) failing to meaningfully grapple with key issues or central arguments raised by the parties; [184] (6) failing to justify a departure from past practices or decisions;[185] and (7) failure to provide thorough reasons in certain circumstances.[186]

Bell Canada v Canada (Attorney General)[187]

BACKGROUND

The trilogy of cases regarding *Vavilov* analysis and application included *Bell Canada* and the *National Football League* (the "**Dual Appeals**"), where the SCC dealt with a decision made by the Canadian Radio-television and Telecommunications Commission ("**CRTC**") to prohibit the substitution of American for Canadian commercials during American television broadcasts of the Super Bowl. The Dual Appeals provided the SCC with the chance to apply the newly minted *Vavilov* framework and the standard of correctness, thereby outlining additional guidance on the framework and assisting courts with interpretation going forward.

FACTS

In the years leading up to 2013, the CRTC received requests by Canadians viewers to allow American commercials to play during popular American television broadcasts such as the Super Bowl. The CRTC ultimately responded by holding broad public consultations in conjunction with its review of general television regulation in Canada. In 2016, following the completion of the review, the CRTC issued an order prohibiting the substitution of American commercials with those tailored to Canadians. However, Bell and the National Football League ("**NFL**") had an existing and exclusive licensing agreement in place until 2020 that allowed real-time substitution of the commercials. They collectively appealed the decision to the FCA, where their appeals were dismissed. The SCC allowed the appeal in a 7-2 decision.

DECISION

Drawing from the analysis in *Vavilov*, the SCC used the Dual Appeals to apply the standard of correctness in practice because it was a statutory appeal of a question of law or jurisdiction. The CRTC issued its order pursuant to section 9(1)(h) of the *Broadcasting Act*,[188] wherein the CRTC may "carry, on such terms and conditions as the [CRTC] deems appropriate, programming services specified by the [CRTC]".[189]

The main question before the SCC was whether the CRTC had the authority under s. 9(1)(h) of the *Broadcasting Act* to issue the Final Order.[190] It determined the scope of the CRTC's power by applying the modern principles of statutory interpretation. Specifically, the SCC considered: (1)

[182] *Vavilov, supra* at paras 115 – 124.
[183] *Vavilov, supra* at paras 125 – 126.
[184] *Vavilov, supra* at paras 127 – 128.
[185] *Vavilov, supra* at paras 129 -132.
[186] *Vavilov, supra* at paras 133 – 135.
[187] 2019 SCC 66 [*"Bell"*].
[188] SC 1991, c 11.
[189] *Bell, supra* at para 2.
[190] *Bell, supra* at para 3.

the grammatical meaning of the English and French phrasings of the statute; (2) that the context of the enumerated powers listed in s. 9(1) of the Act weighed against reading 9(1)(h) as a general power; (3) that s. 10 allows for the creation of regulations related to foreign programing; and (4) the legislative history. The SCC found that the CRTC's decision to prohibit substitutions fell outside of the authority granted in the *Broadcasting Act*. The CRTC was "limited to issuing orders that require television service providers to carry specific channels as part of their service offerings, and attaching [general] terms and conditions".[191]

COMMENTARY

The trilogy provides a much needed restatement of the law of judicial standard of review in Canada. The majority confirmed that the standard of reasonableness presumptively applies to administrative decisions, with two paths through which this presumption can be rebutted. First, where the enabling legislation prescribed the applicable standard of review by either: (1) specifying the standard is correctness; or (2) providing statutory appeal rights to a court, in which case the appellate standards of review will apply. Second, the presumption of reasonableness can be rebutted where the rule of law dictates that the standard of correctness be applied. This will be engaged in cases that raise: (1) constitutional questions; (2) general questions of law of central importance to the legal system as a whole; and (3) questions related to the jurisdictional boundaries between two or more administrative bodies.

Like *Dunsmuir*, whether the presumption of reasonableness and narrow carve outs for correctness reviewed in *Vavilov* lead to simplification in Canadian administrative law remains to be seen. At a minimum, however, the majority shone a light on the importance of proper reasons from administrative decision makers. Absent proper reasons, administrative delegates are at an increased risk of having their decisions quashed. Additionally, the SCC has opened the door for the rule of law to play a more prominent role in standard of review. The outcome, hopefully, is increased stability, while avoiding the need for jurisprudential revision in the next decade.

The SCC also helpfully provided additional guidance through the application of the *Vavilov* framework to the appeal in *Bell Canada* and the *National Football League* in the context of administrative tribunals. This guidance will be particularly important in the context of Alberta's energy tribunals and will hopefully lead to more consistent and predictable outcomes. While the *Vavilov* framework represents an attempt to simplify and streamline the standard of review analysis, in practice it may still lead to diverging reasons, as evidenced by the dissents in both *Vavilov* and *Bell.*

Further, and notwithstanding the attempted simplification of the standard of review process, there remains significant uncertainties as to how this will impact other areas, particularly arbitration. Since the release of *Vavilov*, courts have rendered inconsistent opinions regarding the proper standard of review to be applied in the arbitration context. Traditionally, courts have applied the reasonableness standard to commercial arbitrations on appeal, including on questions of law.[192] This has served an important policy function of instilling confidence in the finality of the arbitration process. While the ABQB recently followed this approach in *Cove Contracting Ltd v Condominium Corporation,*[193] the Manitoba Queen's Bench reached a different conclusion in

[191] *Bell, supra* at para 44.
[192] *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53; *Teal Cedar Products Ltd v British Columbia*, 2017 SCC 32.
[193] 2020 ABQB 106.

Buffalo Point First Nation v Cottage Owners Association.[194] How these competing approaches will be resolved remains to be seen and will have important implications for arbitrations subject to provincial Arbitration Acts.

ENMAX Energy Corporation v. Alberta Utilities Commission;[195] *Capital Power Corporation v Alberta Utilities Commission;*[196] *Milner Power Inc. v Alberta Utilities Commission*[197]

BACKGROUND

In the context of the energy industry, there was also further consideration of standard of review. In each decision Justice Brian O'Ferrall of the ABCA denied applications for permission to appeal decisions of the Alberta Utilities Commission ("**AUC**") in Proceeding 790 relating to the Milner Power line loss dispute. A key feature of each decision was the high level of deference shown by the ABCA towards the AUC.

FACTS

Each decision relates to the AUC's decision that certain past transmission line loss charges were unlawful and unfair. As a result, the AUC retroactively adjusted these charges and reimbursed certain power generators for their payments, while charging others who did not pay a fair share. Applications to appeal relate to those adjustments.

DECISIONS

Ultimately, the applications to appeal were denied in each decision. In arriving at these decisions, the ABCA considered section 29 of the *EUA,* which requires that an appeal from a decision of the AUC to the ABCA be grounded on a question of jurisdiction or on a question of law.[198] Additionally an applicant must demonstrate their question raises an arguable point of law of jurisdiction of sufficient importance, and has a reasonable chance of success.[199] This requirement is a court-imposed "gatekeeping" test that allows a motions judge to determine if a particular question of law or jurisdiction merits a court's attention in a full appeal.

In the *CPC, Milner* and *ENMAX* decisions, the ABCA adopts a novel approach to the "gatekeeping" test. While it recognizes the significance of the legal or jurisdictional question is an important consideration in whether to grant the PTA, it also states that some questions of law or jurisdiction are best answered by regulators, and not by the court. For instance, the ABCA stated that "there are some questions of regulatory law and jurisdiction which this Court is not uniquely suited to answer. That is, it is sometimes preferable to have the regulators resolve their own controversial questions of regulatory law and/or jurisdiction themselves."[200] Indeed, Justice O'Ferrall restates the "test" for PTA as "whether there is a question of law or jurisdiction which, for some good reason, perhaps because of its importance, requires an answer from the Court of Appeal, keeping in mind that there are some questions of law or jurisdiction which are better left

[194] 2020 MBQB 20.
[195] 2019 ABCA 222 ("*Enmax*").
[196] 2018 ABCA 437 ("*CPC*").
[197] 2019 ABCA 127 ("*Milner*").
[198] *Enmax, supra* at para 32.
[199] *Milner,* at para 10
[200] *Milner, supra* at para 11.

to the Commission to decide or resolve over time."[201] In this instance, the ABCA found that the AUC was owed deference in its decision.

COMMENTARY

That the ABCA left certain questions of law or jurisdiction to the AUC is a clear expression of judicial deference. Participants in regulated industries are familiar with the concept of deference, according to which an appellate court will not automatically substitute its own view for that of an expert tribunal. Justice O'Ferrall's view that "there are some questions of law or jurisdiction which are better left to the Commission to decide or resolve over time" appears to extend the concept of deference significantly beyond the appropriate standard of review. Rather than effectively according the AUC the benefit of the doubt after a full hearing and analysis of the issues, as contemplated by the traditional approach to deference, Justice O'Ferrall would have the court refuse entirely to consider certain questions, on the basis of a single judge's assessment at the PTA stage, of whether or not a given question is better left to the AUC. This, conceptually, is a pre-emptive deference standard.

Moreover, the decision in *Milner* was rendered without the benefit of the SCC's decision in *Vavilov*. Under the *Vavilov* framework, discussed above, the standard of review for administrative decisions that are afforded a statutory right of appeal is determined by applying the appropriate appellate standards of review. Section 29 of the *EUA* provides a statutory right of appeal on questions of law or jurisdiction. Thus, appeals of AUC decisions concerning questions of law, including questions of statutory interpretation and those related to the scope of a decision maker's authority, are to be reviewed on a correctness standard. *Vavilov* would appear to require courts to apply a correctness standard, unlike the deferential approach to appeals under this section adopted by the ABCA in denying permission to appeal.

VIII. CONFLICT OF LAWS

This past year witnessed several important decisions related to conflict of laws disputes, including the SCC's highly anticipated decision related to contraventions of customary international law and the act of state doctrine. The ABQB also rendered important decisions affirming key principles related to jurisdiction simpliciter, *forum non conveniens* and the application of anti-suit injunctions.

Nevsun Resources Ltd. v Araya[202]

BACKGROUND

This decision dismisses an appeal by the defendant, Nevsun Resources Ltd. ("**Nevsun**") which was made in response to various lower judgments that dismissed its initial motion to strike a claim. The initial motion to strike concerned a claim for damages from contraventions of customary international law ("**CIL**"). This case is notable as the SCC reiterated that international customary law forms part of Canadian common law and found that corporate liability may arise from a violation of peremptory international legal norms.

[201] *Milner, supra* at para 13; *CPC, supra* at para 30-34.
[202] 2020 SCC 5 ["*Nevsun*"].

FACTS

Nevsun is a Canadian corporation based in BC. Various former Eritrean nationals brought a class action on behalf of more than 1,000 Eritrean workers against Nevsun seeking "damages for breaches of domestic torts including conversion, battery, "unlawful confinement", conspiracy and negligence".[203] The plaintiffs assert they were forced to complete national military service while in Eritrea through its National Service Program where they were sent to the Bisha mine and subjected to forced labour and violent, cruel, inhuman and degrading treatment.

Nevsun brought a motion to strike the pleadings based on the "act of state doctrine". This doctrine precludes domestic courts from assessing the sovereign acts of a foreign government. Nevsun submitted that this includes Eritrea's National Service Program. In addition, Nevsun argued that the claims based on customary international law should be struck because they have no reasonable prospect of success.

The chambers judge rejected Nevsun's various applications finding that BC was the appropriate forum because Nevsun controlled the board and there was real risk of an unfair trial in Eritrea. The chambers judge further noted that the "act of state doctrine" had not been applied in Canada, but it was a part of Canadian common law. However, the doctrine did not apply in the present case. Regarding the applicability of CIL, the BCSC held that CIL is incorporated into, and forms part of, Canadian common law unless there is domestic legislation to the contrary. Lastly, the BCSC denied the continuation of the representative action, meaning the Eritrean workers were not permitted to bring claims on behalf of the other individuals.

The BCCA upheld the BCSC's findings on *forum non conveniens* and other evidentiary matters. It agreed that the act of state doctrine applied within Canada pursuant to the *Law and Equity Act*,[204] which adopts English common law. However, the BCCA found that the doctrine did not apply in the present case as the Eritrean nationals' claims were not against state laws or executive acts. The claims were not barred by state immunity as the claims were against Nevsun. The BCCA noted that Canadian courts are becoming increasingly willing to address issues of public international law when appropriate and therefore the courts should be allowed to hear and test the arguments of the parties.

DECISION

Nevsun appealed on two issues: (1) whether the act of state doctrine forms a part of Canadian common law; and (2) whether the CIL has prohibitions against forced labour, slavery, cruel, inhuman or degrading treatment, and crimes against humanity grounding a claim for damages under Canadian law.

With respect to the act of state doctrine, the SCC outlined its history, noted its confusing nature and non-existence in Canadian jurisprudence, and found that it did not apply in Canada. It highlighted that, while the doctrine has developed in other common law jurisdictions, Canadian law has developed its own distinct jurisprudence regarding the twin principles of conflicts of law and judicial restraint that underlie the act of state doctrine.[205]

Similar to the act of state doctrine, Canadian law does not allow the application of foreign laws

[203] *Nevsun, supra* at para 4.
[204] RSBC 1996, c. 253
[205] *Nevsun, supra* at para 44.

that offend a fundamental morality or public policy. The principle of comity "ends where clear violations of international law and fundamental human rights begin".[206] However, where possible, courts will refrain from making findings that are binding on foreign states, but may still inquire into foreign laws where necessary or incidental to the domestic legal controversy. Accordingly, the SCC found that "[t]he [act of state] doctrine is not part of Canadian common law, and neither it nor its underlying principles as developed in Canadian jurisprudence are a bar to the Eritrean workers' claims".[207]

The SCC then turned to the application of CIL and accepted that it may support a claim and adopted the chambers judge's reasoning as follows: "[t]he current state of the law in this area remains unsettled and, assuming that the facts set out in the [notice of civil claim] are true, Nevsun has not established that the [customary international law] claims have no reasonable likelihood of success".[208] The Plaintiffs were claiming "that customary international law is part of the law of Canada and, as a result, a 'breach of customary international law ... is actionable at common law'".[209] Given that forced labour, slavery, cruel, inhuman or degrading treatment and crimes against humanity are impermissible under CIL, damages for such abuses should be actionable in Canada.

In this context, the SCC addressed Nevsun's motion to strike pursuant to BCSC's Civil Rules (the "**BC Rules**"). Under the BC Rules, claims may be struck where pleadings disclose no reasonable claim[210] and where it is plain and obvious that the claim has no reasonable chance of success.[211] The SCC was required to address whether prohibitions on forced labour and other potential crimes are a part of Canadian law that would allow for a claim's reasonable chance of success. The SCC ultimately found that CIL formed a part of the Canadian common law through the doctrine of adoption[212] and as such, it was not plain and obvious that a claim under those laws could not apply in Canada.

Given that CIL is, subject to domestic statute to the contrary, automatically considered a part of Canadian law, the SCC then addressed whether international norms could be considered CIL. It found that for CIL to be recognized as a norm, it must be generally applied and recognized as *opinio juris*.[213] The law must be generally and sufficiently practiced, and it must be undertaken with a sense of a legal right as opposed to mere general usage. Given that the prohibition against slavery, crimes against humanity, and the prohibition against cruel, inhuman, and degrading treatment are clearly accepted norms and therefore CIL, the SCC found that there is no reason to assume that they may not be applied domestically. This is especially so given that international law has shifted from a "nation-to-nation", to a "personal rights" centric model. This latter development also served to reject Nevsun's arguments that CIL does not apply to corporations.[214]

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[206] *Nevsun, supra* at para 50.
[207] *Nevsun, supra* at para 59.
[208] *Nevsun, supra* at para 69.
[209] *Nevsun, supra* at para 60.
[210] *Nevsun, supra* at para 63.
[211] *Nevsun, supra* at para 64.
[212] *Nevsun, supra* at para 95.
[213] *Nevsun, supra* at para 77.
[214] *Nevsun, supra* at paras 104-108.

However, the SCC indicated that the lower Court would be tasked with deciding which CILs apply to private actors, and which do not.[215]

Ultimately. The SCC found that "it is not 'plain and obvious' that corporations today enjoy a blanket exclusion under customary international law from direct liability for violations of 'obligatory, definable, and universal norms of international law', or indirect liability for their involvement in what Professor Clapham calls 'complicity offenses'".[216] The SCC dismissed the appeal and allowed the class action to proceed.

COMMENTARY

This decision provides significant clarity on the application of customary international law in Canada, and on its relationship with Canada's domestic common law. In finding that CIL is Canadian law, the SCC dispensed with what might otherwise require a conflicts of law analysis. Further, this decision opens the door for Canadian domiciled organizations to be held liable within Canada for breaches of peremptory international norms that took place abroad. Not only can a private corporation be held liable for such a breach, the "norms" of CIL now stand as allowable and recognizable novel causes of action in Canada. Depending on what norms the trial court finds apply to this private actor, the SCC may have allowed for the widespread use of class actions to address human rights abuses where the perpetrator has a connection to Canada.

This decision builds on existing legal trends whereby Canadian courts are increasingly willing to hear matters that have occurred in other jurisdictions, typically those involving human rights violations. Energy companies conducting operations in international jurisdictions should take note that customary international law may apply to that foreign business and may be relied upon in Canadian courts for remedial orders.

RDX Technologies Corp v Appel[217]

BACKGROUND

In this decision, the ABQB considered an anti-suit injunction application to restrain a party from proceeding with an application in Ontario to recognize a foreign judgment from New York (the "**Anti-Suit Injunction**").

FACTS

RDX Technologies Corp ("**RDX**") alleged fraud and misrepresentation against the CWT respondents (collectively "**CWT**") pertaining to the purchase of a biodiesel plant in Missouri.[218] Pursuant to an agreement between the parties, Alberta was the exclusive jurisdiction for any dispute related to that agreement. On August 26, 2014, RDX filed a statement of claim. On October 28, 2014, CWT filed an application staying the action, claiming that New York was the more appropriate forum ("**the Jurisdiction Application**").[219] After adjourning the Jurisdiction Application to September 6, 2018, CWT failed to file a brief by the August 17, 2018 deadline and the Jurisdiction Application was struck. In response, CWT brought a reinstatement application and

[215] *Nevsun, supra* at paras 111-112.
[216] *Nevsun, supra* at para 113.
[217] 2019 ABQB 477 [*"RDX"*].
[218] *RDX, supra* at para 3.
[219] *RDX, supra* at paras 5-6.

a *Res Judicata* application (the "**Reinstatement Application** and ***Res Judicata* Application**").[220]

On January 17, 2019, CWT filed an application in Ontario to recognize the New York judgment. In response, RDX filed the Anti-Suit Injunction application in Alberta seeking a stay of the Ontario proceedings.[221]

DECISION

The ABQB considered two key issues, among others, related to whether: (1) the Reinstatement Application should be granted; and (2) whether the Anti-Suit Injunction should be granted.

The ABQB dismissed the Reinstatement Application, holding that CWT attorned to Alberta jurisdiction by filing its *Res Judicata* Application. In doing so, the ABQB reaffirmed that "if someone takes steps in an Alberta suit (other than objecting to Alberta's jurisdiction or its order for service *ex juris*), then he attorns to Alberta's jurisdiction".[222] The ABQB arrived at this conclusion notwithstanding that CWT had declared in its *Res Judicata* Application that it did "not constitute attornment to the jurisdiction in Alberta".[223]

On the second issue, the ABQB granted the Anti-Suit Injunction against the proceedings in Ontario. In doing so, the ABQB articulated the test for anti-suit injunctions as set out in *Amchem Products Inc v British Columbia*,[224] which required the Court to determine: (1) whether Ontario was the most appropriate forum to hear the action; and (2) if so, whether there was justice or injustices to all parties in allowing the action to proceed in Ontario.[225]

In granting the Anti-Suit Injunction, the ABQB found that, since CWT filed the Ontario application to recognize the New York judgment after its Alberta *Res Judicata* Application, which also sought recognition of that judgment, the application in Ontario was "duplicative and inappropriate".[226] Additionally, by filing the *Res Judicata* Application, CWT attorned to Alberta's jurisdiction and therefore the Anti-Suit Injunction was an appropriate remedy.[227]

The ABQB arrived at this conclusion, notwithstanding that RDX had not yet obtained a stay of the Ontario application prior to filing its Anti-Suit Injunction application, which is typically required before such a remedy is granted.[228]

COMMENTARY

Courts have traditionally been reluctant to grant anti-suit injunctions in Canada. This hesitancy is borne from the principle of comity between jurisdictions, which is somewhat at odds with a court in one jurisdiction staying a proceeding in another. However, this decision illustrates that courts are more willing to grant anti-suit injunctions when: (1) parties have clearly attorned to the jurisdiction where the anti-suit injunction originated, and (2) failing to grant the injunction could lead to inconsistent results, undue costs, and inconclusive proceedings.[229] Notably, the ABQB also

[220] *RDX*, *supra* at paras 9-10.
[221] *RDX*, *supra* at paras 14-15.
[222] *RDX*, *supra* at para 21.
[223] *RDX*, *supra* at para 22.
[224] [1993] 1 SCR 897.
[225] *RDX*, *supra* at para 30.
[226] *RDX*, *supra* at para 38.
[227] *RDX*, *supra* at para 38.
[228] *RDX*, *supra* at para 31.
[229] *RDX*, *supra* at para 41.

signalled that it is not always necessary for applications to obtain a stay of proceedings in the foreign jurisdiction prior to bringing an anti-suit injunction.

Fort Hills Energy LP v Jotun A/S[230]

BACKGROUND

In this decision, the ABQB dismissed three of the defendants' applications for: (1) an order striking the action or staying the action, based on the principles of jurisdiction *simpliciter*; (2) an order staying the action based on *forum non conveniens*; and (3) an order setting aside the order for service *ex juris* on the basis of a lack of full disclosure. The defendants argued that Korea was the more appropriate forum and that Alberta did not have jurisdiction over them.

FACTS

The plaintiff, Fort Hills Energy L.P. ("**Fort Hills**") contracted out the development and operation of an open-pit oil sands mine. Fort Hills arranged for the construction of a plant on the mine site, and decided to coat the structural steel with Jotachar, a fire protection coating. The Jotachar coating was applied to the steel in Korea and subsequently shipped to Alberta. When in Alberta, the coating began to crack and fall off. Fort Hills commenced an action to recover over $182 million in damages. Two of the defendants, Jotun A/S and Chokwang Jotun Ltd., then applied for an order arguing lack of jurisdiction, or in the alternative, *forum non conveniens*, and claimed lack of full disclosure, requiring setting aside the order for service *ex juris*.

DECISION

The defendants argued that none of the alleged torts were committed in the province resulting in no connection to Alberta substantiating the jurisdiction *simpliciter* claim. The ABQB, however, found that if Fort Hills adduced evidence that at least one of the torts was committed in Alberta, the ABQB had jurisdiction *simpliciter*. It then held that: (1) some of the alleged misrepresentations in question were made in Alberta; (2) the development of the formulation for the Jotachar coating may have been in Alberta; (3) the damage occurred in Alberta; and (4) the breach of the duty to warn gave rise to a good arguable case that this tort was committed in Alberta.[231] Accordingly, the ABQB held that Fort Hills established jurisdiction over the dispute.[232]

It then considered whether Korea was the more appropriate forum and weighed the various factors relevant to the *forum non conveniens* analysis, focusing on the compellability of witnesses and records (which favoured Korea) and the juridical advantage (which favoured Alberta). Ultimately, the ABQB held that the defendants did not establish Korea as the more appropriate forum.[233] Finally, it found service *ex juris* was obtained in accordance with Rule 11.25 of the Rules and declined to set aside the Order.[234]

COMMENTARY

This decision provides a fulsome analysis of jurisdictional issues in disputes with connections to multiple jurisdictions for energy companies. It provides litigants guidance in circumstances where

[230] 2019 ABQB 237 ["*Jotun*"].
[231] *Jotun, supra* at paras 54, 64 and 77.
[232] *Jotun, supra* at para 78.
[233] *Jotun, supra* at paras 162 and 163.
[234] *Jotun, supra* at paras 184-186.

there are complex tort and contract claims, as between parties in different jurisdictions engaging in cross border commercial activities. Further, this case confirms several key conflict of laws principles, including: (1) that the threshold to reach a conclusion on jurisdiction simpliciter is low and should be that the plaintiff's evidence raises a "good arguable case"; and (2) the factors to be considered in deciding whether a foreign jurisdiction is a clearly more appropriate forum under the forum *non coveniens* test.

IX. CLASS ACTIONS

Over the past year, numerous courts have released important decisions with respect to certification of class action suits. The ABQB considered the test for leave to proceed with secondary market investor loss claims under its provincial securities statute and certified the proposed class action. Two other decisions considered environmental class action claims, including one decision wherein the QCSC refused to authorize a class action that claimed Canada infringed the class members' rights by failing to respond appropriately to climate change.

Stevens v Ithaca Energy Inc.[235]

BACKGROUND

In June of 2019, the ABQB addressed Alberta's class action civil liability provisions under the *Securities Act* (Alberta) in the context of misrepresentations of material information. It certified the proposed class action lawsuit after assessing what constituted misrepresentations, ultimately finding that, given the evidence of misrepresentations, there was a reasonable possibility that the plaintiff would succeed at trial. This case marks the first instance where Alberta courts have addressed the shareholder's burden to seek "leave to proceed" to bring a class action suit under the *Securities Act*.

FACTS

Ithaca Energy Inc. ("**Ithaca**"), a publicly traded company, listed its equity securities on the Toronto Stock Exchange and the London AIM. As a publicly traded company, it was subject to continuous disclosure requirements. The plaintiff, David Stevens ("**Stevens**"), purchased shares in Ithaca in late 2014. Stevens brought an application for leave to bring a class action suit under Section 211 of the *Securities Act* as a representative plaintiff against Ithaca for breach of disclosure obligations, and for certification of a class action lawsuit for corresponding damages under the *Class Proceedings Act*.

Stevens claimed that on four occasions, Ithaca failed to disclose material facts as to when it would be able to first produce oil from its wells in the North Sea. Stevens claimed that there was evidence to support the conclusion that Ithaca did not disclose a number of events causing slippage in the construction and installation schedule for a floating production facility required to bring oil resources on-stream. Stevens claimed that this lack of disclosure concerning the delays and conflicts with Ithaca's outside engineering firm cost the company hundreds of millions of dollars.

In response, Ithaca claimed it relied upon, and communicated information received from, a contractor regarding the construction progress.

DECISION

[235] 2019 ABQB 474 ["*Ithaca*"].

Stevens argued that Ithaca's position directly violated the leading SCC case regarding failure to disclose material information, *Kerr v Danier Leather Inc.*[236] Specifically, Stevens argued that investors of Ithaca were deprived of material facts, such that investment decisions regarding the state and progress of the construction were made on incomplete information.

The ABQB relied on *Danier* and *Sharbern Holdings Inc. v Vancouver Airport Centre Ltd*[237] to determine whether an adverse fact rises to the level of becoming a material fact requiring disclosure. The test was whether the omitted adverse fact, if disclosed, would have significantly altered the total mix of information made available to investors at the time of the released quarterly report or news release. The ABQB also found that Ithaca's reliance on their contractor's schedule for disclosure purposes, without further explanation, was not reasonable in the circumstances.[238]

It was therefore held that it was reasonably possible that a class action would be successful in light of this test for three of the four alleged omissions, and the ABQB granted the investor's application for leave to proceed. It also certified the proceeding as a class proceeding, as there was a substantial common ingredient in the proposed class' claims. The proceeding is now open to advance towards discovery and trial in respect of the alleged misrepresentations.

COMMENTARY

This decision represents Alberta's first decision relating to shareholders' burden to seek "leave to proceed" with a statutory secondary market claim against a responsible issuer. Subsequent decisions in Alberta regarding leave to proceed with similar claims will likely follow the same analysis. Additionally, given that this case deals with parties from the United Kingdom, the Netherlands, and Poland, its outcome will likely garner significant international interest as it progresses.

Kirk v Executive Flight Centre Fuel Services[239]

BACKGROUND

In this decision, the BCCA set aside the lower Court's decision to certify a class action and remitted the matter to the chambers judge to reconsider the common issues of negligence, nuisance, the *Rylands v Fletcher* rule,[240] and apportionment of liability. The BCCA further struck out certain issues as they related to individual causation and damages.

FACTS

In 2013, a driver of a tanker truck full of Jet A1 fuel took a wrong turn, fell down an embankment and overturned in a creek. These events resulted in approximately 35,000 litres of fuel spilling into a creek and various rivers, and local residents were ordered to evacuate. Subsequently, one resident commenced the proceeding to certify a class action on behalf of residents who owned, leased, rented or occupied real property within the evacuation zone. Robert Kirk alleged property damage, loss of use of property, interference with the quiet enjoyment of property and diminution in property value within the evacuation zone. The defendants included the driver of the truck, the

[236] 2007 SCC 44 ["*Danier*"].
[237] 2011 SCC 23.
[238] *Ithaca*, supra at para 58.
[239] 2019 BCCA 111 ["*Kirk BCCA*"].
[240] [1868] LR 3 HL 330 (UKHL).

company that employed him, the company engaged to provide helicopter services to the province, and the province.

The lower Court certified all thirteen of the plaintiff's common issues, including the action in negligence, pursuant to the *Rylands v Fletcher* rule, and in nuisance.[241] The Chambers Judge found that common issues predominated over the individual issues and there was an identifiable class. The Chambers Judge further found that the class proceeding was the "preferable" procedure based on the goals of the British Columbia *Class Proceedings Act* (the "***CPA***") to increase access to justice, behaviour modification and judicial economy. Lastly, it was held that the resident was an appropriate class representative. However, four appellants challenged the decision and claimed the class as a proposed class failed to meet the requirements of the *CPA*.[242]

DECISION

The BCCA considered the issues of the different types of damages claimed and found it necessary to identify the types of relief the plaintiff sought and categorized them into three groups: Group 1 as physical damage to the property; Group 2 as loss of use and enjoyment of property; and Group 3 as diminution of market value.[243]

Second, the BCCA found that the lower Court did not err in finding there was an identifiable class of two or more persons.[244] The class as certified was defined as: "[a]ll persons who owned, leased, rented, or occupied real property on July 26, 2013, within the Evacuation Zone (as defined in the amended Notice of Civil Claim) except for the defendants and third parties".[245]

The only appellant that alleged error with respect to this definition was the province, who argued that there was both no identifiable class and that the class was overly broad. The BCCA found that the lower Court did not err in certifying the proposed class and leaving the refinement of the class to be considered post-certification. It further noted that it was unnecessary for the representative plaintiff to demonstrate that any one of the other potential claimants also wished to litigate this issue.[246]

Third, the BCCA considered the requirements of paragraph 4(1)(c) of the *CPA*: namely, that the claims of the class members must raise common issues. It found that the BCSC erred with respect to certifying certain issues in negligence, nuisance, and *Rylands v Fletcher*, as they were issues of specific causation.[247] With respect to the diminution of property value issue, the BCCA concluded that the BCSC failed to perform the necessary inquiry into whether the representative plaintiff met the requirement for the "basis in fact" requirement to support a certification order. The BCCA conducted its own analysis of the "basis in fact" requirement and found that the representative plaintiff failed to satisfy the three requirements: (1) a basis in fact to support the assertion that there had been a class-wide diminution in value; (2) a basis in fact for the common issue that a plausible methodology existed that was capable of establishing that the spill caused a class-wide

[241] See *Kirk v Executive Flight Centre Fuel Services Ltd*, 2017 BCSC 726.
[242] RSBC 1996, c 50.
[243] *Kirk BCCA*, *supra* at para 48.
[244] *Kirk BCCA*, *supra* at para 60.
[245] *Kirk BCCA*, *supra* at para 53.
[246] *Kirk BCCA*, *supra* at paras 56 and 57.
[247] *Kirk BCCA*, *supra* at para 73.

diminution in value, and for measuring that diminution; and (3) some evidence of the availability of the data to which the methodology was to be applied.[248]

Finally, the BCCA remitted the question of preferability back to the lower Court, as it found "the scope of the proposed class action will have changed considerably as a result of these reasons".[249]

COMMENTARY

The BCCA confirmed that a representative plaintiff seeking to certify a class action must precisely characterize the nature of the common issues and must exclude issues of specific causation. This decision reminds potential representative plaintiffs in class actions that there must be sufficient commonality such that loss may be established on a class-wide basis. Where different allegations lead to different individual inquiries, those issues may not constitute class issues. This decision further speaks to the types of issues that may or may not be certified as common issues in environmental class action cases.

Environnement Jeunesse c Procureur général du Canada[250]

BACKGROUND

In this decision, the QCSC declined to authorize a class action that claimed that Canada infringed the class members' rights by failing to respond appropriately to climate change. While the QCSC refused authorization on the basis that the class' definition was arbitrary and inappropriate, it determined that it had jurisdiction over the climate change issues raised.

FACTS

Environnement Jeunesse, an environmental non-profit, brought the class action and alleged that Canada, by failing to set adequate GHG emission targets, interfered with the class' rights under the Canadian Charter of Rights and Freedoms (the "**Charter**") and the Québec Charter of Rights and Freedoms.

The class represented Québec residents under the age of 35 and alleged that Canada's actions constituted bad faith, and unlawful and intentional interference with the class' rights of life, liberty and security and equality. The class also claimed that its members would be disproportionately burdened by the socio-economic costs attributable to climate change and initially claimed $300 million in punitive damages. However, Environnement Jeunesse instead asked for the government's positive action toward mitigating the risks of climate change. Canada argued that the action should not be allowed, as it would allow the courts to unjustly interfere with the government's legislature and executive branch.

DECISION

The QCSC dismissed the motion and did not authorize the class action, as the class action requirements in Article 575 C.C.P. had not been met. It found that the age limit of 35 was arbitrary and insufficiently justified, causing the action to be neither efficient nor equitable.[251] It was noted that, as the age of majority in Quebec is 18 years old, those younger than that age would not be

[248] *Kirk BCCA, supra* at para 107.
[249] *Kirk BCCA, supra* at para 151.
[250] 2019 QCSC 2885 ["*Environnement Jeunesse*"]
[251] *Environnement Jeunesse, supra* at para 123.

part of the class. Those older than 35 years old would also be excluded, even though they too would suffer the burdens of climate change.

However, the QCSC did find the issues justiciable. It held that, even though the issues addressed powers of the executive branch, courts nonetheless have jurisdiction due to the allegations of Charter violations.[252]

COMMENTARY

This decision is notable for its declaration that the issue of environmental damages are justiciable. Groups of young people are beginning to litigate with respect to the negative effects of climate change. For instance, in Canada, fifteen children aged 10-19 years old were recently backed by multiple NGOs in seeking declaratory relief and an order from the FC that the federal government create a climate change plan to stabilize the climate system.[253] Additionally, in the Netherlands, the government was ordered to reduce GHG emissions by at least 25% by the end of 2020 as a result of an action brought by a Dutch environmental group and 900 Dutch citizens.[254] Climate change related litigation has also begun in India and the United States. Courts in the coming years will likely see a rise in climate litigation brought by the public or by NGOs, against both private and public parties.

X. INTELLECTUAL PROPERTY

The case law from the FC and the FCA this year foreshadows possible changes coming to the obviousness test. The FC has accepted arguments that section 28.3 of the *Patent Act*, which represents the statutory codification of the obviousness test, ousts the reasonably diligent search test. However, ambiguity remains as the FCA indicated that the reasonable search test still applies.

Courts have also added clarity by addressing the elements of inducing infringement and emphasizing that deference will be given to a trial judge's findings regarding the state of the art and as to the nature and extent of the skilled person's knowledge because these are questions of mixed law and fact.

Aux Sable Liquid Products LP v. JL Energy Transportation Inc.[255]

BACKGROUND

This decision found that certain claims related to a patent were invalid due to overbreadth, inutility, anticipation and unpatentable subject matter. The patent related to the transportation of natural gas by pipeline. This decision raises the issue of the use and contents of a claims' specification in patent disputes and indicates that the "reasonably diligent search" test for prior art no longer applies.

FACTS

The plaintiff, Aux Sable Liquid Products LP ("**Aux Sable**"), brought an action to invalidate a patent related to the transportation of natural gas (the " **NG Patent**") held by the defendant JL Energy Transportation Inc. ("**JL**"). The FC considered whether: (1) claims 9-10 were invalid based

[252] *Environnement Jeunesse*, *supra* at paras 49-52.
[253] *La Rose v Her Majesty The Queen*, Federal Court Action No. T-1750-19.
[254] *Urgenda Foundation vs Kingdom of the Netherlands*, [2015] HAZA C/09/00456689 (June 24, 2015); aff'd (Oct. 9, 2018) (District Court of the Hague, and The Hague Court of Appeal (on appeal)).
[255] 2019 FC 581 [*"Aux Sable*"].

on overbreadth, inutility, anticipation or obviousness; (2) claims 1-8 were invalid for obviousness; and (3) claims 1-10 were invalid based on insufficiency or unpatentable subject matter.

DECISION

The FC found claims 9-10 were invalid for overbreadth, inutility, unpatentable subject matter, and anticipation. It held that the law regarding overbreadth has not changed in light of the SCC's decision in *AstraZeneca Canada Inc v Apotex Inc.*[256] Further, the FC found claims 9-10 lacked utility. Since the single subject matter of the invention was found to be efficient transportation of natural gas, the fact that certain compositions of the claims would include inefficient temperatures, pressures, and concentrations selections meant the claim lacked utility. Claims 9-10 were also invalidated by anticipation, and therefore, obviousness was not considered at this stage.

Of particular interest, however, is the FC's approach to invalidating claims 1-8 on the basis of the reasonably diligent search test in the obviousness challenge. As part of the obviousness test outlined by the SCC in *Sanofi*,[257] courts are required to identify what "differences exist between the matter cited as forming part of the state of the art and the inventive concept of the claim".[258] This first step requires identification of items that form the prior art. Traditionally, items are identified through the reasonably diligent search test by establishing that: (1) the prior art was publically available; and (2) it was locatable by an ordinary person skilled in the art. Prior art that was not locatable through a reasonably diligent search test would not be included in the state of the art. Aux Sable challenged the applicability of this test, arguing that section 28.3 of the *Patent Act* displaces the reasonably diligent search test and allows the challenger to rely on all prior art references disclosed, irrespective of whether they were identifiable in a reasonable search. The FC agreed with this interpretation.[259]

COMMENTARY

The most notable aspect of this case is that the FC calls into question the reasonable diligent search test in an obviousness challenge. If followed, this decision will make it easier for parties to allege obviousness, because it expands the available prior art in such an attack to the entire publically disclosed prior art, not just what is locatable through a reasonably diligent search.

Packers Plus Energy Services Inc. v. Essential Energy Services Ltd.[260]

BACKGROUND

The FCA upheld a trial decision finding a patent for an apparatus used in hydraulic fracturing invalid for obviousness. At issue on appeal was whether the trial judge erred in the obviousness analysis. The FCA's reasons bring to a close a lengthy technology dispute and reaffirms the principle that obviousness is a factual analysis.

FACTS

In 2002, Packers Plus Energy Services Inc. ("**Packers**") filed a patent that disclosed a method and apparatus used in hydraulic fracturing, (the "**072 Patent**"). The 072 Patent selectively sent fluids to specific parts of a wellbore by utilizing a tubing string and sliding sleeves. The FC held the 072

[256] 2017 SCC 36.
[257] *Apotex Inc v Sanofi-Synthelabo Canada Inc*, 2008 SCC 61.
[258] *Aux Sable, supra* at para 135.
[259] *Aux Sable, supra* at para 176.
[260] 2019 FCA 96, leave to appeal to SCC dismissed [*"Packers*"].

Patent was invalid on the basis of obviousness,[261] in the process considering that the 072 Patents commercial success "which can serve as a secondary indicator of inventiveness" did not immediately follow the invention and was a result of rising commodity prices.[262]

DECISION

The appellants argued that the trial judge made a number of errors. However, the FCA held that obviousness findings are of mixed law and fact and reviewable on the highly deferential standard of palpable and overriding error. This includes findings as to the state of the art and as to the nature and extent of the skilled person's knowledge. Many of the grounds of appeal "ran afoul" of these principles and the FCA holding that "it is not the task of [the FCA] to sift through and reweight the evidence germane to obviousness findings".[263]

On each of the grounds of appeal, the FCA held that the FC had based its conclusions on evidence before the Court. In doing so, the FCA affirmed "the requisite comparison for assessing obviousness… is between the claim(s)' inventive concept and the state of the art".[264] They also affirmed that gap between the relevant prior art and the patent at issue that can be better understood, and perhaps filled, with the skilled person's common general knowledge.

The FCA found the FC made the requisite findings of fact by determining that the prior art disclosed most of what Packers argued was inventive. Further, it found that, while using the words "truly new" may have been unsuitable, on a whole, the FC applied the correct test for inventiveness. Next, the FCA held it was not necessary to answer the *Beloit* question of "if the invention was obvious" why had no one previously invented it?[265] With respect to the remaining alleged errors, the FCA found the appellants merely disagreed with the FC's findings. Accordingly, it found that the appellants' arguments lacked merit and dismissed the appeal.

COMMENTARY

As Packers' leave to appeal to the SCC was dismissed, this signals an end to this patent dispute. This case is important as the patent claimed a particular type of hydraulic fracturing that was popular among industry proponents. The decision contributes to a growing body of recent cases from the FCA discussing obviousness. Interestingly, the FCA, in referring to the FC's decision, indicated that relevant prior art would have been located using a reasonably diligent search,[266] seemingly calling into question the conclusions reached in *Aux Sable,* discussed above.

Western Oil Field Equipment Rentals Ltd v M-I LLC[267]

BACKGROUND

This action was commenced by Western Oilfield Equipment Rentals Ltd ("**Western**") asserting M-I LLC's ("**M-I**") 173 Patent was invalid on numerous grounds, including inutility, insufficiency, anticipation, obviousness and overbreadth. Justice O'Reilly rejected each of Western's arguments that the claim was invalid for inutility, insufficiency, anticipation, obviousness and overbreadth, and found that Western had directly, and by inducement, infringed

[261] *Packers*, at para 8 to 19.
[262] *Packers, supra* at para 16.
[263] *Packers, supra* at para 33.
[264] *Packers, supra* at para 32.
[265] *Packers, supra* at para 25.
[266] *Packers, supra* at para 13.
[267] 2019 FC 1606.

the 173 Patent. This decision is notable for its application of the inducement test and its finding that marketing, explaining the method of use and "knowing" that clients would use this information, amounts to inducement.

FACTS

The plaintiff by counterclaim, M-I, developed a certain vacuum-assisted "shale shaker" that separated rocks broken into and contaminating drilling fluid during oil well drilling. M-I's shale shaker was unique in that it originally used a vacuum to complete the separation process. In late 2007, M-I filed its provisional patent application. The patent for the machine was issued in mid-2015, however the commercialized model itself did not use the vacuum.

In 2013, M-I became aware of a similar product developed by Western and its wholly-owned subsidiary, FP Marangoni. The product used a vacuum-assisted screen that was "virtually identical" to M-I's machine and Western had been renting the vacuum-assisted screen throughout Canada since 2010.

DECISION

The FC found that M-I made out its infringement claim, and therefore, was entitled to damages and compensation. It noted that the infringement analysis flows primarily from the actual construction of the machine as outlined in the patent, finding that, while the methods for separation were slightly different, each of the steps, methods, and outcomes used in the Western model were the same as those used by M-I.

The FC held that Western directly infringed the patent's system claims and indirectly infringed the method claims by way of inducement.[268] On the issue of inducement, the FC outlined the test as requiring proof of: (1) direct infringement by a third party; (2) the defendant influencing the third party to the point that the infringing act would not have occurred without that influence; and (3) the defendant knowing that its influence would bring about the infringing act.[269] The FC held the companies who operated Western's rental equipment directly infringed the 173 Patent by working the claimed method. Second, the FC found that Western gave extensive instruction and assistance to their customers on the use and operation of the machine, pitched the machine to its clients, and knew their clients would use the machine (i.e. carry out the acts that amount to infringement).[270]

COMMENTARY

This decision is notable for its analysis on the inducement of infringement where the infringing party rents the infringing machine to others. The FC provided renewed clarity on the application of the inducement test and demonstrates that the bar does not appear to be high when demonstrating that inducement has occurred when a party rents or sells the infringing product and provides written instructions to third parties on how to operate the claim method.

XI. TAX

The tax decisions this year have seen an increase of in-depth discussion covering the applicability of the general anti-avoidance rule. Specifically, the decisions addressing the application of the general anti-avoidance rule pursuant to the *Income Tax Act* (*"**ITA**"*) is of significant importance

[268] *Western, supra* at para 117.
[269] *Western, supra* at para 125.
[270] *Western, supra* at para 130.

to companies who are participating in amalgamations or the use of foreign treaties for tax avoidance purposes.

Birchcliff Energy Ltd. v. Canada[271]

BACKGROUND

This case involved an appeal from a 2017 judgment of the Tax Court of Canada[272] ("**TCC**"), in which the TCC dismissed Birchcliff Energy Ltd ("**Birchcliff**") from a reassessment of its 2006 taxation year denying approximately $16 million in non-capital losses that were incurred by Veracel Inc. ("**Veracel**") and subsequently claimed by Birchliff. The FCA dismissed the appeal, and in doing so, it declined to re-consider the TCC's assessment of the General Anti-Avoidance Rule ("**GAAR**").

FACTS

Birchcliff was formed by the amalgamation of Veracel and Birchcliff's predecessor ("**Predecessor Birchcliff**"). Veracel and Predecessor Birchcliff entered into a number of agreements structured to allow Veracel's losses to shelter profits from certain target oil and gas properties. Veracel sold subscription receipts to public investors that provided purchasers with either shares of the amalgamated Birchcliff or a return of their money in the event of the transaction's failure.

Immediately prior to the amalgamation, the subscription receipt holders were issued Veracel Class B common shares. After the amalgamation, the holders of Veracel's Class B common shares received a majority voting interest in Birchcliff. This structure avoided the loss streaming rules in subsections 256(7) and 111(5) of the *ITA* that would otherwise restrict the carrying-forward of the Veracel losses on an acquisition of control.

This arrangement was reassessed by the Minister of National Revenue (the "**Minister**") and the non-capital losses were denied. The Minister considered the arrangement a transactional sham. Birchcliff appealed the finding to the TCC. The TCC rejected the Minister's assertion that the sham doctrine was a basis for assessment in Canadian tax law, but introduced the GAAR and concluded it applied to deny the non-capital losses claimed by Birchcliff. The SCC found Birchcliff's use of the Veracel losses constituted a tax benefit and the series of transactions leading up to the amalgamation constituted an avoidance transaction, contrary to the object and spirit of subsection 256(7), and was, therefore, abusive. This decision was appealed to the FCA.

DECISION

The only issue before the FCA on appeal was whether the transactions resulted in an abuse of the provisions of the *IAA* in contravention of the third arm of the GAAR test. The FCA upheld the TCC's decision, finding the TCC had properly applied the GAAR and that abuse of subsection 256(7) had occurred. It was held that the fact that the GAAR was not raised at the time of assessment did not prevent the Court from determining the object, spirit, or purpose of the relevant provisions of the *ITA*, which was a question of law.[273]

The FCA identified two relevant provisions of the *ITA* in determining whether the transaction was in contravention of GARR: (1) section 111(5), which prohibits companies from carrying forward

[271] 2019 FCA 151 ["*Birchcliff FCA*"]. The authors acknowledge the contributions of BLG lawyers, Laurie Goldbach and Shannon James to the summary of this decision.
[272] 2017 TCC 234 [*"Birchcliff TCC*"].
[273] *Birchcliff FCA, supra* at para 32.

non-capital losses if there has been an acquisition of control of that corporation; and (2) subsection 256(7), which provides guidance on whether an acquisition of control has occurred upon amalgamation.

The FCA noted that the holders of subscription receipts were entitled to either receive shares of new Birchcliff or their money back. Also, the combination of the issuance of Class B shares of Veracel to the subscription receipt holders followed immediately by the amalgamation of Veracel and Birchcliff "has the same effect and is equivalent to the holders of the subscription receipts only receiving shares of Birchcliff following the amalgamation of Veracel and the Predecessor Birchcliff."[274] Had that been the case, there would have been an acquisition of control of Veracel on the amalgamation, triggering the provisions of subsections 111(5).

The FCA interpreted that s. 256(7)(b)(iii)(B) is in place to ensure that the fair market value of each predecessor corporation is reflected in the ownership of the shares of the amalgamated corporation. This arrangement achieved the opposite result. In finding this, the FCA adopted the TCC's finding indicating it was "abundantly clear that anyone paying for a subscription receipt was seeking to acquire shares of the amalgamated company".[275] The FCA found that the arrangement constituted an abuse of subsection 256(7), triggering the application of the GAAR to the non-capital losses.

COMMENTARY

The denial of leave to appeal from this decision precluded an opportunity of potential clarity from the SCC regarding how GAAR will be applied to loss trading between unrelated parties, and financings occurring before an amalgamation or reverse takeover. Furthermore, this decision did not consider the application of GAAR generally. Notwithstanding this, the refusal for leave to appeal re-affirms the FCA's findings, leaving this decision as the currently accepted status of the application of GAAR.

Canada v Alta Energy Luxembourg SARL[276]

BACKGROUND

On February 12, 2020, the FCA addressed a Canadian corporation's use of the Canada-Luxembourg tax treaty (the "**Treaty**") to sidestep taxes on a $380 million capital gain in Canada, finding that the general anti-avoidance rule (the "GAAR") did not apply to transactions structured under the commonly-used Luxembourg S.A.R.L. entity.

FACTS

Alta Energy Partners LLC ("**US LLC**"), a Delaware corporation, developed an unconventional shale oil site in Northern Alberta in 2011 with Alta Energy Partners Canada Ltd. ("**Alta Canada**"). Alta Canada was a wholly owned subsidiary of US LLC and was incorporated to carry on US LLC's newly-formed Canadian shale business.

US LLC anticipated a significant taxable increase in the value of the "Canadian Resource Property" held by Alta Canada following the completion of various wells. Accordingly, Alta Energy Luxembourg S.A.R.L ("**Alta Lux**") was created in 2012 to take advantage of the Treaty and allocate Alta Canada's gains to Alta Lux as they would be non-taxable in Luxembourg. To

[274] *Birchcliff FCA*, supra at para 48.
[275] *Birchcliff FCA*, supra at para. 49; *Birchcliff TCC* at para 50.
[276] 2020 FCA 43 ["*Alta Energy*"].

achieve this, Alta Canada's shares, which were held solely by Alta Energy Canada Partnership ("**Alta Partnership**"), were transferred to Alta Lux. In 2013, Alta Lux sold its shares to Chevron for approximately $680 million creating a capital gain exceeding $380 million.

The TCC considered whether the capital gain was taxable in Canada under the Treaty, and whether the GAAR applied. For the GAAR to be applicable, there must be: (1) a tax benefit, (2) an avoidance transaction; and (3) which was abusive of the provisions of the *ITA*. Alta Lux admitted both that it derived a tax benefit, and that its restructuring was considered avoidance as it was not primarily for a *bona fide* purpose other than to derive a tax benefit. Therefore, if the Court found abuse, the GAAR would apply. The TTC determined that the underlying rationale of the provision justified the very transaction that Chevron had completed, namely to exempt Luxembourg residents from Canadian tax for investments in immovable property used in business. The Court held that Canada and Luxembourg were presumably aware of these benefits, and could have drafted the Treaty to close the loop hole if desired. Further, the Minister of Finance could not simply apply the GAAR to treaties that it felt held unintended gaps. As such, Alta Lux's appeal was allowed in full. The Crown appealed to the FCA.

DECISION

On appeal to the FCA, the Crown argued that the TCC erred in finding that there was no abuse with respect to the GAAR, and that the GAAR should be read into the Treaty. The Crown argued that the taxpayer was not an investor, had no economic or commercial ties to Luxembourg, and pointed to the fact that the taxpayer would pay less tax in Luxembourg. The FCA rejected these arguments, and referred to the plain words of the provision which indicated that the taxpayer need only be a resident and not an investor. The FCA also held that the strength or weakness of economic or commercial ties with Luxembourg was not a part of the test and should therefore not factor in to the Crown's arguments. After considering the object, spirit and purpose of the relevant provisions of the Treaty, the FCA found that the provisions worked as they were intended to, and therefore were not abused. [277]

COMMENTARY

This decision comes during a time of change in respect to the widespread use of Luxembourg S.A.R.L. entities for tax planning and efficiency purposes. The recently-negotiated anti-treaty shopping provisions in the "Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting" (the "MLI") have been in effect since December 1, 2019 and have applied to some of Canada's tax treaties since January 1, 2020. The MLI introduces a broad "principal purpose test" and anti-avoidance rules to curb the use of foreign-incorporate entities for tax avoidance purposes. Despite some uncertainty as to its mechanics, the MLI promises to represent seismic shift in tax efficiency strategies in Canada and elsewhere. As such, it remains to be seen how this decision applies to the law in light of the advent of the MLI.

In light of this, the decision appears to stand for the proposition that there is nothing clearly improper about choosing a certain foreign regime to obtain a tax benefit. The choice of a certain forum may be evidence that carries weight when arguing avoidance but does not, on its own, substantiate such a claim.

[277] *Alta Energy, supra* at para 80.

XII. Arbitration

In the last year, there have been several court decisions regarding arbitration matters that will have impacts on the energy industry. Of particular note was the SCC's highly anticipated decision regarding the application of the doctrine of unconscionability to an arbitration clause in a standard form contract.

Uber Technologies Inc. v Heller[278]

BACKGROUND

In this decision, the SCC invalidated an arbitration agreement between Uber and certain drivers who subscribe to Uber's service agreements. In doing so, the SCC expanded the doctrine of unconscionability, finding that employment disputes are not considered "commercial" for the purposes of the *International Commercial Arbitration Act*, SO 2017 c 2 ("***ICAA***") and created an exception to the rule of systematic referral.

FACTS

David Heller ("**Heller**") was a driver for Uber who entered into multiple standard form service agreements with the company. Under these agreements, disputes with Uber were to be heard through mediation and arbitration in the Netherlands, which required a flat filing fee of $14,500 USD.[279] Heller brought a class proceeding against Uber, claiming violations of the Ontario *Employment Standards Act*,[280] and sought a declaration that certain drivers were employees pursuant to the *ESA*[281] Additionally, Heller claimed the arbitration clause was invalid because it was unconscionable and illegal as it contracted out of the *ESA*.[282] In response, Uber brought a motion to stay the class proceedings in favour of arbitration.

DECISION

The ONSC stayed the proceedings in favour of the arbitration agreement.[283] It found that the *ICAA* applied because the dispute was international and commercial in nature.[284] It applied the "competence-competence" principle, which states an arbitral tribunal is competent to determine its own jurisdiction.[285] Importantly, the ONSC found the arbitration clause was not unconscionable and it did not violate the *ESA*.[286]

The ONCA reversed this decision, finding that the: (1) the arbitration agreement illegally contracted the out of the *ESA* and that the "competence-competence" principle was inapplicable; and (2) in the event that the arbitration agreement did not illegally contract out of the *ESA*, it was nonetheless invalid on the grounds of unconscionability.

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[278] 2020 SCC 16 ["*Uber*"]; 2019 ONCA 1 ["*Uber ONCA"*]; 2018 ONSC 718 ["*Uber ONSC*"].
[279] *Uber*, *supra* at para 2.
[280] *Uber*, *supra* at para 3; SO 2000 c 41 ("***ESA***")
[281] *Uber*, *supra* at para 1.
[282] *Uber*, *supra* at para 3.
[283] *Uber*, *supra* at para 3; *Uber ONSC*, *supra* at para 4.
[284] *Uber*, *supra* at para 14; *Uber ONSC, supra* at para 50.
[285] *Uber*, *supra* at para 15; *Uber ONSC supra* at para 66.
[286] *Uber*, *supra*; *Uber ONSC*, *supra* at para 74.

The SCC began by determining which statute was applicable to this matter. In finding the *Arbitration Act* ("***AA***"), *1991* was the applicable statute, the SCC focused on the nature of the dispute and not the nature of the relationship between the parties.[287] The SCC found that an employment dispute was not "commercial" as required by s 5(3) of the *ICAA* and therefore this legislation did not apply.[288]

In applying the *AA* to a stay motion, the SCC cited s. 7(2) which outlines that an invalid arbitration agreement is one reason why a court may refuse to stay proceedings.[289] Therefore, in deciding whether a stay should be granted, the SCC determined the validity of the arbitration agreement in accordance with *Dell Computer Corp v Union des consommateurs.*[290] Under this framework, a court is to refer all challenges of an arbitrator's jurisdiction to the arbitrator unless they raise pure questions of law, or questions of mixed fact and law that require superficial consideration of the evidence in the record.[291] The SCC found that this case fell into the mixed fact and law exception because it was possible to resolve the validity dispute through a superficial review.[292]

However, the SCC went further and found that the rule of systematic referral did not apply to abnormal circumstances such as these, where only a court can determine a *bona fide* challenge to arbitral jurisdiction.[293] In essence, the SCC created another exception to the rule of systematic referral. In determining whether this exception is triggered, courts must determine, on an assumption that the pleaded facts are true, that: (1) there is a genuine challenge to arbitral jurisdiction; and (2) from the supporting evidence, there is a real prospect that if the stay is granted, the challenge may never be resolved.[294] On the second issue, the SCC concluded that the fees required resulted in a real prospect that Heller's arguments would not be resolved.[295] Therefore, the SCC found it would determine the challenges of validity.[296]

In turning to validity, the SCC only addressed the doctrine of unconscionability and not the question pursuant to the *ESA*.[297] The SCC stated the test for unconscionability was the proof of inequality between the position of the parties and a resulting improvident bargain.[298] In doing so, the SCC rejected the suggested higher threshold of unconscionability, that of "gross" unfairness.[299] The SCC found that there was inequality between Uber and Heller because: (1) the contract was a standard form agreement that rendered Heller unable to negotiate on his behalf; (2) there was a significant difference in sophistication between the parties; (3) the arbitration agreement contained no information about the costs of mediation and arbitration; and (4) the agreement did not outline

[287] *Uber*, *supra* at paras 19 and 25.
[288] *Uber*, *supra* at para 26.
[289] *Uber*, *supra* at para 30.
[290] 2007 SCC 34 ("***Dell***"),
[291] *Uber*, *supra* at para 33.
[292] *Uber*, *supra* at para 37.
[293] *Uber*, *supra* at paras 37-40 and 44.
[294] *Uber*, *supra* at paras 39 and 44.
[295] *Uber*, *supra* at para 47.
[296] *Uber*, *supra* at para 48.
[297] *Uber*, *supra* at para 99.
[298] *Uber*, *supra* at para 65.
[299] *Uber*, *supra* at para 81-82.

the applicable international arbitration rules.[300] Further, this was an improvident bargain because it secured the benefit of a monetary bar to arbitration and thereby modified every other substantive right in the contract.[301] The SCC found the arbitration clause to be unconscionable and therefore invalid.[302] The appeal was dismissed.

COMMENTARY

This decision has wide-reaching implications, particularly for international companies that rely on standard form contracts that contain arbitration clauses with Canadian employees. These implications will extend to energy companies operating in Canada. First, it appears as though parties who have contracts with employees in different provinces within Canada must expect each unique provincial arbitration act to apply to employment dispute matters. This is because employment disputes are not considered "commercial in nature" so as to trigger the application of the *ICAA*. Second, parties who rely on arbitration agreements must ensure they do not contain bars to accessing the arbitration facilities such as the monetary bar in this matter. If so, this will constitute an exception to the rule of systematic referral resulting in a court having the jurisdiction to make a determination on the matter at issue. Finally, it is very important that parties thoroughly examine the application and analysis of the doctrine of unconscionability as discussed in this case. The SCC appears to have expanded the doctrine, placing a greater onus on parties with greater bargaining power to ensure such contracts and provisions therein are not unconscionable. This higher burden on the stronger party may now put in jeopardy several clauses that once may have been enforceable.

[300] SCC, *Ibid* at 93.
[301] SCC, *Ibid* at 94-95.
[302] SCC, *Ibid* at 98.