Top Judicial Decisions of Interest to Energy Lawyers

PRESENTATION TO THE CANADIAN ENERGY LAW FOUNDATION

Presented By

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Overview of Paper

- Review and discussion of 36 important decisions in the areas of:
  - Constitutional Law
  - Indigenous Law
  - Environmental Remediation and Liability
  - Oil & Gas Compensation
  - Remedies & Injunctive Relief
  - Insolvency
  - Administrative Law
  - Private International Law
  - Class Actions
  - Tax
  - Arbitration

Roadmap: Key Developments

- **Energy & the Division of Powers**
  - *Reference re Environmental Management Act (British Columbia),* 2019 BCCA 181, 2020 SCC 1
  - *Reference re Greenhouse Gas Pollution Pricing Act,* 2019 ONCA 544, 2019 SKCA 40, 2020 ABCA 74
- **Duty to Consult & Trans Mountain**
  - *Coldwater Indian Band et al v Attorney General of Canada,* 2020 FCA 34
- **A new Standard of Review Framework**
  - *Canada (Minister of Citizenship and Immigration v Vavilov,* 2019 SCC 65
- **Private International Law & International Torts**
  - *Nevsun Resources Ltd v Araya,* 2020 SCC 5
- **Notable Mentions**
  - *Uber Technologies Inc,* 2020 SCC 16 (enforceability of arbitration clauses)
  - *Brookfield Residential (Alberta) LP (Carma Developers LP) v Imperial Oil Limited,* 2019 ABCA 35 (section 218 limitation period extension)
  - *Prosper Petroleum Ltd v Her Majesty the Queen in Right of Alberta,* 2020 ABQB 127, 2020 ABCA 85 (mandatory injunctions & cabinet decision making)

Energy & Division of Powers: A Watershed Moment

- Political and legal context
  - Increased political interest in regulating environmental matters has generated conflict between jurisdictions
  - Uncertainty as disputes work through the courts
    - Regulation of interprovincial pipelines
    - Regulation of GHG emissions
    - Environmental assessments
  - Decisions will determine constitutional parameters for the future of environmental regulation in Canada

Energy & Division of Powers cont'd

- ***Reference Re Environmental Management Act*, 2019 BCCA 181, 2020 SCC 1**
  - Background
    - TMX & Political Opposition in BC
    - Proposed amendments to the *Environmental Management Act*
      - Provincial permitting regime
    - Referred to BCCA
  - Issues
    - Are the proposed amendments *intra vires?*
    - Are the proposed amendments inapplicable under IJI?
    - Are the proposed amendments inoperative under federal paramountcy?

Energy & Division of Powers cont'd

- Position of the Parties
- BCCA Decision
  - Law's "default position" an "immediate and existential threat" to the TMX and therefore *ultra vires* the province
- SCC Decision
  - Upheld BCCA decision in a rare decision from the bench
- Implications
  - Reaffirms Parliament's exclusive jurisdiction over interprovincial pipelines
  - Sheds light on line between provincial laws of general application and those that impermissibly regulate federal undertakings
  - IJI and Paramountcy not applied

Energy & Division of Powers cont'd

- ***Reference re Greenhouse Gas Pollution Pricing Act,* 2019 ONCA 544, 2019 SKCA 40, 2020 ABCA 74**
- Background
  - Liberal government flagship environmental policy
  - Operation of the Act → pricing and the federal backstop
  - Opposition from provinces → references launched in SK, ON, AB
- Issues
  - Is the Act *ultra vires* Parliament?
    - Tax or regulatory charge?
    - Supported under trade and commerce, criminal law, POGG powers?

Energy & Division of Powers cont'd

- **Saskatchewan and Ontario Decisions**
  - Act is *intra vires* the Parliament of Canada
  - Key issue in both decisions was whether the Act could be sustained under the federal POGG power
  - Decision hinged on (1) competing characterizations of the Act and (2) the role of POGG
    - Narrow Characterization of Act
      - SKCA → "Setting of minimum standards of price stringency for GHG emissions"
      - ON → "Establishing minimum national standards to reduce GHG emissions"
    - Broad interpretation of POGG power
  - Dissents
    - Act's matter is the "regulation of GHG Emissions" → too broad for POGG

Energy & Division of Powers cont'd

- **Alberta Decision**
  - Carbon pricing scheme is unconstitutional
    - *A "Trojan horse" that would "forever alter the constitutional balance"*
  - Departure from SKCA and ON majorities
    - Characterized the Act more broadly as the "regulation of GHG emissions"
    - Interpreted the POGG power narrowly
    - Narrower view of "provincial inability" test
- Implications for SCC
  - Competing characterizations of the Act
  - Competing interpretations of POGG

Indigenous

- ***Coldwater Indian Band et al v Attorney General of Canada*, 2020 FCA 34**
  - Background
    - 2018 FC decision → environmental assessment deficient, Crown failed to discharge duty to consult
    - 2019 Cabinet re-approval → effort to rectify deficiencies
    - First Nation challenge re-approval → judicial review at the FCA
  - Issue
    - Whether decision to reapprove the TMX and conclude that deficiencies were addressed was reasonable

Indigenous cont'd

- Decision
  - *"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 would never be approved, and the applicants would have a de facto veto right over it."*
- SCC denied leave to appeal in July, 2020
- Implications
  - Concludes legal challenges to TMX
  - Reaffirms principles of reconciliation and the outer limits of the duty to consult
  - Practical example of adequate consultations for large scale projects

Private International Law

- ***Nevsun Resources Ltd. v Araya*, 2020 SCC 5**
  - Background
    - Nevsun constructed mine in Eritrea
    - Mine constructed by military owed subcontractor
    - Eritrean nationals conscripted to construct mine, forced to work long after service completed and subject to human rights abuses
    - Eritrean nationals brought claim against Nevsun in BC
    - BCSC and BCCA held that BC could take jurisdiction and hear the matter
    - Appeal to SCC
  - Issues
    - Does the Act of State Doctrine apply and preclude BC from assuming jurisdiction?
    - Does a claim based on customary international law have a reasonable prospect of success?

Private International Law cont'd

- Decision
  - Act of state doctrine does not apply and therefore does not bar the claims
    - Exists in other jurisdiction but Canadian courts use conflict of laws principles and judicial restraint
  - Not plain and obvious that customary international law claim would not succeed
    - Claims based on CIL may disclose a cause of action in Canada
      - Norms of CIL form part of Canadian common law
      - Remedies for violations of CIL are not limited to state actors
      - Specific novel torts for breaches of CIL could exist
  - Dissent → 4 Justices
    - Judicial creep, novel private rights, new tort claims should not be recognized

Private International Law

- Implications
  - First time CIL found to form part of Canadian common law
  - New development re CIL applying to private actors
  - Future actions against Canadian companies operating abroad

Standard of Review

- ***Canada (Minister of Citizenship and Immigration v Vavilov***
  - Background
    - Registrar cancels Vavilov's citizenship
  - New Framework
    - Presumption of reasonableness
    - Rebutting reasonableness
      - Legislated standard and statutory appeal rights
      - Correctness review and the rule of law
    - Conducting a reasonableness review
      - Indicia of unreasonableness (incoherent reasoning, acting beyond statutory authority, failing to consider relevant case law or meaningfully grapple with key issues, failing to provide thorough reasons, failing to justify departures from past decisions)

Standard of Review

- Implications
  - Strong dissents, undermining clarity
  - Application to energy tribunals
    - Correctness standard applied in Bell
  - Application to arbitrations
    - Competing interpretations in MB and AB courts

Notable Mentions

- *Uber Technologies Inc v Heller*, 2020 SCC 16
  - Enforceability of arbitration clauses
- *Brookfield Residential (Alberta) LP (Carma Developers LP) v Imperial Oil Limited,* 2019 ABCA 35
  - Extending limitation periods under the *EPEA*
- *Prosper Petroleum Ltd v Her Majesty the Queen in Right of Alberta*, 2020 ABQB 127, 2020 ABCA 85
  - Mandatory injunctions & cabinet decision making

Questions?

Thank You

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