Under Construction:

A Close Examination of Recent Construction Law Developments and Their Impact on the Oil and Gas Industry

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Introduction

- Oil and gas construction projects are complex, subject to a host of statutory schemes, can incorporate hundreds of contracting parties, and regularly result in litigation.
  - These projects generate some of the largest construction projects in Canada and help to drive its economy.
- Canadian Courts have recently delivered several construction related decisions that have tested the boundaries of construction law in areas such as: bonding, tendering, liens, and arbitration in the oil and gas industry.
- There are numerous stakeholders involved in the development and regulation of this economic sector, including judges, legislature, and contracting parties.
  - Understanding how these parties interact to direct the outcome of construction disputes can increase certainty and help to minimize risk.
- This presentation will examine a number of these recent decisions that highlight common pitfalls and residual uncertainties in the law of construction.

Bonding

Benefits and Liabilities

Bonding – Benefits and Liabilities

- **Surety bonds** are a commonly used instrument in the construction industry to guarantee performance and limit exposure to lawsuits and other financial losses.
- Recent case law suggests that certain types of bonds are a double-edged sword – both a benefit and liability.
  - In *Valard Construction Ltd v Bird Construction Co* (2018 SCC 8), the SCC departed from 40+ years of jurisprudence by deciding that an obligee can be liable to a lower tier beneficiary for failing to disclose the existence of a labour and material payment bond to subcontractors and suppliers who furnish goods and services to the project.
    - Parties wishing to utilize bonds on their projects must be aware of their accompanying obligations, rights, and duties.
    - Conversely, parties working on projects where bonds might exist should take due care in making timely inquiries about their existence.

Surety Bonds

- A surety bond is a legally binding contract entered into by three parties: the principal, the obligee, and the surety.
  - The surety undertakes to correct the default of the principal with respect to its obligations to the obligee.
  - In the construction industry, most commonly the owner is the obligee, a general contractor is the principal, and a bonding or insurance company is the surety.
  - Differs from other types of guarantee agreements since the surety is entitled to the full range of rights and defences of the principal.
  - The stipulated maximum exposure of the surety within the form of the bond is merely an upper limit, and not a set payment owing upon default.
  - Commonly, the bond will also allow the surety to perform the principal's obligations in lieu of cash payment to the obligee.
  - Language in the bond circumscribes the parties' rights and defines the associated obligations and benefits. The scope of the surety's liability is a matter of contractual interpretation.

Types of Surety Bonds

- In oil and gas construction projects, there are three types of surety bonds:
  1. **Bid bonds**
     - Guarantee that the principal will enter into a formal contract with the obligee upon being selected as the winning bidder.
     - Successor to the old approach of bidders providing deposits with their bids, to deter from the submission of frivolous bids.
       - The old approach tied up significant amounts of capital.
     - In the event of a principal's default, surety is typically required to pay the difference between the amount the principal would have charged for the work and the cost of arranging the contract with another bidder.
     - Surety does not guarantee the performance of the contract, but merely ensures that the principal enters into the contract.

Types of Surety Bonds

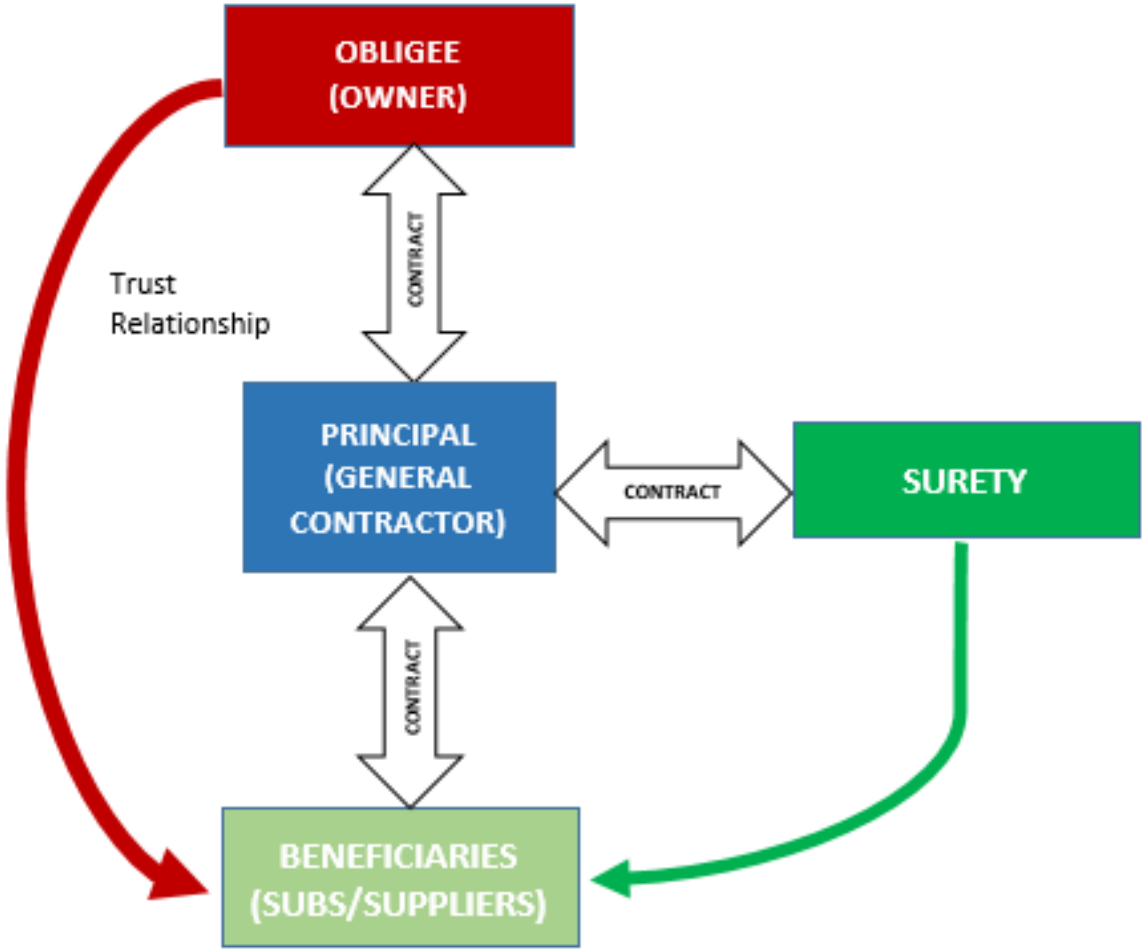
2. Performance bonds

- Commonly required on construction projects.
    - The new *Ontario Construction Act* requires that a contractor (principal) furnish both a performance bond and a labour and material payment bond if the owner (obligee) is the Crown, a municipality or a public sector organization.
        - Other jurisdictions may soon follow this approach.
- Guarantees that the principal will fulfill its obligations as per the contract.
- In the event that a principal defaults on its contractual obligations, and provided there is no defence to the default, the surety is typically entitled to pursue one of three options:
    1. Remedy the default;
    2. Complete the contract in accordance with its terms and conditions; or
    3. Obtain a bid for submission to the obligee, and following an award of contract, pay the associated cost to complete the work.

Types of Surety Bonds

3. Labour and material payment bonds

- Guarantees that subcontractors, suppliers, and possibly other lower tiers are paid for the work and materials they provide for the project.
- Differs from other forms of surety bonds since the obligee is not the only beneficiary under the instrument.
  - Underlying contract is between the principal and the obligee, but the subcontractors and suppliers also benefit directly from the bond.
    - Since there is no privity of contract between the third party beneficiaries and the surety or obligee, the language of the bond creates a trust relationship between the obligee (as trustee) and the lower tier beneficiaries.
- Principal's performance is measured against its obligations to the subcontractors and suppliers, not the obligee.



Valard Construction Ltd v Bird Construction Co, 2018 SCC

Facts

- Suncor Energy hired Bird Construction as a general contractor for a construction project near Fort McMurray.
- Bird Construction entered into a subcontract with Langford Electric for the electrical work, which required for a standard labour and material payment bond to be in place.
  - Structure of the bond:
    - Langford Electric – principal
    - Bird Construction – obligee/trustee
    - Guarantee Company of North America – surety
- Langford further subcontracted work with Valard Construction.
- Valard Construction went unpaid, and claimed against Langford approximately one year after beginning work on the project; it obtained a default judgment of $660,000 against Langford.

Valard Construction Ltd v Bird Construction Co, 2018 SCC

Facts (cont'd):

- After obtaining default judgment, Valard inquired with Bird whether a bond existed on the project.
- Valard then submitted its claim against the bond, but was denied for being past the limitation period.
  - The bond stipulated that any claimant had to provide written notice within 120 days from the last day of work on the project.
- Valard then proceeded against Bird for breaching its fiduciary duty to inform Valard of the existence of the bond within the specified limitation period.

Valard Construction Ltd v Bird Construction Co, Lower Courts Decisions

***Valard Construction Ltd v Bird Construction Co*, 2015 Alta QB**

- Trial judge dismissed Valard's action, awarding Bird costs on a full indemnity basis.
- Under the law as it then was, an obligee had no positive legal duty to disclose the existence of the bond to the beneficiaries thereunder.
- Further, the trial judge held that the purpose of the bond was to protect the obligee, and Bird was under no obligation to take any action to enforce the bond.

***Valard Construction Ltd v Bird Construction Co*, 2016 Alta CA**

- Dismissed Valard's appeal and held the trial judge's decision.
- The Court determined that a "contractor" in the position of the respondent has no legal obligation to inform any potential claimant about the existence of a labour and material payment bond, unless a clear and unequivocal request for information about the bond is made.

Valard Construction Ltd v Bird Construction Co, 2018 SCC

Supreme Court Decision

- SCC acknowledged that the language of the bond did not impose a duty on Bird to protect the interests of the third party beneficiaries.
- However, the language on the bond is only the "main source" of the obligee/trustee's obligations and that where the instrument is silent, the general law of trusts fills the void.
  - Under the general laws of trust, the SCC held that Bird owed Valard a duty.
    - "Wherever a beneficiary would **unreasonably disadvantaged** not to be informed of a trust's existence, the trustee's fiduciary duty includes an obligation to disclose the existence of the trust."
      - To determine what is an "unreasonable disadvantage", requires an evaluation of the "nature and terms of the trust" and the "social or business environment in which it operates."
        - I.e. We must look to the context and rely on the Court's discretion.
- Labour and material payment bonds are not often used in private oil sands construction, and ultimately, the Court held that Valard was **unreasonably disadvantaged** through the deprivation of its ability to claim against its bond within the limitation period.

Valard Construction Ltd v Bird Construction Co, 2018 SCC

Supreme Court Dissent

- Karakatsanis J stated that in the context of the construction industry:
  - Bird was not under an obligation to inform potential claimants of the existence of the bond;
  - Rather it was required to accurately respond when asked about the matter.
    - "Imposing a mandatory obligation on the trustee to inform potential claimants of the bond's existence transforms what was a beneficial risk-management tool into a significant liability."
- Karakatsanis J disagreed that labour and material payment bonds, although widespread in the construction industry, should be treated differently in the allegedly niche oil and gas market.
- She also refused to accept that general trust principles create a significant liability for parties in this particular commercial context.

Bonding – Conclusion and Reflection

- In the SCC decision, the majority appears to have gone out of its way to ensure that Valard received the benefit of the labour and material payment bond.
  - By contrast, the one party who the instrument was definitively intended to protect was then ordered to pay for breaching a previously non-existent duty.
- The Court held that the obligee/trustee was “holding in trust for the beneficiaries their right to claim against and recover from the Guarantee Company”.
- It is arguable that the majority has created a new positive duty on trustees to disclose the existence of a bond where the beneficiary would be unreasonably disadvantaged by not being aware of its existence.
  - Due to the nature of business operations in the industry – the trustee may not even know who the beneficiary is, nor whether the trust property (being the right to bring a claim), yet exists.

Bonding – Conclusion and Reflection

Those wishing to continue using labour and material payment bonds should consider the following precautions:

1. **Delineate the Class of Third Party Beneficiaries Carefully**
   - It is critical as an obligee or surety to understand clearly what class of third party beneficiaries may exist.
2. **Due Diligence – Review Contracts Other than Your Own**
   - All contracting parties, when possible should review contracts between the parties directly above them, which would allow them to know the types of security that already exist.
3. **Meeting the Burden**
   - The obligee need not inform *every* possible beneficiary, but instead must take reasonable steps to that end.
   - An obligee could require that the principal provide notice to each of its subcontractors or suppliers regarding the existence of the bond; however, whether this is sufficient to meet the burden will ultimately be determined on a case-by-case basis.

Tendering

Balancing Interest and Favouring the Owner

Are the scales tipping in favour of the owner?

- The Supreme Court of Canada has consistently held that the “integrity of the bidding system must be protected where under the law of contracts is possible to do so.” (Ron Engineering)
- The Contract A/ Contract B paradigm
- However, there are competing interests at play in the law of tendering

Owners and Contractors soliciting bids	Bidders
• Want more flexibility in selecting the winning bids	• Want to be treated fairly and equally to avoid wasting resources

- Recently in Alberta and British Columbia there have major decisions addressing the appropriate exercise of an owner’s discretion

***Everest Construction Management Ltd v Strathmore (Town)*, 2018 Alta CA**	***J Cote & Son Excavating Ltd. v City of Burnaby*, 2018**
• Decision indicating that owners have a broad discretion to select bidders	• Decision indicating that absent of undue hardship reprisal clauses are constitutionally valid and are not contrary to public policy.

Everest Construction Management Ltd v Strathmore (Town), 2018 Alta CA

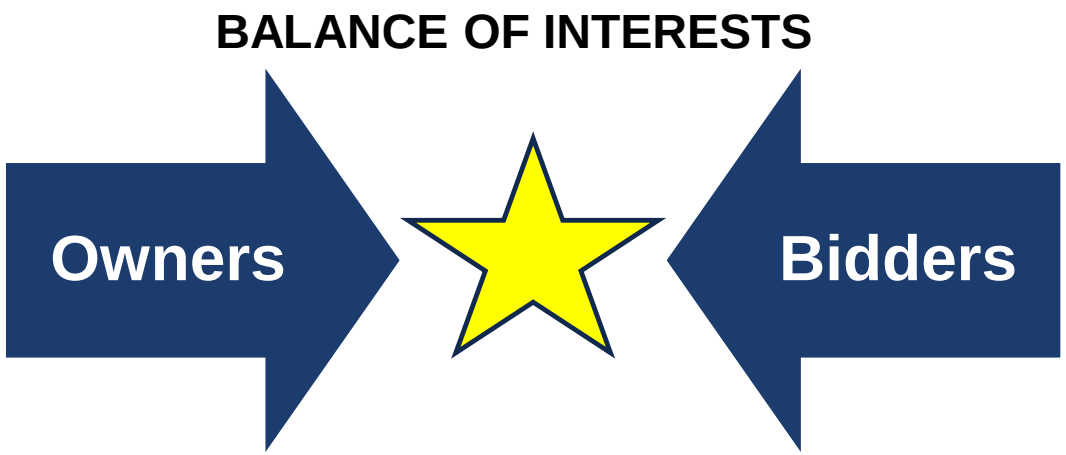
FACTS	• The tender documentation: bid price, completion date, and information about the bidders relevant experience. • Winning bid had higher price than Everest but had a shorter completion time and listed more relevant experience. • Everest commenced an action stating that Strathmore breached the implied duty of fairness in Contract A due to the evaluation of the bids based on completion date, relevant experience and additional costs and that it failed investigate the claims made by the winning bidder. Strathmore also failed to investigate claims by the winning bid.
DECISION	• The ABCA held that the fact that inclusion of relevant experience and completion date was were valid evaluation criteria if clear that there was intent to use the information. • The ABCA also held that there was no duty to investigate a bidder to see if they can comply with its bid. • ABCA stated that owners may rely on information from past experiences with a bidder when evaluating the bids.
RELEVANCE IN THE OIL AND GAS CONTEXT	• Proponents may chose to make certain aspects of their bids, such as the schedule, more appealing, without necessarily having to worry about having the lowest costs. • Smaller contractors may be disadvantaged due to lack of experience . • If past experience can be a criteria bidders should focus on maintaining healthy relationships.

J Cote & Son Excavating Ltd. v City of Burnaby, 2018

FACTS	• J Cote was a construction company that secured most of its work by bidding on municipal contracts. • While working on a contract with Burnaby a dispute arose that led to litigation. • 2 months after the dispute, Burnaby added a new clause to its standard Invitation to Tender stating that company that initiated court proceedings within the past 2 years could not submit a tender. Therefore, J Cote was barred from submitting. • J Cote said the reprisal clause was unconstitutional as it imposed a its right of access to the courts, was contrary to public policy and caused undue hardship.
DECISION	• The BCSC held that the legislature has the power to pass laws in relation to the administration of justice in the province, therefore the right is not absolute. • The *Charter* gives no general right to access the courts and the plaintiff must be able to point to a specific right or freedom set out in the *Charter* that has been infringed. • The threshold for showing undue hardship is high. The fact that a contractor chose to avoid pursing its rights in court because of the reprisal clause is not enough to prove undue hardship.
RELEVANCE IN THE OIL AND GAS CONTEXT	• Oil and gas projects now have another reason to carefully consider the impact of legal proceedings will have on future business opportunities. • Project owners should consider reprisal clauses as a means to deter litigation and avoid being required to select a bidder with whom they've had a troubled past.

Preserving fairness and certainty in the bidding process

- Though case law may seem to be shifting in favour of the owner's interests there are still some court decisions that are reemphasizing that courts must still apply stringent analysis to issues relating to the tendering process.
- Courts must also seek to preserve the fairness and certainty of the bidding process.
- One specific instance of this is *Maglio Installations Ltd v Castlegar (City)* in which the Court held that while an owner may include a right to waive defects in the tender invitations, that right does not allow the owner to waive material defects.
- Therefore, there is still somewhat of a balancing between the competing interests of owners and bidders .



Maglio Installations Ltd v Castlegar (City), 2018

FACTS	• Maglio submitted a fully compliant bid with the call for tenders. • The successful bid did not include a preliminary construction schedule in its tender documents – a document which was stated to be necessary in the call for tenders. • The call for tenders also contained a "discretion clause" stating that the City had the right to waive any defects in the bid or tender documents. • It was agreed by the parties that the discretion clause only allowed the City to waive minor irregularities and non-material defects.
DECISION IN LOWER COURT	• The Court held that the preliminary construction schedule was material because: (1) the preliminary schedule was front and center in the tendering documents, (2) the tender documents stated that time was of the essence, and (3) the schedule was a significant factor in the City's evaluation process and timelines were subject to a regulatory window.
DECISION ON APPEAL	• On appeal the BCCA did not overturn the lower court decision. • The Court agreed with and adopted the test from *Graham Industrial Services,* setting out that a defect in a construction contract bid is material where: (1) the defect has to do with an important or essential part of the tender document, and (2) there is a substantial likelihood that the omission would have been significant in deliberations. Both of these questions are to be objectively answered.

Summary

In General:

- Overall, the above cases indicate a shift towards greater freedom on contract.
- Specifically with respect to an owner's right to create flexibility in the bid section.
- In the cases of *Everest* and *J Cole* the Court is giving owners significant power to dictate which bids they select.
- As long as bids are compliant, owner's are no longer obligated to pick the lowest bid.

In the Oil and Gas Context:

- The cases mentioned may case issues for smaller corporations who do not have the experience or relationships with the owners.
- The *J Cote* decision is particularly relevant as the size and scope of oil and gas infastructure projects often lead to legal disputes and there can be a limited number of players to contract with.
- Keeping healthy business relationships is becoming more important than ever.

Liens on Oil and Gas Projects

Everything but the Kitchen Sink?

Builder's Lien Act

Lien, defined: a right to keep possession of property belonging to another person until a debt owed by that person is discharged

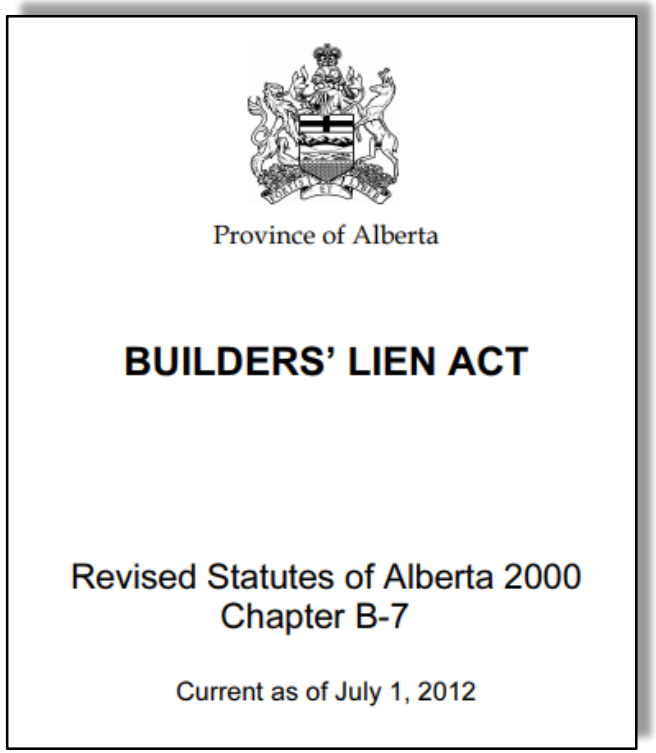
The *Builder's Lien Act* has created a convoluted registration process.

- Errors in registration can be fatal
  - Correct Interest?
  - Correct land titles in office?
  - Within time?

Alberta's Courts & the *BLA*

- Liberal and broad prescription of meaning to provisions
- Aim for a **just result**

The *BLA* can be a flexible and inclusive instrument.


Province of Alberta

BUILDERS' LIEN ACT

Revised Statutes of Alberta 2000
Chapter B-7

Current as of July 1, 2012

International Brotherhood of Electrical Workers v Imperial Oil Ventures Resources Ltd., 2017

A lien on the land surface or on the minerals below?

Facts:

- Imperial Oil contracts electricians to work on surface-level structures of oil sands project.
- Electricians file a builder's lien at Alberta Land Titles Office against the **surface interest** under s. 6(1) of the *BLA*:
  - Section 6(1) of the *BLA* is the general provision that creates a right to lien for work or materials provided "on or in respect of an **improvement**."
- Imperial Oil's **surface** lease came from Alberta Energy Regulator, not Registrar of Land Titles.
- Imperial argues that builder's lien should be registered with Minister of Energy.
  - And because the Brotherhood did not, their lien with the Alberta land Titles Office should be struck.

International Brotherhood of Electrical Workers v Imperial Oil Ventures Resources Ltd., 2017

Facts, con't.:

- Section 6(2) addresses liens on mineral recovery, and contains a broad right to register liens against mineral rights, including the potential to allow liens to attach to **3rd parties.**
  - s. 6(2) reads that a s.6(1) lien extends **to all estates and interests in the mineral concerned** other than the estate in fee simple if the work is done in connection with the recovery of the mineral.

Issue:

1. Is a lien on surface interest invalid if not registered at the source of the surface lease?

2. Is the electricians' work done on the buildings "in connection with" the recovery of the mineral?

International Brotherhood of Electrical Workers v Imperial Oil Ventures Resources Ltd., 2017

Analysis

- Distinction between s. 6(1) and s. 6(2) liens is muddled for **construction projects** in the energy industry.
  - *BLA* not adapted to reflect reality → minerals no longer extracted by wells and jacks but by heavy oil projects which require construction.
- Court references previous Alberta Court of Appeal judgement:
  - "Builders' liens are business oriented statutes with practical, as opposed to formulistic, goals; their overall intent is to ensure that "the land that receives the benefit shall bear the burden."
- Court noted that the contract between the Brotherhood and Imperial specifically excluded the electrician's work from applying to the minerals.

International Brotherhood of Electrical Workers v Imperial Oil Ventures Resources Ltd., 2017

Decision:

- Court found that the building worked upon "in connection with" recovery of minerals was merely incidental; it was not directly involved with the recovery of the mineral.
- The electrician's work was done in connection with construction of improvement as contemplated by s. 6(1), and was thus a s. 6(1) lien applying to surface rights **only.**
- Further, a strict interpretation of the *BLA* was not appropriate and the lien remained valid.
  - It "already existed. It was not created when the lien form was filed at Lien Titles".

Note:

A prudent party will ensure that their lien is registered with both the Land Titles Office and the Minister of Energy. Particularly so if there is some uncertainty as to whether the work being done is "in connection with" the recovery of a mineral – which is likely.

Trotter and *Morton*, 2017 Alta QB

Build it – but don't move it?

Facts:

- Bankrupt intermediary company hired two subcontractors, represented here as Trotter and Morton, to construct four **pumphouses.**
- Pumphouses to be used within larger project on oil sands and then moved to new location after unspecified time.
- Trotter and Morton filed lien under s. 6(1) of the *BLA* under the grounds that pumphouses constituted "**improvements**" of the land, which would be…

Trotter and *Morton*, 2017 Alta QB

(d) "improvement" means anything constructed, erected, built, placed, dug or drilled, or intended to be constructed, erected, built, placed, dug or drilled, on or in land except a thing that is neither affixed to the land nor intended to be or become part of the land;

Issue:

Were the pumphouses, which were designed and intended to be moved, **'improvements'** of the land?

- Again, necessary to be an 'improvement' to have lien through s. 6(1).
- Improvement, per the above, should be affixed to the land and intended to become part of the land.

Trotter and *Morton*, 2017 Alta QB

Analysis:

- Court took detailed analysis of **nature** and **purpose** of pumphouses.
- Noted that entire facility – of which pumphouses were a part – was to be moved and integrated into another project also owned by the owner of the land interest.
- Court noted, when looking to function of the pumphouses, that "[w]ithout more, they would clearly appear to be an 'improvement' to the Horizon site."

Decision:

Court concluded that the buildings **were 'improvements'** under the *BLA.*

- That the pumphouses were to be moved was a factor, but that they were to be moved to land that had interest held by the same owner mitigated this factor.

Trotter and *Morton*, 2017 Alta QB

Trotter's Alternative Argument:

- Trotter submitted that if pumphouses not 'improvements', then should be "materials […] furnished […] in connection with […] the recovery of a mineral."
  - Thus, oil sands project **as a whole** was that to which the lien attached.
  - This is per s. 6(2) of the *BLA*

***BLA* s. 6(1)**	<	***BLA* s. 6(2)**
Work done: improvement **Lien attained on:** estate or interest of owner in the land of which improvement is made.		**Work done:** preparatory, or in connection with, recovery of mineral **Lien attained on:** all estates and interests in the mineral concerned other than fee simple.

Trotter and *Morton*, 2017 Alta QB

Trotter's Alternative Argument, con't.:

- This alternative argument was also accepted.
- Court relied on principle that entire oilsands plant can be an "improvement."
- Principle comes from ***Grey Owl Engineering Ltd. V Propak Systems Ltd***:

Saskatchewan Court of Appeal:

> "it is a mistake to begin and end the inquiry with whether the [potential improvement is] an improvement…", and instead, "ask whether […] the "improvement" with respect to which the legislation is concerned is the project that will lead to the [recovery of the mineral]."

Davidson Well Drilling's Receiver, 2016 Alta QB

Exploration = Improvement?

Facts:

- Davidson Well contracted to do geotechnical testing and exploration on mining sites.
- Davidson then contracts multiple entities for **exploration** - then promptly enters receivership.
- These contracted entities then sought to have liens declared under s. 41 of the *BLA.*

BLA s. 41 :

90-day lien registration window – as compared to standard 45-day – if the services rendered are related to improvements on an **oil or gas well** or an **oil or gas well site.**

Davidson Well Drilling's Receiver, 2016 Alta QB

Issue:

Are ***exploration*** services within the ambit of "**improvements** to an oil or gas well or to an oil or gas well site"?

Analysis:

- "oil or gas well/well site" **not** defined in the *BLA* – court required to interpret.
- Court looked to the motivation behind the *BLA* and determined it was to **benefit contractors.**
- *BLA* is **remedial legislation**, and thus requires a liberal interpretation.
- Court noted that ABCA considers "**improvement**" from perspective of the "**overall project.**"
- Determined 90-day lien period enacted to reflect unique payment practices of industry.

Davidson Well Drilling's Receiver, 2016 Alta QB

Decision:

- Court determined that **improvement** to gas/oil well/wellsite included **exploratory** services, and thus 90-day lien registration period applied.
- Because contractors were exploring for bitumen, from which oil would be processed, this would be within "ordinary and grammatical meaning of oil or gas wells."
- The **potential** that oil or gas **could be discovered** was enough.

Secondary Findings:

- Court found that because the "equipment is required on site on a temporary basis for the purpose of construction, it is essential to completion of the improvement", and thus, "**transportation costs** are properly **included in a builder's lien**."
- Thus, Davidson was able to include standby and demobilization costs in their lien's claim.

Thoughts and Reflections

International Brotherhood of Electrical Workers

- A lien "in connection with" the construction of a building, rather than recovery of a mineral, is registered against the **surface interest** and is a **s. 6(1)** lien to be registered at the Registrar of Land Titles.
- But, if unsure, registering at Minister of Energy is cheaper than not registering mistakenly.

Trotter and Morton

- "**Improvement**" of land has been interpreted generously by the courts.
  - If contracting entities to work on land, likelihood of qualified s. 6(1) liens against land is increasing.
- Courts continue to expand the scope of **interests** that a Builder's Lien can encumber.
  - Recall: court accepted that pumphouses could be either (i) **improvement** for **lien against land interest,** or (ii) **material** to **recovery of mineral** for **lien against mineral interest.**

Thoughts and Reflections

Davidson Well Drilling

- Alberta Courts see *Builder's Lien Act* as remedial and accommodating – for contractors.
- Non-drilling work could be interpreted as preparatory for improvements.
- If work is not obviously related to drilling or servicing an oil or gas well site, best practice would be to register a builders' lien within 45-day period.

The nature of the *Builder's Lien Act* requires paying careful attention to the nature and scope of services being provided to a well site.

Arbitration

Choose your Jurisdiction Wisely

Justice Binnie *(Seidel v. Telus Communications Inc.,* 2011 SCC 15)

"The choice to restrict or not to restrict arbitration clauses in consumer contracts **is a matter for the legislature**. Absent legislative intervention, the courts will generally give effect to the terms of a commercial contract freely entered into, even a contract of adhesion, including an arbitration clause. […]

Respectfully, I believe the Court's job is **neither to promote nor detract from private and confidential arbitration**. The Court's job is to give effect to the intent of the legislature as manifested in the provisions of its statutes."

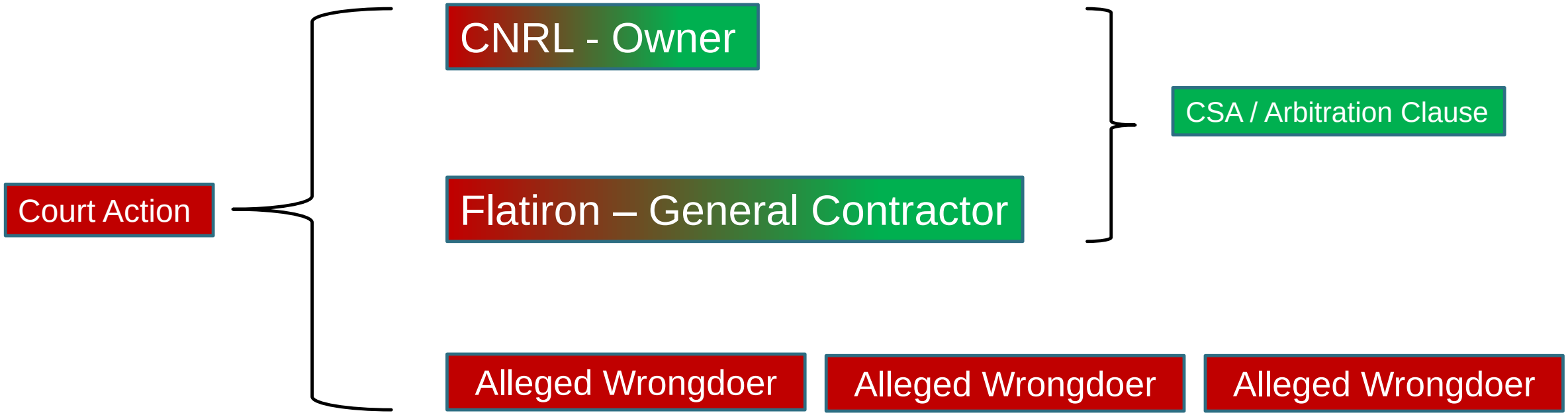
The Question:

Can a party seek relief under the *Arbitration Act* to stay an arbitration in favour of a court proceeding?

Holding contracting parties to their agreements.

Preventing manifestly unfair treatment.

CNRL v Flatiron Constructors – 2018 Alta QB

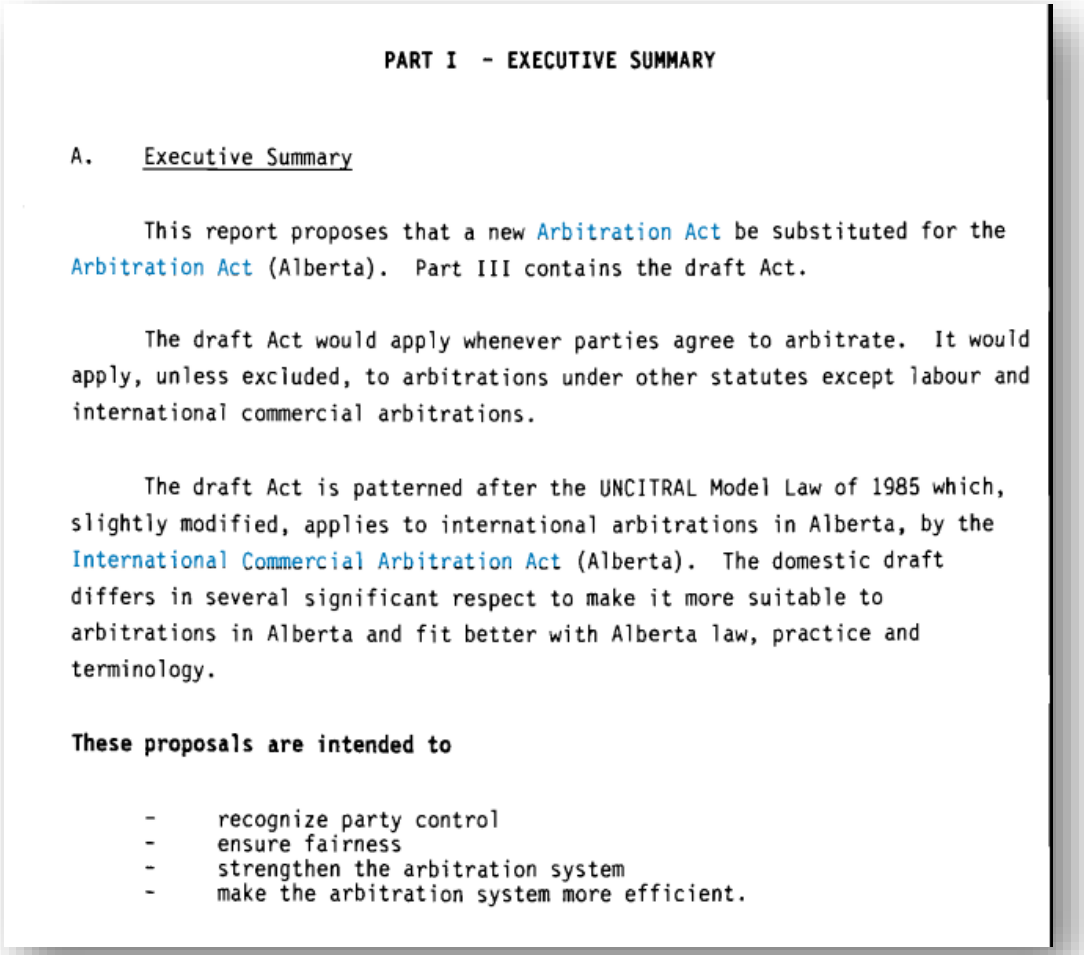


Application by property owner for stay of arbitration commenced by general contractor until final determination is made in parties' related court action against alleged wrongdoers (subcontractors).

The Legislative Intent of the AB *Arbitration Act*

Alberta Institute of Law Research and Reform:

"*Proposals for a New Alberta Arbitration Act*" (Report No. 51)



PART I - EXECUTIVE SUMMARY

A. Executive Summary

This report proposes that a new Arbitration Act be substituted for the Arbitration Act (Alberta). Part III contains the draft Act.

The draft Act would apply whenever parties agree to arbitrate. It would apply, unless excluded, to arbitrations under other statutes except labour and international commercial arbitrations.

The draft Act is patterned after the UNCITRAL Model Law of 1985 which, slightly modified, applies to international arbitrations in Alberta, by the International Commercial Arbitration Act (Alberta). The domestic draft differs in several significant respect to make it more suitable to arbitrations in Alberta and fit better with Alberta law, practice and terminology.

These proposals are intended to

- recognize party control
- ensure fairness
- strengthen the arbitration system
- make the arbitration system more efficient.

ALRI Recommendation (1988)	*Arbitration Act*, RSA 2000, c A-43
8(1) Subject to subsection (2), if a party to an arbitration agreement commences an action in a court about a matter which is agreed to be submitted to arbitration, the court in which the action is brought shall, upon application by another party, stay the action.	7(1) If a party to an arbitration agreement commences a proceeding in a court in respect of a matter in dispute to be submitted to arbitration under the agreement, the court shall, on the application of another party to the arbitration agreement, stay the proceeding.
8(2) A court may refuse to stay an action under subsection (1) if	(2) The court may refuse to stay the proceeding in only the following cases:
a. the arbitration agreement upon which the application is based	(a) a party entered into the arbitration agreement while under a legal incapacity;
i. was made by a party who was under a legal incapacity, ii. was not a valid agreement to arbitrate, iii. does not cover the dispute, or **iv. <u>does not bind all parties to the dispute,</u>**	(b) the arbitration agreement is invalid;
b. the subject matter of the dispute is not capable of being the subject of arbitration under the law of Alberta,	(c) the subject-matter of the dispute is not capable of being the subject of arbitration under Alberta law;
c. the application is unduly delayed, or	(d) the application to stay the proceeding was brought with undue delay;
d. the case is a proper one for a default or summary judgment.	(e) the matter in dispute is a proper one for default or summary judgment.

Arbitration Act, RSA 2000, c A-43

Court intervention limited

6 No court may intervene in matters governed by this Act, except for the following purposes as provided by this Act:

(a) to assist the arbitration process;

(b) to ensure that an arbitration is carried on in accordance with the arbitration agreement;

(c) to **prevent manifestly unfair or unequal treatment of a party to an arbitration agreement**;

(d) to enforce awards.

ALRI Recommendation (1988):

"In a proceeding or other matter governed by this Act, no court shall intervene except where this Act so provides."

Arbitration v Court Action – Merits of a Stay

(1) whether the questions in issue are substantially the same;

(2) if so, would continuation of both proceedings, and, in particular, the proceeding asked to be stayed, be abusive and unfair as to the applicant for a stay; and

(3) has the respondent established the opposite; all on a balance of probabilities.

(i) *a mere balance of convenience is not a sufficient ground for depriving a plaintiff of the advantages of prosecuting his action in English Court if it is otherwise properly brought. The right of access to the King's Court must not be lightly refused;*

(ii) *in order to justify a stay two conditions must be satisfied, one positive and the other negative;*

(a) *the defendant must satisfy the Court that the continuance of the action would work an injustice because it would be oppressive, or vexacious to him, or would be an abuse of the powers of the Court in some other way, and*

(b) *the stay must not cause an injustice to the plaintiff. On both the burden of proof is on the defendant.*

St. Pierre v. South American Stores Ltd., [1935] All E.R. Rep. 408 (CA)

Arbitration v Court Action – the "New Era"

Alberta Opinion *(New Era):*

- s. 6 of *Arbitration Act* provides overriding discretion to prevent manifestly unfair or unequal treatment of a party to an arbitration agreement.
- A party faced with both a statement of claim and a notice to arbitrate, may stay the arbitrations on the basis that the matters in the two proceedings overlap and cannot be reasonably separated.

COURT ACTION GIVEN PRECEDENCE

Saskatchewan Opinion *(Alberici):*

- Rejects Alberta's Interpretation – *"New Era* over-reads the relevant provisions of the *Arbitration Act*."
- "When parties freely contract to resolve disputes by arbitration, courts should give effect to those commitments."

ARBITRATION AGREEMENT GIVEN PRECEDENCE

TELUS Communications Inc. v. Wellman (SCC, April 2019)

Ontario *Arbitration Act*, 1991, SO 1991, c 17:

7 … (5) The court may stay the proceeding with respect to the matters dealt with in the arbitration agreement and allow it to continue with respect to other matters if it finds that,

(a) the agreement deals with only some of the matters in respect of which the proceeding was commenced; and
(b) it is reasonable to separate the matters dealt with in the agreement from the other matters.

"Furthermore, while I agree that s. 7(5) should be read in the context of the statutory scheme as a whole and that s. 6-3 permits the court to intervene "[t]o prevent unequal or unfair treatment of parties to arbitration agreements", I also note that s. 6 allows such intervention only "in accordance with this Act". Therefore, even though Mr. Wellman's interpretation of s. 7(5) would ostensibly give the court greater scope to intervene in an effort to prevent perceived unequal or unfair treatment of parties to arbitration agreements, **the words "in accordance with this Act" indicate that s. 6 was not intended to override or change the meaning of other sections of the *Arbitration Act***."

The Question:

Can a party unilaterally apply under the *Arbitration Act* to consolidate a number of related arbitrations?

Privacy, Consent, and Control Over the Arbitration Process

Preventing Prejudice to Certain Parties

Dealing with Multiple Litigants – Commencing Consolidated Arbitrations (BC)

British Columbia *Arbitration Act*:

s. 21 "Disputes … may be heard in one arbitration if… all parties to those agreements *agree* on the appointment of the arbitrator and the steps to be taken to consolidate the disputes into the one arbitration."

South Coast BC Transportation Authority v BMT Fleet Technology Ltd 2018 BCCA

- Essence of arbitration:
  - Consent
  - Privacy

Consent of all parties required to commence multi-party arbitration.

Dealing with Multiple Litigants – Commencing Consolidated Arbitrations (AB)

Alberta *International Commercial Arbitration Act*:

s. 8(1) The Court of Queen's Bench, on application of the parties to 2 or more arbitration proceedings, may order

(a) The arbitration proceedings to be consolidated…

Pricaspian Development Corp. v BG International Ltd. 2016 Alta QB

- *Interpretation Act* -> Words in plural include the singular.

<u>A single party may bring an application for consolidation of multiple arbitrations.</u>

What's the Difference?

"… all parties to those agreements *agree*"

The Question:

What are the consequences of settling with some, but not all of the defendants?

Settling with Some, But Not All …

Pierringer Agreements

Entering into settlements with some, but not all, defendants:

- Requirements
  - Settling defendants agree to pay a sum of money.
  - Settling defendants are released from action.
  - Plaintiff agrees not to pursue the non-settling defendants for more than their proportionate liability

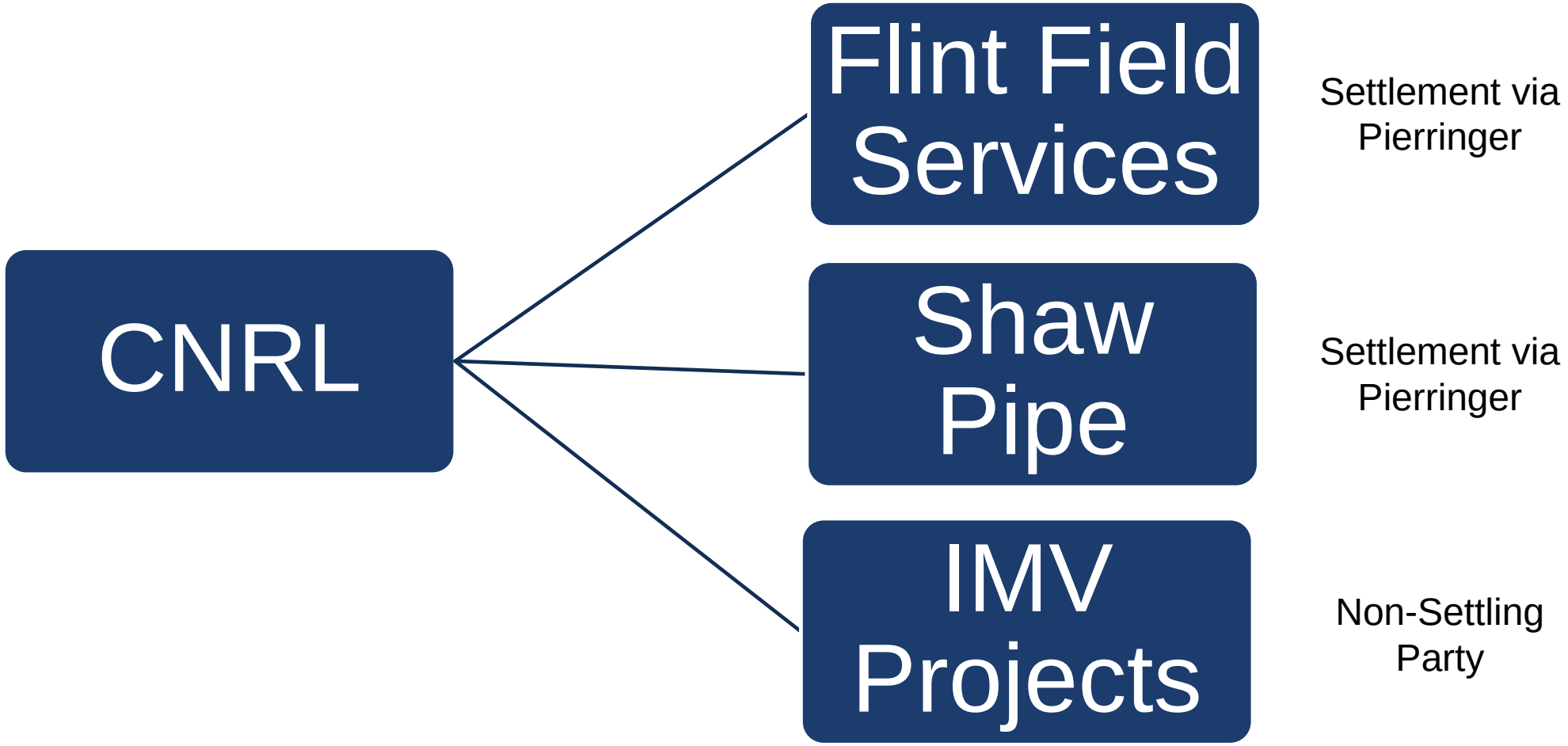
<u>vs. Mary Carter Agreement</u>

- Settling defendants to pay fixed maximum
- Stay in Action to assist Plaintiff
- Payment reduced in proportion to any increase in non-settling defendant's liability

CNRL v Wood Group Mustang, 2018 Alta CA

PLAINTIFF

DEFENDANTS



CNRL v Wood Group Mustang, 2018 Alta CA

The Rule in *Bedard,* 2010 Alta CA and Avoiding a Windfall

- Plaintiff must account to non-settling defendants if it "over settled."
- BUT, plaintiff may reduce amount of settlements by legal costs incurred to pursue the settling defendants.

Damages: $45,425,204.00

	CNRL (50%)	IMV Projects (20%)	Shaw Pipe (25%)	Flint Field Services (5%)
Trial Award	$22,712,602.00	$9,085,040.80	$11,356,301.00	$2,271,260.20
Pierringer			$14,500,000.00	$4,000,000.00
Interest			$213,250.00	$42,650.00
Legal Costs			$3,591,471.00	$1,966,070.00
Take Home			$10,695,279.00	$1,991,280.00
Delta			$661,022.00 (Under Settled)	$279,980.20 (Under Settled)

Questions?

Disclaimer

- The content of this presentation is intended to provide general information only, and does not constitute the provision of legal or other professional advice.
- Attendees are encouraged to seek and obtain proper legal advice from a competent professional regarding their particular circumstances.
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Thank You

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