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Recent Judicial Decisions
Of Interest to Energy Lawyers

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This article summarizes a number of recent judicial decisions of interest to energy lawyers. The authors review and comment on the past year's case law in several areas including alternative dispute resolution, bankruptcy and insolvency, contractual interpretation (including operator agreements), competition law, corporate separateness, damages/limitations of liability, Indigenous law, torts, and selected developments relating to summary dismissal. Specific topics addressed include the interpretation of exclusion clauses, the reaffirmation of the principle of corporate separateness, confirmation that environmental cleanup costs take priority over creditors in bankruptcy proceedings, confirmation that the development, passage, or enactment of legislation does not trigger the duty to consult, and apportionment of liability and Pierringer agreements.

For each case, some background information is provided, followed by a brief explanation of the facts, a summary of the decision, and commentary on the outcome.

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I. ALTERNATIVE DISPUTE RESOLUTION

Over the past year, the Ontario Court of Appeal has rendered two important decisions with respect to the interpretation and enforceability of arbitration provisions. These decisions will be of particular interest to those energy companies who contract with numerous independent contractors using "boiler plate" arbitration clauses, or who rely upon multi-tier dispute resolution clauses in their agreements.

A. Heller v Uber Technologies Inc.[1]

1. BACKGROUND

In *Heller*, the Ontario Court of Appeal confirmed that parties cannot contract out of the employments standards provided in Ontario's *Employment Standards Act* ("*ESA*")[2] by agreeing to resolve all disputes between them in a foreign jurisdiction.

2. FACTS

Mr. Heller commenced a proposed class action, seeking among other things, a declaration that those using the Uber's Driver App to provide food delivery and/or personal transportation services in Ontario were employees of Uber Technologies Inc. ("Uber")[3] (as opposed to contractors) and were governed by the provisions of the *ESA*.[4] Uber sought to stay the proposed class action, relying upon the standard arbitration provision included in its services agreements with Driver App users.[5] That provision provided that disputes would be governed exclusively by the laws of the Netherlands in accordance with the International Chamber of Commerce Mediation and Arbitration Rules ("ICC Rules"). The place of the arbitration was to be Amsterdam.[6]

In agreeing to stay the proposed class action, the motions judge found that courts must enforce arbitration agreements freely entered into. Any restriction to a party's freedom to arbitrate must be found in the legislation, and the *ESA* did not restrict the parties from arbitrating.[7]

3. DECISION

The Court of Appeal overturned the stay on the basis that the arbitration clause at issue had the effect of eliminating Mr. Heller's right to make a complaint to the Ministry of Labour, and thereafter having an Employment Standards Officer investigate that complaint. This triggered section 5 of the *ESA*, which rendered void any agreement between

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[1] 2019 ONCA 1[*Heller*].
[2] SO 2000, c 41 [*ESA*].
[3] In addition to Uber Technologies Inc., this case names as defendants several of Uber's subsidiaries: Uber Canada, Inc., Uber B.V., and Rasier Operations B.V. The appellate decision does not distinguish between the entities in its analysis. The same approach is adopted here.
[4] *Heller, supra* note 1 at para 4.
[5] *Ibid* at para 1.
[6] *Ibid* at para 11.
[7] *Ibid* at paras 16-18.

employers and employees to contract out of an employment standard.[8] With the arbitration clause being invalidated, there was no basis to stay the proposed class action under Ontario's *Arbitration Act, 1991*.[9]

In the alternative, the Court concluded that the arbitration clause was invalid on the basis of unconscionability. In particular, it found that the clause represented a substantially unfair or improvident bargain, as the significant costs of initiating an ICC Arbitration (approximately $14,500) were "out of all proportion" to the small claims drivers would bring. In addition, the Court noted that: (a) drivers were not given any information on the laws of the Netherlands; (b) there was no evidence drivers received any legal advice prior to entering into agreements with Uber; (c) there was a significant inequality of bargaining power between the parties; and (d) the clause was chosen by Uber to favour itself and take advantage of its drivers.[10]

4. COMMENTARY

Arbitration provisions can be a valuable tool where parties want to specify the place and laws under which their dispute will be determined. However, when utilizing such clauses with contractors, who could one day allege an employment relationship, careful attention should be paid in determining whether those clauses could one day be rendered unenforceable due to local employment legislation. Given the differences that may arise in the different jurisdictions that an employer may be operating in, caution must be taken in attempting to standardize the dispute resolution process by resorting to "boiler plate" clauses. Such clauses will increase the risk that the clause could be invalidated in one or more of the jurisdictions the employer is operating in.

B. PQ Licensing S.A. v LPQ Central Canada Inc.[11]

1. BACKGROUND

LPQ Central considered the important issue of when limitation periods begin to run where mediation is a pre-requisite to arbitration.

2. FACTS

PQ Licensing S.A. (the "Franchisor") and LPQ Central Canada Inc. (the "Franchisee") entered into a Development Agreement in 2008. That agreement required the parties to mediate their disputes prior to resorting to arbitration. In 2009 the Franchisee delivered a notice of rescission of the Development Agreement, which was disputed by the Franchisor. Almost two years later, the Franchisee commenced an action in the Superior Court. The case stayed dormant and was administratively dismissed in 2013. The Franchisee later tried to revive the action, which was

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[8] *Ibid* at paras 29-36, 41, 49.
[9] *Ibid* at para 51; S.O. 1991, c. 17.
[10] *Heller, supra* note 1 at para 68.
[11] 2018 ONCA 331 [*LPQ Central*].

opposed on the basis of limitations. The Court stayed the action in favour of an arbitrator deciding the limitations issue.[12]

The arbitrator determined that the limitation period between the parties did not expire, as based on the wording of the Development Agreement, the commencement of the limitations period began at the conclusion of the mediation, and not when the dispute first arose.[13] An appeal to the Ontario Superior Court was dismissed, resulting in the Franchisor appealing to the Ontario Court of Appeal.[14]

3. DECISION

The Court of Appeal began by noting that the standard of reasonableness would "almost always" apply for a review of an arbitration award.[15] Using this standard of review, the Court found that the arbitrator's decision was reasonable – the parties provided for mediation as a pre-condition of arbitration, thus a finding that the limitation clock started to run from the day the mediation concluded was reasonable.[16]

4. COMMENTARY

This decision highlights the uncertainty that may arise where parties include a multi-tier dispute resolution mechanism in their contract. If mediation is clearly made a pre-requisite to arbitration, this may delay the commencement of the limitations clock for the arbitration until after the mediation is complete. However, key to the decision in *LPQ Central* was the requirement that parties first mediate. To the extent there is any uncertainty as to whether a particular resolution provision mandates mediation prior to litigation or arbitration, proceeding as if that provision does not extend the limitation period is likely advisable.

II. BANKRUPTCY AND INSOLVENCY

In the last year, there have been a number of significant decisions made in the context of oil and gas receiverships and bankruptcies. Most notable of these decisions is *Orphan Well Association v Grant Thornton Limited*, in which the Supreme Court of Canada found that Alberta's regulatory regime, which imposes end-of-life obligations on those holding oil and gas licences (including trustees in bankruptcy as deemed licensees), are not in conflict with the *Bankruptcy and Insolvency Act*.[17] While the implications of this decision remain to be seen, it raises the potential for zero-recovery insolvencies for creditors, as end-of-life obligations may far exceed the realizable assets of the insolvent entity.

More generally, the Courts have rendered a number of decisions clarifying the priorities of various creditors and claims, including clarification over: (a) the extent to which a municipality may impose special liens on a bankrupt's

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[12] *Ibid* at paras 4-6.
[13] *Ibid* at paras 7, 12.
[14] *Ibid* at para 22.
[15] *Ibid* at para 26.
[16] *Ibid* at para 47.
[17] RSC, 1985, c B-3 [*BIA*].

property; (b) the unsecured status of linear property tax arrears; and (c) the ineffectiveness of Canada's superpriority over unremitted GST/HST against a secured creditor who received, prior to the tax debtor's bankruptcy, proceeds from the taxpayer's assets.

This year has also seen a number of important decisions clarifying the interpretation and application of the CAPL Operating Procedure in the context of bankruptcies and insolvencies, including: (a) the availability of claims for set-off; (b) the appropriateness of lifting stays of proceedings so that the operator may enforce various contractual rights; and (c) the circumstances under which a party may assume the role of operator upon the current operator being placed into receivership.

A. *Orphan Well Association v Grant Thornton Limited*[18]

1. BACKGROUND

This decision is significant, as it confirmed that Alberta's regulatory regime, which requires the abandonment and remediation of oil and gas operations and associated sites, does not conflict with the *BIA*. As a result, the obligation to address an insolvent company's environmental liability (the cost of which may engulf the realizable value of the insolvent estate) must be addressed before any distributions are made to creditors. This raises the potential for zero-recovery insolvencies for creditors.

2. FACTS

The dispute in this case flows from the bankruptcy of Redwater Energy Corporation ("Redwater"). Prior to its bankruptcy, Redwater held licences for various oil and gas wells, facilities and pipelines. Redwater was also party to a secured loan agreement, under which it owed approximately $5.1 million. The cost of meeting Redwater's end-of-life obligations was in excess of its obligations under the secured loan. Grant Thornton Limited was appointed as the trustee in bankruptcy (the "Trustee").[19]

On learning of Redwater's insolvency, the Alberta Energy Regulator ("AER") sent a letter to the Trustee, advising that under the legislation, it was a deemed licensee, and therefore subject to end-of-life obligations in respect of Redwater's licences. Further, per its licence transfer policy, the AER advised that it would deny any application to transfer Redwater's licences pending satisfaction of these end-of-life obligations.[20] Denial of license transfers would render Redwater's assets effectively unsaleable.

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[18] 2019 SCC 5 [*Redwater*].
[19] *Ibid* at para 46.
[20] *Ibid*. at para 47; The Alberta *Oil and Gas Conservation Act*, RSA 2000, c. O-6 and *Pipeline Act*, RSA 2000, c. P-15, form part of the regulatory scheme that governs Alberta's oil and gas sector. Under the Alberta legislation, industry participants, and the resources that they exploit, require licences to begin operation. Those licences are issued by the AER. One of the objectives of the licensing scheme is the management of environmental risks. Accordingly, attached to each licence are various "end-of-life" obligations that require licence holders to "abandon" (cap and plug oil wells) and remediate properties once they have reached the end of their useful lives. To ensure that these obligations are met, the AER imposes strict limitations on the transfer of licences. In particular, the AER will not permit a transfer where the effect of that transfer would be to reduce one of the parties' asset value to environmental liabilities ratio to less than 1. See *Redwater, supra* note 18 at paras 16-20.

In disputing the AER's assertion, the Trustee relied upon section 14.06(4) of the *BIA*, which in its view entitled it to disclaim all net negative assets, including those with attaching environmental liabilities. The Trustee advised the AER that it had disclaimed 107 of Redwater's licensed properties and had no obligation to satisfy any end-of-life obligations. Further, it stated that any attempt by the AER to block transfer of the relevant licences would be an impermissible violation of the *BIA*.[21] Both the Alberta Court of Queen's Bench and the Alberta Court of Appeal agreed with the Trustee.[22]

3. DECISION

A 5-2 majority of the Supreme Court of Canada overruled the decisions of both lower courts, holding that the provincial legislation did not conflict with the *BIA*.[23]

With respect to section 14.06(4) of the *BIA*, the Supreme Court found that the provision was not intended to permit trustees to disclaim portions of the bankrupt's estate, but was instead limited to protecting trustees from personal liability.[24] As a result, there was no conflict between the *BIA* and Alberta's regulatory regime or the AER's denial of the Trustee's disclaimers.[25] While Alberta's legislation appeared to confer a theoretical threat of personal liability in respect of the trustee, that was found to be insufficient to warrant toppling an important provincial regulatory scheme.[26] In reaching this conclusion, the Court emphasized the principle of co-operative federalism, i.e. courts should endeavour to interpret federal and provincial legislation in such a way as to avoid conflict.[27]

The majority went on to consider whether obligating a trustee to satisfy outstanding environmental obligations prior to permitting the transfer of licences improperly placed a "claim provable in bankruptcy" ahead of secured creditors.[28] In considering this question, the Supreme Court clarified and refined the test for assessing whether environmental liabilities constitute a claim provable in bankruptcy. The test, previously articulated in *Newfoundland and Labrador v AbitibiBowater Inc*[29], is as follows:

(a) there must be a debt, a liability or an obligation to a creditor;

(b) the debt, liability or obligation must be incurred before the debtor becomes bankrupt; and

(c) it must be possible to attach a monetary value to the debt, liability or obligation.[30]

With respect to the first prong of this test, the Court noted that a regulatory body could not become a creditor simply by demanding satisfaction of an environmental obligation.[31] Rather, it must be determined whether the body is

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[21] *Ibid* at paras 50, 52.
[22] *Ibid* at paras 54-59.
[23] *Ibid* at paras 162-163.
[24] *Ibid* at paras 74, 75, 78.
[25] *Ibid* at para 102.
[26] *Ibid* at para 103.
[27] *Ibid* at para 105.
[28] *Ibid* at para 117.
[29] 2012 SCC 67 [*Abitibi*].
[30] *Redwater, supra* note 18 at para 119.

acting in a *bona fide* regulatory capacity.[32] In this case, the AER's enforcement of the end-of-life obligations was viewed as falling within its regulatory capacity. Therefore, the AER could not be characterized as a creditor.[33]

On the third prong, the Supreme Court held monetary value could be found to attach to a liability where it was "sufficiently certain" that the AER would complete the environmental work and that a corresponding liability would "come to pass."[34] The Court held that this prong was not satisfied on the facts.[35] In reaching this conclusion, the Court noted that it was not the AER that would ultimately perform the work, but the Orphan Well Association, an independent not-for-profit organization.[36] In any event, it was not certain when, if at all, the work would be completed, given the rapidly rising rate of orphan wells, and the limited capacity of the Orphan Well Association.[37] As the end-of-life obligations did not constitute a claim provable in bankruptcy, the AER's refusal to permit the transfer of the relevant licences did not give rise to a conflict with the *BIA*.[38] In the result, the Supreme Court directed that funds held in trust by the Trustee from sale proceeds of Redwater assets be used to address the outstanding environmental obligations imposed by the Regulator, as opposed to being distributed to the company's first secured creditor.[39]

4. COMMENTARY

The practical implications posed by *Redwater* are far-reaching for lenders, energy industry participants, and regulators. Energy industry financing will no doubt face growing pains as it adapts to the new legal framework that is effectively a "polluter's *creditor*s pay" model, as opposed to the "polluter-pays" approach to environmental harm that is associated with Canadian resource extraction. Indeed, the potential for zero-recovery insolvencies is likely to result in at least a temporary decline in bankruptcies, as creditors assess whether there is any chance of recovery through the bankruptcy process where significant end-of-life obligations will need to be satisfied.

Further, depending on the extent of the end-of-life obligations, lenders will no doubt adjust their lending practices to account for end-of-life obligations that, until now, were essentially non-issues in the face of first-secured debt. Lenders are likely to be more hesitant in extending financing to small-to-medium-size energy industry participants or will require bonding or other forms of up-front commitments to satisfy the prospective end of life obligations. Certainly any new financing is likely to become more costly as a result of *Redwater*. Secured lenders may also wish to modify the loan terms to which they earlier bound themselves to protect against this new risk.

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[31] *Ibid* at para 124.
[32] *Ibid* at paras 127-129.
[33] *Ibid* at para 136.
[34] *Ibid* at paras 138, 140.
[35] *Ibid* at para 141.
[36] *Ibid* at paras 145, 147-148.
[37] *Ibid* at para 149.
[38] *Ibid* at paras 163-164.
[39] *Ibid* at para 165.

B. Regent Resources (Re)[40]

1. Background

This decision concerns the enforcement of municipal tax liabilities and the interaction between the *Municipal Government Act* ("*MGA*"),[41] and the *Bankruptcy and Insolvency Act*.[42] In particular, this decision addresses the ability of a municipality to enforce tax liabilities through the imposition of a "special lien."[43]

2. Facts

The parties to the action were Ernst & Young Inc. (the "Receiver"), in its capacity as Court-appointed receiver over Regent Resources Ltd. ("Regent"), and Cardston County ("Cardston"), a municipal district located in southern Alberta. Prior to its insolvency, Regent held properties throughout Alberta, including in Cardston, for the purposes of conducting oil and gas drilling operations. However, the Receiver disclaimed all of Regent's net negative assets, including those located in Cardston. This disclaimer was effected despite the fact that the properties were subject to approximately $133,000 in property tax arrears.[44]

In an effort to recover Regent's outstanding tax debt, Cardston sought to assert a "special lien" per s. 348 of the *MGA*, which stated that taxes due were a "special lien" and "take priority over the claims of every person except the Crown."[45] As the properties located in Cardston were of little or no value, Cardston purported to assert its lien over all of Regent's property.[46] The Receiver disputed Cardston's capacity to assert such a lien, arguing that Cardston's right was restricted to land in respect of which the outstanding taxes were levied, or at minimum, that it should be limited to lands within its geographical boundaries.[47]

Cardston made various interpretation-based arguments concerning the meaning of "land," as it appears in s. 348(d)(i), including that the previous version of the *MGA* provided for a special lien "over land in respect of which taxes are due," and the removal of this language demonstrates an intention to broaden the definition of "land" to include land other than land that is subject to outstanding tax liability.[48] Cardston also argued that the term "land" should be interpreted broadly, with reference to the term "goods," as it appears in s. 348(d)(ii) of the *MGA*.[49]

3. Decision

The Court adopted the Receiver's position that legislation should be interpreted in such a way as to avoid absurd results.[50] Cardston's proposed interpretation would be problematic from a practical and logistical standpoint: if an

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[40] 2018 ABQB 669 [*Re Regent*].
[41] RSA 2000, c M-26 [*MGA*].
[42] *BIA, supra* note 17.
[43] *Re Regent, supra* note 40 at paras 1, 4.
[44] *Ibid* at paras 2-3.
[45] *Ibid* at para 8.
[46] *Ibid* at para 4.
[47] *Ibid* at para 9.
[48] *Ibid* at para 19.
[49] *Ibid* at para 14.
[50] *Ibid* at paras 20, 22.

interpretation were adopted that extended the definition of lienable land to land beyond the municipality's boundaries, the municipality could theoretically assert a lien over land located anywhere in the world,[51] resulting in lands becoming subject to competing liens from multiple municipalities.[52] Prospective buyers would then be forced to ascertain whether the seller had outstanding tax obligations in any municipality before being certain that the land was not encumbered by a lien.[53] The Court therefore found Cardston's asserted liens were of no force and effect.[54]

4. COMMENTARY

Despite this decision, it remains unclear whether a "special lien" is limited to the land in respect of which taxes are outstanding, or if it is simply restricted by geographical boundaries, as the Court did not rule on that point. If it is the latter, receivers and trustees in bankruptcy should be aware that municipal taxes attaching to net negative properties may be enforceable by way of lien over other properties within the same municipality.

C. Northern Sunrise County v Virginia Hills Oil Corp.[55]

1. BACKGROUND

In *Virginia Hills* the Alberta Court of Appeal considered whether municipalities that are owed linear property tax arrears, under the *Municipal Government Act*[56], have priority over secured creditors in bankruptcy.[57]

2. FACTS

Virginia Hills Oil Corp. and Dolomite Energy Inc. (the "Debtors") operated a pipeline in six municipalities (the "Appellants"). In 2017, the Debtors were placed into receivership, and subsequently became bankrupt. The Debtors also had two secured creditors: Bank of Nova Scotia and Alberta Treasury Branches (the "Respondents").[58]

An application was made by the Receiver for an order declaring, *inter alia*, that the Appellants' claims were unsecured.[59] The Appellants were served with notice, but none attended or opposed the application.[60] After the order was granted, the receiver distributed the proceeds to the Respondents.[61] The Appellants appealed the order to the Court of Appeal.

3. DECISION

Before deciding the case on its merits, the Court considered two preliminary issues: (a) the impact of the distribution of assets from the Debtors' estates; and (b) the Appellants' arguable abuse of court process given their failure to

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[51] *Ibid* at para 24.
[52] *Ibid* at para 23.
[53] *Ibid* at para 25.
[54] *Ibid* at para 27.
[55] 2019 ABCA 61 [*Virginia Hills*].
[56] *MGA, supra* note 41.
[57] *Virginia Hills, supra* note 55 at para 1.
[58] *Ibid* at paras 5-6.
[59] *Ibid* at para 5.
[60] *Ibid* at para 10.
[61] *Ibid* at para 6.

raise their concerns over priority during the bankruptcy proceedings. On the first issue, the Court found that it had the power to request that the Respondents return the proceeds, as "[proceeds from the distribution can] be traced into the secured lenders' hands or the secured lenders could be declared constructive trustees of the funds".[62] On the second issue, while the Appellants' actions were "extremely problematic in the insolvency context where certainty, speed and efficiency" are key,[63] the Court did not dismiss the case on this basis due to its precedential value.[64]

Turning to the merits, the Court found that linear property tax arrears are unsecured claims in bankruptcy proceedings. Although a provincial legislature "can create a statutory lien that takes precedence over the interests of secured creditors",[65] the current iteration of the *MGA* does not achieve such result.[66]

The Court further noted that linear property tax arrears could enjoy secured claim status if they could be classified as a "property tax". However, the Court found that the wording of the *MGA* does not support such a view,[67] as the owner of the linear property might not be the operator, from whom the arrears are due.[68] If the linear property tax arrears were to be classified as property tax it was unclear what "property" the lien would attach to.[69] There was no justification for attaching such lien to the lands on which the linear property is positioned, nor was there justification to attach the lien to the linear property itself, if the operator and the owner of linear property were not the same entity.[70] Thus, the Court decided that linear property tax arrears are not a "property tax" under the *MGA*.

4. COMMENTARY

Virginia Hills provides helpful clarification on the priority of linear property taxes in bankruptcy. However, it is notable that the Court left the door open for the Alberta legislature to potentially reverse the priority,[71] observing that the legislature was aware of the issue, but had not yet acted.[72] It will be interesting to see if or how the province responds to this decision.

D. Callidus Capital Corp. v Canada[73]

1. BACKGROUND

This decision from the Supreme Court of Canada overrules the judgment previously rendered by the Federal Court of Appeal, adopting, in its place, the dissenting judgment of Pelletier J.A.[74] The issue on appeal was: "Does the

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[62] *Ibid* at para 22.
[63] *Ibid* at para 31.
[64] *Ibid* at para 32.
[65] *Ibid* at para 38.
[66] *Ibid* at para 46.
[67] *Ibid*.
[68] *Ibid* at para 48.
[69] *Ibid* at para 51.
[70] *Ibid*.
[71] *Ibid* at para 53.
[72] *Ibid* at para 52.
[73] 2018 SCC 47 [*Callidus SCC*].
[74] *Ibid* at para 1; *Canada v Callidus Capital Corporation*, 2017 FCA 162 [*Callidus FCA*].

bankruptcy of a tax debtor and subsection 222(1.1) of the *Excise Tax Act*[75]… render the deemed trust under section 222 of the *ETA* ineffective as against a secured creditor who received, prior to bankruptcy, proceeds from the assets of the tax debtor that were deemed to be held in trust for the [Crown in right of Canada]?"[76]

The parties to this appeal were Callidus Capital Corp. ("Callidus") and the Crown in right of Canada ("Canada").

2. FACTS

The facts of this appeal involve a real estate investment company, Cheese Factory Road Holdings Inc. ("Cheese Factory"). Among its assets, Cheese Factory held two properties from which it earned rental income and collected GST and HST. Between 2010 and 2013, Cheese Factory failed to remit the collected GST and HST as required under the *ETA*.

In 2004, Cheese Factory obtained a credit facility from the Bank of Montreal, pursuant to which it withdrew substantial funds. By 2011, Cheese Factory was heavily indebted to the Bank of Montreal and in default under the terms of the credit facility. At that time, the debt was assigned to Callidus, a company offering "recovery financing." Callidus agreed to forbear from enforcement. Pursuant to the forbearance agreement, Cheese Factory agreed to sell one of the two rental properties and remit the income from its remaining property until the debt was satisfied.

In 2012, the Crown discovered Cheese Factory's outstanding GST and HST payment obligations and requested that Callidus remit to it the sum owed. Callidus refused and, in 2013, prompted Cheese Factory to assign itself into bankruptcy. Following Cheese Factory's assignment into bankruptcy, the Crown claimed against Callidus for amounts held in trust by operation of s. 222 of the *ETA*.[77]

At trial, the Federal Court held that s. 222 operated to create a trust in favour of the Crown, whether or not the taxpayer was in possession of the amount. However, the Crown's rights as beneficiary were extinguished on the taxpayer's bankruptcy. A majority of the Federal Court of Appeal disagreed, finding that while s. 222(1.1) served to extinguish the trust created by s. 222(1), an independent cause of action remained against the secured creditor to whom the trust funds were wrongfully paid.[78]

3. DECISION

In his dissenting reasons, which were adopted by the Supreme Court of Canada, Pelletier J.A. found that s. 222(1) imposes a trust over GST/HST amounts that have been collected and remain owing to the Crown. The amount held in this deemed trust is variable to the extent that it can be reduced or increased as taxes owing are remitted or collected. By contrast, s. 222(3) imposes a trust over property that has been transferred from the tax debtor to a secured creditor. The subject matter of the trust is property of equal value to the trust created by s. 222(1), whether

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[75] RSC 1985, c E-15 [*ETA*].
[76] *Callidus FCA, supra* note 74 at para 1.
[77] *Ibid* at para 2.
[78] *Ibid* at paras 26, 43.

in the hands of the tax payer or a secured creditor. As the subject matter of the second trust is defined by the value of the first trust, it too is variable.[79] On bankruptcy of the tax payer, s. 222(1.1) applies, eliminating the deemed trust under s. 222(1) and reducing the value of the property held in the trust created by s. 222(3) to nil.[80]

4. COMMENTARY

This decision restores certainty to Canada's secured financing and priority regime by confirming that the Crown's superpriority over unremitted GST/HST is ineffective against a secured creditor who received, prior to a tax debtor's bankruptcy, proceeds from that taxpayer's assets. It further ensures that secured creditors have the same protection from the Crown as their debtors with regards to the debtor's GST/HST obligations. Had the Federal Court of Appeal's majority decision been left to stand, the Crown would have had the power to recover GST/HST from a bankrupt debtor's secured creditors where the *ETA* explicitly prohibits the Crown from collecting from the bankrupt debtor themselves.

E. Alberta Treasury Branches v COGI Limited Partnership[81]

1. BACKGROUND

This decision is significant with respect to its findings related to the availability of set-off in the context of the bankruptcy of an operator of several oil and gas facilities. The parties to the application were MNP Ltd., in its capacity as receiver and later trustee in bankruptcy (the "Receiver"), Canadian Oil and Gas International Inc. ("COGI") and Firenze Energy Ltd. ("Firenze").

2. FACTS

On COGI's insolvency, Firenze applied for, and was granted, status as operator over the jointly owned operations. Although the operatorship order was granted in January 2016, Firenze was unable to assume the role of operator until September 2016 due to an objection by the AER.[82]

The Receiver filed an application against Firenze for unpaid amounts flowing from COGI's operation of the facilities. In its cross-application, Firenze sought two rulings: (a) a declaration that the Receiver's claim was subject to set-off in respect of amounts owed under the joint operating agreement ("JOA");[83] and (b) a temporary lifting of the stay of proceedings over COGI for the purposes of abandoning certain wells and declaring COGI a delinquent party in order to recover certain outstanding expenses.[84] In support of its application, Firenze relied on several provisions from the 1990 CAPL Operating Procedure ("CAPL 1990"), which was adopted in the JOA, including:

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[79] *Ibid* at paras 50-57.
[80] *Ibid* at paras 63-64.
[81] 2018 ABQB 356 [*COGI*].
[82] *Ibid* at paras 10, 12.
[83] *Ibid* at paras 30, 38.
[84] *Ibid* at paras 45, 46.

(a) Clause 505(b) - the operator may contractually set-off debts owed by the joint-operator if the joint-operator fails to pay its portion of the operating expenses;

(b) Clause 1201 - the operator may initiate the procedure for abandoning wells by notifying the joint-operator, who must contribute equally to the costs of abandonment; and

(c) Clauses 1901 and 1902 - the operator may classify the joint-operator as a delinquent party in certain circumstances so as to withhold proceeds of sales in trust, and recover certain outstanding joint operating expenses from those trust funds.[85]

3. Decision

The Court rejected Firenze's claim for contractual set-off for the period January to September 2016, as despite the Court Order permitting Firenze to take over operatorship, COGI remained the operator pending resolution of the AER's objections.[86] The clear purpose of Clause 505(b) was to provide compensation for the *de facto* operator and Firenze's status as *de jure* operator was insufficient to permit set-off.[87]

The Court similarly rejected Firenze's claim for equitable set-off, which related to amounts owing under a purchase and sale agreement with COGI.[88] The Court noted a clear distinction between COGI as vendor, in which capacity it sold various interests to Firenze, and COGI as operator. Noting that the status of operator "creates an important and well recognized legal distinction," the Court held that Firenze had failed to establish a connection sufficient to warrant equitable setoff.[89]

With respect to lifting the stay of proceedings, the Court found that Firenze had failed to demonstrate that it would suffer material prejudice as a result of the stay,[90] as the inability to enforce contractual remedies was not sufficient.[91] The Court also concluded that Firenze's initiation of abandonment activities was insufficient, particularly given that its admitted incentive was to maximize collection from COGI.[92]

4. Commentary

This decision is important for three reasons. First, it demonstrates that a claim for set-off under Clause 505(b) must be grounded in *de facto*, rather than *de jure*, operatorship. Second, it illustrates the importance of recognizing the distinction between operator and vendor. Claims relating to amounts owed pursuant to an operatorship agreement are not necessarily connected to all business relations between the parties. Third, it illustrates that the inability to

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[85] *Ibid* at para 5.
[86] *Ibid* at paras 34-36.
[87] *Ibid* at para 36.
[88] *Ibid* at para 40.
[89] *Ibid* at paras 40, 42-43.
[90] *Ibid* at para 53.
[91] *Ibid* at para 52.
[92] *Ibid* at para 54.

enforce contractual remedies per Clauses 1201, 1901 and 1902 (and possibly all other contractual remedies) alone is insufficient justification for lifting a stay in proceedings granted under a receivership order.

F. Alberta Energy Regulator v Lexin Resources Ltd.[93]

1. BACKGROUND

This decision relates to an application to lift a stay imposed as part of a receivership in the context of replacement operator provisions in oil and gas joint venture agreements. Midstream Canada Ltd. ("Midstream") applied to lift the stay of proceedings in the receivership of Lexin Resources Ltd., 1051393 BC Ltd., 0989 Resource Partnership, LR Processing Ltd. and LR Processing Partnership (collectively "Lexin") so as to take over operatorship of the facilities in question.

2. FACTS

Lexin and Exxon Mobil Energy Canada co-owned three facilities which were operated by Lexin under the terms of a Construction, Ownership and Operation Agreement ("CO&O Agreement") and the model form Petroleum Joint Venture Association 1999 Standard Operating Procedure ("1999 PJVA"). These governing agreements contain provisions for a change of operator in cases of insolvency.[94]

The three facilities were shut-in pursuant to an order of the AER dated February 15, 2017, and the receivership order was granted one month later. Starting in July 2017, the receiver began marketing the assets, specifically noting that Lexin was the operator of the facilities. Exxon sold its interest in the facilities to Midstream in February 2018, and shortly thereafter, Midstream filed to lift the stay in order to take over operatorship of the facilities.[95]

3. DECISION

In rendering its decision, the Court noted that a mere inability to exercise a contractual right will be insufficient to lift a stay as there is no qualitative difference for Midstream as compared to any other creditor who might also have a contractual right.[96] While clauses allowing the substitution of operator in the event of insolvency are valid as between the parties, they are void against a receiver.[97]

While the Court acknowledged that circumstances may exist where it is appropriate to lift the stay, such as where the properties are actively producing, this was not the case before the Court.[98] Here, the facilities had been shut in prior to Midstream acquiring its interest. As such, Midstream would have been aware of the risks of the Receiver's actions, including the potential transfer of operatorship to the purchaser of Lexin's interest in the facilities.

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[93] 2019 ABQB 23 [*Lexin Resources*].
[94] *Ibid* at paras 3, 11.
[95] *Ibid* at paras 4-8 (Justice Romaine noted that Midstream may be entitled to be the operator of one of the facilities because they are the majority owner, but that Midstream requires operatorship of all three facilities to move the product to market).
[96] *Ibid* para 16.
[97] *Ibid* para 33.
[98] *Ibid* para 36.

Ultimately, the application was denied, as the prejudice to the receiver outweighed the prejudice that may have been suffered by Midstream.[99] Specifically:

(a) the receiver would be subject to significant capital expenditures which it could not realistically fund if the stay were lifted;[100]

(b) it would introduce uncertainty to the sales process as bidders had a reasonable expectation that they would assume operatorship;[101] and

(c) it would prevent the receiver from relying on certain replacement of operator provisions and would allow Midstream to take advantage of the insolvency process to appropriate operatorship rights that would not otherwise be available to it.[102]

4. COMMENTARY

This decision provides clarity to those in the oil and gas industry when either purchasing or entering into an insolvency process as to how the operatorship of the asset will play into the process. It also gives insight into circumstances when a stay could be lifted which provides further guidance to those parties which may be considering bringing an application to lift a stay and become operator.

III. COMPETITION LAW

In June 2018, the Alberta Court of Queen's Bench issued its extensive reasons for judgment in *Dow Chemical Canada ULC and Dow Europe GmbH v NOVA Chemicals Corporation.*[103] This decision involved a wide range of claims by Dow Canada ULC ("Dow Canada") and Dow Europe GmbH ("Dow Europe") (Dow Canada and Dow Europe collectively referred to as "Dow") with respect to NOVA Chemicals Corporation's ("NOVA's") operation of a jointly-owned ethylene manufacturing facility. Also at issue in this matter was a counter-claim advanced by NOVA with respect to Dow Canada's acquisition of ethane feedstocks for its own business purposes, and its subsequent failure to dispose of those feedstocks upon receiving objections from NOVA. This provided the Court with an opportunity to clarify the framework to be used in assessing whether a contractual provision is unenforceable as a common law restraint of trade, or otherwise in breach of the *Competition Act*.[104]

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[99] *Ibid* para 1.
[100] *Ibid* para 37.
[101] *Ibid* para 38.
[102] *Ibid* para 39.
[103] 2018 ABQB 482 [*Dow Canada*].
[104] RSC 1985, c C-34.

A. Dow Chemical Canada ULC and Dow Europe GmbH v NOVA Chemicals Corporation[105]

1. BACKGROUND

This decision is significant in describing the framework applied by the Court when assessing whether a contractual provision is unenforceable as being in restraint of trade, or otherwise illegal as a result of the *Competition Act*. It further assesses how offending provisions are to be dealt with in order to leave the remainder of the agreement in place as between the parties.

2. FACTS

In July 1997, NOVA and Union Carbide Canada Inc. ("UCCI") entered into a suite of project agreements for the construction and operation of an ethylene manufacturing facility ("E3").[106] NOVA was appointed as operator and, pursuant to the Operating and Services Agreement ("OSA"), the parties agreed as follows with respect to the acquisition of ethane feedstocks for E3:

> 5.1 Subject to the terms and conditions of this Agreement…Ethane Services will be provided, and all activities in respect thereof will be conducted, in accordance with the following principles with the objective of securing for the Co-owners the lowest cost, secure supply sources of ethane for the Pool:
>
> (a) only the operator shall acquire ethane for the Pool Area...[107]

Should UCCI acquire Ethane from the "Pool Area", NOVA was entitled under s. 5.15 of the OSA to object if it did not consider those acquisitions to be in its best interests as a "Pool User". After receipt of NOVA's objection, UCCI was required to provide particulars of its ethane acquisition, and within 60 days, make a cash payment to NOVA and dispose of the contract objected to.[108]

Shortly after E3 commenced operations, UCCI merged into Dow Canada.[109] Prior to and subsequent to the merger, Dow Canada purchased ethane for its own needs, including its ethylene manufacturing facility in Fort Saskatchewan, Alberta (LCH-1).[110] While NOVA was aware of Dow's ethane acquisitions pre- and post-merger, it did not object until approximately five years later, when it received a notice of default from Dow relating to NOVA's operation of E3.[111] Four additional notices of default were served on Dow Canada between 2007 and 2012 by NOVA. Dow did not comply with the procedures set out in s. 5.15 subsequent to receipt of these notices.[112]

At trial, NOVA took the position that while s. 5.1(a) provides that only the operator may acquire Ethane in the Pool Area, it did not prohibit Dow from also acquiring ethane in the Pool Area, though it was at risk of NOVA objecting

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[105] *Dow Canada, supra* note 103.
[106] *Ibid* at para 6.
[107] *Ibid* at para 1243.
[108] *Ibid* at para 1254.
[109] *Ibid* at paras 10, 11.
[110] *Ibid* at para 96.
[111] *Ibid* at paras 1221-1222.
[112] *Ibid* at paras 1228-1233.

to those acquisitions. To the extent Dow failed to comply with the procedures set out in s. 5.15, it was in breach of the OSA. In response, Dow Canada asserted that s. 5.1 simply made NOVA the sole ethane buying agent for the joint venture ethane pool. In the alternative, it argued that if NOVA's interpretation were correct, sections 5.1(a) and 5.15 were unenforceable as a restraint of trade, as a violation of competition law, or both.[113]

3. DECISION

The Court began its analysis by finding that while NOVA was permitted to object to Dow's ethane acquisitions in its sole discretion, that discretion was constrained by the general principle of good faith and the duty of honest performance, as provided for in the project agreements and by the Supreme Court in *Bhasin*.[114] Given NOVA's delay in issuing its first objection, along with the fact that the objection covered nearly all of Dow's ethane portfolio (which could not have been used by NOVA), the Court invalidated that objection.[115]

With respect to the proper interpretation of s. 5.1(a), the Court accepted Dow's argument that this provision merely made NOVA the sole buying agent for the E3 joint venture, and did not preclude Dow from acquiring ethane for its own uses.[116] In the event the Court was wrong on this point, it found that s. 5.1(a) and s. 5.15 of the OSA were unenforceable as a restraint on trade using the following four stage analysis:

(a) Does the covenant restrain trade?

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

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

(d) Are the restrictions contrary to the public interest?[117]

In assessing s. 5.1(a), the Court found that the first two elements were satisfied. With respect to the third element, she agreed with Dow that s. 5.1(a) and 5.15 were unreasonable and unenforceable due to being ambiguous in meaning and practical application. For example, as s. 5.15 merely required NOVA to conclude that Dow's acquisition was not in NOVA's best interest, Dow would never be able to predict when it was breaching the restrictive covenant.[118] It was further noted that neither NOVA nor UCCI could have had any legitimate expectation that Dow's acquisition of ethane in the Pool Area would have been restricted, either before or after the merger. The Court concluded that NOVA's interpretation, the effect of which would be to turn Alberta from a two-buyer market to a one-buyer market, was a disproportionate way to protect NOVA's business interests.[119]

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[113] *Ibid* at paras 1234-1242.
[114] *Ibid* at para 1235.
[115] *Ibid* at para 1322.
[116] *Ibid* at paras 1286-1287.
[117] *Ibid* at para 1351.
[118] *Ibid* at paras. 1347-1350.
[119] *Ibid* at para 1351.

With respect to the last requirement, the Court accepted the evidence of Dow's experts, who opined that were the restrictions enforced, NOVA's control over Dow Canada's ethane supplies would reduce its incentive to further invest in ethylene and derivatives business, would reduce revenues and profits for ethane suppliers, and reduce incentives for ethane suppliers to invest in new capacity. As a result of all of the above, the restrictions were unenforceable.[120]

Lastly, the Court concluded that s. 5.1(a) and s. 5.15 of the OSA would be illegal and unenforceable under sections 45 and 90.1 of the *Competition Act*, because if they were implemented as NOVA suggested, they would amount to an agreement to unduly prevent or lessen competition.[121] With respect to s. 45, Justice Romaine concluded that an assessment as to whether competition would be unduly lessened or prevented is not only assessed at the time of contract, as it is a continuing offence.[122] This was an important finding, given that at the time the OSA was entered into with UCCI, it would not have unduly prevented or lessened competition, as UCCI was not a purchaser of ethane at that time. As such, the OSA simply maintained the status quo of Alberta having two major ethane purchasers.

In response to NOVA's argument that the Court should defer to the Competition Bureau's approval of the E3 joint venture and the UCCI/Dow merger, it was determined that there was no evidence indicating that NOVA's interpretation of s. 5.1(a) and s. 5.15, or the effects it would have on limiting or excluding Dow Canada from purchasing ethane in Alberta, was brought to the attention of, or considered by, the Competition Bureau.[123] She further found that even if the question had been considered, the Court of Queen's Bench was not bound by a regulatory body on a question of law, as there was no adjudicative process resulting in a decision on the merits. Thus, a declaration that s. 5.1(a) and 5.15 were unenforceable was not an abuse of process or collateral attack on the Competition Bureau.[124]

After March 12, 2010, the *Competition Act* was amended such that the defence of ancillary restraint was added to uphold contracts contravening s. 45(1) of the *Competition Act*. In order to uphold the agreement, the restraint must be shown to be directly related to, and reasonably necessary for giving effect to a broader and separate agreement that is not itself contrary to the *Competition Act*. The Court found that this defence was not available given the 80 year term of the OSA, which far exceeded any period of time that would have been required to protect NOVA's interest at E3.[125]

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[120] *Ibid.*
[121] *Ibid* at paras 1354, 1417.
[122] *Ibid* at paras 1361-1371.
[123] *Ibid* at paras 1406-1407.
[124] *Ibid* at paras 1410-1411.
[125] *Ibid* at paras 1414-1416.

Given these findings, the Court read down the offending provisions such that they only applied to Dow's acquisition of ethane for the site (and not for its other uses such as LHC-1), which ensured that two buyers of ethane remained in Alberta, which would not subvert the purpose of the *Competition Act*.[126]

4. COMMENTARY

While the Court's interpretation of s. 5.1(a) and s. 5.15 made its subsequent assessment of the common law restraint of trade and the *Competition Act* arguably unnecessary, it nonetheless provides a thorough assessment of the factors at play in each of these respective matters. Of particular importance is the Court's confirmation that its assessment will not be constrained to the time of contract, or by prior findings of the Competition Bureau. Instead, post-contract changes can and will impact whether an agreement is found to either offend the common law restraint of trade, or the *Competition Act*.

IV. CONTRACT

In the last year, there have been a number of important contract decisions of interest to energy lawyers. To begin, the British Columbia Court of Appeal recently concluded that it was no longer necessary for consideration to be paid in order for a contractual amendment or variation to be enforceable. This finding, which has also been accepted in Alberta, could have far reaching impacts on parties seeking to enforce amendments to their agreements.

The Supreme Court has also reconfirmed that parties will be held to their contractual commitments, even where unanticipated changes to the market post-contract result in one contracting party receiving significantly greater (or diminished) benefits from that contract than had been anticipated.

Litigation has also continued over the interpretation of a number of terms commonly seen in the oil and gas industry (and indeed in contracts more generally). For example, this year, we consider *National Bank of Canada v Mosaic Energy Ltd.*[127] (which considered the meaning of "maintenance capital cost"), *Geophysical Service Incorporated v Murphy Oil Company Limited*[128] (which considered the meaning of "supersede"), and *Dow Chemical Canada ULC and Dow Europe GmbH v NOVA Chemicals Corporation*[129] (which considered the extent to which an "objective" to optimize production amounted to a contractual duty).

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[126] *Ibid* at para 1441.
[127] 2018 ABQB 891 [*National Bank*].
[128] 2018 ABCA 380 [*Murphy*].
[129] *Dow Canada, supra* note 103.

A. *Churchill Falls (Labrador) Corp. v Hydro-Quebec*[130]

1. BACKGROUND

The case is significant in confirming that parties will be held to their contractual bargain, even where unforeseen changes post-contract result in significant changes to the benefits the parties had expected to receive at the time of contract.

2. FACTS

In 1969, the Churchill Falls (Labrador) Corporation Limited ("Churchill") and Hydro-Quebec signed a contract for the construction and operation of a hydroelectric plant on the Churchill River in Labrador (the "Contract"). Pursuant to the Contract, Hydro-Quebec undertook to purchase, over a 65-year period, most of the electricity from the plant, whether or not it needed the electricity. Hydro-Quebec further agreed to provide financing to Churchill in the event of cost overruns during construction. In exchange, Hydro-Quebec obtained the right to purchase electricity at fixed prices for the entire term of the Contract. After the Contract was signed, unforeseen changes to the electricity market resulted in this purchase price being significantly below market prices, resulting in substantial profits for Hydro-Quebec. In these circumstances, Churchill sought an order that the Contract be renegotiated and the benefits of the contract reallocated between the parties.[131]

3. DECISION

In a 7-1 decision, the Supreme Court of Canada dismissed Churchill's appeal. With respect to the applicable standard of review, the majority held that the interpretation and characterization of contracts are questions of mixed fact and law, which are reviewed on a standard of palpable and overriding error.[132]

While much of the judgment deals with particular aspects of Quebec civil law, the Court's analysis ultimately rests upon the parties' agreed allocation of risks at the time of contract, and in particular, Hydro-Quebec's agreement to bear the risk of any lost or increased profits resulting from market fluctuations.[133] As a result of this allocation of risk, the Supreme Court rejected Churchill's submission that the parties did not intend for the agreed-upon fixed pricing to apply in the context of unforeseen market changes – the risk of price fluctuations was a known variable that had been allocated at the time of contract. Importantly, the evidence indicated that the parties had intentionally chosen not to include a price adjustment formula in the Contract, which confirmed that fixed-pricing was to apply regardless of the magnitude of those fluctuations.[134] For the same reason, the Court refused to require a renegotiation of the contract or redistribution of the profits earned by Hydro-Quebec on the basis of good faith or equity.[135] Hydro-Quebec's refusal to renegotiate or otherwise forego the benefits it was receiving under the

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[130] 2018 SCC 46 [*Churchill Falls*].
[131] *Ibid* at paras 1-5.
[132] *Ibid* at paras 42, 49.
[133] *Ibid* at para 55.
[134] *Ibid* at paras 56, 80.
[135] *Ibid* at paras 109, 118-119.

Contract could not be seen as a departure from the standard of reasonable conduct that could rebut the presumption that it was acting in good faith.[136]

4. COMMENTARY

This decision serves as an important reminder that parties will be held to the terms of their agreement, even where events arising post-contract radically alter the magnitude of the benefits envisioned at the time of contract. Those entering into long-term arrangements must carefully consider if aspects of their contract (such as pricing) should be subject to periodic review or renegotiation as circumstances change if they wish to avoid the risk.

B. Rosas v Toca[137]

1. BACKGROUND

Rosas is significant, as it changed the long-standing requirement that variations or amendments to a contract require fresh consideration in order to be enforceable.

2. FACTS

In January 2007, Ms. Rosas won approximately $4 million in the lottery and loaned $600,000 of these winnings to Ms. Toca. In July 2014, Ms. Rosas commenced an action against Ms. Toca seeking repayment of the loan.

At trial, it was found that the parties had entered into an interest-free loan agreement, with a term of one year. In order to avoid the operation of the *Limitation Act*.[138] Ms. Rosas asserted that the parties entered into multiple forbearance agreements to extend the repayment date. Specifically, each year, Ms. Toca would ask for another year to pay back the debt, with Ms. Rosas accepting the extension. However, as no additional consideration was provided, these forbearance agreements were found to be invalid, and Ms. Rosas' claim was statute-barred.[139]

3. DECISION

A majority of the Court of Appeal overturned the trial judgment, finding that the variations to the payment date were enforceable regardless of a lack of consideration. This meant that Ms. Rosas' claim was not barred as a result of the *Limitation Act.*[140] In reaching this conclusion, the Court of Appeal found that absent duress, unconscionability, or other public policy concerns, there is no need for fresh consideration to vary contractual terms, and provided the following summary of the test to be applied in these circumstances:[141]

> When parties to a contract agree to vary its terms, the variation should be enforceable without fresh consideration, absent duress, unconscionability, or other public policy concerns, which would render an otherwise valid term unenforceable. A variation supported by valid consideration

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[136] *Ibid* at para 119.
[137] 2018 BCCA 191 [*Rosas*].
[138] RSBC 1996 c 266.
[139] *Rosas, supra* note 137 at paras 2, 5-10.
[140] *Ibid* at paras 185-186.
[141] *Ibid* at paras 4, 183.

> may continue to be enforceable for that reason, but a lack of fresh consideration will no longer be determinative. In this way the legitimate expectations of the parties can be protected. To do otherwise would be to let the doctrine of consideration work an injustice.[142]

4. COMMENTARY

While it is too soon to know the extent to which this decision will be applied, it has the potential to have wide-ranging impacts on the doctrine of consideration if widely adopted. For example, Justice Topolniski of the Alberta Court of Queen's Bench agreed with the approach taken in *Rosas* in the context of whether private parties can reaffirm or revive a debt discharged through bankruptcy.[143] The decision may also play an important role in the context of employment agreements, where employers seek to modify or otherwise implement new contractual terms for its employees. However, given the general power imbalance in such relationships, the exceptions of duress, unconscionability, or public policy concerns may present greater hurdles to the enforcement of the amendment absent fresh consideration.

C. National Bank of Canada v Mosaic Energy Ltd.[144]

1. BACKGROUND

At issue in *National Bank* was the proper definition to be given to the term "maintenance capital costs" under a Gas Handling Agreement ("GHA") between Pembina Gas Services Limited Partnership ("Pembina") and Mosaic Energy Ltd. ("Mosaic")

2. FACTS

From 2014 to 2016, Pembina provided gas transportation and processing services at its gas processing plant to Mosaic pursuant to the GHA. Under the terms of the GHA, Mosaic was responsible for three types of "handling charges", being Capital Charges, Operating Charges, and Additional Charges. The Additional Charges included "maintenance capital costs" as one of the component charges. At issue was whether "maintenance capital costs" included the following expenses incurred by Pembina: (a) the purchase and installation of a condensate reboiler, mercury removal beds and absorbent; and (b) the costs of a heat exchanger study.[145] Mosaic disputed these costs on the basis that the term "maintenance" is limited to replacing existing equipment with identical parts.[146]

3. DECISION

In determining what amounted to a "maintenance capital cost", the Court assessed whether the expenses were necessary, such that without them, the plant would have had to shut down or have had reduced capacity. As the mercury removal beds and condensate reboiler were necessary to maintain the plant's existing capacity and

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[142] *Ibid* at para 4.
[143] 2018 ABQB 860 at para 83.
[144] *National Bank, supra* note 127.
[145] *Ibid* at para 8.
[146] *Ibid* at paras 18, 35.

functionality, they were accepted as maintenance capital costs. However, as the heat exchanger study was not a capital expense, it could not be claimed as a maintenance capital cost.[147]

4. COMMENTARY

This case is significant for two reasons. First, it highlights the importance of parties carefully considering, up front, whether even seemingly common terms should be defined in their contract to avoid future uncertainty and dispute. Second, while each contract must be interpreted in the context of its own factual matrix, this decision may be of assistance in clarifying what is, and is not, properly claimable as a maintenance capital cost where that term is not defined in an agreement.

D. Geophysical Service Incorporated v Encana Corporation[148]

1. BACKGROUND

Encana Corporation ("Encana") was one of several corporations that had been sued by Geophysical Service Incorporated ("GSI") for the improper use of its seismic data. Issues common to most of those parties were tried first, which led to a finding that copying and accessing seismic data from government sources, including the National Energy Board ("NEB"), without paying GSI a licensing fee was permissible. The copying had occurred prior to the companies entering into specific licensing agreements with GSI.[149]

The significance of this case is two-fold: (1) it confirms that the limitation period for a breach of contract may begin when the plaintiff has obtained sufficient information to suspect that a breach may have occurred, but then elects not to make further inquiries to confirm those suspicions; and (2) it highlights the breadth of disclosure that may be permitted under contractual clauses permitting disclosure where required by law.

2. FACTS

Encana licenced seismic data from GSI pursuant to three agreements: the General License Agreement dated September 2, 1998 (the "1998 Agreement"), the GSI Master Seismic Data Licence Agreement (v1.2) dated November 1, 2001 (the "2001 Agreement") and the Master Seismic Data Licence Agreement dated October 3, 2002 (the "2002 Agreement").[150]

In 1999, Encana's predecessor, PanCanadian, made copies of NEB transparencies which reflected two sets of GSI seismic data for the Beaufort Sea (the "Beaufort Material"). PanCanadian did not pursue opportunities in the Beaufort Sea at the time or after merging with Encana. The 2001 and 2002 Agreements, which were signed after

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[147] *Ibid* at para 32.
[148] 2018 ABCA 384 [*Encana*].
[149] *Geophysical Service Incorporated v Encana Corporation*, 2016 ABQB 230, aff'd 2017 ABCA 125, leave to appeal to SCC ref'd [2017] SCCA No 260.
[150] *Encana, supra* note 148 at para 2.

PanCanadian had made copies of the Beaufort Material, prohibited Encana from obtaining GSI's seismic data from a government agency. If it had such data when the agreement was signed, it was required to destroy it or licence it.[151]

The Beaufort Materials were discovered in 2006 and Encana offered to destroy the data. GSI sought damages for breach of contract. Encana, among other things, defended on the basis of limitations (the "Accessed Data Claim").[152]

GSI also alleged that Encana submitted data that it had licensed from GSI to the Canada-Newfoundland and Labrador Offshore Petroleum Board and Canada-Nova Scotia Offshore Petroleum Board either as part of, or as a result of applying for, certain credits known as "Allowable Expenditure Credits" without notice to GSI. This was claimed to be a breach of contract and breach of confidence (the "Submitted Data Claim").[153] Encana defended on the basis that the Agreements permitted disclosure of the data if required by law, citing the following provision:

> 6.3(f)(i) This Agreement, the Seismic Data and the Reprocessed Seismic Data may be disclosed by [Encana] to federal or provincial government agencies only if, such disclosure is required by Canadian law in effect, from time to time. Only that portion of this Agreement, the Seismic Data and the Reprocessed Seismic Data, which is required to be disclosed under any law or regulation, may be disclosed. The Licensee agrees to immediately inform GSI upon receipt of any request or demand for disclosure made upon the Licensee by a government agency. GSI shall have the right to dispute such government agency's right to access the Seismic Data and the Reprocessed Seismic Data at its sole expense and the Licensee shall co-operate with such dispute.[154]

Pursuant to the same provision, Encana asserted that its only obligation to inform GSI was in the event a request or demand for disclosure had been made by a government agency, which had not occurred.[155]

3. DECISION

With respect to the Accessed Data Claim, the Court of Appeal noted that pursuant to an order of the Federal Court, in June 2003, the NEB advised GSI that Encana had accessed the NEB's data. Once GSI had this knowledge, it had an obligation to make reasonable inquiries about its rights, which it failed to do. Instead, it issued its Statement of Claim approximately four years after obtaining the NEB's information, rendering GSI's claim statute-barred.[156]

With respect to the Submitted Data Claim, section 25 of the *Newfoundland Offshore Area Petroleum Geophysical Operations Regulations*[157] required that Encana, as a purchaser of GSI's geophysical data, submit a report containing the data to the Chief Conservation Officer where the costs of purchasing the data were claimed as a credit. As a result, no breach of contract or confidence could be made out. Further, as no request for information

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[151] *Ibid* at para 9.
[152] *Ibid* at paras 1, 9-12.
[153] *Ibid* at paras 1, 37.
[154] *Ibid* at paras 43, 44, 47.
[155] *Ibid* at paras 42-46.
[156] *Ibid* at paras 27-28.
[157] SOR/95-334, s 25(5).

was made by a government agency, there was no contractual obligation for Encana to advise GSI of the disclosure.[158]

4. COMMENTARY

This case highlights the importance of contractual parties diligently following-up where there is information indicating that their counter-part is breaching its contractual obligations. Failing to do so can lead to a finding that sufficient information was available to impose an obligation upon the innocent party to make reasonable inquiries, thereby commencing the limitations clock.

The decision further highlights the importance for those disclosing confidential information under an agreement to carefully consider the protections that it wishes to be in place to protect against unwanted disclosure. For instance, in this case, had GSI required notice of any disclosure, it may have had the opportunity to limit or prevent the disclosure that occurred.

E. Geophysical Service Incorporated v Murphy Oil Company Limited[159]

1. BACKGROUND

This case is significant in that it confirms that where a latter agreement purports to supersede prior existing agreements between the parties, that latter agreement does not apply to those prior agreements, nor does it incorporate the content of those prior agreements, absent specific wording to that effect.

2. FACTS

GSI and Murphy Oil Company Limited ("Murphy") were parties to three agreements: (a) the General License Agreement (the "1996 Agreement"), (b) the Contingent License Agreement (the "1999 Agreement") and (c) the GSI Master Seismic Data License Agreement, dated November 27, 2000 (the "2000 MDLA").[160] In its Statement of Claim, GSI alleged that Murphy was in breach of various provisions of the 2000 MDLA due to its misuse of GSI's seismic data. During the course of a summary dismissal application brought by Murphy, it became apparent that a number of GSI's claims were in fact based upon alleged breaches of the 1996 and/or 1999 Agreements.[161] As such, GSI applied for an amendment to its Statement of Claim during closing submissions of the summary application. This application was denied.[162]

As a result of that denial, a crucial element of establishing GSI's claims became whether the 2000 MDLA captured seismic data provided under the 1996 or 1999 Agreements. In considering this argument, the Chambers Judge rejected GSI's argument that the entire agreement clause expressly made all data licensed under the 1996 or 1999

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[158] *Encana, supra* note 148 at para 51.
[159] *Murphy*, *supra* note 128.
[160] *Ibid* at para 4.
[161] *Ibid* at para 7.
[162] *Ibid* at paras 33-34.

Agreements subject to the 2000 MDLA.[163] That entire agreement clause stated as follows: "This Agreement sets forth the entire agreement between the parties hereto and supercedes all prior agreements, prior data licences, understandings and communications between the parties, whether oral or written."[164]

3. Decision

With respect to the retrospective effect of the 2000 MDLA, and the entire agreement clause in particular, the Court of Appeal noted that "supersede" has been defined to mean "To annul, make void, or repeal by taking the place of". Had the parties wished to make the 2000 MDLA retroactive or retrospective, they had to do so expressly, which was not done here.[165] As a result of this decision, those claims advanced by GSI relating to seismic data obtained prior to the execution of the 2000 MDLA were summarily dismissed.[166]

4. Commentary

As with *Encana*, this decision highlights the importance of careful consideration pre-contract as to the information that a party disclosing confidential information to another wishes to protect. As noted by the Court of Appeal, it would have been a simple matter to expressly provide that the 2000 MDLA applied to all seismic data, yet that was not done.

F. Dow Chemical Canada ULC and Dow Europe GmbH v NOVA Chemicals Corporation[167]

1. Background

This decision is significant in highlighting that contractual terms, which may appear aspirational on their face, can form the basis of significant liability for operators of jointly owned facilities. In this case, NOVA, as operator, had the "objective" of operating the facility so as to optimize product production. As a result of failing to meet this objective, Dow Canada and Dow Europe were awarded damages based upon E3 running at full capacity from 2004 through 2012.

2. Facts

As noted above, in July, 1997, NOVA and UCCI entered into a joint venture to build and operate E3 at NOVA's existing site near Joffre, Alberta. NOVA owned and operated two other ethylene facilities at the site (E1 and E2, respectively). In May 2001, UCCI assigned its rights to production in E3 to Union Carbide (Europe) S.A. ("UCESA"). In October 2001, UCCI amalgamated with the Dow Chemical Company's Canadian operations,

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[163] *Ibid* at para 39.
[164] *Ibid* at para 38.
[165] *Ibid* at para 43.
[166] *Ibid* at paras 39-48.
[167] *Dow Canada, supra* note 103.

becoming Dow Canada. At the same time, UCESA merged with the Dow Chemical Company's European corporate entity, becoming Dow Europe.[168] Dow Canada and Dow Europe are hereafter collectively referred to as "Dow".

At trial, Dow alleged, among other things, that NOVA failed to run E3 at full rates, as required under the Operating and Services Agreement ("OSA"), and as NOVA and Dow had consistently agreed (the "Optimization Claim").[169] This claim was based upon a number of provisions in the OSA, including:

(a) s. 4.3(b), which requires the operator to "conduct the Operations with the objective that the Plant, subject to the direction of the Management Committee, will optimize Product production and achieve first decile performance when compared to other ethylene plants in North America;[170] and

(b) s. 3.2(c), in which the co-owners and the operator covenant "not to do any act… which could cause it or the other Parties to be in breach of… this Agreement".[171]

3. DECISION

In interpreting the OSA, the Court found that section 4.3(b) of the OSA, when combined with the co-owners' monthly nomination procedure, obligated the operator to secure enough ethane to run E3 at the rate necessary to satisfy the nominations of the co-owners (subject to *force majeure*).[172] Based on the fact that NOVA was found to always have sufficient ethane to run E3 to capacity, the Court found that "optimizing product production" was not a complex process, and simply meant producing as much product from E3 as possible. While the Court noted that the term "objective" did not amount to a production guarantee, NOVA was found to be in breach of s. 4.3(b) of the OSA on the basis that it did not attempt to run E3 with the objective of optimizing product production.[173]

Based on its review of the evidence, the Court found that E3 was rarely run to capacity, and that NOVA's stated goal was to optimize production and profit to NOVA from the E1, E2 and E3 plants as a group rather than E3 as a stand-alone plant.[174] By directing that E3 be run to suit NOVA's commercial needs instead of according to the joint venture agreements and co-owner nominations, NOVA as co-owner was also found to be in breach of s. 3.2(c) as it caused the operator to be in breach of its contractual obligations, along with breaching the honesty and good faith provisions of the parties' related Plant Co-Owners Agreement.[175]

4. COMMENTARY

This decision highlights the difficulties that may arise where the owner of an existing manufacturing facility decides to operate an additional facility on the same site which is co-owned with a third party. In these circumstances, and

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[168] *Ibid* at paras 6-11.
[169] *Ibid* at paras 21, 240.
[170] *Ibid* at para 247.
[171] *Ibid* at para 234.
[172] *Ibid* at para 188.
[173] *Ibid* at para 642.
[174] *Ibid* at para 634.
[175] *Ibid* at para 674.

based on the agreed upon obligations of NOVA as operator, the Court confirmed that NOVA's self-interest in operating the remainder of its manufacturing facilities, and its own profit considerations for the site generally, were subordinate to its obligation of optimizing product production from E3. However, it is uncertain if the Court would have reached the same decision had NOVA established a separate and independent group of individuals to manage the operation of E3.

This decision is currently under appeal, which will provide the Court of Appeal the opportunity to further clarify this topic.

G. *Manitok Energy Inc (Re)*[176]

1. BACKGROUND

In its early 2018 decision, *Third Eye Capital Corporation v Dianor Resources Inc.*,[177] the Ontario Court of Appeal clarified the scope and application of the Supreme Court of Canada's decision in *Bank of Montreal v Dynex Resources Ltd.*[178] to determine whether a gross overriding royalty ("GOR") can constitute an interest in land and run with the land. *Third Eye* was included in last year's paper.

In *Manitok*, the Alberta Court of Queen's Bench applied the *Dynex* test, as affirmed in *Third Eye*, concluding that royalties in respect of produced substances, representing a fixed quantity of production per day, may constitute an interest in land if the parties' intention to make it so is sufficiently clear.[179]

2. FACTS

Manitok Energy Inc. ("Manitok") entered into a Volume Acquisition Agreement and a Production Volume Royalty Agreement with Freehold Royalties Partnership ("Freehold"). As part of the agreement, Freehold paid $25 million in exchange for a producing royalty grant ("Producing Royalty"). The Producing Royalty was paid in cash and then later converted to a payment in kind. A subsequent agreement was entered into by Manitok, Freehold and National Bank of Canada (the "Clarification Agreement"), which confirmed that National Bank of Canada did not have a security interest in the Producing Royalty.[180]

Manitok went bankrupt in February 2018 and a receiver was appointed. Freehold brought an application to, *inter alia*, have the Producing Royalty declared an interest in land.[181] The application was of significance because, if the Producing Royalty was not an interest in land, the Receiver would be able to sell the properties free and clear of the Producing Royalty as it would be considered a mere contractual right.

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[176] 2018 ABQB 488 [*Manitok*].
[177] 2018 ONCA 253 [*Third Eye*].
[178] 2002 SCC 7 [*Dynex*].
[179] *Manitok, supra* note 176 at para 22.
[180] *Ibid* at para 3.
[181] *Ibid* at para 1.

3. DECISION

As each of the Volume Acquisition Agreement, Production Volume Royalty Agreement, and Clarification Agreement explicitly stated that the Producing Royalty was to be construed as an interest in land,[182] the Court acknowledged that the parties had "intended the Producing Royalty to be an interest in land."[183] However, the agreements also described the Producing Royalty as an interest in the produced oil volumes rather than an interest in the minerals themselves – "in respect of" rather than "in" the minerals.

The Court applied the test established by the Supreme Court of Canada in *Dynex*, which provides that whether a royalty interest is an interest in land depends upon whether the language describing the interest is sufficiently precise and the interest out of which the royalty is carved is itself an interest in land.[184] After considering the arguments raised by the parties, the Court concluded that "a royalty in respect of produced substances, representing a fixed quantity of production per day, may constitute an interest in land if the parties' intention to make it so is sufficiently clear. I am also satisfied that a royalty may constitute an interest in land despite the absence of, or significant limitations on, a right of entry."[185] Ultimately, the Producing Royalty was found to be "an interest in land and [….] the property of Freehold", and "Freehold properly exercised a right to take the Producing Royalty in kind."[186]

4. COMMENTARY

This decision affirms that royalty interests can be interests in land so long as the parties intentions are clear in the contractual evidence provided.

V. CORPORATE SEPARATENESS

In *Yaiguaje v Chevron Corporation*,[187] the Ontario Court of Appeal strongly reaffirmed the principles of corporate separateness in the context of the plaintiffs' attempts to enforce a foreign judgment granted against Chevron Corporation through the shares and assets of Chevron Canada. This decision will be of great assistance not only in similar actions, but more generally where corporate separateness, or applications to lift the corporate veil are at issue.

A. Yaiguaje v Chevron Corporation[188]

1. BACKGROUND

At issue in *Chevron* was the application of the principle of corporate separateness to enforcement proceedings brought against Chevron Corporation's seventh-level subsidiary for the purpose of satisfying the plaintiffs' judgment (obtained in Ecuador) against Chevron Corporation.

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[182] *Ibid* at paras 5-7.
[183] *Ibid* at para 5.
[184] *Ibid* at para 13, originally from *Dynex*, *supra* note 178 para 22.
[185] *Ibid* at para 22.
[186] *Ibid* at para 26.
[187] 2018 ONCA 472 [*Chevron*].
[188] *Ibid*.

2. FACTS

From 1964 to 1992, oil exploration and extraction on the plaintiffs' traditional lands resulted in extensive environmental pollution. One of the corporations involved was an indirect subsidiary of Texaco Inc. ("Texaco"). Texaco has been part of the Chevron Corporation's global conglomerate since 2001. In 2003, the plaintiffs commenced an action in Ecuador against Chevron Corporation, which resulted in a $9.5 billion judgment. However, as Chevron Corporation has no assets in Ecuador, the plaintiffs sought to enforce their judgment in the United States. That attempt was unsuccessful due to findings that the Ecuadorian judgment was obtained through the fraudulent behaviour of the plaintiffs' counsel.[189]

The plaintiffs then sought to enforce their judgment in the Ontario Superior Court of Justice, against the shares and assets of Chevron Canada Limited ("Chevron Canada"), a seventh-level subsidiary of Chevron Corporation, whose head office is in Calgary, Alberta. The parties agreed to determine whether Chevron Canada's assets are exigible to satisfy the Ecuadorian judgment against Chevron Corporation by way of summary judgment. Chevron Canada and Chevron Corporation were successful on that motion.[190] On appeal, the plaintiffs argued that the *Execution Act*[191] permits execution on Chevron Canada's shares and assets. Alternatively, they argued that the Court should pierce the corporate veil in order to render the assets exigible.[192]

3. DECISION

In dismissing the appeal, the majority of the Court of Appeal made a number of important findings which reaffirmed the importance of corporate separateness within Canada. With respect to the *Execution Act*, the plaintiffs asserted that s. 18(1) permitted the seizure of any interest of Chevron Corporation, including its indirect interest in Chevron Canada.[193] This argument was rejected on the basis that Chevron Corporation had no legal right against Chevron Canada which would permit the seizure of its assets or shares.[194] In particular, the Court reaffirmed that corporations have all of the rights, powers, and privileges of a natural person, meaning corporations are separate from their shareholders – "Thus, if a judgment debtor is a parent corporation, it and not its shareholders or subsidiaries, is responsible for the debts it incurs. It also means that a corporation's assets are its own and do not belong to related corporations."[195] Nor can shareholders claim a proportionate share of a corporation's assets while that corporation is ongoing.[196]

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[189] *Ibid* at paras 1-5.
[190] *Ibid* at para 6.
[191] RSO 1990, c E24.
[192] *Chevron, supra* note 187 at para 7.
[193] *Ibid* at para 53.
[194] *Ibid* at para 55.
[195] *Ibid* at para 58.
[196] *Ibid* at paras 57-58.

With respect to piercing the corporate veil, the plaintiffs asserted that this was possible "when the interests of justice demand it".[197] The Court of Appeal noted that it has "repeatedly rejected an independent just and equitable ground for piercing the corporate veil"[198] in favour of the circumstances identified in *Transamerica*, i.e.:[199]

(a) when the court is construing a statute, contract or other document;

(b) when the court is satisfied that a company is a "mere façade" concealing the true facts (which in turn requires complete control of the subsidiary such that it is a mere puppet of the parent, and the subsidiary being incorporated for an improper purpose or activity); and

(c) when it can be established that the company is an authorized agent of its controllers or its members, corporate or human.[200]

As the plaintiffs had specifically plead that Chevron Canada had not engaged in any inappropriate conduct, it was found that they could not hope to succeed in piercing the corporate veil.[201] The Court further rejected the application of the "group enterprise theory of liability", which holds that where several corporations operate closely as part of the same group of corporations, they are in reality a single enterprise responsible for each other's debts. On this point, the Court noted that:[202]

> There is a difference between economic reality and legal reality. The fact that on an operational level corporate separateness is more nuanced among a group of related corporations is of no moment. It is the legal reality, as provided for in the relevant business corporation statutes, that counts. The CBCA permits subsidiary corporations but also says that each corporation is a natural person. If Parliament wished to carve out an exception to the natural person rule for subsidiaries, it would have been very easy to do so.[203]

Even if it were free to lift the corporate veil for policy reasons, the Court noted that the equities of the case were far from clear, as the plaintiffs' difficulties in enforcing its judgment against Chevron Corporation in the United States did not arise from Chevron Corporation's structuring of its subsidiaries. In that context, the plaintiffs' claim was viewed as an attempt to do an "end run around the United States court order" by breaking well established jurisprudence and creating an unnecessary exception to the principle of corporate separateness.[204] While concurring in the result, Nordheimer J.A. would have left it open for a future third party to seek to access the Court's equitable power to pierce the corporate veil in those "extraordinary situations where liability has been established but the

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[197] *Ibid* at para 64.
[198] *Ibid* at para 67.
[199] *Transamerica Life Insurance Co. of Canada v Canada Life Assurance Co*, [1996] OJ No 1568 aff'd [1997] OJ No 3754 (ONCA).
[200] *Chevron, ibid* at paras 65-68.
[201] *Ibid* at para 74.
[202] *Ibid* at paras 75-77.
[203] *Ibid* at para 77.
[204] *Ibid* at paras 79-82.

judgment creditor is nevertheless left without a remedy because of the judgment debtor's internal corporate structure."[205]

4. COMMENTARY

This case is significant in its strong reaffirmation of the principle of corporate separateness, even where the operations of parents and their subsidiaries are closely intertwined on an operational level. Given the widespread use of separate subsidiaries for each jurisdiction international corporations may be acting in, this decision gives added certainty to parents and subsidiaries alike that they will not be held responsible for the debts and obligations of their affiliates, except in narrow circumstances.

VI. DAMAGES/LIMITATIONS ON LIABILITY

This year, there have been a number of decisions regarding the extent to which exclusion clauses bar lost profits, both direct and consequential. Specifically, in *Dow Chemical Canada ULC and Dow Europe GmbH v NOVA Chemicals Corporation,*[206] the Court determined that an exclusion barring "indirect or consequential damages (including without limitation loss of profits…)" did not bar direct lost profits. Similarly, in *Atos IT Solutions v Sapient Canada Inc.*,[207] it was determined that a clause excluding (in part): "INDIRECT, SPECIAL, CONSEQUENTIAL OR PUNITIVE DAMAGES OR FOR LOSS OF PROFITS" was intended to only exclude consequential lost profits. The clear trend with these decisions is an apparent emphasis on interpreting the relevant exclusion clause in the context of what was foreseeable at the time of contract, as opposed to focusing solely on the words selected by the contracting parties.

The Alberta Court of Appeal has also taken the opportunity in *Canadian Natural Resources Limited v Wood Group Mustang (Canada) Inc. (IMV Projects Inc.)*[208] to clarify that in apportioning liability between many parties, it is an error to over-emphasize the final act, or "final straw", leading to the injury. A fulsome assessment of fault must consider all acts or omissions leading to the injury. In the same decision, the Court also clarified that Plaintiffs who have "over-settled" with a portion of defendants to an action are not required to deduct the entirety of that "windfall" from any amounts awarded against non-settling defendants. Instead, that reduction occurs after the Plaintiff is fully indemnified for its damage (despite any contributory negligence of its own) and it has recovered its solicitor and client costs in pursuing the settling defendants.

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[205] *Ibid* at para 115.
[206] *Dow Canada, supra* note 103.
[207] 2018 ONCA 374 [*Sapient*].
[208] 2018 ABCA 305 [*Wood Group*].

A. Dow Chemical Canada ULC and Dow Europe GmbH v NOVA Chemicals Corporation[209]

1. BACKGROUND

This decision is significant, as it considers the circumstances under which lost profits will be considered consequential damages, and therefore barred by a limitation of liability clause.

2. FACTS

As noted above, Dow's claims against NOVA primarily related to NOVA's under-delivery of ethylene to Dow from E3 over the life of the dispute. The majority of the ethylene received from NOVA is converted by Dow into derivative products, such as polyethylene.[210] A significant portion of Dow's damages claim against NOVA was therefore a claim for lost profits on the sale of these derivative products.[211] In addition to defending against Dow's claims on the merits, NOVA relied upon the exclusions of liability contained in the OSA and COA as a contractual bar to Dow's lost profits claim. In particular:

(a) s. 14.1 of the OSA, which provides that the operator shall have no liability for damages incurred or suffered by the co-owners for breach of contract, torts, etc., except where such damages arise from the operator's gross negligence or wilful misconduct. Even if gross negligence or wilful misconduct is established, there is no liability for excluded damages, including "indirect or consequential damages (including without limitation loss of profits…)";[212] and

(b) s. 5.01 of the COA, which provides that no co-owner shall be liable to the other co-owner for any excluded damages as a result of the joint ownership or use of E3. Excluded damages were defined in the same manner as in the OSA.[213]

NOVA submitted that when taken together, these provisions barred Dow from claiming any lost profits against NOVA, whether in NOVA's capacity as operator or co-owner of E3.[214]

3. DECISION

In rendering her decision, the Court set out the following rules of interpretation for exclusion clauses:

(a) exclusion clauses are to be read in harmony with the rest of the contract and in light of its purpose and commercial context;

(b) limitations on liability are subject to special rules of construction; it must be expressed clearly and it will be "limited in its effect to the narrow meaning of the words employed";

[209] *Dow Canada, supra* note 103.
[210] *Ibid* at para 707.
[211] *Ibid* at para 702.
[212] *Ibid* at paras 995, 997.
[213] *Ibid* at para 998.
[214] *Ibid* at para 999.

(c) the clause must cover the exact circumstances that give rise to the exclusion, and it is generally construed against the party claiming the limitation; and

(d) the degree of strictness applied to the construction of the exclusion clause may depend upon the extent to which it involves a departure from the implied obligations.[215]

In rejecting NOVA's interpretation of the exclusion clauses, the Court noted that lost profits may be either direct or consequential, and on the plain meaning of the words "indirect or consequential damages (including without limitation loss of profits…)", all lost profits were not being defined as indirect or consequential losses, but were described parenthetically as an example or subset of this type of damage. That is, only claims for consequential or indirect lost profits were barred by this provision, not direct lost profits.[216]

In assessing the particular lost profits claimed by Dow, the Court determined that they were all direct lost profits. In particular, it was noted that NOVA would have reasonably foreseen at the time of contract that UCCI would have suffered lost profits due to under-deliveries of ethylene, as they were in the same business. Further, Dow's interpretation was considered to be commercially reasonable given that lost profits could only be claimed if NOVA was first found to be guilty of wilful misconduct or gross negligence; to bar all lost profits would hollow out the obligations of the operator entirely.[217]

4. COMMENTARY

This decision (while currently under appeal) is significant in providing a framework for assessing whether lost profits were intended to be excluded as consequential losses, where consequential losses "include[e] without limitation loss of profits". In particular, parties negotiating a contract containing a similar clause must be mindful that this type of phrasing will not necessarily be considered as defining all lost profits as consequential. Instead, the factual matrix, and an assessment of whether those lost profits were foreseeable at the time of contracting will play key roles in the classification of damages for lost profits.

B. Atos IT Solutions v Sapient Canada Inc.[218]

1. BACKGROUND

As with *Dow Canada*, a central aspect of this decision was the proper interpretation of a limitations of liability clause, which on its face purported to exclude all lost profits.

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[215] *Ibid* at paras 1002-1005.
[216] *Ibid* at para 1033.
[217] *Ibid* at paras 1035-1041.
[218] *Sapient, supra* note 207.

2. FACTS

In early 2006, Enbridge Gas Distribution Inc. ("Enbridge") embarked on a project to replace its numerous legacy customer software information systems with a single new system. Sapient Canada Inc. ("Sapient") was the project's prime contractor, and entered into a fixed-price subcontract with Siemens Canada Limited (now Atos IT Solutions, or "Atos") for the provision of data conversion services and application management support for Enbridge personnel after the new system was operational. In June 2009, Sapient terminated the contract for cause. Atos sued, claiming damages for wrongful termination of the contract. In turn, Sapient counterclaimed for damages arising from the delays in completing the project.[219] At trial, Atos was awarded damages for wrongful termination of the contract.[220]

On appeal, Sapient asserted that the trial judge erred in finding that the below limitation of liability did not bar all lost profits claims:

> 18.6.1 SUBJECT TO SECTION 18.6.2, NOTWITHSTANDING ANYTHING TO THE CONTRARY HEREIN, EACH OF SUBCONTRACTOR AND SAPIENT WILL BE LIABLE TO THE OTHER WITH RESECT TO THIS AGREEMENT AND ANY OTHER OBLIGATIONS RELATED THERETO <u>ONLY FOR DIRECT DAMAGES</u> AND FOR AN AMOUNT THAT WILL NOT EXCEED, IN THE AGGREGATE
> ….
> FOR GREATER CERTAINTY, SUBJECT TO SECTION 18.6.2, <u>NEITHER SUBCONTRACTOR NOR SAPIENT WILL BE LIABLE TO THE OTHER</u> FOR INDIRECT, SPECIAL, CONSEQUENTIAL OR PUNITIVE DAMAGES OR <u>FOR LOSS OF PROFITS</u> (COLLECTIVELY, "**EXCLUDED DAMAGES**"), EVEN IF THE PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.[221]

In interpreting this provision, the trial judge found that the inclusion of loss of profits as Excluded Damages along with "indirect, special and consequential damages" was intended to refer to consequential or indirect lost profits only, which is in accordance with *Hadley v Baxendale*'s recovery principle for consequential losses. It was further determined to be consistent with an assumption that fixed-price commercial contracts contain an element of profit which should be compensable on breach.[222]

3. DECISION

The Ontario Court of Appeal was not persuaded that the trial judge's interpretation of the terms "consequential" or "indirect" damages involved an extricable question of law to which the correctness standard applied.[223] Applying a correctness standard where a non-standard form contract contains words found in other contracts "runs against the grain of two basic directions" given about contractual interpretation: (a) the courts should be slow to identify extricable questions of law given the fact specific nature of ascertaining the objective intentions of the parties; and (b) the meaning of a contractual term is derived not just from the words used, but the context or circumstances in

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[219] *Ibid* at paras 7-12.
[220] *Ibid* at para 16.
[221] *Ibid* at paras 2, 68.
[222] *Ibid* at para 72.
[223] *Ibid* at para 76.

which they are used.[224] The fact that another interpretation might reasonably be available does not provide a basis for appellate intervention.

As the trial judge was found to have given a considered, detailed, and context-specific explanation about how he arrived at the interpretation he did, with no rare extricable error of law or palpable overriding error of fact, his interpretation was deferred to, and this aspect of Sapient's appeal was dismissed.[225]

4. COMMENTARY

On its face, the provision at issue appeared to specifically exclude all lost profits, despite the trial judge's interpretation to the contrary. However, the Court of Appeal was clearly reluctant (in accordance with the Supreme Court's guidance in *Sattva*)[226] to interfere in matters of contractual interpretation. While this is an understandable position for the courts to take in the context of non-standard form contracts, where the interpretation cannot be taken as a precedent for another non-standard form contract, it appears to ignore the weight such decisions will nonetheless have. Indeed, when combined with the decision in *Dow Canada*, the apparent trend appears to be to interpret exclusion clauses in non-standard form contracts utilizing the foreseeability test set out in *Hadley v Baxendale*.[227] If this is the appropriate manner in which to assess these types of clauses, it is unclear why appellate guidance on that point cannot be provided.

C. Canadian Natural Resources Limited v Wood Group Mustang (Canada) Inc. (IMV Projects Inc.)[228]

1. BACKGROUND

This decision is significant in terms of providing a detailed assessment of how damages are apportioned in the context of a pipeline failure, as well as in providing guidance on the distribution of "windfalls" obtained under a Pierrenger agreement.

2. FACTS

This dispute revolved around the construction of a 32 km buried emulsion pipeline between CNRL's Primrose East Plant and its Wolf Lake Plant (the "Pipeline"), which would carry extra-hot emulsion. CNRL retained IMV Projects to provide it with engineering advice on the design and construction of the Pipeline. Shaw Pipe supplied the pipe

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[224] *Ibid* at paras 81-82.
[225] *Ibid* at para 86.
[226] *Creston Moly Corp. v Sattva Capital Corp.*, 2014 SCC 53.
[227] The classic test from *Hadley v Baxendale*, [1854], 9 Ex 341 at p 354, 156 ER 145, provides:
"Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."
[228] *Wood Group, supra* note 208.

system consisting of the pipe, an anti-corrosion coating, insulation, and a waterproof outer jacket. Flint Field Services was retained to install the pipe.[229]

The Pipeline failed after three months of operation. At trial, it was determined that the failure was as a result of numerous factors, including design and installation flaws.[230] However, the catastrophic failure of the Pipeline was found to have been caused by CNRL (in response to a well blow-out, and at the direction of the AER) flowing extra-hot emulsion from the reservoir down the Pipeline without cooling it sufficiently, which pushed the Pipeline beyond its design limits. This led the pipe to expand, causing deflection and further damage to the waterproof membrane. Ultimately the Pipeline failed in several sections.[231]

On the eve of trial, CNRL entered into a Pierringer settlement agreement with Shaw and Flint, with the action proceeding against IMV only. Ultimately, the trial judge determined that all parties had been negligent in some respects, and allocated responsibility amongst them as follows: CNRL – 50%, IMV – 20%, Shaw – 25%, and Flint - 5%.[232]

3. DECISION

The primary issue before the Court of Appeal was the trial judge's apportionment of liability. The Court confirmed that in assessing each party's share of liability, apportionment was to be based on fault considering all of the circumstances of the case, and not causation.[233] In making this assessment, there was a need to consider the "background vulnerability" of the Pipeline (i.e. the Pipeline was unfit for its intended purpose) and the catastrophic failure following the blow-out event.[234]

In assessing all of the factors, the Court of Appeal held that the trial judge committed palpable and overriding errors in her apportionment of liability, including an over-emphasis on the proximity of CNRL's decision to flow extra-hot emulsion down the Pipeline to the failure, and an under-emphasis on the fault of the remaining parties given that their negligence occurred prior to construction.[235] In performing its own assessment of fault, the Court of Appeal modified the apportionment as follows: CNRL – 25%, IMV – 35%, Shaw – 35% and Flint – 5%.[236]

A secondary issue of importance to CNRL's ultimate damages recovery was the majority's discussion of the Pierrenger agreement entered into between CNRL, Flint and Shaw. In particular, the Court noted that when the plaintiff is over-compensated by settling defendants to a Pierrenger agreement (i.e. the settling defendants paid more than their ultimate apportionment of fault), the non-settling defendant is entitled to have its liability reduced by the amount of the windfall. However, that reduction occurs after the plaintiff is fully indemnified for its damage

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[229] *Ibid* at para 1.
[230] *Ibid* at para 2.
[231] *Ibid* at para 6.
[232] *Ibid* at para 7.
[233] *Ibid* at paras 40-41.
[234] *Ibid* at paras 43-54.
[235] *Ibid* at paras 87-88, 95.
[236] *Ibid* at para 163.

(despite any contributory negligence of its own) and it has recovered its solicitor and client costs in pursuing the settling defendants.[237]

4. COMMENTARY

The Court of Appeal's reaffirmation of assessing the apportionment of damages on the basis of fault, and not causation, or proximity to the cause of the ultimate failure of the Pipeline is an important point for all counsel to remember. Merely because one party's actions were the "final straw" leading to the damages sustained does not mean that they can be presumed to be primarily at fault for that damage.

With respect to Pierrenger agreements, the Court's guidance on "windfalls" is particularly advantageous to plaintiffs, as it reduces at least some of the risk associated with settling with one or more defendants.

VII. INDIGENOUS

In the past year, there have been a number of significant Indigenous law decisions. In this part, we focus on those decisions regarding the Crown's duty to consult, including: (a) the Crown's inability to inflexibly rely upon the National Energy Board in satisfaction of its duty to consult; and (b) the Supreme Court of Canada's finding that the development, passage, and enactment of legislation does not trigger the duty to consult.

A. Tsleil-Waututh Nation v Canada (Attorney General)[238]

1. BACKGROUND

In *Tsleil-Waututh*, the Federal Court of Appeal considered the Crown's capacity to rely absolutely on the National Energy Board to satisfy its duty to consult.

2. FACTS

In 2013, Trans Mountain Pipeline LP ("Trans Mountain") submitted an application to the National Energy Board ("NEB") in order to proceed with the expansion of the approximately 1,150-kilometre Trans Mountain pipeline system, which moves crude oil, refined and semi-refined petroleum products from Edmonton, Alberta, to marketing terminals and refineries in the central region and lower mainland areas of British Columbia, as well as to the Puget Sound area in Washington state (the "Project").[239]

Following an extensive review and public hearing process by the NEB under its enabling legislation and the *Canadian Environmental Assessment Act*[240], cabinet accepted the NEB's recommendation and issued a Certificate of Public Convenience and Necessity approving the Project, subject to 157 conditions. Notably, the Governor in

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[237] *Ibid* at para 162.
[238] 2018 FCA 153 [*Tsleil-Waututh*].
[239] *Ibid* at paras 10, 11.
[240] SC 2012, c 19.

Council stated its satisfaction with Canada's consultation process, finding it to be consistent with the honour of the Crown and further finding that the Indigenous concerns had been appropriately accommodated.[241]

A number of First Nations, two cities, and two non-governmental organizations commenced applications for judicial review challenging cabinet's decision to approve the Project. The Attorney General of British Columbia and the Attorney General of Alberta also participated as interveners.

3. DECISION

The Federal Court of Appeal quashed the approval of the project and remitted it to the Governor in Council for redetermination on the basis that the Governor in Council failed by unreasonably relying on the NEB's report, which incorporated a "critical error" at the Project scoping stage by unjustifiably excluding the potential increase in tanker traffic from the scope of its review of the Project.[242]

The Court also held that Canada failed to adequately discharge its duty to consult and accommodate. Specifically, Canada failed to meet its duties in the third phase of the consultation process, which involved the Governor in Council's consideration of the Project following the NEB hearing. The Court explained that, although Canada could rely on the NEB's process to fulfil the Crown's duty to consult, it could not do so unwaveringly. When real concerns were raised about the hearing process or the NEB's findings, Canada was required to dialogue meaningfully about those concerns.[243]

The Court further held that Canada erroneously operated on the basis that it could not impose additional conditions on Trans Mountain on top of the conditions recommended by the NEB, which seriously limited the scope of its consultation.[244] Finally, the Court held that the late delivery of Canada's assessment of the Project's impact until after all but one consultation meeting had been held with the Indigenous applicants contributed to the unreasonableness of the consultation process.[245]

4. COMMENTARY

This decision underscores the importance of independent consultation by the Crown following a hearing before the NEB. While the Crown can rely on the NEB's process to fulfil the Crown's duty to consult, it cannot do so blindly. The Crown must make independent efforts to ensure that the NEB's efforts are sufficient, lest it risk having approvals overturned by the Court.

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[241] *Tsleil-Waututh, supra* note 238 at paras 1-2, 70.
[242] *Ibid* at para 5.
[243] *Ibid* at paras 6, 558, 574.
[244] *Ibid* at para 637.
[245] *Ibid* at para 647.

B. Mikisew Cree First Nation v Canada (Governor General in Council)[246]

1. BACKGROUND

In *Mikisew Cree*, the Supreme Court of Canada confirmed that the development, passage, and enactment of legislation does not trigger the duty to consult.

2. FACTS

In April 2012, the Minister of Finance introduced two pieces of omnibus legislation, Bills C-38 and C-45, that altered Canada's environmental protection regime. The Mikisew Cree First Nation ("Mikisew") was not consulted on either bill. Mikisew brought an application for judicial review in Federal Court, arguing that, as the legislation was developed by a cabinet member and could adversely affect Mikisew's treaty rights, Mikisew should have been consulted about the legislation.[247]

While the Federal Court agreed with Mikisew, the Federal Court of Appeal held that where Ministers develop bills in a legislative capacity, the doctrines of parliamentary sovereignty, the separation of powers, and parliamentary privilege preclude judicial review.[248]

3. DECISION

The Supreme Court of Canada unanimously held that the Federal Court did not have jurisdiction to consider the judicial review application, as the Court was satisfied that there was no statutory grant of jurisdiction enabling the Federal Court to review the passing of legislation and disposed of the appeal.[249] However, the Court was split in its *obiter* reasoning regarding the *extent to which* the judiciary may be able to limit or impose upon Parliament's legislative powers.

Four of the seven majority Justices held that while courts have the power to nullify enacted legislation that is inconsistent with Canada's Constitution and quash executive decisions based on that legislation, courts cannot rule on challenges to the process by which that legislation is formulated, introduced or enacted.[250] Consequently, consultation with Indigenous groups before passing legislation is not legally required[251] and the honour of the Crown does not bind Parliament.[252]

In contrast, the remaining three majority Justices held that, simply because the duty to consult doctrine is inapplicable in the legislative sphere, does not mean the Crown is absolved of its obligation to conduct itself honourably.[253] Instead, declaratory relief could be appropriate where legislation is enacted that is inconsistent with

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[246] 2018 SCC 40 [*Mikisew Cree*].
[247] *Ibid* at paras 6-9.
[248] *Ibid* at paras 10, 11.
[249] *Ibid* at para 17.
[250] *Ibid* at para 124.
[251] *Ibid* at para 166.
[252] *Ibid* at para 135.
[253] *Ibid* at para 52.

the honour of the Crown.[254] Finally, a minority of the Court concluded that the enactment of legislation with the potential to adversely affect Aboriginal rights does give rise to a duty to consult and may be challenged directly for relief if it is enacted in breach of that duty.[255]

4. COMMENTARY

The Supreme Court of Canada's split decision in *Mikisew Cree* has left uncertainty with respect to whether remedies are available as against the legislature. While seven of the nine justices agreed that the duty to consult is not triggered during the law-making process, a separate majority contemplated court challenges where the enactment of legislation is inconsistent with the honour of the Crown. We expect this case may invite new challenges to government decisions.

C. Eabametoong First Nation v Minister of Northern Development and Mines[256]

1. BACKGROUND

The Director of Exploration for the Ministry of Northern Development and Mines (the "Ministry") granted Landore Resource Canada Inc. ("Landore") an exploration permit for an area within the traditional territory of the Eabametoong First Nation ("Eabametoong").[257] Eabametoong filed an application for judicial review to set aside the permit on the basis that the Ministry failed to properly discharge its duty to consult.[258]

Prior to November 2012, mining exploration did not require a permit in Ontario and Landore had completed several drilling campaigns in the area without having contacted Eabametoong.[259] However, the new regulatory regime included consultation requirements which were supplemented by detailed guidelines on the particular procedural steps of the consultation process.[260]

2. FACTS

When Landore decided to continue exploratory operations on the land, the company reached out to the Chief of Eabametoong seeking approval and support.[261] The parties agreed to discuss a memorandum of understanding and held an in-person meeting where Landore presented on the project.[262] There were no concerns raised at this meeting, and Landore reported that their duty to consult had been fulfilled.[263] Eabametoong's view was that this meeting was

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[254] *Ibid* at para 47.
[255] *Ibid* at paras 78, 92.
[256] 2018 ONSC 4316.
[257] *Ibid* at para 1.
[258] *Ibid* at para 2.
[259] *Ibid* at paras 17, 30.
[260] *Ibid* at paras 17-25.
[261] *Ibid* at para 96.
[262] *Ibid* at paras 35, 38.
[263] *Ibid* at para 39.

introductory and that the consultation process would continue, so the Ministry deferred Landore's application until further meetings could be held.[264]

Eventually, there was a second meeting where Eabametoong expressed concerns and frustration about the mining operations. However, the Ministry did not attend and Landore kept no notes.[265] Although follow-up meetings were planned, none materialized.[266] Meanwhile, unbeknownst to Eabametoong, Landore met in private with the Ministry to add pressure for the approval of the permit.[267] The Ministry's consultation efforts shifted after this meeting, and the approval process was expedited in Landore's favour.[268]

Several months later, the Ministry wrote to Eabametoong, indicating that it was enclosing "possible terms and conditions" to address the concerns raised by the community. Eabametoong responded that the terms did not adequately address their concerns. However, the response went unanswered. The permit was approved three weeks later.[269]

3. DECISION

In Eabametoong's application for judicial review, Eabametoong argued that the Crown had withheld information, held private meetings with Landore, and expedited the approval process without explanation, all of which was contrary to promoting reconciliation.[270] The Ontario Court granted the application, setting aside the Ministry's decision.[271]

Consultation must be meaningful and appropriate, but is understood to fall on a spectrum relative to the circumstances that is proportionate to the strength of the claim of right and seriousness of the potential adverse effect on that claimed right.[272] The Ontario regulations similarly provide for this type of consultation.[273]

The Ministry argued that the consultation required was on the lower end of the spectrum, and that it had met and exceeded the requirements under that standard.[274] The Court agreed that the lower standard applied because Eabametoong's claim was weak considering the lands were surrendered.[275] However, the Court stated that even at the lower end of the spectrum the duty to consult does require a genuine effort to reconcile the Crown's interest with that of the First Nation.[276]

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[264] *Ibid* at para 41.
[265] *Ibid* at paras 46-47.
[266] *Ibid* at paras 48-51.
[267] *Ibid* at paras 55-58.
[268] *Ibid* at para 59.
[269] *Ibid* at paras 70-73.
[270] *Ibid*.
[271] *Ibid* at para 128.
[272] *Ibid* at paras 9-10.
[273] *Ibid* at paras 18-25.
[274] *Ibid* at para 91.
[275] *Ibid*.
[276] *Ibid* at para 92.

The Court considered the efforts of Landore, the Ministry, and Eabametoong, and concluded that it was reasonable for Eabametoong to have found that the consultation process had been inadequate.[277] The Ministry had changed course in a way that compromised the reconciliation objectives of the duty to consult.[278] Ultimately, "there was no real and genuine attempt by the Ministry or Landore to listen to Eabametoong's concerns, provide feedback about those concerns and to discuss ways to meet those concerns (if possible)."[279]

4. COMMENTARY

The Court accepted that the Ministry, for appropriate reasons, has the right to change the consultation process, in spite of expectations that may have been created by it or Landore. However, such changes must not compromise the objectives of the duty to consult, which the Court described as "upholding the honour of the Crown by attempting to further the goal of effecting a reconciliation between the Crown and Indigenous peoples."[280] Any changes, and the reasons for the changes, should be communicated to Indigenous peoples.

This case highlights the importance of closely tracking the consultation process, and staying on top of all communications in this regard. The Crown and its delegates must demonstrate genuine and good faith efforts even when the consultation requirements fall on the lower end of the spectrum as they did here. Documenting this process is also very important. While Landore argued that they had made significant consultation efforts, they failed to document the consultation process and could not provide evidence to support their argument that Eabametoong was frustrating the negotiations.[281] On the other hand, Eabametoong pointed to several instances where their communication had gone unanswered, which ultimately supported the Court's conclusion that the consultation process did not meet the requisite standard of sincerity and failed to uphold the honour of the Crown.

VIII. SUMMARY DISMISSAL

In the five years since the Supreme Court of Canada issued its seminal decision in *Hryniak v Mauldin*,[282] calling for a culture shift toward promoting accessible and timely means for resolving disputes, courts of Alberta have struggled in applying the *Hryniak* test, which has resulted in a rift in the case law relating to the proper test for summary judgment.

On one hand, the Court of Appeal in *Can v Calgary Police Service*[283] stated that the appropriate test is one of "unassailable" and "very high likelihood". However, the Court stated the test differently in *Stefanyk v Sobeys*

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[277] *Ibid* at para 109.
[278] *Ibid* at para 111.
[279] *Ibid* at para 120.
[280] *Ibid* at para 110.
[281] *Ibid* at para 95.
[282] 2014 SCC 7 [*Hryniak*].
[283] 2014 ABCA 322.

Capital Incorporated[284]: the only recognized standard of proof is the civil standard of proof, namely proof on a balance of probabilities. The confusion got to a point where judges were applying both tests simultaneously.[285]

To resolve the issue, on September 7, 2018, the Court of Appeal, in a five-member panel heard two summary judgment appeals, i.e., *Brookfield Residential (Alberta) LP v Imperial Oil Limited*[286] and *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd*[287]. In calling a rare five-member panel, the Court intended to provide important guidance on the test. The outcome—the test for summary judgment is still a balance of probabilities, however, only with respect to findings of fact; a principle of "proportionality" should be the guiding principle in granting a summary judgment.

A. Weir-Jones Technical Services Incorporated v. Purolator Courier Ltd[288]

1. BACKGROUND

The Court of Queen's Bench of Alberta summarily dismissed the action started by Weir-Jones Technical Services Inc. ("Weir-Jones") against Purolator Courier Ltd., Purolator Inc. and Purolator Freight ("Purolator") on the basis that Weir-Jones did not commence the action within the applicable two year limitation period. Weir-Jones appealed the decision.

2. FACTS

Weir-Jones and Purolator had a contractual relationship under which Weir-Jones would transport packages on behalf of Purolator.[289] In November 2008, and later in January 2009, Weir-Jones filed grievances with a union alleging various breaches by Purolator. Weir-Jones ended the contractual arrangement in August, 2009 and filed a Statement of Claim in July 22, 2011[290] — almost a year past the two year mark established by the *Limitations Act.*[291]

Weir-Jones had delayed filing a Statement of Claim since it believed that an arbitration between the parties would settle all outstanding matters, even though it had knowledge that some of the claims were outside of the arbitrator's jurisdiction.[292] There were also various communications between the parties about the alleged breaches which Weir-Jones took to mean a standstill agreement. The Court of Queen's Bench granted summary judgment in favour of Purolator.[293]

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[284] 2018 ABCA 125.
[285] *(Re) Schell Estate*, 2018 ABQB 991 at paras 91-92.
[286] 2019 ABCA 35 [*Brookfield*].
[287] 2019 ABCA 49 [*Weir-Jones*].
[288] *Ibid*.
[289] *Ibid* at para 2.
[290] *Ibid* at paras 3-4.
[291] *Limitations Act*, RSA c L-12.
[292] *Weir-Jones, supra* note 287 at para 5.
[293] *Ibid* at para 7.

3. Decision

The majority of the Court of Appeal dismissed Weir-Jones's appeal, as on the record before it, there was no doubt that Weir-Jones had missed the limitation period.[294]

In discussing summary judgment more generally, the Court set out the following general principles:

(a) with respect to the "standard of proof" on a summary judgment motion, the facts are to be proven on a standard of balance of probabilities (which applies even if there is conflicting evidence), and inferences of fact are allowed;[295]

(b) in establishing that a claim or defence has "no merit", or that there is "no defence" to the claim, it is to be understood that these terms simply mean that there is "no real issue";[296]

(c) the "burden of proof" for the moving party to establish that there is no genuine issue for trial, and the opposite requirement for the resisting party, is a balance of probabilities. Nevertheless, complexity of a proceeding might be enough to demonstrate the case should go to trial;[297] and

(d) the principle of fairness reflects a need to ensure an appropriate level of fairness in process. As such, "the chambers judge is entitled to take into consideration the fairness of the process, and its ability to achieve a just result, at all stages."[298]

The majority then summarized the test for a summary judgment as follows:

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

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

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

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[294] *Ibid* at paras 58, 63.
[295] *Ibid* at paras 28-29.
[296] *Ibid* at para 31.
[297] *Ibid* at para 35.
[298] *Ibid* at para 46.

issue requiring a trial. If there is a genuine issue requiring a trial, summary disposition is not available.

(d) In any event, the presiding judge must be left with sufficient confidence in the state of the record such that he or she is prepared to exercise the judicial discretion to summarily resolve the dispute.[299]

The Court emphasized that the analysis need not be done sequentially or in any particular order.

4. COMMENTARY

This case is an important one in Alberta. The confusion around the test to apply in summary judgments got to a point where it was possible "to find a quote in the case law to support virtually any view of the test".[300] The Court of Appeal made it clear that there is only one standard of proof: balance of probabilities, although it is not in and of itself conclusory.

This decision will, no doubt, have a lasting effect: trial is no longer seen as a default procedure. The case of *Weir-Jones* is a proclamation to judges that they should tackle disputes at a summary judgment hearing—trial is no longer the default avenue to resolve all disputes.

B. Brookfield Residential (Alberta) LP (Carma Developers LP) v. Imperial Oil Ltd.[301]

1. BACKGROUND

Brookfield, a companion case to *Weir-Jones*, was an appeal of a summary dismissal of a claim on the basis of a limitation period. The claim concerned alleged contamination of a property as a result of well drilling. Since it was clear that the limitation period had expired, the case depended entirely on an extension of the limitation period.

2. FACTS

Brookfield Residential (Alberta) LP, formerly known as Carma Developers LP, ("Brookfield") appealed the chambers judge's summary dismissal of its action against Imperial Oil Limited ("Imperial Oil").

Brookfield was the owner of a parcel of land in South Edmonton that it proposed to develop.[302] Imperial Oil drilled an oil well on the lands in about 1949, which Brookfield alleged was the source of the contamination.[303] Since 1950

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[299] *Ibid* at para 47.
[300] *Ibid* at para 23.
[301] *Brookfield, supra* note 286.
[302] *Ibid* at para 2.
[303] *Ibid*.

when Imperial Oil sold the well, a reclamation certificate was issued and two independent tests revealed no unusual levels of hydrocarbons on the land.[304]

Ultimately, Brookfield performed another test in 2010, some 60 years after Imperial Oil last operated the well, and found that the land was contaminated with hydrocarbons and salt.[305] Imperial Oil brought an application to summarily dismiss the claim. Brookfield responded by bringing a cross-application for an extension of the limitation period under section 218 of the *Environmental Protection and Enhancement Act* ("*EPEA*").[306]

3. DECISION

The Court of Appeal dismissed the appeal, noting that even if it were to assume that Imperial Oil was responsible for the contamination, the contamination would have occurred at the time the well was drilled. As a result, the ultimate ten year limitation period had passed – indeed more than 60 years had passed between the alleged contamination and filing of the Statement of Claim.[307]

The Court then considered whether the limitation period should nevertheless be extended, or as contemplated in *Lakeview Village Professional Centre Corp. v Suncor Energy Inc.*[308], whether that decision should be deferred until trial.[309] In determining that applications under s 218 of the *EPEA* should be decided at a summary dismissal hearing, the Court effectively retired the *Lakeview Village* decision.[310] Having reviewed the record, the Court concluded that no extension should be granted, as the long passage of time and difficulties in locating expert witnesses would prejudice Imperial Oil in properly defending the case.[311]

4. COMMENTARY

The case of *Brookfield* did not provide any further guidance as to the test for summary judgment, instead, the case effectively retired the previous case law stating that matters dealing with extensions of limitation periods are to be left for trial.[312] The decision to extend a limitation period is still available to judges: it is discretionary. Nevertheless, such extension can and should be done at the summary application hearing—there is no need for an expensive trial.

IX. TAXATION

This year, the Federal Court of Appeal has rendered an important decision with respect to Canadian exploration expenses, and the tax implications for both the corporation and its shareholders where a corporation fails to properly renounce those expenses through a "look back renunciation".

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[304] *Ibid* at para 3.
[305] *Ibid*.
[306] RSA 2000, c E-12.
[307] *Brookfield, supra* note 286 at para 7.
[308] 2016 ABQB 288 [*Lakeview Village*].
[309] *Brookfield, supra* note 286 at para 9.
[310] *Ibid* at para 10.
[311] *Ibid* at paras 15-17.
[312] *Ibid* at paras 9-10.

The Alberta Court of Queen's Bench also affirmed the findings of the Municipal Government Board, which held that similar wells were required to be treated similarly for the purposes of linear property taxes, regardless of the number of well events the particular wells have been classified into. This is of particular importance for those oil and gas companies who drilled wells prior to 2010, when the AER required greater segregation of well production than it currently does.

A. Tusk Exploration Ltd v Canada[313]

1. Background

This case deals with the correct interpretation to be ascribed to a purported renunciation of Canadian exploration expenses ("CEE") by a corporation to non-arm's length shareholders, and the consequent tax charged to the corporation under the *Income Tax Act* ("*ITA*").[314]

2. Facts

A series of rules in the *ITA* allow for deductions from income for CEE incurred in the year, which are generally expenses incurred to determine the existence, location, extent or quality of petroleum, natural gas or mineral resources. CEE is often incurred before any commercial production begins. In certain circumstances, a principal-business corporation may issue a flow-through share, which allows it to renounce certain amounts included in CEE to the holders of the flow-through shares. CEE that has been renounced to a shareholder is deemed to be the CEE of that shareholder, which generally allows them to claim an income deduction in the year. In this way, the resource company can raise funds to engage in exploration activities and make use of the resulting income deduction by passing it through to shareholders.[315]

If certain conditions are met, subsection 66(12.66) will deem the CEE to have been incurred on the last day of the preceding tax year (a "look-back renunciation"). In particular, the shareholders must be at arm's length with the corporation for a look-back renunciation. Further, the renunciation must occur in the first three months of the year, and all of the renounced CEE must be incurred by the end of the year, or the company will be required to pay additional taxes.[316]

Tusk Exploration Ltd. ("Tusk") was unaware that the benefit of subsection 66(12.66) required shareholders to be at arm's length with the corporation, and purported to renounce significant CEE to non-arm's length shareholders. Further, the amounts renounced had not been fully incurred by the end of the year. Upon audit, the non-arm's length

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[313] 2018 FCA 121 [*Tusk*].
[314] RSC 1985 c 1 (5th Supp) [*ITA*].
[315] *Tusk, supra* note 313 at paras 4-6.
[316] *Ibid* at para 7.

shareholders were denied their deductions for the CEE renounced to them and were assessed interest on the resulting tax liability for that year. Tusk was also charged tax under section 211.91 of the *ITA*.[317]

The Tax Court of Canada (the "TCC") found that Tusk was liable for tax under section 211.91 even though the non-arm's length shareholders had not been permitted to claim a deduction for the look-back renunciation and had been assessed interest on their additional tax liability. Tusk appealed this finding on the basis that the TCC erred in its interpretation of the phrase "purported to renounce" as it appears in section 211.91 of the *ITA*.[318]

3. DECISION

Tusk argued that for the purposes of subsections 66(12.73) and 211.91(1) of the *ITA*, an amount that a corporation "purports to renounce" only includes those amounts that are validly renounced.[319] By this reasoning, if the conditions for renunciation are not satisfied, then a corporation cannot have purported to renounce any CEE, and therefore no additional tax under section 211.91 can be levied. Because the shareholders were not at arm's length and the CEE was not validly renounced, Tusk submitted that it could not be liable under section 211.91 for the additional tax.[320]

The Federal Court of Appeal dismissed the appeal and affirmed the TCC's decision.[321] The conditions for a valid renunciation need not be satisfied for a corporation to purport to renounce CEE to a shareholder.[322] On a purposive basis, there was no indication that Parliament intended to restore parties to the position they were in before the (invalid) renunciation had been made.[323] As a result, concerns over double taxation were not persuasive.

4. COMMENTARY

This decision has implications for the energy industry where flow-through share arrangements are used. Taxpayers will need to exercise care to ensure the conditions for a valid renunciation are satisfied or unintended tax consequences may arise.

B. Alberta (Minister of Municipal Affairs) v Ember Resources Inc.[324]

1. BACKGROUND

This decision was a judicial review of a decision of the Municipal Government Board (the “Board”), reported at *Ember Resources Inc. v Designated Linear Assessor for the Province of Alberta*[325], allowing owners' appeal in part

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[317] *Ibid* at paras 11-12.
[318] *Ibid* at para 14.
[319] *Ibid* at para 23.
[320] *Ibid* at para 25.
[321] *Ibid* at paras 40-41.
[322] *Tusk*, *supra* note 313 at paras 26, 27.
[323] *Ibid* at para 37.
[324] 2018 ABQB 971 [*Ember*].
[325] 2016 ABMGB 75.

from a property tax assessment. It considers the application of property tax provisions contained in the *Municipal Government Act*[326] to various linear properties owned by Ember Resources Inc. ("Ember").

2. FACTS

In Alberta, linear properties (including oil wells) are subject to tax under the *MGA*. Taxation is assessed by the Designated Linear Assessor who assigns a value to the properties and calculates taxes owing accordingly. Following enactment of the *2015 Linear Property Assessment Minister's Guidelines* (the "Guidelines"), valuation of linear properties was to be completed with reference to a series of categorical property descriptions assigned by the AER (the "AER Code"). Property value, and the associated tax payable, would be calculated by applying the AER Code to a table contained in the Guidelines. Where a well's production is segregated into multiple "events" (and therefore multiple codes), the table will yield a higher valuation.[327]

The linear properties at issue in this case were drilled prior to 2010. Pursuant to the AER regulations then in effect, production had to be segregated according to the geological formation from which the minerals were being extracted. As a result, Ember was required to equip several wells with additional tubing and other features.[328]

In 2010, the AER changed it regulations and segregation was no longer required. Ember removed the features required to segregate production. The effect of these changes was that many of Ember's wells, which produced a single, commingled product were assigned more than one code – one code associated with the producing well, and one or more codes associated with the now-discarded segregation features.[329]

The combined result of the AER's policy change and the *MGA* tax regime, was that wells drilled after 2010 were assessed for taxation with reference to a single AER Code, while those drilled before 2010 were assessed with reference to multiple AER Codes. Since the Guidelines assigned a higher value to wells possessing multiple AER Codes, Ember's formerly segregated, currently commingled, wells were assigned a higher value than an otherwise equal well drilled after 2010.[330]

On review by the Board, Ember's wells were re-assessed as "single event wells." Specifically, the Board held that the assessment of Ember's wells had failed to take into account considerations of fairness and equity, as was required under s. 293 of the *MGA*. Finding that the effect of the assessment was to treat similar wells differently on the basis of an arbitrary distinction, the Board concluded that the wells should be re-assessed.[331] The Alberta Minister of Municipal Affairs applied to the Alberta Court of Queen's Bench for judicial review.

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[326] *MGA, supra* note 41.
[327] *Ember, supra* note 326 at paras 3-5.
[328] *Ibid* at para 5.
[329] *Ibid.*
[330] *Ibid.*
[331] *Ibid* at para 45.

3. DECISION

The Court dismissed the application, finding that the Board had acted appropriately. Fairness and equity have frequently featured in the Board's decisions regarding reassessment, and their application in this case was consistent with previous decisions.[332] The Court noted that this conclusion was supported by s. 283(1) of the *MGA*, which states that assessments must be prepared "in a fair and equitable manner."[333] Noting that the Board's purpose is to interpret and apply the standards set out in the *MGA* and the Guidelines, the Court found that the Board's assessment did not amount to a second guessing or misapplication of the Guidelines.[334] Finally, the Court held that enactment of the Guidelines was insufficient to dislodge prior case law which emphasized the role of fairness and equity in linear property tax assessments.[335]

4. COMMENTARY

The Court's conclusion in this case demonstrates that former multi-event wells that have since been merged to a single stream will be valued and taxed as a single-event well. This case is also significant in that it confirms the Board's capacity to consider concerns of fairness and equity in its assessment of linear taxes.

X. TORTS

This year, the courts have taken the opportunity to clarify a number of important areas of tort law of interest to oil and gas lawyers. This paper focuses on the following: (a) those circumstances in which a party may sue a regulator for its alleged contribution to the failure of a facility or project; (b) the test to be applied in assessing a breach of confidence claim; and (c) the test to be applied in assessing a claim for interference with contractual relations.

A. Imperial Metals Corporation v Knight[336]

1. BACKGROUND

The significance of this case is its consideration of the permissible limits for a party to commence an action against a provincial regulator for its alleged contribution to the failure of a tailings storage facility.

2. FACTS

On August 4, 2014, a tailings storage facility ("TSF") at the Mount Polley Mine, in British Columbia (the "Mine") failed. An action was commenced by the owner and operator of the Mine, along with its principle shareholder, against the engineering firms who provided services to the plaintiffs over the course of the TSF's history.[337] The defendants, in turn, issued third party claims against the Province of British Columbia (the "Province") on the basis that the Province, in its capacity as regulator of mining in the province, owed a duty of care to the plaintiffs and

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[332] *Ibid* at para 57.
[333] *Ibid* at paras 58-59.
[334] *Ibid* at para 60.
[335] *Ibid* at para 61.
[336] 2018 BCSC 1191 [*Imperial*]
[337] *Ibid* at paras 1-2.

defendants to, among other things, identify, warn of, and/or take appropriate steps within its regulatory authority to address deficiencies in the design of the TSF.[338] The Province of British Columbia brought an application to strike these third party claims on the basis that it was plain and obvious that the pleadings did not disclose a cause of action against it.

3. DECISION

In assessing whether the Province could be found to owe a duty of care to either the plaintiffs or defendants, the Court applied the traditional *Anns/Cooper* test, as developed by the Supreme Court in *Cooper v Hobart*.[339] As a general rule, the Court found that the interactions between a the regulator and regulated parties (here the mine owners) for the purposes of administering and enforcing a statutory scheme will not give rise to a relationship of proximity, as to find otherwise would "transform the Province into the insurer of all mining projects in British Columbia".[340] However, the following exceptions to that rule were accepted:

(a) where the regulator steps outside its role as regulator, and assumes the role of designer, developer, or advisor to the regulated party;

(b) where the regulator acquires knowledge of serious and specific risks to the person or property of a clearly defined group of the class the statutory scheme was intended to protect;

(c) where the regulator makes a specific misrepresentation to the regulated party (apart from a regulatory statement, such as a permit, inspection report, or annual report falling within its statutory or regulatory responsibilities) that invites reliance, and the regulated party relies on the misrepresentation for the purpose for which it was made; and

(d) where interactions between the regulator and regulated party give rise to a clear set of expectations that the regulator will consider the interests of the regulated party, and the statute does not expressly or implicitly exclude consideration of those interests.[341]

In the result, the Court held that the pleadings were overbroad in terms of their statement of the alleged duty of care owed by the Province. However, rather than strike the pleadings, the Court granted leave to the third party claimants to amend the pleadings to eliminate claims based on an unprovable duty of care.[342]

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[338] *Ibid* at paras 22, 27, 30.
[339] 2001 SCC 79.
[340] *Ibid* at para 120.
[341] *Ibid* at para 109.
[342] *Ibid* at paras 127-128.

4. COMMENTARY

The Court's formulation of the circumstances in which a regulator may owe a duty of care to a project owner is very helpful in determining those instances where a plaintiff, or defendant, may have an opportunity to hold a provincial regulator at least partly responsible for projects falling under their regulatory mandate.

B. Scott & Associates Engineering Ltd. v Ghost Pine Windfarm LP[343]

1. BACKGROUND

At issue in *Ghost Pine* was whether the recipient of confidential information provided by Scott & Associates Engineering Ltd. ("Scott") could be liable for breach of confidence where there were no direct dealings between Scott and the third party.

2. FACTS

In 2007, Scott and Finavera Renewables Inc. ("Finavera") worked together on a bid to purchase a wind farm. Scott did a significant amount of work up-front, which was shared with Finavera. Finavera then proceeded to close the purchase without involving or hiring Scott for the project.[344] Scott was successful at trial in obtaining a $600,000 award against Finavera in unjust enrichment.[345]

In 2008, Finavera sold a portion of the project to Ghost Pine Windfarm LP ("Ghost Pine"). Scott subsequently sued Ghost Pine for breach of confidence and unjust enrichment, claiming among other things that Ghost Pine knowingly received and benefitted from Scott's confidential information. This claim was summarily dismissed on the basis that Ghost Pine acquired the project from Finavera in an arm's-length transaction in which Scott had no involvement, and in which Scott conveyed no confidential information to Ghost Pine. It was further found that Ghost Pine did not misuse Scott's information.[346] Scott appealed this decision to the Court of Appeal.

3. DECISION

The Court of Appeal confirmed that the proper test for a breach of confidence claim is as follows: "the information conveyed must be confidential; the information must have been communicated in confidence; and, the party to whom it was communicated must have misused the information to the detriment of the party who confided it".[347] The Court of Appeal agreed with Scott that the chambers judge was in error in dismissing Scott's breach of confidence claim on the basis that there were no direct dealings between Scott and Ghost Pine. That action could still proceed if Ghost Pine knowingly received Scott's confidential information from Finavera and used that

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343 2019 ABCA 2 [*Ghost Pine*].
344 *Ibid* at para 2.
345 *Scott & Associates Engineering Ltd. v Finavera Renewable Inc.*, 2013 ABQB 273, aff'd 2015 ABCA 51.
346 *Ghost Pine, supra* note 348 at paras 3-8.
347 *Ibid* at para 10.

information in a manner not authorized by Scott.[348] However, as Ghost Pine never possessed any of Scott's confidential information, Scott's appeal was dismissed.[349]

4. COMMENTARY

This decision is significant in confirming that the tort of breach of confidence is not simply limited to the party disclosing the confidential information. Liability may also attach to those receiving the confidential information if they are aware that the information had been intended to be confidential, but use that information in any event. To the extent a party is in receipt of third party information that it suspects was intended to be confidential, it is advisable to clarify the extent to which it is permitted to receive and/or use that information in order to avoid potential liability.

C. Geophysical Service Incorporated v Murphy Oil Company Limited[350]

1. BACKGROUND

In *Murphy*, the Court of Appeal took the opportunity to clarify the elements of the tort of interference with contractual relations.

2. FACTS

At trial, GSI alleged that when Murphy partnered with certain third parties who licensed GSI's seismic data, it used its influence with those third parties to induce them to breach their licencing agreements with GSI. This claim was summarily dismissed at first instance on the basis that there was no evidentiary or legal foundation to support it.[351]

3. DECISION

With respect to GSI's claim of interference with contractual relations, the Court described the elements of this tort as including the following:[352]

(a) the tortfeasor must know that the plaintiff had a contract with a third party and its terms;

(b) knowledge of the precise terms of the contract is unnecessary if the tortfeasor had the means of knowledge, yet deliberately disregarded them;

(c) the tortfeasor is liable if it acted knowingly, recklessly, or knowing that the plaintiff probably had a contract whose performance would be interfered with;

(d) the tortfeasor's knowledge must arise before the tortfeasor's act is begun or continued; and

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348 *Ibid* at para 13.
349 *Ibid* at para 17.
350 *Murphy*, *supra* note 128.
351 *Ibid* at para 54.
352 *Ibid* at para 89.

(e) there can be no tort for interference with contractual relations if there is no breach of contract.

In the circumstances, as GSI could not establish any breach of contract beyond one email from 1999 for which the 10-year ultimate limitation period would provide a complete answer, GSI's appeal was dismissed.[353]

4. Commentary

This case is an important reminder that the tort of interference with contractual relations does not require the plaintiff to establish that the defendant definitively knew of the contract at issue, or the precise terms thereof. It is sufficient to establish that the defendant knew that the contract "probably" existed, and deliberately avoided learning the terms of that contract. However, this claim may not be used as simply an alternative to suing your contractual counter-part for breach of contract. Indeed, the need to establish that a breach of contract occurred may necessitate, at a minimum, jointly suing the contractual counter-party and the party who is alleged to have interfered with the contract leading to the breach.

[353] *Ibid* at para 91.