

CELF 2023 Recent Judicial Decisions of Interest to Energy Lawyers

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This paper summarizes recent judicial decisions of interest to energy lawyers. The authors review and comment on case law from the past year in several areas including: arbitration, bankruptcy and insolvency, class actions, competition law, contractual interpretation, cybersecurity, employment and labour, environment, Indigenous law, insurance law, securities litigation, and tax. The authors discuss the practical implications of the decisions and risk-management strategies that may be of benefit to participants in the energy industry. The authors also highlight cases to watch in 2023.

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ARBITRATION

Overview

The courts continue to take a restrained approach to encroaching on the ability of parties to arbitrate a dispute. In 2022, the Supreme Court of Canada ("**SCC**") confirmed when a court may stay an arbitration in favour of resolving the parties' dispute in an insolvency proceeding. Also in 2022, the courts affirmed the narrow grounds on which a court will intervene to set aside an arbitral award and validated that use of summary judgment procedures in certain arbitrations.

Decisions

Peace River Hydro Partners v Petrowest Corp ("Petrowest")¹

Background

In *Petrowest*, arising in the context of a court-ordered receivership under the *Bankruptcy and Insolvency Act*² ("**BIA**"), the SCC clarified the circumstances in which an otherwise valid arbitration agreement may be held to be inoperative in the meaning of British Columbia's domestic arbitration legislation (the "**Arbitration Act**")³ and similar arbitration legislation throughout Canada. Where a party to an arbitration agreement commences legal proceedings in court against another party to the agreement in respect of matters governed by the arbitration agreement, such arbitration legislation permits the party seeking to enforce the arbitration clause to apply to stay the court proceeding in favour of arbitration. In such circumstance, the *Arbitration*

¹ 2022 SCC 41 [*Petrowest*].

² RSC 1985, c B-3 [*BIA*].

³ SBC 2020, c 2.

Act mandates a stay of the court proceedings unless the arbitration agreement is “void, inoperative or incapable of being performed”.⁴

Facts

Peace River Hydro Partners ("**Peace River**") entered into several construction agreements with Petrowest Corp. ("**Petrowest**") in connection with the construction of a hydroelectric dam in British Columbia. The parties' agreements provided that the parties arbitrate disputes arising from their relationship (collectively, the "**Arbitration Agreements**").⁵ Petrowest became insolvent and a Receiver was appointed. The Receiver sued Peace River to recover funds allegedly owed Petrowest (the "**Court Action**"). Peace River applied for a stay of proceedings pursuant to the *Arbitration Act* and argued that the claim should be arbitrated pursuant to the Arbitration Agreements. The chambers judge dismissed the stay application and allowed the Court Action to proceed.⁶ Peace River appealed, and the British Columbia Court of Appeal ("**BCCA**") upheld the dismissal of the stay.⁷ Peace River further appealed to the SCC.

Decision

The SCC dismissed Peace River's appeal and also affirmed the dismissal of the stay. The SCC determined that the Court Action should be permitted to proceed on the basis that the Arbitration Agreements were inoperative. The SCC held that the *Arbitration Act* does not require a court to stay a civil claim brought by a court-appointed receiver in every case where the claim is subject to an otherwise valid arbitration agreement.⁸

⁴ *Ibid* at s. 7(2).

⁵ *Petrowest* at para 13.

⁶ *Ibid* at para 27.

⁷ *Ibid* at paras 28-31.

⁸ *Ibid* at para 34.

The majority reviewed the similarities between arbitration and *BIA* proceedings: both are aimed towards expediency, procedural flexibility, and specialized expertise. Generally, these shared interests will converge through arbitration.⁹ However, in certain insolvency matters, the *BIA* "single proceeding model" will be necessary to preclude arbitration proceedings that would compromise the orderly and efficient conduct of a court-ordered receivership.¹⁰ The SCC observed that the *BIA* grants the courts a broad power to determine that an arbitration agreement is "inoperative" in the face of parallel insolvency proceedings. In particular, a court may find an arbitration agreement to be inoperative in the insolvency context where a centralized judicial process is necessary and the party seeking to avoid the arbitration can establish that submitting the dispute to arbitration would compromise the orderly and efficient conduct of court-ordered receivership.¹¹

The SCC cautioned that courts must be careful when considering whether to refuse to stay a court proceeding in favour of arbitration. Dismissing a stay of proceedings where there is an arbitration agreement is necessarily a highly factual exercise that requires a two-part framework of analysis. This analysis is applicable to all provincial arbitration statutes, as they share similar language.¹²

The determination of whether an arbitration is inoperative is a highly factual exercise. The SCC set out a non-exhaustive list of factors to assess whether an arbitration agreement is "inoperative":

- the effect of arbitration on the integrity of the insolvency proceedings;
- the relative prejudice to the parties from the referral of dispute to arbitration;
- the urgency of resolving the dispute;

⁹ *Ibid* at para 72.

¹⁰ *Ibid* at para 73.

¹¹ *Ibid* at para 73.

¹² *Ibid* at paras 73-75.

- the applicability of a stay of proceedings under bankruptcy or insolvency law; and
- any other factor the court considers material in the circumstances.¹³

These non-exhaustive factors may carry more or less weight depending on the circumstances of the case, and none alone are determinative.

Applying these factors, the SCC held that Petrowest met its burden. The multiple overlapping arbitration proceedings as structured by the Arbitration Agreements increased complexity and expense to the point that enforcing the Arbitration Agreements would compromise the orderly and efficient resolution of the receivership, contrary to the purposes of the *BIA*.¹⁴ Funding for these proceedings would necessarily come from the estate of Petrowest, to the detriment of the creditors. Furthermore, the piecemeal arbitration would result in the same arguments repeated in different forums, creating a serious risk of conflicting outcomes.¹⁵ Accordingly, the Arbitration Agreements were inoperative within the meaning of the *Arbitration Act*.

Commentary

The SCC's decision is a strong statement as to the broad jurisdiction granted to courts in an insolvency proceeding. According to the SCC, courts are empowered to take the steps deemed necessary to meet the objectives of insolvency legislation: efficient dispute resolution and maximization of value for creditors. However, arbitration legislation varies across provinces. Court-appointed receivers seeking to avoid the application of arbitration agreements should seek advice that considers the facts and arbitration legislation specific to each case. Court-appointed receivers should also consider seeking directions in the supervising court before commencing

¹³ *Ibid* at para 155.

¹⁴ *Ibid* at para 187.

¹⁵ *Ibid* at paras 174-175.

court proceedings in connection with a dispute that is subject to an arbitration agreement governed by the *Arbitration Act or other provincial arbitration legislation*.

Tall Ships Development Inc v Brockville (City) (“Tall Ships”)¹⁶

Background

In *Tall Ships*, the Court of Appeal for Ontario (“**ONCA**”) affirmed that courts are very reluctant to set aside arbitral awards and will interpret an arbitrator's decision in a manner that protects it from review, other than in exceptional circumstances. At the heart of *Tall Ships* was whether the application judge at the Ontario Superior Court of Justice (“**ONSC**”) had properly characterized the questions before her as extricable questions of law.¹⁷

Facts

The City of Brockville (“**the City**”) and Tall Ships Landing Development (“**Tall Ships**”) entered into a partnership whereby Tall Ships would develop reclaimed land in downtown Brockville and transfer a particular building to the City. The budget to construct this building was \$7,400,000.00. However, the actual construction cost at the time that Tall Ships transferred the building to the City was \$1.8 million higher. The parties commenced arbitration to determine if the City was liable to Tall Ships for the additional \$1.8 million. In its statement of claim, Tall Ships also claimed interest on the amounts owed, but never advised the City that it would seek such interest. In his award, the arbitrator determined that Tall Ships was responsible for the cost overruns and the City was therefore not responsible for the additional \$1.8 million. The arbitrator also rejected Tall Ships' claim for interest on the amounts. Tall Ships sought to set aside the award. The application

¹⁶ 2022 ONCA 861 [*Tall Ships*].

¹⁷ *Ibid* at para 2.

judge set aside the awards and ordered that a new arbitrator be appointed to reconsider the claims. The City appealed to the ONCA.

Decision

The City argued that the questions before the arbitrator were of mixed fact and law, which did not give rise to any right of appeal. Tall Ships argued that the arbitrator committed extricable errors of law, so the application judge was correct in setting aside the awards.¹⁸ The arbitrator had used the language "time is of the essence" in interpreting the parties' agreement, but there was no such term in the agreement, nor had the parties advanced this argument.¹⁹ The application judge had held that this was an extricable error of law and had set aside the awards.

The ONCA held that the arbitrator had not used the phrase "time is of the essence" as a term of art. Reading the arbitrator's decision as a whole, the arbitrator had clearly based his awards on the contractual language and factual matrix before him, not on an implied "time is of the essence" provision.²⁰ As a finding of mixed fact and law, there was no extricable error of law and the application judge had no jurisdiction to hear Tall Ships' application.²¹

The application judge had also focused on what she considered to be a legal error by the arbitrator imputing construction manager duties onto Tall Ships. However, the arbitrator had not found that Tall Ships was simply a construction manager. Rather, he had considered the contract as a whole, within the context of the project as a whole, to determine what obligations Tall Ships had towards the City. This, too, was a question of mixed fact and law and not subject to appeal.²² The ONCA

¹⁸ *Ibid* at para 14.

¹⁹ *Ibid* at para 25.

²⁰ *Ibid* at para 47.

²¹ *Ibid* at para 49.

²² *Ibid* at para 72.

also found no extricable error of law pertaining to the arbitrator's findings that Tall Ships was not entitled to interest.²³ The ONCA granted the City's appeal and reinstated the arbitrator's award. The ONCA cautioned that judges "should not be too ready to characterize particular issues as issues of law."²⁴

Commentary

In *Tall Ships*, the ONCA reaffirmed that questions of mixed fact and law are not subject to appeal under s. 45 of the Ontario *Arbitration Act, 1991*, ("**Arbitration Act, 1991**")²⁵ and that "the circumstances in which a question of law can be extricated from the interpretation process will be rare."²⁶ Because the *Arbitration Act, 1991* has similar appeal language to the Alberta *Arbitration Act*²⁷ and other provincial arbitration acts, the principles of *Tall Ships* are broadly applicable.

Optiva Inc. v Tbaytel ("**Optiva**")²⁸

Background

The *Optiva* decision affirms that arbitrators have the power, through either statutory language or broad language in the arbitration agreement, to determine that summary actions are available at arbitration even if the arbitration agreement is silent on the matter.

²³ *Ibid* at para 96.

²⁴ *Ibid* at para 16.

²⁵ *Ibid* at para 95; SO 1991, c 17.

²⁶ *Ibid* at para 16.

²⁷ RSA 2000, c A-43.

²⁸ 2022 ONCA 646 [*Optiva*].

Facts

Thunder Bay Telephone ("**Tbaytel**") and Optiva Inc. ("**Optiva**") entered into a purchase and services agreement (the "**Agreement**"). The Agreement contained an arbitration clause. Problems soon developed, which led Tbaytel to terminate the Agreement, alleging that Optiva had breached various terms.²⁹ The parties commenced arbitration on various issues. Tbaytel considered that it had sufficient admissions of fact from Optiva's officers and employees to have some issues determined by a summary judgment motion and sought to do so.³⁰ The arbitrator determined that summary judgment was an option open to the parties, and granted some of Tbaytel's claims against Optiva. Optiva appealed the award to the ONSC and, when unsuccessful, appealed to the ONCA. Optiva argued, among other things, that since the Agreement was silent about summary judgment, the arbitrator was not permitted to proceed by summary judgment, and the award should be set aside.

Decision

The ONCA, among other findings, determined that s. 17 of the *Arbitration Act, 1991*, did not apply to Optiva's notice of dispute to the arbitrator. S. 17 of the *Arbitration Act, 1991*, pertained to the arbitrator's determination of their jurisdiction over the *entire substance* or subject matter of the case, not merely their jurisdiction to make interlocutory or procedural orders that did not determine the merits of the dispute.³¹ The ONCA further held that the arbitrator had the power to determine whether summary judgment was available. The parties collectively chose their arbitrator and gave him broad powers to conduct the arbitration. At s. 8 of the Agreement, the parties gave the

²⁹ *Ibid* at paras 1-2.

³⁰ *Ibid* at para 8.

³¹ *Ibid* at para 25.

arbitrator jurisdiction to consider and rule upon "all motions [...] without limitation."³² The parties provided non-exhaustive examples of this wide authority. Furthermore, the parties gave the arbitrator exclusive jurisdiction to interpret the terms of the Agreement.³³ Finally, the parties also explicitly did not limit the arbitrator's statutory powers under the *Arbitration Act, 1991*. The *Arbitration Act, 1991* also permitted the arbitrator to determine all procedural steps in a "hearing."³⁴ It was open to the arbitrator, and it was not unfair to Optiva, to proceed by way of summary judgment motion.³⁵ The ONCA dismissed the appeal.

Commentary

Optiva confirms that summary judgment motions are available in an arbitration proceeding. The ONCA noted that the benefits of summary judgment³⁶ as identified by the SCC in *Hryniak v Mauldin*,³⁷ are just as present and applicable in an arbitration as they are in court.³⁸ There was nothing manifestly unfair about an arbitrator determining that a summary judgment motion was open to the parties on the basis of the *Act* and the Agreement.³⁹ Accordingly, businesses should endeavour to clarify which procedures are available and not available in their arbitration agreements.

³² *Ibid* at paras 40-42.

³³ *Ibid* at paras 29-31.

³⁴ *Ibid* at paras 37-38.

³⁵ *Ibid* at paras 43-48

³⁶ "The summary judgment motion is an important tool for enhancing access to justice because it can provide a cheaper, faster alternative to a full trial." (*Hryniak v Mauldin*, 2014 SCC 7 at para 34).

³⁷ 2014 SCC 7.

³⁸ *Optiva* at para 38.

³⁹ *Ibid* at para 49.

BANKRUPTCY AND INSOLVENCY

Overview

During the past year, global markets entered into a period of uncertainty caused by, among other things, declining post-COVID government stimulus, rising interest rates, and the war in Ukraine and the associated sanctions imposed by Western governments. In the face of this uncertainty, corporate insolvency filings are on the rise in Canada.

In this context, we address several bankruptcy and insolvency decisions issued in 2022 that are significant for energy lawyers. The *Trident* and *Perpetual Energy* decisions provide further clarity about the treatment of abandonment and reclamation obligations (“**ARO**”) in insolvency following the SCC’s pivotal decision in *Orphan Well Association v Grant Thornton Ltd* (“**Redwater**”).⁴⁰ The *Vestacon* decision of the ONSC clarifies the application of fraudulent conveyances legislation to heavily encumbered assets.

Decisions

***Orphan Well Association v Trident Exploration Corp* (“*Trident Exploration*”)⁴¹**

Background

Trident Exploration clarifies the application of the *Redwater* decision in two important respects. First, the Court of King’s Bench of Alberta (“**ABKB**”) confirmed that the Alberta Energy Regulator (“**AER**”) and Orphan Well Association (“**OWA**”) are entitled to super priority of payment from the sale proceeds of all of a bankrupt oil and gas company’s assets, including its realty. Second, the

⁴⁰ 2019 SCC 5.

⁴¹ 2022 ABKB 839 [*Trident Exploration*].

ABKB confirmed that ARO owed to the AER/OWA have super priority of payment before municipal taxes incurred during receivership.

Facts

Trident Exploration Corp (“**Trident**”) was a group of privately held oil and gas exploration and production companies and partnerships.⁴² In April 2019, Trident ceased operations after failing to restructure its business.⁴³ At the time, Trident's outstanding financial obligations included approximately \$407 million in ARO.⁴⁴

As a result of Trident's decision to cease operating, its licenses were returned to the AER and its ARO were transferred to the OWA.⁴⁵ The OWA subsequently applied to the ABKB for an order appointing a receiver.⁴⁶

In May 2019, the OWA was granted a receivership order to sell Trident's assets to solvent oil and gas companies that would assume its ARO.⁴⁷ The receiver determined that it would be uneconomical to operate Trident's assets and instead focused on safely shutting them in before initiating a sales process.⁴⁸ Roughly 66% of Trident's ARO were ultimately assumed by other companies through that process.⁴⁹

The receiver applied to the ABKB seeking advice and directions about how to distribute \$900,000 in remaining funds, some or all of which were generated by selling Trident's non-oil and gas

⁴² *Ibid* at para 1.

⁴³ *Ibid* at para 2.

⁴⁴ *Ibid* at para 3.

⁴⁵ *Ibid* at paras 4-5.

⁴⁶ *Ibid* at para 6.

⁴⁷ *Ibid* at paras 6-8.

⁴⁸ *Ibid* at paras 9-11.

⁴⁹ *Ibid* at paras 12, 14.

reality.⁵⁰ The AER/OWA took the position that they should receive the remaining funds pursuant to the super priority for ARO as prescribed by *Redwater*. Several municipalities took the position that they should share with the AER/OWA in receiving payment from the remaining funds due to an alleged "parallel priority" as between ARO and unpaid municipal taxes incurred during Trident's receivership.⁵¹

Decision

The ABKB held that the AER/OWA were entitled to super priority of payment from the remaining funds generated from all of Trident's assets, including its non-oil and gas realty.⁵² Since Trident's sole business was in the exploration and production of oil and gas, there was no reason to differentiate its realty from its oil and gas assets in generating funds to pay its ARO.⁵³

Further, the ABKB held that the receiver was not required to pay Trident's municipal taxes incurred during the receivership because its ARO had super priority of payment.⁵⁴ While the municipalities argued that they had a public interest mandate that was similar to the AER/OWA, the ABKB did not agree that the payment of municipal taxes had any higher public interest component than the payment of other debts.⁵⁵ The ABKB held that the unpaid municipal taxes were merely a monetary obligation, whereas ARO were a public duty with a corresponding regulatory obligation.⁵⁶

⁵⁰ *Ibid* at para 15.

⁵¹ *Ibid*.

⁵² *Ibid* at paras 17, 67, 80.

⁵³ *Ibid* at para 67.

⁵⁴ *Ibid* at paras 17, 61-63.

⁵⁵ *Ibid* at para 60.

⁵⁶ *Ibid* at paras 48, 61-63.

Commentary

Trident Exploration is one in a series of post-*Redwater* decisions that have clarified the application of the super priority for ARO. This decision confirms that the super priority applies to all of a bankrupt oil and gas producer's assets, not simply licensed assets, and that post-receivership municipal taxes do not have a parallel priority.

After *Trident*, creditors may have more difficulty recovering debts owed to them by a bankrupt oil and gas company in insolvency proceedings, even if those debts are secured against realty. The ARO super priority applies to all assets owned by a company that is in the sole business of exploration and production of oil and gas. This increases the likelihood that there will be no assets of any type available to satisfy secured and unsecured creditors once ARO have been accounted for.

PricewaterhouseCoopers Inc v Perpetual Energy Inc ("Perpetual Energy")⁵⁷

Background

In *Perpetual Energy*, the Court of Appeal of Alberta ("**ABCA**") held that ARO must be accounted for as part of undertaking a balance sheet solvency test.⁵⁸

Facts

Sequoia Resources Corp. ("**Sequoia**") was previously Perpetual Energy Operating Corp. ("**PEOC**").⁵⁹ The Perpetual Energy group of companies ("**Perpetual**") executed a corporate reorganization that caused PEOC to receive assets that were encumbered with significant ARO

⁵⁷ 2022 ABCA 111 [*Perpetual Energy*].

⁵⁸ *BIA*, c B-3 at s. 2, see s. (c) in the definition of an "insolvent person" [*BIA*].

⁵⁹ *Perpetual Energy* at para 4.

for nominal consideration, with PEOC then being acquired by a third party following which its name was changed to Sequoia.⁶⁰ Approximately 17 months later, Sequoia assigned itself into bankruptcy.⁶¹

Sequoia's trustee in bankruptcy (the "**Trustee**") sued Perpetual alleging that the assumed assets subject to ARO were transferred for approximately \$217 million below their fair market value such that it was a transfer at undervalue pursuant to s. 96 of the *BIA*.⁶² Among other things, the Trustee had to prove that Sequoia was insolvent at the time of the transfer or was rendered insolvent by the transfer.⁶³ Perpetual was granted summary dismissal of the Trustee's claim.⁶⁴ The Trustee appealed.⁶⁵

Decision

The ABCA held that the chambers justice erred by not properly accounting for Sequoia's ARO.⁶⁶ Specifically, Sequoia's ARO formed part of its assets' value in determining whether it was insolvent at the time of the transfer pursuant to the balance sheet solvency test.⁶⁷

The ABCA noted that, since *Redwater*, ARO are an inherent part of the value of licensed oil and gas assets and operate to depress asset value.⁶⁸ While the ABCA recognized that ARO are not easily quantified, and their valuation may depend on various contingencies and assumptions, it

⁶⁰ *Ibid* at paras 4-6.

⁶¹ *Ibid* at para 4.

⁶² *Ibid* at paras 1, 6, 67; *BIA* at s. 96.

⁶³ *Perpetual Energy* at paras 1, 32-33.

⁶⁴ *Ibid* at para 2.

⁶⁵ *Ibid* at para 24.

⁶⁶ *Ibid* at para 70.

⁶⁷ *Ibid* at paras 3, 31, 39, 46.

⁶⁸ *Ibid* at para 39.

held that ARO cannot be assigned nil value until all end-of-life obligations have been fully performed.⁶⁹

Commentary

Perpetual Energy clarifies that oil and gas companies must account for end-of-life obligations when assessing the value of their assets for the purposes of determining solvency. As was the case here, a company can become insolvent due to ARO.

Companies with complex corporate structures should be careful about how assets are held among related entities so as not to render them insolvent. Otherwise, transfers between corporate entities at undervalue may be unwound pursuant to s. 96 of the *BIA*.

Vestacon Limited v Huszti Investments (Canada) Ltd o/a Eyewatch et al (“Vestacon”)⁷⁰

Background

Vestacon confirms that, in appropriate circumstances, a company on the eve of insolvency can transfer a highly encumbered asset to pay its secured creditors without offending section 2 of the *Fraudulent Conveyances Act*,⁷¹ which voids the conveyance of property with the intent to defeat creditors, notwithstanding that the transfer would deprive its unsecured creditors of a remedy.

Facts

Huszti Investments (Canada) Ltd o/a Eyewatch (“**Huszti**”) purchased three unfinished commercial units in a building in Toronto.⁷² As part of financing the purchase and completion of those units,

⁶⁹ *Ibid* at paras 45, 49.

⁷⁰ 2022 ONSC 2104 [*Vestacon*].

⁷¹ RSO 1990, c F.29.

⁷² *Vestacon* at para 2.

three mortgages were registered against the units.⁷³ Huszti hired Vestacon Limited ("**Vestacon**") to do the construction work on the units and that work was substantially completed by June 2017.⁷⁴

Vestacon delivered several invoices to Huszti, most of which went unpaid.⁷⁵ Huszti promised to pay the outstanding Vestacon invoices on numerous occasions, and the parties agreed to a payment schedule.⁷⁶ However, Vestacon did not take any further steps to protect its interests such as by registering a construction lien against the units.⁷⁷

In addition to its failure to pay the Vestacon invoices, Huszti also defaulted on its mortgages.⁷⁸ In October 2017, the first mortgagee issued a notice of power of sale.⁷⁹ The third mortgagee subsequently agreed to purchase the units from Huszti for value, and the sale proceeds were used by Huszti to pay the first and second mortgagees.⁸⁰

Vestacon sued Huszti and the third mortgagee alleging, among other things, that the sale was a fraudulent conveyance pursuant to s. 2 of the *Fraudulent Conveyances Act*.⁸¹ The third mortgagee applied to have the claim against it summarily dismissed.⁸²

⁷³ *Ibid* at paras 3-6.

⁷⁴ *Ibid* at paras 7-8.

⁷⁵ *Ibid* at para 8.

⁷⁶ *Ibid* at para 9.

⁷⁷ *Ibid* at para 10.

⁷⁸ *Ibid* at para 11.

⁷⁹ *Ibid*.

⁸⁰ *Ibid* at paras 12-13, 48.

⁸¹ RSO 1990, c F.29 at s. 2; *Ibid* at paras 14, 31.

⁸² *Vestacon* at para 15.

Decision

In order to succeed in its claim, Vestacon had the onus to prove that Huszti had intended to "defeat, hinder, delay or defraud" Vestacon through the sale to the third mortgagee.⁸³ Vestacon was also required to establish that the third mortgagee had knowledge of Huszti's fraudulent intent.⁸⁴

The ONSC noted that when a debtor transfers its only remaining asset with which it may pay its debts, there is a presumption of intent to defeat creditors.⁸⁵ The ONSC also accepted that Huszti was insolvent or nearly insolvent at the time of the transfer.⁸⁶ However, the ONSC placed significant weight on the fact that the first mortgagee had issued the notice of sale.⁸⁷ Accordingly, if Huszti had not sold the assets, they would have been sold by the first mortgagee in any event.⁸⁸

The ONSC held that, while disposing of one's last assets when facing imminent insolvency is a recognized badge of fraud, it creates a stronger suspicion of fraud where the transfer is of an unencumbered asset.⁸⁹ In this case, Huszti used the proceeds of the sale to pay back the secured creditors who had registrations against the assets.⁹⁰ Since Huszti had an obligation to pay those secured creditors, the ONSC held that the transfer did not constitute a fraudulent conveyance.⁹¹

⁸³ *Ibid* at para 31.

⁸⁴ *Ibid* at para 32. See also the *Fraudulent Conveyances Act, 1571*, (13 Eliz 1), c 5, that remains in force in other provinces and uses nearly identical language, "to delay, hinder or defraud".

⁸⁵ *Vestacon* at para 36.

⁸⁶ *Ibid* at para 48.

⁸⁷ *Ibid*.

⁸⁸ *Ibid*.

⁸⁹ *Ibid*.

⁹⁰ *Ibid*.

⁹¹ *Ibid* at paras 48, 58.

Commentary

Vestacon confirms that a party facing imminent insolvency may transfer a highly encumbered asset to a third party for value and use the proceeds to pay its secured creditors. Creditors with lower priority who do not recover the amounts owing to them are unlikely to be successful in challenging the transfer on the basis that it was a fraudulent conveyance, absent other badges of fraud.

CLASS ACTIONS

Overview

There were several important class action decisions in 2022.

In particular, notwithstanding the generally low threshold to certify class actions, case management justices are increasingly exercising their gatekeeping powers to weed out unmeritorious actions prior to certification. Courts are carefully scrutinizing putative class proceedings to determine if a class proceeding is truly the preferable means of resolving a dispute.

In addition, we note that plaintiffs continue to have difficulty bringing and succeeding in an environmental class action in Canada. Below, we discuss one decision in which a class faced significant hurdles to achieve certification.

Finally, we continue to watch with interest cases in which courts have attempted to reconcile if, and to what extent, an arbitration clause in a contract may prevent a counterparty from bringing a class action against another party. The approaches of different courts can help provide guidance about how these clauses will be enforced in other circumstances.

Decisions

Setoguchi v Uber BV (“**Setoguchi**”)⁹²

Background

In *Setoguchi*, the ABCA was asked to determine if: (1) a negligence claim, as pleaded, disclosed a cause of action recognized at law; and (2) a class action was the preferable means of resolving the claim of the putative class.⁹³

In reaching its decision, the ABCA provided helpful guidance about the gatekeeping role that case management justices play in certification applications brought pursuant to s. 5(1)(a) of the *Class Proceedings Act*⁹⁴ (the “**CPA**”).

Facts

In October 2016, hackers illegally accessed data that Uber BV (“**Uber**”) had collected from its drivers and users and stored in a third-party cloud-based service. The breach resulted in the theft of personal information, including names, phone numbers and email addresses of Uber drivers and users worldwide. Uber paid a ransom to the hackers in return for an assurance that the data would be destroyed.

The proposed representative plaintiff, Dione Setoguchi (“**Setoguchi**”), was an Uber user at the time of the data breach. She commenced a proposed class action against Uber for breach of contract and negligence. Setoguchi alleged that Uber had breached its user and privacy

⁹² 2023 ABCA 45 [*Setoguchi*].

⁹³ *Setoguchi* at para 5.

⁹⁴ SA 2003, c C-16.5.

agreements, and breached its duty of care to the class members, by failing to take adequate measures to protect users' personal information.

At the certification application, the case management justice refused to certify the proceeding as a class proceeding.⁹⁵ In his reasons for decision, the case management justice said that certification should not be granted if it is "plain and obvious" that the class could not succeed and if there is no basis in fact for compensable harm beyond a *de minimis* level.⁹⁶ However, he reluctantly held that the "some basis in fact" test at certification did not apply to a cause of action for negligence that had otherwise been fully pleaded, even if there were no or only *de minimis* damages.⁹⁷ Accordingly, the case management justice accepted that Setoguchi had satisfied the cause of action certification criterion under s. 5(1)(a) of the *CPA*.⁹⁸

However, the case management justice went on to deny certification because he found that a class action was not the preferable procedure of resolving the dispute. This was because he was of the view that the judicial resources required for the action to proceed was disproportionate to the nominal damages that would flow to the class members if they were entirely successful.⁹⁹ Setoguchi appealed.¹⁰⁰

Decision

The ABCA dismissed the appeal.¹⁰¹ In reaching this result, the ABCA confirmed that the "some basis in fact" test does not apply to the cause of action criterion in s. 5(1)(a) of the *CPA*.¹⁰²

⁹⁵ *Setoguchi v Uber BV*, 2021 ABQB 18.

⁹⁶ *Setoguchi* at para 23.

⁹⁷ *Ibid* at para 25.

⁹⁸ *Ibid*.

⁹⁹ *Ibid* at paras 4, 61, 68.

¹⁰⁰ *Ibid* at paras 1-3.

¹⁰¹ *Ibid* at paras 6, 78.

¹⁰² *Ibid* at para 29.

However, the ABCA held that s. 5(1)(a) should not be treated as a “perfunctory exercise” and a case management justice must consider if each element of a cause of action is or ought to be recognized at law. This is particularly the case if a novel claim is raised.¹⁰³

Referring to various authorities from Canada and the United States, the ABCA concluded that the theft of personal information, without more, does not give rise to legally compensable loss.¹⁰⁴ Even if class members might be marginally worse off because of the theft of their personal information, the damage flowing from the theft, without more, would be negligible.¹⁰⁵ The ABCA refused to certify the negligence claim because damage, which is a key element of the cause of action, could not be shown at the certification stage.¹⁰⁶

Regarding the preferable procedure criterion, the ABCA held that it was entirely proper for the case management justice to ask what purpose the action would serve in the context of class proceedings, especially given that only nominal damages were sought.¹⁰⁷ The ABCA also held that it was appropriate for the case management justice to weigh the considerable judicial resources that a class proceeding would require relative to the amount and nature of the proposed claim.¹⁰⁸

Further, in light of the negative press and significant regulatory penalties already imposed on Uber, the ABCA rejected Setoguchi’s argument that the goal of behaviour modification would be achieved if the action proceeded as a class proceeding.¹⁰⁹

¹⁰³ *Ibid* at para 44.

¹⁰⁴ *Ibid* at paras 55-57.

¹⁰⁵ *Ibid* at para 58.

¹⁰⁶ *Ibid* at paras 59-61.

¹⁰⁷ *Ibid* at paras 69-75.

¹⁰⁸ *Ibid* at para 75.

¹⁰⁹ *Ibid* at para 77.

Commentary

Setoguchi provides helpful clarification about s. 5(1)(a) of the *CPA* and confirmation of the role of a case management justice as gatekeeper. In particular, the ABCA emphasized that:

- Neither evidence nor “some basis in fact” is required to determine if a pleading discloses a cause of action under s. 5(1)(a) of the *CPA*.
- Courts must carefully consider if each element of a cause of action is, or ought to be, recognized at law, particularly if a novel claim has been alleged.
- Courts must exercise their gatekeeping function by disposing of claims at the pleadings stage if it is appropriate to do so. This includes causes of action for which damages are an essential ingredient, such as negligence claims. If damage cannot be demonstrated at the certification stage, then a case management justice should deny certification.

Cases About Waiver of Class Action Clauses

Background

Recently, courts in several jurisdictions across Canada have been tasked with deciding if, and to what extent, an arbitration clause in a contract may prevent a counterparty from bringing a class action against another party.

Decisions

In this section, we discuss three cases, namely: (1) *Pokornik v SkipTheDishes Restaurant Services Inc*¹¹⁰ (“**Pokornik**”); (2) *Petty v Niantic Inc*¹¹¹ (“**Petty**”); and (3) *Difederico v AmazonCom*

¹¹⁰ 2022 MBKB 179 [*Pokornik*].

¹¹¹ 2022 BCSC 1077 [*Petty*].

*Inc*¹¹² (“**Amazon**”). In each case, the courts adopted different approaches to reconcile the ability of a contractual counterparty to bring a class action in the face of an arbitration clause.

In *Pokornik*, the Manitoba Court of King’s Bench (“**MBKB**”) held that an arbitration clause may be unconscionable if it operates as a waiver of class action.¹¹³ In particular, the MBKB said that an arbitration clause could be unconscionable if the clause was drafted by a powerful party with more bargaining power in a standard form contract of adhesion.¹¹⁴ The MBKB noted that class actions provide access to justice and an arbitration clause that operates as a waiver of class action may “undermine the principle of effective adjudication of claims on a class basis”.¹¹⁵ The MBKB in *Pokornik* held that arbitrating on an individual-by-individual basis, particularly in a jurisdiction in which the weaker party does not reside, is unlikely to be the preferable means of resolving a dispute with a more powerful party.

In *Petty*, the British Columbia Superior Court held that a waiver of class action is not unconscionable or void due to public policy if the waiver includes: (1) an opt-out time period; (2) a choice between arbitration and commencing small claims court proceedings as “access to justice alternatives”; and (3) includes the possibility of recovering the costs associated with the arbitration.¹¹⁶ In a case involving complex issues and claims of a relatively low monetary value, a class action waiver will not always be found to be unconscionable.¹¹⁷

In *Difederico*, the Federal Court held that a challenge to the arbitrator’s jurisdiction or the validity of the waiver of class action must be argued before the arbitrator.¹¹⁸ Further, it must be “clear on

¹¹² 2022 FC 1256 [*Amazon*].

¹¹³ *Pokornik* at paras 40, 46.

¹¹⁴ *Ibid* at paras 36-39.

¹¹⁵ *Ibid*.

¹¹⁶ *Petty* at paras 35, 59, 74-76, 79, 91.

¹¹⁷ *Ibid* at para 81.

¹¹⁸ *Amazon* at para 2.

the record” that a referral to arbitration will raise a real prospect of denial of access to justice such that no relief would be available to the challenging party.¹¹⁹ In that regard, the Federal Court held that access to justice will not be denied if a party is permitted to participate in an arbitral proceeding held in another jurisdiction by telephone, written submission or at a mutually agreed on location, and at minimal cost.¹²⁰

Commentary

Read together, these cases demonstrate that a court will assess if a waiver of class action in favour of arbitration in another jurisdiction upholds access to justice in light of the circumstances, including its expected cost and other available adjudication methods. However, there appears to be no judicial consensus about when waiver clauses will be held to be void for unconscionability or public policy.

LaSante v Kirk (“Kirk”)¹²¹

Background

In *Kirk*, the British Columbia Court of Appeal (“**BCCA**”) was asked to determine if a putative class action, which included among other claims a claim for nuisance, should be certified. The putative class action arose because of evacuation and water use orders issued in response to an environmental spill and the BCCA commented on common experience in an environmental context.

¹¹⁹ *Ibid* at paras 112, 116.

¹²⁰ *Ibid* at paras 117-118.

¹²¹ 2023 BCCA 28 [*Kirk*].

Facts

In 2013, a tanker truck spilled jet fuel into several waterways.¹²² Among other things, several evacuation and water use orders were issued for the affected areas.¹²³

The representative plaintiff brought a class action against the truck driver on behalf of a class of persons who owned, leased, rented or occupied real property in the affected areas.¹²⁴ He alleged that the spill was a “single incident mass tort” and brought claims in negligence, nuisance, and strict liability.¹²⁵ However, the nuisance claim arose from the orders, rather than the spill itself, to avoid having to assess the degree of contamination or pollution of each individual property to establish liability.¹²⁶

The defendants argued that the nuisance claim was not certifiable because “what happened affected different properties at different times and different class members in different ways such that there was no common experience between them”.¹²⁷ The certification justice did not accept that argument and held that the court could determine if the orders caused substantial interference to the class.

The certification justice certified the class based on the common issues about whether: (1) the orders were a nuisance; and (2) damages could be assessed on an aggregate basis.¹²⁸ The defendants appealed.¹²⁹

¹²² *Ibid* at para 1.

¹²³ *Ibid*.

¹²⁴ *Ibid* at para 2.

¹²⁵ *Ibid*.

¹²⁶ *Ibid* at paras 9-10.

¹²⁷ *Ibid* at para 10.

¹²⁸ *Ibid* at paras 2, 5-6, 46, 49.

¹²⁹ *Ibid* at paras 6, 52.

Decision

The BCCA dismissed the appeal.¹³⁰ The BCCA held that it was open to the certification justice to certify a common issue solely on the fact of the orders.¹³¹

As the BCCA noted, the orders applied to all class members. The orders affected the use and enjoyment of property.¹³² While the class may fail to prove that nuisance extends to an interference with the right to use one's property, rather than with the property itself, the claim was not "bound to fail".¹³³ While some class members may have suffered no loss, such that the interference with their property was not unreasonable, this would have to be determined in a damages analysis, which would be partly tried on an individual basis.¹³⁴ Any issues about subclasses of members could be addressed post-certification.¹³⁵

The BCCA held that the certification justice did not err in finding that aggregate damages flowing from nuisance were certifiable as a common issue.¹³⁶

Commentary

Kirk demonstrates the difficulty in bringing and succeeding in an environmental class action in Canada. In Canada, environmental class actions remain rare with only 71 having been brought between 2010 and 2022. Of those 71 cases, 49 were not certified, 10 were certified but settled or dismissed, four are being appealed, three are awaiting a decision, and one was discontinued. The seven remaining cases are civil law actions in Quebec. Further, most of those cases arose

¹³⁰ *Ibid* at para 7.

¹³¹ *Ibid* at para 66.

¹³² *Ibid* at paras 67, 75.

¹³³ *Ibid* at para 67.

¹³⁴ *Ibid* at para 75.

¹³⁵ *Ibid* at para 76.

¹³⁶ *Ibid* at paras 78, 94.

from emissions standards and disclosures for automobiles rather than environmental spills similar to that considered in *Kirk*. Very few environmental, including climate change, class actions have been certified or proceeded to trial, especially in common law Canada where most are unsuccessful.

Coles v FCA Canada Inc. (“Coles”)¹³⁷

Background

In *Coles*, the ONSC was asked to determine if an action that seeks pure economic loss for dangerous airbags should be certified as a class action. In reaching its decision, the ONSC provided commentary about recent amendments to the Ontario *Class Proceedings Act, 1992*¹³⁸ (the “***Class Proceedings Act, 1992***”).

Facts

In May 2015, the plaintiff, Gary Coles (“**Coles**”), sought to certify a class action against a car manufacturer, FCA Canada Inc. (“**FCA**”), for defective and dangerous airbags that were manufactured by Takata Corporation and TK Holdings (together, “**Takata**”).¹³⁹

Decision

The ONSC dismissed the motion of Coles to certify the action.¹⁴⁰ While the ONSC noted that Coles had otherwise proven each of the other four certification criteria, the ONSC concluded that a class action was not the preferable means of resolving the negligence claims against FCA.¹⁴¹

¹³⁷ 2022 ONSC 5575 [*Coles*].

¹³⁸ SO 1992, c 6.

¹³⁹ *Ibid* at paras 1-2.

¹⁴⁰ *Ibid* at paras 8, 173.

¹⁴¹ *Ibid* at paras 7-8, 132, 140, 152, 172.

In particular, the ONSC concluded that a class action was not preferable to an existing recall program of the Takata airbags being administered by FCA.

While the ONSC noted that recent amendments made to the *Class Proceedings Act, 1992* did not apply to the Coles action, the ONSC provided some commentary about how the amendments might have affected the disposition of the certification motion. The ONSC noted that the amendments to s. 5(1.1) of the *Class Proceedings Act, 1992* introduced a “superiority” and a “predominance” qualification to the preferable procedure criterion. The “superiority” and “predominance” qualification is also included in Rule 23 of the United States Federal Rules of Civil Procedure. The qualification enables a court to determine that a class action is the preferable means of advancing the claims of the class only if (1) the common issues predominate over individual ones; and (2) a class action would be a superior means of advancing those claims over any available alternative.

Commentary

The amendments to the *Class Proceedings Act, 1992*, as discussed in *Coles*, are the first comprehensive amendments to the *Class Proceedings Act, 1992* since its adoption more than 25 years ago. The most significant amendment is the introduction to the certification test of a preferable procedure threshold that adopts the predominance and superiority test in the United States Federal Rules of Civil Procedure.

While the amended test signals a more onerous test for certification, there are a number of factors softening those new requirements. Among other things, class actions will still be assessed on the low “some basis in fact” standard (i.e., the plaintiff only has to show some reason to believe that the common issues may predominate over individual ones, rather than having to prove that they will).

That being said, if Ontario courts follow the experience in the United States, it is likely that there will be a greater number of decisions refusing certification going forward.

COMPETITION LAW

Overview

Canadian jurisprudence has made great strides in recent years when it comes to competition law. The Competition Tribunal (the “**Tribunal**”) has begun issuing its first decisions since the modernization of the *Competition Act*,¹⁴² and the Tribunal has weighed in on important issues of Canadian merger law, including, among others, the Tribunal's approach to product market definition and to what extent a transaction must lessen competition for the reduction to be considered "substantial". The implications of these decisions ought to put energy lawyers across the country on notice.

Decisions

Rebuck v Ford Motor Company (“**Rebuck**”)¹⁴³

Background

In *Rebuck*, the ONSC found that compliance with federal manufacturing guidelines, along with literal truth, provided protection from liability for allegedly breaching provisions of the *Competition Act*.

Facts

The plaintiff brought a class action against Ford Motor Company (“**Ford**”) over allegations that claims about the fuel efficiency of the brand's vehicles were false or misleading.

¹⁴² RSC 1985, c C-34.

¹⁴³ 2022 ONSC 2396 [*Rebuck*].

In 2013 and 2014, Ford sold vehicles with EnerGuide labels that specified expected fuel consumption levels for each vehicle. The labels also included various disclaimers, including statements that the fuel consumption estimates were based on the Canadian government's approved criteria and testing methods, that actual fuel consumption may differ from the estimates, that consumers should "Refer to the Fuel Consumption Guide", and that a copy of the Fuel Consumption Guide could be obtained from a dealer or by calling a specific number.¹⁴⁴ The plaintiff sued under the misleading advertising provisions¹⁴⁵ of the *Competition Act* and alleged that the estimates on these labels were false or misleading, raising claims that the method Ford used to create the estimates was generally inaccurate and tended to overestimate fuel efficiency.¹⁴⁶

Decision

The ONSC found that Ford had used a method approved by federal guidelines to determine its fuel consumption estimates, which meant that Ford could not be held liable for the results of using that method.¹⁴⁷ The ONSC also found that the plaintiff's claims that the labels were false or misleading could not be supported by the evidence. S. 52(4) requires courts to assess both the literal meaning and general impression conveyed by representations. It was uncontested that the EnerGuide statements were true. Moreover, the ONSC found that, contrary to the plaintiff's arguments, the plaintiff failed to lead evidence to suggest that the general impression conveyed by the representations was false or misleading.¹⁴⁸

¹⁴⁴ *Ibid* at para 7.

¹⁴⁵ *Competition Act* at s. 52.

¹⁴⁶ *Ibid* at paras 12-14.

¹⁴⁷ *Ibid* at para 48.

¹⁴⁸ *Ibid* at paras 54-64.

Commentary

This decision confirms that representations made in compliance with federal guidelines will not automatically be considered unlawful or improper. It also demonstrates that evidence of how consumers might perceive the general impressions of a representation must be led for a court to be persuaded that a representation is false or misleading, assuming the literal meaning of that representation is true.

Canada (Commissioner of Competition) v Rogers Communications Inc and Shaw Communications Inc (“Rogers Appeal”) and Canada (Commissioner of Competition) v Parrish & Heimbecker, Limited (“Parrish”)¹⁴⁹

Background

Rogers Appeal and *Parrish* saw the Tribunal demonstrate its approach to mergers that may substantially reduce competition. The Tribunal ruled on multiple foundational Canadian merger law issues, such as the Tribunal's approach to product market definition, the benchmark for determining whether a merger has "substantially" lessened competition, and the burden parties to a merger bear to prove claims of efficiencies.

Facts

In *Rogers*, the Tribunal declined to block a proposed \$26 billion amalgamation between Rogers Communications Inc. and Shaw Communications Inc. on the basis that the Commissioner of Competition (the "**Commissioner**") had not adequately proven that a substantial prevention or lessening of competition would result from the transaction pursuant to the merger provisions¹⁵⁰ of

¹⁴⁹ CT-2022-002 [*Rogers*], 2023 FCA 16 [*Rogers Appeal*], and CT-2019-005 [*Parrish*].

¹⁵⁰ *Competition Act* at s. 92.

the *Competition Act*.¹⁵¹ At the time of the Tribunal's hearing, the transaction involved two steps—a divestiture of the entirety of Freedom Mobile Inc. to Vidéotron Ltd. (Remedy), followed by an amalgamation—which is the form the Tribunal considered, rather than the transaction's original one-step form. The adequacy of the Freedom Mobile divestiture to Vidéotron was the only serious issue in the proceedings before the Tribunal. The Tribunal found that Vidéotron, as an experienced market player in Quebec, will be able to operate Freedom Mobile as an effective competitor and offer competitive bundled products.¹⁵² The Tribunal determined Vidéotron's entry into the wireless markets in western Canada would ensure that competition and innovation there remain unchanged. The Commissioner appealed to the Federal Court of Appeal ("**FCA**").

In *Parrish*, Parrish & Heimbecker, Limited ("**Parrish**") purchased a grain elevator in Manitoba, which the Commissioner argued had substantially lessened or would substantially lessen competition in the wheat and canola purchase markets in the area around the elevator.¹⁵³ The Commissioner advised the Tribunal that defining the provision of intermediary services, such as grain handling services, as the relevant product market was more fitting in this case. He advocated that the Tribunal adopt the United States Horizontal Merger Guidelines' approach to relevant product market definition. The Guidelines' approach contemplated that the benchmark price used for analyzing a product's market could differ from the price where a company's specific value contributions could be identified reasonably clearly. This "value-added" approach, the Commissioner submitted, was more appropriate for the facts.

¹⁵¹ *Rogers Appeal* at para 4.

¹⁵² *Rogers*.

¹⁵³ *Parrish* at para 3.

Decision

The FCA dismissed the Commissioner's appeal in *Rogers*, agreeing with the Tribunal that the Tribunal's consideration of the divestiture in analyzing the transaction's competitive effects was realistic.¹⁵⁴

In *Parrish*, the Tribunal dismissed the Commissioner's application and concluded that the Commissioner did not prove Parrish's acquisition of a grain elevator in Manitoba had substantially lessened or would substantially lessen competition in the relevant markets in the surrounding area. The Tribunal rebuffed the Commissioner's arguments to apply the United States Horizontal Merger Guidelines' approach to relevant product market definition. It held that the "value-added" approach failed on all fronts: "on the facts, from a precedential and legal standpoint, and from a conceptual and economic perspective". The "value-added" approach had never been applied to facts similar to those in *Parrish*.

Commentary

These two cases are important for energy lawyers to consider because they illustrate how the Competition Tribunal will assess mergers that potentially lessen competition. The Tribunal declined to block the transactions in both of these cases, disagreeing with the Bureau's analysis and demonstrating that the Tribunal acts as a powerful independent check in Bureau challenges. *Rogers* in particular illustrates the importance of presenting evidence that a divestiture buyer will be effective. This is also consistent with the Bureau's own guidelines.

¹⁵⁴ *Rogers Appeal* at para 4.

David v Loblaw (“Loblaw”)¹⁵⁵

Background

In *Loblaw*, the ONSC certified a class action alleging a long-running price-fixing conspiracy and commented on the liability of parent companies for the wrongdoings of subsidiaries.

Facts

The plaintiff alleged that the defendants, Weston Bakeries, Loblaw and certain other retailers and producers of packaged bread, participated in a price fixing agreement relating to bread products over a number of years. This conspiracy, the plaintiff alleged, allowed the defendant packaged bread retailers to manipulate the market for 16 years, allowing them to reap \$5 billion in unjust profits.¹⁵⁶ The proposed class also included "umbrella purchasers", or consumers who had purchased products on which the price fixing of bread had an indirect effect.¹⁵⁷

Decision

The ONSC authorized the proceeding but refused to certify it as against a number of the defendants' parent companies in instances where the plaintiff did not establish a reasonable cause of action against those companies. The plaintiff argued that the parent companies controlled the subsidiaries. However, the ONSC noted that the plaintiff did not discuss any active steps that the parent companies took to move the alleged price fixing agreement forward.¹⁵⁸ The

¹⁵⁵ 2021 ONSC 7331 [*Loblaw*].

¹⁵⁶ *Ibid* at paras 2-3.

¹⁵⁷ *Ibid* at para 4.

¹⁵⁸ *Ibid* at para 40.

ONSC also refused to include “umbrella” claims that the alleged conspiracy also increased the price of other non-packaged bread products.¹⁵⁹

Commentary

Energy lawyers who are providing advice to large clients should be aware of the key takeaway from this decision: a parent corporation whose subsidiary is engaged in wrongdoing will not automatically be liable for the subsidiary's misconduct if the parent did not take actions that demonstrate there is no corporate separateness between the two entities.

¹⁵⁹ *Ibid* at para 109.

CONTRACTUAL INTERPRETATION

Overview

The past year was not one for ground-breaking contractual interpretation cases from the SCC in the vein of *Sattva*,¹⁶⁰ *Bhasin*,¹⁶¹ *Callow*¹⁶² or *Wastech*.¹⁶³ However, four cases were released by the ONCA that provide meaningful guidance for energy lawyers. Those decisions concerned: the enforceability of unqualified representations and warranties; the continued availability of a claim of fraudulent misrepresentation in the face of an entire agreement clause and due diligence rights; the principles applicable to purchase price allocation where assets are subject to a Right of First Refusal; and the circumstances in which an expired agreement may be extended by conduct.

Decisions

Boliden Mineral AB v FQM Kevitsa Sweden Holdings AB (“Boliden”)¹⁶⁴

Background

Boliden confirms that, where a party gives a representation about a state of affairs, the representation may be breached even if the representor did not know or reasonably expect that the representation was false at the time of closing. The contractual language selected by the parties in drafting the representations and warranties governs. If parties wish to limit representations to the representor’s knowledge and belief at the time of closing, that must be made express in the contract.

¹⁶⁰ *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 [*Sattva*].

¹⁶¹ *Bhasin v. Hrynew*, 2014 SCC 71 [*Bhasin*].

¹⁶² *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45 [*Callow*].

¹⁶³ *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7 [*Wastech*].

¹⁶⁴ 2023 ONCA 105 [*Boliden*].

Facts

FQM Kevitsa Sweden Holdings (“**FQM**”) sold the shares of a Finnish mining company, Boliden Kevitsa Mining Oy (“**Kevitsa**”) to Boliden Mineral AB (“**Boliden**”). Pursuant to the share purchase agreement between FQM and Boliden (the “**SPA**”), which was governed by Ontario law, FQM provided representations and warranties regarding Kevitsa’s pre-closing tax liabilities. Specifically, FQM represented to Boliden that Kevitsa had correctly filed all tax returns and that the returns were “complete and correct in all material respects”, that all taxes due and payable had been paid except for contested amounts disclosed and provided for in Kevitsa’s financial statements, that there was no audit underway or ongoing discussions with tax authorities, and that “there are no grounds for the reassessment of the Taxes”.¹⁶⁵

The SPA also contained an indemnity clause. It required FQM to indemnify Boliden and Kevitsa for all “Losses” arising from any breach or inaccuracy in the representations and warranties. The SPA defined “Losses” to include all consequential and indirect losses that were reasonably foreseeable.¹⁶⁶

The SPA closed on June 1, 2016. In 2017, Kevitsa was audited by Finnish tax authorities. The audit concluded that FQM had undertaken a reorganization in 2010 as a tax avoidance measure. A reassessment was issued by the Finnish tax authorities in 2018 that required Kevitsa to pay an additional 16 million euros comprising taxes, penalties and interest accrued between 2012 and 2016. Boliden applied for an order seeking indemnification for the tax liabilities from FQM.

The motion judge held that FQM had breached the representation and warranty in the SPA. As a result, FQM was required to indemnify Boliden for the tax liabilities brought about by the

¹⁶⁵ *Ibid* at para 6.

¹⁶⁶ *Ibid* at para 7.

reassessment for the years 2012 to 2016. The motion judge rejected FQM's evidence about what it actually knew or might reasonably have expected to know about the prospect of a reassessment as at closing on the basis that its representation and warranty was absolute and unconditional.¹⁶⁷

The motion judge also ordered FQM to indemnify Boliden for certain accumulated tax losses that were used to offset increased taxes due to the reassessment, leading to higher taxes in 2017 and 2018. The motion judge held that the loss of the accumulated tax losses was a consequential or indirect loss that was a reasonably foreseeable consequence.¹⁶⁸

The motion judge therefore ordered FQM to reimburse Boliden for all additional tax liabilities incurred between 2012 and 2018. FQM appealed the order to the ONCA.

Decision

On appeal, FQM argued that the representation and warranty was true at the time that it was given and that the reassessment arose due to a post-closing reinterpretation of Finnish tax legislation. FQM submitted that a representation and warranty is only required to be true on the date it is made. A breach of a representation and warranty is not actionable simply because, in light of a subsequent event, it is no longer true.¹⁶⁹

The ONCA rejected FQM's submissions. The SPA stated that all representations and warranties were required to be true and correct at the time of closing. While certain representations and warranties in the SPA were limited to the knowledge of FQM, the representation and warranty related to tax reassessment was not.¹⁷⁰

¹⁶⁷ *Ibid* at para 16.

¹⁶⁸ *Ibid* at para 17.

¹⁶⁹ *Ibid* at paras 24-25.

¹⁷⁰ *Ibid* at para 26.

The ONCA held that the representation and warranty was untrue at the time of closing even if the prospect of the reassessment “was neither known to or reasonably expected by FQM” and only became apparent later.¹⁷¹ Even though the grounds for the reassessment only became apparent later, they existed at the time of closing.¹⁷² The ONCA therefore dismissed FQM’s appeal.

Commentary

Representations and warranties are an essential and heavily negotiated part of any transaction. If a party is concerned that a future contingency may render a representation and warranty false, it is critically important to include qualifying language that the representation and warranty is limited to the knowledge of the vendor at the time of closing. Such qualifications are of particular importance in representations and warranties related to tax liabilities, which may be subject to reassessment after closing.

If a party agrees to provide a representation about a state of affairs without qualifying language about the representor’s knowledge, and the state of affairs changes subsequent to the representation, it will not be a defence for the representor to state that it did not know or reasonably expect that the representation and warranty was false at the time of closing.

10443204 Canada Inc v 2701835 Ontario Inc (“10443204 Canada”)¹⁷³

Background

10443204 Canada confirms that the inclusion of an entire agreement clause and due diligence rights in an agreement do not preclude a claim of fraudulent misrepresentation. Even if parties

¹⁷¹ *Ibid* at para 26.

¹⁷² *Ibid* at para 27.

¹⁷³ 2022 ONCA 745 [*10443204 Canada*].

are sophisticated and have equal bargaining power, they cannot contract out of a fraudulent misrepresentation claim.

Facts

2701835 Ontario Inc. (“**Purchaser**”) entered into a purchase and sale agreement with 10443204 Canada Inc. (“**Vendor**”) related to a coin laundry business (the “**Agreement**”). The Agreement contained a standard entire agreement clause, stating that “[t]here is no representation, warranty, collateral agreement or condition, affecting this Agreement other than as expressed herein”.¹⁷⁴ The Agreement also provided a right to the Purchaser to attend the business and conduct due diligence to verify the income of the business.¹⁷⁵

The Vendor commenced an action alleging that the Purchaser was in default under a payment plan that had been put in place pursuant to the Agreement and sought the balance of the purchase price. The Purchaser defended and counterclaimed on the basis that it had been induced to enter into the Agreement by the Vendor’s fraudulent or negligent misrepresentations about the gross revenues of the business.

The Vendor brought a motion for summary judgment on the basis that the Purchaser’s claim of fraudulent or negligent misrepresentation did not give rise to a genuine issue for trial. That motion was successful.

In granting judgment for the Vendor, the motion judge noted the prior decision of the ONCA in *Royal Bank of Canada v 1643937 Ontario Inc* (“**Royal Bank**”), which held that a defence of misrepresentation is not precluded by an entire agreement clause.¹⁷⁶ The motion judge

¹⁷⁴ *Ibid* at para 6.

¹⁷⁵ *Ibid* at para 7.

¹⁷⁶ *10443204 Canada* at para at para 16; *Royal Bank of Canada v 1643937 Ontario Inc.*, 2021 ONCA 98.

distinguished *Royal Bank* on the basis that there had been unequal bargaining power in that case that was not present between the Purchaser and Vendor. The motion judge also relied heavily on the fact that the Agreement afforded the Purchaser the right to conduct due diligence about the income generated by the business prior to closing.¹⁷⁷

The Purchaser appealed the decision granting summary judgment to the ONCA.

Decision

The ONCA granted the appeal and held that the motion judge erred in finding that the Purchaser's defence of fraudulent misrepresentation was precluded by the entire agreement clause. The ONCA held the entire agreement clause could not invalidate the defence of fraudulent misrepresentation because fraudulent misrepresentation, if established, it will result in the contract at issue being avoided or rescinded.¹⁷⁸

The ONCA also held that the motion judge erred in distinguishing *Royal Bank* as the policy of the law to discourage fraud is applicable to cases of equal and unequal bargaining power alike.¹⁷⁹

The ONCA also held that the availability of due diligence rights did not deprive the Purchaser of its right to avoid the contract based on fraudulent misrepresentation.¹⁸⁰ Actual knowledge of the untruth of a representation is a bar to a claim of fraudulent misrepresentation. However, the mere fact that a party has an opportunity to verify that a representation is untrue does not deprive that party of its right to void a contract based on an undetected fraudulent misrepresentation.¹⁸¹

¹⁷⁷ 10443204 *Canada* at paras 16-17.

¹⁷⁸ *Ibid* at paras 20-23

¹⁷⁹ *Ibid* at para 28.

¹⁸⁰ *Ibid* at para 31.

¹⁸¹ *Ibid* at para 31.

Ultimately, the ONCA affirmed that as none of these factors can preclude a defence of fraudulent misrepresentation on their own, the motion judge erred in determining that together they worked to deprive the Purchaser of its fraudulent misrepresentation defence.

Commentary

Entire agreement clauses and due diligence rights are important elements of any sophisticated commercial transaction. While they provide many meaningful protections to the parties to a transaction, neither an entire agreement clause nor a broad due diligence right can preclude a purchaser from advancing a fraudulent misrepresentation claim.

Distilled to its basic principle, *10443204 Canada* confirms that parties cannot contract out of a fraudulent misrepresentation claim. Such a claim goes to the validity of the contract and cannot be precluded by anything in the contract. It therefore remains critical that parties exercise care about the representations that they make during negotiations to avoid a potential misrepresentation claim. Parties cannot rely on their relative bargaining power or the fact that they have bargained for an entire agreement clause or provided their counterparties with broad due diligence rights to avoid such a claim.

Greta Energy Inc et al, v Pembina Pipeline Corporation et al (“Greta Energy”)¹⁸²

Background

Greta Energy provides important guidance about the principles applicable where assets are marketed *en bloc* and then later subject to a purchase price allocation for the purposes of issuing Right of First Refusal (“**ROFR**”) notices. The ONCA provides clarity about the applicability of the

¹⁸² 2022 ONCA 783 [*Greta Energy*].

evolving duty of good faith and confirms that it is not wrongful for vendors and purchasers to act in their own best interests in the circumstances.

Facts

Veresen Energy Infrastructure Inc. ("**Veresen**") owned majority interests in three wind farms (GV1, GV2, and St. Columban). Two of those wind farms (GV1 and GV2) were owned through limited partnerships with Greta Energy Inc. ("**Greta**") and Great Grand Valley 2 Limited Partnership ("**GG2**"). Both GV1 and GV2 were subject to ROFR clauses in the event that Veresen sold its interest.¹⁸³

In August 2016, Veresen announced its intention to sell the wind farms and several other assets *en bloc*.¹⁸⁴ BluEarth Renewables Inc. ("**BluEarth**") submitted a bid in January 2017 for the Veresen assets, including the wind farms. Veresen advised BluEarth that its bid was successful and the parties negotiated a form of purchase and sale agreement (the "**PSA**").¹⁸⁵

BluEarth provided Veresen with a preliminary and then final allocation of the purchase price for each of the three wind farms. The final version of the PSA was signed on February 18, 2017, and ROFR notices were sent to Greta and GG2 on February 23, 2017.¹⁸⁶ Greta and GG2 exercised the ROFR on GV2 but waived the ROFR on GV1.¹⁸⁷

Greta and GG2 then commenced an action against Veresen and BluEarth alleging that they had conspired to manipulate the price of the assets being sold by Veresen in a bad faith attempt to

¹⁸³ *Ibid* at paras 6-7.

¹⁸⁴ *Ibid* at para 8.

¹⁸⁵ *Ibid* at para 8.

¹⁸⁶ *Ibid* at para 9.

¹⁸⁷ *Ibid* at para 10.

prevent Greta and GG2 from exercising their ROFRs.¹⁸⁸ The plaintiffs further alleged that Veresen and BluEarth had knowingly misled them, in breach of the duty of good faith, and also advanced claims of conspiracy, breach of fiduciary duty, and inducing breach of contract.¹⁸⁹

The Defendants applied for and obtained summary dismissal of the action. In dismissing the action, the motion judge found that the respondents acted in their self-interest and did not act improperly in doing so.¹⁹⁰ Veresen set up a legitimate process to sell its assets and BluEarth engaged in that process. Further, it was not commercially unreasonable for BluEarth to pay a price for any or all of the assets that would pressure the ROFR holder not to exercise its rights.¹⁹¹

The motion judge found that the duty of good faith applied in the circumstances, and that Veresen was required to act in good faith towards the ROFR holders when it solicited offers, accepted them, and negotiated the terms of sale. However, that duty was not breached. It is not unfair to require bidders to bid for an *en bloc* package and then defer pricing allocation until after the bidding process had concluded. Further, Veresen did not encourage BluEarth to inflate the price of GV2 and had no obligation to object to any proposed allocations. Finally, Veresen did not take any steps to dissuade the plaintiffs from exercising their ROFRs.¹⁹²

The motion judge found that Veresen did not owe a fiduciary duty to the ROFR holders. While the PSA allowed Veresen to reject unreasonably low price allocations, that clause was for its own benefit. It had not impliedly or expressly undertaken to act in the best interests of the ROFR

¹⁸⁸ *Ibid* at para 12.

¹⁸⁹ *Ibid* at para 12.

¹⁹⁰ *Ibid* at para 2.

¹⁹¹ *Ibid* at para 13.

¹⁹² *Ibid* at para 14.

holders.¹⁹³ The motion judge also rejected the plaintiffs' conspiracy claim on the basis that it was unsupported by evidence.¹⁹⁴

Finally, the motion judge rejected the plaintiff's claim against BluEarth for inducing breach of contract on the basis that BluEarth did not owe any duties of good faith to Greta and GG2 and was entitled to act in its own self interest. There was nothing improper about BluEarth having a bid strategy that could discourage the exercise of a ROFR, as long as the strategy was not unreasonable.¹⁹⁵

The Plaintiffs appealed the summary dismissal of their Action to the ONCA.

Decision

The ONCA unanimously upheld the motion judge's ruling on all grounds. In doing so, the ONCA commented favourably on the motion judge's findings related to the duty of good faith. Among other things, the ONCA accepted the finding that there is no "correct" price for a ROFR – there is only what the vendor offered and what the purchaser is willing to accept. Fair market value was not determinative of whether Veresen acted in good faith.¹⁹⁶

The ONCA also commented favourably on the motion judge's finding that the dynamic between a ROFR holder and a third party is a competitive one, and that BluEarth was entitled to price the assets in a manner intended to discourage the exercise of the ROFR.¹⁹⁷

¹⁹³ *Ibid* at para 15.

¹⁹⁴ *Ibid* at para 16.

¹⁹⁵ *Ibid* at para 17.

¹⁹⁶ *Ibid* at para 25.

¹⁹⁷ *Ibid* at paras 29, 32.

Commentary

ROFRs are a common source of disputes in the energy industry. *Greta Energy* provides helpful clarity about the legal principles, including the continuously evolving law related to the duty of good faith applicable to ROFRs, particularly where assets are sold *en bloc* and then subject to purchase price allocation.

Vendors and purchasers can take comfort in the ONCA's findings related to breach of contract and the duty of good faith. In particular, the ONCA's recognition that there is a competitive process between purchasers and ROFR holders, and that it is not improper for a purchaser to price assets in a manner that discourages the exercise of a ROFR notice. However, this decision leaves the door open to liability in future cases if a bid strategy by a purchaser is held to be commercially unreasonable, or if a vendor and purchaser conspire to frustrate or circumvent a ROFR.

Coffee Time Donuts Incorporated v 2197938 Ontario Inc (“Coffee Time”)¹⁹⁸

Background

This case confirms that fixed term contracts can be extended by the parties' conduct after the written term has expired.

Facts

On July 31, 2009, 2197938 Ontario Inc. and Tirath Gill (the “**Appellants**”) entered into a franchise agreement (the “**Agreement**”) with Coffee Time Donuts Inc. (“**Coffee Time**”). Pursuant to the

¹⁹⁸ 2022 ONCA 435 [*Coffee Time*].

Agreement, the Appellants were to pay Coffee Time royalties in exchange for the right to purchase products from Coffee Time's exclusive suppliers and use Coffee Time's branding.¹⁹⁹

The written term of the Agreement expired on July 31, 2014. However, the Appellants remained in operation pursuant to the terms of the Agreement. Between July 31, 2014, and February 16, 2016, the Appellants continued to pay royalties to Coffee Time, purchase products from exclusive suppliers, and operate under Coffee Time branding, all as provided for in the Agreement. Commencing on February 16, 2016, the Appellants ceased paying royalties to Coffee Time, notwithstanding that they continued to purchase products from exclusive suppliers and operate under Coffee Time branding.²⁰⁰

Coffee Time brought an action against the Appellants for unpaid royalties on the basis that the parties had extended the Agreement by their conduct after the expiry of its written term on a month-to-month basis.²⁰¹ Coffee Time sought summary judgment of its claim.

The motion judge found that the Agreement was continued after the expiration of the written term on July 31, 2014, by the conduct of the parties. The motion judge relied on the fact that the Appellants had continued to pay royalties up to February 16, 2016, and had continued to use Coffee Time's branding and to purchase products from exclusive suppliers even after they ceased paying royalties to Coffee Time.²⁰²

¹⁹⁹ *Ibid* at para 2.

²⁰⁰ *Ibid* at para 2.

²⁰¹ *Ibid* at paras 3, 8.

²⁰² *Coffee Time* at para 5.

Decision

On appeal, the ONCA upheld the motion judge's finding that the Agreement had been extended by the conduct of both parties. In coming to that conclusion, the ONCA relied upon *Saint John Tug Boat Co Ltd v Irving Refining Ltd*,²⁰³ wherein the SCC held that conduct, unaccompanied by any verbal or written undertaking, can constitute acceptance of an offer so as to create a binding contract or, as in this case, extend a contract.²⁰⁴

Commentary

Coffee Time provides a helpful reminder that the conduct of parties following the expiry of an agreement may be construed by the courts as creating an extension of that agreement.

The Appellant in this case was arguably trying to game the system by obtaining contractual benefits without having to pay for them. However, the decision also creates a risk that companies may be faced with attempts to foist contract extensions on them through conduct. For instance, a contractor may continue to provide services after its contract has expired in the hopes of extending its entitlement to payment for those services. It is therefore important to exercise careful contract management and to avoid engaging in any conduct that could be interpreted as an implicit acceptance of an extension.

²⁰³ [1964] S.C.R. 614.

²⁰⁴ *Ibid* at para 7; *Saint John Tug Boat Co. Ltd. v Irving Refining Ltd.*, [1964] SCR 614 at 621-22.

CYBERSECURITY

Overview

In 2022, the ONCA clarified the scope of the tort of intrusion upon seclusion first established in *Jones v Tsige* ("**Jones**").²⁰⁵ In a trilogy of decisions, the ONCA confirmed that the tort of intrusion upon seclusion does not apply to defendants who, for commercial purposes, collect and store the personal information of others (a "**Hacked Defendant**") and fail to prevent a privacy breach by an outside party.

Decisions

Cases about the Tort of Intrusion Upon Seclusion

Background

The ONCA discussed intrusion upon seclusion in three decisions: (1) *Owsianik v Equifax Canada Co.*²⁰⁶ ("**Owsianik**"); (2) *Obodo v Trans Union Canada, Inc.*²⁰⁷ ("**Obodo**"); and (3) *Winder v Marriott International Inc.*²⁰⁸ ("**Marriott**"). In *Owsianik*, the ONCA held that only actual intruders can be liable for intrusion upon seclusion.²⁰⁹ The *Obodo* decision meanwhile confirmed that Hacked Defendants will not be vicariously liable for such an intrusion absent a relationship with the tortfeasor such as an employer-employee relationship.²¹⁰ Finally, the *Marriott* decision rejects the concept of a "constructive intruder" for the purposes of intrusion upon seclusion.²¹¹

²⁰⁵ 2012 ONCA 32.

²⁰⁶ 2022 ONCA 813 [*Owsianik*].

²⁰⁷ 2022 ONCA 814 [*Obodo*].

²⁰⁸ 2022 ONCA 815 [*Marriott*].

²⁰⁹ *Owsianik* at para 2.

²¹⁰ *Obodo* at para 2.

²¹¹ *Marriott* at paras 16, 21.

Decisions

In *Owsianik*, *Obodo*, and *Marriott*, the appellants had unsuccessfully sought class action certification against the respective Hacked Defendants for a claim of intrusion upon seclusion.²¹²

In each case, the Hacked Defendant had been hacked by an unknown third party. As a result, the proposed class members' private information was made available to malicious third parties who could use this information for nefarious purposes. All three plaintiffs appealed their certification decisions.

In *Owsianik*, the ONCA revisited the three proposed elements of the novel tort of intrusion upon seclusion:

1. A defendant must have invaded or intruded upon the plaintiff's private affairs or concerns, without lawful excuse (the “conduct requirement”);
2. The conduct which constitutes the intrusion or invasion must have been done intentionally or recklessly (the “state of mind requirement”); and
3. A reasonable person would regard the invasion of privacy as highly offensive, causing distress, humiliation, or anguish (the “consequence requirement”).²¹³

In *Owsianik*, the appellant pled that the Hacked Defendant's alleged intrusion occurred when it failed to take steps to prevent independent hackers from conduct that clearly invaded the proposed class members' privacy interests.²¹⁴ However, the ONCA held that the Hacked Defendant itself did not interfere with those privacy interests.²¹⁵ The Hacked Defendant had not

²¹² *Marriott* at para 1; *Obodo* at para 2; *Owsianik* at para 2.

²¹³ *Owsianik* at para 54.

²¹⁴ *Ibid* at para 57.

²¹⁵ *Ibid* at para 57.

conducted itself in a manner constituting an intrusion, and no one acting on its behalf or in consort with the Hacked Defendant had done so either.²¹⁶ Its fault, if any, lay in its failure to protect the plaintiffs' privacy interests in negligence, contract, and under various statutes.²¹⁷ Such negligence, however, cannot be transformed by the actions of independent third-party hackers into an invasion by the Hacked Defendants of the plaintiffs' privacy.²¹⁸ Negligence cannot morph or be transformed into an intentional tort.²¹⁹ Accordingly, the ONCA dismissed the *Owsianik* appeal.

In *Obodo*, the appellant argued that the *Obodo* Hacked Defendant had "enabled and facilitated" a third party hacker's access to class members' private information by having inadequate protective measures that fell below industry standards.²²⁰ The appellant also argued that several class actions were certified on the basis that the intruder was an employee of the defendant, and submitted that it would be anomalous if a defendant could be found liable for enabling an intrusion if it was the employer of the intruder, but not if the intruder was unknown to it.²²¹

The ONCA reiterated its decision in *Owsianik* and rejected the appellant's novel argument. There was no allegation that the Hacked Defendant and the unknown hacker were co-conspirators, acted in concert, or acted in pursuit of a common unlawful goal.²²² Rather, the hacker gained access to the information stored by the Hacked Defendant by stealing information from one of the Hacked Defendant's customers.²²³ Absent a properly pled allegation of conspiracy or common enterprise, the Hacked Defendant could only be held liable for intrusion upon seclusion if it were

²¹⁶ *Ibid* at para 64.

²¹⁷ *Ibid* at para 61.

²¹⁸ *Ibid* at para 8.

²¹⁹ *Ibid* at para 71.

²²⁰ *Obodo* at paras 9-10.

²²¹ *Ibid* at para 21.

²²² *Ibid* at para 22.

²²³ *Ibid*.

somehow vicariously liable for the actions of the third-party hacker.²²⁴ The ONCA refused to impose the equivalent of vicarious liability to the Hacked Defendant absent an employer-employee relationship between it and the actual intruder.²²⁵ The ONCA further noted that the Hacked Defendant remained liable for any damages flowing from its negligence, or for breaches of any contractual or statutory duties potentially owing to the appellant and the other class members.²²⁶ The ONCA dismissed the *Obodo* appeal.

In the *Marriott* appeal, the appellant claimed that the Hacked Defendant invaded the privacy of its customers when it collected and stored their personal information in a manner that neither reflected its representations to its customers, nor met its legal obligations to keep the information secure.²²⁷ The appellant alleged the Hacked Defendant had invaded the privacy of its customers regardless of whether any third party actually gained access to the customers' information.²²⁸ The *Marriott* appellant essentially argued that the Hacked Defendant was a "constructive intruder".²²⁹ The motion judge held that the tort of intrusion upon seclusion did not extend to "constructive intruders," only actual intruders.²³⁰

On appeal, the ONCA rejected the "constructive intruder" argument. It held that the material facts pled were the same facts said to support the appellant's claims against the Hacked Defendant based on negligence, breach of contract, and failure to comply with statutory obligations.²³¹ There was no allegation that the Hacked Defendant accumulated, stored or used the class members' personal information for any purpose other than the one reasonably contemplated by the

²²⁴ *Ibid* at para 23.

²²⁵ *Ibid* at para 26.

²²⁶ *Ibid* at para 26.

²²⁷ *Marriott* at para 6.

²²⁸ *Ibid* at para 6.

²²⁹ *Ibid* at para 16.

²³⁰ *Ibid* at para 16.

²³¹ *Ibid* at para 19.

customers.²³² The Hacked Defendant's alleged misconduct lay in its failure to safeguard its customers' privacy rights from intrusion by others, not in the Hacked Defendant itself breaching its customers' privacy rights.²³³ The appellant's argument ignored the rationale behind *Jones*; that persons are entitled to decide for themselves when, how, and to what extent they will disclose their personal information to others.²³⁴ The Hacked Defendant's customers had agreed to disclose personal information to it for operational purposes. There were no facts pled that the Hacked Defendant used or disclosed that information for any other purpose than as represented. Accordingly, there was no breach of the customers' privacy rights until the hackers acted.²³⁵ The ONCA dismissed the *Marriott* appeal.

Commentary

The ONCA refined the scope of the tort of intrusion upon seclusion in several ways which all limit the application of the tort to cases where the defendant themselves deliberately invades the plaintiff's privacy. Absent a common enterprise, conspiracy, or other joint conduct, a Hacked Defendant cannot be held liable for the actions of a third-party hacker. Furthermore, vicarious liability will not be imposed on Database Defendants absent a relationship between the actual intruder and the Hacked Defendant, such as an employer-employee relationship. Finally, merely failing to maintain the security of private information is not sufficient to make out the tort of intrusion upon seclusion.

²³² *Ibid* at para 20.

²³³ *Ibid* at para 20.

²³⁴ *Ibid* at para 21.

²³⁵ *Ibid* at para 21.

EMPLOYMENT AND LABOUR

Overview

During the past year, many employers dealt with the challenges caused by the COVID-19 pandemic. Employers remained engaged in ongoing claims related to policies implemented as a response to the pandemic, including cost reduction programs and mandatory vaccination policies. Those claims wound their way through the courts, with some notable decisions released over the year.

The *Parmar v Tribe Management Inc* (“**Parmar**”)²³⁶ case from the British Columbia Supreme Court (“**BCSC**”) was particularly significant. The BCSC held that placing an unvaccinated employee on unpaid leave under the employer’s mandatory vaccination policy did not constitute constructive dismissal. This decision granted welcome certainty to the many employers who initiated mandatory vaccination policies in response to the pandemic.

Beyond COVID-19 issues, the ABCA also released two decisions that dealt with recurring issues in employment disputes. In *Kosteckyj v Paramount Resources Ltd* (“**Kosteckyj**”)²³⁷, the ABCA specified that employees only have a reasonable, and quite short, period of time to object to a change of employment terms and claim constructive dismissal.

²³⁶ 2022 BCSC 1675 [*Parmar*].

²³⁷ 2022 ABCA 230 [*Kosteckyj*].

Decisions

Parmar v Tribe Management Inc

Background

In *Parmar*, the BCSC upheld a mandatory vaccination policy enacted by an employer. The BCSC dismissed a claim for constructive dismissal brought by an employee who had been placed on unpaid leave for non-compliance with the vaccination policy.

Facts

On October 5, 2021, Tribe Management Inc. (“**Tribe**”) implemented a mandatory vaccination policy in response to the COVID-19 pandemic. The stated purpose of the policy was to protect the health and safety of Tribe’s staff, their families, and the community more generally.²³⁸ The policy provided for medical or religious exemptions.²³⁹ Employees who did not wish to be vaccinated (absent any valid medical or religious exemption) were accommodated by being placed on an unpaid leave of absence rather than being dismissed or disciplined.²⁴⁰

The policy required all employees to be fully vaccinated by November 24, 2021. By that date, only two employees out of approximately 200 remained unvaccinated. Those employees were placed on an unpaid leave of absence for a three-month period, subject to review.²⁴¹

Deepak Parmar was one of those two employees. She did not assert a medical or religious basis for an exemption, but raised certain concerns about the effectiveness and potential risks of the vaccine. Ms. Parmar was placed on unpaid leave, which was ultimately made indefinite. She

²³⁸ *Ibid* at paras 52-54.

²³⁹ *Ibid* at para 56.

²⁴⁰ *Ibid* at para 68.

²⁴¹ *Ibid* at paras 57, 78-81.

resigned two months after being placed on leave, alleging that she had been constructively dismissed.²⁴² Ms. Parmar claimed that Tribe fundamentally breached its contractual obligations, entitling her to treat the employment relationship as having ended.

Tribe maintained that its mandatory vaccination policy was a reasonable and lawful response to the COVID-19 pandemic and that it was justified in placing Ms. Parmar on an unpaid leave of absence for failing to comply with the policy.²⁴³

Decision

The BCSC dismissed Ms. Parmar's claim for constructive dismissal.²⁴⁴ The case largely turned on the fact that Tribe had *bona fide* business reasons, including safety reasons, for the mandatory vaccination policy and for placing Ms. Parmar on an unpaid leave of absence for failing to comply with it.²⁴⁵ The BCSC held that the policy did not need to be perfect. It simply needed to constitute a reasonable approach when implemented.²⁴⁶

The BCSC ultimately determined that Tribe's mandatory vaccination policy was a reasonable and lawful response to the uncertainty created by the COVID-19 pandemic based on the information available to Tribe at the time.²⁴⁷ In coming to that conclusion, the BCSC noted that the policy allowed for both medical and religious exemptions. It also noted that the policy struck an appropriate balance between Tribe's business interests, the rights of its employees to a safe work environment, the interests of Tribe's clients, and the interests of residents in the buildings to which

²⁴² *Ibid* at para 86.

²⁴³ *Ibid* at para 134.

²⁴⁴ *Ibid* at para 157.

²⁴⁵ *Ibid* at para 99.

²⁴⁶ *Ibid* at para 99.

²⁴⁷ *Ibid* at para 134

Tribe provided property management services.²⁴⁸ The policy permitted employees such as Ms. Parmar to maintain their refusal to be vaccinated without losing their employment by placing them on unpaid leave.²⁴⁹

The BCSC held that Ms. Parmar understood that she would be placed on an unpaid leave of absence as a consequence of her decision to remain unvaccinated.²⁵⁰ Her decision to instead resign from her employment with Tribe was a voluntary decision.²⁵¹ Ms. Parmar was entitled to her beliefs about COVID-19 vaccination, but her beliefs did not entitle her to an exception to Tribe's mandatory vaccination policy.²⁵²

Accordingly, the BCSC held that Ms. Parmar had not been constructively dismissed by being placed on leave. Any lost income that Ms. Parmar may have suffered from being placed on unpaid leave and subsequently resigning her position were as a result of her personal choice not to comply with Tribe's reasonable and lawful policy.²⁵³

Commentary

Parmar is one of the first decisions to meaningfully consider the issues related to mandatory vaccination policies in non-unionized workplaces. It provides certainty to employers that have introduced mandatory vaccination policies in response to the COVID-19 pandemic and that are now facing challenges to those policies in the courts.

²⁴⁸ *Ibid* at para 137.

²⁴⁹ *Ibid* at para 137.

²⁵⁰ *Ibid* at para 139.

²⁵¹ *Ibid* at para 140.

²⁵² *Ibid* at para 145.

²⁵³ *Ibid* at para 152.

This case will provide a helpful roadmap for litigants and the courts in dealing with other claims related to mandatory vaccination policies that are currently working their way through the Canadian justice system. As was done in this case, courts are likely to assess the reasonableness of mandatory vaccination policies by reviewing factors such as whether the employer had *bona fide* business reasons for implementing the policy, whether the policy allowed for religious and medical exemptions, and whether the policy was consistent with the state of knowledge about COVID-19 at the time that it was implemented.

Kosteckyj v Paramount Resources Ltd

Background

Kosteckyj confirms that a substantial change to an employee's terms of employment is not enough on its own to constitute constructive dismissal. The employee must also decline to accept the new terms of employment within a reasonable period of time, in this case within 25 days. Failure to object within a reasonable period of time constitutes acceptance of the new terms of employment, and will disentitle an employee from advancing a constructive dismissal claim.

Facts

Olga Kosteckyj was employed as a senior integrity engineer with Paramount Resources Ltd. ("**Paramount**"), a publicly traded energy company.²⁵⁴ On March 27, 2020, Paramount announced that it would be implementing a new cost reduction program throughout the company, effective on April 1, 2020. The cost reduction program included across-the-board reductions of salaries and benefits. For Ms. Kosteckyj, this meant a ten percent salary reduction, suspension of employer RRSP contributions, a delay to or cancellation of her bonus, and no access to seminars

²⁵⁴ *Ibid* at para 18.

or training.²⁵⁵ On April 22, 2020, in an attempt to further reduce costs, Paramount terminated a number of employees without cause, including Ms. Kosteckyj.²⁵⁶

Ms. Kosteckyj brought an action against Paramount seeking damages for wrongful dismissal and applied to have her claim determined by summary trial.²⁵⁷ In her summary trial brief, she alleged that Paramount had constructively dismissed her when the cost reduction program was implemented on April 1, 2020.²⁵⁸

Paramount argued that Ms. Kosteckyj could not claim to have been constructively dismissed on April 1, 2020, given that she was terminated three weeks later on April 22, 2020.²⁵⁹ The chambers judge held that Ms. Kosteckyj had, in fact, been constructively dismissed. The chambers judge determined that the cost reduction program amounted to a change to, and a breach of, Ms. Kosteckyj's employment contract and that she had no obligation to decide whether that change was a repudiation of the contract in the twenty-five days between when she was informed of the program and her termination.²⁶⁰ Paramount appealed the decision.

Decision

The ABCA agreed with the chambers judge that the changes to Ms. Kosteckyj's employment terms resulting from the cost reduction program constituted a substantial change to an essential

²⁵⁵ *Ibid* at para 21.

²⁵⁶ *Ibid* at para 22.

²⁵⁷ *Ibid* at para 23-24.

²⁵⁸ *Ibid* at paras 25.

²⁵⁹ *Ibid* at para 26.

²⁶⁰ *Ibid* at para 33.

obligation in the employment contract.²⁶¹ However, the ABCA held that the chambers judge erred in finding that Ms. Kosteckyj did not accept or acquiesce to those new terms of employment.²⁶²

The ABCA noted that Ms. Kosteckyj never stated that she refused to accept the changes Paramount introduced on April 1, 2020.²⁶³ Further, there was no evidence that Ms. Kosteckyj had taken any steps to communicate with Paramount about the changes or express her dissatisfaction to Paramount prior to April 22, 2020, when her employment was terminated.²⁶⁴ The fact that Ms. Kosteckyj continued to work for three weeks doing the same tasks from the same office was held to be clear evidence that she had in fact accepted the reduced level of compensation.²⁶⁵

The ABCA held that the 25-day period between the implementation of the cost reduction plan and Ms. Kosteckyj's termination was a sufficient period of time for Ms. Kosteckyj to decide whether she would accept Paramount's changes to her employment contract or leave her employment and claim constructive dismissal.²⁶⁶

In his reasons, Justice Wakeling suggested that a bright-line rule should be adopted by the ABCA regarding the length of time in which an employee must accept or reject the new employment terms. Justice Wakeling held that, in light of Ms. Kosteckyj's personal circumstances, the reasonable period of time available to Ms. Kosteckyj to challenge the new terms of employment was no more than ten business days.²⁶⁷ He noted that a different employee may require more

²⁶¹ *Ibid* at para 54.

²⁶² *Ibid* at para 56.

²⁶³ *Ibid* at para 15.

²⁶⁴ *Ibid* at para 79.

²⁶⁵ *Ibid* at paras 58, 78.

²⁶⁶ *Ibid* at paras 82

²⁶⁷ *Ibid* at para 59.

than ten days to consider all of the information needed to make an informed decision, but that it would be rare that a reasonable period of time would exceed fifteen business days.²⁶⁸

Commentary

After the onset of the COVID-19 pandemic, and the collapse in oil and gas prices, many employers in the energy industry enacted cost reduction measures. Legal challenges related to those measures continue to work their way through the justice system. In *Kosteckyj*, the ABCA confirmed that even broadly implemented cost reduction measures can constitute constructive dismissal. However, only employees who reject or object to the new terms of employment within a reasonable period of time will be able to advance claims for constructive dismissal.

In this case, the reasonable period of time was quite short – between 10 and 25 days. However, what constitutes a reasonable period of time for an employee to object to substantial changes to terms of employment is a fact specific analysis which may vary depending on the personal circumstances of a particular employee.

Justice Wakeling attempted to establish a bright-line rule that an employee has between 10 and 15 business days to make a decision about whether to accept or reject new employment terms. While the majority of the ABCA was not prepared to endorse that approach on the evidence before it, it also did not explicitly reject Justice Wakeling's approach. That issue has been left for future courts to determine.

²⁶⁸ *Ibid* at para 60.

ENVIRONMENT

Overview

In this section, we discuss two cases that touch on the liabilities associated with environmental remediation. The first decision from the BCCA highlights the risks associated with relying on an environmental report prepared for a related but separate entity. The second decision, from the ABKB, considers the definition of “person responsible” in Alberta's *Environmental Protection and Enhancement Act*²⁶⁹ (“**EPEA**”) and confirms the policy considerations that must be balanced when assessing limitation period extensions pursuant to s. 218 of the EPEA.

Decisions

0694841 BC Ltd v Alara Environmental Health and Safety Limited (“Alara”)²⁷⁰

Background

In commercial real estate transactions, it is common for the original buyer to assign a purchase agreement to a related company prior to closing or for a related company to otherwise take title to the property. In *Alara*, the BCCA held that the assignee of a purchase agreement could not rely on the environmental site assessment (“**ESA**”) prepared for the assignor, notwithstanding that the companies were closely related. As a result, the assignee could not sue the environmental consultant when it was determined that the ESA was inaccurate.

²⁶⁹ RSA 2000, c E-12.

²⁷⁰ 2022 BCCA 67 [*Alara*].

Facts

Alara Environmental Health and Safety Ltd. ("**Alara**") had prepared ESAs to assist their client, 0694841 B.C. Ltd. ("**069**"), with the potential purchase of a commercial property (the "**Property**"). While areas of potential environmental concern were identified in the Phase I ESA, the Phase II ESA stated that environmental contamination was not identified at the Property and no further environmental investigation was recommended.²⁷¹ Having completed its environmental due diligence, 069 executed the original purchase agreement for the Property. Prior to closing, the purchase agreement was assigned by 069 to International Trade Center Properties Ltd. ("**ITC**"). 069 and ITC were closely related companies, sharing a single director and acting mind.²⁷²

The Phase II ESA included a disclaimer stating that it was prepared exclusively for the use of 069, and that Alara would not assume liability for any losses resulting from any other person's use or reliance on its contents.²⁷³ Years after ITC finalized its purchase of the Property, contamination was discovered. ITC claimed that Alara was negligent in preparing the Phase II Report and sought to recover the remediation costs. The chambers judge had held that ITC could not establish reasonable reliance on the Phase II ESA in the face of the disclaimer and dismissed the claim against Alara. ITC and 069 appealed.

Decision

The appellants argued that the chambers judge erred in concluding that ITC's reliance on the Phase II ESA was not reasonable. They disputed the judge's finding that ITC could have protected itself by requesting Alara's consent to use the Phase II ESA or by commissioning its own environmental assessment. They further submitted that the judge overlooked material factors

²⁷¹ *Ibid* at paras 10, 12.

²⁷² *Ibid* at paras 2, 5.

²⁷³ *Ibid* at para 13.

specific to the relationships between 069, ITC and Alara that were sufficient to establish reasonable reliance.²⁷⁴

The BCCA rejected the appellants' arguments. By failing to ask for Alara's consent to use the Phase II ESA, ITC was precluded from relying on the report or recovering any remediation costs from Alara. The evidence demonstrated that consent was not always granted by Alara and was not a mere formality. The fact that Alara would have granted consent was not relevant to the decision as this information was not known by ITC at the relevant time.²⁷⁵

Pursuant to the assignment agreement, ITC had agreed to conduct its own due diligence. There was no evidence that ITC could not have obtained an independent Phase II ESA. It simply decided not to do so. The BCCA found that ITC decided to rely on the Phase II ESA prepared for 069 despite its knowledge of Alara's disclaimer. While not determinative, the BCCA also noted that the cost of commissioning an independent Phase II ESA would have been less than one percent of the purchase price.²⁷⁶

Lastly, the BCCA held that the close relationship between 069 and ITC and other allegedly unique aspects of the transaction – such as the fact that ITC paid for the Phase II ESA – were not sufficient to distinguish this case from the “typical situation” in which a clear disclaimer operates to extinguish liability to third parties.²⁷⁷ The appeal was dismissed.

²⁷⁴ *Ibid* at para 25.

²⁷⁵ *Ibid* at paras 33-34.

²⁷⁶ *Ibid* at para 35.

²⁷⁷ *Ibid* at para 38.

Commentary

This case highlights the importance of completing independent environmental due diligence in the context of transactions involving the assignment of a purchase agreement. If an environmental report contains inaccuracies or was negligently prepared, standard disclaimer language will generally prevent a third party from recovering damages regardless of whether the third party is closely related to the environmental consultant's client. Potential assignees or related entities intending to rely on a related entities' environmental due diligence should obtain the consultant's consent through a reliance letter or via contract, or commission a separate report.

Paramount Resources Ltd v Grey Owl Engineering Ltd ("Paramount")²⁷⁸

Background

In *Paramount*, the ABKB considered the extension of limitations periods in the context of alleged historic negligence and statutory liability for environmental damage.

Facts

In 2004, Paramount Resources Ltd. ("**Paramount**") undertook a project to insert a fiberglass liner into an existing steel pipeline. Among other things, the defendants (collectively referred to as "**Grey Eagle**") were involved in the supply and installation of the fiberglass liner. The technical specifications for the liner stipulated installation below the frost line to avoid damage that can be caused by water freezing inside the pipeline. The pipeline operated without incident between 2004 and 2015 when operations were discontinued. Paramount completed a successful hydrotest and reactivated the pipeline in December 2017.²⁷⁹

²⁷⁸ 2022 ABQB 333 [*Paramount*].

²⁷⁹ *Paramount* at paras 8-9.

Paramount discovered a pipeline leak in April 2018. The cost to remediate the associated environmental damage was alleged to be approximately \$20 million. Paramount commenced an action against Grey Eagle in February 2019, alleging negligence in connection with construction of the fiberglass liner. Specifically, Paramount alleged that Grey Eagle had failed to install the pipeline deep enough to avoid exposure to frost.²⁸⁰

Grey Eagle applied for summary dismissal, as the action had been filed after the 10-year ultimate limitation date in s. 3(1)(b) of the *Limitations Act*²⁸¹ in Alberta ("**Limitations Act**") and was therefore time-barred. Paramount argued that the limitation clock started running when the pipeline leak was discovered in 2018 because its action was a claim for contribution and indemnity as described in s. 3(3)(e) of the *Limitations Act*. In support of this position it argued that Grey Eagle could have been directly liable for the environmental damage arising from the leak having regard to the definition of "person responsible" in the *EPEA*. In the alternative, Paramount argued that an extension of the limitation period pursuant to s. 218 of the *EPEA* was appropriate in the circumstances. S. 218 of the *EPEA* authorizes an extension of the limitation period for the commencement of a civil proceeding where there is an alleged release of a substance into the environment.

Decision

Justice Kachur of the ABKB granted Grey Eagle's application and summarily dismissed Paramount's claim due to expiry of the 10-year ultimate limitation period. The limitation clock started running when the alleged negligence occurred in 2004 rather than when the leak was discovered in 2018.²⁸² Contrary to Paramount's argument, Grey Eagle's participation in the

²⁸⁰ *Ibid* at paras 1-2.

²⁸¹ RSA 2000, c L-12.

²⁸² *Paramount* at para 25.

pipeline construction project did not amount to having “charge” over the substances transported within the pipeline. It was not, therefore, a “person responsible” for environmental damage under EPEA against whom Paramount could claim contribution or equitable indemnity.²⁸³

After balancing of the competing policy objectives of the *Limitations Act* and the *EPEA*, Justice Kachur determined that it was not appropriate to grant an extension of the limitation period. The 10-year ultimate limitation period prescribed by the *Limitations Act* favours finality and recognizes the problems associated with testing “ancient” claims at trial.²⁸⁴ S. 218 of the *EPEA* acknowledges that environmental damage often goes unnoticed for significant periods of time and may result in a significant financial burden to the public if claims relating to historic releases are not permitted to proceed. Extending the limitation period for environmental claims is warranted in circumstances where the societal benefit of having the polluter pay for environmental damage can be achieved.²⁸⁵ In this case, the leak was detected quickly and a “person responsible” (namely, Paramount) was available to pay. S. 218 is not intended to address any unfairness that may have resulted from Paramount’s claim against Grey Eagle being limitation-barred.²⁸⁶

Lastly, Justice Kachur determined that there was too much uncertainty in the record to resolve the case on a summary basis. Some of the uncertainty was a result of the amount of time that had passed since the project was completed in 2004. The uncertainty resulting from the historic nature of the claim further supported the conclusion that an extension of the limitation period was not appropriate in this case.²⁸⁷

²⁸³ *Ibid* at paras 22-23.

²⁸⁴ *Ibid* at para 29.

²⁸⁵ *Ibid* at paras 30-33.

²⁸⁶ *Ibid* at para 35.

²⁸⁷ *Paramount* at paras 41-42.

Commentary

While the definition of “person responsible” in the *EPEA* is often broadly interpreted, this decision confirms that the term is not intended to capture “everyone who was ever involved in construction of a pipeline”.²⁸⁸ Participating in the construction of a pipeline does not amount to having charge, management or control of the potentially polluting substances transported within the pipeline and therefore being subject to liability under the *EPEA*.

This decision provides certainty about the interplay between the *Limitations Act* and the *EPEA* in the context of recent releases alleged to have been caused by historic negligence. It confirms that s. 218 is an exceptional remedy that is intended to ensure that polluters pay for the cost of environmental damage that would otherwise be borne by society. By clarifying that s. 218 should not be used to facilitate claims against alleged contributors to the environmental damage, this decision provides comfort that defendants involved in historic releases will be able to defeat contribution claims at an early stage of proceedings, particularly when they are not a person responsible for the released substance.

²⁸⁸ *Ibid* at para 22.

INDIGENOUS LAW

Overview

Indigenous issues continue to significantly impact energy matters in courts at all levels throughout Canada. The cases discussed in this section address the potential for private entities to be held liable for their infringement of Aboriginal rights or title, the extent to which a band council resolution is necessary to bind a First Nation in contract law, and the consideration of the socioeconomic benefits for Indigenous groups when assessing the impacts of proposed resource projects.

Decisions

Thomas and Saik'uz First Nation v Rio Tinto Alcan Inc ("Thomas")²⁸⁹

Background

In *Thomas*, the BCSC affirmed the plaintiffs' Aboriginal right to fish but denied their claim for relief against the private owner of a hydroelectric dam that had impacted fish populations. The private owner's defence of statutory authority was successful because the dam was constructed and operated in strict compliance with applicable laws and authorizations.

Facts

In the 1950s, the government of British Columbia authorized Rio Tinto Alcan Inc.'s ("**Rio Tinto**") predecessor to build the Kennedy Dam (the "**Dam**").²⁹⁰ The Dam's operations impacted the flow of the Nechako River. The plaintiff First Nations, the Saik'uz First Nation and the Stelat'en First Nation ("**Saik'uz and Stelat'en**"), have used the Nechako River for fishing and sustenance since

²⁸⁹ 2022 BCSC 15 [*Thomas*].

²⁹⁰ *Ibid* at para 3.

time immemorial. They claim an Aboriginal right to fish the Nechako River and Aboriginal title to the surrounding watershed.²⁹¹

Saik'uz and Stelat'en alleged that the construction of the Dam and associated changes to water flow had adversely affected the health of the Nechako River as well as that of fish populations in the River and surrounding watershed.²⁹² They argued that Rio Tinto was liable to them for the tort of private and public nuisance due to interference with property rights, as well as wrongful interference with riparian rights.²⁹³ Saik'uz and Stelat'en sought injunctive relief compelling Rio Tinto and the provincial and federal governments to restore the River to a more natural state to prevent further damage.²⁹⁴

Rio Tinto denied liability and disputed that a private, non-governmental party could be found liable in nuisance or for breach of riparian rights on the basis of interference with Aboriginal rights. It argued that Aboriginal rights or title can only be asserted against the Crown. Further, Rio Tinto noted that construction and operation of the Dam were explicitly authorized by the government such that the defence of statutory authority should apply.²⁹⁵

Decision

The BCSC affirmed Saik'uz's and Stelat'en's rights to fish the Nechako River and surrounding area for food, social and ceremonial purposes.²⁹⁶ The BCSC also held that there was sufficient evidence to demonstrate that construction and operation of the Dam had significantly altered

²⁹¹ *Ibid* at para 2.

²⁹² *Ibid* at para 10.

²⁹³ *Ibid* at paras 9, 25.

²⁹⁴ *Ibid* at para 10.

²⁹⁵ *Ibid* at paras 11, 12.

²⁹⁶ *Ibid* at paras 253, 343.

certain fish populations within the River and consequently had profound impacts on Saik'uz and Stelat'en.²⁹⁷

The BCSC confirmed that private entities, such as corporations and individuals, may be held liable in tort for their infringement of Aboriginal rights or title.²⁹⁸ However, Rio Tinto was not liable in the circumstances. While Rio Tinto's actions with respect to the Dam had interfered with the use and enjoyment of the Saik'uz's and Stelat'en's Aboriginal rights to fish, the defence of statutory authority applied.²⁹⁹ Rio Tinto's actions were fully authorized by government. It had acted in strict accordance with applicable authorizations and could not have exercised its authority in an alternative manner that would have avoided harm.³⁰⁰

All aspects of the construction of the Dam, the way it was operated, and the scope of the resulting river regulation were expressly authorized by the provincial and federal governments. Rio Tinto had always operated within the parameters of its permits, and any deviations had been expressly authorized by a governmental agency. While the Dam had impacted the Saik'uz's and Stelat'en's rights, those impacts were authorized by the government and did not result from Rio Tinto's non-compliance with any statutory permissions.³⁰¹ Any remedy that the Saik'uz and Stelat'en may have been entitled to could only be against the Crown, which has a duty to protect the their Aboriginal right to fish.³⁰²

²⁹⁷ *Ibid* at para 492.

²⁹⁸ *Ibid* at paras 355, 383.

²⁹⁹ *Ibid* at paras 522, 542.

³⁰⁰ *Ibid* at para 525.

³⁰¹ *Ibid* at para 602.

³⁰² *Ibid* at paras 604, 646.

Commentary

The BCSC's findings in *Thomas* are significant for private owners and operators of infrastructure and other private land users whose actions impact Aboriginal rights or title. Notably, *Thomas* confirms that private entities can be found liable for infringements of Aboriginal rights and title. However, such liability will not arise if the infringements result from government-authorized activity and the private entity has strictly complied with the terms of applicable government authorizations. The decision highlights that it is essential to regularly review and ensure ongoing compliance with the terms of applicable permits and authorizations, as non-compliance could result in liability should there be any adverse impacts to Aboriginal rights or title.

The First Nations have appealed this decision to the BCCA.

Kehewin Cree Nation v Kehew Construction Ltd (“Kehewin”)³⁰³

Background

In *Kehewin*, the ABCA addressed the application of the *Indian Act*³⁰⁴ to private contracts between First Nations and third parties and held that a written band council resolution is not necessary for such contracts to be legally enforceable. There are several ways by which a band council may exercise its authority to bind the First Nation in contract, including through the delegation of contracting authority. The ABCA emphasized the evidence demonstrating that the delegation had been authorized by the band council in reaching its conclusion.

³⁰³ 2022 ABCA 78 [*Kehewin*].

³⁰⁴ RSC 1985 c I-5 [*Indian Act*].

Facts

The Kehewin Cree Nation (“**Kehewin**”) engaged Kehew Construction Ltd. (“**KCL**”) to complete two construction projects on the Kehewin Reserve.³⁰⁵ Kehewin fell behind on payments for both projects and executed two separate written acknowledgements of indebtedness to KCL. Both acknowledgements were signed by the Chief, at the time, of Kehewin.³⁰⁶ When payments remained outstanding, KCL ceased all work on the projects and commenced an action against Kehewin to recover amounts owed.³⁰⁷ As a defence, Kehewin argued that the acknowledgements of indebtedness were not binding as they were executed without any consensus, band council resolution (“**BCR**”), or delegation from the Kehewin Band Council as required by s. 2(3) of the *Indian Act*.³⁰⁸

KCL’s application for partial summary judgment was granted by the master and upheld by the chambers judge.³⁰⁹ Kehewin appealed on the application of s. 2(3) of the *Indian Act*.³¹⁰

Decision

The ABCA dismissed Kehewin’s appeal³¹¹ and held that while the chambers judge’s approach to interpreting s. 2(3) of the *Indian Act* differed from that of the ABCA, he nevertheless arrived at the correct conclusion regarding the Kehewin Band Council’s authority to contract with KCL.³¹²

³⁰⁵ *Kehewin* at para 1.

³⁰⁶ *Ibid.*

³⁰⁷ *Ibid* at paras 10-11.

³⁰⁸ *Ibid* at para 1.

³⁰⁹ *Ibid* at para 12.

³¹⁰ *Ibid* at para 13.

³¹¹ *Ibid* at para 34.

³¹² *Ibid* at para 23.

S. 2(3) requires that powers conferred on band councils be exercised “pursuant to the consent of a majority of the councillors of the band present at a meeting of the council duly convened” “unless the context otherwise requires or [the *Indian Act*] otherwise provides”³¹³ There are differing interpretations of s. 2(3). One line of authority holds that a written BCR is required for a contract with a First Nation to be valid. The other concludes that ostensible authority may bind a First Nation and a BCR is not required. The latter line of authority is based on a contextual interpretation of the *Indian Act* and was preferred by the ABCA here.

The ABCA noted that ss. 81-86 of the *Indian Act* outline the authority of band councils but are silent on the general law of contract. The authority of band councils to enter contracts is, therefore, an inferred power which must nevertheless be exercised in accordance with s. 2(3). The plain meaning of s. 2(3) requires the consent of a majority of the councillors at a council meeting but does not specify how consent must be given. In the absence of any “formalistic requirements”,³¹⁴ consent does not require a BCR. Instead, “a majority of council could authorize someone like the Chief to negotiate a contract and report back to the council.”³¹⁵

The ABCA confirmed that the consent required by s. 2(3) had been granted in the circumstances. The band council had authorized the Chief to execute contracts relative to the construction projects or to delegate that authority to someone else. The contracts at issue had been signed by the Chief or the Chief’s delegate. The ABCA also highlighted that the band council was regularly informed of the work being done by KCL and the payments being made, and that none of the

³¹³ *Indian Act* at s. 2(3).

³¹⁴ *Kehewin* at para 21.

³¹⁵ *Ibid.*

councillors took steps to question what was being done or to stop KCL from continuing work when issues with payments arose.³¹⁶

Concurring in the result, Justice Slatter held that s. 2(3) should only be read as providing interpretive directions with respect to matters expressly contemplated in *Indian Act*. Since band councils are not expressly authorized by the *Indian Act* to enter contracts, s. 2(3) should not apply. The Chief's actual and ostensible authority to enter contracts and delegate that authority was sufficient to bind Kehewin in its agreements with KCL.

Commentary

Kehewin provides greater clarity for those entering into agreements with First Nations about who has contracting authority on behalf of a First Nation. *Kehewin* confirms that a BCR is not required to bind a First Nation in contract. There are no formalistic requirements for how a band council's consent under s. 2(3) of the *Indian Act* must be granted. While the band council may authorize the Chief or others to contract on its behalf, evidence of such authorization will be important if the contract's validity is called into question. It is therefore prudent for counterparties to request evidence of the council meeting at which contracting authority was delegated when dealing with a representative purporting to have such authority.

Benga Mining Ltd v Alberta Energy Regulator ("Benga")³¹⁷

Background

In *Benga*, the ABCA dismissed applications for permission to appeal the decision of a Joint Review Panel ("**JRP**"). The JRP, in its capacity as the Alberta Energy Regulator, denied Benga

³¹⁶ *Ibid* at paras 30, 32.

³¹⁷ 2022 ABCA 30 [*Benga*].

Mining Limited's ("**Benga**") application for approval to construct and operate the Grassy Mountain Steelmaking Coal Project ("**Project**") on the basis that the Project would likely result in significant adverse environmental effects. Applications for permission to appeal the JRP's decision were filed by Benga, the Piikani Nation ("**Piikani**") and the Stoney Nakoda Nations ("**Stoney Nakoda**"). Piikani and Stoney Nakoda had entered into benefits sharing agreements ("**BSAs**") with Benga and supported the Project.³¹⁸

The ABCA's decision highlights the importance of submitting robust environmental impact assessment ("**EIA**") materials, as well as active participation by Indigenous groups and others in favour of the Project in the regulatory process.

Facts

In 2017, Benga applied for approval to construct and operate the Project.³¹⁹ The regulatory review process undertaken by the JRP involved three stages: (1) reviewing submitted "Pre-Panel" materials, including an EIA; (2) conducting a public hearing; and (3) issuing a written decision report.³²⁰

In the first stage, the JRP reviewed the EIA and requested additional information as necessary to facilitate compliance with legislative requirements. When it was satisfied that such requirements had been met, the JRP issued a completeness determination letter.³²¹ In the second stage, the JRP issued a notice of public hearing and informed Piikani and Stoney Nakoda that they had full participation rights in the hearing process,³²² which each only partly utilized. Piikani submitted a

³¹⁸ *Ibid* at paras 9-10.

³¹⁹ *Ibid* at para 4.

³²⁰ *Ibid* at para 14.

³²¹ *Ibid* at paras 16-17.

³²² *Ibid* at para 18.

technical review of Benga's environmental impact statements and written comments in support of the Project.³²³ Stoney Nakoda filed written submissions and made an oral presentation at the hearing indicating that they did not object to the Project.³²⁴

The JRP's decision report concluded that the Project was likely to cause significant adverse environmental effects and would cause loss of lands used by Treaty 7 First Nations for traditional activities and cultural heritage sites.³²⁵ The JRP also found that Benga's EIA provided a limited assessment of the Project's cumulative environmental effects, and failed to consider certain risks that would reduce the Project's positive economic impacts.³²⁶ Benga, Piikani and Stoney Nakoda sought permission to appeal the JRP's decision.

Decision

While the parties raised numerous grounds of appeal, we focus on those relating to the JRP's completeness determination and Indigenous law issues. Ultimately, the applications for permission to appeal were dismissed.³²⁷

Benga argued that the JRP erred in law or denied Benga procedural fairness by concluding that certain information in the EIA was incomplete or insufficient after issuing a completeness determination letter in respect of that information.³²⁸ The ABCA denied permission to appeal on this ground, finding that it did not have arguable merit. The purposes of the completeness determination were to confirm: (1) that EIA content requirements prescribed by the *EPEA* had

³²³ *Ibid* at paras 99-101.

³²⁴ *Ibid* at paras 20-21.

³²⁵ *Ibid* at para 24. Notably, the latter finding was made even though none of the Treaty 7 First Nations (which include the Piikani and Stoney Nakota) objected to the Project

³²⁶ *Ibid* at para 25.

³²⁷ *Ibid* at para 134.

³²⁸ *Ibid* at para 33.

been satisfied, and (2) that sufficient information had been filed to proceed to the public hearing stage.³²⁹ Benga's information had yet to be tested by interveners in the public hearing, and it was reasonable for the JRP to conclude that the information was insufficient in light of concerns raised by such interveners. The completeness determination did not preclude the JRP from finding that the EIA contained deficiencies, nor was the JRP required to request additional information from Benga to fill any gaps.³³⁰ The burden of satisfying the JRP's informational requirements remained with Benga before and during the public hearing process.³³¹ The JRP did not err in law or deny Benga procedural fairness by deciding that burden had not been discharged following the public hearing.

Regarding Indigenous legal issues, the ABCA distilled the grounds of appeal raised by Benga, Piikani and Stoney Nakoda into three main themes and denied permission to appeal on each theme.

The first theme was whether the JRP had failed to properly consider the public interest test and honour of the Crown by not assessing how denial of the Project would impact Piikani and Stoney Nakoda. Indeed, the BSAs between Benga and the First Nations would not be implemented if the Project did not proceed. The ABCA acknowledged that the BSAs were not filed as evidence such that the specific benefits that would accrue to Piikani and Stoney Nakoda were not available to the JRP. However, that did not prevent the JRP from considering whether the Project was in the public interest in a manner consistent with the honour of the Crown. It was clear from the JRP's decision that sufficient information had been presented about the socioeconomic benefits of the

³²⁹ *Ibid* at paras 38-43.

³³⁰ *Ibid* at para 36.

³³¹ *Ibid* at para 53.

Project.³³² The JRP considered the potential socioeconomic benefits on Indigenous people and communities but determined that these would be relatively modest.³³³

The ABCA then considered whether the JRP had a positive obligation to request information from Piikani and Stoney Nakota regarding the implications of not approving the Project. It concluded that this ground of appeal had no arguable merit because the JRP had sufficient information to fulfill its mandate, particularly in relation to potential socioeconomic benefits.³³⁴ The ABCA also emphasized that the Nations had full participation rights in the public hearing. The Nations were aware of the possibility that the Project would not be approved and were entitled to file as much or as little information about Project benefits as they saw fit.³³⁵ The Nations had an appropriate opportunity to inform the JRP about the benefits that their community would lose if the Project were denied. This was not a case where the hearing participant was not aware of the case to be met, or a case where the decision maker refused to consider information submitted by a hearing participant.³³⁶

Finally, the ABCA held that there was no arguable merit to the parties' argument that the JRP's terms of reference prevented it from considering the positive effects of the Project on Indigenous peoples and others.³³⁷

Commentary

Benga provides important guidance for project proponents subject to impact assessment and other regulatory review processes. The decision confirms that a completeness determination does

³³² *Ibid* at para 117.

³³³ *Ibid* at para 112.

³³⁴ *Ibid* at para 124.

³³⁵ *Ibid* at para 119.

³³⁶ *Ibid* at paras 120, 125-126.

³³⁷ *Ibid* at para 133.

not equate to the regulator's agreement with the accuracy or reliability of the application's contents nor place any obligation on the regulator to request additional information if gaps are identified in later stages of the review process. In addition to complying with express application requirements, proponents should consider filing information that is responsive to deficiencies identified by interested parties where feasible. The decision also suggests that proponents should provide evidence to support estimated project benefits and address risks that may impact the extent to which such benefits will be realized.

Indigenous groups that support a given project should fully participate in the applicable review process to ensure the regulator has complete information about project benefits. Where a proponent and affected Indigenous group have entered into a BSA, such information may include an explanation of how denial of the project would adversely affect the Indigenous groups' economic interests. Whether this decision will have a significant effect in practice remains to be seen. Because the details of BSAs are typically confidential, parties face practical challenges regarding how much information they are comfortable disclosing and how much information the regulator or Crown will require.

INSURANCE LAW

Overview

Insurance policies are an important part of every energy operation. Questions about policy wording can result in confusion about the extent and scope of coverage. Recent decisions out of the ONCA provide clarity about the duty to defend and insurance contracts insuring “physical damage”.

Decisions

*IT Haven Inc v Certain Underwriters at Lloyd’s, London (“IT Haven”)*³³⁸

Background

In *IT Haven*, the ONCA dealt with the duty to defend in the context of alleged material misrepresentations by the insured. The ONCA commented on the factors to be considered in duty to defend cases, affirming the availability in some circumstances of the contextual approach developed in *Longo v Maciorowski (“Longo”)*.³³⁹ The ONCA also confirmed that extrinsic evidence should be limited in duty to defence applications.

Facts

The Respondents, IT Haven Inc. (“**IT Haven**”) and its sole director, Ryan Hunt (“**Hunt**”), were insured by Certain Underwriters at Lloyd’s, London (“**Lloyd’s**”) for errors and omissions coverage (the “**Policy**”). As part of IT Haven’s insurance application, it made certain material representations about the nature of its business. IT Haven represented, among other things, that

³³⁸ 2022 ONCA 71 [*IT Haven*].

³³⁹ [2000] 50 OR (3d) 595 (CA).

it received 100% of its revenue in Canada, it did not provide services to the electronic games industry, and it had not incorporated any software or product designed by others into its designs.

In 2019, Niantic Inc. (“**Niantic**”) commenced a claim against Hunt and a related entity, “Global++”, alleging that Hunt and Global++ had infringed Niantic’s copyright by creating and distributing unauthorized derivative versions of Niantic’s mobile games. Hunt and IT Haven claimed that the Global++ software was generic and did not incorporate any software designed by others.

IT Haven and Hunt brought an application for a declaration that Lloyd’s was required to provide a defence against Niantic’s claim. Lloyd’s refused to make such a defence, alleging that the Respondents had made material misrepresentations in IT Haven’s application, failed to inform Lloyd’s of material changes in IT Haven’s business, and breached conditions of the Policy.

The application judge allowed IT Haven and Hunt’s application, holding among other things that under the traditional “pleadings rule”, if there is a mere possibility that a claim will fall within the insurance policy, a duty to defend will arise.

Lloyd’s also sought to introduce extrinsic evidence to demonstrate that Hunt and IT Haven had made material misrepresentations under the Policy. The application judge rejected Lloyd’s introduction of extrinsic evidence, holding that the introduction of extrinsic evidence should be limited in duty to defend applications.

Lloyd’s appealed the ruling of the application judge.

Decision

The ONCA dismissed the appeal. While the applications judge had applied the incorrect test for assessing the duty to defend, a duty to defend was triggered regardless. Rather than the typical application of the “pleadings rule”, the ONCA applied the flexible approach as set out in its earlier

decision in *Longo*. The *Longo* approach was favoured in cases where the insurer alleges a breach of condition or material misrepresentation.

Under the *Longo* approach, a court should consider the following non-exhaustive list of factors in determining whether a duty to defend arises:³⁴⁰

- Is the breach of condition or misrepresentation contested and, if so, on what basis? Is the existence of the breach or the misrepresentation in serious dispute?
- Is it reasonable to expect that the question of the misrepresentation or breach of the condition can be dealt with summarily, on an expedited basis? If so, what are the facts supporting such an expectation?
- Despite a clear misrepresentation or breach of statutory condition, are there circumstances that militate in favor of relief from forfeiture under the Act? Are such circumstances in serious dispute?
- If the insured invokes estoppel by reason of the insurer's conduct, what are the circumstances being relied upon? Is the question of estoppel in serious dispute?
- What is the status of the main action against the insured? Has discovery been held? Has a date for trial been secured? If not, when is the main action likely to be heard?
- What is the particular financial position of the defendant? Is he or she capable of assuming the costs of independent counsel until the issue of the breach of condition is resolved?

³⁴⁰ *IT Haven* at para 52.

On an assessment of these factors, the ONCA held that Lloyd's had a duty to defend Niantic's claim against IT Haven. The application judge had also properly excluded the extrinsic evidence.

Commentary

IT Haven lends an extra level of protection to insureds. This case demonstrates that an insurer's duty to defend is not automatically suspended by alleged breaches of conditions by an insured. Moreover, *IT Haven* suggests that insurers should resist the impulse to lead or consider extrinsic evidence when assessing their duty to defend.

MDS Inc v Factory Mutual Insurance Company ("MDS")³⁴¹

Background

In *MDS*, the ONCA considered the definitions of "corrosion" and physical damage in the context of a dispute over a policy exclusion.

Facts

MDS Inc. and its Canadian subsidiary, MDS (Canada) Inc. (together, "**MDS**") sued its insurer, Factory Mutual Insurance Company ("**FM Global**"), for breach of its insurance policy. At issue were the proper interpretations of "corrosion" and "physical damage".

MDS was covered by a standard form all-risk policy which stipulated that if an excluded peril, such as corrosion, caused physical damage not excluded by the policy, the resulting damage would be ensured.

³⁴¹ 2021 ONCA 594 [*MDS*].

In May 2009, a corrosion leak affected the production of MDS' primary radioisotope supplier, resulting in a shutdown of the business of MDS for 15 months. As a result, MDS lost approximately \$121 million in profits. MDS brought a claim for these lost profits. FM Global refused coverage, arguing that the corrosion exception applied, and that MDS' claimed losses could not be categorized as "physical damage".

The trial judge held in favour of MDS. The trial judge interpreted "corrosion" to apply only to anticipated corrosion. As MDS' claimed damage was caused by unanticipated corrosion, there was no ground to exclude coverage. FM Global appealed.

Decision

The ONCA allowed the appeal, denying coverage to MDS.

The ONCA first found that the trial judge had incorrectly interpreted the term "corrosion". "Corrosion" had to be interpreted in accordance with the principles set out by the SCC in *Sattva*,³⁴² and the approach to standard form contracts in *Ledcor Construction Ltd v Northbridge Indemnity Insurance Co.*³⁴³ A plain meaning approach to the term "corrosion" resulted in a definition that includes both anticipated and unanticipated corrosion. This interpretation had been widely accepted in the United States jurisprudence and maintains consistency and stability of this term across insurance policies.

However, as the corrosion exception did apply, the next question was whether MDS' claimed loss constituted "physical damage". The ONCA had no difficulty answering this question in the negative. "Physical damage" did not include damage resulting from loss of use. While economic

³⁴² *Sattva*.

³⁴³ 2016 SCC 37.

loss may result from physical damage, it itself is not physical damage. MDS' losses were therefore not covered.

Commentary

MDS provides insight into the interpretation of two common phrases in standard form industry insurance contracts: "corrosion" and "physical damage". While the interpretation of corrosion is useful, it is the definition of "physical damage" that will be most instructive to counsel. The ONCA in *MDS* seemed to advocate for a narrow reading of "physical damage", which excludes coverage for loss of use.

SECURITIES LITIGATION

Overview

Two securities litigation cases over the past year provided further insight about the factors that courts consider when assessing whether information is sufficiently material to require disclosure. The courts in these cases considered the relevance of reliability as it relates to disclosure of information and the difference between a “material fact” and a “material change”.

Decisions

Wong v Pretium Resources Inc (“Wong”)³⁴⁴

Background

In this case, the ONCA considered whether the defendant mining company’s failure to publicly disclose the concerns of its consultant amounted to a misrepresentation by omission of a material fact.³⁴⁵ The ONCA upheld the motion judge’s summary dismissal of the class action and confirmed that it is relevant to consider the reliability of information when determining whether that information is material.³⁴⁶

Facts

Pretium Resources Inc. ("**Pretium**") retained Strathcona Mineral Services Ltd. ("**Strathcona**") as a mining expert to oversee and report on a bulk sample program.³⁴⁷ While it conducted the bulk sample program, Strathcona offered its unsolicited opinion to Pretium that Strathcona’s sampling

³⁴⁴ 2022 ONCA 549 [*Wong*].

³⁴⁵ *Ibid* at para 109.

³⁴⁶ *Ibid* at para 3.

³⁴⁷ *Ibid* at para 8.

contradicted a prior estimate about the economic viability of one of Pretium's assets.³⁴⁸ Pretium disagreed with Strathcona and was of the view that the Strathcona concerns were premature.³⁴⁹ Pretium opted not to disclose this information to the market.³⁵⁰ Strathcona resigned from the project³⁵¹ and after Pretium announced the resignation in a news release, Pretium's share price dropped by half.³⁵² Strathcona's opinion later turned out to be incorrect.³⁵³ The motion judge considered whether Pretium had a legal obligation to disclose Strathcona's opinions to the market. The motion judge ultimately agreed with Pretium that there was no omission of material fact and that the company was not obligated to disclose information it reasonably believed to be unreliable and incorrect.³⁵⁴ The case was then appealed.

Decision

The ONCA unanimously affirmed the decision of the motion judge and found that Pretium's decision not to disclose information it considered unreliable and incorrect was lawful and proper.³⁵⁵ The ONCA found that the motion judge properly applied the legal test for a material fact as set out in the SCC decision *Sharbern Holding v Vancouver Airport Centre Ltd*,³⁵⁶ which requires a "fact-specific inquiry".³⁵⁷ The ONCA held that the objective reliability of the omitted information was a relevant consideration in the determination of whether the omitted information was material from the perspective of a reasonable investor.³⁵⁸ The ONCA reiterated that a "secondary market

³⁴⁸ *Ibid* at para 20.

³⁴⁹ *Ibid* at para 13.

³⁵⁰ *Ibid* at para 1.

³⁵¹ *Ibid* at para 29.

³⁵² *Ibid* at paras 30 and 31.

³⁵³ *Ibid* at para 1.

³⁵⁴ *Wong v Pretium Resources Inc.*, 2021 ONSC 54.

³⁵⁵ *Wong* at para 3.

³⁵⁶ 2011 SCC 23.

³⁵⁷ *Wong* at paras 70-76.

³⁵⁸ *Ibid* at para 87, 89, and 91.

misrepresentation by omission requires evidence that disclosure already made is misleading because of its omission".³⁵⁹ The premature Strathcona concerns were found to lack objective reliability and the decision to not disclose the information was appropriate.³⁶⁰

Commentary

Secondary market disclosure disputes remain highly fact specific. This case demonstrates that the reliability of the concern or opinions of an external consultant can be relevant to the fact specific inquiry used to determine the materiality of information and whether it ought to be disclosed.

Markowich v Lundin Mining Corporation ("Markowich")³⁶¹

Background

In this case, a rockslide occurred at an open pit mine owned and operated by Lundin Mining Corporation ("**Lundin**").³⁶² Instability had also been detected at the mine prior to the rockslide.³⁶³ Both incidents were disclosed slightly under a month later, following which Lundin's share price dropped. The plaintiff brought a motion to bring a secondary market misrepresentation claim for Lundin's failure to immediately disclose both incidents.³⁶⁴ The ONSC dismissed the motion for leave to bring the claim³⁶⁵ and declined to certify the class proceeding.³⁶⁶

³⁵⁹ *Ibid* at para 95.

³⁶⁰ *Ibid* at para 109.

³⁶¹ 2022 ONSC 81 [*Markowich*].

³⁶² *Ibid* at para 3.

³⁶³ *Ibid* at para 2.

³⁶⁴ *Ibid* at para 8.

³⁶⁵ *Ibid* at para 28.

³⁶⁶ *Ibid* at para 35.

Facts

Lundin detected instability in the wall of an open mine pit it owned and operated on October 25, 2017.³⁶⁷ A rockslide later occurred at the same pit on October 31, 2017.³⁶⁸ Lundin published a news release on November 29, 2017 disclosing both pieces of information, and its share price dropped by 16 percent the next day.³⁶⁹ The representative plaintiff claimed that both the rockslide and the instability were "changes" to Lundin's "business, operations or capital" considered "material" as they "would reasonably be expected to have a significant effect on the market price or value" of Lundin's shares, and that as a result Lundin was required to disclose immediately via news release and by filing a material change report within 10 days.³⁷⁰ The plaintiff claimed that by waiting nearly a month later to release the information, Lundin breached its obligations pursuant to the Ontario *Securities Act*.³⁷¹

Decision

The ONSC found that neither the pit wall instability nor the rockslide constituted a "change" to Lundin's "business, operations or capital" within the meaning of the Ontario *Securities Act* that would warrant disclosure of the kind the plaintiff claimed.³⁷² The ONSC held that determining whether a change has occurred is a fact-specific inquiry.³⁷³ Upon review of the evidence the ONSC found that no change to Lundin's business, operations or capital had occurred due to the pit wall instability or rockslide.³⁷⁴ The evidence also did not suggest that the instability or rockslide

³⁶⁷ *Ibid* at para 2.

³⁶⁸ *Ibid* at paras 2, 3.

³⁶⁹ *Ibid* at para 5.

³⁷⁰ *Ibid* at para 13.

³⁷¹ RSO 1990, c S.5.

³⁷² *Markowich* at para 194.

³⁷³ *Ibid* at para 146.

³⁷⁴ *Ibid* at para 173.

threatened Lundin's economic viability.³⁷⁵ The ONSC emphasized that there is a critical and deliberate difference between a "material change" and a "material fact", and that while the instability and rockslide were material facts, they were not material changes because they did not result in a different position, course or direction for Lundin's business, operations or capital.³⁷⁶

Commentary

This decision contributes further to the body of case law discussing what constitutes a "material change" pursuant to the *Securities Act*. The case also sheds further light on what circumstances would require an issuer to disclose a material change to the public, which might include changes to position, course or direction for a company's business, operations or capital.

³⁷⁵ *Ibid* at para 174.

³⁷⁶ *Ibid* at para 179.

TAX

Overview

Tax law is a complex and ever-evolving field that requires a deep understanding of legal, financial, and economic principles. Last year, the FCA held that the jurisdiction of the Tax Court of Canada (“**Tax Court**”) is limited to determining the correctness of an assessment and does not extend to varying or quashing opinions. In addition, the SCC commented on the availability of the equitable remedy of recession when parties’ mistakes result in unanticipated and undesirable tax consequences. We discuss these two cases in this section.

Decisions

Canada v Dow Chemical Canada ULC (“Dow”)³⁷⁷

Background

In *Dow*, the FCA confirmed that the Tax Court does not have the jurisdiction to vary or quash an opinion of the Minister of National Revenue (the “**Minister**”). The FCA held that the jurisdiction of the Tax Court is limited to determining the correctness of a tax assessment. Taxpayers may challenge an opinion of the Minister by way of a judicial review proceeding brought in the Federal Court.

Facts

In 2011, the Minister reassessed Dow Chemical's 2006 taxation year by adding approximately \$307 million to its income because of certain transfer pricing adjustments made under s. 247 of

³⁷⁷ 2022 FCA 70 [*Dow*].

the *Income Tax Act*³⁷⁸ (“*ITA*”). Dow Chemical objected to the reassessment. After the filing of the notice of objection, the Minister sent Dow Chemical a proposal letter to allow additional interest expenses in the 2006 taxation year of Dow Chemical. The Minister subsequently refused to permit those additional interest expenses.

In 2013, pursuant to s. 247(10) of the *ITA*, Dow Chemical asked the Minister to reduce its income by the increased interest expense that had been identified by the Minister in her letter. S. 247(10) of the *ITA* allows the Minister to make an adjustment that decreases a taxpayer’s income under the transfer pricing rules if “in the opinion of the Minister”, the adjustment is appropriate. The Minister denied the request. Dow Chemical sought judicial review of this decision in the Federal Court. Dow Chemical also appealed the reassessment of its 2006 taxation year to the Tax Court.

Pursuant to Rule 58 of the *Tax Court of Canada Rules (General Procedure)*, the parties asked the Tax Court to answer the following question:

“Where the Minister [...] has exercised her discretion pursuant to s. 247(10) of the [*ITA*] to deny a taxpayer’s request for a downward transfer pricing adjustment, is that a decision falling outside the exclusive original jurisdiction granted to the Tax Court of Canada under s. 12 of the *Tax Court of Canada Act* and s. 171 of the *ITA*?”³⁷⁹

Decision

The FCA noted that the Minister’s Opinion would be outside the exclusive jurisdiction of the Tax Court if it was subject to judicial review under the jurisdiction of the FCA.³⁸⁰

³⁷⁸ RSC 1985, c 1 (5th Supp.).

³⁷⁹ *Dow* at para 1.

³⁸⁰ *Ibid*, at para 26.

The FCA concluded that s. 18.5 of the *Federal Courts Act*³⁸¹ is not a bar to the Federal Court hearing a judicial review of the Minister's opinion. S. 18.5 of the *Federal Courts Act* only bars the Federal Court from reviewing a decision when another statute, such as the *ITA*, expressly provides a right of appeal. However, s. 247(11) of the *ITA* does not provide for a separate right of appeal from the opinion of the Minister. Therefore, the Federal Court is not barred from reviewing the Minister's opinion.

The FCA then reviewed the remedies that the Tax Court and the Federal Court could grant in this case. The FCA concluded that the remedies available to the Tax Court might not be adequate to address the situation. The goal of Dow Chemical was to obtain a reassessment based on a reduction in income that reflected the downward adjustment. On appeal, the Tax Court would have only had three options available under s. 171(1) of the *ITA*: (1) vacate the assessment; (2) vary the assessment; or (3) refer the assessment back to the Minister for reconsideration and reassessment. These remedies are all directed at the assessment. However, the opinion rendered by the Minister under s. 247(10) of the *ITA* was not an assessment, although it would have affected an assessment. Unlike the Tax Court, the Federal Court has the authority to quash any decision of the Minister on an application for judicial review under s. 18.1(3) of the *Federal Courts Act*.

The FCA held that the Tax Court's authority for varying or quashing the Minister's opinion could not be implicit either. The FCA held that the authority granted by the Parliament to the Tax Court to decide whether an assessment is correct does not, by implication, include the authority to modify or quash the opinion provided by the Minister under s. 247(10) of the *ITA*. The Tax Court's jurisdiction is limited to providing remedies that directly impact the assessment. Even though "it may be more convenient" if the Tax Court had this power, it is not a necessary component of its

³⁸¹ RSC 1985, c F-7.

jurisdiction over assessments.³⁸² Therefore, the FCA held that the Tax Court does not have the jurisdiction to vary or quash the Minister's opinion.

Commentary

The decision of the FCA illustrates the importance of selecting the appropriate court based on the remedy sought in tax litigation. Because of the differences between the jurisdictions of the Tax Court and the Federal Court, taxpayers and practitioners may face confusion and uncertainty when choosing the correct forum. In some circumstances, taxpayers may need to bring simultaneous proceedings in both courts to ensure the relief sought. In fact, the FCA in this decision stated that "the remedies available to both courts may be required if Dow is to succeed."³⁸³ Until Parliament expands the Tax Court's jurisdiction, taxpayers will continue to encounter fundamental jurisdictional issues and should seek professional advice about the appropriate court or courts to commence tax litigation.

Canada (Attorney General) v Collins Family Trust ("Collins Family")³⁸⁴

Background

In *Collins Family*, the SCC discussed the availability of the equitable remedy of rescission when parties' mistakes have resulted in unanticipated and undesirable tax consequences.

Facts

Two different companies hired an accounting firm to advise about two comparable schemes to safeguard corporate assets from future creditors without increasing tax liabilities. Each scheme

³⁸² *Dow* at para 82.

³⁸³ *Ibid* at para 91.

³⁸⁴ 2022 SCC 26 [*Collins Family*].

required the establishment of a family trust with a holding company being named as the trust's beneficiary. After the holding company lent funds to the trust to purchase the shares of the operating company at fair market value, the operating company paid dividends to the trust.

The published guidance of the Canada Revenue Agency (“**CRA**”) at the time provided that s. 75(2) of the *ITA* would attribute the dividends paid to the trust to the holding company. Because intercorporate dividends are exempt from taxation pursuant to s. 112(1) of the *ITA*, no tax would be payable.

A few years after these transactions, the Tax Court ruled in *Sommerer v The Queen*³⁸⁵ that, contrary to the published guidance of the CRA, s. 75(2) does not apply when a trust acquires shares for fair market value rather than through gifting or settling. The CRA began an audit and then issued reassessments that retroactively prohibited the attribution of the dividends to the holding companies and taxed the dividends in the hands of the trusts.

Because of the fundamental misapprehension of the expected tax consequences of the transactions, both trusts sought rescission of all transactions leading up to and including the payment of the dividends. The BCSC as well as the BCCA granted rescission in a substantially identical case a few years earlier: *Re Pallen Trust*³⁸⁶, affirmed by BCCA.³⁸⁷

Decision

On appeal to the SCC, the Crown argued that *Fairmont Hotels Inc v Canada*³⁸⁸ (“**Fairmont**”) articulated the fundamental principle that taxpayers should be taxed on what they actually did and

³⁸⁵ *Sommerer v The Queen*, 2011 TCC 212.

³⁸⁶ *Re Pallen Trust*, 2014 BCSC 305.

³⁸⁷ *Re Pallen Trust*, 2015 BCCA 222 [*Pallen Trust*].

³⁸⁸ *Fairmont Hotels Inc. v Canada*, 2016 SCC 56.

not what they could have done. Further, transactions that parties entered into freely and voluntarily may not be altered retroactively to avoid an unintended tax consequence. The Crown submitted that the relevant test must be focused on whether the taxpayer consented to enter into the transaction. If so, the taxpayer should be responsible for the transaction's tax consequences. In *Fairmont*, the SCC had restricted the application of the equitable remedy of rectification in tax contexts to situations in which the written agreement governing the parties' legal relations did not accurately reflect their actual agreement. While rectification enables a taxpayer to amend its transactions, rescission allows taxpayers to annul transactions as if they never happened.

A majority of eight judges decided in favour of the Crown. The principles outlined in *Fairmont* were held to be broadly applicable to all equitable remedies in the context of tax mistakes. The SCC held that “tax consequences do not flow from contracting parties’ motivations or objectives”, but rather “from the freely chosen legal relationships, as established by their transactions.”³⁸⁹ What the taxpayer agreed to do should be the focus of the investigation. Any apparent "windfall" for the public treasury from the taxpayer losing a benefit or for the taxpayer from securing a benefit is irrelevant. A party's discovery that an instrument's operation results in an unfavourable and unexpected tax consequence does not automatically entitle the court to amend the instrument.

Commentary

According to the SCC, the mere fact that a mistake resulted in negative tax consequences for a taxpayer does not justify equity-based relief if the taxpayer or their hired tax professional either incorrectly predicted the tax consequences of a transaction or erred on the underlying facts or law.

³⁸⁹ *Collins Family* at para 16.

Given this decision, taxpayers and their advisors must use care when structuring transactions. Taxpayers should provide enough time for tax counsel to thoroughly analyze such transactions. If time limitations and the nature of a proposed transaction permit, taxpayers are advised to obtain advance tax rulings from the CRA. Although these rulings are usually not enforceable in court, the CRA will often respect them, and they reduce tax uncertainty.

CASES TO WATCH

Overview

The management of climate change risks by corporations and boards remains a theme in Canada and worldwide. In this section, we highlight ongoing litigation by Canadian youth alleging that Canada's climate change policies have breached their rights pursuant to ss. 7 and 15 of the *Canadian Charter of Rights and Freedoms* (“*Charter*”)³⁹⁰ as well as derivative action in the United Kingdom alleging that a corporate energy transition strategy is insufficient to manage climate risks. We also provide an update on the Government of Alberta’s challenge to the constitutional validity of the *Impact Assessment Act*.³⁹¹

Decisions

***La Rose v Canada* (“*La Rose*”)³⁹²**

In 2020, 15 youth and children from across Canada brought an action against the federal government for action and inaction on climate change, which they alleged had infringed their rights under ss. 7 and 15 of the *Charter*, as well as their rights as beneficiaries under the public trust doctrine.³⁹³ As more fully discussed in the 2021 edition of this paper,³⁹⁴ the Federal Court granted the Government of Canada’s application to strike the statement of claim because it failed to disclose a reasonable cause of action. The claims involved alleged actions that were too broad and diffuse to support a *Charter* analysis.³⁹⁵ The Federal Court also held that the claim alleging

³⁹⁰ s. 7, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

³⁹¹ SC 2019, c 28 at s. 1 [*IAA*].

³⁹² 2020 FC 1008 [*La Rose*].

³⁹³ *Ibid* at para 7.

³⁹⁴ Sophie Lorefice, Changhai Zhu, Sean Fairhurst & Matthew Potts, “Recent Judicial Decisions of Interest to Energy Lawyers” (2021) 59:2 *Alta L Rev* 427 at 456.

³⁹⁵ *La Rose* at para 63.

breach of the public trust doctrine (i.e., that the government has an obligation to protect and preserve inherently public resources) did not have a reasonable prospect of success.³⁹⁶

The plaintiffs' application for permission to appeal of the decision was heard by the Federal Court of Appeal on February 14 and 15, 2023. If the Federal Court's decision is overturned, the question of whether governments are required to mandate a minimum standard of emissions reduction could be further considered at trial.

ClientEarth v Shell plc

In February 2023, ClientEarth, an environmental law charity and shareholder of Shell plc, filed a derivative action in the High Court of England and Wales seeking to hold the directors of Shell plc personally liable for failing to implement an energy transition strategy in alignment with the Paris Agreement.³⁹⁷ ClientEarth claims that Shell's directors failed to manage material and foreseeable climate risks and thereby breached their duty to promote the success of the company and to act with reasonable care, skill and diligence, as per the United Kingdom ("**UK**") *Company Act*.³⁹⁸

Directors of Canadian corporations are subject to similar duties as those in the UK and Canadian corporate statutes permit derivative actions to be brought in substantially the same manner as the UK *Companies Act*. Actions analogous to *ClientEarth v Shell Plc* may, therefore, be initiated in Canada in the coming years.

³⁹⁶ *Ibid* at paras 57, 87.

³⁹⁷ Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104 [*Paris Agreement*].

³⁹⁸ *Companies Act* 2006 (c 46), ss 172, 174 [*Companies Act*].

Reference re Impact Assessment Act³⁹⁹

In *Reference re IAA*, the majority of the ABCA held that that the federal *Impact Assessment Act*⁴⁰⁰ and associated *Physical Activities Regulations*⁴⁰¹ are unconstitutional. As discussed in detail in the 2022 edition of this paper,⁴⁰² the majority noted that the environment is not assigned to either level of government under the *Constitution Act, 1867*,⁴⁰³ and emphasized the subsidiarity principle (i.e., that law-making and its implementation are often best achieved at the effective level of government closest to the citizens affected) to conclude that provincial jurisdiction should be favoured.⁴⁰⁴

The federal government's appeal of the decision was heard by the SCC on March 21 and 22, 2023. The SCC's highly anticipated decision on this matter is expected to confirm whether the federal government may retain oversight and ultimate approval authority over intra-provincial projects based on the projects' environmental effects. It will, therefore, have significant implications for natural resource development across the country.

Competition Bureau and Securities and Exchange Commission Greenwashing and ESG Decisions

Overview

Both the Competition Bureau (the "**Bureau**") and the United States Securities and Exchange Commission (the "**SEC**") have been engaged in significant investigations and reached

³⁹⁹ 2022 ABCA 165 [*Reference re IAA*].

⁴⁰⁰ SC 2019 c 28.

⁴⁰¹ SOR/2019-285.

⁴⁰² K. Fellowes and N. Doelman, *Recent Judicial Decisions of Interest to Energy Lawyers*, 60 *AltaLRev* 541.

⁴⁰³ *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5.

⁴⁰⁴ *Reference re IAA* at paras 149-152.

settlements involving multimillion-dollar penalties related to greenwashing and misstatements and omissions related to environmental, social and governance (“**ESG**”) matters.

Facts

In January 2022, Keurig Canada Inc. (“**Keurig**”) entered into a consent agreement with the Bureau forcing Keurig to pay a \$3 million penalty for greenwashing.⁴⁰⁵

The Competition Bureau launched an investigation against Keurig into the company's claims about the recyclability of its single-use Keurig K-Cup pods after it became aware of concerns that the company's claims may be false or misleading.⁴⁰⁶ The Bureau also investigated the validity of the information about the steps required to prepare the pods for recycling the company advertised on its website, social media, and on text and logos on the K-Cups.⁴⁰⁷ The investigation concluded that the claims were false or misleading because the pods were not recyclable outside of British Columbia and Quebec, and that additional steps may be required to recycle the pods contrary to the information Keurig advertised.⁴⁰⁸ As part of its settlement agreement, Keurig agreed to pay the mentioned \$3 million penalty, change its recyclable claims and packaging, and undertake other corrective measures.⁴⁰⁹

In May 2022, the SEC laid charges against BNY Mellon for misstatements and omissions about ESG considerations in making investment decisions for certain mutual funds that it managed. BNY Mellon represented or implied in various statements that all investments in the funds had

⁴⁰⁵ Competition Bureau Canada, “Keurig Canada to pay \$3 million penalty to settle Competition Bureau’s concerns over coffee pod recycling claims”, (6 January 2022), online: <<https://www.canada.ca/en/competition-bureau/news/2022/01/keurig-canada-to-pay-3-million-penalty-to-settle-competition-bureaus-concerns-over-coffee-pod-recycling-claims.html>> [*Keurig*].

⁴⁰⁶ *Ibid.*

⁴⁰⁷ *Ibid.*

⁴⁰⁸ *Ibid.*

⁴⁰⁹ *Ibid.*

undergone an ESG quality review, even though that was not always the case. To settle the charges, BNY Mellon agreed to pay a \$1.5 million penalty.⁴¹⁰

Commentary

The Keurig consent agreement is evidence of the increased emphasis of competition authorities on cracking down on misleading environmental claims. There are several other cases coming down the pipeline on this issue that have not yet been decided. Upcoming cases include Greenpeace's complaint to the Bureau against Shell Canada for false or misleading claims related to its Drive Carbon Neutral products and the Bureau's probe into the Royal Bank of Canada investigating claims that the bank's climate leadership statements are misleading due to its continued financing of fossil fuel projects.

Both the Keurig settlement and the BNY Mellon order demonstrate the rising importance of ESG and how misrepresentations regarding the environmental friendliness of their activities and other issues related to ESG disclosure can get issuers in hot water with competition authorities. The upcoming decisions will shed further light on the approach competition authorities will take with future greenwashing and ESG noncompliance complaints.

⁴¹⁰ *United States of America Before the Securities and Exchange Commission In the Matter of BNY Mellon Investment Adviser, Inc., Order Instituting Administrative And Cease-And-Desist Proceedings, Pursuant To Sections 203(E) And 203(K) Of The Investment Advisers Act Of 1940 And Section 9(F) Of The Investment Company Act Of 1940, Making Findings, And Imposing Remedial Sanctions And A Cease-And-Desist Order.*