Canadian Energy Law Foundation Conference

Recent Judicial Decisions of Interest to Energy Lawyers

June 15, 2023

Class Actions

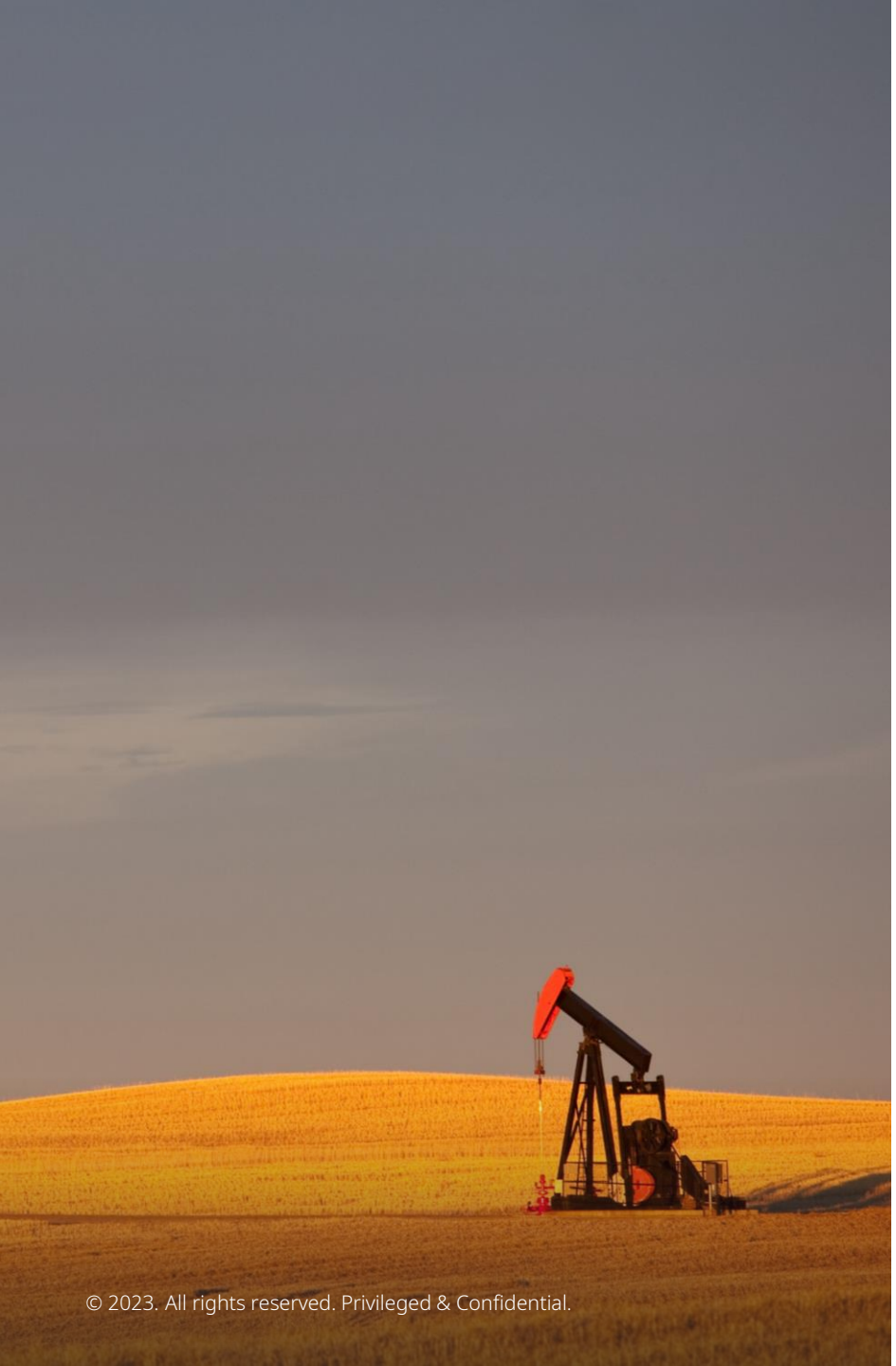
Setoguchi v Uber BV, 2023 ABCA 45

- An important recent case from the Alberta CA providing guidance about the gatekeeping role played by case management justices in certification applications
- Courts must carefully consider at certification if each element of a cause of action is, or ought to be, recognized at law; important for novel claims
- Perfectly valid for justices to ask what purpose the action serves in the context of class proceedings, especially if nominal damages are sought
- Key takeaway: certification is not to be treated as a "perfunctory exercise"; scrutiny is warranted at certification, even if not a merits hearing

LaSante v Kirk, 2023 BCCA 28

- Decision of the BC Court of Appeal about evacuation and water use orders issued in response to a spill
- Plaintiff sued for nuisance because of the orders, not the spill; plaintiff did so to avoid having to assess the degree of pollution to each property
- BCSC certified the class and the BCCA upheld the decision
- BCCA noted that the orders applied to all class members; orders affected the use and enjoyment of property; claim not "bound to fail"
- Illustrates the difficulty of pursuing environmental class actions in Canada

Bankruptcy and Insolvency

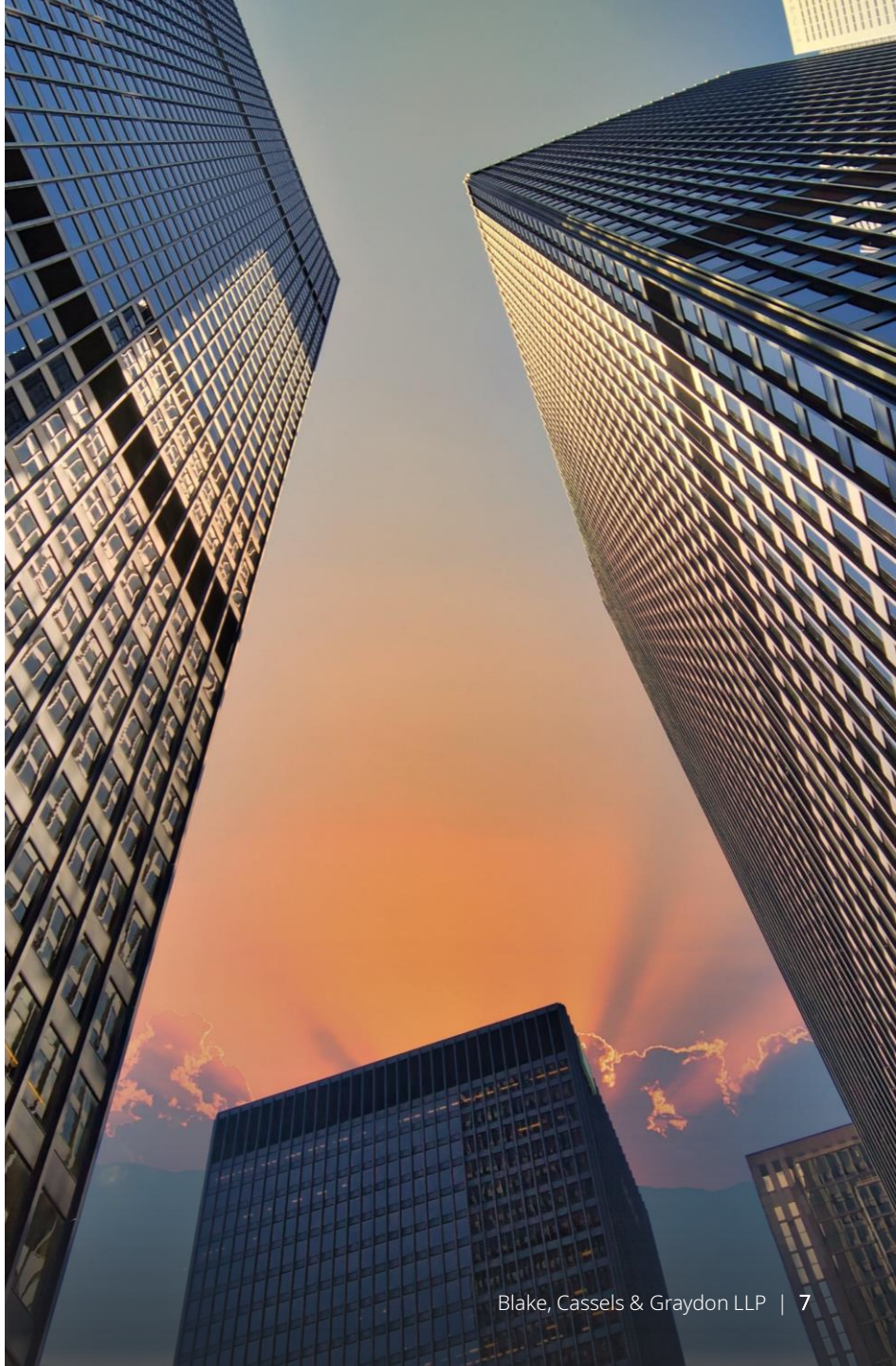


Orphan Well Association v Trident Exploration, 2022 ABKB 839

- Provides clarity about the treatment of abandonment and reclamation obligations following the SCC's *Redwater* decision.
- Key holdings:
  1. The AER and OWA are entitled to super priority from the sale proceeds of the entirety of a bankrupt oil and gas company's assets, including its realty.
  2. The AER and OWA have super priority of payment over municipal taxes incurred during receivership.
- Takeaway: Creditors may have more difficulty recovering debts owed to them by a bankrupt oil and gas company, even if those debts are secured against realty.

PricewaterhouseCoopers v Perpetual Energy, 2022 ABCA 111

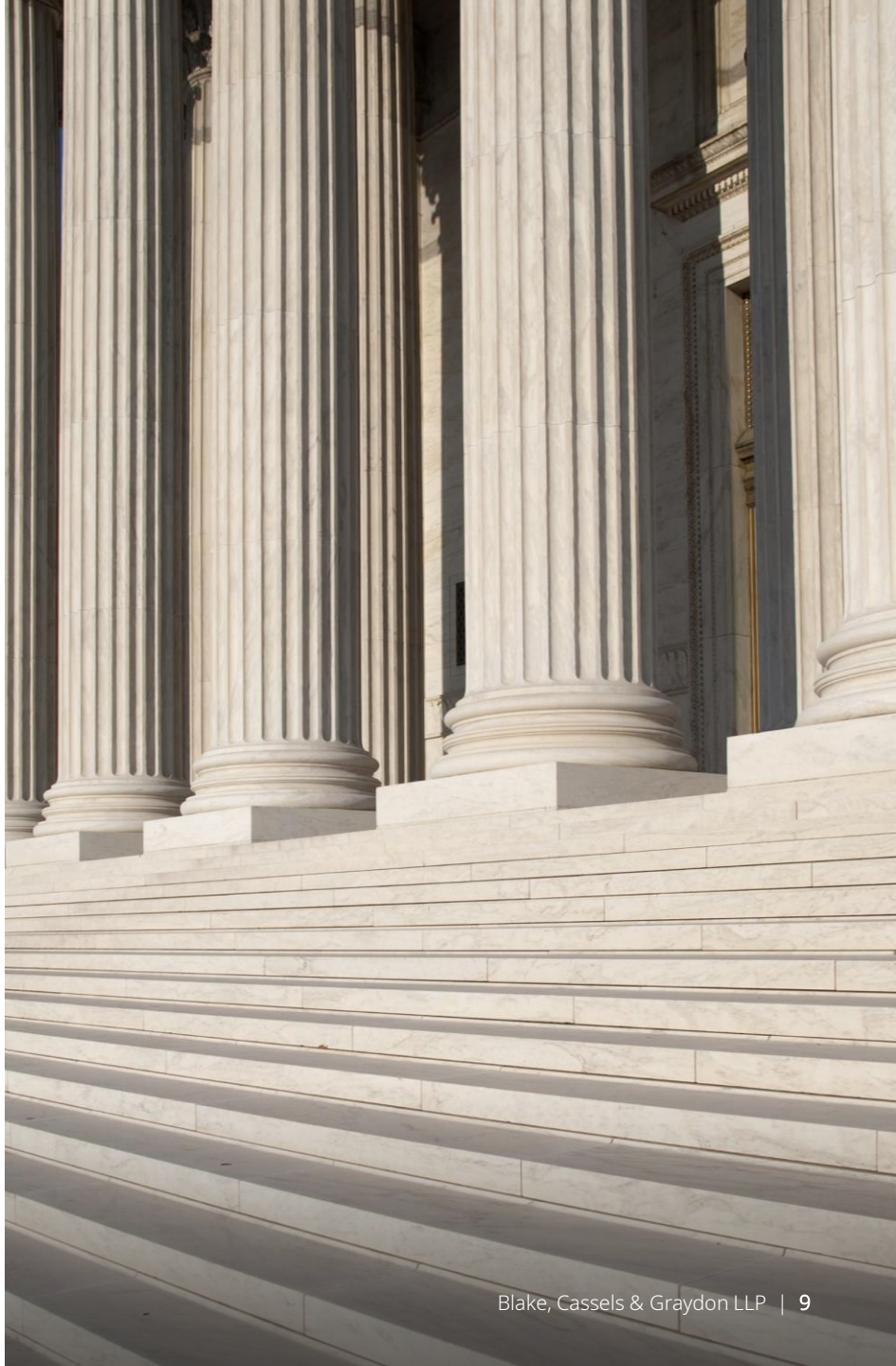
- Another decision clarifying the treatment of abandonment and reclamation obligations ("**ARO**") following the SCC's *Redwater* decision.
- Key holdings:
  1. ARO are an inherent part of the value of licensed oil and gas assets and operate to depress asset value.
  2. ARO must be accounted for as part of undertaking a balance sheet solvency test.
- Takeaway: Transfers that do not account for the value of ARO can render a corporation insolvent for the purposes of s. 96 of the *BIA*.



Arbitration

Peace River Hydro Partners v Petrowest Corp, 2022 SCC 41

- Application to stay claim brought by a court-appointed receiver in favour of arbitration.
- The SCC clarified the circumstances in which an arbitration agreement may be held to be inoperative pursuant to arbitration legislation.
- Key holdings:
  1. The *BIA* grants the courts statutory jurisdiction to declare that an otherwise valid arbitration agreement is inoperative.
  2. That will be appropriate where a centralized judicial process is necessary and submitting the dispute to arbitration would compromise the orderly and efficient conduct of a court-ordered receivership.
- Takeaway: The courts may render an arbitration agreement inoperative where required to meet the objectives of insolvency legislation: efficient dispute resolution and maximization of value for creditors.



Environment

0694841 BC Ltd v Alara Environmental Health and Safety Limited, 2022 BCCA 67

- Consultant prepared Environmental Site Assessments (ESAs) to support purchaser due diligence. Phase II ESA did not identify contamination.
- Original purchaser assigned purchase agreement to closely related company prior to closing.
- Assignee discovered contamination and sued consultant for negligent misrepresentation. The action was dismissed, and dismissal was upheld on appeal.
- Assignee could not rely on ESA prepared for assignor
    - Consultant disclaimed any liability to third parties
    - Assignee could not establish reasonable reliance despite close corporate relationship
- Takeaway: Ensure relevant parties are entitled to rely on ESAs or other environmental due diligence
    - Address reliance by related entities in contract with consultant
    - Obtain a reliance letter
    - Commission a separate report

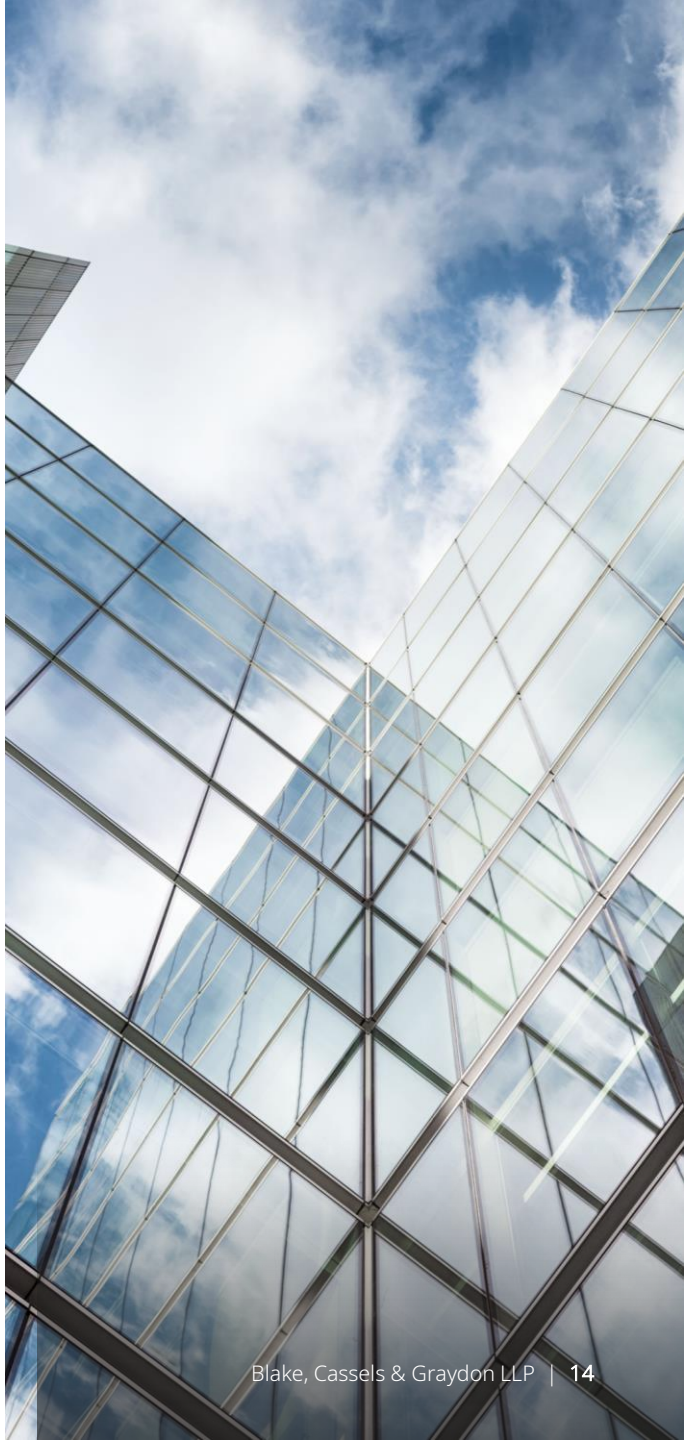
Cases to Watch

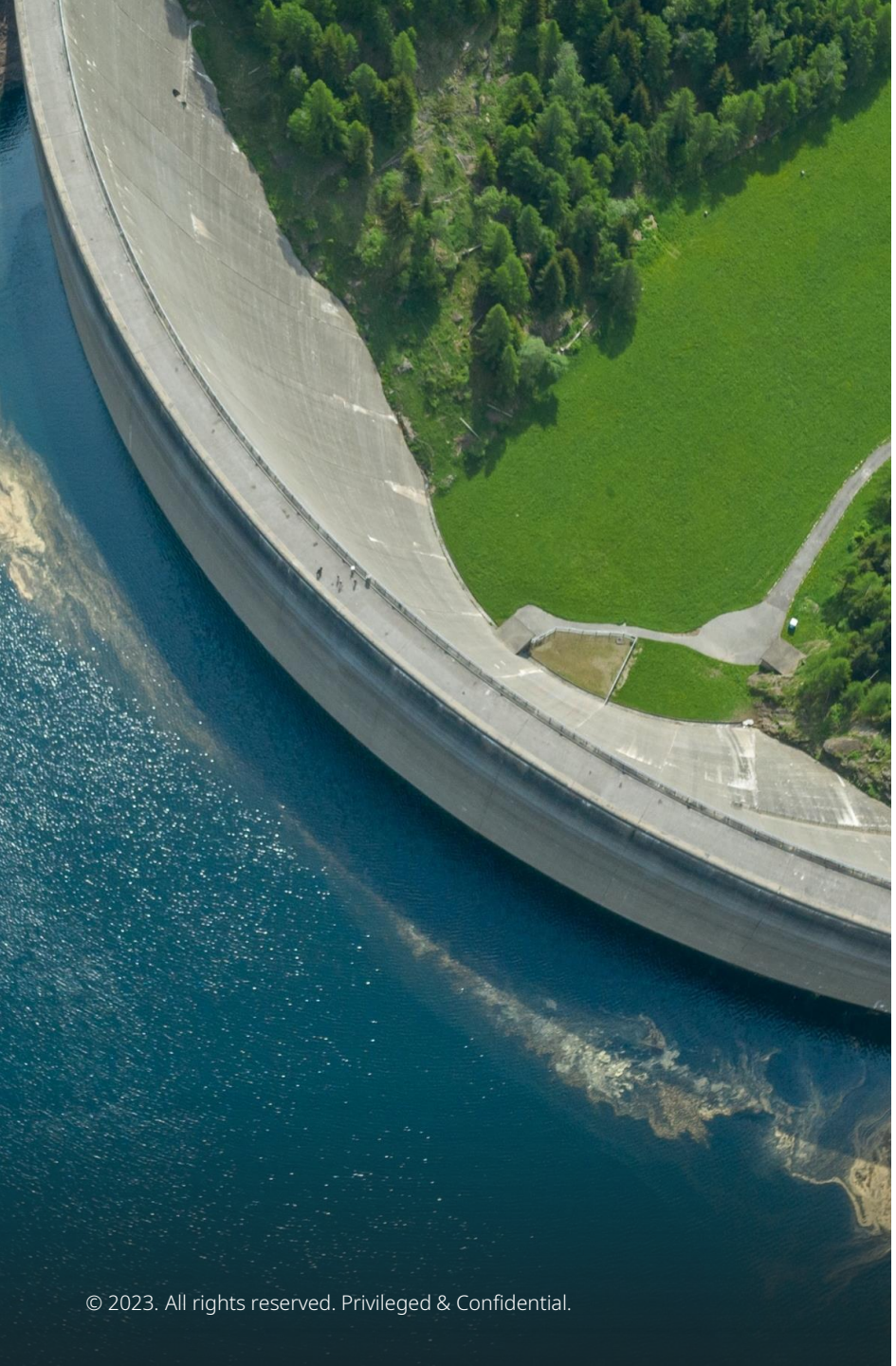
- *Reference re Impact Assessment Act*
  - ABCA majority held the IAA and *Physical Activities Regulations* are unconstitutional
  - SCC heard appeal in March 2023
- *ClientEarth v Shell plc*
  - UK case; may influence climate litigation in Canada
  - Application for leave to pursue derivative action denied
    - Directors do not have specific/unique duties to address climate risk. Proper balancing of competing considerations is a management decision with which courts are ill-equipped to interfere.
    - Court considered ClientEarth's motivation, good faith and views of other shareholders
  - ClientEarth has requested reconsideration via oral hearing

Indigenous Law

Benga Mining Ltd v Alberta Energy Regulator, 2022 ABCA 30

- Completeness determination does not preclude regulator from denying application due to information gaps/deficiencies
- JRP had sufficient evidence to consider Project benefits in a manner consistent with the honour of the Crown
  - Confidential benefits sharing agreements (BSAs) not filed as evidence; detailed assessment of socioeconomic benefits for Piikani and Stoney Nakoda Nations not possible
  - However, information about underlying BSA principles and socioeconomic benefits for Indigenous communities in the area was available
  - No positive obligation to request additional information regarding BSAs or specific project benefits; appellants had full participation rights and opportunity to present benefit-related information
- Takeaways:
  - Respond to information deficiencies identified during regulatory hearing process
  - Supportive interveners should fully participate and file evidence re: benefits (if possible)





Case to Watch

Thomas and Saik'uz First Nation v Rio Tinto Alcan Inc

- BCSC held that private actors may be found liable in tort for infringement of Aboriginal rights
- Defence of statutory authority available in the circumstances
  - Infringements resulted from government-authorized activity
  - Dam operated in strict compliance with terms of applicable authorizations
- BCCA scheduled to hear appeal June 19-23, 2023

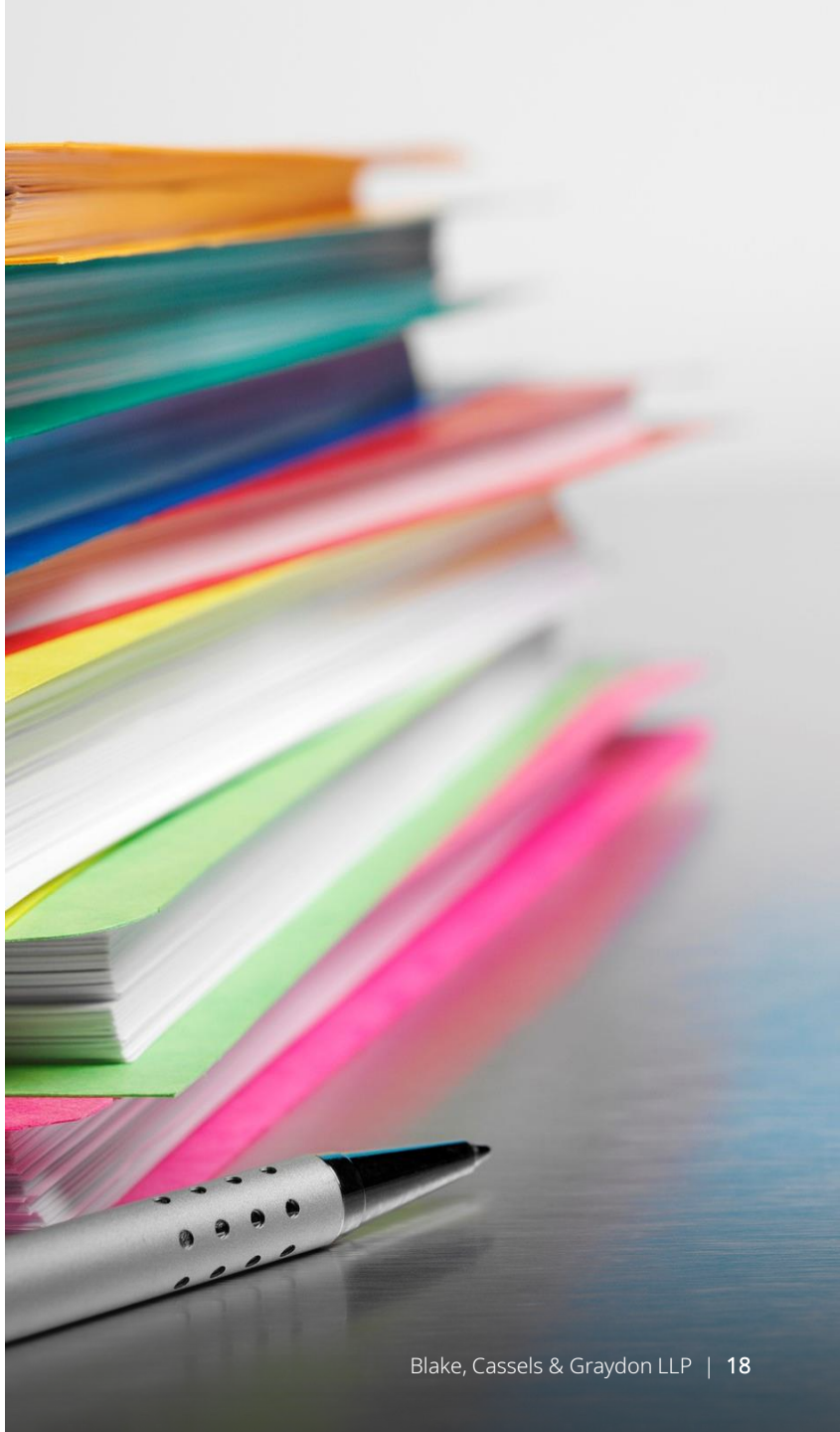
Contractual Interpretation

Greta Energy Inc et al v Pembina Pipeline Corporation, 2022 ONCA 783

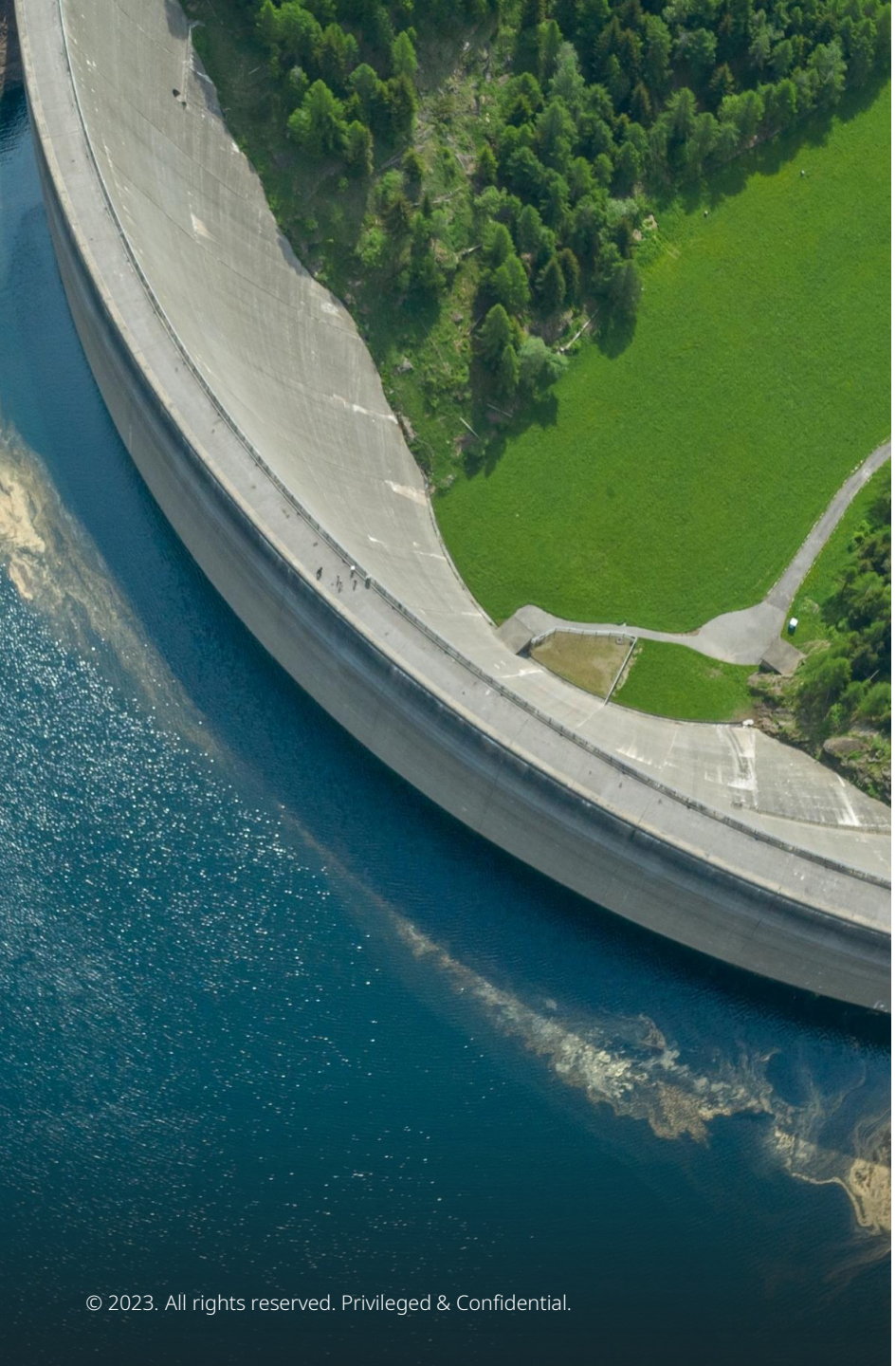
- Assets were marketed *en bloc* and then later subject to a purchase price allocation for the purposes of issuing Right of First Refusal ("ROFR") notices.
- Key holdings:
  1. A vendor owes a duty of good faith towards the ROFR holders. However, a vendor is not a fiduciary of the ROFR holders.
  2. It is not a violation of the duty of good faith to require bidders to bid for an *en bloc* package and then defer pricing allocation until after the bidding process concludes.
  3. It is not commercially unreasonable for a bidder to pay a price for any or all of the assets that would discourage a ROFR holder from exercising its rights.
- Takeaway: There is a competitive process between purchasers and ROFR holders. It is not improper for a purchaser to price assets in a manner that discourages the exercise of a ROFR notice.

10443204 Canada Inc v 2701835 Ontario Inc, 2022 ONCA 745

- Purchaser of a business alleged that the vendor made fraudulent misrepresentations about the gross revenues of the business.
- PSA contained entire agreement clause and right to conduct due diligence.
- Key holdings:
  1. An entire agreement clause cannot invalidate a fraudulent misrepresentation defence which, if established, will result in the contract being avoided or rescinded.
  2. The availability of due diligence rights do not deprive the purchaser of its right to avoid a contract based on fraudulent misrepresentation.
- Takeaway: Parties cannot contract out of a fraudulent misrepresentation claim.



Competition



Rogers/Shaw and Parrish & Heimbecker

- *Rogers* 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
- The Tribunal declined to block the transactions in both of these cases, disagreeing with the Bureau's analysis about the lessening of competition; *Rogers* illustrates the importance of presenting evidence that a divestiture buyer will be effective

David v Loblaw, 2021 ONSC 7331

- Long-running price-fixing conspiracy case about packaged bread
- Plaintiff alleged that the defendants participated in a price fixing agreement about bread products
- ONSC certified, but declined to certify against a number of the defendants' parent companies if plaintiff did not establish a cause of action
- Court rejected the theory that the parents "controlled" the subsidiaries
- Key takeaway: a parent corporation whose subsidiary is engaged in wrongdoing will not automatically be liable for the subsidiary's misconduct, without more

Cases to Watch

Competition Bureau and SEC Greenwashing Decisions

Keurig Canada Inc. Competition Bureau Investigation

- Keurig alleged its single-use K-pods were recyclable.
- Investigation revealed that K-Pods were not recyclable outside of Quebec and Ontario.
- Keurig agreed to pay $3 million fine and to change its representations.
- Canadian competition authorities are pursuing misleading environmental claims more frequently.

BNY Mellon SEC Investigation

- BNY Mellon implied to clients that certain investment decisions had undergone ESG quality review, but this was not always accurate.
- Following SEC investigation, BNY Mellon agreed to pay a $1.5 million penalty.
- The SEC is increasingly penalizing ESG misrepresentations by financial entities.

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