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Recent Judicial Decisions of Interest to Energy Lawyers

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Energy lawyers are frequently met with challenging legal issues within a rapidly changing regulatory and legal environment. It is essential to stay up to date on the latest caselaw from Courts across Canada, and this paper reviews and summarizes recent judicial decisions across a wide range of subject-matter. The authors review cases dealing with arbitration, Indigenous law, environmental law, bankruptcy and insolvency, contracts, corporate law including plans of arrangement, royalties, taxes, employment and others. Several themes emerge, including the increasing focus on environmental priorities and the expansion of director and corporate responsibility.

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I. ARBITRATION

Arbitration as a form of alternative dispute resolution is an increasingly preferred method of resolution among commercial parties, with Courts paying ever increasing deference to valid arbitration clauses.

A. EXPORT DEVELOPMENT CANADA V SUNCOR ENERGY INC[2]

Background

In this case, the Federal Court of Canada set out for the first time the criteria to be used by the Court when asked by parties to appoint an arbitrator under federal arbitration legislation.

Facts

Export Development Canada ("**EDC**") issued an insurance policy (the "**Policy**") to Suncor Energy Canada Inc. ("**Suncor**"). The Policy insures against certain losses caused by expropriation or political violence in respect of oil assets in a number of countries outside of Canada.[3]

In 2015, due to political unrest that affected oil and gas operations in Libya, Suncor claimed indemnity under the Policy for losses relating to Libyan oil assets. A first arbitration determined the value of Suncor's claimed losses and awarded Suncor $347 million payable by EDC.[4]

In 2022, EDC commenced a second arbitration against Suncor seeking to recover repayment of the $347 million. EDC alleges that the Libyan assets that had been subject to the first arbitration continue to have significant value and generate revenue for Suncor.[5]

The parties were unable to agree on the selection of the arbitrator for the second arbitration. Pursuant to the dispute resolution clause in the Policy, EDC applied to the Federal Court for an order, among other things, for the Court to appoint an arbitrator.[6]

Decision

As a preliminary matter, the Court observed that this was the first case where the Federal Court has acted as an appointing authority, as neither the Court nor the parties were able to find a prior reported or unreported decision where it had acted in such capacity.[7] Nevertheless, the Court found that it had jurisdiction to act as appointing authority by virtue of the statutory jurisdiction derived from the *Federal Courts Act,*[8] the *Commercial Arbitration Act,*[9] and the *Commercial Arbitration Code.*[10]

In reaching its decision, the Court addressed the appropriate criteria for selecting the arbitrator. In this case, Suncor proposed two "threshold criteria" for selecting an arbitrator – independence and impartiality, and qualification in Ontario law – whereas EDC argued that a holistic approach was preferable. Ultimately, the Court noted that Article 11(5) of the *CCAA* and *Code* provide flexibility and agreed with EDC's approach that the appointing authority should conduct a holistic assessment in view of

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[2] 2023 FC 1050 [*Export*].
[3] *Ibid* at para 3.
[4] *Ibid* at para 5.
[5] *Ibid* at para 5.
[6] *Ibid* at paras 6-8.
[7] *Ibid* at para 14.
[8] RSC 1985, c F-7.
[9] RSC 1985, c 17 (2nd Supp) [*CAA*].
[10] Schedule 1 to the *CAA; Export*, *supra* note 2 at para 16.

all the circumstances of the case, including the nature of the dispute the arbitrator will be called upon to decide.

In light of this flexibility, the Court set out criteria to be considered in this case. The Court assigned the highest priority to (i) qualifications and experience in Canadian law; and (ii) independence and impartiality.[11] Of medium importance was experience in arbitration generally or with similar commercial disputes.[12] The Court assigned low priority to qualifications or experience in civil law generally, familiarity with disputes in North Africa or the Middle East, and familiarity with the legal, cultural or historical context in Libya.[13] After applying these criteria to the list of candidates proposed, the Court appointed John Judge as arbitrator.[14]

Commentary

This case serves as a reminder for parties that an arbitration clause setting forth a detailed arbitrator selection process can potentially prevent the parties from having to make a Court application for an arbitrator appointment, which may save time and money.

Further, if the parties do need to apply to the Court for an appointment, a detailed list of criteria in the arbitration clause can streamline this process. In *Export*, the language in the arbitration clause played a significant role in the Court's determination of the most important criteria for arbitration selection in this case. Accordingly, parties should specifically list any criteria that should be considered when appointing an arbitrator.

For example, an energy company operating in Alberta may wish to specify in the arbitration clause that any arbitrator be qualified in Alberta law and have experience in the Alberta oil and gas industry.

II. BANKRUPTCY, INSOLVENCY & RECEIVERSHIP

Canada saw a steep rise in insolvencies in 2023, particularly in Q4, with the Office of the Superintendent of Bankruptcy noting that accommodation and food services, retail trade, and construction being particularly affected.[15] Many businesses which struggled through the pandemic years found themselves unable to raise new capital or deal with their debt obligations in an environment of high interest rates, and in the aftermath of government financial support programs.

A. WHITE OAK COMMERCIAL FINANCE LLC V NYGARD ENTERPRISES LTD[16]

Background

This case out of the Manitoba Court of Appeal involves the infamous Peter Nygard, the founder of a fashion empire who is presently serving time in prison for numerous sexual assaults over several decades. The salacious nature of Mr. Nygard's legal troubles crept into the *Companies Creditors Arrangement Act*[17] ("***CCAA***") proceedings of his companies when he applied to use surplus proceeds to help fund his legal fees in the criminal proceedings.

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[11] *Export*, *supra* note 2 at para 81.
[12] *Ibid* at para 88.
[13] *Ibid* at para 89.
[14] *Ibid* at para 97.
[15] "Insolvency Statistics in Canada – December 2023 (Highlights)" (last modified 28 February 2024), online: *Office of the Superintendent of Bankruptcy* <https://ised-isde.canada.ca/site/office-superintendent-bankruptcy/en/statistics-and-research/insolvency-statistics-december-2023-highlights>.
[16] 2023 MBCA 73 [*White Oak*].
[17] RSC 1985, c C-36.

Facts

Peter Nygard established a fashion empire based in Winnipeg, which encompassed at least nine corporations, holding assets including inventory and real estate in Manitoba, Toronto, New York and the Caribbean. After a failed attempt to file a Notice of Intention ("**NOI**") under the *Bankruptcy and Insolvency Act*[18] ("***BIA***") Proposal provisions, the nine companies were put into receiverships in March 2020.[19] Four of the companies were direct borrowers, owing $36 million in secured debt, while the other corporations were guarantors.[20] The Receiver realized $28 million from sale of real estate, and $62 million from the sale of inventory, leaving a surplus of $9.9 million (after fees and payment to the secured lenders).[21] One of the debtors and the owner of the real estate, Nygard Properties Limited ("**NPL**"), claimed a right to the surplus funds, while the unsecured creditors of the other debtor companies sought an order of "substantive consolidation" which would allow the surplus funds to be distributed to all creditors *pro rata*, across the debtor companies.[22]

Decision

Substantive consolidation is an equitable, discretionary remedy and the Court noted that this remedy is rarely ordered in Canada.[23] Assets (and liabilities) typically exist within their own corporate boundaries, and creditors cannot generally "reach over" into another corporation to enhance their recovery. This is especially the case where an order is sought consolidating insolvent corporations with solvent ones. However, in certain circumstances, where there is intertwining of corporate functions, the benefits outweigh prejudice, and it is otherwise fair and reasonable, the Court may make such an order.[24] In the present case, an order of substantive consolidation was made, over the objections of NPL, who also argued that they were subrogated to the senior lender's position after they had been paid out in full.[25]

Commentary

This is an important decision which potentially expands the doctrine of substantive consolidation in Canada. There were some technical legal issues at play, including whether NPL was insolvent or not (its asset values exceeded its liabilities, but it voluntarily filed an NOI proceeding admitting its insolvency). Overall, the Court was asked to consider who should benefit from the excess funds – a company controlled by a convicted sex offender, or the unsecured creditors of the related companies (including landlords, suppliers, vendors, gift card purchasers and taxing authorities). In that respect, the result is perhaps, unsurprising. The doctrine of substantive consolidation has not yet been applied in a case involving an insolvent Canadian oil and gas producer, but there is no reason why it could not be applied in in the appropriate circumstances, especially in situations where it could assist a regulator in disposing of the insolvent producer's abandonment and reclamation obligations and therefore tip the balance of convenience in favour of granting an order for substantive consolidation.

B. PEAKHILL CAPITAL INC V SOUTHVIEW GARDENS[26]

Background

This case demonstrates the pervasiveness of the "reverse vesting order" as a novel way to transfer assets of an insolvent company in such a way as to avoid the usual applications of taxes, fees

[18] RSC 1985, c B-3 [*BIA*].
[19] *White Oak*, *supra* note 16 at paras 8—9.
[20] *Ibid* at para 9.
[21] *Ibid* at para 12.
[22] *Ibid* at paras 13—15.
[23] *Ibid* at paras 24, 31.
[24] *Ibid* at para 26.
[25] *Ibid* at paras 19, 52.
[26] 2023 BCSC 1476.

and regulatory impediments which are triggered by a traditional asset sale. Instead of transferring **assets** from a debtor to a purchaser (as is traditionally done), the debtor company's **shares** are transferred to the purchaser after unwanted assets and liabilities are removed from the debtor company and vended into a new "residual' company.

Facts

On February 16, 2023, a large real estate development project in Vancouver was placed into receivership, with the mortgagees owed over $83 million.[27] After a Court-ordered Sales and Investment Solicitation Process ("**SISP**") a successful bidder was chosen, for a purchase price between $69-72 million. The successful bidder proposed to close the deal by way of an RVO, for the specific purpose of avoiding a Property Transfer Tax ("**PTT**") of approximately $3.5 million.[28] In any insolvency proceeding, the Court must approve a sale, and in this case, the Province of BC objected to the sale at the approval hearing.[29]

The Court had to consider whether to approve a sale with a structure designed solely for the purpose of gaining a tax benefit/avoiding a tax burden. The Court noted that most of the reluctance expressed by the Courts with respect to granting RVOs relates to the fact that RVOs may be used to circumvent creditor votes, or to otherwise prejudice creditors.[30] In the present case, the secured lenders were facing a shortfall under a traditional asset sale, but their shortfall would be $3.5 million less if the transaction proceeded as an RVO. There were no other creditors who would be prejudiced by the sale, as all other creditors were "out of the money".[31]

Decision

The Court confirmed the general principle that the objective of insolvency law is to maximize recovery for creditors, and an RVO does just that.[32] Using an RVO is not equivalent to wrongful tax avoidance, as many corporate transactions are done for tax reasons, and a share transaction would have been permissible outside of an insolvency proceeding.[33] While the Court had to contend with "floodgate" arguments from the Province, it ultimately approved the RVO structure here.[34] This decision is under appeal to the BC Court of Appeal.

Commentary

RVOs are enjoying a "boom" period in Canada over the last few years. Since they first gained popularity in 2020, they are increasingly used as the method of choice for closing an insolvency sale. The Courts have attempted to put the brakes of this "boom", and the leading decision from the Ontario Courts (*Harte Gold Corp, Re*)[35] asserts they should be "rarely" granted.[36] Despite this caution from the Courts, there seems to be no slowing down. When there is no demonstrated prejudice to creditors (i.e. there is no proof that creditors would be better off if the transaction were structured as a traditional asset sale), it is likely that the Court will approve an RVO. We are not aware of any instances of opposed reverse vesting order applications in Alberta to date, and the Courts in Alberta have shown willingness to approve such transactions in the appropriate circumstances.

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[27] *Ibid* at para 49.
[28] *Ibid* at paras 5—6.
[29] *Ibid* at para 10.
[30] *Ibid* at para 45.
[31] *Ibid* at para 50.
[32] *Ibid* at para 57.
[33] *Ibid* at paras 59—64.
[34] *Ibid* at paras 53—55, 83.
[35] 2022 ONSC 653.
[36] *Ibid* at para 38.

C. AQUINO V ERNST AND YOUNG[37] (ON APPEAL TO SCC)

Background

The Ontario Court of Appeal decision which was included in the 2022 edition of this paper[38] is now under consideration at the Supreme Court of Canada. The appeal was heard in December of 2023, and a decision is expected any day now. This case could set a new standard for corporate law, including the "corporate attribution" test, which challenges the formal separation between a corporation (as its own legal "person") and its directors/controlling mind.

Facts

The Bondfield Group of companies were controlled by the Aquino family. In 2019, Bondfield Construction Company Limited ("**Bondfield**") filed for creditor protection under the *CCAA*, and its affiliate Forma-Con Construction ("**Formacon**") was placed into bankruptcy.[39] After investigation, Court officers acting as Trustee and Monitor discovered that Bondfield and Formacon had illegally paid tens of millions of dollars to John Aquino, the son of the Bondfield Group's founder, through a false invoicing scheme.[40] The Monitor and Trustee obtained over $32 million in judgments against Bondfield and Formacon under section 96 of the *BIA* on the basis that the payments were "payments under value" by which John Aquino "intended to defraud, defeat or delay a creditor".[41] False invoices were created with respect to services or materials which were never provided. Therefore, each payment made by Bondfield and Formacon pursuant to these invoices were payments made in exchange for zero value – the ultimate "transaction under value".

John Aquino was the directing mind of Bondfield and Formacon. He denied that his actions constituted fraud, and contended that the payments were made with the approval and knowledge of all the directors of Bondfield. All the directors and shareholders were members of the Aquino family, including a father and two sons. At the same time as money was flowing out of the company under the false invoicing scheme, the directors were temporarily transferring money into the company to make it appear to their lenders that Bondfield was in a stronger financial position than it was.

The issue before the Court came down to an issue of intent. Fraudulent preferences or transfers under value under section 96 of the *BIA* have an element of intent involved. Under section 96 (1)(b), a Court can reverse transfers made within 5 years of bankruptcy if the debtor was insolvent at the time of the transfer or if the debtor intended to defraud, delay or defeat creditors. In this case, it was difficult to establish insolvency over the course of the last five years, as the corporate records were unreliable. Instead, the Court had to focus on the "intent" provision within section 96 of the *BIA*. It is important to note that the Monitor and Trustee did not assert other potential causes of action including fraud, oppressive conduct or breach of fiduciary duty.

Decision

The Court used the "corporate attribution" rule here, and for the first time considered its application in a bankruptcy context. This rule had previously been applied only in criminal and civil law contexts, and a rather restrictive test had been developed under previous caselaw, including the 1985 Supreme Court of Canada decision in *Canadian Dredge & Dock Co v The Queen*[42] ("***Canadian Dredge***") The Ontario Court of Appeal's ruling expanded the scope of this common-law rule in order to "attribute"

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[37] 2022 ONCA 202 [*Aquino*].

[38] Karen Fellowes & Natasha Doelman, "Recent Judicial Decisions of Interest to Energy Lawyers" (2022) 60:2 Alta L Rev 541 at 578.

[39] *Aquino*, *supra* note 37 at para 8.

[40] *Ibid* at para 9.

[41] *Ibid* at para 2.

[42] [1985] 1 SCR 662.

the intent of John Aquino (as an individual) onto the actions of Bondfield and Forma-Con (as corporations), even when certain "minimal requirements" were absent.

Specifically, the ONCA decided to reframe the analysis in the context of public policy considerations and stated that the underlying question to be addressed is, regardless of legal subject matter, who should bear responsibility for impugned actions of a corporation's directing mind, especially when those actions were done within the scope of his or her authority: the creditors or the fraudsters?[43]

The ONCA unsurprisingly concluded that permitting fraudsters to get a benefit at the expense of creditors would be perverse. In order to avoid this outcome, the ONCA attached the fraudulent intentions of John Aquino to Bondfield and Forma-Con in order to achieve the social purpose of providing proper redress to creditors.[44] This was despite the fact that under the traditional test in *Canadian Dredge*, the companies would have had several defences (including the argument that there was no fraud on the companies themselves and that the corporations did not benefit from the scheme).

At the Supreme Court of Canada, several intervenors filed briefs and made submissions, including the Insolvency Institute of Canada and the Attorney General of Ontario.

Commentary

This appeal was heard at the Supreme Court of Canada along with a "companion case' (*Lorne Scott v Doyle Salewski*[45] ("***Golden Oaks***"). Beyond the rather dry principles of *stare decisis* and statutory interpretation, this case presents an interesting opportunity for the Supreme Court of Canada to clarify its position not only with respect to "corporate attribution", but the extent to which policy concerns should be used to reformulate and expand well established legal tests beyond the contexts in which the caselaw was originally developed.

D. POONIAN V BRITISH COLUMBIA SECURITIES COMMISSION[46] (ON APPEAL TO SCC)

Background

The question to be determined on this appeal is whether fines and penalties imposed by regulatory bodies (including securities commissions) can be discharged or wiped out by a bankruptcy filing. The Supreme Court heard this appeal primarily because conflicting caselaw had developed at the Court of Appeal level in British Columbia and Alberta. The Alberta Court of Appeal decision at issue was previously summarized in the 2022 CELF paper[47] (*Hennig v Alberta Securities Commission*[48] ("***Hennig***").

Facts

Starting in 2008, Mr. and Mrs. Poonian were investigated by the BC Securities Commission with respect to a scheme to manipulate the share price of a publicly traded company they controlled. In 2015, the investigation culminated in an order levelling an administrative penalty against Mr. Poonian in the amount of $10 million and an administrative penalty against Mrs. Poonian in the amount of $3.5 million.[49] Both defendants were ordered to pay a "disgorgement order" in the amount of $7.3 million.[50] After several appeals, both defendants made personal assignments into bankruptcy in 2018. After several

[43] *Aquino*, *supra* note 37 at para 78.
[44] *Ibid* at para 79.
[45] 2022 ONCA 509.
[46] 2022 BCCA 274 [*Poonian*].
[47] Fellowes & Doelman, *supra* note 38 at 599.
[48] 2021 ONCA 104.
[49] *Poonian*, *supra* note 46 at para 4.
[50] *Ibid*.

years in bankruptcy, the defendants became eligible for discharge from bankruptcy, subject to an objection filed by their creditor, the BC Securities Commission. At the discharge hearing, the Court ruled that the administrative penalties and disgorgement order survived bankruptcy and could not be wiped out because they fit under one of the statutory exceptions in section 178 of the *BIA*.[51]

Generally speaking, the *BIA* encourages rehabilitation of bankrupts by giving them a "fresh start" and wiping out most of their pre-filing debts upon discharge. However, certain statutory exceptions exist based on societal concerns including damages for sexual assault, fraud, claims debts based on alimony or child support, student loans (within 7 years of graduation), etc. Two of these special exceptions were invoked against the defendants: 1) debts or liabilities arising from obtaining property by false pretences or fraudulent misrepresentation; and 2) fines, penalties or restitution orders or other orders similar in nature imposed by a Court.[52] At the trial level, the Courts denied the discharges, and the BC Securities Commission applied for a declaration that one or both of the exceptions applied. The declaration was granted by the Chambers Judge, who relied heavily on what was then the leading authority, the Alberta Court of Queen Bench decision of Justice Romaine in *Hennig*. An appeal was dismissed by the BCCA with respect to the "false pretences and fraudulent misrepresentation' exception, but allowed with respect to the "fines and penalties" exception.

Decision

On appeal to the Supreme Court of Canada, the appellants argued that the exceptions should be construed narrowly, in the same way as the Alberta Court of Appeal had applied those exceptions in *Hennig*.[53] The Respondents argued for a broad, purposive and dynamic analysis which would prioritize the public's censure of morally or seriously offensive behaviour, over and above the rehabilitative purpose of the *BIA*. Mr. and Mrs. Poonian did not make for particularly sympathetic bankrupts, as it was found they had deliberately targeted vulnerable people to convince them to liquidate their RRSPs and pensions in order to invest in their inflated stock.[54] Despite the millions of dollars allegedly reaped in the scheme, the bankruptcy Trustee was only able to collect less than $5,000 for creditors.[55]

Commentary

This case has garnered intense interest, not only in the bankruptcy community, but also for regulators and administrative bodies across a wide sector of industries and activities. Nine intervenor briefs were filed, including on behalf of the Canadian Association of Insolvency and Restructuring Professionals, the Ontario Securities Commission, the Alberta Securities Commission, the Attorney General of Ontario, the Federation of Law Societies of Canada, the Attorney General of Saskatchewan, the Office of the Superintendent of Bankruptcy, and the Attorney General of British Columbia and the Osgood Investor Protection Clinic.

Increasingly, regulatory tribunals and agencies are levelling huge penalties and fines in order to express public censure of misbehaviour which falls below the level of criminal behaviour but causes harm to society. It is increasingly recognized that specialized administrative tribunals (including the Alberta Energy Regulator and the Alberta Securities Commission) are a better way of addressing such "quasi-criminal" behaviour, and the power and reach of such tribunals (which are not Courts and do not have the same rules, protections and process as a Court) is continuing to expand. A balance must be struck weighing the benefits and costs of judicial and administrative adjudication, especially given the impact of such rulings on the alleged perpetrators and the alleged victims, including the general public and industry.

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[51] *Ibid* at para 30.

[52] *Ibid*.

[53] *Poonian v British Columbia Securities Commission*, SCC File No 40396 (Factum of the Appellants at paras 36—57).

[54] *Poonian v British Columbia Securities Commission*, SCC File No 40396 (Factum of the Respondent at paras 7).

[55] *Ibid* at para 28.

III. CONTRACT CASES

In 2023, Canada saw a significant firming up of the common law on the principles of contract interpretation, the damages requirement of the duty of honest performance, the validity of non-competition clauses, as well as its first interpretation of emojis in contract formation. This has both clarified the law in certain areas as well as opened up a variety of new questions in others.

A. RUEL V REBONNE[56]

Background

This case involves an alleged breach of a non-competition clause following the sale of a business and the associated award for damages.

Facts

The Appellant entered into a purchase and sale agreement with Cresco Darren Ruel for the sale of a home décor business called Down the Beaten Path ("**DBP**"). This purchase and sale agreement had a non-competition clause providing a 5-year prohibition on operating a similar business to DBP, soliciting the customers of DBP, or offering services to the customers of DBP which DBP could provide, or acting in a manner which may be detrimental to DBP's relationship with said customers.[57]

In the years that followed the sale of DBP, the appellant continued to work with Cresco to facilitate the transition of the business and was hired as a commissioned salesperson.[58] The relationship ended in 2017. Prior to the relationship ending, the appellant had incorporated a similar business called Mood Dekor. The appellant had advised Cresco that it would only offer its services to US based customers. After the termination of the relationship between the Appellant and Cresco, the Appellant sold directly to the customers of DBP via his newly incorporated business Home Dekor.[59]

Following a trial, the trial judge found that the non-competition clause was valid and enforceable, and that the Appellant had breached said clause. The appellant appealed on the basis that (i) the non-competition clause was unenforceable because it was vague and overly broad, (ii) he did not breach the non-competition clause, and (iii) on the quantification of damages.

The Decision

The appeal involved various issues of fact and law, including whether the non-competition clause was reasonable and whether it had been violated in this case. The Court of Appeal concluded that the competition clause was reasonable in its terms of activities, territory and duration.

There was also a discussion of the remedy of disgorgement of profits and expectation damages.

With respect to the claim for mental distress arising from breach of contract, the Court of Appeal agreed with the appellant that the trial judge erred by failing to apply the test from *Fidler v Sun Life Assurance Co of Canada*.[60] The *Fidler* test requires that the Court be satisfied that an object of the contract was to secure a psychological benefit that brings mental distress upon breach within the reasonable contemplation of the parties, and that the degree of mental suffering caused by the breach

[56] 2023 ABCA 156 [*Ruel*].
[57] *Ibid* at para 3.
[58] *Ibid* at para 6.
[59] *Ibid*.
[60] 2006 SCC 30.

was of a degree sufficient to warrant compensation.[61] As such, the ABCA allowed the fourth ground for appeal and the award for mental distress damages was overturned.[62]

Commentary

Non-competition clauses have been subject to a great deal of judicial scrutiny over the years, and this case is a succinct statement from the Alberta Court of Appeal which clarifies the law with respect to such clauses, and in particular, the remedies which flow from such a breach. Further, this case provides helpful commentary to business owners and counsel involved in corporate deals in structuring non-competition clauses, including whether such clauses are overly restrictive.

B. BHATNAGAR V CRESCO LABS INC[63]

Background

A business was sold under the terms of an "earn-out" provision which extended over the course of three years, with a change of control provision providing for accelerated payment. The vendors claimed that the purchasers breached the duty of honest performance post-closing.

Facts

On February 19, 2019, a vape products business incorporated in Ontario operating as 180 Smoke ("**180 Smoke**"), was acquired by a U.S. publicly traded company buyer operating as Origin House. Under the share purchase agreement (the "**SPA**"), Origin House paid the shareholders $25M on closing, with an additional $15M payable conditional on 180 Smoke hitting certain revenue and licensing milestones in each of the first three years post-acquisition.[64] Before the SPA was executed, the shareholders of 180 Smoke became aware of a potential acquisition of Origin House. They had a provision added to the SPA providing that a change of control of Origin House during the three year earn-out period would trigger the shareholders' entitlement to the full amount of the earnout for the year of the change of control and for any following years that remained in the three-year earnout period. Such change of control payment was referred to as the "Unearned Milestone Payment".[65]

On April 1, 2019, Origin House announced that it had entered into a purchase agreement with the Respondent Cresco Labs Inc. ("**Cresco**"), by which Cresco would purchase Origin House.[66]

When the transaction ultimately closed in January 2020, (a) the key principals had already resigned in September 2019; (b) the revenue and license milestone had not been met by the target for the 2019 year; and (c) since the closing date was in 2020, the Unearned Milestone Payment was paid for 2020 and 2021 only.[67] Significantly, Origin House did not inform 180 Smoke that the new closing date was January 15, 2020, despite being advised of this by Cresco on October 20, 2019.[68]

The shareholders of 180 Smoke brought an application claiming that Origin House breached the duty of honest performance by not informing them of the delayed closing date and sought payment of the 2019 revenue milestone pursuant to the terms of the SPA as damages, or alternatively, that any failure on their part to achieve the 2019 revenue and license milestones was a result of breaches of contract by Origin House.

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[61] *Ruel*, *supra* note 56 at para 19.
[62] *Ibid* at para 21.
[63] 2023 ONCA 401 [*Bhatnagar*].
[64] *Ibid* at paras 5—6.
[65] *Ibid* at para 7.
[66] *Ibid* at para 8.
[67] *Ibid* at paras 12—14.
[68] *Ibid* at para 13.

Decision

In *CM Callow Inc v Zollinger*,[69] the Supreme Court of Canada confirmed the contractual duty of honest performance.

The Application Judge found that Origin House had breached its duty of honest performance by repeatedly advising the shareholders that the transaction would close in 2019, and neither correcting nor updating that information once Origin House was informed that the closing date would be pushed to January 2020.[70] However, no damages were awarded because the Application Judge concluded that, even if the shareholders had been informed of the change of closing date in October 2019, they would not have been able to meet their revenue or license milestones or force the transaction to close.[71] Further, the Application Judge would not presume that there had been a lost opportunity that should result in damages since no evidence of such an opportunity was presented.[72]

180 Smoke was unsuccessful on appeal. The Ontario Court of Appeal rejected the proposition that *Callow* created an automatic legal presumption of loss where a breach of the contractual duty of honest performance is found.[73] The Court of Appeal held that evidence must be presented by the claimant to establish a loss arising from the breach of a party's duty of honest performance.[74]

The Court of Appeal also held that the Application Judge did not err in refusing to award damages on a basis other than expectation damages. The Court of Appeal, relying again on *Callow*, explained that the ordinary approach to a breach of the duty of honest performance should result in expectation damages, which return the injured party to the position it would have been in had the duty been performed.[75]

Commentary

This decision is a good example of the recent application of the law relating to the duty of honest performance. It clarifies that there is no automatic presumption of loss when there has been a breach of honest performance. A claimant must bring evidence of the loss they suffered because of the breach of honest performance, and parties ought to carefully consider what evidence is available to support a claim of lost opportunity.

C. SOUTHWEST TERMINAL LTD V ACHTER LAND[76]

Background

This case involves a grain trading contract, the terms of which were accepted in an unconventional and modern way: through an emoji.

Facts

South West Terminal Ltd, ("**SWT**") a grain and crop inputs company had been purchasing grain from the defendant farming corporation Achter Land & Cattle Ltd ("**Achter**") since 2012. Typically, the Plaintiff's representative would have conversations in person or over the telephone with the Defendant's

[69] 2020 SCC 45.
[70] *Bhatnagar*, *supra* note 63 at para 20.
[71] *Ibid* at para 22.
[72] *Ibid*.
[73] *Ibid* at para 55.
[74] *Ibid*.
[75] *Ibid* at paras 79—80, 84.
[76] 2023 SKKB 116 [*Achter*].

representative and agree on a price and volume of grain/crops, and then the Plaintiff's representative would draft a contract and send it to the Defendant's representative for approval.[77]

In March 2021, a grain buyer representative for SWT sent a text to farmers, including Achter, indicating that the company was looking to purchase flax for delivery in the fall of 2021. Following this text, one of the owners of Achter called the SWT representative resulting in SWT preparing a contract drafted for Achter to sell SWT 87 tonnes of flax for $669.26 per tonne to be delivered in November. SWT's representative signed the contract, then took a photo of it using his cell phone and texted the photo of the contract to the Defendant's representative with a message: "Please confirm flax contract". The Defendant's representative texted back a thumbs-up emoji.[78]

Achter did not deliver the flax to SWT in November 2021, and SWT sued for breach of contract and damages of $82,200.21 plus interest and costs. SWT then brought a summary judgment application.

The parties disagreed as to whether there was a meeting of the minds, which is the basis of a contractual obligation. SWT argued that a thumbs up emoji from Achter's owner meant "I agree", "I accept", or some sort of positive affirmation. Meanwhile, Achter took the position that the thumbs up emoji meant that the owner of Achter acknowledged receipt of the contract, but not that he approved the contract.[79]

Achter argued that an actual signature is essential as it confirms a person's identity and conveys acceptance, allowing a thumbs up emoji to replace a signature on a contract would open the flood gates to cases asking for interpretations of various emojis.[80] Further, the requirements of subsection 6(1) of the *Sale of Goods Act*[81] (the "***SGA***") were not met in the circumstances as there was no note or memorandum of the contract made or signed by the parties.[82]

Decision

The Court did not accept Achter's arguments and awarded SWT damages of $82,200.21 plus interest and costs, representing the entirety of the damages sought by SWT in this summary judgment motion.[83] Instrumental in coming to this decision was the context in which the emoji was sent.

The Court held that there was a valid contract between the parties and that Achter had breached the contract by failing to deliver the flax. In coming to this conclusion, the Court considered the surrounding context set out in the affidavits and cross-examination transcripts provided in the application. It found that there was "an uncontested pattern of entering into what both parties knew and accepted to be valid and binding deferred delivery purchase contracts on a number of occasions" based on the evidence, which included the Defendant's representative accepting contracts in the past by texting words like "ok", "yup" or "looks good" to SWT's representative, as well as Achter's actions following the sending of the fateful thumbs up emoji.[84] Notably, the photo of the contract was sent shortly after the telephone conversation between the SWT representative and the owner of Achter and no further actions were taken by either party to negotiate the contents of the contract.

The Court confirmed that the test for agreement to a contract for legal purposes whether their conduct would lead a reasonable person to conclude that they had intended to be bound as opposed to

[77] *Ibid* at para 19.
[78] *Ibid* at para 96.
[79] *Ibid* at para 21.
[80] *Ibid* at para 40.
[81] RSS 1978, c S-1.
[82] *Achter*, *supra* note 76 at paras 52—54.
[83] *Ibid* at paras 67—69.
[84] *Ibid* at para 21.

the subjective intent of each party. In determining whether there was a meeting of minds, the Court is able to consider the surrounding circumstances as opposed to solely what is written in the contract.[85]

The Court also held that the provisions of section 6 of the *SGA* had been met, specifically that the contract was in writing and was signed by both parties. The thumbs up emoji was held to be a valid way to convey the purposes of a signature in these circumstances.[86]

Commentary

While cognizant of the floodgates argument, the Court clearly recognized that it cannot, nor should it, attempt to stem the tide of technology and common usage: "this appears to be the new reality in Canadian society and Courts will have to be ready to meet the new challenges that arise from emojis and the like".[87]

The parties' history of entering into grain contracts and their actions immediately surrounding the fateful thumbs up emoji played a major role in the Court's finding that the emoji conveyed acceptance of the contract by Achter. While not every dispute of this type will occur in the context of an ongoing commercial relationship, the decision reinforces the Court's finding that all forms of digital communication, will be given legal validity if a Court can be convinced that they were reasonably understood to convey the intent of the parties.

IV. CORPORATE CASES

This year's corporate cases emphasize the judicial system's growing preference towards prioritizing equitable solutions when parties have not come to the Court with clean hands while also reinforcing the validity of the business judgment rule and the discoverability requirements for the running of limitation periods.

A. PONCE V SOCIETE D'INVESTISSEMENTS RHEAUME LTEE[88]

Background

A corporation sued two directors and presidents alleging breach of their fiduciary duties in connection with the sale of their shares.

Facts

The majority shareholders ("**Shareholders**") of three Quebec insurance corporations within Groupe Excellence ("**Groupe**"), sued the two directors and presidents of Groupe (the "**Presidents**") for breach of their duties of loyalty, information, and good faith in connection with the sale of their shares.[89]

In 2002, the Presidents entered into an agreement establishing forms of incentive pay in the event of a sale of the Shareholders' shares (the "**Agreement**").[90]

In 2005, Industrial Alliance Insurance and Financial Services Inc ("**IA**"), informed the Presidents of its interest in acquiring the Group. Rather than informing the Shareholders of IA's interest, the Presidents held confidential discussions with IA.[91]

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[85] *Ibid* at para 18.
[86] *Ibid* at paras 60—62.
[87] *Ibid* at para 40.
[88] 2023 SCC 25 [*Ponce*].
[89] *Ibid* at paras 13, 23.
[90] *Ibid* at paras 15—16.

In the following months, the Shareholders sold their shares to the Presidents while completely unaware of IA's interest in acquiring Groupe. Shortly afterwards, the Presidents flipped those shares to IA for an immense profit. The Shareholders only found out about this sale after the fact, by reading a press release.[92] The Shareholders sued the Presidents for the profit arising from the Presidents' failure to notify them of IA's interest in acquiring the group in advance of the purchase of their shares.

Decision

The Superior Court ruled in the Shareholders' favour and ordered the Presidents to pay the Shareholders $11,884,743, an amount equal to the profits earned by the Presidents.[93] The Court found that, under both the *Civil Code of Québec*[94] (the "***Civil Code***") and the *Canada Business Corporations Act*[95] (the "**CBCA**") the Presidents, in their capacity as directors, owed duties of honesty, loyalty, prudence and diligence to Groupe. The trial judge found that these same duties could be extended to the shareholders because of the Agreement.[96]

The Court of Appeal affirmed the trial judgment and upheld the remedy awarded by the trial judge.[97] However, it was of the view that the trial judge erred in finding that the duties of honesty and loyalty provided for in the *Civil Code* and the CBCA could be extended to the shareholders.[98] The Court held that the Presidents' conduct fell within the three criteria set out in *Bank of Montreal v Bail Ltée*,[99] and that the Presidents breached their obligations of contractual good faith to inform the Shareholders of IA's interest in acquiring the Group.[100] The Presidents appealed to the Supreme Court of Canada.

The Supreme Court agreed to hear the appeal from the Court of Appeal's decision on two issues: (i) does the Presidents' failure to inform the Shareholders of IA's interest in acquiring Groupe constitute a breach of their duties of loyalty, information and/or good faith in the absence of any explicit contractual obligation in the Agreement; and (ii) if the Presidents should be held liable for such a breach, what is the appropriate remedy to adequately compensate the Shareholders?[101]

In determining the scope of the duties of the Presidents to the Shareholders in these circumstances, the Court examined four legal principles under Quebec civil law including the fiduciary or "maximalist" loyalty duties, the extracontractual obligation to inform, the implied contractual obligation to inform, and the obligation to perform the contract in good faith.[102]

Quebec civil law cases generally do not allow disgorgement of profits in the case of a simple breach of the obligation of good faith. Damages are intended to compensate the aggrieved party based on the harm it has suffered directly.

However, in certain situations the breach of the obligation of good faith prevents the aggrieved party from proving the injury they have sustained and in such cases the Court may presume that the loss suffered is equivalent to the profits obtained by the counterparty. In this case, the Presidents were unable

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[91] *Ibid* at paras 18-21.
[92] *Ibid* at paras 21-22.
[93] *Ibid* at paras 25, 29.
[94] CQLR c CCQ-1991.
[95] RSC 1985, c C-44.
[96] *Ponce*, *supra* note 88 at para 27.
[97] *Ibid* at para 30.
[98] *Ibid*.
[99] [1992] 2 SCR 554.
[100] *Ponce*, *supra* note 88 at para 31.
[101] *Ibid* at para 35.
[102] *Ibid* at para 38.

to rebut this presumption and the Court concluded that the Shareholders were entitled to the profits of $11,884,743 generated by the Presidents in their sale of the shares to IA.[103]

Commentary

While grounded in Quebec civil law, this case is an excellent example of the Supreme Court of Canada's views on the duties of loyalty, information and good faith in the context of directors and officers, particularly when there is evidence on intent to conceal.

B. 17193349 ALBERTA LTD V 1824766 ALBERTA LTD[104]

Background

This case involved a heated dispute between shareholders and directors of a real estate development project, and whether it was appropriate to allow a derivative action to be pursued on behalf of the corporation.

Facts

1824766 Alberta Ltd ("**182**") was incorporated with the purpose of being the investment vehicle and registered title holder for the Tuxedo Project (the "**Project**"), a small residential condo development.[105]

Mr. Anderson and Mr. Thomas invested in the Tuxedo project through a company known as 17193349 Alberta Ltd ("**171**") and Mr. Devani invested through 182. Both 171 and Mr. Devani were shareholders in 182 however Mr. Devani held all of the voting shares in 182. Mr. Thomas was the construction manager of BMP Construction Management Ltd. ("**BMP**").[106]

182 and 171 entered into a financial lending agreement which provided for (i) a line of credit of up to $200,000 advanced by 171, (ii) 182 would retain the servicers of BMP, (iii) 182 would provide 171 security including a director's resolution of 182 authorizing it to enter into the credit facility, (iv) promissory notes from 182 in favour of 171, and (v) an undertaking by 182 to provide an update of the construction and report on all advances to 171.[107]

The Project was completed in December 2015 and was significantly over budget, with some subcontractors left unpaid.[108] By 2016, the mortgages on the property went into default. 182 subsequently sold off the units in the Project to friends of Mr. Devani's. The proceeds of these sales were paid in full to 182, which then used part of the proceeds to pay out the mortgages on the units.[109]

171 brought an application seeking leave to pursue a derivative action on behalf of 182 seeking, amongst other things, a declaration that 182 and 171 are entitled to constructive trusts against the Tuxedo Project lands, a full accounting of the net proceeds of the sale of the units, and Judgment against the purchasers.[110]

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[103] *Ibid* at para 118.
[104] 2023 ABKB 207 [*171 Alberta*].
[105] *Ibid* at para 7.
[106] *Ibid* at para 8.
[107] *Ibid* at para 9.
[108] *Ibid* at paras 11—12.
[109] *Ibid* at paras 16, 18.
[110] *Ibid* at para 23.

Decision

Notably, leave to pursue a derivative action is an equitable remedy. In order to bring a derivative action on behalf of a corporation under section 240 of the Alberta *Business Corporations Act*[111] ("***ABCA***"), there are four statutory requirements to be met: (i) the applicant must meet the requirements to be a "complainant" under the *ABCA*, (ii) adequate notice to the directors of the corporation must be given, (iii) the complainant must be acting in good faith in bringing the application, and (iv) the Court must be satisfied that the derivative action would be in the interests of the corporation.

The primary concern when determining the existence of good faith is whether the proposed derivative action is frivolous or vexatious. Some self-interest by 172 in bringing the application is permissible as long as these interests aligns with that of 182, animosity alone is insufficient to determine whether 172 lacked good faith. While the principals of 171 may have been motivated by a vendetta against the principal of 182, it did not reach a level of bad faith resulting in a finding that the requirement of good faith was satisfied.[112]

Determining whether the action was brought in the interests of 182 is a balancing exercise including a cost/benefits analysis of bringing the action. Actions that are doomed to fail are never in the interests of 182 but the Applicants are also required to do more than establish that the action will not fail and must prove that benefits of bringing the action outweigh the costs. The Court found that the derivative action was likely statute-barred pursuant to the limitations period prescribed by the *Limitations Act*[113] expired in July 2018 and the action was not in the interests of 182 on a cost/benefit basis.[114]

Finally, as derivatives are an equitable remedy, the Court retains a residual discretion to refuse a derivative action even where the statutory tests are met, and Justice Bensler asserted that even if the statutory tests were met that she would not exercise her discretion in these circumstances as the pleadings failed to disclose a demonstrable wrong to 182 that required redress.[115]

Commentary

In order to succeed in a derivative action, the wrong must be done to the corporation and not to an aggrieved individual shareholder or lender. The Court's emphasis on the business judgment rule in determining what is in the interests of a corporation as well as the residual discretion to refuse derivative actions even where the statutory tests are met based on its foundation as an equitable remedy are important points of law for parties looking to bring derivative actions.

V. EMPLOYMENT

As recent years have proved, labour and employment law is continuously evolving and adapting to meet the challenges of the rapidly changing world. In 2023, Courts considered the law surrounding implementation of mandatory workplace policies and whether the independent tort of harassment can exist.

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[111] RSA 2000, c B-9.
[112] *171 Alberta*, *supra* note 104 at paras 30—35.
[113] RSA 2000, c L-12 [*Limitations Act*].
[114] *171 Alberta*, *supra* note 104 at paras 36—44.
[115] *Ibid* at paras 50—52.

A. POWER WORKERS' UNION V CANADA (ATTORNEY GENERAL)[116]

Background

In this case, the Federal Court of Appeal considered application for interim and interlocutory injunctions to suspend the implementation of policies regarding "pre-placement and random alcohol and drug testing of safety-critical workers employed by the respondent employers at Class I high-security nuclear power plants".[117]

Facts

The appellants were unions representing employees in safety-critical positions and individual affected members. The respondent employers and licensees operate all licensed Class 1 high-security nuclear facilities regulated by the Canadian Nuclear Safety Commission ("**CNSC**").[118]

In January 2021, the CNSC issued a direction entitled REGDOC-2.2.4, Fitness for Duty, Volume II: Managing Alcohol and Drug Use Version 3 ("**RegDoc**"). The RegDoc requires license holders operating Class 1 high-security nuclear facilities to implement employee alcohol and drug testing in certain prescribed circumstances.[119]

The RegDoc requires licensees to conduct drug and alcohol testing of workers in safety-critical and safety-sensitive positions in five circumstances. Three of these five circumstances – reasonable grounds testing, post-incident testing, and follow-up testing upon return to work after confirmation of a substance use disorder – were not challenged by the appellants. The appellants challenged the other two circumstances – pre-placement testing for workers who are to work in safety-critical positions, as a condition of placement, and random testing for workers in safety-critical positions (the "**Impugned Provisions**").

In the initial decision, the Federal Court concluded that the Impugned Provisions did not unjustifiably violate sections 7, 8 and 15 of the *Canadian Charter of Rights and Freedoms*[120] (the "***Charter***") and CNSC's adoption of the RegDoc was reasonable (the "**Merits Decision**").[121] The appellants appealed the Merits Decision on the basis that the judge erred in concluding that (i) the impugned provisions of the RegDoc did not violate sections 7, 8 and 15 of the *Charter*; (ii) the CNSC acted within its jurisdiction by adopting mandatory requirements through a regulatory requirement; and (iii) the reasons for adopting the Impugned Provisions were sufficient. The appellants now seek to suspend the implementation of the Impugned Provisions pending appeal of the Merits Decision.

Decision

The Federal Court of Appeal primarily relied on the test for obtaining an interlocutory injunction as set out in *RJR-MacDonald Inc v Canada (Attorney General)*[122] to reach its conclusion. The Court noted that the moving party had the burden of satisfying each branch of the rest, on a balance of probabilities.[123] The Court concluded that the stay should be granted for the following reasons:

- the appeal raised a serious issue for determination;

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[116] 2023 FCA 215 [*PWU*].
[117] *Ibid* at paras 3—4.
[118] *Ibid* at para 6.
[119] *Ibid* at para 7.
[120] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11.
[121] *PWU*, *supra* note 116 at para 11.
[122] [1994] 1 SCR 311.
[123] *PWU*, *supra* note 116 at paras 15-17.

- the appellants would suffer irreparable harm if the injunction were not granted because the breach of privacy rights engaged in submitting bodily fluids under the Impugned Provisions would result in harm that cannot be undone or fully remedied with a retroactive award of damages; and

- the balance of convenience favoured the appellants in light of the interest in protecting constitutional privacy rights, which transcends individuals and concerns society at large.[124]

As a result of this stay, nuclear power plant operators subject to the RegDoc are not able to enforce the provisions of the RegDoc allowing pre-placement or random alcohol and drug testing for workers in safety-critical positions pending the outcome of the appeal of the Merits Decision. The appeal of the Merits Decision was heard in January 2024, but a decision has yet to be rendered.

Commentary

The decision of *PWU* serves as a useful example of an employer's duty to carefully consider the impact of certain mandatory policies in the workplace and whether such policies may unjustifiably infringe upon protected *Charter* rights. This is so even when the policies are designed to address potential safety risks in dangerous and highly regulated industrial spaces. *PWU* dealt specifically with policies enacted affecting power plant workers, but similar challenges could potentially be brought against alcohol and drug policies in a wide range of settings, including oil rigs, mines, and more. Lawyers working in the energy industry are encouraged to watch for the ultimate decision on the merits of this case, as it will provide further guidance to those seeking to draft alcohol and drug policies that will survive judicial scrutiny.

B. ALBERTA HEALTH SERVICES V JOHNSTON[125]

Background

The Alberta Court of King's Bench recently rendered an important decision recognizing for the first time the tort of harassment. While harassment has long been recognized in the criminal context, Alberta's recognition of harassment in the civil context marks a significant development in tort law.

Facts

Kevin J. Johnston ("**Johnston**") was a candidate for mayor of Calgary, Alberta in 2021 and former talk show host. During his mayoral campaign, Johnston frequently attacked Alberta Health Services ("**AHS**") and Sarah Nunn, a public health inspector at AHS (the "**Plaintiffs**"). Johnston specifically targeted Nunn by sharing photos of her and her family, comparing her actions to terrorism and expressing a desire to cause her and other AHS employees, financial harm.

The Plaintiffs asserted that Johnston's statements defamed them and sought a significant award of damages and a permanent injunction restraining Johnston from making further defamatory statements. The Plaintiffs also asserted that Johnston's threatening, and abusive conduct constitutes "tortious harassment", an invasion of privacy and assault.

Decision

In its reasoning the Court noted that the existence of the tort of harassment was controversial and unsettled. The Court observed that the Ontario Court of Appeal in *Merrifield v Canada (Attorney General),*[126] had recently declined to recognize a new tort of harassment.[127] Despite this finding, the Court

[124] *Ibid* at paras 23, 38, 47 and 52.
[125] 2023 ABKB 209 [*Johnston*].
[126] 2019 ONCA 205.
[127] *Johnston*, *supra* note 125 at para 79.

found that there were several post-*Merrifield* decisions of the Ontario Supreme Court affirming the existence of a tort of internet harassment. The Court reasoned that it made no sense that there was no general tort of harassment, but yet there was a narrower tort of internet harassment.[128] The Court noted that "while internet harassment is a problem, so too is old-fashioned low-tech harassment".[129]

In reviewing other established torts, the Court identified a gap in the law where no existing torts address the harm caused by harassment. The Court also considered the frequency at which restraining orders are granted in response to harassment as evidence of the need for a stronger deterrent to harassing behavior. The recognition of the tort of harassment allows damages to be awarded in circumstances where the Court was previously limited to issuing restraining orders. [130]

The Court concluded that it was appropriate to affirm the tort of harassment and that it may be determined by applying the following criteria:

1. the defendant engaged in repeated communications, threats, insults, stalking or other harassing behaviour in person or through other means;

2. the defendant knew or ought to have known it was unwelcome;

3. which would impugn the dignity of the plaintiff, would cause a reasonable person to fear for their safety or the safety of their loved ones, or could foreseeably cause emotional distress; and

4. caused harm.[131]

Based on the foregoing criteria, the Court concluded that criteria for the tort of harassment were met in the cause of Johnston's actions toward Nunn.

The Court awarded Nunn $300,000 in general damages for defamation, $100,000 in general damages for harassment and a further $250,000 for aggravated damages. In granting these damages, the Court noted the extreme emotional distress experienced by Nunn and her family, the lack of remorse expressed by Johnston and the fact that he acted with malice, and the broad dissemination of the harassment by Johnston in the media, amongst other factors. The Court also granted the Plaintiffs application for a permanent injunction.

Commentary

Although the fact specific circumstances in *Johnston* were particularly relevant to the Courts determination, the finding of a new tort of harassment may have widespread implications for Alberta employers. It is conceivable that current and former employees may rely on this new tort in response to workplace harassment, which could give rise to a claim for vicarious liability on the part of the employer. In the wake of this finding, it is imperative that employers keep up to date workplace harassment policies and be proactive with workplace incidents.

VI. ENVIRONMENTAL

Environmental issues continue to take centre stage in Canada, with Canadian Courts of all levels hearing a number of important cases touching on issues such as the constitutionality of environmental regulation, super priority charges for environmental remediation claims, and climate change claims brought against the federal government.

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[128] *Ibid* at paras 80—81.
[129] *Ibid* at para 81.
[130] *Ibid* at paras 91—98.
[131] *Ibid* at para 107.

A. REFERENCE RE IMPACT ASSESSMENT ACT[132]

Background

In this case, the Supreme Court of Canada ruled that the *Impact Assessment Act*[133] and related *Physical Activities Regulation*[134] (collectively, the "***IAA***") are unconstitutional in part as the portion of the *IAA* dealing with so-called "designated projects" is overly broad and intrudes on areas of exclusive provincial jurisdiction.

Facts

As noted by the Supreme Court, the *IAA* essentially consists of "two acts in one".[135] Sections 81 to 91 of the *IAA* establish a scheme for activities carried out on federal lands or outside Canada.[136] The more controversial portion of the *IAA* deals with assessing the broad effects of "designated projects" carried out in Canada, including environmental, health, social, gender and economic impacts, as well as effects on Indigenous communities.[137] Although ostensibly crafted to address various impacts from an assortment of activities, the *IAA* was viewed by many as the federal government creating a veto for projects with high greenhouse gas emissions. In fact, at the second reading for the *IAA*, the Minister of Environment and Climate Change expressly stated that "the final decision on major projects will rest with me or with the federal cabinet."[138] Many of the activities deemed to be designated projects involve intraprovincial activities which fall under exclusive provincial jurisdiction. As stated by the majority at the Supreme Court, "it is difficult to envision a proposed major project in Canada that would not involve any activities that 'may' cause at least one of the enumerated effects" and therefore be subject to the *IAA*.[139]

Under the *IAA*, once the federal government determines that a designated project causes effects on areas of federal jurisdiction that are contrary to the "public interest," then the project proponent is prohibited from proceeding with that project.[140]

Alberta challenged the validity of this legislation as it pertains to intraprovincial activities deemed to be designated projects, arguing that the *IAA* intrudes impermissibly into provincial jurisdiction by regulating intraprovincial activities that do not fall within Parliament's jurisdiction. Canada, on the other hand, defended the validity of the *IAA*, arguing that it only regulates matters that fall squarely within federal jurisdiction because it focuses merely on the "effects within federal jurisdiction", namely sea coast and inland fisheries, "Indians, and Lands reserved for the Indians", imperial treaties, and the national concern branch of the POGG power.[141]

The Alberta Court of Appeal held the *IAA* to be unconstitutional as it undermined Canada's constitutional division of powers.

Decision

The Supreme Court noted the importance of environmental protection and clarified that this case is "not about whether Parliament can enact legislation to protect the environment" as it is clear that such regulation is permitted.[142] Despite highlighting the challenge of classifying environmental legislation within

[132] 2023 SCC 23 [*Reference re IAA*].
[133] SC 2019, c 28, s 1 [*IAA*].
[134] SOR/2019-285.
[135] *Reference re IAA*, *supra* note 132 at para 32.
[136] *Ibid*.
[137] *Ibid* at para 6.
[138] *Ibid* at para 87.
[139] *Ibid* at para 95.
[140] *Ibid* at paras 101—102.
[141] *Ibid* at para 133.
[142] *Ibid* at para 3.

the *Constitution Act, 1867*,[143] the Court nevertheless emphasized that environmental protection must always comport with the constitutional division of powers and each level of government must regulate within its own constitutional sphere.[144]

The Court made it clear that the federal government is free to create legislation with regard to intraprovincial projects and rejected Alberta's argument that there could be "provincial projects" within the exclusive jurisdiction of a province. The federal government is free to regulate such projects, but only from the perspective of the federal aspects of the activity, such as the impacts of the activity on federal heads of power.[145]

Though the *IAA* does assess impacts on federal heads of power, it is not limited to such impacts. The *IAA*, at various points, allows the federal decision-maker to consider all of the impacts of the project as a whole, not just impacts on federal heads of power. Furthermore, the *IAA* utilizes a definition of "effects within federal jurisdiction" that is astonishingly expansive, including, for example, "a change to the environment that would occur… in a province other than the one where the physical activity or the designated project is being carried out."[146] This is broad enough to, for example, encompass any project that emits greenhouse gases, as greenhouse gases are not contained to one jurisdiction. As aptly stated by the Court, this "grants the decision maker a practically untrammelled power to regulate projects *qua* projects, regardless of whether Parliament has jurisdiction to regulate a given physical activity in its entirety."[147]

As such, the Court ultimately concluded that the designated projects portion of the *IAA* is unconstitutional and *ultra vires* Parliament.[148]

Commentary

For many, this decision from the Supreme Court came as a surprise as it marks a departure from the Court's decision in *Reference re Greenhouse Gas Pollution Pricing Act*.[149] This case highlights the importance of respect for Canada's constitutional division of powers, returns a degree of autonomy to the provinces, and reduces red tape for projects. At the same time, this decision also highlights the importance of environmental regulation. Unlike the Alberta Court of Appeal, the Supreme Court did not rule that the *IAA* was unconstitutional in its entirety and held that the portion dealing with federal project was *intra vires* parliament. The Court also made clear that it was not removing the federal government's authority to regulate so-called "provincial projects", instead holding that any such regulation must be contained to effects on federal heads of power.

Following the release of this decision, the federal government announced that it intends to make legislative changes to comply with the Supreme Court's ruling. In the interim, the federal government has released guidance on the administration of the *IAA* to ensure that projects have a clear and orderly path forward.[150]

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[143] (UK), 30 & 31 Vict, c 3, s 91, reprinted in RSC 1985, Appendix II, No 5.
[144] *Reference re IAA*, *supra* note 132 at paras 2, 4.
[145] *Ibid* at para 131.
[146] *Ibid* at paras 182—183, citing *IAA*, *supra* note 133, s 1(b)(ii).
[147] *Reference re IAA*, *supra* note 132 at para 178.
[148] *Ibid* at para 6.
[149] 2021 SCC 11.
[150] Impact Assessment Agency of Canada, News Release, "Government of Canada Releases Interim Guidance on the *Impact Assessment Act*" (26 October 2023), online: *Government of Canada* <https://www.canada.ca/en/impact-assessment-agency/news/2023/10/government-of-canada-releases-interim-guidance-on-the-impact-assessment-act.html>.

B. LA ROSE V CANADA[151]

Background

In *La Rose*, the Federal Court of Appeal addresses claims brought against the federal government for failing to adequately address the issue of climate change.

Facts

La Rose addresses decisions from two similar cases before the Federal Court: *La Rose v Canada[152]* and *Misdzi Yikh v Canada[153]* ("***Misdzi Yikh***"). In *La Rose*, appellants between the ages of 10 and 19 were seeking redress against Canada under sections 7 and 15 of the *Charter* and as well as under the doctrine of public trust for failing to address climate change. The appellants asserted that climate change was having a negative impact on their lives and that, as young people, they would suffer disproportionately given their vulnerability and age.[154] The appellants in *Misdzi Yikh* were members of the Wet'suwet'en First Nation also seeking redress under section 7 and 15 of the *Charter* as they alleged that the impacts of climate change were a threat to "their identity, to their culture, to their relationship with the land and the life on it, and to their food security."[155] The *Misdzi Yikh* appellants further claimed that Canada was in breach of its obligations under the *Paris Agreement* and argued that Parliament had exceeded the general power under section 91 of the *Constitution Act, 1867* to make laws for the peace, order and good government of the country.[156]

At the Federal Court, Canada brought motions to strike the statements of claim in both actions in their entirety. The Federal Court granted these motions, striking both statements of claim and refusing leave to amend on the basis that the claims were not justiciable.

Decision

On a motion to strike, the test is whether it is plain and obvious that the claims have no reasonable prospect of success. In this appeal, the Court addressed whether the claims fail on the basis of justiciability, the substantive law, or the pleadings.

Dealing first with justiciability, the Court noted that the analysis must be focused on whether the Court "has the institutional capacity and legitimacy to adjudicate the matter."[157] The Court rejected the idea that the claims could be rendered non-justiciable due to the fact that climate change is complex or because the legislation reflects a political choice on how to address the issue.[158]

Nevertheless, the Court held that the claims based on the general power in section 91, the public trust doctrine and section 15 of the *Charter* were non-justiciable and therefore were properly struck. The public trust doctrine to date has not been recognized in Canada and the Court held that current caselaw does not support a claim that Canada has an affirmative, trust-like duty to protect public resources as alleged.[159]

Regarding the general power under section 91, the appellants argued that it limits Canada's power to pass laws inconsistent with its constitutional duties and with its international commitments. The

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[151] 2023 FCA 241 [*La Rose*].
[152] 2020 FC 1008.
[153] 2020 FC 1059.
[154] *La Rose*, *supra* note 151 at para 2.
[155] *Ibid* at para 4.
[156] *Ibid*.
[157] *Ibid* at para 24.
[158] *Ibid* at paras 29—32.
[159] *Ibid* at para 62.

Court, however, held that section 91 is *source* of Parliament's legislative power, not a *limit*, and therefore cannot be used the way the appellants allege.[160]

With respect to section 15 of the *Charter*, the appellants argued that they were disproportionately affected by climate change and the existing legislation is not sufficient to address this inequality. The Court, however, noted that section 15 does not impose a positive obligation to address potential social inequalities. Furthermore, the equality claim is essentially about how the legislation will affect the appellants when they are older. The Court held that adjudicating such claims was beyond its scope as this would essentially have it participate in public policy decisions, the exclusive domain of the legislature and executive.[161]

In contrast with the Federal Court, however, the Federal Court of Appeal held that the claims under section 7 of the *Charter* could not be struck on the basis that they were positive rights claims, noting that "a right may be seen as negative or positive depending simply on the perspective taken."[162] For the *Misdzi Yikh* appellants, their pleadings spoke about the effects of climate change on their food security, culture and economies attributed to specific state action, including deficient legislative standards and permissive licensing of greenhouse gas-emitting projects.[163] Though the Court noted that the youth appellants' claim was more prospective as it spoke of future consequences, it also referred to deprivations, such as the fact that Canada has consistently missed the emissions targets it set under the *Paris Agreement* which in turn "deprive the appellants of the fruits of Canada's legislated commitments and compromise the appellants' section 7 interests."[164] The Court found the claims to be novel but held that they were not doomed to fail.[165]

Where the section 7 claims falter is in the specificity of the pleadings. The Court found the laws and state conduct identified by the appellants to be overly broad, effectively putting "the entirety of Canada's response to climate change up for scrutiny."[166] Instead of dismissing the claim outright, however, the Court granted the appellants leave to amend their pleadings regarding section 7 claims, leaving the door open for future litigation in this matter.[167]

Commentary

Though the Federal Court of Appeal ultimately dismissed many of the claims advanced by the appellants, it took a much different tone than the Federal Court. The Federal Court of Appeal held that claims relating to climate change are not inherently non-justiciable by virtue of being "political" or "controversial". The Court also permitted the claims advanced under section 7 of the *Charter* to advance, noting that although the claims were novel, they were not doomed to fail.

By leaving this door open, it is reasonable to expect that further novel claims pertaining to climate change will be heard in the future.

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[160] *Ibid* at paras 68—69, 75.
[161] *Ibid* at paras 77, 81—83, 86, 91.
[162] *Ibid* at para 103.
[163] *Ibid* at para 105.
[164] *Ibid* at para 106.
[165] *Ibid* at para 109.
[166] *Ibid* at para 128.
[167] *Ibid* at para 135.

C. QUALEX-LANDMARK TOWERS INC V 12-10 CAPITAL CORP[168]

Background

In *Qualex*, the Court of Appeal dealt with an interesting application of the *Orphan Well Association v Grant Thornton Ltd*[169] ("***Redwater***") super priority in an action brought by a private party seeking the remediation of environmental contamination on its lands by a party neither engaged in formal insolvency proceedings nor operating in the oil and gas industry. The Court of Appeal overturned a prejudgment attachment order to Qualex-Landmark Towers Inc ("**QLT**"), holding that there was no reasonable likelihood that QLT will establish that its claim for environmental remediation ranks in priority to the claims of secured creditors.

Facts

QLT is the owner of property (the "**QLT Lands**") that is contaminated with volatile organic compounds migrating from neighbouring lands (the "**12-10 Lands**") owned by 12-10 Capital Corp ("**12-10**").[170] Between 2012 and 2015, 12-10 carried out certain investigative work to delineate the contamination on its lands at testing at the behest of then Alberta Environment and Parks ("**AEP**") (now Alberta Environment and Protected Areas). In 2018, the AEP directed 12-10 to submit an environmental site assessment ("**ESA**") in respect of the 12-10 Lands by June 1, 2018; 12-10 failed to do so. In February 2022, the AEP wrote to 12-10 requesting again that an ESA be submitted, this time by July 8, 2022; 12-10 again failed to do so.[171]

In the meantime, 12-10 attempted to sell a portion of the 12-10 Lands to a third party. Notably, the sale included most of the 12-10 Lands but did not include the portion that was the source of the environmental contamination.[172] Though the sale eventually fell through, it became apparent that if a sale were to go through, QLT would likely not be able to recover any of the costs of remediation from 12-10. This was because the 12-10 Lands were subject to extensive mortgages that were roughly equivalent to the value of the 12-10 Lands.[173] Furthermore, 12-10's only asset was the 12-10 Lands so if it were to sell the "non-contaminated" portion, it would be left with essentially no assets to satisfy any judgment QLT might receive.[174] As such, QLT brought an application for an attachment order over the proceeds of any sale of the 12-10 Lands, seeking to preserve its ability to collect on any judgment until the matter of whether its remediation claims could receive priority over the secured creditors could be heard. QLT also sought leave to amend its statement of claim to add 12-10's secured mortgage lenders and the beneficial owner of two mortgages as defendants.

Decision

Before the chambers judge QLT argued and the Court accepted that there was a reasonable likelihood that a claim for a priority charge on the 12-10 Lands would be established and that there were reasonable grounds for believing that 12-10 was dealing with its property in a manner that would likely seriously hinder QLT's enforcement of a judgment.[175]

QLT argued that "[e]nvironmental obligations have a unique place in the priority scheme after some recent case law", and cited *Redwater* and subsequent jurisprudence[176] in support of its claim for

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[168] 2023 ABKB 109 [*Qualex* KB Decision]; overturned by the Alberta Court of Appeal in 2024 ABCA 115 [*Qualex CA Decision*].
[169] 2019 SCC 5.
[170] *Qualex KB Decision*, *supra* note 168 at para 6.
[171] *Ibid* at paras 14—17, 20.
[172] *Ibid* at para 18.
[173] *Ibid* at para 79.
[174] *Ibid* at para 83.
[175] *Ibid* at para 65.
[176] *Manitok Energy Inc (Re)*, 2022 ABCA 117 ("***Manitok***"), *PricewaterhouseCoopers Inc v Perpetual Energy*

environmental remediation damages ranking in priority to the registered mortgages and related security interests.[177] Specifically, QLT argued that just as Redwater had a public duty under the regulatory regime governing Alberta's oil and gas industry to fulfill its end-of-life obligations, 12-10 had a public duty under the *Environmental Protection and Enhancement Act*[178] ("***EPEA***") to address the damage caused by the migration of contaminants from its lands.[179] This argument was necessary, as QLT was an unsecured tort claimant with no statutory right under the *Land Titles Act*[180] or the *Personal Property Security Act*[181] to secure payment of its alleged damages or remediation costs in priority to secured creditors.[182]

QLT further argued that the analysis in *Redwater* in relation to the enforcement of public environmental remediation obligations should be extended beyond formal insolvency proceedings to allow private citizens and beneficiaries of an entity's public duties under *EPEA* the same recourse against insolvent entities as the AEPA in carrying out enforcement orders. QLT also argued that the developments in *Redwater* and other recent case law prevent 12-10 from abandoning the environmental remediation obligations it owed to the public at large.[183]

In accepting that there was a reasonable likelihood that *Redwater* and the subsequent case law regarding environmental obligations would be applied to 12-10, the chambers judge allowed the amendments to QLT's statement of claim and granted the attachment order, focusing on the underlying public duty a polluter has to its fellow citizens. The chambers judge held that regulators exist to enforce public duties but that in instances where a *bona fide* neighbour seeks civil law recourse for the breach of environmental remediation obligations, that neighbour should not be put in a worse position than a regulator to have those obligations fulfilled. In other words, QLT should not be prejudiced in the context of environmental remediation obligations just because it is not a regulator.[184]

On appeal, the appellants argued that the chambers judge made a legal error by holding that *Redwater* may apply outside of insolvency proceedings to create a common law "super priority" in favour of a private litigant.[185]

The Court of Appeal agreed, holding that the priority sought by QLT was unsupported by any statutory or existing Court authority and therefore did not have a reasonable likelihood of being established.[186] The Court of Appeal noted that the complex web of federal and provincial legislation governing secured lending and the availability of "super priority" rights underpin millions of mortgage loans in Canada and provide certainty to both lenders and borrowers, and as such Courts must proceed with "great caution" where potential changes to the law are major and would have complex ramifications.[187]

The Court of Appeal further held that QLT's amended claim against 12-10's secured mortgage lenders was hopeless as it would have altered the "carefully crafted statutory priorities" and the legislative intent of *EPEA*.[188] The Court of Appeal held that nothing in the relevant provincial or federal legislation gives private litigants a right to priority charge that ranks above other claims registered against land simply because they can be characterized as involving "environmental remediation obligations", nor did

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Inc, 2021 ABCA 16 and 2022 ABCA 111; and *Orphan Well Association v Trident Exploration Corp*, 2022 ABKB 839 ("***Trident***"),

[177] *Qualex CA Decision*, *supra* note 168 at para 8.
[178] RSA 2000, c E-12.
[179] *Qualex CA Decision*, *supra* note 168 at para 13.
[180] RSA 2000, c L-4.
[181] RSA 2000, c P-7.
[182] *Qualex CA Decision*, *supra* note 168 at para 8.
[183] *Ibid* at para 13.
[184] *Qualex KB Decision*, *supra* note 168 at paras 94—95 and 98—99.
[185] *Qualex CA Decision*, *supra* note 168 at para 16.
[186] *Ibid* at para 17.
[187] *Ibid*.
[188] *Ibid* at para 21.

any case law (including *Redwater*) create common law rights or powers inconsistent with the applicable legislation.[189]

The Court of Appeal concluded its reasons by noting that the legislature had tasked the AEPA, and not private litigants, with the enforcement of environmental remediation obligations under *EPEA* for the public good.[190] Private litigants, such as QLT, are under no obligation to act for the benefit of others and disrupting legislated priority schemes and the commercial certainty they provided by granting common law "super priorities" to private litigants would not carry with it any assurance the money recovered would be used for the public good and it would undermine the objective of the *EPEA*.[191] The Court of Appeal stated that if any changes regarding priority entitlements is required to achieve environmental policy objectives, those would have to be addressed by the legislature or parliament.[192]

Commentary

In *Qualex*, the Court of Appeal declined to extend the application of the *Redwater* decision and subsequent case law to grant private litigants' super priority over secured creditors for claims for damages or expenses arising from environmental remediation obligations. This decision was likely welcomed by secured lenders (noting that The Canadian Bankers Association was an intervenor party in *Qualex*) as the extant priority scheme for lenders or mortgagors was not disrupted to account for claims of private litigation related to environmental remediation costs. The *Qualex* decision also clarifies the scope of application of *Redwater* and confirms that private litigants do not have the same ability as regulators to enforce statutory environmental remediation obligations for the 'public good'. Rather, private litigants may look to other remedies, such as obtaining an environmental protection order, to require polluters to take remedial steps where a release of a harmful substance has or may occur.

D. RE MANTLE MATERIALS GROUP, LTD[193]

Background

Similar to *Qualex*, *Mantle* represents a further expansion of the *Redwater* principles. In *Mantle*, the Alberta Court of King's Bench held that equipment used in a gravel pit business could be subject to an environmental super priority charge.

Facts

Mantle Materials Group, Ltd. ("**Mantle**") was the owner of multiple gravel pits located in Alberta.[194] Alberta Environment and Protected Areas ("**AEPA**") issued Environmental Protection Orders ("**EPOs**") with respect to several of these properties that required Mantle to remediate at a significant expense.[195] As a result of these reclamation obligations as well as other significant debt, Mantle filed a notice of intention to make a proposal under section 50.4 of the *BIA* and was granted a stay of proceedings.[196]

During the stay period, a key issue that arose was the treatment of Mantle's reclamation obligations. Mantle and AEPA argued, *inter alia*, that certain prefiling debts to creditors whose support was necessary to perform the reclamation work should be paid in advance of the secured creditors.[197] Travelers Capital Corp ("**Travelers**"), one of the secured creditors, disagreed. Travelers had provided

[189] *Ibid* at para 22.
[190] *Ibid* at para 26.
[191] *Ibid*.
[192] *Ibid* at para 27.
[193] 2023 ABKB 488 [*Mantle*].
[194] *Ibid* at para 4.
[195] *Ibid* at paras 6, 11, 13.
[196] *Ibid* at para 13.
[197] *Ibid* at para 15.

Mantle with a loan to use in the acquisition of equipment for use in its operations. In return, Mantle granted Travelers a security interest over the equipment that was registered in the Alberta Personal Property Registry. Travelers argued that the reclamation work should not receive priority over its security interest in the equipment, contending that *Redwater* held that reclamation obligations should only be satisfied using assets encumbered by the reclamation obligations.[198]

Decision

The Court's decision hinged on the interpretation of three decisions: *Redwater*, *Manitok*, and *Trident*. These cases all, in varying degrees, dealt with whether assets not directly encumbered by the reclamation obligations can be subject to a "super priority" charge.[199] In *Trident*, the latest in this trio of cases, the Court held that all assets held by an oil and gas business should be treated as related to the reclamation obligations even if they were not directly involved in oil and gas production.[200] In that case, the assets in question were properties used to store equipment used in oil and gas production.[201]

In *Mantle*, the Court analyzed whether Mantle's equipment subject to Travelers' security interest was analogous to the equipment and real estate in *Trident*. The Court ultimately found that the equipment in which Travelers had a security interest formed part of Mantle's gravel production business and, as a result, there was no "sensible distinction" from the situation in *Trident*.[202] As a result, the environmental reclamation obligations were given priority over Travelers' security interest in the equipment.

An application for leave to appeal by Travelers was dismissed by the Alberta Court of Appeal on October 23, 2023.[203]

Commentary

This case represents yet another expansion on the *Redwater* principles elevating the status of environmental reclamation obligations. Since *Redwater*, many of the cases applying the environmental super priority have continued to be in the oil and gas industry. *Mantle* marks one of the first cases outside of that industry and demonstrates the growing prevalence of the "polluter pays" principle.

Though touching on whether assets truly "unrelated" to the business giving rise to the reclamation obligations may be subject to the *Redwater* super priority charge, the Court ultimately left this question for another day as it determined that, similar to *Trident*, the assets were in fact related to the business. It remains to be seen whether Courts will eventually expand the super priority charge to cover assets unrelated to the business giving rise to the reclamation obligations.

E. CORDY ENVIRONMENTAL INC V OBSIDIAN ENERGY LTD[204]

Background

In yet another recent decision expanding on the "polluter pays" principle, the Court in *Cordy* determined that contractors who go unpaid for environmental remediation work can bring a claim against former owners of the remediation site.

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[198] *Ibid* at paras 12, 15.
[199] *Ibid* at para 17.
[200] *Ibid* at para 37.
[201] *Ibid*.
[202] *Ibid* at paras 39—40.
[203] *Mantle Materials Group, Ltd v Travelers Capital Corp*, 2023 ABCA 302.
[204] 2023 BCSC 1198 [*Cordy*].

Facts

In October 2015, a spill occurred on a pipeline owned by Obsidian Energy Ltd ("**Obsidian**") in British Columbia.[205] The pipeline was deactivated and abandoned in 2016 and was subsequently sold to Predator Oil BC Ltd ("**Predator**").[206] In July 2017, the British Columbia Oil and Gas Commission ordered that the site of the spill had to be remediated by the operator.[207] In September 2017, Predator transferred its leasing rights to the Pipeline to Opsmobil Energy Services Inc/Ranch Energy Corporation ("**Opsmobil**").[208] Opsmobil hired Cordy Environmental Inc ("**Cordy**") to remove contaminated soil from the area around the spill.[209] Opsmobil was subsequently placed in receivership before paying Cordy for any of the remediation work.[210]

As a result of this non-payment, Cordy later sued multiple parties, including Opsmobil, Predator and Obsidian, amongst others. Cordy then applied for summary judgment against Obsidian. Obsidian cross-applied for summary dismissal of Cordy's claims.

Cordy claimed that Obsidian was liable to it for the unpaid remediation work by virtue of section 47 of British Columbia's *Environmental Management Act*[211] ("***EMA***"):

47(1) A person who is responsible for remediation of a contaminated site is absolutely, retroactively and jointly and separately liable to any person or government body for reasonably incurred costs of remediation of the contaminated site, whether incurred on or off the contaminated site.

Under the *EMA*, "persons responsible" for remediation of contaminated sites includes previous owners or operators of the site.[212]

In response, Obsidian raised several defences, most notably the following:

Obsidian is not a "person responsible" as it assigned all of its liabilities to Predator;[213]

- Cordy could not be considered a "person responsible" as persons who provide assistance in conducting remediation work are expressly carved out of the definition and, therefore, Cordy cannot advance a claim under section 47;[214] and

- Cordy's claim was novel as all other cost recovery actions under the *EMA* were commenced by owners or neighbours of contaminated properties.[215]

Decision

The Court found that Obsidian was a "person responsible" under the *EMA* as the definition expressly includes previous owners and operators of the site. The fact that Obsidian may have a claim for indemnity against Predator does not eliminate its primary responsibility under the *EMA*.[216]

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[205] *Ibid* at para 3.
[206] *Ibid* at paras 7—8.
[207] *Ibid* at para 9.
[208] *Ibid* at para 10.
[209] *Ibid* at para 11.
[210] *Ibid* at paras 11—12.
[211] SBC 2003, c 53.
[212] *Ibid*, s 45.
[213] *Cordy*, *supra* note 204 at para 33.
[214] *Ibid* at paras 39—40.
[215] *Ibid* at para 38.
[216] *Ibid* at paras 50—51.

The Court accepted that Cordy is not a "person responsible" under the *EMA* but held that section 47 does not require the claimant to be a "person responsible", rather simply a "person who has incurred reasonable costs".[217] Although cases up to that point had only involved owners and neighbours of contaminated sites, the Court noted that the *EMA* does not limit claimants to these categories. As such, Cordy was not barred from advancing its claims.[218]

However, the Court nonetheless declined to grant summary judgment as Cordy had failed to put "its best foot forward" in establishing that its remediation costs were reasonably incurred. The Court specifically noted that Cordy had not established what type of equipment it used, the distances that the excavated materials had to be hauled, whether all of the hauled materials were contaminated, and whether its rates were in line with industry standards.[219]

The Court also acknowledged Obsidian's argument that it would be unduly harsh to find it jointly and separately liable to Cordy as the environmental liabilities were accounted for in the purchase price paid by Predator when it agreed to indemnify Obsidian from claims such as this, holding that this was another reason why this matter must be resolved at trial.[220]

Commentary

This case serves as a "seller beware"; selling and assigning liabilities does not automatically absolve a person of liability for environmental reclamation costs. Former owners and operators remain liable under the *EMA* notwithstanding the fact that they have divested their interest in the contaminated property. For that reason, former owners and operators should consider seeking robust indemnities from purchasers to limit the temporal or financial scope of any future environmental liabilities.

For contractors performing remediation work, this case establishes that their remedies are not limited to seeking contractual remedies against the party that hired them. This decision effectively establishes that contractors are able to sidestep an insolvency proceeding to bring claims for unpaid remediation work against former owners under section 47 of the *EMA*.

F. EYE HILL (RURAL MUNICIPALITY) V SASKATCHEWAN (MINISTER OF ENERGY)[221]

Background

In *Eye Hill*, the Saskatchewan Court of King's Bench confirmed the applicability of *Redwater* in Saskatchewan and rejected a rural municipality's attempts to elevate the priority status of unpaid municipal taxes.

Facts

In June 2020, Bow River Energy Ltd ("**Bow River**") was granted an initial order in Alberta pursuant to the *CCAA*.[222] At the time, Bow River was the owner of oil and gas wells in Saskatchewan with extensive end-of life obligations.[223] As part of the *CCAA* proceedings, Bow River carried out a sales and investment solicitation process. However, none of the bids received in the SISP would have addressed Bow River's environmental obligations and, as a result, the Saskatchewan Minister of Energy and Resources ("**MER**") refused to support any of the potential transactions.[224] As a result, the *CCAA*

[217] *Ibid* at paras 55, 60.
[218] *Ibid* at paras 56—60.
[219] *Ibid* at paras 75—79.
[220] *Ibid* at paras 67—68.
[221] 2023 SKKB 52 [*Eye Hill*].
[222] *Ibid* at para 10.
[223] *Ibid* at para 3.
[224] *Ibid* at paras 12—14.

proceedings were ceased, and a receiver was appointed over Bow River to liquidate its assets. The receiver sold Bow River's assets and sought to distribute the proceeds to MER to offset Bow River's environmental obligations.[225]

The Rural Municipality of Eye Hill ("**Eye Hill**") brought an application seeking a declaration that the funds should be used to address outstanding municipal taxes owed by Bow River in priority to all other parties by virtue of orders granted in the *CCAA* proceedings. Eye Hill also disputed the applicability of *Redwater* in Saskatchewan, pointing to differences in Alberta and Saskatchewan's statutory framework.

Decision

First, the Court rejected Eye Hill's argument that the orders made in the *CCAA* proceeding gave it priority to the funds in the receivership. The Court held that the *CCAA* orders were not applicable to the receivership proceedings, noting that Bow River's receivership in Saskatchewan was governed by different legislation in a different province than the *CCAA* proceedings.[226] Even if the *CCAA* orders had granted Eye Hill priority, this would have been defeated by the receivership order which granted the receiver priority over "all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person."[227] Furthermore, the provision in the *CCAA* orders that Eye Hill alleged granted it priority status merely confirmed that if there was a legal requirement that municipalities like Eye Hill be paid in priority, that legal requirement must be respected; it did not create an independent right to priority repayment.[228]

The Court further noted that Bow River had not been paying its municipal taxes throughout the *CCAA* proceedings. Eye Hill was aware of this fact but chose not to seek an order for repayment. The Court took a dim view of this approach and held that if Eye Hill believed it was entitled to those funds during the *CCAA* proceedings, it should have brought a claim at that time, as a creditor "should not be permitted to lie in the weeds, waiting for the most appropriate moment to raise a claim to try to gain an advantage not available to other creditors."[229]

Eye Hill's claim of either an express or constructive trust was also soundly rejected by the Court, which instead held that Eye Hill at most had a lien specific to the property to which the taxes relate. However, since the property was already sold by the receiver, the lien could no longer be claimed, and Eye Hill therefore had no priority claim to the funds in the receivership. Even if the lien claim survived in proceeds held in trust, the Court held that it must nonetheless be dealt with in accordance with the *Redwater* principles.[230]

The Court held that the funds must be used to address Bow River's environmental obligations, as *Redwater* is fully applicable within Saskatchewan. The Court noted that Saskatchewan's *The Oil and Gas Conservation Act*,[231] is based on the Albertan regime, which was the subject of the *Redwater* decision. As such, the reasoning in *Redwater* is equally applicable in Saskatchewan.[232] Applying the *Redwater*/*Abitibi* test, the Court held that MER was not a creditor as it was acting in a *bona fide* regulatory capacity. Bow River's environmental obligations were incurred from the date its licenses for the wells were granted and therefore arose prior to Bow River becoming bankrupt. Lastly, it was not sufficiently certain that MER would carry out the abandonment and reclamation work as it was experiencing a serious backlog in

[225] *Ibid* at paras 4—5.
[226] *Ibid* at paras 25—27.
[227] *Ibid* at para 27.
[228] *Ibid* at paras 28—29.
[229] *Ibid* at paras 33—35.
[230] *Ibid* at paras 36—42, 66.
[231] RSS 1978, c O-2.
[232] *Eye Hill*, *supra* note 221 at para 47.

abandonment work, and it would take many years to work through the queue before it could even consider carrying out reclamation work in relation to Bow River's environmental obligations.[233]

Commentary

Eye Hill marks the first decision applying *Redwater* in Saskatchewan and is yet another example of the elevation of claims related to environmental remediation. This decision also stands as a clear rejection of the idea that unpaid municipal taxes may be entitled to enhanced priority. Ultimately, such claims must fall behind the priority given to environment remediation claims under *Redwater*.

This ruling was affirmed by the Saskatchewan Court of Appeal.[234]

VII. INDIGENOUS LAW

Interpretation of treaty rights, underwater mineral rights, an expansion of the duty to consult and a rejection of the United Nations Declaration on the Rights of Indigenous Peoples as forming part of Canadian law featured in the prominent indigenous cases this year.

A. CHIPPEWAS OF NAWASH UNCEDED FIRST NATION V CANADA (ATTORNEY GENERAL)[235]

Background

In *Chippewas,* the Ontario Court of Appeal considered the applicable test for claiming Aboriginal title over land covered by water.

Facts

The Chippewas of Nawash Unceded First Nation and Saugeen First Nation ("**SON**") claimed to have Aboriginal title to submerged lands in a large section of Lake Huron and Georgian Bay surrounding the Bruce Peninsula, or alternatively, to certain portions of those lands.[236] SON further argued that the Crown breached its honour and Treaty 45 ½ by failing to act with diligence to protect SON's lands from encroachment by settlers. Lastly, SON argued for a constructive trust over all municipal roads and unopened road allowances on the lands that were surrounded to the Crown through a subsequent treaty.[237] Local municipalities were names as parties to the proceeding.

Decision

The Court of Appeal reaffirmed the findings of the trial judge that the boundaries selected by SON encompassed a much larger area that SON's actual connection to the claimed land and the findings that SON did not exercise sufficient control over the claimed area.[238] However, SON also pled in the alternative that they sought such portions of the Title Claim area despite not putting forward any alternative boundaries in their pleadings or at trial. The Court of Appeal found that the matter should be remitted back to the trial judge to determine if SON satisfied the test from *Tsilhqot'in Nation v British Columbia*[239] ("***Tsilhqot'in***") test for any limited portion of the Title Claim area.[240]

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[233] *Ibid* at paras 49—64.
[234] *Eye Hill (Rural Municipality) v Saskatchewan (Energy and Resources)*, 2023 SKCA 120.
[235] 2023 ONCA 565 [*Chippewas*].
[236] *Ibid* at para 1.
[237] *Ibid* at paras 3, 5.
[238] *Ibid* at paras 45—52.
[239] 2014 SCC 44.
[240] *Chippewas*, *supra* note 246 at paras 101—107.

The Ontario Court of Appeal affirmed that the Crown breached its Treaty honour obligations. The Court further upheld the finding that the Crown did not owe or breach a fiduciary duty to SON, noting that where a Crown obligation is grounded in the honour of the Crown, it is not always necessary to invoke fiduciary duties because the Crown is still obliged to comply with its constitutional obligations in a manner consistent with the honour of the Crown.[241]

With respect to the claim for a constructive trust on road allowance, the Court of Appeal found that the remedy sought by SON would have an adverse effect on third parties such as municipalities who have relied on the Treaty and associated Crown title that followed to build road infrastructure as well as those who relied on the roads to build their lives over the years. Given that SON ultimately received financial benefit from the resulting situation, it was found to be unjust to impose the constructive trust claim in the circumstances.[242]

Commentary

Though the Court of Appeal ultimately held that Aboriginal title was not established over the claimed lands, it did confirm that such claims over submerged lands could, in theory, be established under the *Tsilhqot'in* test. The Court of Appeal remitted the issue of whether Aboriginal title could be established over a smaller area than originally claimed back to the trial judge. This matter has yet to be heard.

B. MÉTIS NATION OF ALBERTA ASSOCIATION V ALBERTA (INDIGENOUS RELATIONS)[243]

Background

This case deals with the Alberta government's draft Métis Consultation Policy that would have guided the duty to consult with Métis people for resource development.

Facts

Alberta's Minister of Indigenous Relations decided to not move forward with the development of a Métis Consultation Policy ("**MCP**") and instead to continue to rely on a Credible Assertion Process ("**CAP**") for assessing non-settlement Métis rights claims (the "**Decision**").[244] The CAP is the Government of Alberta's internal procedure for assessing the credibility of rights asserted by the Métis to assist in determining when its duty to consult was triggered.[245] The MCP would have represented a more formalized procedure developed in conjunction with the Métis Nation of Alberta ("**MNA**") and other Métis organizations. Alberta had been working with these organizations since 2014 to develop the MCP.[246] The MNA sought judicial review to quash the Decision for various reasons and argued that the Decision breached the honour of the Crown. Alberta argued that the Decision was not amenable to judicial review as it was a matter of public policy.

Decision

The judicial review found the Decision was amenable to judicial review and that the honour of the Crown was engaged.[247] However, the Court concluded that Alberta did not act contrary to the honour of the Crown and held that the Decision was reasonable with the MNA being afforded adequate procedural

[241] *Ibid* at paras 203—211.
[242] *Ibid* at paras 275—298.
[243] 2024 ABCA 40.
[244] *Ibid* at para 1.
[245] *Ibid* at para 12.
[246] *Ibid* at para 1.
[247] *Ibid* at para 2.

fairness. The application for judicial review was dismissed and the MNA appealed arguing that the judicial review judge erred in finding that Alberta had not breached the honour of the crown and its related duty to negotiate.[248]

Both the appeal and cross-appeal to the Court of Appeal were dismissed, and it was found that Alberta was not obliged to provide reasons for the Decision, that the duty to negotiate was not engaged, and that the honour of the Crown was not breached.[249]

Commentary

Since the Court of Appeal's decision was released, the MNA issued a press release expressing disappointment and indicated that it will "continue to engage with the current Alberta Government on these matters with the hopes that a mutually agreeable way forward can be found."[250] Interestingly, the MNA noted that the federal government has signed a consultation agreement with the MNA and regularly consults with it.[251] This will be an area to watch as the MNA engages in dialogue with Alberta and the duty to consult continues to evolve.

C. GITXAALA V BRITISH COLUMBIA (CHIEF GOLD COMMISSIONER)[252]

Background

In *Gitxaala*, First Nations challenged the British Columbia system for registering and recognizing mineral claims.

Facts

Two First Nations within British Columbia argued that the current mineral tenure system in the province operates in contravention of the Crown's duty to consult with First Nations.

The grant of mineral rights in BC is regulated under the *Mineral Tenure Act*[253] (the "***MTA***"). Under the *MTA*, "free miners" may register a "mineral claim" over unclaimed Crown land.[254] The holder of a mineral claim is granted the right to enter onto the surface of the claim to conduct exploratory activities amongst other things.[255] If the miner finds minerals and wishes to commercially extract them, the miner must apply for further approvals under the *Mines Act*.[256]

Prior to 2004, mineral claims in BC required physical staking.[257] In 2004, the Province amended the *MTA* by adopting an online system for mineral claims registration called the online Mineral Titles Registry.[258] The Court in *Gitxaala* observed that this system was created before the notable Supreme Court of Canada decision on the duty to consult in *Haida Nation v British Columbia (Minister of Forests)*[259]

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[248] *Ibid*.
[249] *Ibid* at para 4.
[250] Métis Nation of Alberta, Press Release, "Métis Will Seek Leave to Supreme Court of Canada on Duty to Negotiate" (2 February 2024), online <https://albertametis.com/news/metis-will-seek-leave-to-supreme-Court-of-canada-on-duty-to-negotiate/#:~:text=The%20case%20is%20about%20the,MNA%20for%20terminating%20these%20negotiations.>
[251] *Ibid*.
[252] 2023 BCSC 1680 [*Gitxaala*].
[253] RSBC 1996, c 292.
[254] *Gitxaala*, *supra* note 252 at para 2.
[255] *Ibid*.
[256] RSBC 1996, c 293; *Gitxaala*, *supra* note 252 at para 2.
[257] *Gitxaala*, *supra* note 252 at para 118.
[258] *Ibid*.
[259] 2004 SCC 73.

("***Haida***") and therefore it was not something British Columbia was required to consider when the system was implemented.[260]

The First Nations also claimed for a systemic declaration that that the Chief Gold Commissioner (the "**CGC**") has a constitutional duty to consult before issuing mineral claims on lands to which Aboriginal rights and title are asserted, and that the CGC failed to do so.[261] The Nations also sought a declaration that the online Mineral Titles Registry operates in a way that is inconsistent with section 35 of the *Constitution Act, 1982*,[262] the BC *Declaration on the Rights of Indigenous Peoples Act*[263] ("***DRIPA***"), and the *United Nations Declaration on the Rights of Indigenous Peoples*[264] ("***UNDRIP***").[265]

Decision

The Court applied the *Haida* test and concluded that the duty to consult was triggered when the Crown grants mineral tenures based on the "free entry" regime. The lack of consultation with affected First Nations at the time a mineral claim is granted was found to be a breach of the Crown's obligations.[266]

The Nations' first claim was that the system had an adverse impact on their abilities to govern at present. The Court rejected this and found that the impugned Crown conduct must in some way impede the Nations' abilities to govern their land in the future after Aboriginal title is established by them.[267]

The second argument made by the Nations was that the mineral tenure system had an adverse impact on areas of significant cultural and spiritual importance to the Nations as well as upon their rights to own and financially benefit from the minerals within their territories. The Court agreed and found that this adverse impact triggered their duty to consult. Importantly, the Court asserted that the concept of adverse impacts must be viewed through the lens of the Nations and that the analysis of whether the duty to consult is deemed to be triggered must be viewed from an Indigenous perspective.[268]

As a result, the Court granted a declaration that the CGC's conduct in establishing an online system allowing automatic registration of mineral claims in the Nations' territories which does not allow for a prior consultation process constituted a breach of the obligations of the Crown.[269] In granting this declaration the Court asserted that an overly narrow understanding of Aboriginal title, one that excludes the rights to subsurface minerals, is inconsistent with the goals of reconciliation and upholding the honour of the Crown and that the duty to consult exists to ensure that the Crown does not manage its resources in a manner that ignores Aboriginal claims.[270]

The Court rejected the Nations' claims that certain sections of *DRIPA* created justiciable rights on which the Court could adjudicate and ruled that *DRIPA* did not have the effect of incorporating *UNDRIP* into BC law.[271]

The Court granted the Province's request for an 18 month extension to remedy its breach of its constitutional duty to consult. This was done to allow the Province time to design a regime, which may

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[260] *Gitxaala*, *supra* note 252 at para 118.
[261] *Ibid* at para 86.
[262] s 35, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.
[263] SBC 2019, c 44.
[264] UNGA, 61st Sess, UN Doc A/RES/61/295 (2007) GA Res 61/295.
[265] *Gitxaala*, *supra* note 252 at para 86.
[266] *Ibid* at para 559.
[267] *Ibid* at para 306.
[268] *Ibid* at para 326.
[269] *Ibid* at para 559.
[270] *Ibid* at para 392.
[271] *Ibid* at para 433.

include amendments to legislation, which recognize the rights of Indigenous peoples and enables the consultation process.[272]

Commentary

The Crown's duty to consult is the subject of ongoing Court battles and lawyers working in the resource sector should be mindful of its impact not only on the Crown, but on all affected parties.

Lawyers should also keep an eye on legislative updates in British Columbia in the coming year updating British Columbia's consultation process for mineral claims.

Lastly, the Court made it clear that this decision was *not* "deciding the validity of any previously registered mineral claims, mineral leases, or mines."[273] As such, the rights of existing rights-holders will not be impacted.

VIII. LIMITATION PERIODS

The decisions in this section highlight the importance of the type of relief sought on both the applicability of limitation periods and standard form releases. Where the relief sought is declaratory rather than remedial, limitation periods and certain forms of release may not act as complete defences to an action. Further, it was affirmed that actual knowledge of a claim is required in order for limitation periods to be triggered.

A. SECURE ENERGY (DRILLING SERVICES) INC V CANADIAN ENERGY SERVICES LP[274]

Background

This case before the Federal Court addressed the application of limitation periods to declarations under section 52 of the *Patent Act*[275] related to inventorship and ownership, as well as the effect of releases on claims for declarations of true and proper inventorship under the *Patent Act*. This case draws an important distinction between the type of relief sought and the applicability of limitations legislation.

Facts

Secure Energy (Drilling Services) Inc. ("**Secure Energy**") brought an application for summary judgment under section 52 of the *Patent Act* seeking a declaration that it is the owner and its employee Simon Levey is the true inventor of Canadian Patent No. 2,624,834 (the "**834 Patent**").[276] Canadian Energy Services L.P. ("**CES**") had been listed as the owner of the 834 Patent with John Ewanek as the inventor.[277]

In response, CES brought an application to strike Secure Energy's application as an abuse of process and collateral attack, claiming that Secure Energy was seeking to re-litigate issues of ownership of the 834 Patent that had already been decided by the Alberta Court of King's Bench and the Alberta Court of Appeal.[278] CES also maintained that Secure Energy's claim was barred by operation of the

[272] *Ibid* at para 559.
[273] *Ibid* at para 23.
[274] 2023 FC 906 [*Secure Energy*].
[275] RSC 1985, c P-4.
[276] *Secure Energy*, *supra* note 274 at para 1.
[277] *Ibid* at para 3.
[278] *Canadian Energy Services Inc v Secure Energy Services Inc*, 2020 ABQB 473; appeal dismissed in 2022 ABCA 200.

Alberta *Limitations Act* and by virtue of a mutual release between Mr. Ewanek and a predecessor to Secure Energy (the "**Release**").[279]

Decision

The Federal Court held that the matter before it was not an abuse of process or collateral attack on the decisions of the Alberta Courts, as they did not determine questions of inventorship or ownership of the 834 Patent.[280] In its dismissal Secure Energy's appeal, the Alberta Court of Appeal stated that the trial judge was in error in not addressing the inventorship of Patent 834.[281] However, the majority of the Court of Appeal held that issue did not need to be determined as the matter before them was to enforce the 834 Patent[282] and that there was nothing precluding Secure Energy from determining ownership and rectifying the Patent Register under section 52 of the *Patent Act*.[283]

Regarding CES's argument that Secure Energy's application was outside of the limitation periods and therefore barred, the Federal Court drew an important distinction between the types of relief sought. Alberta's *Limitation Act* bars any remedial order sought more than "2 years after the date on which the claimant first knew, or in the circumstances ought to have known" or "10 years after the claim arose" whichever period expires first.[284]

In this case, Secure Energy was not seeking a remedial order, but rather a declaration of ownership and inventorship of the Patent.[285] Citing *Grenke v Corlac Inc*,[286] the Federal Court held that in exercising its jurisdiction under section 52 of the *Patent Act*, it is simply determining the rights of private parties as reflected in the Patent Office records, which is a matter of a public nature and not a private cause of action attracting application of the *Limitations Act*. As a result, the Federal Court held that no limitation period applied to Secure Energy's application for declaratory relief.[287]

On the issue of the Release, in August of 2007, Mr. Ewanek and the predecessors to Secure Energy executed mutual releases, releasing Mr. Ewanek "…of and from any and all manner of actions, causes of actions, suits, contracts, claims, demands, and damages of any kind whatsoever, whether corporate or personal" that the predecessors from Secure Energy may have had against him until August of 2007.[288]

The Federal Court held that although the Release purports to release "all manner of actions… against John Ewanek", Secure Energy's application for a determination of ownership and rectification of the Patent Register under section 52 of the *Patent Act* was not a "claim" against Mr. Ewanek *per se*.[289] There was nothing in the Release that prohibited a party from seeking a declaration and as such, it was held not to bar to Secure Energy's application.

Commentary

For registered owners and inventors of patents, the Federal Court's application of limitation laws to section 52 of the *Patent Act* may be a cause for concern, as claims for declarations of ownership and inventorship may be allowed to proceed notwithstanding the expiry of legislated limitation periods. This case also serves as an important reminder for claimants and defendants that general releases may not

[279] *Secure Energy*, *supra* note 274 at para 16.
[280] *Ibid* at paras 39, 40.
[281] *Ibid* at para 32.
[282] *Ibid* at para 33.
[283] *Ibid* at para 40.
[284] *Limitations Act*, *supra* note 113 at section 3(1).
[285] *Secure Energy*, *supra* note 274 at para 59.
[286] 2007 FC 396 at paras 16, 17.
[287] *Secure Energy*, *supra* note 274 at para 71.
[288] *Ibid* at paras 16, 73.
[289] *Ibid* at para 77.

bar claims for declaratory relief. Drafters of releases should keep this in mind and consider expressly referencing declaratory actions, or risk having such claims survive despite the intention to release 'all manner of claims'.

B. DI FILIPPO V BANK OF NOVA SCOTIA[290]

Background

This case involves the amendment of pleadings in a class action litigation alleging price fixing, specifically the attempt to add new defendants in the face of a limitation period.

Facts

The plaintiffs brought class actions against a number of financial institutions for conspiracy to fix the market and trading prices of gold and silver (the "**Gold Action**" and the "**Silver Action**", respectively). The plaintiffs allege that the defendants used various illegal methods and practices to fix the prices, depriving the class of the actual value of their trades. The class period was defined from January 1, 2004 to December 31, 2016.[291]

The plaintiffs sought to amend the pleadings to add more defendants and amend claims against established defendants. The motion judge dismissed this motion finding that the proposed amendments included time-barred new claims and in the case of one bank, while the claim was not time barred, it could not be joined in the action because it did not arise out of the same transaction or occurrence.[292]

The Gold Action was commenced on December 18, 2015, and Silver Action was commenced on April 15, 2016. Similar class proceedings were ongoing in the US where the regulatory body the Commodity Futures Trading Commission ("**CFTC**") made orders in 2019 and 2020 against existing defendants UBS and HSBC, as well as four other financial institutes Bank of America, Merrill Lynch, JP Morgan and Morgan Stanley. The CFTC settled with Deutsche Bank in the US litigation which included provisions that Deutsche Bank cooperate in pursuing claims against the remaining Defendants.[293]

The CFTC findings related to a method of fraudulently manipulating the gold and silver trading markets known as "spoofing," where a fake order for the metal would be placed and later withdrawn after another transaction went through at an inflated or deflated price influenced by the fake order.[294]

The issue was when class counsel had "actual knowledge" that Bank of America, Morgan Stanley and Merrill Lynch had been added to US proceedings, thus starting the discoverability clock. There was also an issue as to whether JP Morgan was a "proper party" to the existing conspiracy actions.[295]

Decision

The Ontario Court of Appeal allowed the appeal, in part because the US pleadings and Swiss Competition Commission press release "did not disclose the necessary material facts" and it was therefore an error of law "to find that the proposed amendments were statute barred on the basis that class counsel had actual knowledge of the claims against Bank of America, Merrill Lynch and Morgan Stanley more than two years before the motion to amend was brought."[296]

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[290] 2024 ONCA 33.
[291] *Ibid* at paras 4—6.
[292] *Ibid* at para 2.
[293] *Ibid* at pars 4—7.
[294] *Ibid* at para 8.
[295] *Ibid* at para 20.
[296] *Ibid* at para 60.

It was noted that actual knowledge does not materialize when a party can make a "plausible inference of liability." Rather, it materializes when a party has "the material facts upon which a plausible inference of liability on the defendant's part can be drawn."[297]

In the present case, the Court found that while class counsel may have had reason to suspect that Bank of America, Merrill Lynch, and Morgan Stanley were part of the conspiracy, that suspicion was not actual knowledge.[298]

The Court of Appeal also allowed the appeal with respect to adding JP Morgan as a defendant, and noted that the spoofing was done by traders with the knowledge and consent of their superiors and that this conduct benefitted JP Morgan financially while harming market and market participants.[299]

Commentary

It is notoriously difficult to name all parties in a proceeding which involves wrongful conduct over a period of time, or pursuant to a collusive practice such as price fixing. This case is a good reminder of the ever-present concerns about looming limitation periods, especially when trying to launch a Canadian action which is based on findings made by a foreign tribunal.

IX. OIL AND GAS

The decisions in this section confirm that oil and gas regulators and other administrative decision makers must exercise their decision-making powers in a reasonable, transparent and intelligible manner, failing which they risk having their decisions overturned on judicial review. The Alberta Courts also examined the importance of parties' intentions when assessing whether a transfer or sale of oil and gas royalty rights is binding upon subsequent purchasers of the underlying leasehold interests.

A. SHELL CANADA LIMITED AND SHELL CANADA ENERGY V ALBERTA (ENERGY)[300]

Background

This was an appeal by the Alberta Minister of Energy (the "**Minister**") from a decision of the Alberta Court of King's Bench ordering a judicial review of the Minister's decision to refuse to convene a Dispute Review Committee (a "**DRC**") pursuant to the *Mines and Minerals Dispute Resolution Regulation*[301] (the "***Dispute Resolution Regulation***") to review the disallowance of certain employee costs claimed by the respondents, Shell Canada Limited and Shell Canada Energy ("**Shell**").

Facts

Shell had submitted details of costs to the Minister it claimed to have incurred in operating the Muskeg River oilsands project for 2009, which were to be deducted from revenues in the calculation of Crown royalties. Following an audit by Alberta Energy, Shell disputed the disallowance of certain of the costs under the *Dispute Resolution Regulation*.[302]

In November of 2015, the Director of Dispute Resolution (the "**Director**") proposed that the 2009 audit of Shell's expenses be confirmed as correct.[303] The Director found that certain expenses claimed were for Shell employee tasks that were not "Solely Dedicated" to the Muskeg River project as required

[297] *Ibid* at para 59.
[298] *Ibid*.
[299] *Ibid* at para 69.
[300] 2023 ABCA 230 [*Shell*].
[301] Alta Reg 170/2015.
[302] *Shell*, *supra* note 300 at para 3.
[303] *Ibid*.

under the *Oil Sands Allowed Costs (Ministerial) Regulation*[304] (the "***Allowed Costs Regulation***"), but rather were shared among multiple oil sands projects.[305]

Shell did not accept the proposed resolution, and the Director in turn issued a Statement of No Resolution.[306] Shell then requested the establishment of a DRC.[307] The Minister declined, as she considered Shell's position on the "Solely Dedicated" issue to be without merit within the meaning of section 7(10) of the *Dispute Resolution Regulation*. Importantly, the Minister did not provide reasons for her decision.[308] On judicial review, the Minister's screening decision that Shell's position was without merit was found to be unreasonable. The Minister "had simply parroted the position of the Department of Energy" and "…failed to demonstrate any consideration of the scheme and purpose of the regulations, or of the arguments made to her by Shell."[309]

The judicial review judge declared that the Minister must convene a DRC and that the question of whether the disallowed costs on the basis that they were not "Solely Dedicated" are allowed costs under the *Allowed Costs Regulation*.[310]

Decision

The issues on appeal by the Minister were whether the judicial review judge failed to apply a reasonableness standard when reviewing the Minister's screening decision and whether the judicial review judge's decision granting *mandamus* usurped the Minister's discretion to screen out new issues.[311]

On reasonableness, the Alberta Court of Appeal framed the issue as whether the Minister's screening decision that Shell's position was "frivolous, vexatious or without merit" was reasonable.[312] In holding that the screening decision was unreasonable, the Court held that the Minister's reasons for concluding Shell's position was without merit did not explain the analysis undertaken or test applied to make that determination.[313] The Minister's decision did not disclose the reasoning process, did not address the context or purpose of the *Dispute Resolution Regulation* and did not bear "the hallmarks of reasonableness – justification, transparency and intelligibility"[314] in accordance with the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*[315] ("***Vavilov***"). The Court of Appeal therefore dismissed the Minister's appeal and upheld the judicial review judge's decision quashing the Minister's screening decision.

Regarding the remedy granted by the judicial review judge to quash the Minister's screening decision and directing the issues to be determined before the DRC, the Court of Appeal agreed with the judicial review judge that the matter did not need to be remitted back to the Minister as it would not serve any purpose. In *Vavilov*, the Supreme Court stated that remitting a matter back to a decision make is not necessary where a particular outcome is inevitable.[316] In this case, the Court of Appeal held that it was inevitable that Shell's complaint would not be screened out as being frivolous or vexatious or without merit such that there was no need to remit that decision to the Minister.[317] The Court of Appeal did find

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[304] Alta Reg 231/2008.
[305] *Shell*, *supra* note 300 at para 3.
[306] *Ibid*.
[307] *Ibid*.
[308] *Ibid* at para 4.
[309] *ibid* at para 5.
[310] *ibid* at para 6.
[311] *Ibid* at para 15.
[312] *Ibid* at para 19.
[313] *Ibid* at para 23.
[314] *Ibid*.
[315] 2019 SCC 65.
[316] *Shell*, *supra* note 300 at para 30.
[317] *Ibid*.

that the judicial review judge expanded the scope of the dispute raised by Shell, and reformulated the question to be put to the DRC to align with what the parties had reasonably contemplated.[318]

Commentary

The Alberta Court of Appeal's decision in *Shell* serves as a reminder that regulators must exercise their decision-making powers reasonably, in keeping with the tenets of procedural fairness set forth in *Vavilov*. If a regulator's decision does not bear the "hallmarks of reasonableness", then it is at risk of being overturned on judicial review. This decision should be welcomed by oil sands project operators, as it confirms that ministerial decisions related to the calculation of royalties need to be justified, transparent or intelligible.

B. TAYLOR PROCESSING INC V ALBERTA (MINISTER OF ENERGY)[319]

Background

In *Taylor*, the Alberta Court of King's Bench invalidated three decisions from the Alberta Minister of Energy that resulted in the unlawful collection of over $20 million in royalties from Taylor Processing Inc. ("**Taylor**") and Nova Chemicals Corporation ("**Nova**", collectively with Taylor, the "**Applicants**"), and underlines the importance of adhering to the applicable royalty regulations and the fair treatment of energy companies.

Facts

Taylor operates a gas plant that processes raw gas subject to royalties payable under the *Mines and Minerals Act*[320] (the "***MMA***"), and co-stream gas that has already been processed elsewhere and for which royalties have already been paid.[321] Taylor was responsible for metering and reporting on Petrinex all gas volumes that are processed, net of shrinkage, for the purpose of calculating royalties under the *MMA*.[322] Taylor had used a "Fuel Allocation Procedure" to report co-stream gas volumes to the Royalty Operations Branch of Alberta Energy (the "**Department**").[323]

After four years of Taylor reporting its gas volumes using this procedure, the Department began applying its own "Pro-Rata Fuel Allocation Approach" to allocate between volumes of raw and co-stream gas.[324] The Department's approach increased the amount of royalties paid by Nova.[325] The Applicants objected and requested information as to why the Department's allocation was preferred over that of Taylor, to which they claimed they did not receive an adequate response. A series of three decisions were issued by the Department and the Director of Dispute Resolution (the "**Director**") in favour of the Department's assessments of royalties payable by the Applicants (the "**Decisions**"), finding among other things that the Applicants did not adduce sufficient evidence their Fuel Allocation Procedure for reporting gas volumes is accurate.[326] The Applicants brought an application for judicial review of these Decisions.

Decision

The Applicants argued that the Decisions were unjustified, lacked transparency and intelligibility and did not conform with the Minister's jurisdiction pursuant to the *MMA* or the *Natural Gas Royalty*

[318] *Ibid* at para 58.
[319] 2023 ABKB 64 [*Taylor*].
[320] RSA 2000, c M-17 [*MMA*].
[321] *Taylor*, *supra* note 319 at paras 7, 9.
[322] *Ibid* at para 10.
[323] *Ibid* at para 17.
[324] *Ibid* at para 21.
[325] *Ibid* at para 22.
[326] *Ibid* at para 52.

Regulation, 2009[327] (the "***Royalty Regulation***") and that the Department breached its duty of procedural fairness by failing to give adequate reasons.[328]

The Alberta Court of King's Bench agreed, holding that the decisions by the Minister were unreasonable for several reasons, including that the Department and the Director improperly reversed the onus onto the Applications and failed in their duty to provide adequate reasons for the Decisions.

Section 37 of the *MMA* grants authority to the Minister to take remedial action where, in its opinion, something has been done to reduce the Crown's royalty entitlement.[329] The Minister bears the evidentiary burden of establishing an act falls within section 73 of the *MMA* and its opinion must be justified by appropriate reasons.[330] Similarly, section 16(2) of the *Royalty Regulation* allows the Minister to recalculate royalty compensation due when information has been wrongly reported or withheld, with the Minister bearing the evidentiary onus of showing what information was incorrect or omitted before it is permitted to recalculate royalty compensation.[331]

In this case, the Department and the Director did not identify what information was incorrectly entered into or omitted from Petrinex, a public data of record management and exchange platform for governments and private stakeholders, nor did they provide an explanation for how the Applicants failed to allocate shrinkage fairly. Rather, they simply stated it was "not convinced" the Applicants provided sufficient evidence and that there was a "lack of supporting information", despite not making any efforts to collect the information it thought was missing or was incomplete.[332] By failing to identify the evidentiary basis required to establish the Applicants had done something to reduce the Crown's royalty entitlement or that they had wrongly reported or withheld information, the Department and the Director unreasonably misplaced the Minister's onus onto the Applicants.[333]

The Department and the Director were also found to have not considered relevant evidence, namely the Alberta Energy Regulator's (the "**AER**") assessment and investigation of the Applicants' Fuel Allocation Procedure. The AER's assessment, which was based on information that the Department and the Director had failed to collect, was favourable to the Applicants. The Court held that "[h]aving failed to take similar steps to investigate the Fuel Allocation Procedure itself, the Department's rejection of the AER's conclusion and formation of its own conclusion about the Fuel Allocation Procedure render the Minister's "opinion" under section 37 of the *MMA* arbitrary."[334]

The Court of King's Bench quashed the Department and Director's decisions and ordered the Minister to repay over $20 million plus interest to Nova in wrongfully collected royalties. The Decisions were not remitted back to the Department or the Director for reconsideration "would be pointless", as the AER's assessment conclusively proved that the Applicants' Fuel Allocation Procedure was appropriate.[335]

Discussion

In *Taylor*, the Alberta Court of King's Bench affirmed that the principles of procedural fairness apply where the Minister of Energy engages in a royalty review. In the event royalties are to be recalculated under the *MMA*, the Minister must engage in a proper investigation, obtain (or at minimum request) information and records it requires to make an intelligible decision, must consider all evidence before it, and provide a reasoned decision for any recalculation to oil and gas project operators. The

[327] Alta Reg 221/2008.
[328] *Taylor*, *supra* note 319 at para 63.
[329] *Ibid* at para 83.
[330] *Ibid* at paras 84 and 85.
[331] *Ibid* at para 87.
[332] *Ibid* at para 88.
[333] *Ibid* at para 91.
[334] *Ibid* at para 98.
[335] *Ibid* at paras 119 and 120.

Minister cannot shift the burden to industry to justify why its royalty calculations were correct. Although the Court acknowledged "…the importance to Albertans of the Crown's entitlement to its royalty share… the Crown is entitled to collect only those royalties that are lawfully due – no more, no less and, even then, only in accordance with what is permitted under the *MMA*".

C. TERRA ENERGY CORP (RE)[336]

Background

In *Terra*, the Alberta Court of King's narrowly interprets the Crown's ability to recover royalties from a purchaser or transferee when a Crown lease is transferred under section 91.1 of the *MMA* to those liabilities that existed *before* the transfer occurred, and not to contingent liabilities.

Facts

In 2015, Enercapita Energy Ltd. ("**Enercapita**") acquired certain Crown leases from Terra Energy Corp. ("**Terra**"). At the time, no royalty arrears associated with the purchased assets were outstanding.[337]

In March of 2016, Terra entered into insolvency proceedings.[338] The Crown submitted a proof of claim as an unsecured creditor of claims that arose in June of 2016, after the transfer and registration of leases.[339] During Terra's insolvency proceedings, Alberta Energy performed audits of Terra's 2011 to 2014 gas cost allowance filings under section 38(6) of the *MMA*.[340] Neither Terra nor its bankruptcy trustee responded to Alberta Energy's requests for information, and as a result in January of 2017 Terra's filings of allowable expenditures were amended to zero which resulted in a net amount owing to Alberta Energy.[341]

In November of 2017, Alberta Energy requested payment of Terra's gas royalty arrears from Enercapita of approximately $3.2 million.[342] At the time, Enercapita had a balance owing on its royalty account in excess of $1.2 million.[343] Enercapita requested information and supporting documentation from Alberta Energy regarding the calculation of Terra's arrears, though no response was provided.[344] In May of 2018, Alberta Energy advised Enercapita that it would be pursuing a right of set off and applying Enercapita's credit against Terra's outstanding arrears.[345]

Thereafter, Enercapita provided documentation regarding Terra's arrears, while Alberta Energy did not provide a full response to requests for information made by Enercapita.[346] On December 17, 2020, Alberta Energy sent Enercapita a letter advising that its credit would not be refunded and that its royalty account would continue to be set-off against Terra's arrears.[347] Enercapita then filed the within application seeking a declaration that Alberta Energy did not have the statutory authority to claim royalty arrears owing by Terra or to set off amounts owing by Terra against credits held by Enercapita, and for a refund of amounts owing to Enercapita under its royalty account.

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[336] 2023 ABKB 236 [*Terra*].
[337] *Terra*, *supra* note 336 at para 4.
[338] *Ibid* at para 10.
[339] *Ibid* at para 11.
[340] *Ibid* at paras 12, 13.
[341] *Ibid* at para 15.
[342] *Ibid* at para 16.
[343] *Ibid* at para 19.
[344] *Ibid* at para 26.
[345] *Ibid* at para 28.
[346] *Ibid* at para 42.
[347] *Ibid* at para 41.

Decision

The Alberta Court of King's Bench held that Alberta Energy did not have the ability under the *MMA* to claim Terra's royalty arrears from Enercapita, nor did it have the right of set off. Section 91.1 of the *MMA* provides that any obligations or liabilities under an agreement that existed before the transfer was registered continue to run with the interest, and the transferor and the transferee are jointly responsible for any obligation or liability.[348]

In this case, the Court held that the Terra arrears did not 'exist' before the transfer of the leases was registered. At the time of the transfer of Terra's Crown leases to Enercapita, there were no known royalty arrears, only contingent liabilities.[349] The arrears relate to Crown's reversal of certain of Terra's gas cost allowance claims, which occurred after Alberta Energy conducted its audits in 2016 and 2017.[350]

Further, it was held that it would be inequitable and contrary to commercial realities and practicalities to hold Enercapita liable for Terra's arrears.[351] Specifically, while an obligation to pay Crown royalties may arise upon extraction of a mineral, that obligation does not "exist" until there is a determination of the net allowable deductions. The Court held this interpretation is keeping with the object of the *MMA*, which is "to see that Albertans benefit from resource extraction in the form of royalties paid to the provincial Crown, net of the Crown's share of allowable expenses".[352]

In concluding its analysis on this issue, Romaine J. stated that "[t]o permit Alberta Energy to ignore the temporal component of section 91.1 of the *MMA* and collect royalties from an innocent purchaser would increase the risk in oil and gas transactions, and place unwarranted strain on the industry."[353]

On the issue of set-off, the Court held that even if Alberta Energy were able to recover Terra's arrears from Enercapita, it would not be entitled to set off those arrears against Enercapita's credit in its royalty account. Section 46(4) of the *MMA* states that where any amount is owing by a person to the Crown, the Minister may recover that amount by way of set-off against any amount owing to that person by the Crown.[354] In this case, Alberta Energy had not established that Enercapita owed any arrears. In particular, Alberta Energy had overallocated Terra's arrears onto Enercapita[355] and did not properly consider the information provided by Enercapita substantiating Terra's gas cost allowance claims.[356]

Alberta Energy was directed to refund all amounts owing to Enercapita under its royalty account.[357]

Commentary

In the context of the recent increase in mergers and acquisitions in Alberta's oil and gas industry, *Terra* is an important decision with respect to potential liability of purchasers for outstanding royalties. The Court of King's Bench's holding that royalty obligations 'exist' only after a final calculation has been made net of allowable deductions should provide some comfort to companies looking to acquire oil and gas leases. Those contingent liabilities may not be known at the time of the transaction, and as Romaine J. held, ignoring the temporal component within the royalty review scheme under the *MMA* would increase risk and place unwarranted strain on industry.

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[348] *Ibid* at paras 60, 61.
[349] *Ibid* at paras 66, 76.
[350] *Ibid* at paras 65—67.
[351] *Ibid* at para 68.
[352] *Ibid* at para 72.
[353] *Ibid* at para 83.
[354] *Ibid* at para 86—87.
[355] *Ibid* at para 98—100.
[356] *Ibid* at para 106.
[357] *Ibid* at para 110.

D. PRAIRIESKY ROYALTY LTD V YANGARRA RESOURCES LTD[358]

Background

In *PrairieSky*, the Alberta Court of King's Bench considered whether the successor in interest to a Crown lease is bound by an overriding royalty that was originally granted by a predecessor lessee, and for which they did not have notice at the time they acquired their leasehold interest.

Facts

In December of 2014, PrairieSky Royalty Ltd. ("**PrairieSky**") became the successor to a royalty agreement (the "**Royalty Agreement**") pursuant to which an 8% overriding royalty (the "**8% Royalty**") was granted under a Crown lease on unpatented Crown lands (the "**Crown Lease**").[359] In June of 2016, Yangarra Resources Ltd. ("**Yangarra**") acquired the underlying Crown Lease. However, it was not aware of the 8% Royalty interest held by PrairieSky.[360]

When Yangarra drilled a horizontal well on the subject Crown lands and commenced production, PrairieSky sent a demand letter for payment of the 8% Royalty, to which Yangarra asserted it was not bound by the 8% Royalty.[361]

PrairieSky sought a declaration that Yangarra was bound to pay the 8% Royalty. Yangarra asserted that the 8% Royalty was not an interest in land that could run with the lands subject to the Crown lease, and therefore could not encumber subsequent lessees. Yangarra also claimed that if the 8% Royalty is an interest in land, it is a *bona fide* purchaser for value without notice, and it should therefore not be bound by the 8% Royalty.[362]

The issues before the Alberta Court of King's Bench were whether the 8% Royalty constitute an interest in land, if so whether it has priority over Yangarra's interest in the Crown lease, and what was the appropriate remedy.[363]

Decision

In assessing whether the 8% Royalty is an interest in land, the Court applied the test set forth in the Supreme Court of Canada's decision in *Bank of Montreal v Dynex Petroleum Ltd.*[364] ("***Dynex***") where it was held that an overriding royalty interest can be an interest in land if: 1) the language used in describing the interest is sufficiently precise to show that the parties intended the royalty to be a grant of an interest in land, rather than a contractual right to a portion of the oil and gas substances recovered from the land; and 2) the interest, out of which the royalty is carved, is itself an interest in land.[365]

The Court held that the second part of the *Dynex* test was easily satisfied as the 8% Royalty was carved from Crown Lease, and focused its analysis on the first part of the *Dynex* test and interpreting whether the parties intended to create an interest in land,[366] having regard to the agreement as a whole, along with the surrounding circumstances including the facts known by the parties at the time the

[358] 2023 ABKB 11 [*PrairieSky*].
[359] *Ibid* at paras 11, 13.
[360] *Ibid* at para 15.
[361] *Ibid* at para 16.
[362] *Ibid* at para 3.
[363] *Ibid* at para 6.
[364] 2002 SCC 7 at para 22.
[365] *PrairieSky*, *supra* note 359 at para 20.
[366] *Ibid* at para 29.

agreement was made, the purpose, nature and custom of the agreement, and commercial realities of the industry.[367]

In its analysis, the Court set forth core indicia of an interest in land, which include the presence of a clause in the agreement that expressly states the royalty in question constitutes an interest in land, is to be construed as an interest in land, or runs with the lands subject to the royalty or the underlying interest in land (an "**Interest in Land Clause**"), and whether the royalty interest can last for the duration of the underlying estate.[368]

In this case, the Royalty Agreement contained an Interest in Land Clause, and witnesses appearing on behalf of the original parties to same gave evidence that the intent was for the 8% Royalty to not only create an interest in the land, but also that this interest would run for the duration of the underlying Crown Lease.[369]

Regarding the issue of priorities, Yangarra asserted that, at equity, it was a *bone fide* purchaser for value ("**BFPV**") and should not be bound by the 8% Royalty.[370] Both PrairieSky and Yangarra were found to have legal interests in the Crown lands, and the priority of their respective interests was determined through application of the *nemo dat* maxim whereby "no one can give what they do not have".[371]

Yangarra acquired its interest in the Crown Lease after PrairieSky became successor to the Royalty Agreement. As a result, Yangarra could only take its legal interest in the Crown land "subject to PrairieSky's prior legal interest".[372] As such, PrairieSky's interests took priority over the subsequently-acquired interests of Yangarra. The Alberta Court of King's Bench further held that Yangarra's defence of BFPV did not apply, as that is an equitable defence that arises where a subsequent legal interest is acquired without notice of a prior equitable interest. Both Yangarra and PrairieSky held competing legal (and not equitable) interests.[373]

The Court declared that PrairieSky's 8% Royalty is an interest in subject Crown land, which attaches to the land, and is binding on Yangarra and all subsequent working interest owners of the land.[374] Yangarra was also ordered to pay outstanding royalties owing to PrairieSky.[375]

Commentary

The decision in *PrairieSky* underlines the importance of parties' intentions when transferring oil and gas royalty rights. In this case, both the wording of the Royalty Agreement and the evidence of the original contracting parties were decisive factors in establishing the requisite intent that the 8% Royalty was an interest in the Crown land at issue and that it was intended to continue for the duration of the Crown Lease. Purchasers intending on acquiring royalty rights should ensure that their royalty agreements explicitly state these intentions or risk having those royalty rights set aside in the event the underlying Crown Lease is transferred or sold.

For those companies looking to acquire Crown leases, the *PrairieSky* decision emphasizes the need to conduct thorough due diligence to uncover overriding royalties, as being a *bona fide* purchaser for value may not be defence from having to pay royalties. The need for fulsome due diligence may be

[367] *Ibid* at para 36, 61.
[368] *Ibid* at para 63.
[369] *Ibid* at paras 94, 120.
[370] *Ibid* at para 121.
[371] *Ibid* at para 145.
[372] *Ibid* at para 146.
[373] *Ibid* at paras 149—150.
[374] *Ibid* at para 156.
[375] *Ibid* at para 157.

especially important where royalty rights are in respect of unpatented Crown lands that are not subject to the Torrens system of land registration where interests in land would otherwise be registered.

X. PLANS OF ARRANGEMENT

A plan of arrangement is a Court-approved procedure permitting corporate reorganizations, mergers and acquisitions, and other fundamental changes such as debt restructuring. The *ABCA* sets out the statutory requirements for these corporate reorganizations and arrangements. In 2023, Canadian Courts weighed in on several fundamental issues, including whether a proposed plan of arrangement was "fair and reasonable" to stakeholders in the face of impending insolvency, the authority to unwind a completed plan of arrangement and the necessity of compliance with the statutory procedures within the *ABCA.*

A. HEAL GLOBAL HOLDINGS CORP (RE)[376]

Background

In *HEAL,* the Court of King's Bench of Alberta rejected a proposed plan of arrangement for a distressed company because it was not "fair and reasonable" to affected securityholders.

Facts

HEAL Global Holdings Corp ("**HEAL**"), Pathway Health Corp ("**Pathway**") and The Newly Institute Inc ("**Newly**") (collectively, the "**Proponents**") entered into an arrangement agreement on March 31, 2023 whereby Pathway would acquire all of the common shares of Newly (the "**Newly Shares**"), other than the Newly Shares held by HEAL, and all of the common shares of HEAL pursuant to a plan of arrangement under section 193 of the *ABCA* (the "**Arrangement**"). An interim order setting out the procedure for the proposed Arrangement was previously granted on April 25, 2023 (the "**Interim Order**").

The meeting of security holders was held on May 30, 2023 (the "**Special Meeting**") and the Arrangement was approved by 100% of the votes represented (54.5%) at the meeting. Of the 54.5% of votes cast in favour of the Arrangement, HEAL held 40.7% (which were not subject to the Arrangement) and the directors and officers held 19.7%. Of those not represented at the Special Meeting, approximately 32% were absent, 10.5% had exercised dissent rights and had no right to vote and 3% cast no vote and advised Newly that they opposed the Arrangement (the "**Opposing Shareholders**").[377]

Although Newly was solvent at the time of the Interim Order, its financial position had deteriorated such that it was nearly insolvent as of May 31, 2023 – one day after the Arrangement was approved at the Special Meeting. By not having updated financial information, Newly's shareholders may not have been aware of the imminent threat of insolvency.[378]

On June 30, 2023, the Proponents brought an application for a final order approving the Arrangement (the "**Final Approval Application**").[379] The Arrangement and Final Approval Application was opposed the Opposing Shareholders, primarily on the basis that the Arrangement was not fair and reasonable.[380]

[376] 2023 ABKB 451 [*HEAL*].
[377] *Ibid* at paras 12—16.
[378] *Ibid* at paras 49—50.
[379] *Ibid* at para 5.
[380] *Ibid* at paras 3—4.

Decision

In applying the "fair and reasonable" test set out in the Supreme Court of Canada's decision of *BCE Inc v 1976 Debentureholders,*[381] the Court considered whether (i) the arrangement had a valid business purpose, and (ii) whether the objections of those whose legal rights were being arranged were being resolved in a fair and balanced way.[382]

The Court considered Newly's dire financial position and found that the Arrangement was necessary for the continued operation of Newly and had a valid business purpose. The Court acknowledged that if the Arrangement was not approved, which could be the corporation's financial lifeboat, Newly could go under.[383] Nevertheless, the Court determined that the Arrangement was not "fair and reasonable" for the following primary reasons:

- many of the shares voting in favour of the Arrangement were held by HEAL, despite the fact that HEAL's shares in Newly were not subject to the Arrangement;[384]
- the Arrangement would treat a single class of shareholders as two groups who do not share the same rights, privileges, restrictions and conditions;[385]
- the information available to security holders at the time of the Special Meeting was prejudicially out of date;[386] and
- Newly shareholders that dissented to the Arrangement would effectively have their dissent rights excoriated.[387]

The Court concluded that while the Arrangement would provide for Newly's continued existence and save the corporation from insolvency, the adverse effect on the rights of securityholders was too substantial to approve the Arrangement.[388]

Commentary

HEAL provides useful guidance to distressed companies considering arrangement transactions. *HEAL* demonstrates that that even where an arrangement may remedy a corporation's imminent insolvency, Court approval for a plan of arrangement is not a "rubber stamp". In each circumstance, the Court must carefully scrutinize all of the relevant facts, including the impact of the transaction on affected securityholders and the process through which the transaction was approved before granting its approval.

B. TAIGA GOLD CORP V MUNDAY[389]

Background

In this case, the Alberta Court of Appeal declined a request to unwind a completed transaction despite finding that the lower Court erred in approving the plan of arrangement in the first instance.

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[381] 2008 SCC 69 [*BCE*].
[382] *HEAL*, *supra* note 377 at paras 23, 29, citing *BCE*, *supra* note 382 at para 138.
[383] *HEAL*, *supra* note 377 at paras 37—39.
[384] *Ibid* at para 47.
[385] *Ibid* at paras 53—56.
[386] *Ibid* at para 92.
[387] *Ibid* at paras 65 and 72.
[388] *Ibid* at paras 96—99.
[389] 2023 ABCA 12 [*Taiga*].

Facts

Taiga Gold Corp. ("**Taiga**") was a mineral exploration company incorporated under the *ABCA*. SGO Mining Inc. ("**SGO**") acquired shares, warrants and options in Taiga held by third parties by a Court-approved plan of arrangement under section 193 of the *ABCA* (the "**SGO Arrangement**"). The approval proceedings occurred in early 2022.[390]

On January 14, 2022, Taiga sought an *ex parte* interim order setting the date for shareholders to consider and vote upon a resolution to approve the SGO Arrangement. Taiga did not advise the Court that there were warrant holders opposing the SGO Arrangement, nor that the warrant holders may be entitled to notice of the meeting and to vote on the proposed transaction. Accordingly, the interim order did not set a meeting of warrant holders nor impose any requirement that they vote on the SGO Arrangement.

On February 22, 2022, the shareholder meeting took place and approximately 85% of the shareholders voted to approve the SGO Arrangement.[391] The following day, the final hearing took place to approve the SGO Arrangement. The warrant holders opposed the SGO Arrangement on the basis that Taiga had not met the test for approving plans of arrangement set out in the Supreme Court of Canada decision of *BCE.*[392] The warrant holders raised concerns that (i) the SGO Arrangement would affect their legal rights because it would extinguish their contractual right to exercise their warrants or to commence a claim, (ii) the procedural requirements of section 193 of the *ABCA* had not been met because a meeting of the warrant holders had not been held as required by section 193(4)(b), and (iii) the SGO Arrangement did not meet the *BCE* test because it treated shareholders and warrant holders unequally.[393]

The chambers judge acknowledged that warrant holders' legal rights would be affected by the SGO Arrangement and that a meeting of the warrant holders should have been held prior to approving the SGO Arrangement. Nevertheless, the chambers judge approved the SGO Arrangement and concluded that the failure to hold a meeting of the warrant holders was not fatal as it would not have affected the vote outcome. Even if all the warrant holders voted against the SGO Arrangement, it would have been approved in any event because it was approved by the required two-thirds majority of security holders.[394]

Decision

On appeal, the Court of Appeal of Alberta was tasked with determining, among other things, whether the chambers judged erred in concluding that the *ABCA*'s procedural requirements were met; specifically, that the Court would waive the requirement under section 193(4)(b) to hold a meeting of warrant holders at which they could vote.[395]

The Court of Appeal of Alberta held that the chambers judge erred in concluding that a meeting of the warrant holders was not required prior to approving the SGO Arrangement, because such a meeting *was* required. The language of section 193(4)(b) of the *ABCA* is mandatory, not permissive, and the chambers judge had no discretionary authority to approve the SGO Arrangement if the statutory requirements were not met. As a result, the first step of the *BCE* test was not satisfied and the SGO Arrangement should not have been approved.[396]

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[390] *Ibid* at paras 3—4.
[391] *Ibid* at para 9.
[392] *Ibid* at para 11.
[393] *Ibid* at para 12.
[394] *Ibid* at paras 13—16.
[395] *Ibid* at para 17.
[396] *Ibid* at para 37.

The Court of Appeal of Alberta then turned to what remedy was appropriate in the circumstances. The warrant holders requested that the Court either amend the already approved and completed arrangement to give warrant holders dissent rights, or (ii) to carve out an exception for the warrant holders to sue on the warrants. The Court declined to grant this relief on the basis that it was far from clear that it had the authority to partially unwind the SGO Arrangement, and it was not willing to change the terms that may have been critical to the transaction. Although there was an error in approving the SGO Arrangement, the appeal was dismissed.

The Court noted that if the warrant holders wanted to preserve their ability to ability to receive an effective remedy on appeal, it would have been wise to apply to the chambers judge or a justice of this Court for a stay pending appeal, regardless of the tight timelines involved.[397]

Commentary

This decision serves as a reminder for both applicants for approval of plans of arrangement, and for opposing parties that the procedural requirements under the *ABCA* must be rigidly adhered to. This includes obtaining votes of all classes of securityholders irrespective of whether their ultimate vote will end up and an approval or denial of the proposed transaction. Further, *Taiga* cautions that if a party has concerns that a Court should not have approved a plan of arrangement, it must seek a stay of proceedings of the Court's approval order as it may be impossible to unwind an arrangement after it has been completed.

[397] *Ibid* at paras 40—41.