

RECENT JUDICIAL DECISIONS OF INTEREST TO ENERGY LAWYERS

MATTI LEMMENS* AND BRETT CARLSON**

The past year was a busy one for the energy industry, with many reported decisions of significance. Key decisions regarding constitutional jurisdiction, the duty to consult, and judicial review kept the industry in a pattern of optimism and hesitancy. This article summarizes a number of recent judicial decisions and provides commentary on their significance to Canada's energy industry. In particular, decisions reviewed in this article cover subjects including constitutional division of powers, the Crown's duty to consult, oil and gas leases and purchase and sale agreements, environmental remediation and liability, insolvency, intellectual property, tax, remedies and injunctive relief, class actions, conflict of laws, arbitration, and judicial review. In each case, the facts, a summary of the decision, and commentary on the outcomes and future implications for energy lawyers and the industry are canvassed. With the past year of decisions finishing with COVID-19 restrictions, the energy industry saw some of the most drastic change in recent memory. The industry will need to exercise perseverance in these tumultuous times in order to adapt, withstand, and recover from the changes of this past year.

TABLE OF CONTENTS

I.	CONSTITUTIONAL	412
	A. REFERENCE RE GREENHOUSE GAS POLLUTION PRICING ACT (SASKATCHEWAN, ONTARIO, AND ALBERTA)	413
	B. REFERENCE RE ENVIRONMENTAL MANAGEMENT ACT (BRITISH COLUMBIA)	416
	C. ATTORNEY GENERAL OF QUEBEC V. IMTT-QUÉBEC INC.	417
II.	INDIGENOUS	419
	A. COLDWATER INDIAN BAND V. ATTORNEY GENERAL OF CANADA	419
	B. WILLIAM V. BRITISH COLUMBIA (ATTORNEY GENERAL)	421
	C. ATHABASCA CHIPEWYAN FIRST NATION V. ALBERTA	422
	D. FORT MCKAY FIRST NATION V. PROSPER PETROLEUM LTD.	424
III.	ENVIRONMENTAL REMEDIATION AND LIABILITY	426
	A. CONOCOPHILLIPS CANADA RESOURCES CORP. V. SHELL CANADA LIMITED	426
	B. RESOLUTE FP CANADA INC. V. ONTARIO (ATTORNEY GENERAL)	428
	C. ISH ENERGY LTD. V. WEBER CONTRACT SERVICES INC.	429
	D. BAMRAH V. WATERTON PRECIOUS METALS BID CORP.	431
	E. BROOKFIELD RESIDENTIAL (ALBERTA) LP (CARMA DEVELOPERS LP) V. IMPERIAL OIL LIMITED	432
IV.	OIL AND GAS COMPENSATION	434
	A. WHITECAP RESOURCES INC. V. CANADIAN NATURAL RESOURCES LIMITED	434

* Partner, Borden Ladner Gervais LLP, Calgary, Alberta.

** Associate, Borden Ladner Gervais LLP, Calgary, Alberta. The authors wish to thank Jesse Vreeken, Emma Morgan, Patricia McGauley, and Brett Nguyen for their contribution to this article.

B.	<i>CANADIAN NATURAL RESOURCES LIMITED</i> <i>v. LISAFELD ROYALTIES LTD.</i>	436
C.	<i>KARVE ENERGY INC. v. DRYLANDER RANCH LTD.</i>	438
D.	<i>HUDSON KING v. LIGHTSTREAM RESOURCES LTD.</i>	439
V.	REMEDIES AND INJUNCTIVE RELIEF	441
A.	<i>PROSPER PETROLEUM LTD. v. HER MAJESTY THE QUEEN</i> <i>IN RIGHT OF ALBERTA</i>	442
B.	<i>COASTAL GASLINK PIPELINE LTD. v. HUSON</i>	443
C.	<i>ENERPLUS CORPORATION v. COPYSEIS LTD.</i>	444
VI.	INSOLVENCY	446
A.	<i>PRICEWATERHOUSECOOPERS INC.</i> <i>v. PERPETUAL ENERGY INC.</i>	446
B.	<i>THIRD EYE CAPITAL CORPORATION v.</i> <i>RESSOURCES DIANOR INC./DIANOR RESOURCES INC.</i>	449
VII.	STANDARD OF REVIEW	450
A.	<i>CANADA (MINISTER OF CITIZENSHIP</i> <i>AND IMMIGRATION) v. VAVILOV</i>	450
B.	<i>BELL CANADA v. CANADA (ATTORNEY GENERAL)</i>	453
C.	<i>ENMAX ENERGY CORPORATION v. ALBERTA UTILITIES COMMISSION;</i> <i>CAPITAL POWER CORPORATION v. ALBERTA UTILITIES COMMISSION;</i> <i>MILNER POWER INC. v. ALBERTA UTILITIES COMMISSION</i>	455
VIII.	CONFLICT OF LAWS	457
A.	<i>NEVSUN RESOURCES LTD. v. ARAYA</i>	457
B.	<i>RDX TECHNOLOGIES CORPORATION v. APPEL</i>	460
C.	<i>FORT HILLS ENERGY LP v. JOTUN A/S</i>	462
IX.	CLASS ACTIONS	463
A.	<i>STEVENS v. ITHACA ENERGY INC.</i>	463
B.	<i>KIRK v. EXECUTIVE FLIGHT CENTRE FUEL SERVICES LTD.</i>	465
C.	<i>ENVIRONNEMENT JEUNESSE</i> <i>c. PROCUREUR GÉNÉRAL DU CANADA</i>	467
X.	INTELLECTUAL PROPERTY	468
A.	<i>AUX SABLE LIQUID PRODUCTS L.P.</i> <i>v. J.L. ENERGY TRANSPORTATION INC.</i>	469
B.	<i>PACKERS PLUS ENERGY SERVICES INC.</i> <i>v. ESSENTIAL ENERGY SERVICES LTD.</i>	470
C.	<i>WESTERN OILFIELD EQUIPMENT RENTALS LTD. v. M-I LLC</i>	471
XI.	TAX	473
A.	<i>BIRCHCLIFF ENERGY LTD. v. HER MAJESTY THE QUEEN</i>	473
B.	<i>HER MAJESTY THE QUEEN</i> <i>v. ALTA ENERGY LUXEMBOURG S.A.R.L.</i>	475
XII.	ARBITRATION	477
A.	<i>UBER TECHNOLOGIES INC. v. HELLER</i>	477

I. CONSTITUTIONAL

Increasing interest by provincial and federal governments in regulating various aspects of the environment and climate change, including oil transportation, greenhouse gas (GHG)

emissions regulation, and environmental assessments, has led to a proliferation of division of powers disputes. This past year, the Supreme Court of Canada firmly rebuked British Columbia's attempt to regulate the interprovincial transportation of heavy oil. Additionally, the Quebec Court of Appeal reaffirmed important principles related to the jurisdiction of environmental assessments while also adding some clarity to the often murky doctrine of interjurisdictional immunity (IJI). Finally, three appeal courts rendered decisions on the federal carbon tax, with all but the Alberta Court of Appeal holding that the law is constitutional. The Supreme Court of Canada heard this matter on 22–23 September 2020 and is expected to release a decision in the spring of 2021.¹

**A. REFERENCE RE GREENHOUSE GAS POLLUTION PRICING ACT
(SASKATCHEWAN, ONTARIO, AND ALBERTA)²**

1. BACKGROUND

In 2019 and 2020, the Saskatchewan Court of Appeal, the Ontario Court of Appeal, and the Alberta Court of Appeal released their reference decisions on the constitutionality of the federal *Greenhouse Gas Pollution Pricing Act*.³ Both the Ontario and Saskatchewan Courts of Appeal found that the *GGPPA* was a valid exercise of federal power under the national concern branch of the peace, order, and good government power (POGG),⁴ while the Alberta Court of Appeal provided a strong rebuke of this conclusion, holding that POGG could not support such a broad subject matter without significantly infringing into provincial jurisdiction.⁵ The case is now before the Supreme Court of Canada, which is tasked with resolving a critical division of powers issue between the federal and provincial governments over the regulation of GHG emissions.

2. FACTS

The *GGPPA* operates through the imposition of a levy on the use of fossil fuels and sets minimum GHG reduction standards nationally. Provinces may either elect to fall under the *GGPPA*, or enact their own legislation with equal, or more stringent, reduction targets. The *GGPPA* is targeted at both: (1) fossil fuel consumption generally by imposing a monetary charge on businesses that produce or import fuels that cause GHG emissions; and (2) industrial emitters by pricing GHG emissions on an output based system.

¹ *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544, appeal as of right to the SCC, 38781 [GGPPA Reference Ont CA]; *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40, appeal as of right to the SCC, 38663 [GGPPA Reference Sask CA]; *Reference re Greenhouse Gas Pollution Pricing Act*, 2020 ABCA 74 appeal as of right to the SCC, 39116 [GGPPA Reference Alta CA].

² *Ibid.*

³ SC 2018, c 12, enacted pursuant to section 186 of the *Budget Implementation Act, 2018, No 1*, SC 2018, c 12 [GGPPA].

⁴ See *GGPPA Reference Sask CA*, *supra* note 1 at paras 114–17; *GGPPA Reference Ont CA*, *supra* note 1 at para 163.

⁵ See *GGPPA Reference Alta CA*, *supra* note 1 at para 21.

3. DECISIONS

In each reference, the appeal courts applied the standard division of powers framework to the *GGPPA*: first characterizing the *GGPPA*'s "pith and substance,"⁶ and then classifying it within a head of power under sections 91 or 92 of the *Constitution Act, 1867*.⁷ The majorities at the Ontario and Saskatchewan Courts of Appeal characterized the *GGPPA*'s matter narrowly, as the establishment of minimum national standards of price stringency, while the Alberta Court of Appeal defined the matter more broadly, as the regulation of GHG emissions generally. These competing characterizations ultimately led to different classifications, causing the Alberta Court of Appeal to hold that the *GGPPA* could not be sustained under any federal head of power, including POGG.

a. Saskatchewan Court of Appeal

The *GGPPA* was challenged on the grounds that it imposes a tax, the application of which is determined by the Governor in Council (GIC), and therefore it offends the *Constitution Act, 1867* by creating a tax authorized by the GIC and not Parliament.⁸ The Saskatchewan Court of Appeal held that the *GGPPA* does not create a tax, but instead a regulatory charge as the statute could achieve its ends without raising funds and is "wholly disinterested in generating revenue."⁹

On the issue of POGG, the Saskatchewan Court of Appeal applied the test set out in *R. v. Crown Zellerbach Canada Ltd.*¹⁰ and determined that the matter, the setting of minimum standards of price stringency for GHG emissions, could be supported by the national concern branch.¹¹ In doing so, the Saskatchewan Court of Appeal emphasized the "singleness, distinctiveness and indivisibility"¹² prong of the national concern branch to find that, without a concerted provincial effort to address GHG emissions, legislative action in Canada would be conducted in piecemeal fashion and ultimately be ineffective.¹³

b. Ontario Court of Appeal

On the issue of POGG, the Ontario Court of Appeal applied similar reasoning, placing considerable weight on provincial indivisibility, holding that "[w]hile a province can pass laws in relation to GHGs emitted within its own boundaries, its laws cannot affect GHGs emitted by polluters in other provinces — emissions that cause climate change across all provinces and territories."¹⁴ The dissent, foreshadowing aspects of the Alberta Court of Appeal decision that followed, disputed this argument and held that "[t]here are many things that individual provinces cannot establish, but it does not follow that those things are matters

⁶ *GGPPA Reference Sask CA*, *supra* note 1 at para 55; *GGPPA Reference Ont CA*, *supra* note 1 at paras 67–70; *GGPPA Reference Alta CA*, *ibid* at para 145.

⁷ (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5. See *GGPPA Reference Sask CA*, *ibid* at paras 56–57; *GGPPA Reference Ont CA*, *ibid*; *GGPPA Reference Alta CA*, *ibid* at para 151.

⁸ See *GGPPA Reference Sask CA*, *ibid* at para 8.

⁹ *Ibid* at paras 87, 97.

¹⁰ [1988] 1 SCR 401.

¹¹ See *GGPPA Reference Sask CA*, *supra* note 1 at para 125.

¹² *Ibid* at para 153.

¹³ *Ibid* at paras 153–58.

¹⁴ *GGPPA Reference Ont CA*, *supra* note 1 at para 117.

of national concern on that account. If it were otherwise, any matter could be transformed into a matter of national concern simply by adding the word ‘national’ to it.”¹⁵

c. Alberta Court of Appeal

The Alberta Court of Appeal breathed some life into the dissenting opinions from the Saskatchewan and Ontario Courts of Appeal, holding that the *GGPPA* represents an unconstitutional “Trojan Horse”¹⁶ that would “forever alter the constitutional balance”¹⁷ between the provinces and territories. The Alberta Court of Appeal majority differed from the Saskatchewan and Ontario Courts of Appeal majorities in three key respects. First, it characterized the *GGPPA* more broadly as relating to the regulation of GHG emissions generally.¹⁸ Second, it interpreted the scope of POGG more narrowly, holding that it “is not a grand entrance hall into every head of provincial power”¹⁹ and only applies to matters “local or private in nature in a province,” which are *not* enumerated in the *Constitution Act, 1867*.²⁰ Third, it held that the provincial inability test does not relate to the *consequences* of provincial inaction, but rather provinces’ *jurisdictional ability* to enact a challenged scheme on their own. Accordingly, placing the *GGPPA* under POGG would allow it to intrude “deep into the provinces’ exclusive jurisdiction over property and civil rights.”²¹

4. COMMENTARY

Due to COVID-19 hearing suspensions, appeals to the Supreme Court of Canada were adjourned to September. Before the Supreme Court will be two different articulations of the *GGPPA*’s pith and substance, and the proper scope of POGG. At its core, the Alberta Court of Appeal’s decision represents a strong and robust articulation of provincial rights, interpreting the *GGPPA* broadly and the scope of POGG narrowly, while the Ontario and Saskatchewan Courts of Appeal decisions interpret the *GGPPA* narrowly and invite a broader application of POGG. If the Supreme Court adopts the reasoning of the Alberta Court of Appeal, it will significantly restrict federal ability to regulate GHG emissions, and potentially other environmental matters, under POGG. The lasting implications will be significant for future development of energy projects in Canada, as well as other reference decisions making their way through the courts, including the Alberta Court of Appeal’s upcoming reference hearing on the constitutionality of the recently enacted *Impact Assessment Act*.²²

¹⁵ *Ibid* at para 229.

¹⁶ *GGPPA Reference Alta CA, supra* note 1 at para 22.

¹⁷ *Ibid* at para 21.

¹⁸ *Ibid* at paras 252–56.

¹⁹ *Ibid* at para 176.

²⁰ *Ibid* at para 178.

²¹ *Ibid* at para 333.

²² Being Part 1 of *An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts*, SC 2019, c 28.

B. *REFERENCE RE ENVIRONMENTAL MANAGEMENT ACT (BRITISH COLUMBIA)*²³

1. BACKGROUND

On 16 January 2020, the Supreme Court of Canada unanimously dismissed British Columbia's attempt to regulate the transportation of heavy oil through the province. The nine-member panel delivered a rare oral decision from the bench, stating that it agreed with the British Columbia Court of Appeal's reasons. This strong, unanimous decision provided much needed legal clarity on federal-provincial energy jurisdiction, and removed a major potential hurdle for the completion of the Trans Mountain Pipeline Project (the TMX project).

2. FACTS

As part of a larger response to the TMX project, which will considerably increase the flow of heavy oil from Alberta to British Columbia's coast, the British Columbia government proposed changes to the *Environmental Management Act*²⁴ in April of 2018. The changes would prohibit the possession, charge, or control of heavy oil in British Columbia without a provincial permit. Premier John Horgan referred the matter to the British Columbia Court of Appeal in response to political controversy and concerns over the constitutionality of the proposed amendments.

3. DECISION

The British Columbia Court of Appeal unanimously held that the proposed amendments were outside the scope of provincial jurisdiction as they primarily focused on a federal interprovincial undertaking.²⁵ Largely agreeing with the federal government's position, the British Columbia Court of Appeal determined that the pith and substance of the proposed amendments related to the regulation of the TMX project, which is designed to carry heavy oil from Alberta to tidewater.²⁶ The proposed amendments, therefore, fell outside of provincial jurisdiction. The British Columbia Court of Appeal further held that the proposed amendments were not a law of general application, and effectively only regulated the TMX project and certain railcars that export heavy oil to tidewater.²⁷ It further held that the "default" position of the law represented "an immediate and existential threat to a federal undertaking," which could "hardly be described as an 'incidental' or 'ancillary' effect."²⁸

The British Columbia Court of Appeal also noted that it would be impractical for "different laws and regulations to apply to an interprovincial pipeline ... every time it crosses a border," as it would stymie its operation by forcing it to "comply with different conditions governing its route, construction, cargo, safety measures, spill prevention, and the aftermath

²³ 2019 BCCA 181 [*EMA Reference CA*], aff'd 2020 SCC 1.

²⁴ SBC 2003, c 53 [*EMA*].

²⁵ See *EMA Reference CA*, supra note 23, Summary.

²⁶ *Ibid* at paras 101, 105.

²⁷ *Ibid* at para 101.

²⁸ *Ibid* at para 97.

of any accidental release of oil.”²⁹ Parliament was given exclusive jurisdiction to regulate these matters, “allowing a single regulator to consider interests and concerns beyond those of ... individual province(s).”³⁰

The British Columbia Court of Appeal concluded that:

At the end of the day, the [National Energy Board] is the body entrusted with regulating the flow of energy resources across Canada to export markets. Although the principle of subsidiarity has understandable appeal, the TMX project is not only a “British Columbia project”. The project affects the country as a whole, and falls to be regulated taking into account the interests of the country as a whole.³¹

4. COMMENTARY

The Supreme Court of Canada’s affirmation of the British Columbia Court of Appeal’s decision provides legal clarity on regulatory jurisdiction over federal undertakings. In substance, the decision was the strongest possible signal for project proponents, as it agreed with the British Columbia Court of Appeal’s decision that the proposed amendments ought to fall at the validity stage of the division of powers analysis, holding outright that provinces do not have constitutional authority to regulate interprovincial pipelines, without having to apply the complex doctrines of IJI and federal paramountcy. This decision removed a major potential legal obstacle facing the TMX project, and potentially for other future projects.

C. *ATTORNEY GENERAL OF QUEBEC V. IMTT-QUÉBEC INC.*³²

1. BACKGROUND

This decision applied the IJI doctrine in the context of the provincial environmental assessment process in Quebec for port operations. The case is notable for its commentary on certain aspects of IJI, holding that courts should not be excessively narrow in searching for analogous precedents when determining whether the doctrine applies. While this decision does not directly involve energy, its potential expansion of the doctrine of IJI has implications for other federal undertakings, including pipelines and rail.

2. FACTS

IMTT-Québec Inc. (IMTT) built seven installations on port lands leased from the Quebec Port Authority without undergoing a provincial environmental assessment. As a result, Quebec brought a motion seeking an injunction requiring that the company obtain authorization. The trial judge dismissed the motion on the basis that IMTT’s activities were carried out on federal property, and closely linked to federal jurisdiction over navigation and shipping. Consequently, the *Environment Quality Act* did not apply to IMTT.³³ Quebec

²⁹ *Ibid* at para 101.

³⁰ *Ibid*.

³¹ *Ibid* at para 104.

³² 2019 QCCA 1598 [*IMTT*].

³³ CQLR, c Q-2 [*EQA*].

appealed the Quebec Superior Court decision. The question on appeal was whether certain provisions of the *EQA* were inapplicable or inoperative with respect to IMTT's operations.

3. DECISION

The Quebec Court of Appeal affirmed the trial judge's finding that IMTT's activities were carried out on federal property and closely linked to matters under federal jurisdiction. Jurisprudence indicated that the doctrine of IJI applied, such that the authorization process stipulated in the *EQA* did not apply to IMTT to the extent that the company operated installations for navigation and shipping purposes only.³⁴

In arriving at this conclusion, the Court of Appeal embarked on a lengthy review of the doctrine of IJI, and in particular, on how provincial environmental assessments interact with federal undertakings. As a starting point, it noted that *Canadian Western Bank v. Alberta*³⁵ provided that IJI should be limited to "situations already covered by precedent."³⁶ Since IJI operates to protect "core" federal powers against provincial intrusions, the precedent requirements asks courts to locate a precedent identifying a "core" power in question.³⁷

This question of precedent has been the source of some confusion and was the subject of debate in various facts before the *EMA Reference*, discussed above.³⁸ The Quebec Court of Appeal provided some clarification on this point, holding that: (1) "the type of provincial statute ... against which [IJI] is raised is not a material factor in seeking out a precedent,"³⁹ (2) it is "possible to obtain a clear answer [as to what constitutes a core power] by analogy between similar situations,"⁴⁰ and (3) new core powers can be discovered.⁴¹ Accordingly, a precedent directly on point is not necessarily required and the task of the court is to "seek out a *clear* body of jurisprudence regarding the elements comprising the 'core' of a head of power."⁴²

4. COMMENTARY

From a division of powers perspective, this decision is interesting as it considers to what degree previous precedent is required as a precondition to applying IJI to core federal powers. This requirement is the subject of some confusion and debate, particularly when trying to apply IJI to federal activities where a "core" has not been previously identified in the jurisprudence. This is particularly relevant to federal undertakings such as interprovincial pipelines, where much of what comprises the "core" of that federal power has yet to be formally established. While submissions were made on this point in the *EMA Reference*

³⁴ See *IMTT*, *supra* note 32 at para 4.

³⁵ 2007 SCC 22.

³⁶ *IMTT*, *supra* note 32 at para 170.

³⁷ *Ibid* at para 170.

³⁸ *Supra* note 23 and accompanying text. While the proper role of IJI was discussed in various facts, the British Columbia Court of Appeal and the Supreme Court of Canada declined to consider the doctrine, having found that the proposed amendments were ultra vires at the first stage of the division of powers analysis.

³⁹ *IMTT*, *supra* note 32 at para 172.

⁴⁰ *Ibid* at para 177.

⁴¹ *Ibid* at para 174.

⁴² *Ibid* at para 178 [emphasis in original].

decisions, discussed above, the British Columbia Court of Appeal and Supreme Court of Canada resolved the matter at the validity stage and therefore did not consider IJI. In any event, the decision in *IMTT* may be useful in future interprovincial pipeline litigation as it represents a more flexible view of IJI's application.

II. INDIGENOUS

This past year witnessed important developments and clarifications related to the Crown's duty to consult Indigenous communities and the respective responsibilities of the federal and provincial governments, as well as administrative tribunals and other delegates that hear matters touching upon that duty. The Supreme Court of Canada upheld a Federal Court of Appeal decision that dismissed certain Indigenous legal challenges to the TMX project, clearing the way for the project to proceed, while reaffirming that the duty to consult does not equate to a veto over projects. Further, both the Alberta and British Columbia Courts of Appeal addressed duty to consult issues related to various resource projects that were being considered by those provinces, further contributing to the growing body of case law on the scope of the duty to consult.

A. *COLDWATER INDIAN BAND* *V. ATTORNEY GENERAL OF CANADA*⁴³

1. BACKGROUND

This case concerned an application for judicial review by several parties that challenged the second approval of the TMX project. The review related to whether the Crown had adequately addressed deficiencies in its consultation efforts with First Nations prior to the second approval of the TMX project.

2. FACTS

In November 2016, Canada approved the TMX project as being in the public interest; however, several parties launched court challenges alleging that the Crown had failed to adequately discharge its duty to consult. In its 2018 decision, the Federal Court of Appeal found that the TMX project's environmental assessment was deficient and that the Crown failed to fulfil its duty to consult.⁴⁴ Accordingly, Canada initiated a reconsideration hearing and continued Indigenous consultations as set out in the 2018 Federal Court of Appeal decision. The GIC again approved the TMX project on 22 June 2019. Several parties sought judicial review on the same grounds as those in the initial Federal Court of Appeal decision. The Federal Court of Appeal granted leave to hear the judicial review of the second TMX project approval.⁴⁵

⁴³ 2020 FCA 34 [*Coldwater FCA*], leave to appeal to SCC refused, 39111 (2 July 2020) [*Coldwater SCC*].

⁴⁴ See *Tsleil-Waututh Nation v Attorney General of Canada*, 2018 FCA 153 [*Tsleil-Waututh*].

⁴⁵ See *Raincoast Conservation Foundation v The Attorney General of Canada*, 2019 FCA 224.

3. DECISION

The Federal Court of Appeal dismissed the application for judicial review, finding no basis for interfering with the GIC's second authorization of the TMX project. It noted that all the applicants essentially argued was that something more than a "specific and [focused and] brief and efficient" process of consultation was necessary.⁴⁶ Rather, the Federal Court of Appeal articulated that the focus of the case was not to adjudicate the case, but rather to consider whether the GIC could reasonably have concluded that the flaws identified in the 2018 decision were addressed by the renewed consultation.⁴⁷

In reviewing Canada's re-approval of the TMX project, the Federal Court of Appeal considered the empowering legislation, the jurisprudence surrounding the Crown's duty to consult, the relevance of post-approval consultation, and the importance of the matter to those impacted by the TMX project. The Federal Court of Appeal held that, in light of the outcome reached on the facts and the law, the GIC's decision was reasonable.

In reaching this decision, the Federal Court of Appeal commented that:

The applicants' submissions are essentially that the Project cannot be approved until all of their concerns are resolved to their satisfaction. If we accepted those submissions, as a practical matter there would be no end to consultation, the Project would never be approved, and the applicants would have a *de facto* veto right over it.⁴⁸

The Federal Court of Appeal added that the Crown's consultation efforts represented

[A] genuine effort in ascertaining and taking into account the key concerns of the applicants, considering them, engaging in two-way communication, and considering and sometimes agreeing to accommodations, all very much consistent with the concepts of reconciliation and the honour of the Crown.⁴⁹

The Supreme Court of Canada denied a leave to appeal application on 2 July 2020.⁵⁰

4. COMMENTARY

This decision represented a major victory for the TMX project, which has been engaged in years of litigation. The federal government has done much to continue on with the TMX project, which has now proceeded with construction. This decision also provides some clarity with respect to the Crown's consultation obligations by emphasizing that Indigenous groups do not have a veto power over projects.

⁴⁶ *Coldwater FCA*, *supra* note 43 at para 18, citing *Tsleil-Waututh*, *supra* note 44 at para 772.

⁴⁷ *Ibid* at para 64.

⁴⁸ *Ibid* at para 86.

⁴⁹ *Ibid* at para 76.

⁵⁰ See *Coldwater SCC*, *supra* note 43.

B. WILLIAM V. BRITISH COLUMBIA (ATTORNEY GENERAL)⁵¹

1. BACKGROUND

The British Columbia Court of Appeal considered an appeal relating to whether British Columbia had satisfied its duty to consult with respect to its decision to approve an exploratory drilling program by Taseko Mines Limited (TML) in traditional Tsilhqot'in territory.

2. FACTS

The Xení Gwet'in First Nations Government and the Tsilhqot'in Nation (the applicants) are holders of certain Aboriginal hunting and trapping rights in the area of the exploratory drilling. The targeted area may contain some of the world's largest gold and copper deposits.

In 2010, British Columbia released an environmental assessment certificate for the original project. However, the original project was rejected by the federal government due to adverse environmental effects. TML then submitted a revised project to the federal government, which was also denied. TML applied for judicial review of the federal decision. While this judicial review was underway, TML applied to the province for the exploratory drilling. Notwithstanding the federal government's two rejections of the broader project, British Columbia granted approval. The applicants sought judicial review of this decision, arguing that the province had failed to discharge its duty to consult. The trial judge held that British Columbia's decision to approve the exploratory drilling was reasonable and that the Crown had discharged its duty to consult.

3. DECISION

The British Columbia Court of Appeal was tasked with determining whether the trial judge erred by: (1) "concluding the Province did not breach its procedural duty to consult and accommodate"; (2) "upholding the Province's approval based on a purpose which did not form any part of the consultation"; and (3) concluding that "the Province did not breach its substantive duty to consult and accommodate by unreasonably approving the exploratory drilling."⁵²

The British Columbia Court of Appeal determined at the outset that, given the serious impacts on Indigenous hunting and trapping rights, deep consultation was required to discharge the Crown's duty to consult.⁵³ Further, it stated that the "crux of the dispute is that the parties are unable to reconcile their differences because of an honest but fundamental disagreement over whether the project should be permitted to proceed."⁵⁴

The British Columbia Court of Appeal dismissed the first two grounds of appeal, which were procedural in nature, holding that the Senior Inspector took into account the position

⁵¹ 2019 BCCA 74, leave to appeal to SCC refused, 38548 (13 June 2019) [William SCC].

⁵² *Ibid* at para 2.

⁵³ *Ibid* at para 38.

⁵⁴ *Ibid* at para 39.

of the parties, provided a reasonable explanation of why their positions were not accepted, and properly based his decision on the need to inform a future environmental assessment process.

The British Columbia Court of Appeal also dismissed the ground of appeal relating to the province's substantive decision to approve the exploratory drilling, holding that the Senior Inspector's decision was reasonable. In forming this conclusion, the Court of Appeal noted:

[I]n this case, reconciliation cannot be achieved because of an honest disagreement over whether the project should proceed. The process of consultation was adequate and reasonable in the circumstances. The fact that the Tsilhqot'in position was not accepted does not mean the process of consultation was inadequate or that the Crown did not act honourably.⁵⁵

This holding was predicated on the important principle that the duty to consult "guarantees a process, not a particular result."⁵⁶ On 13 June 2019, the Supreme Court of Canada dismissed an application for leave to appeal.⁵⁷

4. COMMENTARY

Consistent with the Federal Court of Appeal's decision in *Coldwater*, discussed above, this decision upholds the principle that a fundamental disagreement between the Crown and Aboriginal rights holders does not necessarily indicate that the consultation process was inadequate. The adequacy of the consultation may be upheld even where the parties cannot reach agreement. This decision contributes to the growing body of case law etching out the parameters of the duty to consult in the context of reconciliation, while reaffirming the important principle that this duty guarantees a process, not a substantive result.

C. *ATHABASCA CHIPEWYAN FIRST NATION V. ALBERTA*⁵⁸

1. BACKGROUND

In this decision, the Alberta Court of Appeal dismissed a judicial review appeal from the Athabasca Chipewyan First Nation (ACFN) regarding a proposed project in Treaty 8 territory.

2. FACTS

The ACFN filed a statement of concern regarding a proposed pipeline project in Treaty 8 territory. The Aboriginal Consultation Office (ACO) determined that the project did not trigger the Crown's duty to consult. The ACFN applied for judicial review of that determination. The chambers judge held that the ACO has the authority to decide whether the Crown's duty to consult is triggered, and further held that the taking up of land by the

⁵⁵ *Ibid* at para 56.

⁵⁶ *Ibid* at para 41, citing *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 at para 79.

⁵⁷ See *William SCC*, *supra* note 51.

⁵⁸ 2019 ABCA 401.

Crown in a treaty area does not, in itself, adversely affect treaty rights. The ACFN appealed this decision, thereby raising the following two questions: “(1) whether the ACO has any authority in law to make the decision on whether the duty to consult is triggered; and (2) whether the ‘mere’ act of taking up land by the Crown in a treaty area is sufficient to trigger the duty to consult.”⁵⁹

3. DECISION

The Alberta Court of Appeal outlined the steps that the project proponents had undertaken with respect to consulting eight First Nations as well as notifying 33 additional First Nations, including the ACFN. Once the ACO was aware of the ACFN’s statement of concern, it issued a report to the ACFN and asserted there was no duty to consult with respect to the pipeline project.

The Court of Appeal confirmed that the ACO has the authority to decide when the duty to consult is triggered, stating that the Minister of Indigenous Relations is part of the Crown, and the ACO exercises the Minister’s authority with respect to consultation. Accordingly, the ACO falls under the umbrella of the Crown and has the authority to decide if the duty to consult is required, “guided by various written policies.”⁶⁰

On the second ground of appeal, the Court of Appeal confirmed that merely taking up land in Treaty 8 territory does not trigger a duty to consult all Treaty 8 nations. Relying upon *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, the Alberta Court of Appeal found that adverse effects to the rights of all Treaty 8 nations cannot be presumed simply because the Crown takes up lands anywhere within Treaty 8 lands.⁶¹ Rather, there must be a contextual analysis to determine if the taking up of lands adversely affects a First Nation’s right to hunt, fish, and trap. If so, the duty to consult is triggered.

4. COMMENTARY

The Alberta Court of Appeal’s decision provides clarity and certainty that the ACO, and other Crown delegates, are empowered to administer and discharge the Crown’s consultation obligations. The decision further confirms that an adverse effect on Aboriginal treaty rights is necessary to trigger a duty to consult, but that the taking up of any land within a treaty area will not necessarily give rise to a duty to consult all First Nations within a given treaty area. In doing so, the Alberta Court of Appeal reaffirmed the contextual analysis laid down in *Mikisew Cree*.

⁵⁹ *Ibid* at para 30.

⁶⁰ *Ibid* at para 52.

⁶¹ 2005 SCC 69 [*Mikisew Cree*].

D. FORT MCKAY FIRST NATION V. PROSPER PETROLEUM LTD.⁶²

1. BACKGROUND

In this decision, the Alberta Court of Appeal held that boards and tribunals are responsible for upholding the honour of the Crown where their decisions may affect an Aboriginal right, regardless of whether they also assess Crown-Aboriginal consultations. The decision, while unique due to various promises made by the Alberta government, expands the potential scope of considerations for boards and tribunals when adjudicating on questions where negotiations with First Nations or Aboriginal rights are asserted.

2. FACTS

This decision was an appeal by the Fort McKay First Nation (FMFN) to the Alberta Court of Appeal following the Alberta Energy Regulator's (AER) June 2018 approval of Prosper Petroleum Ltd.'s (Prosper) application to build its proposed 10,000 barrel per day Rigel oil sands bitumen recovery project (the Rigel project) within five kilometres of FMFN reserves.

For some years prior to the AER's decision, Alberta and the FMFN had been taking part in ongoing negotiations to develop the Moose Lake Access Management Plan (MLAMP) to address the cumulative effects of oil sands development on the First Nation's Treaty 8 rights. The FMFN began negotiations with Alberta in 2001 to develop a plan protecting its traditional lands in the form of the MLAMP. The MLAMP was to be subsumed into the Lower Athabasca Regional Plan (LARP), and become a legally binding document. The FMFN specifically sought a ten kilometre buffer zone around their lands from oil sands development, as it had already lost 70 percent of its traditional lands to the development. Alberta initially denied this request, but in 2014 Alberta's then Premier Jim Prentice committed to completing the MLAMP with provisions creating a ten kilometre buffer zone under the LARP by 30 September 2015.

The principal question before the AER was whether the Rigel project was in the public interest. The AER panel therefore addressed the Rigel project's safety, efficiency, and its effects on existing Aboriginal rights. Given the ten kilometre buffer zone, the FMFN took issue with the Rigel project's proximity to its reserve lands. While the AER found that the Rigel project would disrupt the FMFN's connection to the land, it held this was not an impact on a Treaty 8 right, and there was little real evidence to suggest infringement of an Aboriginal right otherwise. Ultimately, the panel found the Rigel project was in the public interest. In doing so, it declined to consider the MLAMP negotiations and the "Prentice Promise" of a ten kilometre buffer zone as the negotiations had not yet concluded.⁶³ Further, the panel held that the Alberta Cabinet was required to assess the adequacy of project consultations and the honour of the Crown as it was statute-barred from doing so itself.

⁶² 2020 ABCA 163.

⁶³ *Ibid* at para 15.

3. DECISION

The FMFN appealed the decision, arguing the AER committed an error of law or jurisdiction by failing to consider the honour of the Crown, and failing to delay approval of the Rigel project until the FMFN's negotiations with Alberta about the MLAMP were completed.

The Alberta Court of Appeal allowed the appeal, finding that while the AER may be statute-barred from assessing the adequacy of Crown-Aboriginal consultation, the AER was not relieved of its duty to assess the honour of the Crown.⁶⁴ The Court of Appeal held that, where empowered to consider questions of law, and without a clear demonstration that the legislature intended to exclude such jurisdiction, tribunals also have the implied jurisdiction to consider issues of constitutional law as they arise. This is especially so where the board or tribunal is assessing the public interest.⁶⁵

In the context of projects that may affect Aboriginal rights, and therefore touch on constitutional duties, the Court of Appeal further held that a project clearly cannot be in the public interest if it breaches constitutionally protected Aboriginal rights. While the AER was statute-barred from assessing the adequacy of Crown consultation, it was by no means restricted from assessing the duty to uphold the honour of the Crown, which is a procedural, instead of substantive, consideration, and therefore broader than consultation.⁶⁶

As the FMFN and Alberta agreed on the letter of intent which created the "Prentice Promise," and MLAMP negotiations were underway, completing the Prosper project in the zone that was subject to negotiations would serve to directly circumvent, and render ineffectual, the negotiations themselves. This was clearly at odds with the honour of the Crown.

Further, as the AER had deferred the assessment of the adequacy of consultation to the Cabinet, the Alberta Court of Appeal also held the AER cannot avoid its statutory duty to assess the public interest by simply deferring to the Cabinet. The requirement of Cabinet approval does not immunize the AER from its requirement to consider the MLAMP negotiations and related issues insofar as they implicate the honour of the Crown. The Court of Appeal therefore held there was no basis by which to decline to address the MLAMP as a consideration in the public interest. The appeal was allowed, the AER decision vacated, and the case was remitted back to the AER to rehear the matter, considering the honour of the Crown and the MLAMP process.

4. COMMENTARY

This decision requires boards and tribunals to consider and address the honour of the Crown when deliberating on the public interest. That consideration is even more poignant where some level of Crown-Aboriginal negotiations are underway that touch on the subject

⁶⁴ *Ibid* at paras 39–44.

⁶⁵ *Ibid*.

⁶⁶ *Ibid* at paras 46–58.

matter of the hearing. Depending on the facts of the case before a board, the honour of the Crown may need to be assessed as a separate item to that of consultation alone. Project proponents and governments should also note that negotiations, governmental promises, letters of intent, or other similar indications may be understood as reflecting on the honour of the Crown in the regulatory context. Further, in some circumstances, this may strengthen governmental promises to the extent that they contemplate some form of action vis-à-vis a First Nation.

III. ENVIRONMENTAL REMEDIATION AND LIABILITY

A number of decisions were rendered in the previous year dealing with environmental remediation and liability, which demonstrate that parties can benefit from clarity in their private agreements as to who bears the burden of environmental remediation in the context of purchase and sale agreements, indemnities, and contracts for service to maintain infrastructure that may cause environmental damage. Further, the courts have confirmed that parties responsible for maintenance on pipelines or other infrastructure that may cause environmental damage ought to diligently abide by the terms of their contracts and perform work prudently to avoid liability.

A. *CONOCOPHILLIPS CANADA RESOURCES CORP.* *v. SHELL CANADA LIMITED*⁶⁷

1. BACKGROUND

ConocoPhillips concerns a complex dispute over ownership of five abandoned wells in the Mackenzie Delta. Master Hanebury of the Court of Queen’s Bench of Alberta applied the principles in last year’s *Weir-Jones Technical Services Incorporated v. Purolator Courier Ltd.* and held that it was appropriate to grant the application for summary judgment.⁶⁸ The Court found that on the terms of the asset purchase agreement, Shell had obtained abandoned oil wells and associated environmental liabilities in addition to the valuable assets in the area.

2. FACTS

Two companies, ConocoPhillips Canada Resources Corp. (Conoco) and Shell Canada Limited (Shell), both argued that the other was the owner responsible for remediation of the wells in question. Conoco’s predecessor, Gulf Canada Resources Ltd. (Gulf), and Shell entered into a Purchase and Sale Agreement (PSA) and other associated agreements in 1991. Pursuant to the PSA, Gulf transferred its assets on an “as is” basis to Shell. In 2011, Conoco employees, who did not have knowledge of the PSA, discovered the 1991 PSA. Conoco sent a formal letter to Shell advising that there were certain wells with associated environmental liabilities that should be transferred to Shell. In response, Shell replied that it had never intended to take over the impugned wells pursuant to the PSA. Therefore, in 2014, Conoco commenced an action seeking a declaration that Shell was the owner of the wells and sumps,

⁶⁷ 2019 ABQB 727 [*ConocoPhillips*].

⁶⁸ 2019 ABCA 49.

an order for specific performance of the PSA, and a declaration that Shell was liable to Conoco for any other damages.

3. DECISION

The main issue therefore was whether the PSA and associated agreements transferred Gulf's interest in the wells and sumps to Shell. The Alberta Court of Queen's Bench ultimately granted Conoco a declaration that Shell owned the wells in question and found that the PSA transferred Gulf's interest in the wells to Shell.⁶⁹

The Alberta Court of Queen's Bench found that the wells constituted an asset under the PSA by considering the ordinary meaning of the terms, then by considering the PSA as a whole — focusing on clauses relating to environmental liability — to decide the objective intent of the parties.⁷⁰ The PSA provided that Shell was liable for environmental liabilities, including well abandonment and reclamation, save for a 180 day period following the closing wherein Gulf was responsible for such liability.⁷¹ The Court emphasized that, if the parties intended for the impugned wells to remain with Gulf after closing, Shell would not have agreed to the six month limitation on environmental liability.⁷² The PSA also included a clause where Shell acknowledged that it was acquiring the assets on an “as is” basis, and acknowledged it was familiar with the condition of the wells.⁷³

In response to a counterclaim by Shell, the Court found that there was no nexus between the parties sufficient to find that Conoco had a duty to advise Shell of its ownership of the wells, to advise Shell of any contamination on the sites, or to undertake remediation. It was found that a vendor of land does not owe a duty to warn the purchaser of ongoing liability beyond that contracted for in an agreement.⁷⁴

4. COMMENTARY

This decision is significant for industry participants who have sold or purchased assets or an interest in land where abandoned wells are present. It is also significant because the Alberta Court of Queen's Bench granted summary judgment on a complex commercial case with contested and lengthy facts from both parties.

This decision ties into the larger trend of judicial consideration of Canada's aging infrastructure. As regulators pursue private parties to remediate abandoned wells, industry participants are being forced to deal with ownership of abandoned oil wells from the 1970s and 1980s. Remediation of failing oil and gas infrastructure carries massive liabilities. A company may mistakenly assume responsibility for remediation if they are unaware of an agreement that transferred assets to another party. This decision sends a strong message that

⁶⁹ See *ConocoPhillips*, *supra* note 67 at para 282.

⁷⁰ *Ibid* at para 176.

⁷¹ *Ibid* at para 180.

⁷² *Ibid* at para 202.

⁷³ *Ibid* at para 185.

⁷⁴ *Ibid* at para 279.

oil and gas companies should promptly investigate ownership issues, particularly regarding abandoned wells.

**B. *RESOLUTE FP CANADA INC.*
*V. ONTARIO (ATTORNEY GENERAL)*⁷⁵**

1. BACKGROUND

This decision held that an indemnity, granted by the province of Ontario to two former owners of a pulp and paper mill and their successors and assigns, did not protect subsequent owners of the same property from the costs of complying with a remediation order 26 years later.

2. FACTS

In 1977, the owner and predecessors of a pulp and paper mill in Dryden, Ontario were sued by certain First Nations who alleged that mercury from the mill contaminated nearby rivers and caused them harm. After the action with the First Nations settled, Ontario granted an indemnity in 1985 to the former owners of the mill, and to their successors and assigns. The indemnity was granted:

[F]rom and against any obligation, liability, damage, loss, costs or expenses incurred by any of them ... as a result of any claim, action or proceeding, whether statutory or otherwise ... [stemming from] any damage, loss, event or circumstances, caused or alleged to be caused by or with respect to, either in whole or in part, the discharge or escape or presence of any pollutant by [the owner of the mill] or its predecessors, including mercury or any other substance, from or in the plant or plants or lands or premises.⁷⁶

In 2011, the Director of the Ministry of the Environment and Climate Change issued a remediation order to monitor and maintain the mercury waste disposal site (the Director's Order). The Director's Order was issued to former owners of the mill, Weyerhaeuser Company Limited (Weyerhaeuser) and Resolute FP Canada Inc. (Resolute). Weyerhaeuser brought a motion seeking a declaration that it was entitled to indemnification and compensation from Ontario for the costs of complying with the Director's Order. Resolute sought leave to intervene to claim the same. All parties moved for summary judgment.

The chambers judge found that the indemnity covered statutory claims brought by an agent of Ontario, and that Resolute and Weyerhaeuser were entitled to the costs of complying with the Director's Order. Ontario appealed. A 2-1 majority of the Ontario Court of Appeal upheld the chambers judge's decision, but only to the extent that it covered first party claims (that is, Resolute was not indemnified).

⁷⁵ 2019 SCC 60.
⁷⁶ *Ibid* at para 14.

3. DECISION

A 4-3 majority of the Supreme Court of Canada found that the chambers judge made palpable and overriding errors of fact. One of those errors was the decision that the waste disposal site was continuously contaminating the environment, when there was no evidence of continuing contamination.⁷⁷ Rather, the waste disposal site was the solution to the previous contamination and merely held the mercury-contaminated waste. This error led to the Director's Order, which imposed maintenance and monitoring obligations, was a "Pollution Claim" within the meaning of the 1985 Indemnity.⁷⁸

The Supreme Court stated that the indemnity must be considered as a whole. The indemnity was silent on whether first parties would be indemnified against other first parties. Certain paragraphs of the indemnity gave Ontario the right to carry or participate in the defence of any proceeding, and required the parties to co-operate with Ontario in defence of any claim. The Supreme Court concluded that these paragraphs demonstrated that the indemnity was not intended to cover first party claims.⁷⁹

Other errors included: (1) failing to consider the context of prior indemnities connected to the litigation brought by the First Nations; and (2) failing to limit the scope of the indemnity to the issues defined in the broader settlement to which the indemnity was a schedule. As such, the Supreme Court allowed Ontario's appeal on summary judgment with costs throughout, and dismissed Resolute's and Weyerhaeuser's appeals.

4. COMMENTARY

With the Supreme Court of Canada split at 4-3 and the Ontario Court of Appeal split at 2-1, it is clear that the interpretation of indemnification contracts is complex and uncertain, which highlights the importance of clearly addressing all matters in an indemnity contract. For example, this contract would have benefited from clarity on the types of contamination covered, the types of claims covered, and *whose* claims were shielded by the indemnity. This case is required reading for corporations interested in buying polluted sites, notwithstanding standard indemnifications.

C. *ISH ENERGY LTD. V. WEBER CONTRACT SERVICES INC.*⁸⁰

1. BACKGROUND

In this decision, the Alberta Court of Queen's Bench addressed integrity management programs in the context of pipeline maintenance, finding that where plans are inadequate or not followed, liabilities may attach despite pre-existing maintenance deficiencies.

⁷⁷ *Ibid* at para 28.

⁷⁸ *Ibid*.

⁷⁹ *Ibid* at para 33.

⁸⁰ 2019 ABQB 221.

2. FACTS

On 17 July 2007, five pipeline leaks were discovered in the Desan Field located near Fort Nelson, British Columbia. The owner and licensee of the pipeline, ISH Energy Ltd. (ISH), had contracted with Weber Contract Services Inc. (Weber) for the operation and maintenance of the pipeline between 2000 and 2007. As part of the contract, Weber was required to conduct regular pigging and to apply certain chemicals such as corrosion inhibitors or biocides to keep the pipeline clean and prevent corrosion. A day before the discovery of the leaks, Weber introduced a pig into the main line that became stuck. To dislodge the pig, Weber introduced 200 psi of pressure into the mainline and closed or “pinched” an inlet valve. After the leak was found, a smart pig was introduced into the mainline, which uncovered internal corrosion. Shortly thereafter, additional leaks were discovered on the gathering lines. As licensee of the pipeline, ISH took steps to remediate the affected areas and repair the damaged portions of the pipeline.

ISH sued Weber for negligence and breach of contract, alleging that the leaks were caused by a combination of internal pipeline corrosion and a high-pressure event in the pipeline system. Weber filed a defence arguing, among other things, that the corrosion existed prior to its contractual relationship with ISH.

3. DECISION

The Alberta Court of Queen’s Bench found that pigging was not completed with the frequency required under the contract.⁸¹ It further found that Weber failed to adhere to the scheduled injection of anti-corrosion chemicals into the pipeline system.⁸² Accordingly, Weber was in clear breach of its obligations under the contract, and in breach of its duty of care to pig the lines in accordance with the schedule and apply the anti-corrosion chemicals.

Weber argued that, in order to assess whether it complied with the standard of care, ISH needed to proffer expert evidence that demonstrated the efficacy of the maintenance plan. The Court found that such expert evidence was not required to assess the standard of care, and instead referred to evidence of what constituted an adequate preventative maintenance program in general.⁸³

Weber pointed to evidence that corrosion already existed prior to 2000 and that the maintenance plan was not sufficient to prevent corrosion. This argument was rejected, with the Alberta Court of Queen’s Bench finding that “[c]ommon sense suggests that had Weber properly implemented [the] program, at least some of the corrosion damage would have been prevented.”⁸⁴

⁸¹ *Ibid* at para 111.

⁸² *Ibid* at para 87.

⁸³ *Ibid* at para 109.

⁸⁴ *Ibid* at para 209.

The Court of Queen’s Bench awarded ISH damages against Weber for breach of contract and negligence in the amount of \$24,372,897.87, comprising \$10,712,197.49 in cleanup and remediation costs and \$13,660,700.38 for repairs to the pipeline.⁸⁵

4. COMMENTARY

This decision emphasizes the importance of an effective integrity management program and its strict implementation to the pipeline industry, and customers who directly or indirectly may bear some or all of the resulting costs of repairs and environmental remediation.

From this case, it is clear that inadequate implementation of an integrity management program is sufficient to attach environmental and other liability to the person who has the statutory or contractual obligation. It is noteworthy that Weber was found liable despite the pre-existing corrosion prior to its contractual engagement. Therefore, failure to comply with the maintenance program, which could contribute to corrosion, may attract liability.

Further, this decision reaffirmed that expert evidence may not be necessary to establish the standard of care in all cases. In this case, the evidentiary record was sufficient to establish a breach of the standard of care.

D. *BAMRAH V. WATERTON PRECIOUS METALS BID CORP.*⁸⁶

1. BACKGROUND

In *Bamrah*, a minority shareholder of Chaparral Gold Corp. (Chaparral) opposed a proposed plan of arrangement through which Waterton Precious Metals Bid Corp. (Waterton) would acquire Chaparral for \$0.61 per Chaparral share, on the basis of environmental liabilities of Chaparral. The shareholders of Chaparral had consented to the proposed arrangement. The minority shareholder argued that the proposed consideration of \$0.61 was insufficient.⁸⁷

2. FACTS

During negotiation of the arrangement, potential environmental liability for Chaparral arose regarding contamination at historical smelter sites.⁸⁸ Pursuant to securities law disclosure requirements, various documents were publicly disclosed that detailed the potential liability.⁸⁹

Chaparral made a settlement offer to the Environmental Protection Agency (EPA) regarding the potential liability. The EPA disputed the amount, and further stated that it

⁸⁵ *Ibid* at para 251.

⁸⁶ 2019 BCSC 258 [*Bamrah*], aff’d 2020 BCCA 122 [*Bamrah CA*], leave to appeal to SCC refused, 39188 (24 September 2020).

⁸⁷ *Ibid* at paras 1–8.

⁸⁸ *Ibid* at para 65.

⁸⁹ *Ibid* at para 67.

would be pursuing Chaparral for remediation costs.⁹⁰ The proceedings were disclosed in a management circular, but the disputed potential liability had not been resolved at the time of negotiations for the arrangement. Further, the minority shareholder argued that the existing environmental liability dispute essentially forced Chaparral shareholders to sell their shares and listed the dispute as one of his reasons for opposing the arrangement.

3. DECISION

The British Columbia Supreme Court held that the potential EPA liability did not force Chaparral shareholders to sell their shares. It found that, while the potential liability negatively affected the ultimate value and price paid for the Chaparral shares, the potential liability was not a factor that stripped shareholders of their choice to sell their shares or hold them. The British Columbia Supreme Court characterized the potential environmental liability as a material development, which shareholders could weigh in their decision-making in voting for or against the arrangement.⁹¹

4. COMMENTARY

Ongoing environmental liabilities in the context of a corporate transaction or arrangement will not necessarily constitute a cause of action for minority shareholders opposing the transaction or arrangement. This case was appealed on the basis that the trial judge erred in his analysis of market factors. The British Columbia Court of Appeal disagreed with the appellant,⁹² and adopted the analysis for how courts should set the fair value of shares owned by dissenting shareholders from *Carlock v. ExxonMobil Canada Holdings ULC*,⁹³ where Justice Harris held that “[t]he behaviour of a real market is better evidence of value than a theoretical market.”⁹⁴ The British Columbia Court of Appeal held that the lower Court’s analysis was entirely consistent with *Carlock*, and considered the deal price as a starting point and then considered market-based factors. Therefore, it was not an error for the lower Court to prefer the evidence based on the market-based analysis of Waterton instead of the theoretical evidence presented by the minority shareholder’s expert. A leave to appeal application has been filed at the Supreme Court of Canada.

E. *BROOKFIELD RESIDENTIAL (ALBERTA) LP (CARMA DEVELOPERS LP) v. IMPERIAL OIL LIMITED*⁹⁵

1. BACKGROUND

This decision touches on section 218 of the *Environmental Protection and Enhancement Act*, which allows the Alberta Court of Queen’s Bench to extend a limitation period where there is an alleged release of a substance into the environment.⁹⁶ In 2017, the Court

⁹⁰ *Ibid* at paras 71–73.

⁹¹ *Ibid* at para 85.

⁹² See *Bamrah CA*, *supra* note 86.

⁹³ 2020 YKCA 4 [*Carlock*].

⁹⁴ *Ibid* at para 19.

⁹⁵ 2019 ABCA 35 [*Brookfield CA*], *aff’d* 2017 ABQB 218 [*Brookfield QB*].

⁹⁶ RSA 2000, c E-12 [*EPEA*].

summarily dismissed Brookfield Residential's (Brookfield) application to extend that limitations period. Brookfield appealed.

2. FACTS

Brookfield acquired land for the purposes of developing a residential subdivision which had, intermittently since 1949, been used as a location for an oil and salt water disposal well by various entities including Imperial Oil Limited (Imperial). In 2010, excavation revealed that hydrocarbon and salt remediation was required. Since Brookfield's claim against Imperial was statute-barred under the ultimate ten year *Limitations Act*⁹⁷ period, its claim was entirely reliant on obtaining a limitations extension under section 218 of the *EPEA*. Section 218 stipulates several factors that must be taken into consideration before granting an application, including: (1) "when the alleged adverse effect occurred"; (2) whether that effect ought to have been discovered by due diligence efforts; (3) "whether extending the limitations period would prejudice the proposed [defendant]"; and (4) any other criteria that a court considers relevant.⁹⁸

The Alberta Court of Queen's Bench concluded that this was not an appropriate case for extending the limitations period, finding that "permitting an action to go ahead more than 60 years after the Defendant last was involved in the Well would be an abuse" of a section 218 extension.⁹⁹

3. DECISION

The Alberta Court of Appeal dismissed the appeal, and in doing so, provided important guidance on several aspects of section 218 applications. First, it overruled *Lakeview Village Professional Centre Corporation v. Suncor Energy Inc.*, which had suggested that, under certain circumstances, section 218 decisions should be deferred to trial.¹⁰⁰ The Court of Appeal rejected this approach, stating that it is contrary to the language of section 218, and that deferring the limitations decision to trial "defeats the whole purpose" of limitation periods and would continue to expose the defendant to the "expense and inconvenience of a trial."¹⁰¹ Second, in considering the fourth factor in the section 218 test, the Court of Appeal provided guidance on the competing policy considerations between both the *Limitations Act* and the *EPEA*. It noted that the *EPEA* reflects the policy objectives of the "polluter pays" principle and recognition that environmental contamination may be difficult to detect, but that in granting an application under this legislation, the fourth factor requires a balancing as against the principles of finality and fairness that underscore the *Limitations Act*.

Ultimately, the Alberta Court of Appeal concluded that this was not an appropriate use of a section 218 extension because the long passage of time since the release would prejudice Imperial and make it difficult to establish a proper standard of care.

⁹⁷ RSA 2000, c L-12.

⁹⁸ *EPEA*, *supra* note 96, s 218.

⁹⁹ *Brookfield CA*, *supra* note 95 at para 5, citing *Brookfield QB*, *supra* note 95 at para 102.

¹⁰⁰ 2016 ABQB 288 [*Lakeview*].

¹⁰¹ *Brookfield CA*, *supra* note 95 at para 10.

4. COMMENTARY

This decision overrules the *Lakeview* approach to section 218 extensions by requiring applications to be decided prior to trial. Further, the decision emphasizes the Court's sensitivity to prejudice caused by the passage of time. Plaintiff applicants should be mindful of this factor in particular when deciding whether or not to pursue a limitations extension under the *EPEA*.

IV. OIL AND GAS COMPENSATION

The past year has seen a number of interesting cases related to oil and gas compensation issues stemming from lease, purchase, and sale disputes. In particular, the Alberta and Saskatchewan Courts of Queen's Bench have shed light on the interpretation and enforcement of both modern and historic offset well clauses: one with modern drill, drop, or pay provisions, and the other without. Additionally, the Alberta Court of Queen's Bench has rendered an interesting decision related to a net profit interest agreement, and the complex royalties and deductions prescribed by it in the context of a dispute over payments dating back many years.

A. *WHITECAP RESOURCES INC.* *V. CANADIAN NATURAL RESOURCES LIMITED*¹⁰²

1. BACKGROUND

This decision involved the interpretation of various modern offset well provisions in leases between two oil and gas production and exploration companies. The remedy sought, the return of Whitecap Resources Inc.'s (Whitecap) compensatory royalties paid under protest to Canadian Natural Resources Limited (CNRL), largely turned on the interpretation of defensive drilling obligations under the leases.¹⁰³

2. FACTS

CNRL acquired a lessor's interest from Devon Energy Corporation (Devon) in certain leases held by Whitecap over lands in Saskatchewan. The leases had drill, drop, or pay offset well provisions where, if a well is drilled on contiguous lands, certain actions must be taken to protect the current lessor from the drainage of their formation. CNRL demanded payment from its lessee, Whitecap, in lieu because the offset obligations under the drill, drop, or pay obligations were triggered. Whitecap disagreed, but paid \$1.1 million in compensatory royalties under protest to protect its lease from default. Whitecap commenced an action to recover the monies and CNRL counterclaimed for additional royalties.

¹⁰² 2019 ABQB 698 [*Whitecap*].

¹⁰³ *Ibid* at paras 1, 4.

3. DECISION

The Alberta Court of Queen's Bench allowed Whitecap to recover \$984,721.98 and dismissed CNRL's counterclaim.¹⁰⁴ It determined that, based on the plain language of the lease, the 90-day period to either drill, drop, or pay started upon the date that production commenced on the adjacent lands, and was independent of when the lessor delivered notice of default. The Court noted that while there may be evidence of industry practice that the clock starts upon delivery of notice of default, it could not override the plain language of this lease.¹⁰⁵

Additionally, a quarter section of land was leased to Whitecap with the new lease backdated to protect Whitecap from a possible trespass claim. However, between the date it was backdated to and the date of the lease's actual execution, two offsetting wells began to produce. Therefore, at issue was whether Whitecap had an obligation to satisfy the offset obligation with respect to the two offsetting wells. The applicable provision of the lease said the obligation started "at any time subsequent to the date of the Lease."¹⁰⁶ The Court considered the conduct of the parties and the unlikelihood that rational commercial operation would require offsetting wells to protect the very minimal amount of production expected (a few hundred dollars' worth). Based on these considerations, the Court concluded that "date of the Lease" meant the date the parties signed the contract and ordered that the royalties paid in protest to CNRL for that period be repaid to Whitecap.¹⁰⁷

Further, one of Whitecap's leases was a "Lease Option Agreement" that required Whitecap to drill ten wells during the "Earning Periods." Under the Lease Option Agreement, the offset well clauses were suspended until the termination date, which was defined as "at the End of Earning Period 3."¹⁰⁸ CNRL argued the offset well clauses recommenced when the tenth well was drilled. The Alberta Court of Queen's Bench disagreed, stating that this position was not supported by the language of the agreement which clearly defined the "End of Earning Period 3" with a date (namely, 31 December 2013).¹⁰⁹

CNRL also argued that, on the end of "Earning Period 3," Whitecap had to immediately drill defensively in response to the wells drilled while its offset well clauses were suspended. The Alberta Court of Queen's Bench noted the conduct of the parties did not suggest this was their intention. It further noted that requiring otherwise would defeat the purpose and intent of the Lease Option Agreement because it would force wells to be placed strategically during the earning periods to meet future defensive drilling obligations, whereas Whitecap should be allowed to drill wells anywhere during the earning periods.¹¹⁰

The Court also found that, if defensive drilling is required in response to an offset well on laterally *or* diagonally adjoining land, it does not necessarily mean the lessee is to drill on

¹⁰⁴ *Ibid* at para 7.

¹⁰⁵ *Ibid* at paras 39–43.

¹⁰⁶ *Ibid* at para 21.

¹⁰⁷ *Ibid* at para 53.

¹⁰⁸ *Ibid* at para 61.

¹⁰⁹ *Ibid* at paras 60–63.

¹¹⁰ *Ibid* at paras 64–68.

both the laterally *and* diagonally adjoining lands; therefore, Whitecap needed to only defensively drill one well (or pay in lieu).¹¹¹ Lastly, it was held that, if an offset well extends into a legal subdivision that is not an adjoining unit, compensation instead of drilling must only be proportionate to the substances obtained from the adjoining unit.

4. COMMENTARY

This decision canvassed complex and fact-specific drill, drop, or pay provisions that are unique to the oil and gas industry. Such leasing provisions are designed to protect lessors from drainage from neighbouring properties by providing them with a number of options, such as drilling defensively, dropping the lease, or paying royalties to the lessor in lieu of drilling.¹¹² This decision is significant as it interprets, applies, and clarifies the operation of leases that contain such provisions. Since drill, drop, or pay provisions are now commonplace in oil and gas leases, industry participants will benefit from understanding how courts have approached disputes that engage these types of leases.

B. CANADIAN NATURAL RESOURCES LIMITED V. LISAFELD ROYALTIES LTD.¹¹³

1. BACKGROUND

Lisafeld Royalties provides another example of the application of offset well provisions. However, unlike in *Whitecap*, the lease in question contained an older version of the offset well provision, and did not contain modern drill, drop, or pay provisions. Accordingly, the lease in question only created the option to either drill or terminate the lease.

2. FACTS

Lisafeld Royalties Ltd. (Lisafeld) owned the mines and minerals on the east half of a section of land in southern Saskatchewan (the leased land). The leased land was first leased in 1949, and the lessee's interest in the lease was eventually assigned to CNRL.¹¹⁴

The lease required the lessee to drill an offset well if a third party, commercially producing well was drilled on land adjacent to the leased lands. Specifically, upon the adjacent well commencing commercial production, the lessee had six months to drill the offset well on the leased lands to mitigate against the inevitable formation drainage from the new adjacent well.¹¹⁵ The lease did not provide options to the lessee to pay compensatory royalties or to surrender non-producing formations instead of terminating the lease for a breach or default of any of its terms.

CNRL drilled a horizontal well that began on the Leased Land, but only produced from areas under certain neighbouring lands. CNRL took no action to offset this, and the six

¹¹¹ *Ibid* at para 98.

¹¹² *Ibid* at para 12.

¹¹³ 2019 SKQB 201 [*Lisafeld Royalties*].

¹¹⁴ *Ibid* at para 6.

¹¹⁵ *Ibid* at para 7.

months contemplated by the offset provision expired.¹¹⁶ The horizontal well was shut in three months after the six months expired.

Over six months later, Lisafeld sent CNRL a letter demanding fiscal compensation for the failure to drill an offset well. Lisafeld subsequently sent a formal notice of default to CNRL, which triggered the 90 day remedy period. CNRL maintained there was no default and applied to the Saskatchewan Court of Queen's Bench for a declaration that it neither breached nor defaulted under the lease to protect its position. Lisafeld applied for summary judgment and dismissal of CNRL's application.

At the summary judgment hearing, CNRL maintained its position claiming the offset well clause was not triggered. If the offset well clause was triggered, CNRL argued that a different well, drilled in 1956, sufficed as an offset well. CNRL further argued that a subsequently negotiated unitization arrangement that included the leased lands continued the lease regardless of whether there was cause for termination.

3. DECISION

The Saskatchewan Court of Queen's Bench found the lessee was not obligated to address the offset well until a notice of default was delivered. Lisafeld delayed in delivering the notice of default, and when it did deliver the notice, the horizontal well was no longer producing. As there was no possibility of drainage from Lisafeld's lands to the horizontal well, CNRL had no obligations under the offset clause.¹¹⁷

The Court found that the previously drilled 1956 well would have satisfied the offset well obligation.¹¹⁸ The 1956 well was a vertical well drilled into the same formation as the horizontal well, which ultimately revealed that the formation was not viable for oil production. It further noted that if the well triggering an offset obligation is a horizontal well, it is sufficient for the lessee to drill a vertical well into the same formation to satisfy the obligation.¹¹⁹

The subsequently negotiated unitization arrangement covering the leased lands provided it would supersede any inconsistent provision of an underlying lease. The unitization arrangement stated that any operations in the unit area were deemed an operation on each lease under the arrangement. As the leased lands fell under this arrangement, the Saskatchewan Court of Queen's Bench accepted CNRL's argument that this arrangement could act to continue the lease in the horizontal well's formation, "so long as unitized substances are being produced and royalties are being paid to Lisafeld under the Plan of Unit Operation."¹²⁰

The Court refused to apply the lease's antiquated definitions of "drilling unit" for horizontal wells to the lease's offset well provision because technology had progressed such

¹¹⁶ *Ibid* at para 11.

¹¹⁷ *Ibid* at para 65.

¹¹⁸ *Ibid*.

¹¹⁹ *Ibid* at para 64.

¹²⁰ *Ibid* at para 73.

that the horizontal leg of the well casing could have been in various locations. It further found that the purpose of the provision was to trigger the obligation on the lessee to drill an offset well if there was production on a laterally adjoining spacing unit. The spirit of this provision was achieved by the drilling of the 1956 well and unitization agreement. As such, the Court concluded that the lease was not breached and continued in full force and effect.¹²¹

4. COMMENTARY

This decision emphasizes the importance of timing in delivering a notice of default, and concurrent regard to whether the triggering well is producing at the time when the notice is delivered. It also clarifies how offset drilling clauses may apply to horizontal wells, where the lease was made before horizontal wells were developed. Horizontal wells can suffice and satisfy the lease terms even when horizontal wells were not contemplated upon the formation of the lease. The Saskatchewan Court of Queen's Bench demonstrated a willingness to examine and ensure the spirit of the provision was achieved, taking a substance over form approach to interpretation and satisfaction. Lastly, this decision is an example of how disputes related to offset well provisions, without modern drill, drop, or pay provisions, are resolved.

C. *KARVE ENERGY INC. v. DRYLANDER RANCH LTD.*¹²²

1. BACKGROUND

In *Karve Energy*, the Alberta Court of Queen's Bench held that a negotiated compensation term of a surface lease cannot be overruled by the Surface Rights Board (SRB) unless the agreement conflicts with section 27 of the *Surface Rights Act*.¹²³

2. FACTS

In 1994, Drylander Ranch Ltd. (Drylander) and the predecessor to Karve Energy Inc. (Karve) entered into a 25 year surface lease, which contained compensation provisions that permitted Karve, as the operator, to reduce annual compensation upon the removal of surface facilities from the land.¹²⁴ In 2016, Karve exercised this contractual right and notified Drylander that annual rent payments would be reduced since the premises had been abandoned.

Drylander responded with an application to the SRB, arguing the reduction in rent was unilateral and contrary to the rental review provisions in section 27 of the *SRA*. The SRB held that Drylander was entitled to full rent under the lease and confirmed that the only two ways compensation provisions can be varied are by mutual party agreement or pursuant to section 27 of the *SRA*.

¹²¹ *Ibid* at para 75.

¹²² 2019 ABQB 298 [*Karve Energy*].

¹²³ RSA 2000, c S-24 [*SRA*].

¹²⁴ *Karve Energy*, *supra* note 122 at paras 6–7.

3. DECISION

The Alberta Court of Queen’s Bench found that the SRB made a reviewable error when it held that the compensation provisions of the lease conflicted with section 27 of the *SRA*. While the parties cannot contract out of the section 27 compensation review period, they are nonetheless entitled to agree to compensation payable under the lease, or agree to a mechanism for adjustment to the annual rates. According to the Court, the parties agreed to a lease which permitted, if certain conditions were present, a reduction in annual rent. In finding that Karve acted unilaterally in reducing the rent, the SRB “ignored the plain language and meaning of the contract,”¹²⁵ leading to a “commercially unreasonable result.”¹²⁶ The purpose and operation of section 27 of the *SRA* is to “create a mechanism for review of compensation every 5 years,” which does not interfere with the parties’ ability to agree on annual rent adjustments.¹²⁷ Further, a “conflict between a private agreement and the [*SRA*] arises only where the two provisions cannot both be given their lawful effect but instead are mutually exclusive or irreconcilable.”¹²⁸

4. COMMENTARY

This decision provides important clarification about the SRB’s ability to interfere with bilateral agreements respecting annual lease compensation. In particular, parties entering into surface lease agreements should take comfort in knowing that the agreements on pricing mechanisms will be enforced unless there is a clear conflict with section 27 of the *SRA*. This result reinforces the ability of sophisticated parties to negotiate contractual terms and have confidence that such terms will be enforced, all while ensuring compliance with the *SRA*.

D. *HUDSON KING V. LIGHTSTREAM RESOURCES LTD.*¹²⁹

1. BACKGROUND

This decision addressed a relatively rare type of contractual relationship found in the oil and gas industry — a net profits interest (NPI). The Alberta Court of Queen’s Bench was tasked with interpreting an NPI and the complex royalties and deductions prescribed by it in the context of a dispute over payments reaching back many years. The case was complex, as it also addressed the law of fiduciary duty, the duty of honest performance, and the characterization of certain taxes in Saskatchewan.

2. FACTS

The plaintiffs were the current interest holders under an NPI agreement entered into in 1977. The agreement provided that the interest holders would receive 50 percent of all profits derived from oil and gas wells within a certain area in southeast Saskatchewan. The interest holders brought a claim against the corporate counterparty (and its successors) to the NPI

¹²⁵ *Ibid* at para 39.

¹²⁶ *Ibid* at para 41.

¹²⁷ *Ibid* at para 42.

¹²⁸ *Ibid*.

¹²⁹ 2020 ABQB 149 [*Hudson*].

agreement, alleging that certain charges were improperly allocated to the NPI account. The improper charge allocation reduced the profits paid out under the agreement. In finding two breaches of the NPI agreement, the Alberta Court of Queen's Bench directed that the NPI account be adjusted to remove the improper charges and that any corresponding profits be paid to the plaintiffs.

3. DECISION

a. Fiduciary Duty

The plaintiffs argued that the successive corporate counterparties to the NPI agreement were fiduciaries who had breached their duties to the individual interest holders. Fiduciary relationships have been found in previous oil and gas cases where one party had control of operations, accounting, or both. However, those cases predated the Supreme Court of Canada's decision in *Alberta v. Elder Advocates of Alberta Society*.¹³⁰ To find a fiduciary relationship, *Elder Advocates* imposed a prerequisite that the alleged fiduciary must have given an undertaking to act in the best interests of the beneficiary. The Alberta Court of Queen's Bench found that there had been no such undertaking given by any of the corporate counterparties. Rather, the NPI agreement contemplated the defendants pursuing their own self-interest in maximizing profits earned from the assets, which would correspondingly benefit the NPI holders.¹³¹ Though the Alberta Court of Queen's Bench noted that the plaintiffs were vulnerable to the defendants' exercise of discretionary powers, that power did not affect the "legal or substantial practical interests" of the plaintiffs.¹³² The plaintiffs had no separate legal or practical interest other than the right to profits under the agreement, which created contractual, but not fiduciary, duties for the defendants.

b. Duty of Honest Performance

In performing their contractual duties, the defendants were required to adhere to the duty of honest performance, as initially recognized by the Supreme Court in *Bhasin v. Hrynew*.¹³³ The Alberta Court of Queen's Bench recognized that the nature of an NPI differs from that of a royalty, in that the owner of the latter can readily track production and thus one's entitlement.¹³⁴ An NPI holder, conversely, "relies and depends on the operator's competence, efficiency and honesty" in operations and accounting.¹³⁵ The duty of honest performance prescribed that the defendants had to make efforts to ensure their decisions were consistent with what the NPI agreement required, and they had to communicate candidly with the plaintiffs.¹³⁶

In allocating over \$14 million in expenses to the NPI account relating to the acquisition of assets in the NPI area that formed part of a larger acquisition, the Alberta Court of Queen's Bench found that the defendants breached the NPI agreement as well as the duty of

¹³⁰ 2011 SCC 24 [*Elder Advocates*].

¹³¹ See *Hudson*, *supra* note 129 at para 134.

¹³² *Ibid* at para 129, citing *Elder Advocates*, *supra* note 130 at para 34.

¹³³ 2014 SCC 71.

¹³⁴ See *Hudson*, *supra* note 129 at para 122.

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

honest performance.¹³⁷ The agreement provided that they could allocate the “cost and expense incurred” from the asset acquisition to the account.¹³⁸ The Alberta Court of Queen’s Bench found that the defendants did not make a meaningful effort to determine the appropriate “cost and expense” relating to the NPI assets from the broader acquisition; rather, they picked a higher number that advanced their own interests at the plaintiffs’ expense.¹³⁹ The defendants failed to be honest and candid with the plaintiffs by refusing to provide information regarding the justification for the allocation. The information provided was inaccurate and misleading.

c. Tax Characterization

The defendants were also found to have breached the NPI agreement by deducting taxes paid under Saskatchewan’s *The Corporation Capital Tax Act* from the NPI area revenues.¹⁴⁰ The NPI agreement only permitted the deduction of taxes on production. The parties disagreed regarding whether the *CCTA* tax was in fact a tax on production, or whether it was a capital tax. The Alberta Court of Queen’s Bench held that the NPI agreement permitted the deduction of taxes and other charges directly on production, but not taxes *affected by* production, such as income taxes.¹⁴¹ In analyzing the language in the statute and its stated purpose, the Court found that the tax regime created a tax on corporations producing resources in the province, a tax *affected by* the amount of resources produced, but not a tax *on the resources* themselves. As such, it was not chargeable under the NPI agreement.

4. COMMENTARY

This decision is notable both for addressing the practical issues inherent in NPI agreements, and for its discussion on fiduciary duties, the duty of honest performance, and the characterization of the *CCTA*. Producers, operators, and those in a position of control over shared revenue agreements should take note of this case, as the Alberta courts have found that the common law clearly supplements these types of agreements with various duties that, while not necessarily approaching fiduciary levels, remain strict. It clarifies the duty of honest performance that typically accompanies an NPI and that would not normally be seen accompanying a royalty given the inability of interested parties to track their entitlement. It is uncertain what, if any, effect this Alberta decision will have on tax treatment for producers in Saskatchewan.

V. REMEDIES AND INJUNCTIVE RELIEF

There were many decisions issued this year regarding remedies and injunctive relief in the context of the energy industry. Some of the highlights include injunctions sought with respect to the Coastal GasLink project, a rare mandatory injunction compelling Cabinet to render a timely decision on a resource project, and the issuance of a replevin order for the return of seismic data.

¹³⁷ *Ibid* at para 155.

¹³⁸ *Ibid* at para 500.

¹³⁹ *Ibid* at para 539.

¹⁴⁰ SS 1979–80, c C-38.1 [*CCTA*].

¹⁴¹ See *Hudson*, *supra* note 129 at paras 223–38.

A. *PROSPER PETROLEUM LTD. v. HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA*¹⁴²

1. BACKGROUND

On 18 February 2020, the Alberta Court of Queen’s Bench granted an injunction directing Alberta to issue a decision in ten days regarding whether to approve Prosper Petroleum Ltd.’s (Prosper) Rigel Oil Sands Project (the Rigel project). Alberta appealed the decision and successfully brought an application to stay the order pending appeal of the injunction shortly thereafter. The appeal has yet to be heard.

2. FACTS

The Rigel project is a proposed steam-assisted gravity drainage extraction facility in the Athabasca Oil Sands region, with a designed capacity to produce up to 10,000 bbl/d of bitumen. Prosper initiated the regulatory approval process in 2013, and in 2018, the AER granted approval subject to Cabinet approval. However, successive provincial governments failed to render a final decision. As a result, Prosper claimed that it underwent a period of financial uncertainty and difficulty that included worker layoffs and reduced wages and work hours.

3. DECISION

The Alberta Court of Queen’s Bench described the delay as “abusive,” and confirmed that the provincial government has a public legal duty under the *Oil Sands Conservation Act*¹⁴³ to study project proposals and issue decisions within a reasonable timeframe.¹⁴⁴ It found that the scope of the Crown’s discretion did not render it immune from *mandamus*, an order of injunction, or both, and ultimately held that the Alberta government breached its duty by delaying its decision for an unreasonable time. The Court rejected the Crown’s argument that because it did not “give specific reasons for the lengthy review, citing Cabinet confidentiality” it therefore must be assumed that “Cabinet is acting in the public interest ... [w]ith no information to support that assumption.”¹⁴⁵

The Court then found that Prosper met the test for an interlocutory injunction to be granted. Prosper inquired about the progress of the government’s decision on numerous occasions and received no explanation for the delays. Accordingly, it was found that Prosper demonstrated that irreparable harm would result if the relief were not granted, beyond simply financial loss. In issuing the mandatory injunction, the Court concluded that “there is a strong public interest in encouraging a timely Cabinet decision.... The balance of convenience supports an injunction.”¹⁴⁶

¹⁴² 2020 ABQB 127 [*Prosper*].

¹⁴³ RSA 2000, c O-7.

¹⁴⁴ See *Prosper*, *supra* note 142 at para 76.

¹⁴⁵ *Ibid* at para 48.

¹⁴⁶ *Ibid* at paras 69–70.

However, the Alberta Court of Appeal granted a stay pending the appeal of this decision, finding that the appeal raises a serious issue that Alberta would suffer irreparable harm, and that on a balance of convenience the stay should be granted.¹⁴⁷ In particular, the Court of Appeal found that “if a stay is denied ... the substance of its appeal ... is rendered nugatory” and therefore a stay should be granted.¹⁴⁸

4. COMMENTARY

If upheld on appeal, this decision reinforces project proponents’ rights to obtain finality in regulatory decisions within reasonable timelines, and confirms the availability of injunctive relief when governments fail to make decisions in a timely matter. This is a somewhat unconventional remedy and, if upheld, represents a powerful tool for project proponents. The decision is also notable for confirming that citing Cabinet confidentiality as a reason for not providing reasons for a project’s lengthy review will not create a presumption that the Cabinet acted in the public interest.

B. COASTAL GASLINK PIPELINE LTD. v. HUSON¹⁴⁹

1. BACKGROUND

In this decision, the British Columbia Supreme Court granted an interlocutory injunction and enforcement order restraining the defendants from preventing the plaintiff’s access to service roads it used for the Coastal GasLink project.

2. FACTS

The plaintiff, Coastal GasLink Pipeline Ltd. (Coastal GasLink) obtained all of its necessary provincial permits and authorizations to construct the Coastal GasLink project. However, various First Nations opposed the Coastal GasLink project and set up various blockades. Notwithstanding an interim injunction issued by the British Columbia Supreme Court, the blockades remained in place until the Royal Canadian Mounted Police attempted to enforce the interim injunction.

Following this injunction, work began but was delayed by additional blockades and obstructions. Coastal GasLink then brought an application for another injunction. The defendants argued that the plaintiffs could not proceed with construction on their traditional territory, as Indigenous law (specifically, Wet’suwet’en law) governed their territory.

3. Decision

The British Columbia Supreme Court first noted that Indigenous customary laws are not part of Canadian common law, unless there is some process by which the Indigenous customary law is recognized as part of Canadian law, or where Indigenous laws are simply

¹⁴⁷ See *Prosper Petroleum Ltd v Her Majesty the Queen in Right of Alberta*, 2020 ABCA 85 at paras 14–35.
¹⁴⁸ *Ibid* at para 32.
¹⁴⁹ 2019 BCSC 2264.

admissible as fact evidence. In this case, the British Columbia Supreme Court found there was no such process, so the Indigenous customary law was only relevant as fact evidence.¹⁵⁰

The British Columbia Supreme Court further found that the equities in the case favoured an injunction, as refusing to grant the injunction would cause the plaintiffs and many others “serious and irreparable harm.”¹⁵¹ It noted that the plaintiff properly acquired the permits in question, and the law did not recognize any right of the defendants to block and obstruct Coastal GasLink from pursuing its activities, which were authorized by law.¹⁵²

Accordingly, the British Columbia Supreme Court found that the plaintiff met all three branches of the test for an interlocutory injunction. Further, it ordered enforcement provisions within the injunctive order to inform the public of potential consequences in the event of non-compliance.¹⁵³

4. COMMENTARY

While this decision reaffirms common principles underlying injunctions, it is notable for its consideration of how Indigenous customary law should factor into an injunction application, with the British Columbia Supreme Court holding that such law does not override domestic law. Further, the British Columbia Supreme Court also engaged in a lengthy discussion about Indigenous legal structures, including the conflicting roles of elected band officials and hereditary chiefs.¹⁵⁴ This factor was considered in the balance of convenience analysis.¹⁵⁵ This emphasis comes on the heels of increasing interest in the schism that often exists between elected band councils and hereditary chiefs regarding their respective support for various resource projects that affect Indigenous interests. This decision may shed some light on how the existence of parallel and often competing Indigenous political authorities will factor into court proceedings and project approvals in the future.

C. *ENERPLUS CORPORATION V. COPYSEIS LTD.*¹⁵⁶

1. BACKGROUND

On 13 November 2019, the Alberta Court of Queen’s Bench granted an order of replevin to the plaintiff, Enerplus Corporation (Enerplus), ordering the defendant, Copsyseis Ltd. (Copsyseis), to immediately return seismic data that Copsyseis was storing pursuant to a data storage, management, and archiving agreement (the data agreement). This decision provides an interesting example of the operation of replevin orders, and how the remedy can offer a creative form of short-term relief for one party, while preserving the other party’s broader claim for determination at trial.

¹⁵⁰ *Ibid* at paras 127–29.

¹⁵¹ *Ibid* at para 224.

¹⁵² *Ibid* at para 225.

¹⁵³ *Ibid* at para 227.

¹⁵⁴ *Ibid* at paras 130–39.

¹⁵⁵ *Ibid* at para 218.

¹⁵⁶ 2019 CarswellAlta 2885 (QB) [*Enerplus*].

2. FACTS

Upon termination of the Data Agreement by Enerplus, Copyseis refused to return certain seismic data unless Enerplus paid a \$1,000,000 termination fee for data deletion and other services. In response, Enerplus sought a replevin order for the immediate return of the seismic data. Enerplus argued that withholding the data was affecting its core business and that it had established substantive grounds for its claim that there was wrongful detention of the seismic data. On the contrary, Copyseis argued that Enerplus was attempting to use the order to “circumvent the ordinary operation of the parties’ contractual obligations under the Data Agreement.”¹⁵⁷

3. DECISION

The Alberta Court of Queen’s Bench began by reviewing the test for replevin orders under rule 6.49 of the *Alberta Rules of Court*,¹⁵⁸ which provides that: (1) “it must be established there was a wrongful taking or detention of the personal property”; (2) “the value and the description of the personal property must be established”; and (3) “the applicant must establish it is the rightful owner or is entitled to lawful possession of the personal property.”¹⁵⁹

The Court focused on whether the data agreement permitted Copyseis to retain the seismic data until Enerplus had paid a termination fee. However, it was careful to note that it was not to “embark on a trial” of that issue, but rather decide whether Enerplus could establish facts that can provide substantial grounds for its claim.¹⁶⁰

The Court found that Enerplus met the test for a replevin order on the grounds that: (1) it was the owner of the seismic data; (2) prior to termination under the Data Agreement it had unfettered access to the data and relied on such access for its core business; (3) Copyseis was now refusing to return the seismic data unless and until Enerplus paid a termination fee; and (4) Enerplus had shown that there were substantial grounds for its entitlement to lawful possession of the data.¹⁶¹ On the fourth ground, the Court pointed to the fact that the data agreement required a 60 day notice period for termination and that all outstanding invoices were to be paid in full. It further found that Enerplus paid all outstanding invoices and there was no reference in the agreement that a termination fee for post-termination services was required.¹⁶² The Court was careful to acknowledge that it may very well be the case that a trial would determine that the Data Agreement provided for a termination fee, but that was not the task at hand in this application.¹⁶³

In the Court’s view, granting the replevin order “preserve[d] the *status quo* for the parties” by: (1) allowing Enerplus to obtain its seismic data and thus carry on its core business, while (2) crystallizing any potential liability that Enerplus is determined at trial to have to

¹⁵⁷ *Ibid* at para 8.

¹⁵⁸ Alta R g 124/2010, r 6.49.

¹⁵⁹ See *Enerplus*, *supra* note 156 at para 9.

¹⁶⁰ *Ibid* at para 12.

¹⁶¹ *Ibid* at paras 12–16.

¹⁶² *Ibid* at paras 17–21.

¹⁶³ *Ibid* at paras 24–25.

Copyseis.¹⁶⁴ To achieve the latter goal, Enerplus provided an undertaking that it will be responsible to pay damages caused as a result of the replevin order if it is not ultimately successful at trial. The Court therefore ordered that Enerplus provide a letter of credit in the amount of \$1,000,000 in favour of Copyseis.¹⁶⁵

4. COMMENTARY

Replevin orders are an extraordinary pretrial remedy as they allow the return of personal property to a party claiming ownership in an action before the matter has been fully adjudicated. This case demonstrates that the threshold for establishing replevin orders is relatively low and that “the applicant need only establish substantial grounds for its claim.”¹⁶⁶ This decision is also significant in that it represents a creative interim solution which allowed the applicant to retrieve the seismic data, and thus carry on its core business, while requiring it to post a letter of credit in favour of the defendant, thereby crystallizing the defendant’s claim to the termination fee, which will be determined at trial.

VI. INSOLVENCY

The insolvency decisions of the past year provide insight into the legal landscape and analysis post-*Orphan Well Association v. Grant Thornton Ltd.*¹⁶⁷ and in particular the ongoing discussion regarding environmental liabilities and abandonment obligations in bankruptcy. Additionally, the Ontario Court of Appeal rendered an important decision affirming the jurisdiction of receivership courts to extinguish third party interests in land by vesting order, while providing a framework for when such orders are appropriate in the context of insolvency proceedings.

A. *PRICEWATERHOUSECOOPERS INC.* *v. PERPETUAL ENERGY INC.*¹⁶⁸

1. BACKGROUND

The Alberta Court of Queen’s Bench struck four of the five claims brought by PriceWaterhouseCoopers Inc., the trustee in bankruptcy for Sequoia Resources Corp. (Sequoia), related to the sale of certain distressed assets prior to Sequoia’s assignment in bankruptcy. The trustee’s claims, which ultimately sought to unwind an asset transaction, were grounded in allegations of (1) an undervalued transfer, violating section 96 of the *Bankruptcy and Insolvency Act*;¹⁶⁹ (2) oppression; (3) a violation of public policy, statutory illegality and other equitable claims; and (4) breach of director’s duties.¹⁷⁰ The defendant, Perpetual Energy Inc. (Perpetual Energy), moved to strike or summarily dismiss the trustee’s claims.

¹⁶⁴ *Ibid* at para 26.

¹⁶⁵ *Ibid* at para 27.

¹⁶⁶ *Ibid* at para 10.

¹⁶⁷ 2019 SCC 5 [*Redwater*].

¹⁶⁸ 2020 ABQB 6 [*Perpetual*], leave to appeal to Alta CA refused, 2020 ABCA 254 [*Perpetual CA*].

¹⁶⁹ RSC 1985, c B-3 [*BIA*].

¹⁷⁰ See *Perpetual*, *supra* note 168 at para 22.

2. FACTS

Perpetual Energy held all the shares in Perpetual Energy Operating Corp. (PEOC). Sequoia was formerly known as PEOC. Perpetual Energy was also the sole beneficiary of another defendant, Perpetual Operating Trust (POT). Prior to 1 October 2016, PEOC had no assets or operations and was solely the trustee for POT, which held a beneficial interest in certain oil and gas properties and related assets (the trust assets). These trust assets included gas wells and other properties in Alberta identified for disposition (the Goodyear assets). PEOC, as trustee for POT, held the legal interests and licences for the assets.

Perpetual Energy and Kailas Capital Corp. (Kailas Capital) entered into a letter of intent dated 7 July 2016, which stated that Kailas Capital sought to minimize commodity price risk. Pursuant to the letter of intent, POT sold its beneficial interest in the Goodyear assets to PEOC through an asset purchase agreement. PEOC transferred legal title to all the remaining POT assets to PEOC, and PEOC changed its name to Sequoia. This transaction (the asset transaction) was completed on 1 October 2016, and the parties signed a resignation and mutual release. Sequoia operated the Goodyear assets until it assigned itself into bankruptcy in March 2018.

The trustee commenced an action seeking an order declaring the asset transaction void as against the Trustee, or in the alternative, judgment for an amount not less than \$217,570,800 based on section 96(1) of the *BIA*.

3. DECISION

The Alberta Court of Queen’s Bench identified five distinct issues and decided whether the issues could be determined by way of summary dismissal or striking the claim: (1) whether the transaction was completed at arm’s length in accordance with the *BIA*; (2) whether the trustee was a complainant entitled to bring an oppression claim under the Alberta *Business Corporations Act*; ¹⁷¹ (3) whether the trustee was entitled to relief on the grounds of public policy; (4) whether the release was a complete bar to the claims against Ms. Rose, the director and shareholder of Perpetual Energy and director of PEOC prior to 1 October 2016; and (5) whether Rose breached “her fiduciary duty and duty of care owed to PEOC by approving the Asset Transaction.” ¹⁷²

The Court declined to summarily dismiss or strike the trustee’s claim that the impugned asset transaction was not at arm’s length. Pursuant to section 96 of the *BIA*, an undervalued transfer between non-arm’s length parties may be challenged within five years of the initial bankruptcy event. The Court concluded that the *BIA* claim could not be determined on a summary basis nor could it be struck, due to the necessity of evaluating the credibility of witnesses who were involved in the asset transaction’s negotiation. ¹⁷³

¹⁷¹ RSA 2000, c B-9.

¹⁷² *Perpetual*, *supra* note 168 at para 5.

¹⁷³ *Ibid* at para 98.

The Court struck the remainder of the trustee's claims. With respect to the trustee's oppression claim, it found that the claim did not constitute a cause of action and struck it based on rule 3.68 of the *Alberta Rules of Court*.¹⁷⁴ It was found that the trustee was not a "proper person" to be entitled to relief on the basis of oppression.¹⁷⁵

The Court disagreed with the trustee's argument that the abandonment and reclamation obligation (ARO) was a liability that allowed it to be a "proper person" to bring an oppression claim. It noted that the ARO could not constitute a liability or a provable claim at the time of the asset transfer because: (1) there was no creditor with respect to the impugned ARO, and absent a creditor, there can be no corresponding liability; and (2) the ARO was a "notional and contingent" obligation, which was insufficient to constitute a liability.¹⁷⁶ Rather, the ARO was a "future burden that has not crystallized into a liability."¹⁷⁷

The Court struck the trustee's claim that the impugned transactions were void on the basis of public policy, statutory illegality, or equitable rescission and, therefore, disclosed no cause of action.¹⁷⁸ It further struck both of the trustee's claims against Rose. The *Redwater* decision nullified the trustee's assertions concerning the mutual release agreement and that Rose breached her duties. It was determined that there was no evidence that Rose acted inappropriately in discharging her fiduciary duties in connection to the asset transaction. Moreover, the terms of the release stated that the parties considered all factors related to the document's execution and that the release was a complete bar to the trustee's claims against Rose.¹⁷⁹

4. COMMENTARY

This post-*Redwater* case contributes to the ongoing discussion in Canadian law regarding environmental liabilities and abandonment obligations in bankruptcy. The trustee appealed the decision, and in response, two of the defendants brought an application requesting that the trustee post security for costs in the amount of \$240,000. On 29 January 2020, the Alberta Court of Appeal granted the defendants' application.¹⁸⁰ On 29 June 2020 leave to appeal was dismissed.¹⁸¹

¹⁷⁴ *Supra* note 158, r 3.68.

¹⁷⁵ See *Perpetual*, *supra* note 168 at paras 201, 211.

¹⁷⁶ *Ibid* at para 172.

¹⁷⁷ *Ibid* at para 239.

¹⁷⁸ *Ibid* at para 281.

¹⁷⁹ *Ibid* at paras 308–27.

¹⁸⁰ See *PricewaterhouseCoopers Inc v Perpetual Energy Inc*, 2020 ABCA 36.

¹⁸¹ See *Perpetual CA*, *supra* note 168.

B. *THIRD EYE CAPITAL CORPORATION V. RESSOURCES DIANOR INC./DIANOR RESOURCES INC.*¹⁸²

1. BACKGROUND

This decision was the second of two appeals regarding whether a gross overriding royalty (GOR) interest was an interest in land.¹⁸³ This appeal touched on the jurisdiction of receivership courts and specifically whether those courts have the ability to grant an approval and vesting order (AVO) extinguishing a third party interest in land.

2. FACTS

Dianor Resources Inc. (Dianor) was insolvent, and one of its lenders, Third Eye Capital Corporation (Third Eye), requested the Court appoint a receiver over Dianor's assets, undertakings, and property. Dianor's main asset was a group of mining claims in Ontario and Quebec. One of its agreements provided for the payments of GORs to the appellant, 2350614 Ontario Inc. (235Co). In 2015, the Ontario Court of Appeal made an order approving the sales process for Dianor's mining claims. The receiver accepted Third Eye's bid, conditional on obtaining court approval. The bid contained a condition that the GORs be terminated or impaired.

235Co asked that the property to be vested in Third Eye be subject to its GORs. The Receivership Court held that the GOR did not constitute an interest in land and therefore the vesting order could be made, vesting clear title. 235Co appealed the judgment respecting whether the GOR interest could be extinguished by a vesting order granted in a receivership proceeding. The Ontario Court of Appeal issued a preliminary decision in 2018 confirming that the GOR was in fact an interest in land, but invited further submissions on whether the Court has jurisdiction to extinguish that interest.¹⁸⁴ At issue in this appeal, therefore, was whether a third party interest in land was extinguishable by an AVO.¹⁸⁵

3. DECISION

The Ontario Court of Appeal outlined the history of AVOs as they related to certain provisions of the *BIA*. It held that section 243 of the *BIA* is broad in nature and, in light of its legislative history and purpose, provides receivership courts with jurisdiction to grant AVOs. It further found that a court's jurisdiction under section 243 extended to "the implementation of the sale through the use of a vesting order as being incidental and ancillary to the power to sell."¹⁸⁶

The Court then considered whether it was *appropriate* to vest out 235Co's GORs in the circumstances. In considering whether an interest in land should be extinguished, the Court

¹⁸² 2019 ONCA 508 [*Third Eye* 2019].

¹⁸³ The first appeal being *Third Eye Capital Corporation v Ressources Dianor Inc/Dianor Resources Inc.*, 2018 ONCA 253.

¹⁸⁴ *Ibid* at para 130.

¹⁸⁵ See *Third Eye* 2019, *supra* note 182.

¹⁸⁶ *Ibid* at para 77.

stated that “a court should consider: (1) the nature of the interest in land; and (2) whether the interest holder has consented to the vesting out of their interest either in the insolvency process itself or in agreements reached prior to the insolvency.”¹⁸⁷

Focusing on the nature of the interest in land held by 235Co, the Court held that the interest in land was more than purely monetary and, accordingly, the motion judge erred in granting a vesting order extinguishing an interest in land in the nature of the GORs. However, the Court held that 235Co failed to appeal on a timely basis and within the time limits prescribed by the *BIA*. The appeal was therefore dismissed.¹⁸⁸

4. COMMENTARY

As a preliminary matter, this decision affirms that receivership courts indeed have jurisdiction to extinguish third party interests in land by vesting orders. More important, however, is the Ontario Court of Appeal’s guidance on when it is appropriate for courts to vest out certain interests in land in the context of insolvency proceedings. This principled framework provides resource companies with greater certainty and clarity in scenarios where assets, subject to royalty interests, and other potential interests in land, are sold.

VII. STANDARD OF REVIEW

In December 2019, the Supreme Court of Canada addressed the judicial standard of review of administrative decisions in a trilogy of cases heard in short succession. The Supreme Court seized the opportunity to restate the law and provide clarity. In *Canada (Minister of Citizenship and Immigration) v. Vavilov* the Supreme Court reviewed a decision of the Canadian Registrar of Citizenship.¹⁸⁹ In *Bell Canada v. Canada (Attorney General)*¹⁹⁰ and *National Football League v. Attorney General of Canada*,¹⁹¹ the Supreme Court reviewed decisions of the Canadian Radio-television and Telecommunications Commission. With three judgments rendered within a two day span, the Supreme Court affirmed the presumption of the standard of reasonableness and provided guidance on selecting the correct standard of review.¹⁹²

A. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION) V. VAVILOV¹⁹³

1. BACKGROUND

This decision revisited the *Dunsmuir v. New Brunswick* contextual analysis for determining the standard of review of administrative decisions.¹⁹⁴ Pre-*Vavilov*, if the standard

¹⁸⁷ *Ibid* at para 109.

¹⁸⁸ *Ibid* at paras 147–48.

¹⁸⁹ 2019 SCC 65 [*Vavilov*].

¹⁹⁰ 2019 SCC 66 [*Bell*], rev’g 2017 FCA 249 [*Bell CA*].

¹⁹¹ 2017 FCA 249, leave to appeal to the SCC granted, 37897 (10 May 2018) [*National Football League*]. Consolidated with *Bell* by order of the Federal Court of Appeal: see *Bell CA*, *ibid* at paras 1–2.

¹⁹² See *Vavilov*, *supra* note 189 at para 10.

¹⁹³ *Ibid*.

¹⁹⁴ 2008 SCC 9 [*Dunsmuir*].

of review had not been settled by the jurisprudence, in practice, an advocate typically attempted to convince a court that, based on the contextual analysis and common law factors, the standard of review ought to be correctness. In *Vavilov*, the Supreme Court established a presumption that administrative decisions are subject to a standard of review of reasonableness. There are exceptions to this presumption. For example, the standard of review will be correctness if: (1) the statute specifies the standard of review is correctness or if there is a statutory right of appeal on a pure question of law or jurisdiction; or (2) if on judicial review there is a constitutional question, a general question of law of central importance to the legal system, or if the question involves jurisdictional boundaries between administrative bodies. In practice, it is foreseeable that post-*Vavilov* an advocate's argument will be redirected to trying to convince courts that one of the exceptions to the presumption applies.

2. FACTS

The Supreme Court of Canada was tasked with reviewing a decision of the Canadian Registrar of Citizenship (the Registrar) to cancel Mr. Vavilov's citizenship pursuant to section 3(2)(a) of the *Citizenship Act*.¹⁹⁵ Section 3(2)(a) excludes children of "a diplomatic or consular officer or other representative or employee in Canada of a foreign government" from the "birth on soil" rule deeming all who are born in Canada to be Canadian citizens.¹⁹⁶ The Registrar cancelled Vavilov's certificate of Canadian citizenship on the basis that he was the child of diplomatic agents. Vavilov sought judicial review in the Federal Court, and then appealed to the Federal Court of Appeal which found that the Registrar's decision was unreasonable. The Registrar appealed to the Supreme Court.

3. DECISION

The Supreme Court of Canada unanimously upheld the Federal Court of Appeal's decision, finding that the Registrar's decision was unreasonable for failing to consider legislative debate, jurisprudence on the subject, and domestic and international law. The Supreme Court found that the exceptions in the *Citizenship Act* were clearly meant for those with diplomatic privilege and immunity, both of which Vavilov never enjoyed. Vavilov's citizenship was therefore reinstated. In doing so, the Supreme Court articulated the following guiding principles for the standard of review.

a. Step 1 — Presumption of Reasonableness

First, on review of an administrative decision, there is a presumption that the standard of review will be reasonableness.¹⁹⁷ This codifies a long-standing presumption already largely borne out in the law.¹⁹⁸ However, new to the framework are clearly outlined circumstances where the presumption of reasonableness can be rebutted.

¹⁹⁵ RSC 1985, c C-29.

¹⁹⁶ *Ibid.*, s 3(2)(a).

¹⁹⁷ *Vavilov*, *supra* note 189 at para 16.

¹⁹⁸ *Ibid.* at para 25.

b. Step 2 — Rebutting Reasonableness

The presumption of reasonableness may be rebutted where: (1) the legislated standard of review is correctness or the impugned legislation contains statutory appeal rights to a court; or (2) the rule of law requires the standard of correctness to be applied. The majority noted that, although infrequent, future courts may find other ways the presumption of reasonableness is rebutted.

i. *Legislated Standard of Review and Statutory Appeal Rights*

The legislature may alter the presumption of reasonableness.¹⁹⁹ Alternatively, where a statutory appeal mechanism is legislated, the appellate standards of review in *Housen v. Nikolaisen* will apply.²⁰⁰ Therefore, if by way of a statutory right of appeal, questions of law will be subject to a standard of review of correctness, and questions of fact will only be overturned subject to a palpable and overriding error.²⁰¹ Should statutory appeals have a leave requirement, the majority held that this does not affect the standard to be applied if leave is granted.

ii. *Correctness Review Required by the Rule of Law*

Similar to the pre-*Vavilov* jurisprudence, certain circumstances demand that courts review decisions based on a correctness standard to protect the rule of law. The majority made clear that the court reviewing an administrative decision may either uphold the administrative finding, or substitute it with its own.²⁰² The Supreme Court provided a non-exhaustive list of situations where the law requires a standard of correctness, including: (1) constitutional questions; (2) general questions of importance to the legal system as a whole; and (3) questions concerning jurisdictional boundaries between multiple administrative bodies.²⁰³

c. Step 3: Guidance on How to Perform Reasonableness Review

The majority reaffirmed that “[r]easonableness is a single standard that takes its colour from the context”²⁰⁴ and that, while a decision need not be held to a standard of perfection, it must contain the hallmarks of intelligibility, transparency, and justification.²⁰⁵ In assessing reasonableness, the Supreme Court outlined two ways in which decisions may be unreasonable.²⁰⁶

First, decisions based on internally incoherent reasoning will be unreasonable. The majority ruled that an administrative body’s reasons must be read in light of the record. A decision is unreasonable if the reasons, read holistically, fail to reveal a rational chain of analysis or if they reveal that the decision was based on an irrational chain of analysis. If the

¹⁹⁹ *Ibid* at para 33.

²⁰⁰ 2002 SCC 33.

²⁰¹ See *Vavilov*, *supra* note 189 at para 37.

²⁰² *Ibid* at para 54.

²⁰³ *Ibid* at paras 54–69.

²⁰⁴ *Ibid* at para 89, citing *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59.

²⁰⁵ *Ibid* at paras 15, 81.

²⁰⁶ *Ibid* at paras 73–75.

decision does not “add up,” or relies on logical fallacies “such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise,”²⁰⁷ the impugned decision may be rendered unreasonable.²⁰⁸

Second, decisions where legal or factual constraints are not given consideration may lead to a finding of unreasonableness. The Supreme Court of Canada provided other indicia of unreasonableness that may be applied against a decision, which include: (1) acting beyond the statutory authority granted by the legislature; (2) failing to consider relevant case law; (3) failing to adhere to principles of statutory interpretation;²⁰⁹ (4) failing to take into account the evidentiary record and general factual matrix;²¹⁰ (5) failing to meaningfully grapple with key issues or central arguments raised by the parties;²¹¹ (6) failing to justify a departure from past practices or decisions;²¹² and (7) failing to provide thorough reasons in certain circumstances.²¹³

B. *BELL CANADA V. CANADA (ATTORNEY GENERAL)*²¹⁴

1. BACKGROUND

The trilogy of cases regarding the *Vavilov* analysis and application included *Bell* and *National Football League* (the dual appeals), where the Supreme Court of Canada dealt with a decision made by the Canadian Radio-television and Telecommunications Commission (CRTC) to prohibit the substitution of American commercials with Canadian commercials during American television broadcasts of the Super Bowl. The dual appeals provided the Supreme Court with the chance to apply the newly minted *Vavilov* framework and the standard of correctness, thereby outlining additional guidance on the framework and assisting courts with interpretation going forward.

2. FACTS

In the years leading up to 2013, the CRTC received requests by Canadian viewers to allow American commercials to play during popular American television broadcasts such as the Super Bowl. The CRTC ultimately responded by holding broad public consultations in conjunction with its review of general television regulation in Canada. In 2016, following the completion of the review, the CRTC issued an order prohibiting the substitution of American commercials with those tailored to Canadians. However, Bell and the National Football League (NFL) had an existing and exclusive licencing agreement in place until 2020 that allowed real time substitution of the commercials. They collectively appealed the decision to the Federal Court of Appeal, where their appeals were dismissed. The Supreme Court of Canada allowed the appeal in a 7–2 decision.

²⁰⁷ *Ibid* at para 104.

²⁰⁸ *Ibid* at paras 102–107.

²⁰⁹ *Ibid* at paras 115–24.

²¹⁰ *Ibid* at paras 125–26.

²¹¹ *Ibid* at paras 127–28.

²¹² *Ibid* at paras 129–32.

²¹³ *Ibid* at paras 133–35.

²¹⁴ *Supra* note 190.

3. DECISION

Drawing from the analysis in *Vavilov*, the Supreme Court of Canada used the dual appeals to apply the standard of correctness in practice because it was a statutory appeal of a question of law or jurisdiction. The CRTC issued its order pursuant to section 9(1)(h) of the *Broadcasting Act*,²¹⁵ wherein the CRTC may “require any licensee ... to carry, on such terms and conditions as the [CRTC] deems appropriate, programming services specified by the [CRTC].”²¹⁶

The main question before the Supreme Court was whether the CRTC had the authority under section 9(1)(h) of the *Broadcasting Act* to issue its order.²¹⁷ It determined the scope of the CRTC’s power by applying the modern principles of statutory interpretation. Specifically, the Supreme Court considered: (1) the grammatical meaning of the English and French phrasings of the statute; (2) that the context of the enumerated powers listed in section 9(1) of the *Broadcasting Act* weighed against reading section 9(1)(h) as a general power; (3) that section 10 allows for the creation of regulations related to foreign programming; and (4) the legislative history. The Supreme Court found that the CRTC’s decision to prohibit substitutions fell outside of the authority granted in the *Broadcasting Act*. The CRTC was “limited to issuing orders that require television service providers to carry specific channels as part of their service offerings, and attaching [general] terms and conditions.”²¹⁸

4. COMMENTARY

The trilogy provides a much needed restatement of the law of judicial standard of review in Canada. The majority confirmed that the standard of reasonableness presumptively applies to administrative decisions, with two paths through which this presumption can be rebutted. First, where the enabling legislation prescribes the applicable standard of review by either: (1) specifying the standard is correctness; or (2) providing statutory appeal rights to a court, in which case the appellate standards of review will apply. Second, the presumption of reasonableness can be rebutted where the rule of law dictates that the standard of correctness be applied. This will be engaged in cases that raise: (1) constitutional questions; (2) general questions of law of central importance to the legal system as a whole; or (3) questions related to the jurisdictional boundaries between two or more administrative bodies.

Like *Dunsmuir*, whether the presumption of reasonableness and narrow carve outs for correctness review in *Vavilov* lead to simplification in Canadian administrative law remains to be seen. At a minimum, however, the majority shone a light on the importance of proper reasons from administrative decision-makers. Absent proper reasons, administrative delegates are at an increased risk of having their decisions quashed. Additionally, the Supreme Court of Canada has opened the door for the rule of law to play a more prominent role in standard of review. The outcome, hopefully, is increased stability, while avoiding the need for jurisprudential revision in the next decade.

²¹⁵ SC 1991, c 11.

²¹⁶ *Ibid*, s 9(1)(h).

²¹⁷ See *Bell*, *supra* note 190 at para 3.

²¹⁸ *Ibid* at para 44.

The Supreme Court also helpfully provided additional guidance through the application of the *Vavilov* framework to the appeals in *Bell* and *National Football League* in the context of administrative tribunals. This guidance will be particularly important in the context of Alberta's energy tribunals and will hopefully lead to more consistent and predictable outcomes. While the *Vavilov* framework represents an attempt to simplify and streamline the standard of review analysis, in practice it may still lead to diverging reasons, as evidenced by the concurring opinion in *Vavilov* and the dissent in *Bell*.

Further, and notwithstanding the attempted simplification of the standard of review process, there remains significant uncertainty as to how this will impact other areas, particularly arbitration. Since the release of *Vavilov*, courts have rendered inconsistent opinions regarding the proper standard of review to be applied in the arbitration context. Traditionally, courts have applied the reasonableness standard to commercial arbitrations on appeal, including on questions of law.²¹⁹ This has served an important policy function of instilling confidence in the finality of the arbitration process. While the Alberta Court of Queen's Bench recently followed this approach in *Cove Contracting Ltd. v. Condominium Corporation No 012 5598 (Ravine Park)*,²²⁰ the Manitoba Court of Queen's Bench reached a different conclusion in *Buffalo Point First Nation v. Cottage Owners Association*.²²¹ How these competing approaches will be resolved remains to be seen and will have important implications for arbitrations subject to provincial arbitration acts.

**C. *ENMAX ENERGY CORPORATION V. ALBERTA UTILITIES COMMISSION*;²²²
CAPITAL POWER CORPORATION V. ALBERTA UTILITIES COMMISSION;²²³
*MILNER POWER INC. V. ALBERTA UTILITIES COMMISSION*²²⁴**

1. BACKGROUND

In the context of the energy industry, there was also further consideration of standard of review. In each decision, Justice Brian O'Ferrall of the Alberta Court of Appeal denied applications for permission to appeal decisions of the Alberta Utilities Commission (AUC) in Proceeding 790 relating to the Milner Power line loss dispute. A key feature of each decision was the high level of deference shown by the Court of Appeal towards the AUC.

2. FACTS

Each decision relates to the AUC's decision that certain past transmission line loss charges were unlawful and unfair. As a result, the AUC retroactively adjusted these charges and reimbursed certain power generators for their payments, while charging others who did not pay a fair share. The applications for permission to appeal related to those adjustments.

²¹⁹ See *Satva Capital Corp v Creston Moly Corp*, 2014 SCC 53; *Teal Cedar Products Ltd v British Columbia*, 2017 SCC 32.

²²⁰ 2020 ABQB 106.

²²¹ 2020 MBQB 20.

²²² 2019 ABCA 222 [*Enmax*].

²²³ 2018 ABCA 437 [*CPC*].

²²⁴ 2019 ABCA 127 [*Milner*].

3. DECISIONS

Ultimately, the applications for permission to appeal were denied in each decision. In arriving at these decisions, the Court of Appeal considered section 29 of the *Alberta Utilities Commission Act*,²²⁵ which requires that an appeal from a decision of the AUC to the Court of Appeal be grounded on a question of jurisdiction or on a question of law.²²⁶ Additionally, an applicant must demonstrate their question raises an arguable point of law or jurisdiction of sufficient importance, and has a reasonable chance of success.²²⁷ This requirement is a court imposed “gatekeeping” test that allows a motions judge to determine if a particular question of law or jurisdiction merits a court’s attention in a full appeal.

In the *CPC, Milner* and *ENMAX* decisions, the Alberta Court of Appeal adopted a novel approach to the “gatekeeping” test. While it recognized the significance of the legal or jurisdictional question is an important consideration in whether to grant permission to appeal, it also states that some questions of law or jurisdiction are best answered by regulators, and not by the Court. For instance, the Court of Appeal stated that “there are some questions of regulatory law and jurisdiction which this Court is not uniquely suited to answer. That is, it is sometimes preferable to have the regulators resolve their own controversial questions of regulatory law and/or jurisdiction themselves.”²²⁸ Indeed, Justice O’Ferrall restated the “test” for permission to appeal as:

[W]hether there is a question of law or jurisdiction which, for some good reason, perhaps because of its importance, requires an answer from the Court of Appeal, keeping in mind that there are some questions of law or jurisdiction which are better left to the [AUC] to decide or resolve over time.²²⁹

In this instance, the Court of Appeal found that the AUC was owed deference in its decision.

4. COMMENTARY

That the Alberta Court of Appeal left certain questions of law or jurisdiction to the AUC is a clear expression of judicial deference. Participants in regulated industries are familiar with the concept of deference, according to which an appellate court will not automatically substitute its own view for that of an expert tribunal. Justice O’Ferrall’s view that “there are some questions of law or jurisdiction which are better left to the [AUC] to decide or resolve over time” appears to extend the concept of deference significantly beyond the appropriate standard of review. Rather than effectively according the AUC the benefit of the doubt after a full hearing and analysis of the issues, as contemplated by the traditional approach to deference, Justice O’Ferrall would have the Court refuse entirely to consider certain questions, on the basis of a single judge’s assessment at the permission to appeal stage, of whether or not a given question is better left to the AUC. This, conceptually, is a pre-emptive deference standard.

²²⁵ SA 2007, c A-37.2 [AUC Act].

²²⁶ See *Enmax*, *supra* note 222 at para 32.

²²⁷ See *Milner*, *supra* note 224 at para 10.

²²⁸ *Ibid* at para 11.

²²⁹ *Ibid* at para 13. See also *CPC*, *supra* note 223 at paras 30–34.

Moreover, the decision in *Milner* was rendered without the benefit of the Supreme Court of Canada's decision in *Vavilov*. Under the *Vavilov* framework, discussed above, the standard of review for administrative decisions that are afforded a statutory right of appeal is determined by applying the appropriate appellate standards of review. Section 29 of the *AUC Act* provides a statutory right of appeal on questions of law or jurisdiction. Thus, appeals of AUC decisions concerning questions of law, including questions of statutory interpretation and those related to the scope of a decision-maker's authority, are to be reviewed on a correctness standard. *Vavilov* would appear to require courts to apply a correctness standard, unlike the deferential approach to appeals under this section adopted by the Alberta Court of Appeal in denying permission to appeal.

VIII. CONFLICT OF LAWS

This past year witnessed several important decisions related to conflict of laws disputes, including the Supreme Court of Canada's highly anticipated decision related to contraventions of customary international law and the "act of state doctrine." The Alberta Court of Queen's Bench also rendered important decisions affirming key principles related to jurisdiction *simpliciter*, *forum non conveniens*, and the application of anti-suit injunctions.

A. *NEVSUN RESOURCES LTD. V. ARAYA*²³⁰

1. BACKGROUND

This decision dismisses an appeal by the defendant, Nevsun Resources Ltd. (Nevsun) which was made in response to various lower judgments that dismissed its initial motion to strike a claim. The initial motion to strike concerned a claim for damages from contraventions of customary international law (CIL). This case is notable as the Supreme Court of Canada reiterated that CIL forms part of Canadian common law, and found that corporate liability may arise from a violation of peremptory international legal norms.

2. FACTS

Nevsun is a Canadian corporation based in British Columbia. Various former Eritrean nationals brought a class action on behalf of more than 1,000 Eritrean workers against Nevsun seeking "damages for breaches of domestic torts including conversion, battery, 'unlawful confinement' (false imprisonment), conspiracy and negligence."²³¹ The plaintiffs assert they were forced to complete national military service while in Eritrea through its National Service Program, where they were sent to the Bisha mine and subjected to forced labour and violent, cruel, inhuman, and degrading treatment.

Nevsun brought a motion to strike the pleadings based on the "act of state doctrine." This doctrine precludes domestic courts from assessing the sovereign acts of a foreign government. Nevsun submitted that this includes Eritrea's National Service Program. In

²³⁰ 2020 SCC 5 [*Nevsun*].

²³¹ *Ibid* at para 4.

addition, Nevsun argued that the claims based on CIL should be struck because they had no reasonable prospect of success.

The chambers judge rejected Nevsun's various applications, finding that British Columbia was the appropriate forum because Nevsun controlled the board of the Bisha Company and there was a real risk of an unfair trial in Eritrea. The chambers judge further noted that the "act of state doctrine" had not been applied in Canada, but it was a part of Canadian common law. However, the doctrine did not apply in the present case. Regarding the applicability of CIL, the British Columbia Supreme Court held that CIL is incorporated into, and forms part of, Canadian common law unless there is domestic legislation to the contrary. Lastly, the British Columbia Supreme Court denied the continuation of the representative action, meaning the Eritrean workers were not permitted to bring claims on behalf of the other individuals.

The British Columbia Court of Appeal upheld the British Columbia Supreme Court's findings on *forum non conveniens* and other evidentiary matters. It agreed that the act of state doctrine applied within Canada pursuant to the *Law and Equity Act*, which adopts English common law.²³² However, the British Columbia Court of Appeal found that the doctrine did not apply in the present case, as the Eritrean nationals' claims were not against state laws or executive acts. The claims were not barred by state immunity, as the claims were against Nevsun. The British Columbia Court of Appeal noted that Canadian courts are becoming increasingly willing to address issues of public international law when appropriate, and therefore the courts should be allowed to hear and test the arguments of the parties.

3. DECISION

Nevsun appealed on two issues: (1) whether the act of state doctrine forms a part of Canadian common law; and (2) whether CIL has prohibitions against forced labour, slavery, cruel, inhuman or degrading treatment, and crimes against humanity, grounding a claim for damages under Canadian law.

With respect to the act of state doctrine, the Supreme Court of Canada outlined its history, noted its confusing nature and non-existence in Canadian jurisprudence, and found that it did not apply in Canada. It highlighted that, while the doctrine has developed in other common law jurisdictions, Canadian law has developed its own distinct jurisprudence regarding the twin principles of conflicts of law and judicial restraint that underlie the act of state doctrine.²³³

Similar to the act of state doctrine, Canadian law does not allow the application of foreign laws that offend a fundamental morality or public policy. The principle of comity "ends where clear violations of international law and fundamental human rights begin."²³⁴ Where possible, courts will refrain from making findings that are binding on foreign states, but may still inquire into foreign laws where necessary or incidental to a domestic legal controversy.

²³² RSBC 1996, c 253.

²³³ See *Nevsun*, *supra* note 230 at para 44.

²³⁴ *Ibid* at para 50, citing *R v Hape*, 2007 SCC 26 at para 52.

Accordingly, the Supreme Court of Canada found that “[t]he [act of state] doctrine is not part of Canadian common law, and neither it nor its underlying principles as developed in Canadian jurisprudence are a bar to the Eritrean workers’ claims.”²³⁵

The Supreme Court of Canada then turned to the application of CIL and accepted that it may support a claim, and adopted the chambers judge’s reasoning as follows: “[t]he current state of the law in this area remains unsettled and, assuming that the facts set out in the [notice of civil claim] are true, Nevsun has not established that the [customary international law] claims have no reasonable likelihood of success.”²³⁶ The plaintiffs were claiming “that customary international law is part of the law of Canada and, as a result, a ‘breach of customary international law ... is actionable at common law.’”²³⁷ Given that forced labour, slavery, cruel, inhuman or degrading treatment, and crimes against humanity are impermissible under CIL, damages for such abuses should be actionable in Canada.

In this context, the Supreme Court of Canada addressed Nevsun’s motion to strike pursuant to the British Columbia *Supreme Court Civil Rules*.²³⁸ Under the *BC Rules*, claims may be struck where pleadings disclose no reasonable claim,²³⁹ and where it is “plain and obvious” that the claim has no reasonable chance of success.²⁴⁰ The Supreme Court of Canada was required to address whether prohibitions on forced labour and other potential crimes are a part of Canadian law that would allow for a claim’s reasonable chance of success. The Supreme Court of Canada ultimately found that CIL formed a part of the Canadian common law through the doctrine of adoption and as such, it was not plain and obvious that a claim under those laws could not apply in Canada.²⁴¹

Given that CIL is, subject to any domestic statute to the contrary, automatically considered a part of Canadian law, the Supreme Court of Canada then addressed whether international norms could be considered CIL. It found that for CIL to be recognized as a norm, it must be generally applied and recognized as *opinio juris*.²⁴² The law must be generally and sufficiently practiced, and it must be undertaken with a sense of a legal right as opposed to mere general usage. Given that the prohibitions against slavery, crimes against humanity, and cruel, inhuman, and degrading treatment are clearly accepted norms and therefore CIL, the Supreme Court of Canada found that there is no reason to assume that they may not be applied domestically. This is especially so given that international law has shifted from a “nation-to-nation” model to a “personal rights”-centric model. This latter development also served to reject Nevsun’s arguments that CIL does not apply to corporations.²⁴³ However, the Supreme Court of Canada indicated that the lower Court would be tasked with deciding which parts of CIL apply to private actors, and which do not.²⁴⁴

²³⁵ *Nevsun*, *ibid* at para 59.

²³⁶ *Ibid* at para 69.

²³⁷ *Ibid* at para 60.

²³⁸ BC Reg 168/2009 [*BC Rules*].

²³⁹ *Ibid*, r 9-5(1)(a).

²⁴⁰ See *Nevsun*, *supra* note 230 at para 64.

²⁴¹ *Ibid* at para 94.

²⁴² *Ibid* at para 77.

²⁴³ *Ibid* at paras 104–108.

²⁴⁴ *Ibid* at para 113.

Ultimately, the Supreme Court of Canada found:

[I]t is not “plain and obvious” that corporations today enjoy a blanket exclusion under customary international law from direct liability for violations of “obligatory, definable, and universal norms of international law”, or indirect liability for their involvement in what [Andrew] Clapham calls “complicity offenses.”²⁴⁵

The Supreme Court dismissed the appeal and allowed the class action to proceed.

4. COMMENTARY

This decision provides significant clarity on the application of CIL in Canada, and on its relationship with Canada’s domestic common law. In finding that CIL is Canadian law, the Supreme Court of Canada dispensed with what might otherwise require a conflicts of law analysis. Further, this decision opens the door for Canadian domiciled organizations to be held liable within Canada for breaches of peremptory international norms that took place abroad. Not only can a private corporation be held liable for such a breach, the “norms” of CIL now stand as allowable and recognizable novel causes of action in Canada. Depending on what norms the trial Court finds apply to this private actor, the Supreme Court may have allowed for the widespread use of class actions to address human rights abuses where the perpetrator has a connection to Canada.

This decision builds on existing legal trends whereby Canadian courts are increasingly willing to hear matters that have occurred in other jurisdictions, typically those involving human rights violations. Energy companies conducting operations in international jurisdictions should take note that CIL may apply to that foreign business and may be relied upon in Canadian courts for remedial orders.

B. *RDX TECHNOLOGIES CORPORATION V. APPEL*²⁴⁶

1. BACKGROUND

In this decision, the Alberta Court of Queen’s Bench considered an anti-suit injunction application to restrain a party from proceeding with an application in Ontario to recognize a foreign judgment from New York.

2. FACTS

RDX Technologies Corp. (RDX) alleged fraud and misrepresentation against the CWT defendants (collectively, CWT) pertaining to the purchase of a biodiesel plant in Missouri.²⁴⁷ Pursuant to an agreement between the parties, Alberta was the exclusive jurisdiction for any dispute related to that agreement. On 26 August 2014, RDX filed a statement of claim. On 28 October 2014, CWT filed an application to stay the action, claiming that New York was the more appropriate forum (the jurisdiction application).²⁴⁸ After adjourning the jurisdiction

²⁴⁵ *Ibid.*

²⁴⁶ 2019 ABQB 477 [*RDX*].

²⁴⁷ *Ibid* at para 3.

²⁴⁸ *Ibid* at paras 5–6.

application to 6 September 2018, CWT failed to file a brief by the 17 August 2018 deadline and the jurisdiction application was struck. In response, CWT brought a reinstatement application and a *res judicata* application (the Reinstatement Application and *res judicata* application).²⁴⁹

On 17 January 2019, CWT filed an application in Ontario to recognize the New York judgment. In response, RDX filed the anti-suit injunction application in Alberta seeking a stay of the Ontario proceedings.²⁵⁰

3. DECISION

The Alberta Court of Queen’s Bench considered two key issues, among others, related to: (1) whether the Reinstatement Application should be granted; and (2) whether the anti-suit injunction should be granted.

The Court dismissed the reinstatement application, holding that CWT attorned to Alberta jurisdiction by filing its *res judicata* application. In doing so, the Court reaffirmed that “if someone takes steps in an Alberta suit (other than objecting to Alberta’s jurisdiction or its order for service *ex juris*), then he attorns to Alberta’s jurisdiction.”²⁵¹ The Court arrived at this conclusion notwithstanding that CWT had declared in its *res judicata* application that it did “not constitute an attornment to the jurisdiction of Alberta.”²⁵²

On the second issue, the Court granted the anti-suit injunction against the proceedings in Ontario. In doing so, the Court articulated the test for anti-suit injunctions as set out in *Amchem Products Inc. v. British Columbia (Workers’ Compensation Board)*,²⁵³ which required the Court to determine: (1) whether Ontario was the most appropriate forum to hear the action; and (2) if so, whether there was justice or injustice to all parties in allowing the action to proceed in Ontario.²⁵⁴ In granting the anti-suit injunction, the Alberta Court of Queen’s Bench found that, since CWT filed the Ontario application to recognize the New York judgment after its Alberta *res judicata* application, which also sought recognition of that judgment, the application in Ontario was “duplicative and inappropriate.”²⁵⁵ Additionally, by filing the *res judicata* application, CWT attorned to Alberta’s jurisdiction and therefore the anti-suit injunction was an appropriate remedy.²⁵⁶

The Alberta Court of Queen’s Bench arrived at this conclusion notwithstanding that RDX had not yet obtained a stay of the Ontario application prior to filing its anti-suit injunction application, which is typically required before such a remedy is granted.²⁵⁷

²⁴⁹ *Ibid* at paras 10–11

²⁵⁰ *Ibid* at paras 14–15.

²⁵¹ *Ibid* at para 21, citing *Manson v Canada (Justice)*, 2006 ABCA 212 at para 5.

²⁵² *Ibid* at para 22.

²⁵³ [1993] 1 SCR 897.

²⁵⁴ See *RDX*, *supra* note 246 at para 30.

²⁵⁵ *Ibid* at para 38.

²⁵⁶ *Ibid*.

²⁵⁷ *Ibid* at para 31.

4. COMMENTARY

Courts have traditionally been reluctant to grant anti-suit injunctions in Canada. This hesitancy is borne from the principle of comity between jurisdictions, which is somewhat at odds with a court in one jurisdiction staying a proceeding in another. However, this decision illustrates that courts are more willing to grant anti-suit injunctions when: (1) parties have clearly attorned to the jurisdiction where the anti-suit injunction originated, and (2) failing to grant the injunction could lead to inconsistent results, undue costs, and inconclusive proceedings.²⁵⁸ Notably, the Alberta Court of Queen's Bench also signalled that it is not always necessary to bring an application to obtain a stay of proceedings in the foreign jurisdiction prior to bringing an anti-suit injunction.

C. *FORT HILLS ENERGY LP v. JOTUN A/S*²⁵⁹

1. BACKGROUND

In this decision, the Alberta Court of Queen's Bench dismissed three of the defendants' applications for: (1) an order striking the action or staying the action, based on the principles of jurisdiction *simpliciter*; (2) an order staying the action based on *forum non conveniens*; and (3) an order setting aside the order for service *ex juris* on the basis of a lack of full disclosure. The defendants argued that Korea was the more appropriate forum and that Alberta did not have jurisdiction over them.

2. FACTS

The plaintiff, Fort Hills Energy LP (Fort Hills) contracted out the development and operation of an open-pit oil sands mine. Fort Hills arranged for the construction of a plant on the mine site, and decided to coat the structural steel with Jotachar, a fire protection coating. The Jotachar coating was applied to the steel in Korea and subsequently shipped to Alberta. When in Alberta, the coating began to crack and fall off. Fort Hills commenced an action to recover over \$182 million in damages. Two of the defendants, Jotun A/S and Chokwang Jotun Ltd., then applied for an order arguing lack of jurisdiction, or in the alternative, *forum non conveniens*, and claimed lack of full disclosure, requiring setting aside the order for service *ex juris*.

3. DECISION

The defendants argued that none of the alleged torts were committed in the province, resulting in no connection to Alberta to substantiate the jurisdiction *simpliciter* claim. The Alberta Court of Queen's Bench, however, found that if Fort Hills adduced evidence that at least one of the torts was committed in Alberta, the Court of Queen's Bench had jurisdiction *simpliciter*. It then held that: (1) some of the alleged misrepresentations in question were made in Alberta; (2) the development of the formulation for the Jotachar coating may have been in Alberta; (3) the damage occurred in Alberta; and (4) the breach of the duty to warn

²⁵⁸ *Ibid* at paras 38–40.

²⁵⁹ 2019 ABQB 237 [*Jotun*].

gave rise to a good arguable case that this tort was committed in Alberta.²⁶⁰ Accordingly, the Court of Queen’s Bench held that Fort Hills established Alberta had jurisdiction over the dispute.²⁶¹

It then considered whether Korea was the more appropriate forum and weighed the various factors relevant to the *forum non conveniens* analysis, focusing on the compellability of witnesses and records (which favoured Korea), and the juridical advantage (which favoured Alberta). Ultimately, the Alberta Court of Queen’s Bench held that the defendants did not establish Korea as the more appropriate forum.²⁶² Finally, it found service *ex juris* was obtained in accordance with rule 11.25 of the *Alberta Rules of Court*²⁶³ and declined to set aside the order.²⁶⁴

4. COMMENTARY

This decision provides a fulsome analysis of jurisdictional issues in disputes with connections to multiple jurisdictions for energy companies. It provides litigants guidance in circumstances where there are complex tort and contract claims, as between parties in different jurisdictions engaging in cross-border commercial activities. Further, this case confirms several key conflict of laws principles, including: (1) that the threshold to reach a conclusion on jurisdiction *simpliciter* is low and should be that the plaintiff’s evidence raises a “good arguable case”; and (2) the factors to be considered in deciding whether a foreign jurisdiction is a clearly more appropriate forum under the *forum non conveniens* test.

IX. CLASS ACTIONS

Over the past year, numerous courts have released important decisions with respect to certification of class action suits. The Alberta Court of Queen’s Bench considered the test for leave to proceed with secondary market investor loss claims under its provincial securities statute and certified the proposed class action. Two other decisions considered environmental class action claims, including one decision wherein the Quebec Supreme Court refused to authorize a class action that claimed Canada infringed the class members’ rights by failing to respond appropriately to climate change.

A. *STEVENS V. ITHACA ENERGY INC.*²⁶⁵

1. BACKGROUND

In June 2019, the Alberta Court of Queen’s Bench addressed Alberta’s class action civil liability provisions under the *Securities Act* in the context of misrepresentations of material information.²⁶⁶ It certified the proposed class action lawsuit after assessing what constituted misrepresentations, ultimately finding that, given the evidence of misrepresentations, there

²⁶⁰ *Ibid* at paras 54, 64, 77.

²⁶¹ *Ibid* at para 78.

²⁶² *Ibid* at paras 162–63.

²⁶³ *Supra* note 158.

²⁶⁴ See *Jotun*, *supra* note 259 at paras 184–86.

²⁶⁵ 2019 ABQB 474 [*Ithaca*].

²⁶⁶ RSA 2000, c S-4.

was a reasonable possibility that the plaintiff would succeed at trial. This case marks the first instance where Alberta courts have addressed the shareholder's burden to seek "leave to proceed" to bring a class action suit under the *Securities Act*.

2. FACTS

Ithaca Energy Inc. (Ithaca), a publicly traded company, listed its equity securities on the Toronto Stock Exchange and the London Alternative Investment Market. As a publicly traded company, it was subject to continuous disclosure requirements. The plaintiff, Mr. Stevens, purchased shares in Ithaca in late 2014. Stevens brought an application for leave to bring a class action suit under section 211 of the *Securities Act* as a representative plaintiff against Ithaca for breach of disclosure obligations, and for certification of a class action lawsuit for corresponding damages under the *Alberta Class Proceedings Act*.²⁶⁷

Stevens claimed that on four occasions, Ithaca failed to disclose material facts as to when it would be able to first produce oil from its wells in the North Sea. Stevens claimed that there was evidence to support the conclusion that Ithaca did not disclose a number of events causing slippage in the construction and installation schedule for a floating production facility required to bring oil resources on stream. Stevens claimed that this lack of disclosure concerning the delays and conflicts with Ithaca's outside engineering firm cost the company hundreds of millions of dollars.

In response, Ithaca claimed it relied upon, and communicated information received from, a contractor regarding the construction progress.

3. DECISION

Stevens argued that Ithaca's position directly violated the leading Supreme Court of Canada case regarding failure to disclose material information, *Kerr v. Danier Leather Inc.*²⁶⁸ Specifically, Stevens argued that investors of Ithaca were deprived of material facts, such that investment decisions regarding the state and progress of the construction were made on incomplete information.

The Alberta Court of Queen's Bench relied on *Danier and Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*²⁶⁹ to determine whether an adverse fact rises to the level of becoming a material fact requiring disclosure. The test was whether the omitted adverse fact, if disclosed, would have significantly altered the total mix of information made available to investors at the time of the released quarterly report or news release. The Court also found that Ithaca's reliance on their contractor's schedule for disclosure purposes, without further explanation, was not reasonable in the circumstances.²⁷⁰

It was therefore held that it was reasonably possible that a class action would be successful in light of this test for three of the four alleged omissions, and the Court granted the

²⁶⁷ SA 2003, c C-16.5.

²⁶⁸ 2007 SCC 44 [*Danier*].

²⁶⁹ 2011 SCC 23.

²⁷⁰ See *Ithaca*, *supra* note 265 at para 58.

investor's application for leave to proceed. It also certified the proceeding as a class proceeding, as there was a substantial common ingredient in the proposed class' claims. The proceeding is now open to advance towards discovery and trial in respect of the alleged misrepresentations.

4. COMMENTARY

This decision represents Alberta's first decision relating to shareholders' burden to seek "leave to proceed" with a statutory secondary market claim against a responsible issuer. Subsequent decisions in Alberta regarding leave to proceed with similar claims will likely follow the same analysis. Additionally, given that this case deals with parties from the United Kingdom, the Netherlands, and Poland, its outcome will likely garner significant international interest as it progresses.

B. *KIRK V. EXECUTIVE FLIGHT CENTRE FUEL SERVICES LTD.*²⁷¹

1. BACKGROUND

In this decision, the British Columbia Court of Appeal set aside the lower Court's decision to certify a class action and remitted the matter to the chambers judge to reconsider the common issues of negligence, nuisance, the *Rylands v. Fletcher*²⁷² rule, and apportionment of liability. The Court of Appeal further struck out certain issues as they related to individual causation and damages.

2. FACTS

In 2013, a driver of a tanker truck full of Jet A1 fuel took a wrong turn, fell down an embankment, and overturned in a creek. These events resulted in approximately 35,000 litres of fuel spilling into a creek and various rivers, and local residents were ordered to evacuate. Subsequently, one resident commenced the proceeding to certify a class action on behalf of residents who owned, leased, rented, or occupied real property within the evacuation zone. The plaintiff alleged property damage, loss of use of property, interference with the quiet enjoyment of property, and diminution in property value within the evacuation zone. The defendants included the driver of the truck, the company that employed him, the company engaged to provide helicopter services to the province, and the province.

The lower Court certified all thirteen of the plaintiff's common issues, including the actions in negligence, pursuant to the *Rylands v. Fletcher* rule, and in nuisance.²⁷³ The chambers judge found that common issues predominated over the individual issues and there was an identifiable class. The chambers judge further found that the class proceeding was the preferable procedure based on the goals of the British Columbia *Class Proceedings Act* of increased access to justice, behaviour modification, and judicial economy.²⁷⁴ Lastly, it was

²⁷¹ 2019 BCCA 111 [*Kirk CA*], rev'g 2017 BCSC 726 [*Kirk SC*].

²⁷² [1868] UKHL 1.

²⁷³ See *Kirk SC*, *supra* note 271.

²⁷⁴ RSBC 1996, c 50 [*CPA*].

held that the plaintiff was an appropriate class representative. However, four appellants challenged the decision and claimed that the proposed class failed to meet the requirements of the *CPA*.

3. DECISION

The British Columbia Court of Appeal considered the issues of the different types of damages claimed and found it necessary to identify the types of relief the plaintiff sought and categorized them into three groups: (1) physical damage to the property; (2) loss of use and enjoyment of property; and (3) diminution of market value.²⁷⁵

Second, the Court of Appeal found that the lower Court did not err in finding there was an identifiable class of two or more persons.²⁷⁶ The class as certified was defined as: “[a]ll persons who owned, leased, rented, or occupied real property on July 26, 2013, within the Evacuation Zone (as defined in the amended Notice of Civil Claim) except for the defendants and third parties.”²⁷⁷

The only appellant that alleged error with respect to this definition was the province, who argued that there was both no identifiable class and that the class was overly broad. The Court of Appeal found that the lower Court did not err in certifying the proposed class and leaving the refinement of the class to be considered post-certification. It further noted that it was unnecessary for the representative plaintiff to demonstrate that any one of the other potential claimants also wished to litigate this issue.²⁷⁸

Third, the Court of Appeal considered the requirements of section 4(1)(c) of the *CPA*: namely, that the claims of the class members must raise common issues. It found that the British Columbia Supreme Court erred with respect to certifying certain issues in negligence, nuisance, and the rule in *Rylands v. Fletcher*, as they were issues of specific causation.²⁷⁹ With respect to the diminution of property value issue, the British Columbia Court of Appeal concluded that the British Columbia Supreme Court failed to perform the necessary inquiry into whether the representative plaintiff met the requirements for the “basis in fact” requirement to support a certification order. The British Columbia Court of Appeal conducted its own analysis of the “basis in fact” requirement, and found that the representative plaintiff failed to satisfy the three requirements: (1) “[a] basis in fact to support the assertion that there had been a class-wide diminution in value”; (2) “[a] basis in fact for the common issue that a plausible methodology existed that was capable of establishing that the spill caused a class-wide diminution in value, and for measuring that diminution”; and (3) “[s]ome evidence of the availability of the data to which the methodology was to be applied.”²⁸⁰

²⁷⁵ See *Kirk CA*, *supra* note 271 at para 48.

²⁷⁶ *Ibid* at para 60.

²⁷⁷ *Ibid* at para 53.

²⁷⁸ *Ibid* at paras 56–57.

²⁷⁹ *Ibid* at para 73.

²⁸⁰ *Ibid* at para 107.

Finally, the British Columbia Court of Appeal remitted the question of preferability back to the lower Court, as it found “the scope of the proposed class action will have changed considerably as a result of these reasons.”²⁸¹

4. COMMENTARY

The British Columbia Court of Appeal confirmed that a representative plaintiff seeking to certify a class action must precisely characterize the nature of the common issues and must exclude issues of specific causation. This decision reminds potential representative plaintiffs in class actions that there must be sufficient commonality such that loss may be established on a class-wide basis. Where different allegations lead to different individual inquiries, those issues may not constitute class issues. This decision further speaks to the types of issues that may or may not be certified as common issues in environmental class action cases.

C. *ENVIRONNEMENT JEUNESSE* C. *PROCUREUR GÉNÉRAL DU CANADA*²⁸²

1. BACKGROUND

In this decision, the Quebec Superior Court declined to authorize a class action that claimed that Canada infringed the class members’ rights by failing to respond appropriately to climate change. While the Quebec Superior Court refused authorization on the basis that the class’ definition was arbitrary and inappropriate, it determined that it had jurisdiction over the climate change issues raised.

2. FACTS

Environnement Jeunesse, an environmental non-profit, brought the class action and alleged that Canada, by failing to set adequate GHG emission targets, interfered with the class’ rights under the *Canadian Charter of Rights and Freedoms*²⁸³ and the *Quebec Charter of Human Rights and Freedoms*.²⁸⁴

The class represented Quebec residents under the age of 35 and alleged that Canada’s actions constituted bad faith, and unlawful and intentional interference with the class’ rights of life, liberty, security, and equality. The class also claimed that its members would be disproportionately burdened by the socio-economic costs attributable to climate change and initially claimed \$300 million in punitive damages. However, Environnement Jeunesse instead asked for the government’s positive action toward mitigating the risks of climate change. Canada argued that the action should not be allowed, as it would allow the courts to unjustly interfere with the government’s legislature and executive branch.

²⁸¹ *Ibid* at para 151.

²⁸² 2019 QCCS 2885 [*Environnement Jeunesse*].

²⁸³ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

²⁸⁴ CQLR c C-12.

3. DECISION

The Quebec Superior Court dismissed the motion and did not authorize the class action, as the class action requirements in article 575 of the *Code of Civil Procedure* had not been met.²⁸⁵ It found that the age limit of 35 was arbitrary and insufficiently justified, causing the action to be neither efficient nor equitable.²⁸⁶ It was noted that, as the age of majority in Quebec is 18 years old, those younger than that age would not be part of the class. Those older than 35 would also be excluded, even though they too would suffer the burdens of climate change.

However, the Quebec Superior Court did find the issues justiciable. It held that, even though the issues addressed powers of the executive branch, courts nonetheless have jurisdiction due to the allegations of *Charter* violations.²⁸⁷

4. COMMENTARY

This decision is notable for its declaration that the issue of environmental damages is justiciable. Groups of young people are beginning to litigate with respect to the negative effects of climate change. For instance, in Canada, fifteen children aged 10-19 years old were recently backed by multiple NGOs in seeking declaratory relief and an order from the Federal Court that the federal government create a climate change plan to stabilize the climate system.²⁸⁸ Additionally, in the Netherlands, the government was ordered to reduce GHG emissions by at least 25 percent by the end of 2020 as a result of an action brought by a Dutch environmental group and 900 Dutch citizens.²⁸⁹ Climate change related litigation has also begun in India and the United States. Courts in the coming years will likely see a rise in climate litigation brought by the public or by NGOs, against both private and public parties.

X. INTELLECTUAL PROPERTY

The case law from the Federal Court and the Federal Court of Appeal this year foreshadows possible changes coming to the obviousness test. The Federal Court has accepted arguments that section 28.3 of the *Patent Act*, which represents the statutory codification of the obviousness test, ousts the reasonably diligent search test.²⁹⁰ However, ambiguity remains, as the Federal Court of Appeal has indicated that the reasonable search test still applies.

Courts have also added clarity by addressing the elements of inducing infringement, and emphasizing that deference will be given to a trial judge's findings regarding the state of the

²⁸⁵ CCP.

²⁸⁶ See *Environnement Jeunesse*, *supra* note 282 at para 123.

²⁸⁷ *Ibid* at paras 49–52.

²⁸⁸ *La Rose v Her Majesty The Queen*, T-1750-19 (FC) (Statement of Defence).

²⁸⁹ *Urgenda Foundation v The State of The Netherlands (Ministry of Infrastructure and the Environment)*, ECLI:NL:RBDHA:2015:7196, C/09/456689/HA ZA 13-1396, aff'd ECLI:NL:GHDHA:2018:2610, 200.178.245/01 (The Netherlands).

²⁹⁰ RSC 1985, c P-4, s 28.3.

art and as to the nature and extent of the skilled person's knowledge, because these are questions of mixed law and fact.

**A. *AUX SABLE LIQUID PRODUCTS LP
V. J.L. ENERGY TRANSPORTATION INC.***²⁹¹

1. BACKGROUND

This decision found that certain claims related to a patent were invalid due to overbreadth, lack of utility, anticipation, and unpatentable subject matter. The patent related to the transportation of natural gas by pipeline. This decision raises the issue of the use and contents of a claim's specification in patent disputes and indicates that the "reasonably diligent search" test for prior art no longer applies.

2. FACTS

The plaintiff, Aux Sable Liquid Products L.P. (Aux Sable), brought an action to invalidate a patent related to the transportation of natural gas held by the defendant J.L. Energy Transportation Inc. (JL). The Federal Court considered whether: (1) claims 9-10 were invalid based on overbreadth, lack of utility, anticipation or obviousness; (2) claims 1-8 were invalid for obviousness; and (3) claims 1-10 were invalid based on insufficiency or unpatentable subject matter.

3. DECISION

The Federal Court found claims 9-10 were invalid for overbreadth, lack of utility, unpatentable subject matter, and anticipation. It held that the law regarding overbreadth has not changed in light of the Supreme Court of Canada's decision in *AstraZeneca Canada Inc. v. Apotex Inc.*²⁹² Further, the Federal Court found claims 9-10 lacked utility. Since the single subject matter of the invention was found to be efficient transportation of natural gas, the fact that certain compositions of the claims would include inefficient temperatures, pressures, and concentrations meant the claim lacked utility. Claims 9-10 were also invalidated by anticipation, and therefore, obviousness was not considered at this stage.

Of particular interest, however, is the Federal Court's approach to invalidating claims 1-8 on the basis of the reasonably diligent search test in the obviousness challenge. As part of the obviousness test outlined by the Supreme Court of Canada in *Apotex Inc. v. Sanofi-Synthelabo Canada Inc.*,²⁹³ courts are required to identify what "differences exist between the matter cited as forming part of the 'state of the art' and the inventive concept of the claim."²⁹⁴ This first step requires identification of items that form the prior art. Traditionally, items are identified through the reasonably diligent search test by establishing that: (1) the prior art was publicly available; and (2) it was locatable by an ordinary person skilled in the art. Prior art that was not locatable through a reasonably diligent search would not be

²⁹¹ 2019 FC 581 [*Aux Sable*].

²⁹² 2017 SCC 36.

²⁹³ 2008 SCC 61.

²⁹⁴ *Aux Sable*, *supra* note 291 at para 135.

included in the state of the art. Aux Sable challenged the applicability of this test, arguing that section 28.3 of the *Patent Act* displaces the reasonably diligent search test and allows the challenger to rely on all prior art references disclosed, irrespective of whether they were identifiable in a reasonable search. The Federal Court agreed with this interpretation.²⁹⁵

4. COMMENTARY

The most notable aspect of this case is that the Federal Court calls into question the reasonably diligent search test in an obviousness challenge. If followed, this decision will make it easier for parties to allege obviousness, because it expands the available prior art in such an attack to the entire publicly disclosed prior art, not just what is locatable through a reasonably diligent search.

B. *PACKERS PLUS ENERGY SERVICES INC.* *V. ESSENTIAL ENERGY SERVICES LTD.*²⁹⁶

1. BACKGROUND

The Federal Court of Appeal upheld a trial decision finding a patent for an apparatus used in hydraulic fracturing invalid for obviousness. At issue on appeal was whether the trial judge erred in the obviousness analysis. The Federal Court of Appeal's reasons bring to a close a lengthy technology dispute and reaffirms the principle that obviousness is a factual analysis.

2. FACTS

In 2002, Packers Plus Energy Services Inc. (Packers) filed a patent that disclosed a method and apparatus used in hydraulic fracturing (the 072 patent). The 072 patent selectively sent fluids to specific parts of a wellbore by utilizing a tubing string and sliding sleeves. The Federal Court held the 072 patent was invalid on the basis of obviousness,²⁹⁷ in the process considering that the 072 patent's commercial success "which can serve as a secondary indicator of inventiveness" did not immediately follow the invention and was a result of rising commodity prices.²⁹⁸

3. DECISION

The appellants argued that the trial judge made a number of errors. However, the Federal Court of Appeal held that obviousness findings are of mixed law and fact, and reviewable on the highly deferential standard of palpable and overriding error. This includes findings as to the state of the art and as to the nature and extent of the skilled person's knowledge. Many of the grounds of appeal ran afoul of these principles and the Federal Court of Appeal

²⁹⁵ *Ibid* at para 176.

²⁹⁶ 2019 FCA 96, leave to appeal to SCC refused, 38694 (19 December 2019) [*Packers*].

²⁹⁷ *Ibid* at paras 8–19.

²⁹⁸ *Ibid* at para 16.

held that “it is not the task of [the Federal Court of Appeal] to sift through and reweigh the evidence germane to obviousness findings.”²⁹⁹

On each of the grounds of appeal, the Federal Court of Appeal held that the Federal Court had based its conclusions on evidence before the Court. In doing so, the Federal Court of Appeal affirmed “the requisite comparison for assessing obviousness ... is between the claim(s)’ inventive concept and the state of the art.”³⁰⁰ The Federal Court of Appeal also affirmed that the gap between the relevant prior art and the patent at issue can be better understood, and perhaps filled, with the skilled person’s common general knowledge.

The Federal Court of Appeal found the Federal Court made the requisite findings of fact by determining that the prior art disclosed most of what Packers argued was inventive. Further, it found that, while using the words “truly new” may have been unsuitable, on a whole, the Federal Court applied the correct test for inventiveness. Next, the Federal Court of Appeal held it was not necessary to answer the question of “if the invention was so obvious,” why had no one previously invented it?³⁰¹ With respect to the remaining alleged errors, the Federal Court of Appeal found the appellants merely disagreed with the Federal Court’s findings. Accordingly, it found that the appellants’ arguments lacked merit and dismissed the appeal.

4. COMMENTARY

As Packers’ application for leave to appeal to the Supreme Court of Canada was dismissed, this signals an end to this patent dispute. This case is important as the patent claimed a particular type of hydraulic fracturing that was popular among industry proponents. The decision contributes to a growing body of recent cases from the Federal Court of Appeal discussing obviousness. Interestingly, the Federal Court of Appeal, in referring to the Federal Court’s decision, indicated that relevant prior art would have been located using a reasonably diligent search, seemingly calling into question the conclusions reached in *Aux Sable*, discussed above.³⁰²

C. **WESTERN OILFIELD EQUIPMENT RENTALS LTD. V. M-I LLC**³⁰³

1. BACKGROUND

This action was commenced by Western Oilfield Equipment Rentals Ltd. (Western) asserting M-I LLC’s (M-I) patent (the 173 patent) was invalid on numerous grounds, including lack of utility, insufficiency, anticipation, obviousness, and overbreadth. Justice O’Reilly rejected each of Western’s arguments that the claim was invalid for inutility, insufficiency, anticipation, obviousness, and overbreadth, and found that Western had directly, and by inducement, infringed the 173 patent. This decision is notable for its

²⁹⁹ *Ibid* at para 33.

³⁰⁰ *Ibid* at para 32.

³⁰¹ *Ibid* at para 25, citing *Beloit Canada Ltd v Valmet OY* (1986), 8 CPR (3d) 289 (FCA) at 295.

³⁰² *Packers, ibid* at para 13.

³⁰³ 2019 FC 1606.

application of the inducement test and its finding that marketing, explaining the method of use, and “knowing” that clients would use this information, amounts to inducement.

2. FACTS

The plaintiff by counterclaim, M-I, developed a certain vacuum-assisted “shale shaker” that separated rocks broken into and contaminating drilling fluid during oil well drilling. M-I’s shale shaker was unique in that it originally used a vacuum to complete the separation process. In late 2007, M-I filed its provisional patent application. The patent for the machine was issued in mid-2015; however, the commercialized model itself did not use the vacuum.

In 2013, M-I became aware of a similar product developed by Western and its wholly owned subsidiary, FP Marangoni Inc. The product used a vacuum-assisted screen that was “virtually identical” to M-I’s machine, and Western had been renting the vacuum-assisted screen throughout Canada since 2010.

3. DECISION

The Federal Court found that M-I made out its infringement claim, and therefore, was entitled to damages and compensation. It noted that the infringement analysis flows primarily from the actual construction of the machine as outlined in the patent, finding that, while the methods for separation were slightly different, each of the steps, methods, and outcomes used in the Western model were the same as those used by M-I.

The Federal Court held that Western directly infringed the patent’s system claims and indirectly infringed the method claims by way of inducement.³⁰⁴ On the issue of inducement, the Court outlined the test as requiring proof of:

- (1) “[D]irect infringement by a third party;
- (2) the defendant [influencing] the third party to the point that the infringing act would not have occurred without that influence; and
- (3) the defendant [knowing] that its influence would bring about the infringing act.”³⁰⁵

The Court held the companies who operated Western’s rental equipment directly infringed the 173 Patent by working the claimed method. Second, the Court found that Western gave extensive instruction and assistance to its customers on the use and operation of the machine, pitched the machine to its clients, and knew its clients would use the machine (that is, carry out the acts that amount to infringement).³⁰⁶

³⁰⁴ *Ibid* at para 117.

³⁰⁵ *Ibid* at para 125.

³⁰⁶ *Ibid* at para 130.

4. COMMENTARY

This decision is notable for its analysis on the inducement of infringement where the infringing party rents the infringing machine to others. The Federal Court provided renewed clarity on the application of the inducement test and demonstrated that the bar does not appear to be high when demonstrating that inducement has occurred when a party rents or sells the infringing product, and provides written instructions to third parties on how to operate the claimed method.

XI. TAX

The tax decisions this year have seen an increase of in-depth discussion covering the applicability of the General Anti-Avoidance Rule (GAAR). Specifically, the decisions addressing the application of the GAAR pursuant to the *Income Tax Act* are of significant importance to companies who are participating in amalgamations or the use of foreign treaties for tax avoidance purposes.³⁰⁷

A. *BIRCHCLIFF ENERGY LTD. V. HER MAJESTY THE QUEEN*³⁰⁸

1. BACKGROUND

This case involved an appeal from a 2017 judgment of the Tax Court of Canada, in which the Tax Court dismissed the appeal of Birchcliff Energy Ltd. (Birchcliff) from a reassessment of its 2006 taxation year denying approximately \$16 million in non-capital losses that were incurred by Veracel Inc. (Veracel) and subsequently claimed by Birchcliff.³⁰⁹ The Federal Court of Appeal dismissed the appeal, and in doing so, it declined to reconsider the Tax Court's assessment of the GAAR.

2. FACTS

Birchcliff was formed by the amalgamation of Veracel and Birchcliff's predecessor (Predecessor Birchcliff). Veracel and Predecessor Birchcliff entered into a number of agreements structured to allow Veracel's losses to shelter profits from certain target oil and gas properties. Veracel sold subscription receipts to public investors that provided purchasers with either shares of the amalgamated Birchcliff or a return of their money in the event of the transaction's failure.

Immediately prior to the amalgamation, the subscription receipt holders were issued Veracel class B common shares. After the amalgamation, the holders of Veracel's class B common shares received a majority voting interest in Birchcliff. This structure avoided the

³⁰⁷ RSC 1985, c 1 (5th Supp) [ITA].

³⁰⁸ 2019 FCA 151 [Birchcliff CA], aff'g 2017 TCC 234 [Birchcliff TCC], leave to appeal to SCC refused, 38761 (14 November 2019). The authors acknowledge the contributions of BLG lawyers Laurie Goldbach and Shannon James to the summary of this decision.

³⁰⁹ See Birchcliff TCC, *ibid*.

loss streaming rules in sections 256(7) and 111(5) of the *ITA* that would otherwise restrict the carrying forward of the Veracel losses on an acquisition of control.³¹⁰

This arrangement was reassessed by the Minister of National Revenue and the non-capital losses were denied. The Minister considered the arrangement a transactional sham. Birchcliff appealed the finding to the Tax Court. The Tax Court rejected the Minister's assertion that the sham doctrine was a basis for assessment in Canadian tax law, but introduced the GAAR and concluded it applied to deny the non-capital losses claimed by Birchcliff. The Tax Court found Birchcliff's use of the Veracel losses constituted a tax benefit, and the series of transactions leading up to the amalgamation constituted an avoidance transaction, contrary to the object and spirit of subsection 256(7), and was, therefore, abusive. This decision was appealed to the Federal Court of Appeal.

3. DECISION

The only issue before the Federal Court of Appeal was whether the transactions resulted in an abuse of the provisions of the *ITA* in contravention of the third arm of the GAAR test. The Federal Court of Appeal upheld the Tax Court's decision, finding the Tax Court had properly applied the GAAR and that abuse of section 256(7) had occurred. It was held that the fact that the GAAR was not raised at the time of assessment did not prevent the Court from determining the object, spirit, or purpose of the relevant provisions of the *ITA*, which was a question of law.³¹¹

The Federal Court of Appeal identified two relevant provisions of the *ITA* in determining whether the transaction was in contravention of the GAAR: (1) section 111(5), which prohibits companies from carrying forward non-capital losses if there has been an acquisition of control of that corporation; and (2) section 256(7), which provides guidance on whether an acquisition of control has occurred upon amalgamation.

The Federal Court of Appeal noted that the holders of subscription receipts were entitled to either receive shares of the new Birchcliff or their money back. Also, the combination of the issuance of class B shares of Veracel to the subscription receipt holders followed immediately by the amalgamation of Veracel and Birchcliff "has the same effect and is equivalent to the holders of the subscription receipts only receiving shares of Birchcliff following the amalgamation of Veracel and the Predecessor Birchcliff."³¹² Had that been the case, there would have been an acquisition of control of Veracel on the amalgamation, triggering the provisions of section 111(5).

The Federal Court of Appeal interpreted that section 256(7)(b)(iii)(B) is in place to ensure that the fair market value of each predecessor corporation is reflected in the ownership of the shares of the amalgamated corporation. This arrangement achieved the opposite result. In finding this, the Federal Court of Appeal adopted the Tax Court's finding indicating it was "abundantly clear that anyone paying for a subscription receipt was seeking to acquire shares

³¹⁰ *Supra* note 307, ss 256(7), 111(5).

³¹¹ See *Birchcliff CA*, *supra* note 308 at para 32.

³¹² *Ibid* at para 48.

in the amalgamated company.”³¹³ The Federal Court of Appeal found that the arrangement constituted an abuse of section 256(7), triggering the application of the GAAR to the non-capital losses.

4. COMMENTARY

The denial of leave to appeal from this decision precluded an opportunity for potential clarity from the Supreme Court of Canada regarding how the GAAR will be applied to loss trading between unrelated parties, and financings occurring before an amalgamation or reverse takeover. Furthermore, this decision did not consider the application of the GAAR generally. Notwithstanding this, the refusal of leave to appeal reaffirms the Federal Court of Appeal’s findings, leaving this decision as the currently accepted status of the application of the GAAR.

B. *HER MAJESTY THE QUEEN* *V. ALTA ENERGY LUXEMBOURG S.A.R.L.*³¹⁴

1. BACKGROUND

On 12 February 2020, the Federal Court of Appeal addressed a Canadian corporation’s use of the Canada-Luxembourg tax treaty (the treaty)³¹⁵ to sidestep taxes on a \$380 million capital gain in Canada, finding that the GAAR did not apply to transactions structured under the commonly used Luxembourg S.A.R.L. entity.

2. FACTS

Alta Energy Partners L.L.C. (Alta US L.L.C.), a Delaware corporation, developed an unconventional shale oil site in northern Alberta in 2011 with Alta Energy Partners Canada Ltd. (Alta Canada). Alta Canada was a wholly owned subsidiary of Alta US L.L.C. and was incorporated to carry on Alta US L.L.C.’s newly formed Canadian shale business.

Alta US L.L.C. anticipated a significant taxable increase in the value of the “Canadian Resource Property” held by Alta Canada following the completion of various wells. Accordingly, Alta Energy Luxembourg S.A.R.L (Alta Lux) was created in 2012 to take advantage of the treaty and allocate Alta Canada’s gains to Alta Lux as they would be non-taxable in Luxembourg. To achieve this, Alta Canada’s shares, which were held solely by Alta Energy Canada Partnership (Alta Partnership), were transferred to Alta Lux. In 2013, Alta Lux sold its shares to Chevron for approximately \$680 million, creating a capital gain exceeding \$380 million.

³¹³ *Ibid* at para 49, citing *Birchcliff TCC*, *supra* note 308 at para 50.

³¹⁴ 2020 FCA 43, leave to appeal to SCC granted, 39113 (6 August 2020) [*Luxembourg*].

³¹⁵ *Convention between the Government of Canada and the Government of the Grand Duchy of Luxembourg for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital*, 10 September 1999, Can TS 2000 No 22 (entered into force 17 October 2000).

The Tax Court considered whether the capital gain was taxable in Canada under the treaty, and whether the GAAR applied. For the GAAR to be applicable, there must be: (1) a tax benefit; (2) an avoidance transaction; and (3) which was abusive of the provisions of the *ITA*. Alta Lux admitted both that it derived a tax benefit, and that its restructuring was considered avoidance as it was not primarily for a bona fide purpose other than to derive a tax benefit. Therefore, if the Court found abuse, the GAAR would apply. The Tax Court determined that the underlying rationale of the treaty provision justified the very transaction that Chevron had completed, namely to exempt Luxembourg residents from Canadian tax for investments in immovable property used in business. The Court held that Canada and Luxembourg were presumably aware of these benefits, and could have drafted the treaty to close the loophole if desired. Further, the Minister of National Revenue could not simply apply the GAAR to treaties that it felt held unintended gaps. As such, Alta Lux's appeal was allowed in full. The Crown appealed to the Federal Court of Appeal.

3. DECISION

On appeal to the Federal Court of Appeal, the Crown argued that the Tax Court erred in finding that there was no abuse with respect to the GAAR, and that the GAAR should be read into the treaty. The Crown argued that the taxpayer was not an investor, had no economic or commercial ties to Luxembourg, and pointed to the fact that the taxpayer would pay less tax in Luxembourg. The Federal Court of Appeal rejected these arguments, and referred to the plain words of the provision which indicated that the taxpayer need only be a resident and not an investor. The Federal Court of Appeal also held that the strength or weakness of economic or commercial ties with Luxembourg was not a part of the test and should therefore not factor in to the Crown's arguments. After considering the object, spirit, and purpose of the relevant provisions of the treaty, the Federal Court of Appeal found that the provisions worked as they were intended to, and therefore were not abused.³¹⁶

4. COMMENTARY

This decision comes during a time of change in respect to the widespread use of Luxembourg S.A.R.L. entities for tax planning and efficiency purposes. The recently negotiated anti-treaty shopping provisions in the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* have been in effect since 1 December 2019, and have applied to some of Canada's tax treaties since 1 January 2020.³¹⁷ The *MLI* introduces a broad "principal purpose test" and anti-avoidance rules to curb the use of foreign incorporated entities for tax avoidance purposes. Despite some uncertainty as to its mechanics, the *MLI* promises to represent a seismic shift in tax efficiency strategies in Canada and elsewhere. As such, it remains to be seen how this decision applies to the law in light of the advent of the *MLI*.

In light of this, the decision appears to stand for the proposition that there is nothing clearly improper about choosing a certain foreign regime to obtain a tax benefit. The choice

³¹⁶ *Luxembourg*, *supra* note 314 at para 80.

³¹⁷ 7 June 2017, Can TS 2019 No 26 (entered into force 1 July 2018) [*MLI*].

of a certain forum may be evidence that carries weight when arguing avoidance but does not, on its own, substantiate such a claim.

XII. ARBITRATION

In the last year, there have been several court decisions regarding arbitration matters that will have impacts on the energy industry. Of particular note was the Supreme Court of Canada’s highly anticipated decision regarding the application of the doctrine of unconscionability to an arbitration clause in a standard form contract.

A. *UBER TECHNOLOGIES INC. V. HELLER*³¹⁸

1. BACKGROUND

In this decision, the Supreme Court of Canada invalidated an arbitration agreement between Uber and certain drivers who subscribe to Uber’s service agreements. In doing so, the Supreme Court expanded the doctrine of unconscionability, finding that employment disputes are not considered “commercial” for the purposes of the *International Commercial Arbitration Act*,³¹⁹ and created an exception to the rule of systematic referral.

2. FACTS

David Heller was a driver for Uber who entered into multiple standard form service agreements with the company. Under these agreements, disputes with Uber were to be heard through mediation and arbitration in the Netherlands, which required a flat filing fee of \$14,500 USD.³²⁰ Heller brought a class proceeding against Uber, claiming violations of the Ontario *Employment Standards Act*³²¹ and sought a declaration that certain drivers were employees pursuant to the *ESA*.³²² Additionally, Heller claimed the arbitration clause was invalid because it was unconscionable and illegal as it contracted out of the *ESA*.³²³ In response, Uber brought a motion to stay the class proceedings in favour of arbitration.

3. DECISION

The Ontario Superior Court of Justice stayed the proceedings in favour of the arbitration agreement.³²⁴ It found that the *ICAA* applied because the dispute was international and commercial in nature.³²⁵ It applied the “competence-competence” principle, which states an arbitral tribunal is competent to determine its own jurisdiction.³²⁶ Importantly, the Ontario Superior Court of Justice found the arbitration clause was not unconscionable and it did not violate the *ESA*.³²⁷

³¹⁸ 2020 SCC 16 [*Uber SCC*], aff’g 2019 ONCA 1 [*Uber CA*], rev’g 2018 ONSC 718 [*Uber Sup Ct J*].

³¹⁹ SO 2017, c 2, Schedule 5 [*ICAA*].

³²⁰ See *Uber SCC*, *supra* note 318 at para 2.

³²¹ SO 2000, c 41 [*ESA*]. See *Uber SCC*, *ibid* at para 3.

³²² See *Uber SCC*, *ibid* at para 1.

³²³ *Ibid* at para 3.

³²⁴ *Ibid*; *Uber Sup Ct J*, *supra* note 318 at para 4.

³²⁵ See *Uber SCC*, *ibid* at para 14; *Uber Sup Ct J*, *ibid* at para 50.

³²⁶ See *Uber SCC*, *ibid* at para 15; *Uber Sup Ct J*, *ibid* at para 66.

³²⁷ See *Uber SCC*, *ibid*; *Uber Sup Ct J*, *ibid* at para 74.

The Ontario Court of Appeal reversed this decision, finding that: (1) the arbitration agreement illegally contracted out of the *ESA* and that the “competence-competence” principle was inapplicable; and (2) in the event that the arbitration agreement did not illegally contract out of the *ESA*, it was nonetheless invalid on the grounds of unconscionability.³²⁸

The Supreme Court of Canada began by determining which statute was applicable to this matter. In finding the *Arbitration Act, 1991*³²⁹ was the applicable statute, the Supreme Court of Canada focused on the nature of the dispute and not the nature of the relationship between the parties.³³⁰ The Supreme Court found that an employment dispute was not “commercial” as required by section 5(3) of the *ICAA*, and therefore this legislation did not apply.³³¹

In applying the *AA* to a stay motion, the Supreme Court cited section 7(2), which outlines that an invalid arbitration agreement is one reason why a court may refuse to stay proceedings.³³² Therefore, in deciding whether a stay should be granted, the Supreme Court determined the validity of the arbitration agreement in accordance with *Dell Computer Corp. v. Union des consommateurs*.³³³ Under this framework, a court is to refer “all challenges of an arbitrator’s jurisdiction to the arbitrator unless they raise pure questions of law, or questions of mixed fact and law that require only superficial consideration of the evidence in the record.”³³⁴ The Supreme Court found that this case fell into the mixed fact and law exception because it was possible to resolve the validity dispute through a superficial review.³³⁵

However, the Supreme Court went further and found that the rule of systematic referral did not apply to abnormal circumstances such as these, where only a court can determine a bona fide challenge to arbitral jurisdiction.³³⁶ In essence, the Supreme Court created another exception to the rule of systematic referral. In determining whether this exception is triggered, courts must determine, on an assumption that the pleaded facts are true, that: (1) “there is a genuine challenge to arbitral jurisdiction”; and (2) “from the supporting evidence, whether there is a real prospect that, if the stay is granted, the challenge may never be resolved by the arbitrator.”³³⁷ On the second issue, the Supreme Court concluded that the fees required resulted in a real prospect that Heller’s arguments would not be resolved.³³⁸ Therefore, the Supreme Court found it would determine the challenges of validity.³³⁹

In turning to validity, the Supreme Court of Canada only addressed the doctrine of unconscionability and not the question pursuant to the *ESA*.³⁴⁰ The Supreme Court stated the test for unconscionability was the proof of inequality between the position of the parties and

³²⁸ See *Uber CA*, *supra* note 318.

³²⁹ SO 1991, c 17 [AA].

³³⁰ See *Uber SCC*, *supra* note 318 at paras 19, 25.

³³¹ *Ibid* at para 26.

³³² *Ibid* at para 30.

³³³ 2007 SCC 34 [*Dell*].

³³⁴ See *Uber SCC*, *supra* note 318 at para 33.

³³⁵ *Ibid* at para 37.

³³⁶ *Ibid* at paras 37–40, 44.

³³⁷ *Ibid* at para 44.

³³⁸ *Ibid* at para 47.

³³⁹ *Ibid* at para 48.

³⁴⁰ *Ibid* at para 99.

a resulting improvident bargain.³⁴¹ In doing so, the Supreme Court rejected the suggested higher threshold of unconscionability, that of “gross” unfairness.³⁴² The Supreme Court found that there was inequality between Uber and Heller because: (1) the contract was a standard form agreement that rendered Heller unable to negotiate on his behalf; (2) there was a significant difference in sophistication between the parties; (3) the arbitration agreement contained no information about the costs of mediation and arbitration; and (4) the agreement did not outline the applicable international arbitration rules.³⁴³ Further, this was an improvident bargain because it secured the benefit of a monetary bar to arbitration and thereby modified every other substantive right in the contract.³⁴⁴ The Supreme Court found the arbitration clause to be unconscionable and therefore invalid.³⁴⁵ The appeal was dismissed.

4. COMMENTARY

This decision has wide-reaching implications, particularly for international companies that rely on standard form contracts that contain arbitration clauses with Canadian employees. These implications will extend to energy companies operating in Canada. First, it appears as though parties who have contracts with employees in different provinces within Canada must expect each unique provincial arbitration act to apply to employment dispute matters. This is because employment disputes are not considered “commercial in nature” so as to trigger the application of the *ICAA*. Second, parties who rely on arbitration agreements must ensure they do not contain bars to accessing the arbitration facilities such as the monetary bar in this matter. If so, this will constitute an exception to the rule of systematic referral resulting in a court having the jurisdiction to make a determination on the matter at issue. Finally, it is very important that parties thoroughly examine the application and analysis of the doctrine of unconscionability as discussed in this case. The Supreme Court of Canada appears to have expanded the doctrine, placing a greater onus on parties with greater bargaining power to ensure such contracts and provisions therein are not unconscionable. This higher burden on the stronger party may now put in jeopardy several clauses that once may have been enforceable.

³⁴¹ *Ibid* at para 65.

³⁴² *Ibid* at paras 81–82.

³⁴³ *Ibid* at para 93.

³⁴⁴ *Ibid* at paras 94–95.

³⁴⁵ *Ibid* at para 98.

[this page is intentionally blank]