RECENT JUDICIAL DEVELOPMENTS OF INTEREST TO ENERGY LAWYERS

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This article provides an overview of recent judicial developments of interest to energy lawyers. The authors summarize and provide commentary on recent Canadian case law in the areas of: Aboriginal law, administrative law, conflict of laws, contracts, environmental law, freehold leases, rights of first refusal, surface rights, unjust enrichment, and taxation.

Cet article donne un aperçu des récents développements judiciaires d'intérêt pour les avocats du secteur énergétique. Les auteurs résument et commentent la jurisprudence canadienne dans les domaines suivants: droit des autochtones, droit administratif, conflits de lois, contrats, droit de l'environnement, bailfranc, droit de premier refus, droit de superficies, enrichissement injustifié, et taxation.

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* All of Osler, Hoskin & Harcourt LLP. The authors wish to acknowledge the valuable assistance of Kelsey Armstrong, Ron Franklin, Dana Jevremovic, Piotr Bychawski, David Jamieson, and Lia Bruschetta.

I. ABORIGINAL LAW

A. *QUEBEC (AG) V MOSES*[1]

1. BACKGROUND

Moses concerns the interaction between a unique regulatory process set up under the *James Bay and Northern Québec Agreement*[2] and the *Canadian Environmental Assessment Act*.[3] The *James Bay Treaty* was concluded in 1975 and is a complex modern agreement negotiated by well-resourced parties supported by teams of legal and technical advisors. The question before the Court was whether environmental review under the mechanism provided for in the *James Bay Treaty* precluded a subsequent *CEAA* review of the same project.

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1 2010 SCC 17, [2010] 1 SCR 557 [*Moses*].

2 Québec and Grand Council of the Crees (of Québec), 5 November 1975 in *James Bay and Northern Québec Agreement and Complementary Agreements* (Sainte-Foy, QC: Les publications du Québec, 1998), online: Indian and Northern Affairs Canada (INAC) <http://www.collectionscanada.gc.ca/webarchives/20061209154934/http://www.ainc-inac.gc.ca/pr/agr/que/jbnq_e.pdf> [*James Bay Treaty*].

3 SC 1992, c 37 [*CEAA*].

2. FACTS

Lac Doré Mining Inc was the proponent of a vanadium mining project (the Vanadium Project) in northern Quebec on lands subject to the *James Bay Treaty*. The lands in question are classified as Category III lands under the *James Bay Treaty* which means that they are subject to the regulatory jurisdiction of Quebec. Projects on Category III lands are reviewed by several different panels but decision-making authority rests with the provincial administrator (the Administrator). Appeals from the Administrator's decisions may be heard by either the Quebec cabinet or the federal cabinet depending upon the subject matter of the decision.

The Vanadium Project was reviewed by the Evaluating Committee and then referred to the Administrator. The Administrator, using the Evaluating Committee's recommendations, determined the scope of environmental assessment. The Administrator's assessment directions focused on impacts on the Cree populations. The proponent of the Vanadium Project submitted materials that acknowledged impacts on fish habitats but did not provide "information about the scale and nature of the precise impact of the project on fish habitat; nor did it disclose in any detail how it proposed to mitigate the environmental damage."[4]

The Evaluating Committee expressed concerns about the information provided with respect to fish habitat degradation. Similarly, a number of federal bodies expressed concerns — Fisheries and Oceans Canada, Natural Resources Canada, and Environment Canada. The Canadian Environmental Assessment Agency also contacted the Administrator to explore whether its assessment process could be coordinated with the process under the *James Bay Treaty*. The approval process was not completed before the matter proceeded to litigation.

3. DECISION

The issue before the Court was whether the Vanadium Project is exempt from federal regulatory processes despite the need for a permit issued by the federal Fisheries Minister for the harmful alteration, disruption, or destruction of fish habitat. Quebec took the position that once the provincial Administrator approves the Vanadium Project, the federal Fisheries Minister is required to issue the requested permit without any review of the environmental impact of the Vanadium Project under *CEAA*. The Cree First Nation took a contrary position supporting the requirement for *CEAA* review.

Quebec relied on section 22.6.7 of the *James Bay Treaty*, which provided that "a project shall not be submitted to more than one (1) impact assessment and review procedure unless such project falls within the jurisdictions of both Québec and Canada."[5] Despite the Vanadium Project's impact on fish habitat, the project fell within the exclusive jurisdiction of Quebec pursuant to the *James Bay Treaty*. Dissenting Justices LeBel and Deschamps held that when section 22.6.7 was interpreted in context, it was clear that secondary approvals necessary for a project to proceed were not intended by the parties to be sufficient to trigger

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4 *Moses*, *supra* note 1 at para 25.
5 *Supra* note 2, s 22.6.7, cited in *Moses*, *ibid* at paras 3, 9.

the exception to the general rule that a project should be subject to only a single environmental review.

The majority came to a different conclusion based, in part, on section 22.7.5, which provides: "Nothing in the present Section shall be construed as imposing an impact assessment review procedure by the Federal Government unless required by Federal law or regulation."[6] The majority held that section 22.7.5 indicated that the parties to the *James Bay Treaty* did not intend to exclude "a separate federal obligation external to the Treaty, the Treaty thus contemplates the obligation of compliance with federal law whether in existence at the time of the negotiations (e.g. s. 31 of the *Fisheries Act* as it then was) or impact assessments subsequently imposed by federal law (e.g. the *CEAA*)."[7] The dissenting Justices disagreed, holding that section 22.7.5 was in actuality a "transitional provision" and should not be given the interpretive weight that the majority gave it.[8]

The majority addressed the dissenting Justices' concerns about duplication and inefficiency in the regulatory process in the following terms: "Common sense as well as legal requirements suggest that the *CEAA* assessment will be structured to accommodate the special context of a project proposal in the James Bay Treaty territory, including the participation of the Cree."[9]

4. COMMENTARY

This case seems fraught with political undertones. One cannot help but wonder whether there were nationalist, rather than substantive reasons behind Quebec's position that its regulatory jurisdiction trumped that of Canada. The majority seems all too aware that the case, which is ostensibly about environmental regulation under the *James Bay Treaty*, is a vehicle for arguments of provincial paramountcy.[10] This is underscored by the position taken by the Cree. The Cree, who might be expected to defend the regulatory process in the *James Bay Treaty*, which explicitly provides for their involvement at various stages, took the position that further environmental review by Canada was required despite there being no explicit provision for Cree involvement in such a review process apart from the general law requiring consultation when Aboriginal rights may be affected. The Cree position, if nothing else, betrays a lack of trust and confidence in the *James Bay Treaty* regulatory process, particularly in the final decision-making authority of Quebec.

The dissenting Justices are quite right that the most efficient and sensible regulatory approach for projects is to have a single environmental review and that this was the intention of the parties to the *James Bay Treaty*. However, to resolve the case in the way favoured by the dissenting Justices would remove all discretion from the federal Fisheries Minister and effectively confer the Minister's jurisdiction on Quebec. This is at odds with the established constitutional order and is not the clear intention of the *James Bay Treaty*. Whatever the flaws in the majority analysis may be, Justice Binnie reveals an appreciation for the practical

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6 *James Bay Treaty*, *ibid*, s 22.7.5, cited in *Moses*, *ibid* at para 11.
7 *Ibid*.
8 *Ibid* at para 133.
9 *Ibid* at para 48.
10 *Ibid* at para 13.

aspects of the regulatory process. He points out the tradition of *CEAA* review taking place together with provincial reviews in the context of joint review panels, and indicates the expectation of the Court that a collaborative and efficient regulatory review will be established. Indeed, a joint review would seem to satisfy the *James Bay Treaty* requirement for a single review and, at the same time, address the implicit concerns of the Cree over Quebec's decision-making power.

B. *BECKMAN V LITTLE SALMON/CARMACKS FIRST NATION*[11]

1. BACKGROUND

Following a long negotiation process, the Yukon Territory and its First Nations concluded an umbrella final agreement and 11 different land claims treaties in 1997. The treaty in issue in *Little Salmon* was one of the 11 land claims treaties; the *Little Salmon/Carmacks First Nation Final Agreement*.[12] *Little Salmon* raises the issue of the proper approach to the interpretation of modern land claims treaties and the relevance of the duty to consult in the context of modern land claims treaties.

2. FACTS

Yukon granted 65 hectares of land to Larry Paulsen in 2004 (the Paulsen Land). The Paulsen Land is adjacent to the settlement lands of Little Salmon/Carmacks First Nation (LSCFN) and was part of the LSCFN traditional territory. LSCFN members had a treaty right of access to the Paulsen Land for the purposes of hunting and fishing for subsistence. LSCFN was provided notice of the land grant application and made written submissions. LSCFN, however, failed to attend the meeting where the concerns in its written submissions were considered.

LSCFN applied for judicial review of the decision to grant title to the Paulsen Land. LSCFN alleged that Yukon had failed to adequately consult with LSCFN. The Yukon government responded that consultation was not required by the LSCFN *Final Agreement*. Consultation is expressly required by the LSCFN *Final Agreement* in a number of contexts, but not where land grants are concerned. The LSCFN *Final Agreement*, it was argued, should be interpreted strictly given that it is a modern land claim treaty that was negotiated with the benefit of a large team of legal and technical advisors. In contrast, LSCFN contended that Yukon government owed a duty of consultation and accommodation. And, in the circumstances, LSCFN contended that this duty of consultation and accommodation required that the land grant application be refused. The Supreme Court of the Yukon and the Yukon Court of Appeal both held that consultation was required, but that the level of consultation fell at the low end of the spectrum. The Court of Appeal held that the government's duty to consult had been fulfilled.[13]

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11 2010 SCC 53, [2010] 3 SCR 103, aff'g 2008 YKCA 13, 296 DLR (4th) 99 [*Little Salmon*].

12 Government of Canada, Little Salmon/Carmacks First Nation, & the Government of the Yukon, 21 July 1997 (Ottawa: Minister of Public Works and Government Services Canada, 1998), online: INAC <http://www.ainc-inac.gc.ca/al/ldc/cc1/fagr/ykn/slmon/lsfa/lsfa-eng.pdf> [LSCFN *Final Agreement*].

13 *Little Salmon*, *supra* note 11 at para 6.

3. DECISION

Justice Binnie, writing for the majority of the Court, charted a middle course between the aggressive and opposite interpretations favoured by the parties. He began by dismissing the contention that the LSCFN *Final Agreement* should be strictly construed to exclude a duty to consult except where such a duty is expressly required. Justice Binnie explained that "the treaty will not accomplish its purpose if it is interpreted by territorial officials in an ungenerous manner or as if it were an everyday commercial contract."[14] At the same time, he underscored the fact that modern land claim agreements are different from historical treaties and that a more balanced approach to interpretation is appropriate. He held:

> Modern comprehensive land claim agreements … starting perhaps with the *James Bay and Northern Québec Agreement* (1975), while still to be interpreted and applied in a manner that upholds the honour of the Crown, were nevertheless intended to create some precision around property and governance rights and obligations. Instead of *ad hoc* remedies to smooth the way to reconciliation, the modern treaties are designed to place Aboriginal and non-Aboriginal relations in the mainstream legal system with its advantages of continuity, transparency, and predictability. It is up to the parties, when treaty issues arise, to act diligently to advance their respective interests.[15]

A balanced approach to interpreting modern treaties will not oust the Crown's duty to consult and, if appropriate, accommodate, because such duties stem from the honour of the Crown. Justice Binnie held that the Crown's duties may be shaped by a treaty, but the Crown cannot contract out of its duties.[16] He noted that the LSCFN *Final Agreement* provided for a development assessment process that was subsequently enacted in the form of the *Yukon Environmental and Socio-economic Assessment Act*.[17] *YESAA* provides for Aboriginal participation in environmental and socio-economic assessments of projects proposed in the Yukon. However, *YESAA* was not yet in place at the time of the application concerning the Paulsen Lands. Justice Binnie's observations suggest, without deciding the issue, that review under *YESAA* process will satisfy the Aboriginal consultation requirement for projects in the Yukon. However, in the present case, Justice Binnie concluded that there was a "procedural gap" that must be filled by the duty to consult because *YESAA* was not yet in effect.[18]

Justice Binnie went on to consider the facts of the case and found that Yukon's communications with LSCFN, and the public meeting where the land grant was discussed, satisfied the Crown's duty to consult in the circumstances. Yukon was found not to have a duty to accommodate LSCFN. Justice Binnie noted that the parcel of land had been reconfigured to accommodate various concerns and that LSCFN did not suggest any alternative other than rejection of the application.[19]

The concurring judgment by Justice Deschamps, writing for herself and Justice LeBel, begins by noting that the key question is not whether a treaty is "modern" but whether the

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14 *Ibid* at para 10.
15 *Ibid* at para 12.
16 *Ibid* at para 61.
17 SC 2003, c 7 [*YESAA*].
18 *Little Salmon*, *supra* note 11 at para 38.
19 *Ibid* at para 82.

treaty deals with the issue of consultation. Where a treaty is silent on the issue of consultation, the common law duty to consult will fill the gap. Justices Deschamps and LeBel held that there was no procedural gap in the LSCFN *Final Agreement* and that the transitional provisions together with the subsequently enacted *YESAA* provided a complete code.[20] Building upon their dissenting reasons in *Moses*, Justices Deschamps and LeBel emphasized the autonomy of First Nations to enter into treaties and the need to respect the negotiated terms. Just as they resisted having *CEAA* environmental review superimposed on the process established under the *James Bay Treaty*, Justices Deschamps and LeBel saw no reason to impose a duty to consult upon a treaty framework that provided for consultation within the regulatory process.

4. COMMENTARY

Taken together, the majority and concurring reasons indicate that, where a First Nations group has negotiated a framework for the exercise of its rights, the court is not inclined to intervene using the duty to consult to protect the interests of the First Nation. The difference between the majority and concurring decisions is one of degree. Justice Binnie's reasons may be characterized as being more protective of First Nations' interests by providing that the duty to consult may be shaped, but not extinguished, by modern treaties. Justice Deschamps appears to have greater respect for the freedom of First Nations to define their rights by treaty and more inclined to hold them to the bargains made. For the time being, Justice Binnie's approach will govern; but as practical matter, even under Justice Binnie's approach, it appears that there is less scope for the duty to consult to operate in the context of modern treaties.

Both the majority and concurring reasons imply that *YESAA* will provide an adequate forum for consultation with First Nations. A project proponent should not take too much comfort from this suggestion. *YESAA* process involves First Nations, but it is not necessarily the ideal forum for consultation. Representation on the Yukon Environmental and Socio-economic Assessment Board (YESAB) is not limited to the First Nations affected by a project nor are the First Nations members of YESAB necessarily acting in the role of representing the affected First Nations. A prudent project proponent should make a case-by-case evaluation of what the duty to consult requires and should not assume that going through the YESAB process alone is enough to satisfy the duty to consult. Indeed, to the extent that the YESAB process is not an effective consultation mechanism, Justice Binnie's reasons suggest that the courts can reinforce the process by requiring additional consultation.

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[20] *Ibid* at para 124.

C. *RIO TINTO ALCAN INC V CARRIER SEKANI TRIBAL COUNCIL*[21]

1. BACKGROUND

Carrier Sekani is an important case because it restates the test for the duty to consult and analyzes the duty to consult in the context of a licence renewal for an existing project.

2. FACTS

The British Columbia government approved the construction of a dam across the Nechako River in the 1950s. The Carrier Sekani First Nation (CSFN) claim the Nechako Valley as their traditional territory and claim the right to fish in the Nechako River. The CSFN was not consulted by the British Columbia government prior to the construction of the dam. Electricity generated by the dam has been sold for many years to BC Hydro pursuant to Electricity Purchase Agreements (EPAs). EPAs are subject to approval by the British Columbia Utilities Commission (BCUC).

CSFN objected to the approval of an EPA for 2007 on the grounds that the British Columbia government had failed to consult with CSFN. The BCUC determined that the issue of consultation could not arise because no Aboriginal interest was affected by the EPA approval decision. The British Columbia Court of Appeal reversed the decision and remitted the case to the BCUC for further evidence and argument. Rio Tinto Alcan Inc and BC Hydro appealed to the Supreme Court of Canada.

3. DECISION

The duty to consult is based in the honour of the Crown.[22] Where, as in much of British Columbia, the treaty claims process is ongoing, there is a duty to consult with First Nations on matters that may adversely affect their rights or claims. Moreover, in some circumstances, there may be a duty to accommodate Aboriginal "interests in the spirit of reconciliation."[23] The Court restated its three-part test for determining when the duty to consult arises: "(1) the Crown's knowledge, actual or constructive, of a potential Aboriginal claim or right; (2) contemplated Crown conduct; and (3) the potential that the contemplated conduct may adversely affect an Aboriginal claim or right."[24]

The first two branches of the test were satisfied in this case. The only real issue surrounded whether the EPA could be viewed as adversely affecting an Aboriginal claim or right under the third part of the test. The Court held that under the third part of the test:

> The question is whether there is a claim or right that potentially may be adversely impacted by the *current* government conduct or decision in question. Prior and continuing breaches, including prior failures to

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21 2010 SCC 43, [2010] 2 SCR 650 [*Carrier Sekani*].
22 See *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 [*Haida*].
23 *Carrier Sekani*, *supra* note 21 at para 32.
24 *Ibid* at para 31.

> consult, will only trigger a duty to consult if the present decision has the potential of causing a novel adverse impact on a present claim or existing right.[25]

While the Court would not entertain the argument stopping the approval of the 2007 EPA based on a past failure to consult, the Court observed that such a failure to consult may be remedied by an action for damages.

The Court also considered the BCUC's jurisdiction to determine the adequacy of Crown consultation. The BCUC, like many tribunals, does not have the power to consider constitutional matters.[26] Accordingly, because Aboriginal rights are constitutional rights, the question for the Court was whether the BCUC has jurisdiction to evaluate the sufficiency of Crown consultation. The express limit on the BCUC's jurisdiction to decide constitutional issues was limited to those questions that would require notice to be given under section 8 of the *Constitutional Question Act*.[27] These include questions that challenge the constitutional validity of a law or seek a constitutional remedy. The question of adequate consultation, though constitutional in nature, does not require such notice.

4. COMMENTARY

Carrier Sekani provides welcome certainty to owners of legacy projects. Many projects built before the time when consultation was well-understood and practiced are vulnerable to the allegation that, at the time that they were constructed, proper consultation did not take place. This decision does not insulate such projects from all potential liability, but it does ensure that ongoing activities subject to permitting or other government decision-making (that do not result in incremental impacts on Aboriginal interests) will not trigger the duty to consult.[28]

Developers of new projects should also take note of this decision. The Court's reiteration of the idea that past failures to consult may be compensable in damages underscores the importance of consultation at the early stages of a project and the maintenance of good records of consultation. Proper consultation and good documentation will not only assist with project approval, it will mitigate the risk of liability in the future.

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25 *Ibid* at para 49 [emphasis in original].

26 See *Utilities Commission Act*, RSBC 1996, c 473, s 2(4); *Administrative Tribunals Act*, SBC 2004, c 45, s 44(1).

27 RSBC 1996, c 68.

28 For a similar fact scenario, see *Fond du Lac Denesuline First Nation v Canada (AG)*, 2010 FC 948, 377 FTR 50 [*Fond du Lac Denesuline First Nation*].

D. *WEST MOBERLY FIRST NATIONS V BRITISH COLUMBIA (CHIEF INSPECTOR OF MINES)*[29]

1. BACKGROUND

First Coal Corporation (First Coal) applied for an amendment to an existing permit issued under the British Columbia *Mines Act*[30] to allow it to obtain a 50,000 tonne bulk sample of coal from lands located within the traditional territory of the West Moberly First Nations (WMFN). First Coal also applied for an amendment to an existing permit on the same lands to allow an advanced exploration program consisting of 173 drill holes and five trenches.

2. FACTS

WMFN are signatories of Treaty No 8.[31] This Treaty protects the rights of all signatories to hunt and fish on unoccupied Crown lands within the boundaries of the Treaty, and also allows the Crown to "take up" lands from time to time. The Supreme Court of Canada in *R v Badger*[32] and *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*[33] held that Treaty No 8 protects the right to meaningful exercise of traditional hunting practices.

WMFN objected to First Coal's application to amend its permits on the grounds that the planned bulk coal sample and advanced exploration program would negatively affect the Burnt Pine caribou herd. WMFN had traditionally hunted the Burnt Pine caribou at certain times of the year. However, as a result of other development in the area, including the Bennett Dam, the Burnt Pine caribou herd had dwindled to only 11 animals. Indeed, the southern mountain population of woodland caribou, of which the Burnt Pine herd is a part, has been listed as "threatened" under the *Species at Risk Act*.[34]

WMFN submitted that the Crown had failed to adequately consult and accommodate because the Crown failed to put in place a plan to protect and increase the size of the Burnt Pine caribou herd. The Ministry of Energy, Mines and Petroleum Resources took the position that no plan to protect and promote the growth of the Burnt Pine caribou herd was necessary because it was only one of nine caribou herds within the WMFN traditional territory and the total impact on caribou in the traditional territory would not be significant. The Ministry further took the view that the cumulative impacts on caribou from past developments in the area were "beyond the scope of the review of this project to fully assess."[35] WMFN further objected to the Crown taking into account future economic benefits (that is, from a future coal mine) in justifying its approval of the application, while refusing to consider the future environmental impacts that a coal mine would bring.

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29 2011 BCCA 247, 333 DLR (4th) 31 [*West Moberly CA*], aff'g 2010 BCSC 359, [2010] 11 WWR 752 [*West Moberly SC*], leave to appeal to SCC requested.

30 RSBC 1996, c 293.

31 21 June 1899, online: INAC <http://www.ainc-inac.gc.ca/al/hts/tgu/tr8-eng.asp>.

32 [1996] 1 SCR 771.

33 [2005] 3 SCR 388 [*Mikisew Cree*].

34 SC 2002, c 29.

35 *West Moberly SC*, *supra* note 29 at para 30.

The Crown contended that it had satisfied the duty to consult and accommodate. As a result of the materials submitted by WMFN, First Coal modified its proposal in several ways. The bulk sample of coal was reduced from 100,000 tonnes to 50,000 tonnes, an access road was closed, and the mining method was changed. First Coal further submitted that it had provided funds to WMFN to study the caribou and to engage "a wildlife biologist to develop a plan to restore altered landscapes and to monitor the caribou population."[36]

3. BRITISH COLUMBIA SUPREME COURT DECISION

The Court distinguished between the consultative activities of First Coal and the Crown. First Coal, the Court observed, "has taken reasonable steps to meet West Moberly's concerns."[37] By contrast, the Court found that the Crown had not satisfied its duty to consult and accommodate. The Court was concerned with two aspects: (1) the slow response time of the Crown; and (2) the Crown's failure to establish a plan to protect and rehabilitate the Burnt Pine caribou herd.[38] The Court was also critical of the Crown's position that the cumulative impacts of development in the area were beyond the scope of authority of the Crown to consider.

The Court struggled with the remedy to grant to WMFN because the bulk sample was largely complete by the time of the hearing. The Court determined that the "pragmatic and reasonable step" was to stay the permit for the Advanced Exploration Program pending accommodation of the WMFN's concerns about the Burnt Pine caribou herd.[39] The Court determined that the period for the stay would be 90 days and admonished the Crown to work expeditiously to put a recovery plan into place.[40]

4. BRITISH COLUMBIA COURT OF APPEAL DECISION

Two judges of the Court of Appeal, Chief Justice Finch and Justice Hinkson, partly upheld the trial judgment in different sets of reasons, and the third judge, Justice Garson, offered dissenting reasons. The conflicting decisions leave considerable uncertainty over the interpretation of Treaty No 8 and the duty to consult and accommodate where many of the adverse impacts complained of predate the project under consideration.

Chief Justice Finch reiterated the principles of Aboriginal treaty interpretation, noting that treaty rights are to be "construed liberally" in favour of Aboriginal groups.[41] The appellants contended that the treaty right to hunt was not species-specific or location-specific. Citing *Mikisew Cree*, where it was held that the presence of wild game on other Treaty No 8 lands was not an answer to the impact of a road on certain traplines, Chief Justice Finch concluded that the right to hunt was affected by the proposed development and the duty to consult was, therefore, engaged. He concluded that "[t]he chambers judge did not err in considering the specific location and species of the petitioners' hunting practices."[42]

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36 *Ibid* at para 46.
37 *Ibid* at para 48.
38 *Ibid* at paras 50-51.
39 *Ibid* at para 79.
40 *Ibid* at para 83.
41 *West Moberly CA*, *supra* note 29 at para 132.
42 *Ibid* at para 140.

Chief Justice Finch went on to observe that "the concept of mining, as understood by the treaty makers would never have included the possibility that areas of important ungulate habitat would be destroyed by road building, excavations, trenching, the transport of heavy equipment and excavated materials, and the installation of an 'Addcar system.'"[43]

The appellants contended that the chambers judge erred in considering the historical impact of development in the area. Chief Justice Finch, however, disagreed, holding that "the historical context is essential to a proper understanding of the seriousness of the potential impacts on the petitioners' treaty right to hunt."[44] He also rejected the appellants contention that the chambers judge should not have considered the impact of a completed project when the application in question was for a preliminary stage of the project. Chief Justice Finch concluded, "to the extent the chambers judge considered future impacts, beyond the immediate consequences of the exploration permits, as coming within the scope of the duty to consult, he committed no error. And, to the extent that [the Ministry of Energy, Mines and Petroleum Resources] failed to consider the impact of a full mining operation in the area of concern, it failed to provide meaningful consultation."[45] Chief Justice Finch held that the matter should be remitted for further consultation, so the chambers judge's accommodation order was set aside without prejudice to any future direction on accommodation.[46]

Justice Hinkson concurred with Chief Justice Finch on many points but differed on the key question of accommodation. Justice Hinkson held that while the impact of past development may inform the scope of consultation, it is inappropriate for accommodation to include remediation of the effects of past development.[47] As a result, he concluded that the chambers judge's order that the Crown put in place a plan for the rehabilitation of the Burnt Pine caribou herd should be overturned.

Justice Garson, in dissent, held that the Treaty No 8 right to hunt was a general right that was not specific to caribou or to a specific caribou herd. As a result, she concluded that the Crown acted appropriately in taking into account the presence of other larger caribou herds and other species in the area.[48] She further held that it was reasonable for the Crown to not consider the impact of the full mining operation as it was possible that after the exploration phase, the project would not proceed.[49] Justice Garson went on to conclude that "the consultation process was directly responsive to the concerns raised by WMFN, insofar as those concerns related to the permits under consideration."[50]

5. COMMENTARY

West Moberly CA raises two issues that are ripe for consideration by the Supreme Court of Canada. First is the question of the treaty interpretation. Can the right to hunt embodied in the numbered treaties be construed in certain circumstances as a right to hunt for a specific

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43 *Ibid* at para 150.
44 *Ibid* at para 117.
45 *Ibid* at para 125.
46 *Ibid* at paras 164-65.
47 *Ibid* at para 181.
48 *Ibid* at para 222.
49 *Ibid* at para 240.
50 *Ibid* at para 286.

species or even a specific herd? Similarly, is the suggestion of Chief Justice Finch that a late nineteenth century understanding of "mining" should inform a court's approach to the questions of consultation and accommodation appropriate? Second, to what extent must consultation and accommodation take into account past, cumulative, and even future impacts of development?

Historic treaties with Aboriginal peoples are to be given a large and liberal construction in favour of the Aboriginal interests protected. However, when the purpose of the treaties is considered — the peaceful accommodation of conflicting modes of life — it is hard to see why rigid interpretations like those adopted by Chief Justice Finch in favour of Aboriginal peoples are warranted. Resolving treaty ambiguities in favour of Aboriginal peoples and requiring the honour of the Crown to be upheld is quite different from strict construction against the Crown. Moreover, we must remember that the Aboriginal treaties are constitutional documents and, as such, interpretation should not be frozen in time. Interpreting the Treaty No 8 right to hunt as protecting a specific herd of caribou would seem to frustrate the larger purpose of the Treaty when there are other food sources and other caribou herds in the general area. Similarly, viewing mining developments through the prism of the late nineteenth century would erect a significant barrier to the approval of modern mining within the Treaty No 8 territory.

All of the *West Moberly* decisions agree that past impacts form part of the context that defines the scope of consultation but differ on whether the impact of subsequent approvals yet to be sought should be considered. The decisions also differ on the question of the responsibility to accommodate for cumulative effects. Complaints concerning cumulative effects and future development effects are commonplace in recent claims filed by Aboriginal groups. Cumulative effects claims highlight a disconnect between the business and legal reality experienced by project developers and the public policy question of development at large. Given that the Crown often expects the cost of accommodation to be borne by project proponents, developers (such as First Coal in the present case) are concerned with their own project and expect not to be required to financially, or otherwise, accommodate Aboriginal interests for impacts caused by past impacts or other projects. Indeed, to require project proponents to accommodate for cumulative impacts not of their making would put a significant brake on development. Similarly, requiring project proponents to consult and accommodate impacts of future approvals that may or may not be sought is incompatible with normal practices of project planning and approval.

The concern with cumulative effects and impacts of future projects by Aboriginal peoples is understandable. Aboriginal peoples, however, lack the legal tools to deal with cumulative impacts because the duty to consult and duty to accommodate typically arises in the context of discrete applications for permits or approvals. Moreover, *Carrier Sekani* suggests that the legal duty to consult and accommodate is limited to impacts arising from the specific Crown decision in issue. This is not to say that a legal tool should be fashioned by the courts to enable Aboriginal peoples to effectively advance cumulative effects and future impacts claims. Instead, what is required is a more effective public policy response that includes Aboriginal peoples in regional development planning.

E. *FOND DU LAC DENESULINE FIRST NATION V CANADA (AG)*[51]

1. BACKGROUND

Areva Resources Canada Inc (Areva) operated the Maclean Lake Uranium Mine and Mill and the Midwest Uranium Mine site in northern Saskatchewan. Areva applied to the Canadian Nuclear Safety Commission (CNSC) for renewal of the Maclean Lake licence and to incorporate care and maintenance activities for the Midwest Uranium Mine site into the Maclean Lake licence. Upon the application being granted, a group of First Nations and northern Saskatchewan communities, who called themselves the Athabasca Regional Government (ARG), had intervened in the CNSC proceedings and sought judicial review of the CNSC's decision on the grounds that the Crown had not fulfilled its duty to consult.

2. FACTS

The CNSC conducted a review of the various issues relevant to the application, including safety and environmental questions. The CNSC was satisfied that Areva met all of the required standards. The CNSC then reviewed Areva's efforts to inform northern Saskatchewan communities and First Nations about its projects. Areva's efforts to disseminate information satisfied the CNSC, but CNSC noted the concerns of the ARG and encouraged Areva to improve its communications with First Nations and northern communities.

ARG expressed concerns with mining and development in the Athabasca region of northern Saskatchewan generally, and the perceived lack of community involvement and consultation. To address these concerns, ARG developed a process to govern development initiatives in the region called "Consultation Protocol and Development Review Process and Approval Process" (the ARG Protocol). The ARG Protocol has not been accepted by other levels of government, and in fact, ARG itself is not recognized "as an entity that is entitled to be consulted and accommodated."[52] ARG asked the Court to impose a court-supervised consultation process that closely resembled the ARG Protocol.

3. DECISION

The Court took the view that ARG's opposition to the renewal and amendment of the Areva permits were motivated by ARG's general concerns about development rather than specific issues with Areva's application. The Areva application was for a renewal and amendment of existing licences and would not have a significant impact on Aboriginal rights. The Court also noted that the Athabasca Basin Development Limited Partnership (ABDLP), which was made up of or owned by the members of ARG, had provided a letter of support for Areva's application.[53] The letter of support from ABDLP also made it clear that the Areva

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51 *Supra* note 28.

52 *Ibid* at para 149.

53 The ABDLP's letter of support to Areva read in part: "It is the goal of the Athabasca region to fully participate in the economy and ABDLP supports all companies and operations that share this goal as well. We are confident that the existing operations at McClean Lake share our goal and we would fully support the renewal of McClean Lake's licence in its present form." *Ibid* at para 155.

application was not a genuine concern. The real issue was the larger framework for consultation and development approval in the Athabasca region of northern Saskatchewan.

The Court expressed its concern with recognizing ARG and implementing a court-supervised consultation process, which would see ARG being consulted on a regional level with respect to development. The Court observed that it had no evidence before it as to whether there were other communities in the Athabasca region of northern Saskatchewan whose views were consistent with ARG. Essentially, the Court took the view that recognition of ARG and the adoption of a regional mechanism for consultation and development review was a matter best left to the political arena.

The Court went on to consider whether ARG or any of its members had standing to make an application for judicial review. To have standing under section 18.1 of the *Federal Courts Act*, ARG or its members had to be "directly affected" by the CNSC decision.[54] The Court held that ARG was not a recognized entity and that none of its members were directly affected because there were no adverse effects of the decision, only benefits.[55]

The Court held that the CNSC had the jurisdiction to determine the existence of the duty to consult and the adequacy of consultation. The Court went on to find that no duty to consult existed because of the lack of adverse effects on Aboriginal rights. In the alternative, if a duty to consult did exist, it was at the lower end of the spectrum and was satisfied by Areva's efforts prior to the CNSC hearing and the CNSC regulatory process.[56] The Court also held that the provincial Crown had no duty to consult as the decision in question was a decision of a federal tribunal.

4. COMMENTARY

Fond du Lac Denesuline First Nation highlights one of the practical difficulties with consultation. The duty to consult, as it is currently understood, is not an effective tool for managing regional development. To some extent, courts have acknowledged this by encouraging Aboriginal parties to participate in the larger consultation activities that occur as part of the regulatory process. Indeed, some of the more robust regulatory processes are much more effective in dealing with the regional impact of development than isolated consultation processes. We also note that some of the mechanisms associated with modern treaties (for example, *YESAA*) appear to be more suited to managing developments that affect multiple communities, including Aboriginal and non-Aboriginal communities, than consultation that occurs on a First Nation-by-First Nation basis.

On large projects, facilitating consultation on a regional basis (or at least a basis larger than individual First Nations) will serve both First Nations and project proponents. First Nations are often under-resourced. Aggregations of First Nations, however, would enjoy greater financial and human resources that would allow them to more effectively consult.

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54 RSC 1985, c F-7, s 18.1.
55 *Fond du Lac Denesuline First Nation*, *supra* note 28 at para 180.
56 *Ibid* at paras 219, 229.

Project proponents might welcome consultation with a regional entity such as ARG on the basis that a single entity with better resources makes for a more efficient negotiating partner.

F. *YELLOWKNIVES DENE FIRST NATION V CANADA (AG)*[57]

1. BACKGROUND

The Yellowknives First Nation (YFN), Lutsel K'e Dene First Nation (LKDFN), and others sought judicial review of a decision of the Mackenzie Valley Land and Water Board (MVLWB) to issue North Arrow Minerals Inc (North Arrow) a permit to conduct exploration for lithium at a prospect 340 kilometres northeast of Yellowknife (the Phoenix Project).

2. FACTS

The YFN and LKDFN are part of the Akaitcho Dene First Nations (ADFN), which is a party to Treaty No 8. The ADFN reside in the territory surrounding Great Slave Lake and claim as their traditional territory a significant part of the eastern part of the Northwest Territories. The ADFN made a land claim in 1976. Negotiations with the Crown over the land claim began in 1996 and are ongoing. The ADFN, Northwest Territories, and Government of Canada signed an Interim Measures Agreement that provides that the ADFN shall set up a body called the Akaitcho Screening Board to pre-screen all development applications within the land claim area. The ADFN's position was that review of an application by the Akaitcho Screening Board was not consultation.

The MVLWB was set up as a consequence of the *Gwich'in* and *Sathu Dene and Metis Comprehensive Land Claim Agreements*.[58] The guidelines established by the MVLWB provide specific direction with respect to consultation with ADFN. In particular, the guidelines state that "it is important that proponents meet face to face with ADFN prior to submission of an application."[59]

North Arrow met with a representative of the YFN Land & Environmental Office and with the Chief and Council of the YFN. The YFN presented North Arrow with its template Exploration Agreement, which "sets up a regular and ongoing consultation process, [and it] requires employment and business opportunities (where possible, the conduct of archaeological studies and monitoring (including site visits)) and some mitigation measures."[60] North Arrow was asked to bear the costs of the obligations set out in the Exploration Agreement. YFN informed North Arrow that it "had no significant concerns with the project so long as the exploration agreement was entered into."[61] North Arrow rejected the Exploration Agreement because it was a junior mining company with limited financial

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57 2010 FC 1139, 377 FTR 267 [*Yellowknives*].

58 *Ka'a'Gee Tu First Nation v Canada (AG)*, 2007 FC 763, 315 FTR 178 at para 19, referring to INAC, *Gwich'in Comprehensive Land Claim Agreement*, 22 April 1992 (Ottawa: INAC, 1992), online: Gwich'in Tribal Council <http://www.gwichin.nt.ca/documents/GCLCA.pdf>; INAC, *Sahtu Dene and Metis Comprehensive Land Claim Agreement*, 6 September 1993 (Ottawa: INAC, 1993), online: INAC <http://www.ainc-inac.gc.ca/ai/scr/nt/na/agr/index-eng.asp>.

59 *Yellowknives*, *supra* note 57 at para 23.

60 *Ibid* at para 25.

61 *Ibid* at para 33.

resources. North Arrow's efforts to consult with LKDFN began later and were more limited than consultations with YFN. North Arrow also rejected proposals made by LKDFN on grounds of costs. At no time did North Arrow meet face to face with YFN or LKDFN community members.

MVLWB took the view that it did not have jurisdiction to determine whether the duty to consult was satisfied. However, once Indian and Northern Affairs Canada (INAC) took the position that the duty to consult was satisfied, the MVLWB granted North Arrow the requested permit.

3. DECISION

The Court first considered whether the MVLWB was required to determine if the duty to consult existed and had been met. The Court observed that the first element — whether the duty to consult existed — did not have to be decided by MVLWB because all parties agreed that consultation was required. The Court then decided that the MVLWB did have to determine whether the duty to consult was satisfied because it was required to by section 114 of the *Mackenzie Valley Resource Management Act*.[62] The Court did not fault the MVLWB from inquiring of INAC whether the duty to consult was satisfied but took issue with the fact that MVLWB did not take into consideration information from the First Nations. INAC, the Court concluded, did not make sufficient inquiries of the First Nations to properly assess what it was told by North Arrow.

The Court did not accept the Crown's position that the duty to consult was satisfied through the regulatory process. North Arrow failed to follow the MVLWB's guidelines on consultation by not having face to face meetings with the community members. MVLWB then avoided the consultation issue by making inquiries of INAC and relying on the response without further analysis. The Court observed that "[t]he Respondent has the difficult task of arguing that on the one hand, the Board cannot evaluate whether the duty to consult has been met, and on the other, that the process which the Board follows is such that the Crown need not actually consult — because the duty is fulfilled."[63]

4. COMMENTARY

From *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)* onward it has been understood that consultation may take place within the regulatory process.[64] The *Yellowknives* case seemingly contradicts *Taku* in that the Court found that consultation had not taken place even though a regulatory process existed. *Yellowknives* is better understood as a case where a proper regulatory process might have satisfied the duty to consult. However, North Arrow's failure to follow the MVLWB's guidelines for consultation together with the MVLWB's abdication of its responsibility to assess the sufficiency of the consultation prior to the matter coming before it, rendered the process

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62 SC 1998, c 25.
63 *Yellowknives*, *supra* note 57 at para 104.
64 2004 SCC 74, [2004] 3 SCR 550 [*Taku*].

fatally flawed. A regulatory process will only satisfy the duty to consult where it is properly conducted.

A practical problem is also highlighted by the *Yellowknives* case. The process of consultation and accommodation can be time-consuming and demanding on financial resources. Junior mining companies, like North Arrow, or junior energy companies may struggle with the time delays and the financial cost of consultation and accommodation. While the Court indicates that North Arrow should have been more patient, open, and willing to bargain, it is not clear that a deal would have been reached with the First Nations. In areas covered by First Nations claims, the longer lead time for projects and expense associated with consultation and accommodation tips the playing field in favour of larger companies with greater human and financial resources.

G. *TSUU T'INA NATION V ALBERTA (MINISTER OF ENVIRONMENT)*[65]

1. BACKGROUND

Water supply and usage in southern Alberta is becoming an urgent issue with the growth of population and industry and the threat of global warming combined with a corresponding decline in precipitation and glacial runoff. The allocation of scarce water rights is important for the energy industry in southern Alberta. Moreover, the right of First Nations to be consulted on water issues and the possible priority of First Nations water rights over other water rights is a matter of interest to project proponents.

2. FACTS

Alberta Environment responded to concerns about water supply and usage through the development of the Water Management Plan for the South Saskatchewan River Basin (SSRB), which was approved by the Lieutenant Governor in Council in 2006. The Tsuu T'ina First Nation (TTFN), whose reserve extends west from the boundary of the City of Calgary and is located entirely within the SSRB, and the Samson Cree First Nation (SCFN), whose reserve is north of the City of Red Deer and is outside the SSRB, challenged the SSRB Water Management Plan on the grounds that there had been insufficient consultation prior to its adoption. The TTFN is a party to Treaty No 7,[66] and the SCFN is party to Treaty No 6.[67]

Separate from the TTFN and SCFN application for judicial review of the decision to adopt the SSRB Water Management Plan, TTFN and SCFN each commenced proceedings by way of a statement of claim for, amongst other things, a declaration that their treaty water rights take precedence over all other water rights granted in the SSRB.

The Crown recognized that it had a duty to consult with TTFN in developing the SSRB Water Management Plan. The dispute with TTFN was not whether there was a duty to

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65 2010 ABCA 137, 482 AR 198 [*Tsuu T'ina*].
66 12 July 1877, online: INAC <http://www.ainc-inac.gc.ca/al/hts/tgu/tr7-eng.asp>.
67 9 September 1876, online: INAC <http://www.ainc-inac/gc.ca/al/hts/tgu/tr6-eng.asp>.

consult, but instead, over the quality and content of the consultation. The Crown does not appear to have recognized a duty to consult with SCFN due to a lack of proximity.

The Alberta Court of Queen's Bench found the consultation between the TTFN and the Crown was flawed on both sides. Alberta Environment sought information from the TTFN in 2000 and again in 2002. On neither occasion did the TTFN provide any response. The TTFN were invited to "participate as full members of the Bow River [Basin Advisory Committee]."[68] TTFN explained their non-participation in the early stages of the development of the SSRB Water Management Plan on the grounds that they were entitled to be consulted separately from the larger public consultation and policy development process.[69] Subsequently, Alberta Environment sought to meet with the TTFN separately. The meeting went poorly because the TTFN objected to the Crown being represented by a Deputy Minister rather than the Minister of Environment. An invitation was extended by the Minister to meet with the Chief, but the meeting did not place. As a result of the TTFN meeting with the Deputy Minister, Alberta Environment provided the TTFN with funding to engage a technical expert. Following completion of the TTFN technical consultant's report, Alberta Environment met with the TTFN and it became clear that some of the TTFN's issues went beyond the scope of the SSRB Water Management Plan. Accordingly, Alberta Environment proposed a two-track process that would see consultations on SSRB issues separated from other matters requiring consultation. The TTFN rejected this approach and threatened legal action.

The Alberta Court of Queen's Bench held that Alberta Environment's actions and statements following the TTFN's response as recorded in the minutes of a meeting with the Chiefs of the Treaty No 7 First Nations led the TTFN to believe that further consultation would take place prior to the adoption of the SSRB Water Management Plan. The Court observed that Alberta Environment was probably referring to its plan to engage in post-approval consultation on matters not within the scope of the SSRB Water Management Plan. Alberta Environment did nothing to address the TTFN's misunderstanding and no further consultation took place prior to the SSRB Water Management Plan being adopted in August 2006.

3. DECISION

The Court of Appeal began by considering the nature of the duty to consult and the correct test for determining the existence of the duty to consult. The Court noted that the chambers judge used the test from *R v Sparrow* which considers: (1) the existence and infringement of an Aboriginal right; and (2) the justification for the infringement.[70] The Court went on to consider the standards in *Haida* and in *Mikisew Cree*. *Haida* provides that a duty to consult "arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it."[71] *Mikisew Cree* emphasizes that the duty to consult is a procedural right. The procedural aspect of the duty to consult requires the Crown to engage First Nations even when the underlying

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68 *Tsuu T'ina*, *supra* note 65 at para 101.
69 *Ibid* at para 103.
70 [1990] 1 SCR 1075.
71 *Haida*, *supra* note 22 at para 35.

substantive treaty rights claims (for example, the right to hunt or fish) are not proved. It is not acceptable for the Crown to fail to consult and then take the position that the infringement on the substantive Aboriginal right is justified under the second part of the *Sparrow* test.[72] The Court summarized its views on the law governing the duty to consult:

> [T]here should not be three separate tests to determine whether a duty to consult exists.… The underlying theme of the cases in which a duty to consult has been found is that the honour of the Crown is always at stake when it deals with aboriginal peoples. In other words, the question is always whether the honour of the Crown requires that consultation and appropriate accommodation take place when a proposed government action threatens to adversely affect aboriginal peoples. The test is broad and sensitive to differing factual circumstances.[73]

The Crown submitted that no duty to consult arose because the action in question was legislative and therefore not reviewable, and because the government action did not have any potential adverse impacts. The Court did not decide the question of whether the action was legislative and immune from review. Instead, the Court held that the duty to consult was engaged at the earlier stage of policy development prior to the SSRB Water Management Plan being adopted by the cabinet.

The Court concluded that the SSRB Water Management Plan could have adverse impacts on the TTFN and that the Crown's efforts to consult with the TTFN indicated the Crown's awareness of this fact. At the same time, however, the Court noted that, to the extent that the alleged adverse impact was real, it was reversible, unlike the type of impacts alleged in *Mikesew Cree* and other cases. The harm identified by the TTFN was that other users have priority rights and that the trading of water licences might increase water usage and put stress on the SSRB. However, the Court observed that the system of water licence priority and water licence trading was not the subject of the SSRB Water Management Plan. Even if priority was a concern with respect to the SSRB Water Management Plan, the Court noted that if the TTFN was successful in its Statement of Claim it would have priority over the Crown and all third parties whose water rights were obtained from the Crown. Since the SSRB Water Management Plan only sought to preserve and protect the SSRB, if the TTFN is successful in its lawsuit it will have benefited from the implementation of the SSRB Water Management Plan.

As noted above, the Court found the TTFN consultation process to be flawed on both sides. That conclusion, however, did not mean that the Crown failed to satisfy its duty to consult. The Court held that, in the circumstances, the chambers judge's conclusion that the level of consultation was at the low end of the spectrum was reasonable. In support of this conclusion, the Court noted that the timeline for completion of the SSRB Water Management Plan was extended to facilitate consultation, a number of meetings took place, funds were provided for a technical expert, the process was inhibited by TTFN's procedural demands, Alberta Environment was facing what it considered to be an emergent situation, some accommodation was made in the form of providing First Nations water allocation out of the

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72 *Mikisew Cree*, *supra* note 33 at para 59.
73 *Tsuu T'ina*, *supra* note 65 at para 46.

Crown reservation, and Alberta Environment committed to continue consultation on matters identified by TTFN but outside the scope of the SSRB Water Management Plan.

The Court expressed doubts as to whether there was a duty to consult with SCFN as a result of a lack of proximity to the SSRB. The Court held that even if there was a duty to consult, it was at a very low level and that the Crown had satisfied the duty.

4. COMMENTARY

Tsuu T'ina provides useful clarification of the law surrounding the duty to consult. Perhaps more importantly, it highlights that: (1) a flawed consultation process will not necessarily mean that a duty to consult has been breached; and (2) an interim remedy will not always be the appropriate means to address a failure to consult.

Despite criticizing Alberta Environment for poor communications in the period shortly before the SSRB Water Management Plan was adopted by cabinet, the Court accepted the chambers judge's finding that the duty to consult had been satisfied. This makes it clear that months or years of efforts to consult will not necessarily be washed away by a single incident. The Court's finding is undoubtedly a product of its contextual approach. Had the potential adverse effect on the TTFN been greater and the level of consultation been higher on the spectrum, the Court might have reached a different conclusion.

Many duty to consult cases involve permanent changes to lands subject to Aboriginal claims. Roads, dams, and mines can forever alter landscapes. As a result, the remedy typically sought by First Nations facing such situations is a suspension of the licence or permit allowing the activity until proper consultation and accommodation has taken place. The present case shows that other government actions — here a resource management plan — may not raise the same concerns about imminent and permanent harm. Given that the SSRB Water Management Plan was intended to protect the environment, that Alberta Environment had committed to consult with TTFN in respect of other water rights issues, and that the TTFN had a legal action pending seeking a declaration of priority over water rights, the Court did not see the need for an interim remedy preventing adoption of the SSRB Water Management Plan. If the TTFN's position was vindicated in the lawsuit, no harm would have resulted from adoption of the SSRB Water Management Plan.

H. *NUNATUKAVUT COMMUNITY COUNCIL INC V NEWFOUNDLAND AND LABRADOR HYDRO-ELECTRIC CORPORATION (NALCOR ENERGY)*[74]

1. BACKGROUND

The Newfoundland and Labrador Hydro-Electric Corporation (Nalcor Energy) intends to develop dams on the Lower Churchill River in Labrador to generate hydroelectric energy. A joint review panel (the JRP) was convened to conduct an environmental assessment. While the JRP was sitting, the Nunatukavut Community Council (NCC) applied to the Federal

[74] 2011 NLTD(G) 44, [2011] 2 CNLR 214 [*Nunatukavut*].

Court for an injunction preventing further public hearings of the JRP until the Crown discharged its duty to consult with the NCC.

2. FACTS

The JRP's terms of reference included:

> [T]he mandate to invite information from Aboriginal persons or groups related to the nature and scope of potential or established Aboriginal rights or title in the area of the Project, as well as information on the potential adverse impacts or potential infringement that the Project/Undertaking will have on asserted or established Aboriginal rights or title.[75]

The federal and provincial Ministers of Environment issued guidelines that, among other things, required Nalcor Energy to consult with Aboriginal groups, including the NCC.

The Court reviewed the lengthy record of meetings and communications between the NCC and the Canadian Environmental Assessment Agency, the Newfoundland Department of Environment and Conservation, and the JRP. The Court then noted that Nalcor Energy's record of communications with the NCC was 18 pages long.

3. DECISION

The Court held that the normal three-part test for injunctive relief applied: (1) serious issue to be tried; (2) irreparable harm; and (3) balance of convenience.[76] The Court held that a failure to consult was a serious issue to be tried. The Court's reasons focused on the questions of irreparable harm and balance of convenience.

The Court reviewed the NCC's concerns in the context of irreparable harm. The Court noted that the NCC's frustrations with the land claims process and lack of an impact benefit agreement coloured its approach to the JRP process. With respect to the Lower Churchill Project, the Court observed that the consultation and accommodation process was "generous."[77] The Court went on to observe that the NCC's concerns about consultation were premature and, in fact, the NCC might irreparably harm its own interests by refusing to participate in the JRP process. The Court observed, "Nunatukavut risks losing an important opportunity to influence the development of the project by declining to participate in the public hearings before the JRP."[78]

The Court found that the balance of convenience favoured letting the JRP proceed. The NCC's position was not that the Lower Churchill Project should be stopped. To the contrary, the NCC's concern was primarily with issues of mitigation and compensation. The Court observed that "Nunatukavut wants to obtain land claims and impact benefits agreements with the federal and provincial governments, similar to the 'New Dawn Agreement' which the

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75 *Ibid* at para 11.
76 *Ibid* at para 5, citing *RJR-MacDonald Inc v Canada (AG)*, [1994] 1 SCR 311 at 332-33.
77 *Ibid* at para 42.
78 *Ibid* at para 44.

province, Nalcor Energy, and the Innu Nation signed on September 26, 2008."[79] Since the JRP process was mandated to consider mitigation, and because compensation can continue to be negotiated even if the JRP is ongoing or has even completed its work, the balance of convenience favoured Nalcor Energy, which would suffer significant losses if the JRP process was stopped.

4. COMMENTARY

Nunatukavut shows the importance for project proponents to take a proactive approach to consultation and to maintain rigorous documentation of all consultation activities. The Court was clearly influenced by the extensive record of consultation that Nalcor Energy adduced. While the consultation record was not enough to convince the Court that there was no serious issue to be tried, it put the NCC's allegations of irreparable harm in perspective. The claim that the JRP process must be stopped to prevent irreparable harm in the form of a failure to consult rang hollow in the face of the extensive efforts prior to the JRP and through the JRP made by Nalcor Energy and the Crown to consult with the NCC.

I. *ATHABASCA CHIPEWYAN FIRST NATION V ALBERTA (MINISTER OF ENERGY)*[80]

1. BACKGROUND

The Athabasca Chipewyan First Nation (ACFN) sought judicial review of the decision of the Minister of Energy to issue oil sands leases to Shell Canada Ltd (Shell) covering lands within the ACFN's traditional territory. ACFN alleged that the Minister had a duty to consult with ACFN and that he failed to adequately consult. The chambers judge dismissed the ACFN's action on the grounds that the old *Alberta Rules of Court*[81] rule 753.11(1) requires an application for judicial review within six months of the date of the administrative decision being challenged.

2. FACTS

The Crown's interaction with ACFN with respect to the leases granted to Shell was limited to posting on the Aboriginal Community Link website that the lands in question were to be offered at an upcoming land sale and then posting the result of sale on the same website. Subscribers to the Aboriginal Community Link, including ACFN, receive notices of new postings by email.

The chambers judge held that posting that the lands were for sale and that they were subsequently sold on the Aboriginal Community Link provided the ACFN with actual or constructive notice of the Minister's decision regarding the leases. The ACFN did not

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79 *Ibid* at para 30.

80 2011 ABCA 29, 45 Alta LR (5th) 217, aff'g 2009 ABQB 576, 481 AR 270, leave to appeal to SCC requested [*Athabasca Chipewyan*]. The Alberta Court of Queen's Bench decision in this case was discussed in Jeff W Bright & Patrick W Burgess, "Recent Judicial Developments of Interest to Energy Lawyers" (2010) 48:2 Alta L Rev 517 at 521-23.

81 Alta Reg 390/1968, repealed by Alta Reg 124/2010.

provide satisfactory evidence to explain why it did not receive notice through the Aboriginal Community Link or through the other public notice given by the Crown regarding the leases.

3. DECISION

The Alberta Court of Appeal began by noting that limitations law applies equally to Aboriginal claims.[82] The limitation in question, rule 753.11(1), provides that applications "to set aside a decision or act" must be brought within six months of the decision or act.[83] ACFN argued that their application sought declaratory relief in addition to asking the Court to quash the Minister's decision. The Court of Appeal, quoting Justice Slatter's reasons in *Papaschase Indian Band No 136 v Canada (AG)*[84] with approval,[85] held that rule 753.11(1) should be interpreted strictly to respect the Legislature's intention to prevent challenges to administrative decisions after six months and that no distinction should be drawn between a request to quash and declaratory relief.

The Court of Appeal also dispensed with the chambers judge's finding of constructive notice. The Legislature, according to the Court of Appeal, intended finality in decisions after six months. The Court held that "the Legislature intended the limitation to operate without regard to the potential applicant's knowledge. The rule is operative upon the 'decision or Act' occurring, not the date the decision or act is communicated to potential parties."[86]

Even though it was held that no notice was required, the Court of Appeal went on to consider the question of constructive notice. The Court held that once the Minister led evidence showing that notice of the decision to grant the leases was given to the public (including through the Aboriginal Community Link), it fell to ACFN to show that it had not received notice. The ACFN's evidence, however, was found by the Court of Appeal to be insufficient to rebut the inference of notice drawn from the publicity of the decision.

The Court of Appeal also rejected ACFN's argument that the duty to consult required the Minister to give actual notice of the decision to grant the leases in order for the limitation period to start to run.

4. COMMENTARY

Crown consultation prior to or concurrent with the land sale process would be impractical. Postings are often made based on confidential information and analyses that give the posting party a temporary advantage over competitors. Bids in the land sale process are often made through agents to conceal the principal's identity so as to maintain competitive advantages. Delaying the period between posting and bidding for an Aboriginal consultation process would significantly affect industry practice. Quite apart from the question of limitations, a case can be made from a practical standpoint that Aboriginal rights are not affected by the

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82 *Athabasca Chipewyan*, *supra* note 80 at para 26. See also *Wewaykum Indian Band v R*, 2002 SCC 79, [2002] 4 SCR 245 at para 114.

83 *Supra* note 81.

84 2004 ABQB 655, 365 AR 1 [*Papaschase*].

85 *Athabasca Chipewyan*, *supra* note 80 at para 23.

86 *Ibid* at para 28.

disposition of oil sands leases. The oil sands lease grants the holder an interest in the lands subject to the lease, but it does not grant the holder any right or power to develop the lands or do anything inconsistent with traditional Aboriginal use of the surface lands. Instead, Aboriginal rights are affected by the regulatory decisions leading to project approval that necessarily follow the grant of oil sands leases. On a case where limitations are not dispositive, a more sensible result would be to find that, at the land sale stage, a duty to consult either does not exist or is so low on the spectrum that the ordinary public notice process is sufficient.

The Court of Appeal's decision on limitations is correct based on existing law, but it seems inconsistent with the spirit of reconciliation and the honour of the Crown. Viewed from the ACFN perspective, the Crown failed to consult and then invoked a strict rule of its own making to prevent the ACFN from having its concerns about consultation heard. The Court of Appeal's approach also seems to be at odds with the policy that informs the Alberta *Limitations Act*.[87] The *Limitations Act*, adopted in 1999, shortened and standardized limitation periods at two years subject to the discoverability principle which itself is subject to a ten-year ultimate limitation period. Section 13 of the *Limitations Act* excludes Aboriginal breach of fiduciary obligation claims from the two-year limitation period. Presumably, this exception was to ensure that the honour of the Crown was not compromised by the operation of a harsh procedural rule.

II. ADMINISTRATIVE LAW

A. *PRINCE V ALBERTA (ENERGY RESOURCES CONSERVATION BOARD)*[88]

1. BACKGROUND

Talisman Energy Inc obtained a pipeline licence in the Chinook Ridge area near the Alberta-British Columbia border southwest of Grande Prairie. The applicants sought leave to appeal the decision of the Energy Resources Conservation Board (ERCB) which granted the pipeline licence and denied the applicants' standing. The applicants contended that the pipeline would cross lands covered by their Registered Fur Management licence (RFML) and thus they were directly and adversely affected by the pipeline application.

2. FACTS

The applicants asserted that they had an interest in the lands because the pipeline crossed lands covered by their RFML and because they were Aboriginal persons "exercising traditional cultural practices."[89] The trapline had been used by four generations of the Prince family. The applicants further expressed environmental concerns and concerns about the consultation process.

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87 RSA 2000, c L-12.
88 2010 ABCA 214, [2010] 4 CNLR 184 [*Prince*].
89 *Ibid* at para 4.

The ERCB dismissed both of the applicants' concerns. The Board found that the pipeline was not proximate to the traditional lands of the Sucker Creek Indian Band, of which the applicants were members. The ERCB also concluded that the pipeline would have little environmental impact as it mostly followed existing disturbances, such as roadways. As a result, the ERCB concluded that the rights of the applicants were not "directly and adversely" affected pursuant to section 26(2) of the *Energy Resources Conservation Act*[90] and denied the applicants standing.[91]

3. DECISION

The Court reaffirmed that under section 26(2) of the *ERCA*, the Court is to: (1) apply a legal test to determine whether the claim, right, or interest being asserted is one known to law; and (2) a factual test to determine whether the ERCB had any information that shows that the application may directly and adversely affect such rights. The Court held that the ERCB correctly identified the asserted right. Turning to the factual question, the Court held that even viewing the facts "through a lens of sensitivity to aboriginal rights and values" the potential adverse effect of the pipeline was "minimal and largely speculative."[92] The Court held that the ERCB's decision was reasonable in the circumstances, since the asserted interests were limited, the potential for adverse effects on the asserted interests was speculative, and "to the extent that an adverse effect on [any asserted] interest might be quantifiable and provable, a compensation scheme appropriate to trapline operation existed separately through a dedicated program."[93]

4. COMMENTARY

The Court in *Prince* has resolved some uncertainty surrounding the test for standing created by *Kelly v Alberta (Energy Resources Conservation Board)*.[94] The Alberta Court of Appeal in *Kelly* held that the Board had no jurisdiction to refuse standing on the basis that an applicant was not affected differently or to a greater degree than the rest of the public.[95] The *Kelly* decision thus challenged the extent of the Board's discretion to determine what degree of connection between an applicant's asserted rights and a proposed project is sufficient for the applicant's rights to be directly and adversely affected, as required by section 26(2) of the *ERCA*. While *Kelly* was not expressly considered by the Court in *Prince*, the Court in *Prince* confirmed that the Board does have the discretion to determine the degree of connection required in each circumstance. This decision provides some clarity for both the Board in terms of its powers to deny standing and also for the Court in terms of when interference with a Board decision on standing is appropriate.

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90 RSA 2000, c E-10, s 26(2) [*ERCA*].
91 *Prince*, *supra* note 88 at para 7.
92 *Ibid* at para 15.
93 *Ibid*.
94 2009 ABCA 349, 464 AR 315 [*Kelly*].
95 *Ibid* at para 32.

B. *FREEHOLD PETROLEUM AND NATURAL GAS OWNERS ASSOCIATION V ALBERTA (ENERGY RESOURCES CONSERVATION BOARD)*[96]

1. BACKGROUND

Freehold Petroleum considers when a mineral rights owner will meet the definition of "local intervener" in proceedings before the ERCB so that hearing costs may be recovered.

2. FACTS

The Freehold Petroleum and Natural Gas Owners Association (FHOA) intervened in a proceeding before the ERCB concerning whether a mineral lease held by OMERS Energy Inc (OMERS) was valid and subsisting. FHOA represented the interests of Eva Cymbaluk, who leased mineral rights to OMERS and, on the premise that the OMERS lease had expired, subsequently leased the mineral rights to Montane Resources Ltd. The ERCB hearing determined that the OMERS lease agreement had lapsed. FHOA sought costs for its participation in the ERCB hearing. The ERCB denied the application for costs and FHOA sought leave to appeal the decision to the Court of Appeal.

3. DECISION

The test for local intervener status requires the applicant to demonstrate that it "has an interest in, or … is in actual occupation of or is entitled to occupy land that is or may be directly and adversely affected by a decision of the Board."[97] FHOA rested its argument on the fact that it represented the interests of Cymbaluk and that she had an interest in the lands subject to the lease considered by the ERCB. FHOA contended that the ERCB erred because its decision could only have been based on the conclusion that Cymbaluk did not have an interest in land contrary to well-established law that a lessor's royalty interest is an interest in land.[98]

The Court dismissed the argument over whether Cymbaluk had an interest in land on the grounds that it was irrelevant. The Court stated that, properly understood, the ERCB decision was that Cymbaluk's interest was not directly and adversely affected by the issues before the ERCB. The Court held that the issue before the ERCB was the validity of the well licence and that the question of the validity of the lease was incidental. The impact on Cymbaluk was not on her interest in land, which would subsist no matter the result, but only on the royalty to which she would be entitled. In other words, the decision did not affect her reversionary rights. The Court contrasted this "residual impact" with the impact of the ERCB's costs decision in respect of a hearing involving whether coal bed methane rights are held by petroleum and natural gas rights holders or coal rights holders.[99]

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96 2010 ABCA 125, 487 AR 149 [*Freehold Petroleum*].
97 *ERCA*, *supra* note 90, s 28(1).
98 See *Scurry-Rainbow Oil Ltd v Kasha* (1996), 184 AR 177 (CA) [*Scurry-Rainbow*].
99 *Freehold Petroleum*, *supra* note 96 at paras 12-13.

4. COMMENTARY

Courts are reluctant to interfere with costs decisions on the grounds that such decisions are discretionary and the tribunal or lower court is better placed to assess the appropriateness of a costs award. This reluctance is reinforced in situations involving interveners who may be viewed as uninvited guests to a proceeding. These forces are seen in the Court's efforts to define Cymbaluk's interest so that it was found to be not directly and adversely affected. Viewed in isolation from the natural hesitance of courts to second-guess costs awards, it is hard to see how Cymbaluk's interest in land was not potentially be directly and adversely affected by the matters before the ERCB. Cymbaluk was the mineral rights owner and the ERCB's hearing was to decide which party had the right to produce the resources to which her rights attached.

C. *CALGARY (CITY OF) V ALBERTA (ENERGY AND UTILITIES BOARD)*[100]

1. BACKGROUND

This was an appeal by the City of Calgary (Calgary) of two decisions of the Alberta Energy Utilities Board (EUB) permitting ATCO Gas and Pipelines Ltd (ATCO) to use deferred gas accounts (DGAs) to recover a lump sum from consumers in 2005 for understated costs and expenses incurred by ATCO between 1999 and 2004. Calgary appealed two of the EUB's decisions on the following question: "Whether the Board erred in law or in jurisdiction by allowing for the recovery, in 2005, of costs or expenses that were incurred between 1998 and 2004."[101]

2. FACTS

In May 2004, ATCO sought EUB approval to correct balances in its DGAs for each of its south and north gas distribution service territories (ATCO Application).[102] The proposed adjustment to the DGA for southern Alberta was largely attributable to an understatement of the gas costs incurred by ATCO in the period from 1999 to 2004. ATCO's recalculations indicated that its gas costs in southern Alberta from 1999 to 2004 had been understated by $11.6 million (the shortfall). ATCO proposed that the shortfall be charged to its present southern Alberta customers by way of an adjustment to its DGAs.

The EUB made three decisions relevant to the appeal. In the first decision, despite expressing concern of the evolution of DGAs into a "catch-all" method for fixing gas cost errors and the lateness of ATCO's proposed adjustments, the EUB permitted ATCO to recover 85 percent of the shortfall through adjustments to its DGAs.[103] The second decision arose from the Board's concerns about the timing of the ATCO application for the imbalance

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100 2010 ABCA 132, 477 AR 1 [*Calgary v Alberta*].

101 *Calgary (City of) v Alberta (Energy and Utilities Board)*, 2009 ABCA 150, [2009] AWLD 1886 at para 9.

102 The appeal being discussed concerned only the adjustment proposed to the southern DGA.

103 EUB, *ATCO Gas, A Division of ATCO Gas and Pipelines Ltd: Imbalance and Production Adjustments — Deferred Gas Account*, EUB Decision 2005-036 (28 April 2005) [the DGA Decision]. EUB and Alberta Utilities Commission decisions are available online at <http://www.auc.ab.ca/applications/decisions/Pages/ArchivedDecisions.aspx>.

adjustments.[104] Finding that it possessed the jurisdiction to establish limitation periods for the DGA process in the context of its statutory mandate to set just and reasonable rates under the *Gas Utilities Act*,[105] the EUB adopted a general limitation period of two years for refunds to and recovery from consumers through the DGA process.[106] In the third decision, the EUB reiterated its position that DGAs are not subject to any statutory limitations that would prevent the EUB from granting the ATCO Application.[107]

Only the DGA Decision and the DGA Reconsideration Decision were at issue in the appeal.

3. DECISION

Justice Hunt (with Justice Paperny concurring) and Justice Côté offered separate opinions, both of which held that the decisions under appeal should be vacated. However, the Court was not able to agree on the central issue on appeal: whether the DGA Decision and the DGA Reconsideration Decision amounted to illegal retroactive rate-making.

Justice Hunt held that the EUB possessed the jurisdiction to authorize ATCO's use of DGAs to rectify the shortfall in the circumstances. The EUB's authority over DGAs, according to the majority, flowed from its power to set just and reasonable rates and a fair rate of return on rate base found in sections 36 and 37 of the *Gas Utilities Act*.[108] Recognizing that "imposing gas cost shortfalls or surpluses incurred by past consumers on future consumers [was] generally prohibited," the majority held that "[t]he history of DGAs [demonstrated] that affected parties knew they would be used from time to time to alter gas rates based on later, actual gas costs."[109] Accordingly, Justice Hunt found that "the use of the DGA in this case did not involve prohibited [decision-making]."[110]

Justice Hunt, however, found the EUB's decision to allow the company to recover 85 percent of the transportation imbalances through the DGA to be unreasonable.[111] She emphasized that (1) unlike most previous uses of DGAs, the shortfall "did not result from gas price volatility"; (2) unlike "other past uses of DGAs where errors were attributable to measuring equipment problems … the failure to levy appropriate gas charges was entirely due to deficiencies within ATCO's own system, [and were] exacerbated by a long delay in discovering the problem"; and (3) "ATCO's destruction of data made data verification impossible."[112] As a result of such carelessness on ATCO's part, at least some consumers,

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104 EUB, *ATCO Gas, A Division of ATCO Gas and Pipelines Ltd: Deferred Gas Account Limitation Period*, EUB Decision 2006-042 (11 May 2006) [DGA Limitations Decision].

105 RSA 2000, c G-5.

106 DGA Limitations Decision, *supra* note 104 at 21.

107 EUB, *ATCO Gas, A Division of ATCO Gas and Pipelines Ltd: Reconsideration of Decision 2005-036 — Deferred Gas Account — Imbalance and Production Adjustments*, EUB Decision 2008-001 (8 January 2008) [DGA Reconsideration Decision]. This decision was made following the Court's decision that since the issue of the Board's jurisdiction to grant the ATCO's application had not been raised before the Board, the Court lacked the evidentiary record to hear Calgary's appeal of the DGA Decision: *Calgary (City of) v ATCO Gas and Pipelines Ltd*, 2007 ABCA 133, 404 AR 317.

108 *Calgary v Alberta*, *supra* note 100 at para 41.

109 *Ibid* at paras 51, 59.

110 *Ibid* at para 61.

111 *Ibid* at para 71.

112 *Ibid*.

who were not consumers when the problems originated, would have to absorb the costs.[113] Finding that the use of the DGA in the circumstances gave rise to intergenerational equity issues which were at the heart of the prohibition against retrospective rate-making, the majority returned the matter to the Alberta Utilities Commission (AUC) for reconsideration.

Justice Côté concurred with Justice Hunt's conclusion that the decisions were unreasonable. However, he further held that the use of DGAs to make up the shortfall constituted illegal retroactive rate-making.[114] According to Justice Côté, DGAs were never intended nor ordered to be used for the purpose put forward by ATCO. He reasoned that the history of Alberta's public utilities legislation is incompatible with any EUB "power to take into account to base, or adjust, rates on actual shortfalls or excesses of revenues or expenses in a year earlier than the year in which the application by the utility is filed."[115]

4. COMMENTARY

The reasoning of the Court on the issue of the reasonableness of the decisions is undoubtedly correct. Although the Court was unable to arrive at a unanimous decision with respect to the central issue on appeal, this case does provide a useful overview of the principles that courts will apply in considering how to address historical accounting errors or adjustments of publicly regulated services. Although Justice Hunt and Justice Côté reached different conclusions, they both stressed that there are compelling reasons why losses such as those at issue in the appeal should be borne by utilities' shareholders, who possess a more direct means of influencing management than consumers.[116]

D. *HUNT OIL COMPANY OF CANADA, INC V GALLEON ENERGY INC*[117]

1. BACKGROUND

Hunt Oil Company of Canada, Inc (Hunt) commenced an action against Galleon Energy Inc (Galleon) for abuse of process, negligent misrepresentation, and intentional interference with economic interests. The claims stem from Galleon's objection to Hunt's application to the ERCB for approval of an enhanced oil recovery program. Hunt claimed that Galleon's actions delayed the ERCB's approval of the Hunt application, thereby giving Galleon a competitive advantage in draining a shared oil pool. Galleon brought a motion to strike the statement of claim pursuant to rule 129 of the old *Alberta Rules of Court*.[118]

2. FACTS

Hunt made an application to the ERCB in late 2007 for approval for an enhanced oil recovery program in the Kleskun Beaverhill Lake Oil Pool (the Oil Pool). Galleon, like Hunt, produced oil from the Oil Pool. Before the ERCB, Galleon took the position that Hunt's

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113 *Ibid*.
114 *Ibid* at para 183.
115 *Ibid* at para 117.
116 *Ibid* at paras 73, 140-48.
117 2010 ABQB 212, 489 AR 326 [*Hunt Oil*].
118 *Supra* note 81.

proposed waterflood program risked diminishing overall recovery from the Oil Pool. The ERCB dismissed Galleon's concerns and approved Hunt's application. The substance of Hunt's allegation was that Galleon's position before the ERCB was baseless and intended to delay Hunt's implementation of the waterflood program so that Galleon could gain an advantage over Hunt in draining the Oil Pool in the interim period.

3. DECISION

The Court dispensed with Hunt's abuse of process claim on three grounds. First, the Court held that parties are entitled to advance their own economic interests through administrative processes. Gaining an economic advantage by delaying the outcome of a proceeding is not an improper purpose and, as such, does not found a claim for abuse of process.[119] Second, the Court held that the appropriate venue for policing the misuse of administrative processes is before the administrative tribunal itself. The Court held that the law permits a person to participate in an administrative proceeding without being subject "to any liability other than the liability to pay the costs of the proceeding."[120] Lastly, the Court noted that the pleading was defective because it omitted to expressly state a definite act or threat in furtherance of the improper purpose.[121]

The Court held that parties in a regulatory process do not have a special relationship that gives rise to a duty of care not to make inaccurate statements to the opposite party or the administrative tribunal. The Court recognized that regulatory processes may be adversarial and that "[s]tatements of position made in proceedings are not to be relied on as being true, as the nature of such proceedings assumes a certain degree of advocacy."[122]

Hunt's claim for intentional interference with economic interests failed because it failed to plead an essential element of the tort. Hunt failed to plead that Galleon had committed an unlawful act.

The Court went on to consider Galleon's responding submission that Hunt's claim was itself an abuse of process by reason of being a collateral attack on the ERCB process. Taken as a whole, Hunt's pleading was premised upon the conclusion that the ERCB should not have granted Galleon standing. The Court held that "Hunt cannot claim damages arising from what it alleges to be an erroneous order of the Board."[123] Moreover, the ERCB will be undermined if interveners are potentially subject to tort liability for participation in the ERCB process.[124]

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119 *Ibid* at para 21.
120 *Ibid* at para 24.
121 *Ibid* at para 31.
122 *Ibid* at para 41.
123 *Ibid* at para 80.
124 *Ibid* at para 81.

4. COMMENTARY

The result in *Hunt Oil* is undoubtedly correct; however, some of the reasons are troubling.

The Court's conclusion that statements made in an administrative proceeding are not to be relied upon as being true because they are advocacy, may undermine the administrative process. Administrative tribunals, no less than courts, rely on participants to tell the truth. Evidence in administrative tribunals is frequently given under oath or affirmation, and counsel practicing before administrative tribunals are bound by the same oath of office and *Code of Professional Conduct* as counsel acting before the courts.[125] There can be no question that participants before an administrative tribunal have a duty to tell the truth and not to mislead the tribunal. The Court in *Hunt Oil* may have been on more solid ground, concluding that, while there is a duty not to mislead an administrative tribunal, such a duty is not enforceable by way of a private tort action. Instead, administrative tribunals possess the powers to discipline participants for being untruthful or misleading. As a result, an additional safeguard in the form of a private action is unnecessary and the existence of a tort duty is negated on policy grounds.

The allegations in *Hunt Oil* remind us of the possibility that energy regulatory processes could be used for questionable competitive purposes. The Court makes a persuasive case of why tort liability is not the answer to competitive misuse of the energy regulatory process, but it cannot give more than a statement of faith that administrative tribunals will police the misuse of their process. Given the amount of money that can be at risk in energy regulatory processes, it is not clear that costs alone, at least costs at the levels typically seen in energy regulatory processes, are sufficient to dissuade parties from misusing the regulatory process for competitive purposes.

E. *GREAT LAKES POWER LTD V ONTARIO (ENERGY BOARD)*[126]

1. BACKGROUND

The Ontario Energy Board (OEB) is responsible for approving electricity rates that utilities charge to consumers, pursuant to section 78(3) of the *Ontario Energy Board Act, 1998*.[127] The ordinary rate-setting regulatory process of the OEB was interrupted by legislation enacted in December 2002, which froze electricity rates temporarily until the legislation's repeal on 9 December 2004.[128]

Great Lakes Power illustrates the consequences of the interplay between such legislation and the OEB's dual responsibilities of ensuring fair prices for electricity consumers, on the one hand, and fair opportunities for cost recovery and profit for electricity utilities, on the

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125 For example, chapter 10, rule 14 of the *Code of Professional Conduct* states that "A lawyer must not mislead the court nor assist a client or witness to do so." Law Society of Alberta, *Code of Professional Conduct* (Calgary: Law Society of Alberta, 2009) at 10-2, online: Law Society of Alberta <http://www.lawsociety.ab.ca/files/regulations/Code.pdf>.

126 2010 ONCA 399, 262 OAC 245, aff'g (2009), 253 OAC 1 (Div Ct), leave to appeal to SCC refused, 33812 (9 December 2010) [*Great Lakes Power*].

127 SO 1998, c 15, Schedule B.

128 *Great Lakes Power*, *supra* note 126 at para 4.

other. Significantly, the case concerns a tumultuous period in the history of Ontario's electricity regulation policy, at the front end of several years of back and forth between deregulation and re-regulation of the province's electricity generation and supply.

2. FACTS

In 2002, Great Lakes Power Ltd (GLP) applied to the OEB for rate approval. GLP applied based on a revenue requirement of $12.7 million per year, meaning that the rates it sought would result in a perceived fair revenue to it of $12.7 million for each year in which the sought-after rate would be in effect. In order to avoid shocking its consumers with the higher rates, GLP's application sought rates based on a revenue requirement of only $9.8 million per year, with the remaining $2.9 million to be recovered from consumers later under a proposed rate deferral plan.

On 13 May 2002, the OEB issued an interim order approving rates that corresponded to the $9.8 million revenue requirement, pending a full public hearing. Before the public hearing could take place, however, the Ontario government enacted legislation (Bill 210[129]) which froze electricity rates and deemed any existing interim orders of the OEB to be final. Bill 210 was repealed on 9 December 2004.

In August 2007, GLP applied to the OEB for approval of its rates for 2007, which included a claim for the amount accumulated under the rate deferral plan. The OEB rejected GLP's application. The Divisional Court upheld the OEB's decision, using a standard of review of reasonableness.

GLP appealed the Divisional Court decision. Its primary argument was that the OEB approved the $12.7 million revenue requirement and the rate deferral plan in its 2002 interim order, and the interim order became final by virtue of Bill 210. Secondly, GLP argued that the Divisional Court decision denied GLP the opportunity to realize a fair and reasonable return on investment, an opportunity to which it is entitled pursuant to the objectives of Ontario's electricity regulation legislation.

3. DECISION

The Court of Appeal dismissed GLP's appeal. The Court of Appeal held that the 2002 interim order did not constitute approval of the $12.7 million revenue requirement nor of the rate deferral plan.[130] Contrary to GLP's argument, the OEB was silent on both topics and simply approved the $9.8 million pending a full public hearing.[131] Thus, Bill 210 cannot have rendered final that which was not considered such in the 2002 interim order.[132]

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129 *An Act to amend various Acts in respect of the pricing, conservation and supply of electricity and in respect of other matters related to electricity*, 3rd Sess, 37th Leg, Ontario, 2002 (repealed by *An Act to amend the Ontario Energy Board Act, 1998 with respect to electricity pricing*, SO 2003, c 8) SO 2002, c 23.

130 *Great Lakes Power*, *supra* note 126 at para 16.

131 *Ibid* at paras 3, 15.

132 *Ibid* at para 18.

Moreover, the Court of Appeal, although sympathetic, stated that GLP's right to a fair return on its investment did not support finding in GLP's favour. The objective of fairness to GLP, "no matter how compelling, [could not] justify a redefinition of the terms of the interim order."[133] The 2002 interim order simply did not support the result that GLP sought in its 2007 application.

The Court of Appeal held that there was no unfairness to GLP because it was still entitled to go before the OEB to seek the same outcome in terms of revenue requirement and rate deferral plan, but subject to a proper prudency review.[134] In fact, the justices encouraged GLP to do so, stating, "in our view, that would be the best result."[135] Nonetheless, the Court of Appeal conclusively determined that "[a] public utility must undergo a prudency review before passing along its costs to consumers."[136] Such a prudency review requirement was not abolished by the operation of Bill 210.

4. COMMENTARY

This case serves an important purpose in light of the great flux the Ontario electricity regulatory system has experienced in the last decade. Although the term was only repeated in *obiter dicta*, the Court of Appeal in *Great Lakes Power* is strongly guided by the concept of the "regulatory compact"[137] — the objective behind public utility regulation which requires a mindful balancing of the rights and interests of utilities against those of ratepayers.

The Court of Appeal does not disagree that the interim order granted to the utility in 2002 was made final by Bill 210. However, the Court of Appeal held that it is inconceivable and contrary to regulatory practice that the OEB would approve such a large amount without stakeholder consultation and a more complete evidentiary record — in other words, costs will not be passed on to customers without the usual prudency review process, including, "among other things, notice to interested parties and an opportunity for them to present submissions at a hearing."[138] The Court of Appeal has put utilities and the Ontario government on notice that no act of the Legislature will absolve the OEB of its responsibility to regulate in the ordinary course, with all the safeguards at its disposal to ensure a proper balancing of interests between utilities and ratepayers. Finally, the Court of Appeal held that regulatory boards such as the OEB are to be given a high degree of deference when making regulatory decisions, and as a result, reviewed the case on a standard of review of reasonableness.

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133 *Ibid* at para 20.
134 *Ibid* at paras 21, 23.
135 *Ibid* at para 25.
136 *Ibid* at para 22.
137 *Ibid* at para 24. For a discussion of the "regulatory compact," see Dustin Kenall, "De-Regulating the Regulatory Compact: The Legacy of *Dunsmuir* and the 'Jurisdictional' Question Doctrine" (2011) 24:1 Can J Admin L & Prac 115.
138 *Great Lakes Power*, *supra* note 126 at para 12.

F. *SMITH V ALLIANCE PIPELINE LTD*[139]

1. BACKGROUND

Alliance Pipeline Ltd (Alliance) obtained approval from the National Energy Board (NEB) in 1998 to build a pipeline across land owned by Mr. Smith. However, Alliance failed to perform certain reclamation work required by the easement agreement between the parties. Smith completed the reclamation work and presented an invoice to Alliance of approximately $10,000. Alliance offered to pay $2,500.

2. FACTS

Smith commenced an arbitration proceeding pursuant to the *National Energy Board Act*.[140] The arbitration was aborted because one of the arbitrators was appointed to the bench. A second arbitration was commenced before a new committee of arbitrators (the Second Arbitration Committee). Alliance also commenced an Alberta Court of Queen's Bench action against Smith seeking access to his lands, outside the pipeline easement, to perform maintenance work. The Court of Queen's Bench action was eventually discontinued and the second arbitration was resolved in Smith's favour. The second arbitration resulted in an order requiring Alliance to pay Smith's invoice for reclamation work, part of his costs from the first arbitration, part of his costs from the discontinued Court of Queen's Bench action, and his costs of the second arbitration on a solicitor-client basis. The decision in the second arbitration was upheld by the Federal Court on a judicial review application and then overturned by the Federal Court of Appeal.

3. DECISION

The question before the Court was whether the word "costs" in section 99(1) of the *NEBA* refers only to expenses incurred in relation to the specific arbitration proceeding for which the costs award is made or whether it may have a broader meaning that extends to related proceedings. The Court held that the review of the Second Arbitration Committee's interpretation of "costs" was subject to the reasonableness standard rather than the correctness standard. Reasonableness was the appropriate standard because the Second Arbitration Committee was interpreting its governing statute and because of the discretionary and fact-dependent nature of costs decisions.[141]

The Court found that it was reasonable to compensate Smith for costs incurred in the first arbitration, Court of Queen's Bench action, and second arbitration given that each of those proceedings were seeking "compensation in respect of a single expropriation by a single expropriating party."[142] The Court further explained that full indemnification was consistent with the purpose of the *NEBA* expropriation provisions and expropriation law more

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139 2011 SCC 7, [2011] 1 SCR 160 [*Alliance*].

140 RSC 1985, c N-7 [*NEBA*].

141 Justice Deschamps, dissenting in *Alliance*, *supra* note 139 at paras 78-80, agreed that the correct standard was reasonableness but disagreed with the majority's reliance on the fact that the Second Arbitration Committee was interpreting its home statute.

142 *Ibid* at para 48 [emphasis omitted].

generally. The Court concluded by noting that "this is a case in which 'justice can only be done by a complete indemnification for costs'"[143] and that Smith should not have to bear the costs of being a test case for Alliance.

4. COMMENTARY

The Court's decision in *Alliance* seems to reflect the Court's view of Alliance's conduct. Alliance failed to meet its contractual obligations to reclaim Smith's land, failed to pay Smith when he reclaimed the land for Alliance, and then engaged in protracted litigation to defend its position. The Court's deferential stance toward the Second Arbitration Committee and statements in favour of the indemnity principle in the context of expropriation cases will support future claims for full indemnification in similar circumstances.

G. *HANNA V ONTARIO (AG)*[144]

1. BACKGROUND

Ontario promulgated its *Renewable Energy Approvals* under Part V.0.1 of the Act[145] regulation under the *Environmental Protection Act*[146] in 2009. The challenged sections of the *REA* regulation prescribe minimum setback requirements for wind energy facilities and require compliance with the *Noise Guidelines for Wind Farms: Interpretation for Applying MOE NPC Publications to Wind Power Generation Facilities*,[147] published by the Ontario Ministry of the Environment.

2. FACTS

The applicant sought judicial review of the Minister of Environment's decision to promulgate the *REA* regulation. The basis for the application for judicial review was that the Minister contravened the Ontario *Environmental Bill of Rights, 1993*.[148] In particular, the Minister was alleged to have failed to consider the Ministry statement of environmental values as required by section 11 of the *EBR*. The statement of environmental values requires, among other things, that the Ministry use a "precautionary science-based approach in its decision making to protect human health and the environment."[149] The applicants submitted that there was medical uncertainty about the effect of wind turbines on human health and that the Minister had failed to respect the precautionary science-based approach by failing to get any medical evidence.

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143 *Ibid* at para 76, citing *Foulis v Robinson* (1978), 92 DLR (3d) 134 at 142 (Ont CA).
144 2011 ONSC 609, 105 OR (3d) 111 [*Hanna*].
145 O Reg 359/09 [*REA*].
146 RSO 1990, c E.19.
147 Ontario Ministry of the Environment, *Noise Guidelines for Wind Farms: Interpretation for Applying MOE NPC Publications to Wind Power Generation Facilities* (Toronto: Queen's Printer for Ontario, 2008), online: Ontario Ministry of the Environment <http://www.ene.gov.on.ca/stdprodconsume/groups/lr/@ene/@resources/documents/resource/std01_079435pdf>.
148 SO 1993, c 28 [*EBR*].
149 *Hanna*, *supra* note 144 at para 3.

3. DECISION

The Court observed that the adoption of a regulation is not subject to judicial review unless it was done "without authority or is unconstitutional."[150] Adoption without authority includes enacting a regulation without complying with a condition precedent.[151] The alleged condition precedent in the present case is section 11 of the *EBR*. In particular, the applicant took the position that the Minister could not comply with the requirement of a precautionary science-based approach without obtaining medical evidence.

The Court concluded that the Minister's review satisfied the precautionary science-based approach because it included engineering opinions and reports from, among others, the World Health Organization. The Court went on to note that in any specific application to approve the installation of a wind turbine, "the adequacy of the minimum setback could be challenged."[152]

4. COMMENTARY

Hanna shows that renewable energy projects are not immune to the type of community-based challenges faced by traditional energy projects. Wind farms, in particular, face objections on aesthetic and health grounds. Given the statements of the Court, we are likely to see regulatory challenges and perhaps court actions concerning the minimum setback for wind turbines on a project-by-project basis. Despite the likelihood of future litigation, project proponents should take some comfort in the Court's conclusion that medical evidence is not always required to satisfy the precautionary science-based approach in the Ministry's statement.

III. CONFLICT OF LAWS

A. *KUWAIT AIRWAYS CORPORATION V IRAQ*[153]

1. BACKGROUND

The principle of state immunity for sovereign acts is well enumerated and internationally recognized. Only in very specific circumstances, when particular exceptions are met, will a Canadian court exercise jurisdiction over actions of a foreign state. In *Kuwait Airways*, the Court considered the applicability of the commercial activities exception to Canada's *State Immunity Act*[154] and clarified the approach in determining whether such an exception applies. This decision is of interest to energy lawyers because of the many foreign state-owned energy companies active in Canada.

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150 *Ibid* at para 11.
151 *Ibid*.
152 *Ibid* at para 33.
153 2010 SCC 40, [2010] 2 SCR 571 [*Kuwait Airways*].
154 RSC 1985, c S-18 [*SIA*].

2. FACTS

In 1990 the Iraqi government ordered the appropriation of aircraft and equipment from the Kuwait Airways Corporation (KAC) by the Iraqi Airways Company (IAC). Following the Gulf War, KAC brought an action in the United Kingdom for damages arising from the failure to return all of its appropriated aircraft and equipment. In 2008, the High Court of Justice awarded KAC damages totalling over CDN$1 billion and costs against Iraq in the amount of approximately CDN$84 million.[155] This award was based on the finding that Iraq's acts could not be considered to have fallen within the protection of the *State Immunity Act 1978* (UK)[156] as its control and funding of IAC's defence, which were intended to deceive the Court, were not sovereign acts but rather fell within the commercial exception to state immunity.

KAC applied to the Quebec Superior Court to have the UK judgment recognized in Quebec in order to seize assets of Iraq located in Montreal. The Quebec Superior Court and Court of Appeal for Quebec held that Iraq was entitled to immunity in Canadian courts under the *SIA* and that Iraq's actions were sovereign acts that did not fall within the commercial activity exception. KAC then appealed to the Supreme Court of Canada.

3. DECISION

Section 5 of the *SIA* provides that "[a] foreign state is not immune from the jurisdiction of a court in any proceedings that relate to any commercial activity of the foreign state."[157] The Court must consider both the state's act and its purpose. The initial action of appropriating the aircraft and equipment was a sovereign act. However, the retention and use of the aircraft and equipment by IAC (a state-owned enterprise) were commercial acts.[158] The Supreme Court of Canada stated that the Quebec Superior Court and the Court of Appeal for Quebec incorrectly characterized the issue as the seizure of the aircraft and equipment by Iraq. The Court stated that the UK litigation was actually commercial litigation relating to the use of the seized aircraft and equipment, and therefore, not immune by virtue of the *SIA* because the exception in section 5 of the *SIA* applied. The commercial activity exception applied because Iraq intervened to defend IAC in the UK action relating to the retention of the aircraft and equipment, not their initial seizure.

4. COMMENTARY

The Supreme Court of Canada in *Kuwait Airways* clarified the approach to be taken in determining whether the "commercial activity" exception to the *SIA* will apply to enable it to have jurisdiction over the actions of a foreign state. As provided above, a court must review the nature of the acts in issue in the full context of the case, including the purpose of the acts, to determine whether it would fall within the commercial activity exception.

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155 *Kuwait Airways*, *supra* note 153 at para 2, citing *Kuwait Airways Corporation v Iraqi Airways Company*, [2008] EWHC 2039 (QBD (Technology and Construction Court)).

156 *State Immunity Act 1978* (UK), c 33.

157 *SIA*, *supra* note 154, s 5.

158 *Kuwait Airways*, *supra* note 153 at para 35.

IV. CONTRACTS

A. *PETROBANK ENERGY AND RESOURCES LTD V RFG CP NO 1 LTD*[159]

1. BACKGROUND

Courts reject the use of interpretive aids or extrinsic evidence when faced with interpreting contracts that are clear and unambiguous on their face. This was confirmed by Justice Iacobucci in *Eli Lilly & Co v Novopharm Ltd*, where he added:

> In the words of Lord Atkinson in *Lampson v. City of Quebec* (1920), 54 D.L.R. 344 (P.C.), at p. 350:
>
> > … the intention by which the deed is to be construed is that of the parties as revealed by the language they have chosen to use in the deed itself.… [I]f the meaning of the deed, reading its words in their ordinary sense, be plain and unambiguous it is not permissible for the parties to it, while it stands unreformed, to come into a Court of justice and say: "Our intention was wholly different from that which the language of our deed expresses."[160]

However, where a contract is not plain and unambiguous, a court may consider extrinsic evidence and look to the background and surrounding circumstances to determine "the true intent of the parties at the time of entry into the contract."[161]

2. FACTS

In 2004 Petrobank Energy and Resources Ltd (Petrobank) sought to attract an investor that would provide sufficient funds to field test a novel oil sands recovery process in exchange for shares in Whitesands Insitu Ltd (the Shares), an entity that owned approximately 40,000 acres of oil sands leases in northern Alberta. With the help of TD Securities Inc (TD), Petrobank was able to attract investment from Richardson Capital Ltd, which owned or controlled and managed the plaintiffs (collectively, the Investors).

On 3 March 2005, the parties signed a memorandum of understanding (the MOU). A unanimous shareholders agreement (the USA) was later signed on 22 March 2005. Under the terms of the USA, the Investors had an exchange right (the Exchange Right), which allowed them, following valuation, to exchange all their Shares for "cash and/or Petrobank shares or Substitute Entity equity securities."[162] Under the terms of the Exchange Right, the amount of cash and/or Petrobank shares to be received in exchange for the Shares would be equal to the fair market value (FMV) of the Shares, as determined by a valuator.

Importantly, while the MOU was not meant to be a binding agreement, it explicitly stated that with respect to the Exchange Right, the FMV of the Shares would be equal to "the value

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159 2010 ABQB 114, 495 AR 28 [*Petrobank*].
160 [1998] 2 SCR 129 at para 55.
161 *Consolidated-Bathurst Export Ltd v Mutual Boiler and Machinery Insurance Co*, [1980] 1 SCR 888 at 901.
162 *Petrobank*, *supra* note 159 at para 17.

or mid-point of the range of values," as determined by the valuator.[163] On the other hand, the USA did not explicitly specify what price would be paid if the valuator were to set a range of values for the Shares.

On 12 April 2007, the Investors requested a valuation of their Shares, which was performed by TD. The valuation did not set a specific price for the Shares but rather stated that the FMV was a range between $120 and $160 per share. Petrobank adopted the position that the Exchange Right allowed them to specify the value of the Shares, and determined the value to be $120 per Share.[164] On 11 May 2007, the Investors responded by exercising their Exchange Right, while placing Petrobank on notice that they did not accept the $120 per Share value and reserving "all rights and remedies with respect to a determination by the courts as to the fair market value following the exercise of the Exchange Right."[165]

3. DECISION

Faced with a USA that was unclear on how the FMV was to be set for the Shares as a result of a range of values provided by TD, the Court was tasked with determining whether the Shares' FMV was $120 or an alternate price, such as the mid-range price favoured by the Investors. As stated by Justice Hawco, the issues in this case were two-fold:

1. …whether the parties made a mistake in failing to incorporate into the USA the words of the MOU or the idea of how to value the shares in event a range was given by the valuator?

2. If the parties did make a mistake, may the Court amend or rectify the USA to provide for that idea to be incorporated?[166]

Petrobank advanced the argument that the language used in the Exchange Right clause gave it the ability to specify the amount if it was faced with a range of values. However, Justice Hawco disagreed and found that the USA was clear in that the FMV was to be determined by the valuator. Instead, the terms of the USA did not provide the price to be paid for the FMV of the Shares in the event that the valuator set a range of values. As a result, the contract was not plain and unambiguous. In order to establish the intentions of the parties, the Court examined the extrinsic evidence leading up to the execution of the USA.

Although the USA had an entire agreement clause, Justice Hawco held that the parties had always intended to incorporate the language of the MOU into the USA. It was determined that such language was not included as a result of mutual mistake. This conclusion was reached, in part, due to evidence of a clearly expressed intent to incorporate into the definitive agreement a method of resolving this dilemma, as demonstrated in the MOU. During the trial, Petrobank "admitted that the MOU was indeed an expression of the parties intentions."[167] Justice Hawco found that there was no evidence to suggest that the language regarding the Exchange Right in the MOU had been negotiated out.

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163 *Ibid* at para 28.
164 *Ibid* at paras 18-19.
165 *Ibid* at para 21.
166 *Ibid* at para 62.
167 *Ibid* at para 68.

Justice Hawco determined that the facts of this case met the test for rectification, as highlighted in *Bank of Montreal v Vancouver Professional Soccer Ltd*:

> Before rectification can be obtained, the applicant must establish:
>
> 1. that the written instrument does not reflect the true agreement of the parties;
>
> 2. that the parties shared a common continuing intention up to the time of signature that the provision in question stand as agreed rather than as reflected in the instrument.[168]

As such, rectification was awarded and the language of the MOU was incorporated into the USA. The FMV of the Shares was set to be the mid-point of the range determined by TD, at $140 per Share.

4. COMMENTARY

While several factors contributed to the final result, it is interesting to note that the Court found in favour of the Investors despite the fact that they were "very sophisticated" investors and were equipped with "experienced and capable counsel."[169] The language in the MOU, omitted in all drafts of the USA, was simply missed. In addition, there was no mention of the language in the MOU throughout the ongoing correspondence between the parties. Instead, it was not until the Amended Statement of Defence and Counterclaim was filed that the Investors raised the issue of a mistake having been made.[170] The Court in *Petrobank* went to great lengths to determine the original intent of the parties. It will be interesting to see whether *Petrobank* signals a new willingness on the part of courts to look beyond the express terms of contracts or whether it is an anomaly.

B. *LYATSKY GEOSCIENCE RESEARCH AND CONSULTING LTD V GEOCAN ENERGY INC*[171]

1. BACKGROUND

Generally, a formal written assignment and novation agreement or notice of assignment is necessary to establish a person as a party to an agreement. However, a Canadian court may, in certain circumstances, exercise its discretion to conclude that "a party can be novated into an agreement by course of conduct."[172] Further, where an agreement is susceptible to two or more reasonable interpretations, subsequent conduct of the parties to the agreement can be relied upon to resolve ambiguity.[173]

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168 *Ibid* at para 76, citing *Bank of Montreal v Vancouver Professional Soccer Ltd* (1987), 15 BCLR (2d) 34 at para 11 (CA).

169 *Petrobank*, *supra* note 159 at para 32.

170 *Ibid* at para 44.

171 2009 ABPC 392, [2009] AJ no 1441 (QL) [*Lyatsky Geoscience*].

172 *Ibid* at para 15, citing *Herold v British American Oil Co* (1954), 12 WWR (NS) 333 (Alta SC).

173 *Lyatsky Geoscience*, *supra* note 171 at para 12.

2. FACTS

On 1 November 2003, Lyatsky Geoscience Research and Consulting Ltd (Lyatsky) and Lloyd Venture 1 Inc (Lloyd) entered into a written agreement (the Lyatsky GORR Agreement) whereby Lloyd granted a gross overriding royalty of 3 percent on 100 percent of production to Lyatsky on various working interests owned by Lloyd (the Lyatsky GORR). The Lyatsky GORR was to be paid from Lloyd's working interest. On 10 February 2004, Lloyd, as farmor, entered into a master farmout agreement (MFA) with Westerra 2000 Inc (Westerra), as farmee. Under the MFA, Lloyd farmed out its interest in various lands, including those subject to the Lyatsky GORR. Westerra drilled on the subject lands and earned 100 percent of Lloyd's working interest. Under the MFA, the Lyatsky GORR was a permitted encumbrance on the lands.

In October of 2004, Lloyd contacted Westerra to inform them that Dr Lyatsky had received a royalty cheque, however, it did not appear that the Lyatsky GORR had been calculated correctly. Westerra's land manager at the time, Boyle, responded by forwarding a cheque for the alleged deficiency. All subsequent royalty cheques were, in Lloyd and Lyatsky's view, properly calculated and paid until June of 2006 when Westerra became a wholly owned subsidiary of Geocan Energy Inc (Geocan). At that time, Geocan wrote to Lloyd and Lyatsky advising that it felt an accounting error had been made with regard to the Lyatsky GORR. Geocan then ceased making royalty payments altogether and requested repayment from Lloyd and Lyatsky for what it argued were overpayments made under the Lyatsky GORR. Lloyd and Lyatsky disputed the cessation of payments and brought an action for underpayment through to February 2008.

The issues in dispute were: (1) whether Geocan was responsible for the Lyatsky GORR; and (2) if so, at what rate. Geocan took the position that in the absence of a written assignment of the Lyatsky GORR it was not responsible for royalty payments, as the Lyatsky GORR did not run with the land.[174]

3. DECISION

The Alberta Provincial Court found that the royalty portion of the MFA was unclear and ambiguous. Lyatsky was not, however, a party to the MFA. In order to resolve the ambiguity in the MFA, it was deemed necessary to consider what Westerra (now Geocan), as farmee, knew and had assumed at all relevant times.[175]

The Court found that the record clearly showed that Westerra was aware it had assumed a royalty payable to Lyatsky of 3 percent on 100 percent of production. Westerra's land manager, Boyle, was the employee responsible for negotiation of the MFA on behalf of Westerra at the time. He had inquired after the Lyatsky GORR by way of an email five days prior to the execution of the MFA: "I will require a copy of your GORR agreement with the Geologist including the lands that are encumbered by the Royalty."[176]

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174 *Ibid* at para 11.
175 *Ibid*.
176 *Ibid* at para 7.

The Court inferred that this information was logically requested so that Westerra could understand the burdens it was to assume upon entering the MFA. The evidentiary record also showed that Westerra had kept a copy of the Lyatsky GORR Agreement for its records. Unlike the MFA, the Lyatsky GORR Agreement was clear as to how the royalty should be quantified and that the royalty was an interest in the land.[177] Quoting the Alberta Court of Appeal in *Scurry-Rainbow*, the Court relied on the following principle: "[W]here the agreement is susceptible of two or more reasonable alternative meanings, evidence of the subsequent conduct of the parties is admissible as an aid to resolving the ambiguity if the conduct is more consistent with one interpretation than the other."[178]

The Court determined that Boyle's payments from 2004 to 2006 on behalf of Westerra showed an acknowledgment of the royalty rate as set out in the Lyatsky GORR Agreement. Further, in March 2008 Westerra had assigned its interests subject to the Lyatsky GORR Agreement to Husky Oil Operations (Husky). To allow Westerra to insist its intent was to novate Husky into an agreement it did not consider itself a party to would be illogical.[179]

While no formal written assignment and novation agreement or notice of assignment had been entered into between Lloyd, Lyatsky, and Westerra, the Court relied on case law that had previously held that a party could be novated into an agreement by course of conduct.[180] In this case, Westerra was considered a party to the Lyatsky GORR Agreement due to its conduct.

The Court granted judgment in favour of Lyatsky and dismissed Geocan's claim against Lyatsky and Lloyd.

4. COMMENTARY

Where ambiguity exists in contractual interpretation, subsequent conduct may prove invaluable in establishing a resolution consistent with one approach over another. Prior to launching an action, a party should take careful note of all relevant conduct by a predecessor entity who is a party to an original agreement. This conduct may well influence a court's interpretation of a contract. However, while the Court held that the parties conduct essentially resulted in a novation, this decision may be suspect in light of previous authorities on the subject that "suggest that it is very difficult to establish novation by course of conduct."[181] As such, this decision provides a useful illustration for when a court will find novation by course of conduct, however, such decision may not necessarily be followed by other courts.

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177 *Ibid* at para 11.

178 *Ibid* at para 12, citing *Scurry-Rainbow*, *supra* note 98 at para 45.

179 *Ibid* at para 14.

180 *Ibid* at para 15.

181 Nigel Bankes, "Provincial Court royalty calculation decision" ABlawg.ca (11 January 2010) at 2, online: ABlawg.ca <http://ablawg.ca/wp-content/uploads/2010/01/blog_nb_lyatsky_abpc_jan2010 .pdf>, referring to: *National Trust Company v Mead*, [1990] 2 SCR 410; *Canada Southern Petroleum Ltd v Amoco Canada Petroleum Co*, 2001 ABQB 803, 300 AR 201.

C. *CCS CORPORATION V SECURE ENERGY SERVICES INC*[182]

1. BACKGROUND

The Court in *CCS* was asked to amend a statement of claim to significantly broaden the scope of a constructive trust claim. The Court considered the required elements for a party to plead constructive trust and followed the Supreme Court of Canada decision in *Soulos v Korkontzilas*.[183] A constructive trust may be found for wrongful conduct and need not necessarily be limited to claims of unjust enrichment.

2. FACTS

CCS Corporation (CCS) brought an application to the Alberta Court of Queen's Bench to amend its statement of claim and enlarge the scope of the constructive trust it was seeking against Secure Energy Services Inc (Secure), Triumph EPCM Ltd (Triumph), Pembina Pipeline Corporation (Pembina), and various former individual CCS employees (collectively, the Secure Defendants). CCS and Secure were competitors in the Alberta oil field waste disposal industry. Secure was the successor corporation to both Secure Energy Services Inc and 1232711 Alberta Inc, which were incorporated by the defendants Daniel Steinke and Rene Amirault, respectively. Steinke and Amirault were former employees of CCS.[184]

CCS alleged that Steinke, Amirault, and various other former employees of CCS had provided confidential information to Secure and Triumph. CCS also argued that Pembina had encouraged Steinke and Amirault to establish Secure in the wake of unsuccessful negotiations between Pembina and CCS. Finally, CCS alleged that Pembina went on to conspire with former CCS employees "to use CCS confidential information to develop and augment a number of Pembina/Secure joint ventures."[185]

CCS had "already claimed a constructive trust over all profits made by Secure based on or derived from CCS confidential information."[186] Under this application, CCS sought to add a constructive trust over the entire business of the Secure/Pembina joint ventures and each of the real property assets within that business, including eight facilities owned and operated by Secure. Secure countered that "the proposed constructive trust amendment [was] both hopeless and seriously prejudicial."[187] Secure maintained that a preliminary finding of unjust enrichment would be necessary before a constructive trust could be considered as a remedy. Secure further argued that CCS would not be able to establish the necessary elements of unjust enrichment.[188]

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182 2010 ABQB 466, 495 AR 191 [*CCS*].
183 [1997] 2 SCR 217 [*Soulos*].
184 *CCS*, *supra* note 182 at para 2.
185 *Ibid*.
186 *Ibid* at para 10.
187 *Ibid*.
188 *Ibid* at para 12.

3. DECISION

The Court of Queen's Bench acknowledged case law from the Supreme Court of Canada, which firmly holds that the remedy of constructive trust is not limited solely to claims of unjust enrichment. In *Soulos*, Justice McLachlin (as she was then) ruled that "constructive trusts are recognized both for wrongful acts like fraud and breach of duty of loyalty, as well as to remedy unjust enrichment and corresponding deprivation."[189]

Justice McLachlin went on to identify four conditions required before a court would impose a constructive trust based on wrongful conduct:

> (1) The defendant must have been under an equitable obligation … in relation to the activities giving rise to the assets in his hands;
>
> (2) The assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiff;
>
> (3) The plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties and;
>
> (4) There must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case.[190]

A constructive trust, therefore, may be ordered where there is unjust enrichment *or* wrongful conduct that meets the four *Soulos* requirements, above. Secure could not succeed on their argument that a preliminary finding of unjust enrichment was a necessary precondition to a constructive trust remedy.

The *Soulos* considerations emphasize that a direct connection is required between the "equitable obligation and agency activities of the defendants and the particular assets over which the constructive trust is sought."[191] In other words — it is essential to establish that the assets over which the constructive trust is sought are in the hands of the defendants *because* of the breach. In this application, the Court of Queen's Bench found there was not sufficient evidence to ground a constructive trust over the broadened scope of assets claimed by CCS.[192]

Secure had "not come into properties that CCS would otherwise have acquired.… [A]ssuming the allegations to be true," Secure had improperly used CCS information "to obtain a competitive advantage in the marketplace that is compensable in damages or remedied by a constructive trust over Secure's profits" — not the entirety of assets as was being argued by CCS.[193]

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189 *Soulos*, *supra* note 183 at para 43.
190 *Ibid* at para 45.
191 *CCS*, *supra* note 182 at para 18.
192 *Ibid* at para 24.
193 *Ibid*.

The Court of Queen's Bench ruled that the entirety of business and real property assets within the business of Secure and the Secure/Pembina joint ventures was "not appropriate subject matter for a constructive trust."[194] The enlarged claim would be "hopeless" and the application to amend the CCS statement of claim was denied on this ground.[195] It was not necessary, therefore, for the Court to determine whether the amendment was also prejudicial.[196]

4. COMMENTARY

The remedy of constructive trust is not limited to claims of unjust enrichment and will include wrongful acts where the four conditions, as laid out in *Soulos*, are met. The *Soulos* considerations emphasize the necessity for a direct connection between the assets over which a constructive trust is sought and the breach. In their absence, a Canadian court may deem a claim for constructive trust hopeless and the scope and remedial capacity of the constructive trust doctrine will be limited.

V. ENVIRONMENTAL

A. *FORTISALBERTA INC: MICRO-GENERATION DETERMINATION*[197]

1. BACKGROUND

The *Micro-Generation Regulation*[198] came into effect in early 2009 and provides customers with credits for excess electricity delivered to the electricity grid. A customer must apply to the AUC to qualify as a micro-generator and to their particular distributor to get approval to connect the micro-generator. The benefits of qualifying as a micro-generator would be the most significant for an industrial consumer that is able to use what was once waste to obtain electricity credits.

2. FACTS

Great Northern Power Corporation (GNP), on behalf of AltaGas Ltd, submitted a micro-generation application to FortisAlberta Inc (Fortis) on 1 March 2010. The application was for GNP to construct and operate a waste heat recovery generating unit (Generating Unit) at AltaGas' Mosquito Creek compressor station. The Generating Unit would recover waste heat from reciprocating engines used to power the natural gas compressors and would generate electricity to be used to meet a portion of AltaGas' power needs for Mosquito Creek. On 30 March 2010 Fortis filed a notice of dispute with the AUC stating that it was unclear whether the Generating Unit satisfied the requirements to be classified as a micro-generator under the *Micro-Generation Regulation*.

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194 *Ibid* at para 27.
195 *Ibid*.
196 *Ibid* at para 28.
197 AUC Decision 2010-274 (15 June 2010) [*FortisAlberta*].
198 Alta Reg 27/2008.

3. DECISION

The AUC reviewed the application to determine whether the Generating Unit met the criteria set forth in the *Micro-Generation Regulation* for a micro-generation generating unit. The AUC concluded that generating electricity from waste heat is akin to solar, hydro, and wind power in that it utilizes existing energy. Accordingly, waste heat recovery is "renewable or alternative energy" under the *Micro-Generation Regulation*. The AUC also found that the Generating Unit met the conditions in the *Micro-Generation Regulation* regarding size and end use of energy and therefore concluded that it met the definition of a micro-generation generating unit in the *Micro-Generation Regulation*.

4. COMMENTARY

An industrial customer can enjoy significant cost savings if it is able to meet the criteria in the *Micro-Generation Regulation* for a micro-generator. Not only will an industrial consumer be able to offset its electricity costs, but it will also be the responsibility of the distributor to pay the costs of interconnection and the customer's retailer to manage the administration and billing costs. While it was previously clear that the *Micro-Generation Regulation* was applicable to traditional renewable sources of energy, such as solar and wind power, the AUC in *FortisAlberta* broadened the scope of this regulation to include energy generated as a by-product of an industrial activity. The AUC stated that: "Generating electricity from this energy source, like the sun shining, water falling, or wind blowing, utilizes existing energy, which in this case is generated incidentally to the underlying customer's industry."[199]

Potentially, the AUC's decision could provide opportunities for many industrial producers in the province to offset electricity costs.

B. *WESTERN COPPER CORPORATION V YUKON WATER BOARD*[200]

1. BACKGROUND

Yukon has a unique environmental regulatory regime. The *YESAA* is a product of the Umbrella Final Agreement between Yukon, Canada, and eleven Yukon First Nations. *YESAA* takes the place of the *CEAA* and provides a role for First Nations in the environmental assessment process. Generally, projects are reviewed by the Yukon Environmental and Socio-economic Assessment Board (YESAB). YESAB is an arm's-length from the Government of the Yukon and has First Nations representation. On a typical application, YESAB produces a recommendation that is forwarded to a "decision body," which is one or more of the Yukon, Canada, or a First Nation. Once a "decision body" has accepted, rejected, or varied the YESAB recommendations, a permit or authorization is usually issued by the appropriate authority. There are very few court decisions interpreting the provisions of *YESAA*.

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199 *FortisAlberta*, *supra* note 197 at 6.

200 2011 YKSC 16, 57 CELR (3d) 193 [*Western Copper*]. See *supra* notes 3, 17 for references to the *CEAA* and *YESAA*.

2. FACTS

Western Copper Corporation (WCC) applied to the Yukon Water Board (the Water Board) for a type A water license for a proposed copper heap leach mining project northwest of Carmacks, Yukon (the Carmacks Copper Project). The Water Board denied the application for a water licence despite WCC having already obtained a recommendation from YESAB subject to 148 mitigation measures and a decision document from the Yukon accepting the YESAB recommendation (including the mitigation measures).

WCC appealed the Water Board's decision on the grounds that once the Yukon issued its decision document, the Water Board had no jurisdiction to refuse to issue a water license on environmental grounds. In particular, WCC relied upon section 83 of *YESAA*, which states that a territorial agency "shall implement a decision document issued by the territorial minister in respect of the project." WCC also relied on section 86 of *YESAA*, which states that the Water Board may not "set terms of such [water] rights that conflict with such a decision document, to the extent that such a decision document is required to be implemented by a federal agency or a territorial agency, municipal government or first nation." WCC submitted that the "the power or discretion to deny a licence must be exercised in conformity with the decision document."[201]

3. DECISION

The Court made a distinction between the assessment process under *YESAA* and the regulatory process under the *Waters Act*.[202] Completion of the assessment process is a precondition of proceeding to the regulatory process. The assessment process does not replace the regulatory process. The Court emphasized that acceptance of a YESAB recommendation by a decision body through the issuance of a decision document is not the same thing as the granting of a licence or permit.[203] The Court held:

> The Water Board has expressly disagreed with the finding of the executive committee of YESAB that certain aspects of the heap leach technology have been proven to be viable. There is no obligation, statutory or otherwise, for the Water Board to accept the scientific finding from the assessment process. To come to such a conclusion, which is Western Copper's interpretation of the Yukon development assessment and regulatory process, would completely eviscerate the licensing role of the Water Board. In my view, it was never intended that the assessment process' recommendations of socio-economic terms and conditions would trump the regulatory licensing process.[204]

The Court went on to conclude that *YESAA* section 83 only limits the Water Board's discretion when it is taking an action to enable a project to be undertaken. However, the Water Board, in refusing to issue the water licence, was not enabling the Carmacks Copper Project. The Court found support for this interpretation in *YESAA* section 86 which provides

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201 *Ibid* at para 85.
202 SY 2003, c 19.
203 *Western Copper*, *supra* note 200 at para 114.
204 *Ibid* at para 112.

that terms and conditions of a licence cannot conflict with a decision document. Again, the Court noted that there was no conflict because the water licence had not been issued.[205]

4. COMMENTARY

The Court's decision highlights a tension in *YESAA*. On one hand, the Court's conclusion that *YESAA* was not intended to usurp the regulatory process seems reasonable. Why have a Water Board if it is bound by YESAB's decisions? On the other hand, it seems inefficient to have an extensive environmental review process before YESAB, followed by a review by a decision body with power to accept, reject, or vary the YESAB recommendation, followed by yet another review by a permitting or licencing body. This cumbersome regulatory process with its evident risk of conflicting decisions from different bodies is a disincentive to the development of projects in the Yukon.

An equally plausible interpretation of *YESAA* sections 83 and 86 would have been that the Water Board and similar territorial permitting or licencing bodies are not intended to duplicate the work of YESAB or work at cross-purposes to YESAB. This interpretation would bind the Water Board and similar territorial permitting or licencing bodies where YESAB has made recommendations relevant to a permit or licence application. This is not to say that the Water Board ceases to have any discretion. Indeed, the Water Board would retain jurisdiction to: (1) consider matters not subject to *YESAA* assessment; and (2) in matters subject to *YESAA* assessment, consider issues not addressed by YESAB in its recommendation. Since the *YESAA* process is still in its infancy, a more efficient regulatory process may emerge through institutional co-operation or court decisions more attuned to the problem of regulatory inefficiency.

VI. FREEHOLD OIL AND GAS LEASES

A. *DESOTO RESOURCES LTD V ENCANA CORPORATION*[206]

1. BACKGROUND

The terms of the *habendum* clause of a freehold oil and gas lease have been litigated many times. The *habendum* clause provides for the instances in which the primary term of a lease will be extended and most often states that the lease will only continue beyond the primary term where a well has been drilled during the primary term and any of the leased substances continue to be produced or are capable of being produced. As discussed below, the plaintiff's predecessor in interest did not drill a well during the primary term of two freehold leases and the leases were not capable of being continued beyond the primary term; however, the plaintiff sought to establish a claim in estoppel, to extend the term of the lease and establish that it held a valid beneficial interest in the leases.

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205 *Ibid* at para 125.
206 2010 ABQB 448, 491 AR 97 [*Desoto*].

2. FACTS

Pan Canadian Petroleum Ltd (Pan Canadian) (as predecessor in interest to Encana Corporation (Encana)) and Penn West Petroleum (as predecessor in interest to Jofco Resources Inc) entered into two freehold oil and gas leases in 1974 and 1975 (the Leases). Jofco Resources Inc (Jofco) (as predecessor in interest to Desoto Resources Ltd (Desoto)) drilled a number of wells in 1998 that had been shut-in by the EUB. In 1999 Jofco entered bankruptcy proceedings. The Leases were assigned to Numac Energy Inc (Numac) and Pan Canadian agreed to not terminate the Leases in exchange for priority status over other unsecured creditors. The parties subsequently entered into a royalty agreement. In 2003 Encana served a notice of termination of the Leases and the parties that held legal interest on behalf of Desoto agreed with the termination.

In 2008 the EUB concluded that Desoto did not hold a valid interest in the Leases because the wells were not capable of production.[207] Desoto appealed the EUB decision to the Alberta Court of Appeal, challenging the EUB's jurisdiction to rule on the validity of a freehold oil and gas lease. The Court of Appeal dismissed Desoto's application and stated that the EUB has jurisdiction to determine lease validity.[208]

Desoto applied to the Alberta Court of Queen's Bench for a declaration that it held a valid beneficial interest in the Leases. Desoto conceded that there had been no production on the Leases since 1998 and the Leases could not continue for actual production. Rather, Desoto focused on three estoppel arguments in an attempt to show that the Leases were still valid and subsisting. It argued that the Leases should be continued on the basis of: (1) promissory estoppel, (2) estoppel by acquiescence, or (3) estoppel by deed.[209]

3. DECISION

The Court of Queen's Bench dismissed all of Desoto's estoppel arguments. With respect to promissory estoppel, the Court stated there had been no existing legal relationship between the parties when the representations or actions leading to the estoppel had been made or taken.[210] The legal relationship between Desoto's predecessor and Encana had ceased when the Leases had expired on their own terms as a result of lack of production, therefore, any representations made at the time of the bankruptcy filing did not give rise to promissory estoppel because the Leases had already expired and a legal relationship no longer existed. Further, the Court also dismissed Desoto's argument on estoppel by acquiescence because Encana's actions could not be said to have amounted to fraud as a result of having acquiesced Desoto into believing that the Leases were still valid. With respect to estoppel by deed, Desoto argued that the assignment of the Leases by Jofco to Numac and an agreement to reduce the royalty rates estopped Encana from denying the validity of the Leases. The Court appears to have found that Desoto was unable to rely on estoppel by deed

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207 *Desoto Resources Ltd: Section 40 Review of Well Licence No. 0365128 — Joffre Field*, EUB Decision 2008-047 (17 June 2008) at 11.

208 *Desoto Resources Ltd v Alberta (Energy Utilities Board)*, 2008 ABCA 349, 17 ACWS (3d) 550 at para 2.

209 *Desoto*, *supra* note 206 at para 43.

210 *Ibid* at para 47.

because the agreements relied upon were merely incidental to the agreements under which Desoto was claiming its interest, namely the Leases.

Desoto appealed the Alberta Court of Queen's Bench decision and the Alberta Court of Appeal allowed the appeal.[211] In particular, the Court of Appeal held that the matter was not appropriate for summary judgment as there was uncertainty over what had been agreed in the 1999 bankruptcy arrangement and set aside the Court of Queen's Bench summary judgment.[212]

4. COMMENTARY

The Court of Queen's Bench dismissed Desoto's estoppel arguments and stated that the 1999 bankruptcy arrangement and agreements related thereto were ancillary to the agreement at issue (namely the Leases). The Court of Appeal decision has created significant uncertainty with respect to the Court of Queen's Bench finding in stating that the 1999 bankruptcy arrangement requires a finding of fact to determine its significance, the parties conduct, and the availability of any possible estoppel argument. It will remain to be seen how the Court of Queen's Bench will weigh the significance of the 1999 bankruptcy arrangement and if such arrangement will be sufficient to establish an estoppel argument.

B. *TRIBUTE RESOURCES INC V MCKINLEY FARMS LTD*[213]

1. BACKGROUND

Tribute dealt with the continuation of a freehold oil and gas lease and a gas storage lease. The oil and gas lease was unique in that it had been amended by a unit operating agreement (UOA) that deemed production by the lessee where annual rentals were paid.

2. FACTS

The predecessor in interest to Tribute Resources Inc (Tribute) entered into an oil and gas lease with the predecessor of McKinley Farms Ltd (McKinley) in 1977. The lease provided for a primary term of "ten years and so long thereafter as oil or gas are produced in paying quantities, or storage operations are being conducted."[214] The lease was amended in 1984 by a UOA which provided that production of the leased substances would be deemed as long as the annual rental payments had been made.

From 2001 gas was no longer produced in paying quantities, however, Tribute continued to pay the annual rental payments to McKinley pursuant to the UOA. Some of these annual rental payments were tendered and accepted late.[215]

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211 *Desoto Resources Ltd v Encana Corporation*, 2011 ABCA 100, [2011] AJ no 355 (QL).
212 *Ibid* at para 29.
213 2010 ONCA 392, 263 OAC 214 [*Tribute*].
214 *Ibid* at para 3.
215 *Ibid* at para 5.

With respect to the storage lease, the lease provided a term of ten years unless Tribute, or some other person, applied to the OEB to be designated as a gas storage area. Tribute never made an application to the OEB.

3. DECISION

The Ontario Superior Court of Justice held that the gas storage lease had terminated as no application had been made to the OEB.[216] With respect to the freehold oil and gas lease, the applications judge held that the payments made by Tribute under the UOA were not sufficient to save the freehold lease. The applications judge stated that the language of the UOA changed the payment obligations but not the duration of the freehold lease.[217]

The Ontario Court of Appeal varied the applications judge's decision and held that the oil and gas lease continued to remain valid. Tribute had continued to make rental payments, albeit occasionally late, and McKinley accepted such payments. The Court held that pursuant to the UOA this was sufficient to continue the oil and gas lease as only payment was required to deem production and thus continue the freehold lease.[218]

4. COMMENTARY

The decision of the Ontario Court of Appeal diverged from the treatment of freehold oil and gas leases in Alberta. In particular, the Alberta Court of Appeal in *Freyberg v Fletcher Challenge Oil and Gas Inc*,[219] and the cases that followed, strictly construed the terms of the *habendum* clause and the failure to make annual payments prior to the due date. *Habendum* clauses that contain "unless" wording typically states that the lease will terminate *unless* rentals are paid prior to the due date. Failure to make a payment within the time period specified would result in the automatic termination of the lease even if payments were made late but accepted by the lessor. The Court in *Tribute* appears to have diverged from this well-established jurisprudence because of the amendments to the lease as a result of the UOA. In coming to its decision, it appears that the Ontario Court neglects to give any deference to the previous Alberta decisions on freehold oil and gas leases. It is unlikely that this decision will have any implications on the strict interpretation of freehold leases in Alberta; however, one must be cognizant of the varying judicial treatment between Alberta and Ontario.

C. *BEARSPAW PETROLEUM LTD V ENCANA CORPORATION*[220]

1. BACKGROUND

This case concerned the interpretation of an oil and gas lease. The appellant, Encana, asserted that the lease had terminated because the wells were not "producible" or because of the breach of an implied term to market natural gas. The Court noted that this is the first

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216 *Tribute Resources Inc v McKinley Farms Ltd*, [2009] OJ no 2722 (QL) at para 31 (SC).
217 *Ibid* at para 19.
218 See *Tribute*, *supra* note 208 at paras 25-29.
219 2005 ABCA 46, 363 AR 35, aff'g 2007 ABQB 353, 428 AR 102 [*Freyberg*].
220 2010 ABQB 225, 34 Alta LR (5th) 165 [*Bearspaw QB*], aff'd 2011 ABCA 7, 78 BLR (4th) 1 [*Bearspaw CA*].

Canadian case to interpret the meaning of the term producible in the *habendum* clause of an oil and gas lease.[221]

2. FACTS

In 1960 Encana's predecessor in interest granted a petroleum and natural gas lease to the predecessor in interest to Bearspaw Petroleum Ltd (Bearspaw). The lease provided that after the ten year primary term the lease would continue for "so long thereafter as the leased substances or any of them are producible from the leased area."[222] A number of wells were drilled on the lands subject to the lease. However, leased substances had not been sold since production ceased in 2003. In 2005 Encana provided a notice of termination of the lease to Bearspaw. Bearspaw sought a declaration that the lease continued to be valid and that it held a subsisting right in the lands.

3. DECISION

Encana contended that producible must mean being capable of being put into production in commercial quantities immediately. Encana submitted that this narrow definition of "producible" should be adopted because it made no commercial sense for the parties to enter into an arrangement where income from production would not be realized within the first ten years of the lease.

The Alberta Court of Queen's Bench held that "producible" should be given its ordinary meaning which is "capable of being produced when other things are done."[223] Justice McMahon emphasized that the definition of producible did not require the leased substances to be capable of immediate production. Producible could refer to the leased substances being capable of future production.[224]

The Court contrasted the term producible with the phrase "produced, saved and marketed" in the provision of the lease governing royalties. Justice McMahon observed that the yearly rental came due once the leased substances became producible and the royalty became due once the leased substances were produced, saved, and marketed. The distinction in the language between the two provisions indicates that producible means something different than "produced" and supports the adoption of the plain meaning of the term producible.[225]

The Alberta Court of Appeal acknowledged the direction in *Freyberg* that *habendum* clauses are to be interpreted strictly.[226] However, the Court emphasized that each *habendum* clause is to be interpreted on its own terms. The clause in issue in *Freyberg* was distinguished on the basis that it used the term "produced" not "producible."[227] Nevertheless,

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221 *Bearspaw CA*, *ibid* at para 14.
222 *Bearspaw QB*, *supra* note 220 at para 4.
223 *Ibid* at para 26.
224 *Ibid* at paras 25-26.
225 *Ibid* at paras 31-32.
226 *Bearspaw CA*, *supra* note 220 at para 28, citing *Freyberg*, *supra* note 219 at paras 49-54, 65. For a discussion of *Freyberg*, see Chris Simard, David Holub & Larina Taylor, "*Lady Freyberg*: Examples of How Contemporary Courts in Alberta Approach the Modern Business Realities of the Freehold Petroleum and Natural Gas Lease" (2009) 46:2 Alta L Rev 299.
227 *Bearspaw CA*, *supra* note 220 at para 29.

the approach in *Bearspaw CA* is consistent with *Freyberg* because both favoured the plain meaning.

The Court also considered whether Bearspaw was in breach of an implied covenant to market the natural gas. Justice McMahon and the Court of Appeal both dispensed with this argument on the grounds that the lease expressly contemplated marketing to occur other than on an immediate basis.[228]

4. COMMENTARY

Bearspaw CA is a textbook example of using plain meaning for contractual interpretation. Producible means something different than produced, which is the other word commonly used in the same circumstances, and the parties must be presumed to mean something different when they choose different words. The practical business reasons advanced by Encana for favouring a meaning other than the plain meaning were not persuasive in the circumstances given that there were also practical considerations that favoured the plain meaning. Indeed, the Court noted that the plain meaning of producible favoured "orderly development" of the resource over "immediate development" and was consistent with "commercial efficacy."[229]

Bearspaw CA could have raised many of the same questions about economic production that were considered in *Freyberg*. Whether or not a substance is producible is contestable in the same way that the question of the existence of an economical and profitable market was in *Freyberg*. As some commentators have observed, the existence of an economical and profitable market is a subject over which parties might reasonably differ and which might even be the subject of expert evidence.[230] This question, however, was avoided in *Bearspaw CA* because Encana conceded the challenge that if the wells were tied into a pipeline, they would produce in economic quantities.[231] A different case with a similarly worded *habendum* clause involving marginal wells might provide a future court with an opportunity to explore the meaning of "producible" in greater depth and in practice.

D. *CANPAR HOLDINGS LTD V PETROBANK ENERGY AND RESOURCES LTD*[232]

1. BACKGROUND

The Alberta Court of Appeal in *Canpar* considered the availability of relief from forfeiture as an equitable remedy that would allow continuation of a freehold oil and gas lease. In Alberta, courts have strictly interpreted the terms of freehold oil and gas leases, which will often automatically terminate in the event of certain breaches, particularly breaches relating to failure to comply with payment obligations. The availability of relief from forfeiture would provide relief to lessees under particular circumstances and potentially continue a freehold

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228 *Ibid* at para 38.
229 *Ibid* at para 22.
230 Simard, Holub & Taylor, *supra* note 226 at 310.
231 *Bearspaw CA*, *supra* note 220 at para 4.
232 2011 ABCA 62, 331 DLR (4th) 588 [*Canpar*].

oil and gas lease where such continuation is not specifically available pursuant to the terms of the lease.

2. FACTS

In 2000 the predecessor in interest to Petrobank entered into a petroleum and natural gas lease with Canpar Holdings Ltd (Canpar). Pursuant to the lease, Canpar was entitled to a 17.5 percent royalty on crude oil produced without any deductions. Canpar asserted that Petrobank was not entitled to deduct fuel gas from its royalty payments and ultimately issued a notice of default in 2006. Canpar sought a declaration that the lease had terminated and an order for possession, damages, and an accounting for the subsequent production from the lands.

3. DECISIONS

The Alberta Court of Queen's Bench held that the lease did not allow for deductions from the royalty payments for fuel gas, despite Petrobank's assertion that this was common industry practice. Accordingly, the lease had terminated pursuant to its default provisions because Petrobank had failed to make the necessary royalty payments. Canpar was entitled to the full royalty between the time that production commenced on the lands and when the lease terminated in 2006.[233] Further, the Court held that damages for continued production from the date of termination of the lease should be calculated on the basis of the "mild rule" set forth in the *Freyberg* trial decision.[234] Notably, the Court interpreted the mild rule to mean that the provisions of the lease were deemed to have continued and that Petrobank was liable to Canpar for only the 17.5 percent royalty it was owed under the lease. Pursuant to the mild rule, deeming the lease to have continued for the determination of damages protected Petrobank from potentially more severe damages, such as trespass, as Petrobank would not have been entitled to be on the lands. Further, as the Court found that the lease had terminated, Petrobank was required to deliver the premises within 30 days of the date of the order.

The Alberta Court of Appeal agreed with the trial judge's finding that royalties had been payable on the fuel gas produced pursuant to the lease. However, the Court of Appeal held that the appellant was entitled to relief from forfeiture and that the trial judge had erred in failing to grant this relief. The Court stated that the trial judge had failed to apply the Supreme Court of Canada's decision in *Saskatchewan River Bungalows Ltd v Maritime Life Assurance Co*.[235] In *Saskatchewan River Bungalows*, the Supreme Court stated that relief from forfeiture was an entirely discretionary equitable remedy that required the consideration of "the conduct of the applicant, the gravity of the breaches, and the disparity between the value of the property forfeited and the damage caused by the breach."[236] The Court of Appeal stated that Petrobank's conduct was "somewhat reasonable" and that it had committed minor breaches.[237] Further, the Court found that the award by the trial judge produced a result that

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233 *Ibid* at para 7.
234 *Ibid* at para 56.
235 [1994] 2 SCR 490 [*Saskatchewan River Bungalows*].
236 *Ibid* at 504.
237 *Canpar*, *supra* note 232 at para 49.

was completely out of proportion with the damages caused by the breach. The Court granted relief from forfeiture and set aside the order for damages and disgorgement of profits.[238] Further, the Court stated that the effect of the trial judge's order would have been a windfall to the lessor as it would have put the lessor in a position to which it would not have been entitled, as the lessor would not necessarily have been able to put the wells into production as it did not hold the entire section.[239]

4. COMMENTARY

The Court of Appeal's decision centered around the trial judge's failure to consider the governing authority in the area of relief from forfeiture and came to a decision that appears to be more in line with the intention of such equitable relief. The award granted by the Alberta Court of Queen's Bench would have resulted in a windfall for the lessor and the Court of Appeal decision recognized that such equitable relief is available to prevent such gross inequities. While the terms of a freehold oil and gas lease are generally strictly applied, the availability of relief from forfeiture can provide a lessee with substantial relief and save the lease from termination. Further, the Court of Appeal and the Court of Queen's Bench relied upon the plain language of the royalty terms of the lease.

VII. RIGHTS OF FIRST REFUSAL

A. *CENTRE FOR EARTH AND SPIRIT SOCIETY V SISTERS OF SAINT ANN*[240]

1. BACKGROUND

Most often, disputes regarding rights of first refusal (ROFR) in an agreement involves the process surrounding the notice and exercise of the ROFR. ROFR clauses are typically very specific with respect to when the ROFR will arise and the process which the parties must follow to seek ROFR waivers and, where applicable, to exercise a ROFR. The Court in *Centre for Earth and Spirit Society* discusses when the process requirements will be triggered and when the selling party will be under an obligation to inform the ROFR holder of such potential sale.

2. FACTS

The defendant, the Sisters of Saint Ann, leased a parcel of land (the Lands) to the plaintiff, Centre for Earth and Spirit Society, pursuant to the terms of a lease agreement (the Lease Agreement). Under the terms of the Lease Agreement, the defendant granted the plaintiff a ROFR over the Lands. The ROFR clause indicated that the defendant was obliged to give the plaintiff the right to purchase the Lands "in the event that the [defendant] decides to sell the Lands."[241] Prior to the expiration of the term of the Lease Agreement, the defendant published an advertisement in the local paper, announcing that it had two parcels of land for sale which included the Lands. The defendant also passed a corporate resolution authorizing

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238 *Ibid* at para 50.
239 *Ibid* at para 56.
240 2010 BCSC 1087, 94 RPR (4th) 152 [*Centre for Earth and Spirit Society*].
241 *Ibid* at para 8.

the sale of the two parcels of land even though no firm offer had yet been received. In its statement of claim, the plaintiff sought a declaration that the ROFR clause granted it an existing and subsisting "right of first refusal/option to purchase" and sought "specific performance of the right of first refusal/option to purchase" the Lands.[242] The defendant brought an application for summary judgment to dismiss the plaintiff's claim.

The plaintiff argued that when the defendant adopted the resolution approving the sale of the two parcels, the defendant had "decided to sell" the Lands subject to the Lease Agreement and was then under an obligation to define the terms under which it would convey the two parcels of land and "inform the plaintiff of those terms" as the ROFR clause amounted to both a ROFR and an option to purchase.[243] The defendant argued that its obligation to comply with the ROFR clause only arose when it received an offer from a third party setting out terms with which it was prepared to accept.

3. DECISION

The British Columbia Supreme Court rejected the plaintiff's arguments. It held that the ROFR clause did not grant an option to purchase and that the phrase "decides to sell," when given its ordinary and natural meaning, refers to circumstances where the defendant receives an offer to purchase on terms that it is prepared to accept.[244] As the defendant in this particular case never received an offer that it was willing to accept, the defendant's obligation to give notice to the plaintiff under the ROFR clause was never triggered. The Court rejected the plaintiff's request for specific performance because, as the defendant never received an offer to purchase, there was no contract for purchase and sale which a court could enforce in favour of the plaintiff. The Court dismissed the plaintiff's action.

4. COMMENTARY

The Court in *Centre for Earth and Spirit Society* has clarified a selling party's obligations to a ROFR holder and the timeliness with which it must provide notice of an intention to sell to a ROFR holder. Taking steps to prepare for a potential sale was not enough to trigger the ROFR obligations, rather, an offer to purchase must have been made. A ROFR holder will not be entitled to exercise its ROFR until a clear offer has been presented to the selling party and the selling party is able to provide the ROFR holder with the terms of an offer which it is actually willing to accept. The article "Restrictions on Disposition in the Oil and Gas Industry: The Extinction of the Species?" describes ROFRs as a negative covenant in which the vendor must not dispose of the property to a third party prior to first offering said property to the ROFR holder.[245] It would not be possible for a vendor to provide a ROFR notice if it was not yet aware of the sale price and the particular terms of a proposed transaction. The Court's decision provides useful guidance for when a ROFR will be triggered and will likely be useful authority for companies operating in Alberta because it provides a practical result for parties to a potential transaction.

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242 *Ibid* at para 1.
243 *Ibid* at paras 25-26.
244 *Ibid* at para 45.
245 Gordon L Tarnowsky, Miles Pittman & Carolyn Wilton, "Restrictions on Disposition in the Oil and Gas Industry: The Extinction of the Species?" (2007) 44:3 Alta L Rev 477 at 479.

B. *NAL GP LTD V BP CANADA ENERGY COMPANY*[246]

1. BACKGROUND

Disputes have often arisen with respect to the allocation of value to assets that are subject to a ROFR in a package sale transaction. The ROFR holder will only have rights in respect of a portion of the lands subject to a proposed sale, and the selling party will allocate a particular value to those lands in the ROFR notice. Often the ROFR holder will dispute the value allocated to the ROFR lands as being out of line with the actual value of the lands. Obviously a ROFR holder would like the lowest value possible attributed to the ROFR lands, since that would be the price it would have to match in order to exercise its ROFR. A ROFR holder must establish that the selling party has acted in bad faith in attributing a value to the ROFR lands before a court will review the allocation of value.

2. FACTS

BP Canada Energy Company (BP) and Spearpoint Energy Corporation (as predecessor in interest to NAL GP Ltd (NAL)) entered into an agreement in 2008 that included a ROFR. In July 2010 BP entered into an agreement with Apache Canada Ltd (Apache) to sell certain assets, including the ROFR assets.[247] On 23 August 2010, BP and Apache met with NAL to discuss the proposed sale and on 21 August 2010, BP sent a letter to NAL to confirm that, pursuant to the August 23rd meeting, NAL was waiving its ROFR. In response, NAL requested that BP prepare ROFR notices which were delivered on 24 September 2010. The ROFR notices required the ROFR to be exercised within 15 days.

NAL sought a declaration from the Alberta Court of Queen's Bench that the notices were deficient and alternatively sought a temporary injunction to prevent the BP-Apache transaction from closing. NAL also sought to examine documents relating to the sale and oral discovery of representatives of BP and Apache.

3. DECISION

The Alberta Court of Queen's Bench, referring to the decision in *Chase Manhattan Bank of Canada v Sunoma Energy Corporation*,[248] dismissed NAL's temporary injunction application and stated that NAL had failed to present any evidence that BP and Apache had acted in bad faith in allocating value to the assets. As stated in *Chase Manhattan*, the onus is on the applicant to provide evidence to demonstrate bad faith on the part of the defendants.[249] The Court stated that NAL had not suffered any irreparable harm and that to grant the injunction would in effect give NAL something to which it was not entitled, since the agreement between BP and NAL did not grant either party a right to examine how a party arrived at a purchase price.[250] Justice Hawco stated that if NAL believed there would have been irreparable harm it should have elected to exercise its ROFR, paid the purchase price,

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246 2010 ABQB 626, [2010] AJ no 1127 (QL) [*NAL*].
247 *Ibid* at paras 4-5.
248 2001 ABQB 142, 283 AR 260 [*Chase Manhattan*].
249 *Ibid* at para 34.
250 *NAL*, *supra* note 246 at paras 25, 27.

and sued BP if it was "of the view that the price paid was arrived at through bad faith."[251] The Court dismissed the plaintiffs action.

4. COMMENTARY

In Alberta, courts have made it difficult for a ROFR holder to challenge a vendor's allocation of value. The Court in *NAL* dealt with the often discussed "allocation dilemma" and reiterated the difficulty in valuing particular assets in a package sale. The Court took a strong stance on the instances in which it would find a ROFR notice to be deficient. In particular, the Court reiterated the *Chase Manhattan* decision in finding that evidence of bad faith must be present in order to question the allocation of value that a vendor applies to the ROFR assets when specific contractual language requiring that a vendor justify such allocation is absent. Further, the Court emphasized the fact that it would only award damages that a party was entitled to and that damages would not be awarded where it would put the party in a better position than it was entitled to pursuant to the agreement. Justice Hawko's statement that NAL should have paid the price and sued later was practical and accords with the agreement. Practically, NAL could not ignore the provisions of the agreement and go to court for an injunction. However, given that the value of the assets was approximately $1 billion it would have been a large risk for NAL to elect to purchase pursuant to the ROFR, and then risk that the price, or the method of calculation, could not later be challenged as unfair or in bad faith. Based on the Court's decision in *NAL*, and previous allocation dilemma decisions, the cards seem to be stacked against the ROFR holder.

VIII. SURFACE RIGHTS

A. *ENBRIDGE PIPELINES (ATHABASCA) INC V KARPETZ*[252]

1. BACKGROUND

When an entity proposes to construct and operate a new underground pipeline to transport crude oil, a common approach to determining landowner compensation is the pattern of dealings (PoD) approach. The approach is accepted industry practice and is recognized by the courts as a mechanism that provides fair compensation. Its aim is to equally compensate landowners, whose use of the land is the same, for the injurious effect of the pipeline. In this way, pipeline operators, who obtain similar pipeline rights-of-way, provide compensation packages that are applied to comparable freehold lands. The EUB was responsible for "deciding if a PoD has been established and thereafter in determining appropriate compensation."[253] Referring to *Imperial Resources Ltd v 826167 Alberta Inc*,[254] the Court stated: "Once a suitable PoD is established by the evidence, however, the [EUB] should only depart from compensation based upon an established PoD for the most cogent of reasons."[255]

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251 *Ibid* at para 26.
252 2010 ABCA 185, 490 AR 166 [*Enbridge*].
253 *Ibid* at para 5.
254 2007 ABCA 131, 404 AR 212.
255 *Enbridge*, *supra* note 252 at para 5.

2. FACTS

In 2007 Enbridge Pipelines (Athabasca) Inc (Enbridge) received approval from the EUB to construct a subsurface pipeline to transport crude oil between Edmonton and Cheecham, Alberta. Enbridge was responsible for compensating affected landowners for a right-of-way (ROW), either by a permanent ROW or a temporary work space (TWS). Initially, Enbridge established compensation to be a lump sum payment of $1,500 and $750 per ROW and TWS acre, respectively. A significant group of landowners declined the offer, which prompted Enbridge to sweeten its offer to $1,900 and $950 per ROW and TWS acre, respectively. In total, 148 landowners agreed and were paid those amounts.

The offer was refused by 14 landowners (the Applicants) who brought an application before the EUB to determine compensation. Enbridge's position was that the agreements entered into by the 148 landowners on the same pipeline constituted a persuasive PoD. However, the EUB rejected Enbridge's proposal and awarded upfront compensation of $700 per acre, plus an additional $100 per acre per year, reviewable every five years. None of the previously executed agreements included an annual payment component.

On appeal to the Alberta Court of Queen's Bench, Justice Macklin held that Enbridge's proposed PoD was a reasonable basis to determine fair compensation and "concluded that the Board's reasons for rejecting it were neither cogent or valid."[256] As conceded by counsel, there was "not only no evidence but no fact of an established pattern of dealings involving an annual payment component for subsurface pipelines."[257] Instead, except for one previous example of an arrangement that was agreed to by an operator, annual payment components have only been imposed for surface rights uses. Furthermore, the Court found that the EUB's award did not reflect losses that might actually be suffered by the Applicants. As a result, the Court set aside the EUB award as unreasonable and exercised its statutorily equivalent jurisdiction to set compensation in accordance with Enbridge's proposed PoD.

3. DECISION

The landowners applied to the Alberta Court of Appeal for leave to appeal. Justice Watson found that the Applicants were motivated to "restore the [EUB's] creation of a novel 'system that would allow landowners to choose between a lump sum settlement and a compensation package that includes an annual component.'"[258] The Court was not convinced that there was evidence to "justify a finding of power imbalance, misleading information or oppression" during the negotiation process.[259] In fact, Justice Watson held that "the only basis the Board used to infer unfairness would appear to be the absence of an annual payment component," rather than being critical of any particular term contained in the proposed PoD.[260]

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256 *Ibid* at para 11.
257 *Ibid* at para 12.
258 *Ibid* at para 17.
259 *Ibid* at para 18.
260 *Ibid* at para 19.

Justice Watson found that the Applicants failed to demonstrate "a reasonable prospect of success."[261] He noted that Justice Macklin "carefully examined the Board's rationales, finding them to be clearly unreasonable on their own record, since they hinged on errors of law, assumptions of contract unfairness that had no evidence, and on unreasonable distinctions from the present proposed compensation packages."[262] He held

> that it was reasonable for Macklin J. to conclude that an arguable justification for departing from the established PoD to include an annual payment component was not [established] … and it was unreasonable for the Board to conclude otherwise. To disturb Macklin J.'s conclusions in those respects, having regard to the standard of review, would require a clear ground of appeal of arguable substance which does not exist here.[263]

4. COMMENTARY

According to the Court of Appeal, Justice Macklin offered two reasons why it was unreasonable to include an annual component for future potential adverse effects to the applicants' use of their land. First,

> the basis for doing so was conjectural and/or redundant to the rationale for the lump sum payment [and second,] the procedural difficulty and cost of validating and reviewing an annual payment component every five years for each claimant would be unnecessarily burdensome having regard to the fact that there would again be a need to predict on an arbitrary basis the future from that point.[264]

However, it is important to note that this case does not stand for the proposition that an annual component to a compensation package for an underground pipeline is inappropriate. This is made clear by Justice Watson in his final remarks:

> In deciding whether leave to appeal should be granted or denied in this case, it is not necessary for me to say, nor would I suggest, that an annual payment component cannot be considered to be a valid part of a compensation package for a subsurface pipeline. It is also unnecessary for me to say whether procedural cost and difficulty arising from five year reviews of annual payment components would be a valid reason to refuse an annual payment component if the basis for such were lifted from the conjectural to the real.[265]

As such, with the right set of facts, the landscape is set for a court to adjudicate on the appropriateness of a PoD that includes an annual component to a compensation package for a subsurface pipeline.

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261 *Ibid* at para 26.
262 *Ibid* at para 23.
263 *Ibid* at para 29.
264 *Ibid* at para 28.
265 *Ibid* at para 29.

B. *CANADIAN NATURAL RESOURCES LTD V BENNETT & BENNETT HOLDINGS LTD*[266]

1. BACKGROUND

Under Alberta's *Surface Rights Act*,[267] parties unable to reach consensus may apply to the Alberta Surface Rights Board (SRB) for a hearing to determine the appropriate annual compensation for renewable leases. Where a PoD has been established, compensation for the compulsory imposition (or renewal) of a surface lease may be based on negotiated amounts in prior contracts between parties. The determination of whether a PoD exists will be a factual analysis. Resort to consideration of specific factors, such as those laid out in *Intensity Resources Ltd v Dobish*,[268] is an acceptable but not necessary precondition to establishing a POD.

2. FACTS

Canadian Natural Resources Ltd (CNRL) was the current lessee in 11 surface leases on lands owned by Bennett & Bennett Holdings Ltd (Bennett) and Circle B Holdings Ltd (Circle B). Each lease required CNRL to provide specific annual compensation to Bennett. The rate of compensation was reviewable every five years. In 2005 seven of the 11 leases were up for review. Through agents, CNRL attempted to negotiate new compensation rates with Bennett. The parties were unsuccessful in reaching agreement and proceeded to a hearing at the SRB to determine the annual compensation rate.

At the hearing, the SRB determined it was appropriate to increase the compensation payable on all seven leases, however not to the level sought by Bennett and Circle B. CNRL, who had sought a reduction in the annual compensation on the leases before the SRB, chose to appeal the decision to the Alberta Court of Queen's Bench. CNRL attempted to establish, through expert testimony, that there had been a PoD between the parties such that a compensation rate had already been established. The Court dismissed CNRL's expert testimony and concluded there had been no PoD. The Court of Queen's Bench utilized considerations identical to those in the *Intensity Resources* to reject the expert testimony before it. CNRL argued that a PoD could be proven without resort to these particular considerations.

CNRL subsequently appealed this decision to the Alberta Court of Appeal. Leave to appeal was granted to CNRL on the grounds that the test for determining a PoD was "of sufficient importance to merit appellate consideration" and to review whether the trial judge had "erred in rejecting the expert testimony."[269]

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266 2010 ABCA 91, 477 AR 226, aff'g 2008 ABQB 19, 436 AR 256 [*CNRL v Bennett*].
267 RSA 2000, c S-24.
268 (1989) 94 AR 366 [*Intensity Resources*].
269 *Canadian Natural Resources Limited v Bennett & Bennett Holdings Ltd*, 2008 ABCA 440, 75 RPR (4th) 7 at paras 9-10.

3. DECISION

The Court of Appeal deemed it unnecessary to affirmatively conclude whether the set of considerations under dispute were required to establish a pattern of prior dealings. In this instance, the Court of Queen's Bench had not treated them as preconditions but merely weighed the considerations set forth in the *Intensity Resources* decision in coming to a factual determination as to whether a PoD existed. There was no indication that the Court of Queen's Bench had viewed the *Intensity Resources* considerations as "firm rules of law" or as binding upon the Court.[270]

CNRL's expert, in this instance, was suggesting something similar to a notion of comparable sales to establish a PoD: "using comparable sales is one of a handful of well-established and very common methods used by appraisers to find prices or values. Whether past sales … of other properties are evidence of the sale … value of the piece of land in question, is usually a question of fact."[271] There are many reasons why a past sale can be found "insufficiently comparable," however there are only a handful of reasons that commonly recur.[272] The Court of Appeal stated firmly that "[a] judge, tribunal member, or arbitrator may even cite (or flatteringly imitate) the considerations discussed in one or two past decisions. There is nothing the matter with that."[273] Where a judge utilizes such considerations it would be incorrect to assume he or she is "tying himself or herself to rigid rules of law," or adopting a view that the considerations present a legal test "without clearer words than those found here."[274]

Having determined that the Court of Queen's Bench had not erred in utilizing the *Intensity Resources* considerations, the Court of Appeal was left to decide whether the Court of Queen's Bench had made a reversible error or acted unreasonably in their ruling. The Court of Appeal found that the analysis by the Court of Queen's Bench was sound and denied a new hearing.

4. COMMENTARY

The Court of Appeal did not rule here on whether the considerations laid out in *Intensity Resources* present necessary preconditions or a legal test in determining whether a PoD exists. The facts before the Court did not merit such analysis, as whether or not the *Intensity Resources* considerations were firm rules would not have changed the outcome in this case. This case solely determines that resorting to specific factual considerations, such as those found in *Intensity Resources*, will be acceptable to establish a PoD. The legality of such considerations being treated as necessary preconditions remains unclear. Under an alternate factual scenario, further clarity from an appellate court may be required.

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270 *CNRL v Bennett*, *supra* note 266 at para 8.
271 *Ibid* at paras 9-10.
272 *Ibid* at para 10.
273 *Ibid*.
274 *Ibid* at para 11.

IX. UNJUST ENRICHMENT

A. *SALNA V AWAD*[275]

1. BACKGROUND

At trial before the Alberta Court of Queen's Bench, *Salna* involved a complex arrangement between multiple persons and companies with respect to the acquisition of an oil and gas concession in Egypt and the exploration activities undertaken on the lands subject to the concession. *Salna* explores the liability of joint ventures partners for the obligations of the joint venture and the applicability of the concept of unjust enrichment in that context.

2. FACTS

Awad is a petroleum geologist/geophysicist with experience in the Egyptian oil industry. At his instigation, Dover Investments Ltd (Dover) successfully bid on an Egyptian oil concession. On 18 July 2002, Dover entered into a Concession Agreement for Petroleum Exploration and Exploitation (the EWA Concession). Under the EWA Concession, Dover was obliged to drill two wells and spend a minimum of US$3.5 million during the initial phase of the exploration (Phase One). Dover had the right to extend the exploration period for an additional two years, which would require the drilling of two further wells and an additional US$4 million (Phase Two). If Dover exercised its right to extend the exploration period into Phase Two, Dover then had the option to extend the exploration period again (Phase Three), which would require two more wells and US$4.5 million. If all of these obligations were satisfied, Dover could hold exploration rights for seven years.

A joint venture agreement was entered into with respect to the EWA Concession. A separate company, Dover Petroleum Corporation (Dover Petroleum) was a party to the joint venture agreement. However, Dover, the contracting party under the EWA Concession, was not a party to the joint venture agreement. Despite the similarity in names between Dover and Dover Petroleum, the two companies are not affiliated with each other.

The two wells required during Phase One did not yield commercial production. In addition, one of the obligation wells required during Phase One did not reach the target depth approved by the Egyptian General Petroleum Corporation (EGPC). Dover argued that EGPC required a third obligation well be drilled in order to extend the EWA Concession into Phase Two, although EGPC also gave credit for this third well (3X) and counted it as an obligation well with respect to Phase Two. As the initial US$4 million investment provided by Dover Petroleum had been exhausted by the first two wells, the replacement well was to be paid for on a proportionate basis by the joint venture partners. All the partners met the cash call with the exception of Awad. His share was paid by Dover in the amount of US$939,550.71.[276] None of the three obligation wells drilled during Phase One were commercial, and Dover brought suit to recover the amounts paid on Awad's behalf.

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[275] 2011 ABCA 20, 330 DLR (4th) 214, aff'g 2010 ABQB 419, 29 Alta LR (5th) 327 [*Salna*].
[276] *Ibid* at para 12.

The trial judge found that while Awad "vigorously maintained his interest" in the EWA Concession,[277] Awad made it clear in writing that he refused to be responsible for the additional cost of the third well. This did not mean, however, that Dover had not conferred a benefit on Awad to the detriment of Dover. The trial judge found that there was no juristic basis for the enrichment, and therefore Dover was entitled to recover its losses.

3. DECISION

At trial, Justice Horner accepted that EGPC had required the drilling of 3X in order to allow the joint venture partners to extend the EWA Concession into Phase Two, as well as to preserve the cost recovery status of the first obligation well (1X). Consequently, Justice Horner found that a benefit had been conferred on Awad since he stood to gain as an interest holder in the EWA Concession, and he also found Dover had clearly suffered deprivation in paying drilling costs on Awad's behalf.

With respect to the final element of a claim of unjust enrichment, Justice Horner did not find any juristic reason to support the enrichment. Justice Horner found that the only category of juristic reason that might be applicable to the facts of this case is that of officious or unwanted benefit.[278] However, despite Awad making it perfectly clear that he did not believe 3X needed to be drilled and that he would not pay any of the costs associated with 3X, Justice Horner found that Dover at all times had a reasonable expectation of being repaid for the costs advanced on behalf of Awad and that Dover had not conferred an officious or unwanted benefit on Awad.[279] Although Awad was not in favour of drilling 3X, he vigorously maintained his interest in the later phases of the exploration period of the EWA Concession, which were made possible by the drilling of 3X.

On appeal, the Alberta Court of Appeal made it clear that Awad did not demonstrate any errors on the part of the trial judge. The appeal rested on the applicable limitation period set out in section 3(1)(a) of the *Limitations Act*[280] and the Court affirmed the decision of Justice Horner that the proceedings had been commenced prior to the expiration of the applicable limitation period.

4. COMMENTARY

This decision confirms that formal acceptance of a benefit is not required in order to make out the elements of unjust enrichment. Indeed, even if a party actively objects to the activity giving rise to the benefit, unjust enrichment may still be maintained. Awad did not obtain an immediate benefit from Dover's expenditure on his behalf because the wells were not commercial. However, the payment maintained his interest in further phases of the EWA Concession. While Awad did not ask for the benefit, his refusal to pay while simultaneously trying to maintain his interest in the project indicated his acceptance of the benefit to the detriment of Dover. The Court clearly expressed that one may not reap the benefit of commercial ventures without fulfilling the obligations of that venture.

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277 *Ibid* at para 22.
278 *Ibid* at para 45.
279 *Ibid* at paras 49, 55.
280 *Supra* note 87, s 3(1)(a).

X. TAX

A. *LEHIGH CEMENT LTD V R*[281]

1. BACKGROUND

This case was an appeal by Lehigh Cement Ltd (Lehigh) of a judgment of the Tax Court of Canada pursuant to which the Court upheld assessments made under Part XIII of the *Income Tax Act*.[282] From 1998 to 2002, Lehigh had paid interest to Bank Brussels Lambert (the Belgian Bank) and was subsequently assessed for unpaid non-resident withholding tax on such interest payments. At issue in this case is whether the assessments for unpaid interest were supportable pursuant to the general anti-avoidance provisions in the *Income Tax Act*.[283]

2. FACTS

During the period covered by the assessments under appeal, Lehigh, a Canadian corporation that carried on business in Canada as a manufacturer of cement and other building materials, was a member of a related group of corporations (the HZ Group). Heidelberger Zement, a German corporation, led the HZ Group, and CBR International Services SA (CBR IS), a Belgian corporation, acted as the treasury centre for the HZ Group.[284]

Subsequent to Lehigh borrowing $140 million from a consortium of Canadian banks, the loan was sold to another corporation within the HZ Group. The sale was financed with funds from one of the foreign corporations within the HZ Group.[285] During the time the Lehigh debt was held by a foreign corporation within the HZ Group, the interest was subject to non-resident withholding tax at the rate of 15 percent pursuant to paragraph 212(1)(b) of the *Income Tax Act*. As required under this provision, Lehigh withheld the tax and remitted the funds to the Crown. As of August 1997, the Lehigh debt was held by CBR IS.[286]

In August 1997, the terms of the Lehigh debt were amended by Lehigh and CBR IS. The amended terms provided for a fixed interest rate and removed any obligation on behalf of Lehigh to repay more than 25 percent of the principal amount of the debt within five years. Under this new arrangement, the interest on the debt would qualify for a withholding tax exemption if it was paid to an arm's-length person. Shortly after the terms of Lehigh debt were amended, the Belgian Bank purchased from CBR IS the right to be paid all interest payable on the Lehigh debt up to September 2002. After August 1997, Lehigh paid directly all interest payable on the Lehigh debt to the Belgian Bank, but did not withhold and remit tax.[287]

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281 2010 FCA 124, [2010] 5 CTC 13 [*Lehigh*].
282 RSC 1985, c 1 (5th Supp).
283 *Lehigh*, *supra* note 281 at para 1.
284 *Ibid* at para 10.
285 *Ibid* at para 11.
286 *Ibid*.
287 *Ibid* at paras 14-15, 17.

The Crown asserted that the purpose of the exemption was to facilitate access to funds in foreign capital markets. The Crown argued that even though interest payable to the Belgian Bank on the Lehigh debt was within the section 212(1)(b)(vii) exemption, non-resident withholding tax was payable on the interest on the basis of the application of the general anti-avoidance rule in section 245. The Tax Court accepted this argument and upheld the assessments against Lehigh.

3. DECISION

The Federal Court of Appeal allowed the appeal. The Court held that, just because an exemption under the *Income Tax Act* "may be claimed in an unforeseen or novel manner … [it] does not necessarily mean that the claim is a misuse of the exemption."[288] The Federal Court of Appeal interpreted *Canada Trustco Mortgage Co v R*[289] as requiring that the Crown establish that the result of an impugned transaction is inconsistent with the purpose of the exemption. While the Crown attempted to argue that the exemption at issue in this case should be construed in accordance with a fiscal policy evidenced in a single sentence in a 1975 budget paper, the Court rejected this argument.

The Federal Court of Appeal noted that the splitting of interest payable on, and the principal amount of, a debt was a normal aspect of commercial financing transactions, and one that the Crown was aware of in 1975 when this exemption was first enacted. Furthermore, the Court noted that the Crown had conceded that, if the Belgian Bank had purchased both the principal amount of the debt and the interest payable thereon, the exemption would apply. Justice Sharlow characterized this as an "irreconcilable inconsistency" in the argument of the Crown, as such a transaction between CBR IS and the Belgian Bank would not be a transaction that would give Lehigh access to funds in foreign capital markets.[290]

4. COMMENTARY

While the Crown did not appeal this case, in March 2011 the federal Department of Finance promulgated draft legislative proposals in response to this decision. The Crown proposed to amend the *Income Tax Act* to provide that withholding tax under Part XIII will apply to interest paid to a non-resident (whether such non-resident is at arm's-length to the taxpayer or not) on a debt owed by the taxpayer to a non-resident that is not at arm's-length to the tax payer.[291]

With the subsequent defeat of the government in connection with the federal budget for 2011, these proposed amendments were not implemented. It remains to be seen if the next federal government will table a bill in the House of Commons to effect such amendments to the *Income Tax Act*.

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288 *Ibid* at para 37.
289 2005 SCC 54, [2005] 2 SCR 601.
290 *Lehigh*, *supra* note 281 at para 40.
291 Canada, Department of Finance, "Department of Finance Releases Draft Income Tax Proposals" (16 March 2011), online: Department of Finance <http://www.fin.gc.ca/n11-11-024-eng.aspx>.

B. *TERASEN GAS INC V BRITISH COLUMBIA*[292]

1. BACKGROUND

In 2000 Terasen Gas Inc (Terasen) acquired pipe and compressors required to construct the 303 kilometre Southern Crossing Pipeline in southeastern British Columbia. The cost of the acquisition was approximately $65 million. The British Columbia Ministry of Small Business and Revenue concluded that Terasen's plan for the purchase of this equipment was flawed and assessed Terasen for sales tax of almost $4.5 million plus interest. Terasen appealed the decision to the British Colombia Supreme Court and Justice Silverman allowed the appeal. The Crown appealed to the British Columbia Court of Appeal.

2. FACTS

The tax plan developed by Terasen "was as follows: 1) Terasen purchased the equipment before and after July 27, 2000; 2) on that date, Terasen sold the equipment to a trust, the beneficiary of which was a Terasen subsidiary; 3) … Terasen [subsequently] leased the equipment from the trust for [Terasen's] use, first for a period of 13 months and then by amendment for five years. The transactions were properly documented" and Terasen actually paid all of the purchase and lease payments.[293] There was no argument that "the purchase prices and lease rates were other than commercially sound."[294]

In connection with the construction of the Southern Crossing Pipeline, all of the equipment became "affixed to land which Terasen owned or over which it held a registered right of way. The compressors were constructed on land Terasen owned. The pipe was laid on land owned by third parties who entered into agreements with Terasen for the rights of way required."[295] Once the equipment became affixed to the land it ceased to be tangible personal property and became realty, and consequently Terasen paid no sales tax in respect of the equipment after October 2000.

Before both the British Columbia Supreme Court and the British Columbia Court of Appeal, the Crown argued that the transaction between the trust and Terasen was not a lease but a sale. This argument was based in part on the common law principle that the lease of a fixture is not possible as the lessor of personal property cannot retain title to such property once it has been affixed to land. If the transaction was a sale rather than a lease, then as the equipment was tangible personal property at the time of the sale approximately $4.5 million in sales tax would be payable by Terasen.

3. DECISION

While the Court of Appeal did not disagree with the Crown's argument that it is not possible to lease a fixture at common law, the Court of Appeal looked to the *Social Service*

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292 2010 BCCA 255, 289 BCAC 312, aff'g 2009 BCSC 1030, [2010] 1 CTC 42.
293 *Ibid* at para 2.
294 *Ibid*.
295 *Ibid* at para 7.

Tax Act, which defines a lease as "a right to use tangible personal property."[296] As there was no argument that the equipment was other than tangible personal property at the time of the transaction between the trust and Terasen, the Court of Appeal dismissed the province's appeal and set aside the assessment made by the Minister.

4. COMMENTARY

Terasen made a good use of provisions of the *Social Service Tax Act* and regulations thereunder in structuring a transaction to minimize sales tax payable in relation to the equipment. While the Crown urged the Court to accept that absolving Terasen of the obligation to pay sales tax would not result in fair taxation, the Court instead found that any unfairness was a direct result of the applicable regulations that excluded certain types of fixtures from tax liability. If the Crown is concerned about the unfairness of the result, then it is open to the Crown to amend the regulations to prohibit this result from being replicated.

C. *HUSKY OIL LTD V R*[297]

1. BACKGROUND

Husky Oil Ltd (Husky) appealed a decision of the Tax Court of Canada relating to an assessment of a taxable capital gain of approximately $4 million. The Crown asserted that section 87(4) of the *Income Tax Act*, or alternatively subsection 69(4) of the *Income Tax Act*, applied to deem Mohawk Canada Ltd (Mohawk), a predecessor by amalgamation of Husky, to have realized the taxable capital gain in 1998.

2. FACTS

Prior to the series of transactions that gave rise to this appeal, three corporate groups existed: the "Balaclava group," the "Husky group," and the "Mohawk group." The members of the Balaclava group were never related (for income tax purposes) to any member of either of the other two groups.[298]

When Mohawk was soliciting bids for a takeover, in 1997 and early 1998, a predecessor of Husky by amalgamation (also named Husky Oil Ltd and referred to as Old Husky) expressed its willingness to acquire Mohawk. However, Old Husky did not desire to acquire the business of one of the subsidiaries of Mohawk, Mohawk Lubricants Ltd (Lubricants). An arrangement was reached among the three corporate groups whereby a member of the Balaclava group would acquire all of the voting shares of Lubricants and Old Husky would acquire Mohawk. The three corporate groups agreed on a series of transactions that resulted in deferring the capital gains tax on Balaclava's acquisition of Lubricants. Pursuant to this series of transactions, which included an amalgamation of a member of the Balaclava group with Lubricants, the Balaclava group acquired control of the amalgamated corporation (Lubes Amalco) that held the business and assets of Lubricants, and Mohawk was entitled

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296 RSBC 1996, c 431, s 1(1).
297 2010 FCA 125, [2010] 5 CTC 112 [*Husky*].
298 *Ibid* at paras 13-14

to be paid approximately $9.5 million in 2023 (25 years later), without interest. Following this series of transactions, Old Husky and Mohawk amalgamated to form Husky.

Mohawk treated the disposition of Lubricants as a deferred transaction under section 87(4) of the *Income Tax Act*. The Crown assessed Husky in 2004 for a taxable capital gain on the disposition of Lubricants in 1998 for deemed proceeds of disposition of $15.5 million. The Tax Court found that section 87(4)(b) applied and that Husky (as successor to Mohawk) should be assessed the capital gain in connection with the amalgamation that formed Lubes Amalco. The Tax Court held that the purpose of the exception was to compel the shareholder of an amalgamating corporation to act in its own interest and not for the benefit of a related party. Husky appealed to the Federal Court of Appeal.

3. DECISION

The Federal Court of Appeal allowed the appeal and set aside the judgment of the Tax Court. While the Tax Court had held that section 87(4)(b) did apply because the amalgamation conferred a benefit to the Husky group as shareholders of Mohawk, the Federal Court of Appeal construed this section more narrowly. The Court of Appeal rejected the opinion of the Tax Court that the exception under section 87(4) is designed to compel the shareholder of an amalgamating corporation to act in its own interest and not for the benefit of a related party, such as a controlling shareholder.

The Court of Appeal clarified that, in order for section 87(4)(b) to apply, there must be a shift in value (by way of an amalgamation) from a shareholder of an amalgamating corporation to a person related to such shareholder. The only evidence before the Court (being the assessment of the Minister) suggested that the fair market value of the shares of Lubricants held by Mohawk prior to the amalgamation was $15.5 million, and that the fair market value of the preferred shares on Lubricants held by Mohawk immediately following the amalgamation was zero. While the Court did not agree that this was an accurate valuation (as a right to be paid $15.5 million 25 years later without interest is certainly worth less than $15.5 million, but is also certainly worth more than zero) the Court did determine the case on the basis of this valuation as no argument to the contrary was advanced by Husky. The Crown argued that this difference in valuation reflected a shift in value of $15.5 million from Mohawk to Old Husky and therefore section 87(4)(b) applied. The Court disagreed and held that the beneficiary of this shift in value was necessarily the Balaclava group as it was the Balaclava group that acquired control of Lubes Amalco. As Mohawk (the shareholder of Lubricants) was not related to any member of the Balaclava group, there was no shift in value from a shareholder to a person related to the shareholder and therefore section 87(4)(b) did not apply.

4. COMMENTARY

This case clearly states that section 87(4)(b) of the *Income Tax Act* only applies where value is shifted by way of an amalgamation from a shareholder of an amalgamating corporation to a person that is related to the shareholder and that has an interest in the amalgamating corporation. Even if some benefit or advantage accrues to a parent company of such shareholder as a result of the amalgamation, this is not sufficient to warrant deeming

proceeds of disposition under section 87(4)(b). Such a parent company cannot be considered to be the beneficiary because the shift in value runs from its subsidiary to the other persons with an interest in the amalgamated corporation. Furthermore, the Court notes that the tax savings resulting from the amalgamation itself cannot be the benefit conferred to the related person — there must be some additional benefit that accrues to a related person that has an interest in the amalgamating corporation.

In *obiter dicta* the Court also comments on an unstated premise underlying the Crown's argument — that it is improper for a taxpayer to defer a capital gain by agreeing to postpone receipt of the cash consideration for 25 years. As the Crown did not proceed under the general anti-avoidance rule in section 245 of the *Income Tax Act*, the Court did not need to determine this issue. However, the Court did note that it could be argued that it would be unfair and fiscally unsound to require a taxpayer to pay capital gains tax in respect of an amount that such a taxpayer did not actually receive pursuant to an arm's-length transaction.

D. *DAISHOWA-MARUBENI INTERNATIONAL LTD V R*[299]

1. BACKGROUND

In 1999 and 2000, respectively, Daishowa-Marubeni International Ltd (Daishowa) sold two timber mill divisions, one in High Level, Alberta (the High Level Division), to Tolko Industries (Tolko) and the other near Red Earth, Alberta (the Brewster Division), to Seehta Forest Products Ltd (Seehta).[300] Pursuant to the asset purchase agreements in both transactions, the purchasers assumed Daishowa's reforestation or silviculture liabilities in respect of the timber resource properties. The Minister assessed Daishowa and included in the calculation of its proceeds of disposition of timber resource properties the amount of the estimated silviculture liability, being $11 million in the Tolko deal and almost $3 million in the Seehta deal. Daishowa argues no such amounts should be included in proceeds of disposition and, in the alternative, if an amount is to be so included then Daishowa is entitled to an offsetting deduction from income.

2. FACTS

Daishowa sold the assets of its two timber mill divisions which included the timber resource properties. Pursuant to the *Timber Management Regulation*,[301] a forest tenure could not be assigned unless the assignee assumed the silviculture liability associated with the forest tenure.[302] As a result, in the context of both sales, the asset purchase agreements included provisions for the assumption by the purchasers of Daishowa's silviculture liabilities, which spanned a period of 14 years.

The definitive asset purchase agreement for the High Level Division provided for a purchase price of $169 million. Tolko also assumed the silviculture liabilities. The evidence disclosed that the $169 million purchase price in the agreement was derived from Tolko's

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299 2010 TCC 317, [2010] 5 CTC 2289 [*Daishowa-Marubeni*].
300 *Ibid* at para 1.
301 Alta Reg 60/1973.
302 *Daishowa-Marubeni*, *supra* note 299 at para 3.

bid of $180 million, less the estimated silviculture liability of $11 million. With respect to the Brewster Division, the estimated silviculture liability was almost $3 million.

Daishowa did not include in its proceeds of disposition, in respect of either sale, any amounts for the assumed silviculture liabilities. Daishowa was reassessed to include such amounts in its proceeds of disposition of the timber resource properties. In its appeal to the Tax Court, Daishowa argued that (1) the fair market value of the silviculture liabilities was not quantifiable at the time of the sale and consequently no amount should be included as proceeds of disposition; (2) the estimated fair market value of the silviculture liabilities should be discounted since the reflected amounts were necessarily uncertain and were payable over the next 14 years; and (3) Daishowa should be entitled to an offsetting deduction from income for having paid the purchaser with assets to assume the silviculture liabilities. The Crown argued that the consideration received by Daishowa from the purchasers included the assumption of liabilities in a quantifiable amount and that such an amount should be included as proceeds of disposition.

3. DECISION

The Tax Court allowed Daishowa's appeal but only to the extent of a reduction in the amount to be included as proceeds of disposition. The Court held that the assumption of liabilities by the purchasers constituted consideration for the sale of the timber resource properties; Daishowa had received a benefit by the purchasers assuming the silviculture liabilities and the evidence indicated that the purchasers would have paid more if the purchasers had not assumed such liabilities.

The Court reached this conclusion despite the fact that the amount of the silviculture liabilities were unascertainable at the time that the transactions occurred. While the Court acknowledged that there is a judicial reluctance to impose tax where the amount to be taxed is uncertain or not ascertainable, Justice Miller held that there is no general rule that an uncertain amount may never be subject to tax.[303] The correct approach is to consider the nature of the uncertainty and the manner in which this effects the amount that should be subject to tax.[304]

The Court held that the estimated amount of the silviculture liabilities should be discounted to recognize that there was inherent uncertainty in the estimates, the costs would be incurred over a span of years, Daishowa had little power to reduce the uncertainty, and the purchaser would only be allowed to claim a deduction when the costs were actually incurred. In light of these factors, the Court determined that Daishowa's proceeds of disposition in respect of the assumption of liabilities by Tolko and Seehta should be reduced to approximately $4 million for the High Level Division and $1 million for the Brewster Division.

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303 *Ibid* at para 39.
304 *Ibid*.

4. COMMENTARY

The inclusion of assumed reforestation liabilities as proceeds of disposition could have a meaningful impact on the oil and gas industry. Virtually all oil and gas asset purchase transactions involve an assumption of liabilities by the purchaser, generally including an assumption of abandonment and reclamation and environmental liabilities. Such liabilities are analogous to the silviculture liabilities assumed by Tolko and Seehta.

Abandonment, reclamation, and environmental liabilities are often highly uncertain at the time of a sale transaction. Despite this uncertainty, this case appears to indicate that the assumption of such liabilities by a purchaser may well constitute consideration payable to the vendor and therefore give rise to some amount being included as proceeds of disposition. Unfortunately, the Tax Court did not prescribe how such amounts would be calculated for tax purposes. Justice Miller considered a number of factors but did not ascribe any specific weight or significance to any specific factors; indeed at one point, he waxes eloquently about how he wished he "could be more arithmetically accurate."[305]

This decision makes a clear statement that an assumption of liability in connection with a purchase and sale of assets is part of the consideration, but it leaves much to be desired in terms of how parties should quantify or value such consideration.

[305] *Ibid* at para 51.