RECENT JUDICIAL DEVELOPMENTS OF INTEREST TO OIL AND GAS LAWYERS

KAYLYNN G. LITTON AND JAMES F. MAXWELL*

This article provides a brief review of recent Canadian judicial decisions of interest to oil and gas lawyers. The authors survey recent Canadian cases in the following areas of law: aboriginal, administrative, conflict of laws, confidentiality, contracts, employment, environmental, freehold leases, unit agreements, injunctions, rights of first refusal, surface rights, taxation, and securities.

Cet article donne un bref aperçu des récentes décisions judiciaires canadiennes qui intéressent les avocats pratiquant dans le domaine pétrolier et gazier. Les auteurs ont examiné les dernières causes canadiennes dans les domaines de droit suivants: autochtone, administratif, conflit de lois, confidentialité, contrats, emploi, bail franc, accord d'union, injonctions, droit de préférence, droits de superficie, taxation et valeurs mobilières.

TABLE OF CONTENTS

* Partners, Macleod Dixon LLP. The authors wish to recognize and thank Stephanie LeBlanc and Thomas Collopy for their invaluable assistance in the preparation of this article. They would also like to acknowledge and thank Dion Legge, for his considerable input in the review of and commentary on the *Penn West Petroleum Ltd. v. Canada* case set out in the Taxation section of this article, and Everett Bunnell, Q.C., for his invaluable input on the cases set out in the Aboriginal Law section of this article.

I. ABORIGINAL LAW

A. *TSILHQOT'IN NATION V. BRITISH COLUMBIA*[1]

1. BACKGROUND

This is the first decision of the courts regarding a claim of Aboriginal title in British Columbia since the decision of the Supreme Court of Canada in *Delgamuukw v. British*

[1] 2007 BCSC 1700, [2008] 1 C.N.L.R. 112.

Columbia.[2] This action was commenced in 1990, and the plaintiffs sought injunctions against forestry companies seeking to harvest timber in parts of the Cariboo-Chilcotin region of British Columbia known as the "Brittany Triangle" and the "Trapline Territory" (the Claim Area). The action evolved over time, and when the trial was commenced in 2002, proceedings against the forestry companies had been discontinued as they had abandoned plans to log in the Claim Area, the Federal Crown had been added as a party to the action, and the action had been reframed to one seeking a declaration of Aboriginal title over the Claim Area.

The trial lasted 339 days and involved extensive oral history and oral tradition evidence, along with significant historical documentary evidence further supported by more recent expert reports. In addition to the main issues concerning Aboriginal title and rights, the Court examined the applicability of British Columbia's *Forest Act*[3] to Aboriginal title lands.

2. FACTS

The Xeni Gwet'in First Nation is one of six Tsilhqot'in bands. This action was brought by Chief William (the Plaintiff) in his representative capacity as Xeni Gwet'in Chief on behalf of all Xeni Gwet'in and all Tsilhqot'in people. The Plaintiff sought declarations of Tsilhqot'in Aboriginal title to the Claim Area, Aboriginal rights to hunt and trap in the Claim Area, and the right to trade in animal skins and pelts in the Claim Area.

3. DECISION

Upon examination of the pleadings, Vickers J. noted that the Plaintiff sought a declaration of Aboriginal title to the entirety of the Claim Area. While the Plaintiff's counsel asserted, in final arguments, that the Court had jurisdiction to make a declaration of title with respect to all or any portion of the Claim Area, British Columbia argued that the Plaintiff's claim was an all or nothing claim of title to the entirety of the Claim Area, which must either be granted or rejected as a whole. Justice Vickers considered the decision of the Supreme Court of Canada in *Delgamuukw* wherein it rejected the appellant's attempt to reframe its original claim on appeal on the basis that permitting the appellant to do so would deny the respondents the opportunity to know the appellant's case.[4] Justice Vickers concluded that, as the Plaintiff had advanced an all or nothing claim and had failed to prove occupation establishing Aboriginal title to the entire Claim Area, the Court was unable to grant the Plaintiff a declaration of Aboriginal title.[5]

Despite his conclusion that he was unable to grant a declaration of title, Vickers J. engaged in a detailed examination of the Plaintiff's claim in respect of various tracts of land comprising the Claim Area. Justice Vickers offered his non-binding opinion that a tract of land almost half the size of the Claim Area, and including lands both within and outside of the Claim Area, "was occupied by Tsilhqot'in people at the time of sovereignty assertion to

---

2 [1997] 3 S.C.R. 1010 [*Delgamuukw*].
3 R.S.B.C. 1979, c. 140.
4 *Supra* note 1 at para. 123.
5 *Ibid.* at para. 129.

a degree sufficient to warrant a finding of Tsilhqot'in Aboriginal title land."[6] Later in his judgment, Vickers J. also expressed his non-binding opinion that, as only the federal government has the power to extinguish Aboriginal title, any grant by the provincial Crown of private interests (including fee simple rights) in the Claim Area had not and could not extinguish Tsilhqot'in rights or Aboriginal title.[7]

Continuing to address the other claims made by the Plaintiff, Vickers J. determined that Aboriginal title lands are not Crown lands, and pursuant to the doctrine of interjurisdictional immunity, the *Forest Act*, as a provincial law of general application, does not apply to Aboriginal title lands. In respect of lands to which Aboriginal title is claimed, but has not been established, and to lands subject to Aboriginal rights other than title, the *Forest Act* would apply, subject to the Crown's burden of justification of infringement. While noting that until there is a finding of Aboriginal title, lands that are not held privately are presumed to be Crown lands, Vickers J. concluded that the provisions of the *Forest Act* do not apply to lands that it had determined meet the test for Aboriginal title, notwithstanding that he did not grant a declaration regarding Aboriginal title to such lands.[8]

In case he had erred in his conclusions regarding the applicability of the *Forest Act*, Vickers J. went on to consider whether the *Forest Act* or the application thereof infringed Tsilhqot'in title. He concluded that the act of passing the *Forest Act* did not constitute an infringement, but that the application of a forestry scheme including Aboriginal title lands did constitute a prima facie infringement requiring justification.[9] He concluded that there was no compelling and substantial justification for the infringement as there was no evidence that logging the Claim Area was economically viable and because the evidence presented regarding the need to log the Claim Area to prevent the spread of the mountain pine beetle was not compelling.[10]

Justice Vickers went on to consider whether, in light of this infringement on Tsilhqot'in rights, there had been proper consultation. He found that there was "no doubt that considerable effort [had] been made to engage Tsilhqot'in people in the forestry proposals and the land use planning in the Claim Area. The central question [was] whether all of this effort amount[ed] to genuine consultation."[11] British Columbia argued that it had met its consultation duties, but that the Plaintiff had not responded in good faith. It also argued that while strategic planning decisions may have serious impacts on Aboriginal title, all these decisions did was trigger a duty to consult, and there could be no infringement until there was an authorization by the Crown for the removal of timber. Justice Vickers found that "all of the events that [led] up to the granting of a cutting permit signal[led] the Province's intention to manage and dispose of an Aboriginal asset. These events demand[ed] consultation and, where necessary, appropriate accommodations."[12]

---

6 *Ibid.* at para. 960.
7 *Ibid.* at para. 998.
8 *Ibid.* at para. 1045.
9 *Ibid.* at paras. 1053, 1066.
10 *Ibid.* at para. 1108.
11 *Ibid.* at para. 1123.
12 *Ibid.* at para. 1131.

Justice Vickers looked at three land use plans developed by British Columbia, all of which demonstrated the Province's determination to open up the Claim Area for logging. None of the land use plans took into account Aboriginal title or rights, and all were expressed to be "without prejudice" to Aboriginal rights. He concluded, however, that the plans included detailed commitments to third party interests which would prejudice and infringe upon Tsilhqot'in Aboriginal title.

Justice Vickers determined that the rights and title claimed by the Tsilhqot'in were such that deep consultation and accommodation were required, and found that by failing to recognize and accommodate Tsilhqot'in claims of Aboriginal title and rights, the Province had failed in its obligation to consult with the Tsilhqot'in people.[13]

Finally, Vickers J. declared that Tsilhqot'in people did have Aboriginal rights in the Claim Area, including rights to hunt and trap birds and animals, and to trade in skins and pelts to secure a moderate livelihood.[14] He concluded that land use planning and forestry activities authorized by British Columbia had unjustifiably infringed Tsilhqot'in Aboriginal rights, but declined to award damages as the Plaintiff had claimed damages only in respect of infringement of Aboriginal title and not in respect of infringement of Aboriginal rights.[15]

Justice Vickers concluded his 458-page decision with an 18-page dissertation on reconciliation, beginning as follows:

> Throughout the course of the trial and over the long months of preparing this judgment, my consistent hope has been that, whatever the outcome, it would ultimately lead to an early and honourable reconciliation with Tsilhqot'in people. After a trial of this scope and duration, it would be tragic if reconciliation with Tsilhqot'in people were postponed through seemingly endless appeals. The time to reach an honourable resolution and reconciliation is with us today.[16]

4. COMMENTARY

Perhaps the single most notable aspect of the decision of Vickers J. in this case is his inclusion, in great detail, of his non-binding opinions in respect of Tsilhqot'in Aboriginal title. He concluded that the Aboriginal title of the Tsilhqot'in Nation to a significant portion of the Claim Area had been proven and that any grants of interests in the area of Tsilhqot'in title by the provincial Crown have not extinguished Tsilhqot'in Aboriginal title. While acknowledging that the consequences of a grant of Aboriginal title on private interests — including fee title — which have been granted by the provincial Crown in the Claim Area are unclear, he stated generally his confidence that sharing these non-binding opinions would "assist the parties to achieve a fair and lasting resolution of the issues, which must be found to achieve a reconciliation of all interests."[17]

---

13 *Ibid.* at para. 1141.
14 *Ibid.* at paras. 1240-41, 1265.
15 *Ibid.* at paras. 1294, 1334.
16 *Ibid.* at para. 1338.
17 *Ibid.* at para. 962.

Also notable is the implication in Vickers J.'s discussion of the duty to consult that, notwithstanding considerable effort on the part of British Columbia forestry personnel to engage the Tsilhqot'in people in the consideration of forestry planning and the development of land use proposals, the provincial Crown cannot be found to have fulfilled its duty to consult in respect of forestry planning and land use proposals because of the failure of the Province to acknowledge the existence of Tsilhqot'in Aboriginal title. He indicated that provincial policies, which either deny Tsilhqot'in title and rights or indicate that they could be addressed only through treaty negotiations, meant that "from the perspective of forestry officials, there was simply no room to take into account the claims of Tsilhqot'in title and rights."[18] Reading between the lines in this discussion, there seems to be a suggestion that the lack of an agreement between the Tsilhqot'in and the provincial Crown in respect of forestry and land use planning was viewed as evidence of lack of true consultation and accommodation. If this is the case, it would be inconsistent with the principle enunciated in *Haida Nation v. British Columbia (Minister of Forests)*[19] that it is the process and not the outcome that determines whether the Crown's duty to consult and accommodate has been fulfilled.[20]

It is not an overstatement to say that this is a highly unusual decision which is of very uncertain precedential value.

Notices of appeal of the Court's decision in this case have been filed on behalf of both the federal and the British Columbian governments.

B. *KA'A'GEE TU FIRST NATION V. CANADA (A.G.)*[21]

1. BACKGROUND

Oil and gas projects are often undertaken in remote areas of northern Canada. Often these developments take place on or near territory covered by a treaty or Aboriginal title subject to treaty rights or subject to a claim of Aboriginal title or treaty rights. As First Nations have an intimate connection with the land, these developments may impact local First Nations communities. In these situations, the Crown has a duty to consult with any First Nations impacted by such development. In this case, the Crown agreed that there was a duty to consult. The issue at bar was whether the Crown had fulfilled its obligations in that regard.

2. FACTS

Paramount Resources Ltd. (Paramount) carries on oil and gas exploration in the Northwest Territories on lands over which the Ka'a'Gee Tu First Nation (KTFN) claim Aboriginal rights and treaty rights. This region is subject to the terms of Treaty 11, which guarantees the KTFN the right to hunt, fish, and trap throughout the surrendered lands. Treaty 11 provides for the creation of reserve lands, but no such reserves had been created. While the Crown

---

18 *Ibid.* at para. 1139.
19 2004 SCC 73, [2004] 3 S.C.R. 511 [*Haida*].
20 *Ibid.* at para. 63.
21 2007 FC 763, 315 F.T.R. 178 [*Ka'a'Gee Tu*].

views Treaty 11 as a land surrender treaty, the KTFN has indicated that, in its view, it was a treaty of peace and friendship. The KTFN maintain that the Deh Cho First Nations (of which the KTFN is one) did not allow reserve lands to be set aside pursuant to Treaty 11 as they did not want to submit to the Crown's interpretation of Treaty 11.

The KTFN brought an application for judicial review, challenging a decision to recommend mitigation measures in respect of Paramount's oil and gas project. It claimed that the project would negatively impact treaty rights and Aboriginal rights, and that the Crown had breached its duty to consult and accommodate before issuing the decision.

Paramount's development, located in the Cameron Hills of the Northwest Territories bordering Alberta, proceeded in three phases. The phase over which this action was brought was an expansion of its existing project, known as the "Extension Project." The Extension Project was significant and involved the following elements: drilling and tie-in of 50 additional wells, oil and gas production over a 15- to 20-year period, seismic activity, construction of temporary camps, use of water from lakes, and disposal of drilling waste. Approval for this project involved various legislation and several administrative bodies. Central to this claim were the Mackenzie Valley Land and Water Board (LWB) and the Mackenzie Valley Environmental Impact Review Board (Review Board), which were established pursuant to the *Mackenzie Valley Resource Management Act*.[22] The LWB is responsible for issuing land use permits and water licences in unsettled claim areas within the Mackenzie Valley, while the Review Board is charged with environmental assessment, environmental impact review, and ensuring that the concerns of Aboriginal people and the general public are considered. Both of these boards rely heavily on consultation and provide guidelines on how consultation is to be undertaken by developers when applications are made.

In April 2003, Paramount applied to the LWB to amend some of its land use permits and water licences. The LWB conducted a preliminary screening, consulting 21 organizations, including the KTFN, with respect to the Extension Project and determined that the Extension Project would have significant adverse impacts on the environment and was a source of public concern. As a result, the LWB referred the application to the Review Board for environmental assessment and recommended joint public hearings.

Over the next several months, an environmental assessment process was conducted, including the preparation and circulation to interested parties of draft terms of reference for the environmental assessment, work plans, the developer's assessment report, and exchanges of information pursuant to information requests from interested parties and public hearings. The KTFN was involved in all stages of this environmental assessment process. Following completion of the environmental assessment process, the Review Board issued its environmental assessment report and reasons (the Report). While it acknowledged the potential impact of the Extension Project on the rights of the KTFN, the Review Board concluded that, with implementation of certain mitigating measures, the Extension Project

[22] S.C. 1998, c. 25 [*MVRMA*].

would not likely have a significant environmental impact and recommended that it should proceed to the regulatory phase for approval.

Shortly after release of the Report, the KTFN sent letters to the Minister of Indian and Northern Affairs Canada (INAC) and the federal and territorial ministers with responsibilities in the area (the Responsible Ministers) responding to the Report and asking to be included in the continuing review process, which would be undertaken pursuant to ss. 130 and 131 of the *MVRMA*. Section 130 of the *MVRMA* provides in part that the Responsible Ministers may, after consulting the Review Board, adopt the Review Board's recommendations with modifications, an option known as the "consult to modify" process.[23] The Responsible Ministers replied to the KTFN letter requesting inclusion that only they and the Review Board were permitted to participate in the consult to modify process.

Upon reviewing the suggestions of the Review Board, the Responsible Ministers took issue with some of the mitigating measures proposed by the Review Board. As a result, the Review Board sought comments on the proposed modifications from the parties involved in the environmental assessment, including the KTFN. Despite this, the KTFN was largely excluded from the consult to modify process. The KTFN wrote to the Review Board and the Minister of INAC several times, expressing its concerns regarding the proposed development of the Extension Project and highlighting its view that the consult to modify process was inconsistent with the Crown's duty to consult and accommodate. The Minister of INAC eventually responded to the KTFN that he would be in touch with Chief Chicot before a final decision was made. This commitment was not kept, and on 5 July 2005, the Responsible Ministers adopted the Review Board recommendations with modifications to 12 of the Review Board's original 17 recommendations. The KTFN filed an application for judicial review on 9 August 2005, alleging that the Crown had failed to discharge its duty to consult in making its decision. The Crown did not dispute that the duty to consult was triggered in connection with its decision-making process regarding the Expansion Project. As such, the issue before the Court was whether the Crown had satisfied its duty.

3. DECISION

Justice Blanchard began his analysis by determining the appropriate standard of review of regulatory body decisions. Following the decision of the Supreme Court of Canada in *Haida*,[24] he determined that the standard of reasonableness should be used when determining whether the regulatory process in question discharged the Crown's duty to accommodate.[25] Questions surrounding the existence and the content of the duty were to be reviewed on the standard of correctness. Justice Blanchard continued by stating the Supreme Court of Canada's articulation of the Crown's duty to consult: "the duty to consult and accommodate is founded upon the honour of the Crown, which requires that the Crown, acting honourably, participate in processes of negotiation with the view to effect reconciliation between the

---

23 *Ibid.*, s. 130; *supra* note 21 at para. 29.
24 *Supra* note 19.
25 *Supra* note 21 at para. 93.

Crown and the Aboriginal peoples with respect to the interests at stake."[26] For the duty to consult to arise, there must be either an existing or potential Aboriginal right or title that might be adversely impacted by the Crown's actions, and the Crown must have knowledge of both the existence of the right or claimed right and that the contemplated conduct may adversely affect such right or claimed right. Justice Blanchard also reiterated that the degree of consultation would vary in the circumstances: the stronger the claim and the greater the impact of the conduct, the higher the degree of consultation required by the Crown.[27]

In beginning his analysis of the KTFN's claims, Blanchard J. noted that the KTFN holds established Aboriginal rights over the affected area.[28] He also observed that, while it was not within the Court's mandate to decide on the KTFN's Aboriginal title claims in the conduct of this judicial review application, the KTFN had a reasonably arguable claim for Aboriginal title over the area, a factor which elevated the content of the duty to consult.[29] Justice Blanchard determined that the Extension Project would have a significant and lasting impact on lands over which the KTFN asserted title and on its hunting, trapping, and fishing rights.[30] Based on these factors, Blanchard J. found that the duty to consult in this case must "involve formal participation [of the KTFN] in the decision-making process."[31]

Turning to the evidence regarding the conduct of the review process, Blanchard J. was satisfied that the Crown had discharged its duty in the conduct of the review process up to the point when the Review Board issued its report. To that point, the KTFN was heavily involved in the process and was given many opportunities to express its concerns, which Blanchard J. found were seriously considered by the relevant authorities and were incorporated into the mitigation measures recommended by the Review Board. However, he found that the KTFN was nearly excluded from the consult to modify process, pursuant to which the Crown "unilaterally change[d] the outcome of what was arguably, until that point, a meaningful process of consultation."[32] As a result of these unilateral changes, this process failed to fulfill the Crown's "duty to consult, and if necessary, accommodate before making a final decision on the approval of the Extension Project."[33] Justice Blanchard stressed that good faith consultation was required at this stage, and even though there was no duty to reach an agreement, the consultations might lead to an obligation to accommodate.[34]

After a declaration that the Crown failed to discharge its duty, Blanchard J. ordered the parties (which included Paramount) to engage in meaningful consultation in the context of the consult to modify process.

---

26 *Ibid.* at para. 94 [citations omitted]. See *Haida*, *supra* note 19; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388 [*Mikisew Cree*].

27 *Ka'a'Gee Tu*, *ibid.* at para. 97.

28 *Ibid.* at para. 101.

29 *Ibid.* at para. 107.

30 *Ibid.* at para. 112.

31 *Ibid.* at para. 117.

32 *Ibid.* at para. 120.

33 *Ibid.* at para. 131.

34 *Ibid.*

4. COMMENTARY

Justice Blanchard's decision highlights that where a duty to consult applies, the scope of the Crown's duty may extend to each stage of the decision-making process under the *MVRMA*. Exclusion of a group to which the duty is owed at any stage of the process may be seen as a failure to provide meaningful consultation. Although he ordered that the parties to the litigation, including Paramount, engage in a process of meaningful consultation, he did not attempt to clarify the role of the private resource developer in consultation — which remains a duty of the Crown, based upon the honour of the Crown.

The Crown appealed the Federal Court's decision, but has since abandoned its appeal. Appeals related to other aspects of this litigation are ongoing.

C. *PLATINEX INC. V. KITCHENUHMAYKOOSIB INNINUWUG FIRST NATION*[35]

1. BACKGROUND

This decision represents another instalment in the continuing saga of Platinex Inc. (Platinex) and the Kitchenuhmaykoosib Inninuwug First Nation (KI) in relation to Platinex's proposed mining operations in remote northwestern Ontario.

2. FACTS

Platinex is a junior exploration company holding a number of mining claims near Big Trout Lake in northwestern Ontario (the Property). The KI reserve is located in this area, and although Platinex's proposed exploratory operations are not within the KI reserve, they are located on KI traditional lands over which the KI people exercise treaty rights. Platinex had been engaged in discussions with KI over the past seven years regarding planned exploration and KI's claims to the Property. Platinex was aware that KI intended to file treaty land entitlement claims concerning areas covering the Property. Although the claim was rejected, KI has not exhausted its appeal mechanisms with respect to their claim.

Platinex asserted that it must begin exploratory work soon, failing which, it would become bankrupt. It planned to drill 24 to 80 holes at six target sites. Justice Smith observed that KI was not opposed to development generally upon their traditional lands, but wished to be a partner in any development and to be consulted at all times. As a result of various disputes between the parties, this action arose. While Platinex claimed damages and sought injunctive relief, KI counterclaimed, seeking its own injunction. The majority of this decision relates to KI's counterclaim seeking its own injunction.

3. DECISION

Justice Smith began by recognizing the existence of the Crown's duty to consult, due to the potentially adverse effect of Platinex's drilling operations conducted within KI's treaty

---

[35] (2007), 29 C.E.L.R. (3d) 116 (Ont. Sup. Ct. J.).

area.[36] He stressed that consultation does not require that the parties reach an agreement, but does require that they proceed on a good faith basis.[37] He was satisfied that, although the parties had not reached an agreement, there had been meaningful discussions between KI, Platinex, and the Crown.[38] As in similar cases, he reiterated that the duty of the Crown to consult with a First Nation varies with the circumstances and is impacted by the strength of the claim, the rights affected, and the degree of impact of the proposed development.[39]

Justice Smith proceeded by examining the availability of injunctive relief. For an injunction to be issued, an applicant must satisfy a court that there is a serious issue to be tried, that without an injunction irreparable harm will occur, and that the balance of convenience favours the granting of an injunction. In the present case, he failed to find a high degree of probability that Platinex's proposed drilling program would harm the land, culture, and community of KI.[40] With the likelihood of Platinex going bankrupt if it could not proceed with its development, Smith J. found the balance of convenience to be in its favour. Despite this, Smith J. stated that Aboriginal rights deserve the respect of both society and the justice system, though they do not automatically trump competing rights of government, corporations, or individuals.[41]

Justice Smith dismissed KI's motion for an interlocutory injunction, although he noted that an injunction might generally be appropriate to protect Aboriginal rights.[42] Convinced that Platinex should not, however, be allowed to proceed at its will, he issued a declaratory order, intended to encourage consultation, control the pace of development, and provide for accommodation, if necessary.[43]

4. COMMENTARY

Justice Smith noted, near the end of the decision, that

> [i]t is not in the interests of the parties or the judicial process to allow an environment of conflict and distrust to prevail. Such an atmosphere does not, and cannot, promote the fundamental principle of reconciliation that is at the very heart of balancing Aboriginal interests and rights with those of others.[44]

He went on to note that his grant of an interim declaratory judgment permitted the court to stay involved as development progressed and to exercise "[o]ngoing supervision"[45] of development, including requiring its satisfaction that a proper consultation protocol has been implemented before Platinex may proceed with its exploration drilling program and supervision by the court of matters, including, but "not limited to, a review of a proposed

---

36 *Ibid.* at para. 71.
37 *Ibid.* at para. 82.
38 *Ibid.* at para. 88.
39 *Ibid.* at para. 99.
40 *Ibid.* at para. 157.
41 *Ibid.* at paras. 171-72.
42 *Ibid.* at para. 173.
43 *Ibid.* at paras. 184-85.
44 *Ibid.* at para. 183.
45 *Ibid.* at para. 186.

drilling timetable, the scope and content of a consultation protocol, all aspects of the Phase One exploratory drilling program, and provisions for compensation and funding."[46]

One wonders whether Smith J.'s insertion of his own judgment as to matters subject to agreement between Platinex and KI is conducive to avoiding an atmosphere of mistrust and conflict, which he noted is not conducive to the ultimate goals of fairness and reconciliation. Based on review of recent decisions, it appears that since this judgment was issued, Platinex and the KI have been back before Smith J. at least four times, most recently in respect of contempt charges against several KI leaders who blockaded Platinex's access to the Property in violation of the order of the Court.[47]

While Platinex's goal to develop the Property is clear, KI's perspective is less easily encapsulated. While Smith J. noted in the decision, summarized above, that KI was not opposed to development on its traditional lands, it is not clear based on subsequent developments that that is the case. As summarized by Smith J. in his decision relating to the contempt charges:

> The perspective of KI is more complex. KI fears that further encroachment on their traditional land will threaten their way of life and culture, and ignores, diminishes, and disrespects them. Although interested in possible commercial and economic opportunities, KI views the issues of sovereignty, cultural and spiritual concerns, as being paramount.
>
> On December 7, 2007, Chief Morris summarized his position and that of several other contemnors when he stated in court: "I stand by the fact that the land I'm … on now is our land. I believe God put us there. God [gave] us a language, the animals to live off and we just don't want to see development on that area…As a treaty partner I expect to be treated as a partner,… not where one is superior than us."[48]

It is notable that Smith J. sentenced the KI leaders to six months in jail for contempt. Five KI leaders began serving their sentences on 17 March 2008.

Where the interests of the parties are so diametrically opposed, it is difficult to foresee how the ultimate goal of fairness and reconciliation can be achieved.

D. *LITTLE SALMON/CARMACKS FIRST NATION V. YUKON (MINISTER OF ENERGY, MINES AND RESOURCES)*[49]

1. BACKGROUND

This case addresses the scope and applicability of the duty to consult and accommodate in situations where a modern final agreement is applicable.

---

46 *Ibid.* at para. 188.
47 *Platinex v. Kitchenuhmaykoosib Inninuwug First Nation*, [2008] 2 C.N.L.R. 301 (Ont. Sup. Ct. J.).
48 *Ibid.* at paras. 14-15 [footnotes omitted].
49 2007 YKSC 28, [2007] 3 C.N.L.R. 42 [*Little Salmon*].

2. FACTS

Little Salmon/Carmacks First Nation (the First Nation) is a signatory to the Little Salmon/Carmacks First Nation Final Agreement (the Final Agreement), a modern comprehensive claim agreement with Canada and Yukon. The Final Agreement settles the First Nation's land claims and addresses other matters, including land use planning, heritage, forest resources, and water management.

The First Nation applied for judicial review of a decision by the Director of the Agriculture Branch of Yukon Territory granting an agricultural land application made by Larry Paulsen. The land granted pursuant to the application was not within the First Nation's settlement area, but was within its traditional territory and enveloped portions of the trapline of Johnny Sam, a First Nation member. The First Nation argued that the right of the Crown to transfer lands located within the First Nation's traditional territory is subject to the Crown's duty to consult and accommodate and that the Crown did not fulfill this duty. The Yukon Government's policy regarding review of land applications provided that

> [i]n the case of dispositions of Crown land in the Traditional Territory of a First Nation with Final and Self-Government Agreements, there is no legal obligation to consult with the First Nation. Aboriginal rights in respect of that Crown land are no longer asserted, and the Final and Self-Government Agreements do not set out an obligation to consult. Also, there is no other applicable legislation that establishes a legal consultation requirement.
>
> The Yukon Government consults with First Nations regarding dispositions because it is good practice when conducting public business to liaise with other governments. First Nations are consulted about land applications because they are owners of significant amounts of Settlement Land and would be interested in what occurs on nearby Crown land. We believe it is good practice to consult on land applications with First Nations and other publics in the nearby territory because the information and interests that are brought to our attention result in better-informed decisions.[50]

On this basis, the Yukon Government claimed that there was no legal duty to consult with the First Nation in respect of the Paulsen land application as none was expressly set out in the Final Agreement, and alternatively, that if there was a duty to consult, it had been fulfilled.

3. DECISION

Justice Veale noted that the Supreme Court of Canada, in *Mikisew Cree*,[51] applied the duty to consult and accommodate to the interpretation of a historical treaty.[52] After reviewing the Supreme Court's analysis of the issue in *Mikisew Cree*, Veale J. concluded that "the duty to consult and accommodate arises from the concept of honour of the Crown and is an implied term of every treaty."[53] He proceeded by analyzing the features of the Final Agreement to

---

50 *Ibid.* at para. 20.
51 *Supra* note 26.
52 *Supra* note 49 at para. 3.
53 *Ibid.* at para. 66.

determine whether, as the Yukon Government submitted, the terms of the Final Agreement precluded the application of a common law duty to consult and accommodate. He noted that the Final Agreement expressly incorporated existing and future constitutional rights by reference and concluded that these rights included the right to benefit from the duty of consultation and accommodation, which duty is "a constitutional treaty obligation based on the honour of the Crown and section 35 of the *Constitution Act, 1982*."[54]

After concluding that the Final Agreement did not preclude the application of the duty to consult and accommodate, Veale J. went on to consider whether the duty to consult was triggered by the proposed transfer of land pursuant to the Paulsen land application. He concluded that, as the land grant removed significant land from the traditional territory of the First Nation, negatively impacting the right of the First Nation members to harvest wildlife for subsistence and negatively impacting the trapline of Sam, significant treaty rights of the First Nation as set out in the Final Agreement might be adversely affected. Justice Veale made clear that these negative impacts struck at the heart of what the Final Agreement sought to protect — the culture and way of life of the First Nation. As the Yukon Government had notice of the Final Agreement, and as the grant of the application negatively impacted the First Nation, the Crown had a duty to consult.[55]

In assessing whether the Yukon Government had met the duty in this case, Veale J. acknowledged that the Yukon Government met the informational requirement,[56] but noted that "it [was] difficult to conclude that a duty has been met when the legal requirement of the duty is denied."[57] He was also troubled by the fact that the consultation process used by the Yukon Government was a public consultation and information-gathering process that gave equal weight to all public views and recommendations, not a process designed to fulfill the Crown's common law duty to consult and accommodate.[58] Although he indicated that, in the circumstances, the scope of the Crown's duty was not immense, the Yukon Government should have consulted directly with the First Nation and Sam.[59] While some information was provided to these parties, the Yukon Government failed to engage them actively in the process and did not meet its duty to consult. As a result, Veale J. quashed the decision approving the Paulsen application.

4. COMMENTARY

This decision seeks to clarify the relationship between modern land claim agreements or settlement agreements and the common law. Justice Veale concluded that the Crown's duty to consult and accommodate is applicable to all treaties, whether historic or modern. In entering into settlement agreements with the Crown, Aboriginal groups do not give up their constitutional rights, including the right to benefit from the Crown's duty of consultation and accommodation.

---

54 *Ibid.* at para. 82; see *Constitution Act, 1982*, s. 35, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

55 *Little Salmon, ibid.* at para. 103.

56 *Ibid.* at para. 115.

57 *Ibid.* at para. 116.

58 *Ibid.* at para. 117.

59 *Ibid.* at para. 122.

This case also emphasizes that inclusion of Aboriginal groups in public consultation and information-gathering processes will not satisfy the Crown's duty to consult where such processes do not involve direct consultation between the Crown and the affected Aboriginal group.

This decision has been appealed to the Yukon Court of Appeal.

E. *DENE THA' FIRST NATION V. CANADA (MINISTER OF ENVIRONMENT)*[60]

The Dene Tha' First Nation applied for judicial review of certain decisions of Ministers relating to the design and creation of the regulatory and environmental review process for the Mackenzie Gas Pipeline, alleging the Ministers had failed to fulfill their obligations to consult with the Dene Tha'.[61] At trial, Phelan J. concluded that there was a failure on the part of the Crown to consult with the Dene Tha'. The Ministers appealed the decision. The parties eventually settled the dispute, rendering the appeals moot, however the Court of Appeal ordered that the appeals would go ahead. The Court found no error in the decision of Phelan J. that warranted intervention. For consideration of the decision of the Court of Appeal, please refer to "Recent Regulatory and Legislative Developments of Interest to Oil and Gas Lawyers 2007-2008."[62]

II. ADMINISTRATIVE LAW

A. *DUNSMUIR V. NEW BRUNSWICK*[63]

The distinction between the standards of review of "unreasonableness" and "patent unreasonableness" in judicial review has often been the subject of academic commentary since the standard of reasonableness *simpliciter* was introduced in *Canada (Director of Investigation and Research v. Southam.*[64] The Supreme Court of Canada in *Dunsmuir* has now responded to these concerns, reducing the standards from three to two and eliminating the illusory distinction between patent unreasonableness and reasonableness *simpliciter*. For a full discussion of this case, please refer to "Recent Regulatory and Legislative Developments of Interest to Oil and Gas Lawyers 2007-2008."[65]

---

60 2008 FCA 20, 35 C.E.L.R. (3d) 1.

61 *Dene Tha' First Nation v. Canada (Minister of Environment)*, 2006 FC 1354, 303 F.T.R. 106.

62 John E. Lowe & Jonathan M. Liteplo, "Recent Regulatory and Legislative Developments of Interest to Oil and Gas Lawyers, 2007-2008" (2009) 46 Alta. L. Rev. 521 at 540.

63 2008 SCC 9, [2008] 1 S.C.R. 190 [*Dunsmuir*].

64 [1997] 1 S.C.R. 748.

65 *Supra* note 62 at 578.

III. CONFLICT OF LAWS

A. *YUGRANEFT CORPORATION V. REXX MANAGEMENT CORPORATION*[66]

1. BACKGROUND

This case deals with the application in Alberta of a limitation period in respect of an international arbitration award.

2. FACTS

Yugraneft Corporation (Yugraneft) brought an application for an order to enforce in Alberta an international arbitration award. Yugraneft was a Russian joint stock company. Rexx Management Corporation (Rexx) was incorporated in Alberta for the purpose of providing logistics to Yugraneft. The companies entered into a contract pursuant to which Rexx was to supply Yugraneft with equipment and materials. The contract provided that disputes were to be referred to arbitration in Russia.

A dispute arose under the contract, with Yugraneft alleging that it had prepaid nearly US$1 million for services that Rexx did not provide. The matter was referred to a three-member panel of the International Commercial Arbitration Court in Russia. Rexx initially argued that the arbitration panel had no jurisdiction to consider the dispute, but this argument was dismissed. When the tribunal subsequently heard the main dispute, Rexx did not appear. The tribunal granted an award in favour of Yugraneft, in September 2002, in the sum of $935,729.43.

In January 2006, Yugraneft filed an Originating Notice in Alberta, seeking to enforce the arbitration award.

Rexx filed an affidavit in which it was alleged that Yugraneft had been the subject of an illegal, armed takeover by Tyumen Oil Company (TNK). Rexx contended that when TNK took over Yugraneft, it failed to pay Rexx for the equipment and material Rexx had supplied.

Yugraneft sought to have the arbitration award both "recognized" and "enforced" in the Alberta Court. In Alberta, the *Limitations Act*[67] provides that an action will be barred if a plaintiff does not seek a "remedial order" within two years of the date that the cause of action arises or ten years from the date a judgment or order is issued for the payment of money. The *Limitations Act* defines a "remedial order" as excluding declarations as to rights and duties, or enforcement of a remedial order.[68] Yugraneft argued that the arbitration award was, in essence, a remedial order. Yugraneft argued, in the alternative, that "recognition" of the award was in the nature of a declaration, and was therefore not affected by the expiry of the two-year limitation period under the *Limitations Act*. Yugraneft also argued that the term

---

66 2007 ABQB 450, 423 A.R. 241.
67 R.S.A. 2000, c. L-12.
68 *Ibid.*, s. 1(i).

"judgment" should be seen to apply to either a domestic or a foreign judgment, and that therefore the ten-year limitation period had not yet expired with respect to the arbitral award.

Yugraneft argued that the contract in dispute was governed by the *International Commercial Arbitration Act*,[69] which incorporates the *Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law*.[70] The *Model Law* does not contain a specific limitation on the time within which an application for enforcement must be brought.

Rexx argued that Yugraneft was, in essence, seeking a remedial order in Alberta, and that the action was barred because Yugraneft knew of its cause of action for more than two years before the action was commenced in Alberta. Rexx submitted that an action on a foreign judgment gives rise to an independent cause of action, which arises at the time that the original award is made.

Rexx argued, in the alternative, that enforcement of the arbitration award in Alberta would be contrary to public policy in the face of evidence that TNK's takeover of Yugraneft had been fraudulent.

3. DECISION

The Court recognized that arbitrations in Alberta are governed by the *ICAA*, and acknowledged that the *Model Law* contains no reference to a limitation period on enforcement of an award.[71]

The Court rejected Yugraneft's argument that the arbitral award was a declaration and exempt from the *Limitations Act*. The Court held that an international arbitration award is remedial and not merely a declaration as to rights.[72]

The Court noted as well that Canadian case law establishes that an action to enforce a foreign judgment is considered to be an action upon a simple contract debt.[73] Yugraneft had argued that, in keeping with principles of comity, a more modern approach should be taken, and a foreign judgment should be treated as being the same as a domestic judgment for limitation purposes. In other words, Yugraneft argued, the arbitral award should be treated as being a remedial order, compliant with the requirements of the *Limitations Act* and obtained within the relevant limitation period and requiring only enforcement within the ten-year limitation period governing judgments for the payment of money.

While the Court found some merit in Yugraneft's argument, it held that the current state of the law in Canada recognizes that foreign judgments are to be treated as actions on simple contract debts, which must be pursued within two years of the date the foreign judgment is

---

69 R.S.A. 2000, c. I-5 [*ICAA*].
70 GA Res. 72, UN GAOR, 40th Sess. (1985) 308 [*Model Law*].
71 *Supra* note 66 at para. 52.
72 *Ibid.* at para. 59.
73 *Ibid.* at para. 62, citing *Rutledge v. United States Savings and Loan* (1906), 37 S.C.R. 546.

obtained. The Court stated that legislative change would be required to bring the law in line with emerging principles of comity.[74] In the interim, the Court concluded that the present limitation period for a foreign judgment, or a foreign arbitral award, is two years. Thus, the Court held that the action to enforce the arbitral award was statute barred.[75]

4. COMMENTARY

This case reinforces the need for parties who agree to be bound by provisions related to foreign arbitrations to remain vigilant about Canadian limitation periods when it comes to issues of enforcement of the arbitral award. In this case, a party that was successful in arbitration waited too long before taking steps to enforce in Alberta on the decision of the arbitrators, and in the result, was barred from pursuing assets in Alberta owned by the unsuccessful party.

B. *PRO SWING INC. V. ELTA GOLF INC.*[76]

1. BACKGROUND

Traditionally, Canadian courts have been guided by the common law rule that in order to be recognized and enforced, a foreign judgment must be for a debt or a defined sum, and must be final and conclusive. As a consequence of this, foreign non-money judgments have not traditionally been enforced. This case considers whether that traditional rule should be relaxed.

2. FACTS

Pro Swing Inc. (Pro Swing) manufactures customized golf clubs. In 1998, Pro Swing filed a complaint in an Ohio Court alleging that eight defendants had infringed its trademark. Elta Golf Inc. (Elta), an Ontario company, was named as one of the defendants. Pro Swing asserted that Elta was selling golf clubs over the Internet under the trademark "Rident," and argued that this trademark was confusingly similar to Pro Swing's "Trident" trademark. In response to Pro Swing's action, Elta entered into a settlement agreement with Pro Swing, in which Elta agreed that it would discontinue advertising and distributing the clubs. The settlement agreement was incorporated into a consent decree, which was endorsed by the Ohio Court.

In 2002, Pro Swing filed a motion in Ohio for contempt of court, alleging that Elta had violated the settlement agreement and the consent decree. The Ohio Court issued a contempt order.

In June 2003, Pro Swing sought to have the Ontario Superior Court of Justice enforce the consent decree and the contempt order.[77] Elta resisted the action, arguing that the Court

---

74 *Ibid.* at para. 68.
75 *Ibid.* at para. 82.
76 2006 SCC 52, [2006] 2 S.C.R. 612 [*Pro Swing*].
77 *Pro Swing v. ELTA Golf* (2003), 68 O.R. (3d) 443 (Sup. Ct. J.).

should not enforce a non-money judgment, and arguing that the contempt order was quasi-criminal in nature. The Superior Court of Justice declared the consent decree enforceable in Ontario. Justice Pepall held that recent authorities called for relaxation of the rule that foreign judgments would only be enforced if they were for a fixed sum of money.[78] She also found that the contempt order was not penal, but restitutionary, and enforceable in Ontario.[79]

The Court of Appeal agreed that it was time to re-examine the rules regarding enforcement of foreign non-money judgments, but ruled that the Ohio orders were not sufficiently certain.[80]

Pro Swing sought leave to appeal to the Supreme Court of Canada. In an unusual turn of events, after leave was granted, Elta declared that it did not have sufficient resources to continue to incur legal fees and the hearing proceeded with no attendance by Elta.

3. DECISION

The Supreme Court split 4-3 in its decision in this case. The majority commented on the traditional rule that foreign non-money judgments are not enforceable in Canada, noting that the enforcement of such a judgment may require our domestic court to interpret and apply another jurisdiction's laws. The Court also noted the traditional concern that enforcement of foreign non-money judgments has the effect of allowing a foreign court to reach deeply into Canadian enforcement regimes and allows a foreign country to dictate and control the enforcement process in this country.[81]

The Court was satisfied that the time was ripe to revise the traditional common law rule, but expressed caution that any such change must retain judicial discretion to ensure that the foreign order does not disturb the integrity of the Canadian legal system.[82]

The Court expressed concern that the enforcement of equitable remedies, in particular, gives rise to issues, given the broad range of judicial discretion applied in granting such awards. The Court held that the basic conditions that must apply to a more relaxed approach to enforcement of foreign judgments would include the requirements that the judgment be "rendered by a court of competent jurisdiction[,] … be final, and … be of a nature that the principle of comity requires the domestic court to enforce [the judgment]."[83] The Court noted that comity does not require a domestic court to afford greater judicial assistance to a foreign litigant than would normally be afforded to a domestic litigant. The domestic court should also ensure that the foreign order is sufficiently clear that the defendant knows what is expected of it and does not expose the Canadian litigant to unforeseen obligations.[84]

---

78 *Ibid.* at para. 15.
79 *Ibid.* at paras. 16-17.
80 *Pro Swing v. ELTA Golf* (2004), 71 O.R. (3d) 566 (C.A.) at paras. 9, 11.
81 *Supra* note 76 at paras. 10-15.
82 *Ibid.* at para. 15.
83 *Ibid.* at para. 31.
84 *Ibid.* at para. 30.

In considering the facts of the present case, the Court examined three issues: (1) the quasi-criminal nature of the foreign contempt order; (2) the burden on the judicial system of enforcement of a foreign order; and (3) the extraterritorial nature of the orders sought to be enforced.

As to the quasi-criminal nature of the contempt order, the Court noted that in Canada an individual may be jailed for contempt of court, required to pay a fine, or provide community service. The Court held that this quasi-criminal element precludes the enforcement of such an order in Canada.[85]

With respect to the burden on the judicial system, the Court noted that Pro Swing had other options for enforcing its Ohio orders — it could have commenced a new action in Canada, or it could have sought letters rogatory for the purpose of obtaining evidence in Canada for use in the Ohio proceedings.[86] The Court expressed concern that, given Elta's absence due to financial limitations, judicial resources could be expended to assist Pro Swing, only to find that Elta was insolvent.[87]

On the question of extraterritoriality, the Court noted that Pro Swing's trademark protection applied only in the United States. Given that the settlement agreement did not expressly give worldwide application to the restrictions to be imposed upon Elta, the consent decree could not have such broad application.[88] The contempt order also purported to require Elta to provide an accounting for all sales, even those that did not fall within Pro Swing's trademark protection. The Court held that these facts offended the principle of territoriality.[89]

As a consequence of the foregoing conclusions, the Court held that the foreign orders were not enforceable in Canada.[90]

As a further matter, and while the argument was not raised, the Court considered the fact that some of the information sought by Pro Swing as part of its application would have violated the protection of personal information. The Court cited public policy as a further possible reason why a foreign judgment might not be enforceable.[91]

The dissent, which included the Chief Justice, would have granted the appeal and permitted the enforcement of the foreign orders on the terms ordered by the trial judge. The dissenting justices considered the consent decree and contempt order to be final and sufficiently clear to be enforceable.[92] The dissent held that there was nothing penal about the contempt order and stated that a public policy concern that was not before the court should not be raised.[93]

---

85 *Ibid.* at paras. 35, 39.
86 *Ibid.* at paras. 42-43.
87 *Ibid.* at para. 46.
88 *Ibid.* at para. 56.
89 *Ibid.* at para. 57.
90 *Ibid.* at para. 64.
91 *Ibid.* at paras. 59-61.
92 *Ibid.* at paras. 110, 116.
93 *Ibid.* at paras. 109, 121.

4. COMMENTARY

Several Canadian decisions have accepted that our courts should relax the traditional rules regarding enforcement of foreign non-money judgments. However, this case provides only limited guidance as to what that ultimate modification to the common law will look like. It is clear that to be enforceable, foreign judgments must be rendered by courts of competent jurisdiction, must be clear and final, and must not have territorial reach that exposes Canadian litigants to consequences that would not be reasonable in Canada. We will have to await further decisions in this area for more clarity than this case provides.

IV. CONFIDENTIALITY

A. *MINERA AQUILINE ARGENTINA SA V. IMA EXPLORATION INC.*[94]

1. BACKGROUND

The British Columbia Court of Appeal rendered this decision in an appeal and cross-appeal of the decision of the British Columbia Supreme Court.[95] This case involves the proper interpretation of a confidentiality agreement signed by IMA Exploration Inc. (IMA). At trial, Minera Aquiline Argentina SA (Minera) was awarded judgment against IMA for unlawful use by IMA of confidential information.

2. FACTS

IMA and Minera were prospective purchasers of a mining property (Calcatreau Property) from Newmont Mining Corp. (Newmont) and other mining companies. All prospective purchasers were required to sign a confidentiality agreement prior to receipt of a bid package and commencement of due diligence relating to the Calcatreau Property. During a site visit, an IMA contractor requested data relating to a satellite map that he observed on the wall of a Newmont geologist's office. The request was considered by the Newmont managers and the IMA contractor was later provided with a disk containing requested data (BLEG A data) even though the BLEG A data was largely unrelated to the Calcatreau Property.

IMA ultimately decided not to bid on the Calcatreau Property. Several months later, the IMA contractor reviewed the BLEG A data for the first time. He noted silver anomalies in the data, and based thereon, staked mineral claims to the surrounding area (Navidad Claims) on behalf of IMA. Minera, the successful purchaser of the Calcatreau Property, reviewed the BLEG A data following the completion of the purchase and noted the same anomalies, but when it attempted to stake mineral claims, it found that IMA had already done so.

Minera brought an action against IMA and its subsidiary for breach of the confidentiality agreement. The trial court held that the BLEG A data was both confidential information covered by the confidentiality agreement and information that was protected by confidentiality at common law. The trial judge declared that IMA held the Navidad Claims

---

94 2007 BCCA 319, [2007] 10 W.W.R. 648 [*Minera Aquiline*].

95 *Minera Aquiline Argentina SA v. IMA Exploration*, 2006 BCSC 1102, [2007] 1 W.W.R. 43.

pursuant to a constructive trust in favour of Minera and ordered that the Navidad Claims and all assets related thereto be transferred to Minera within 60 days, subject to payment by Minera of all reasonable amounts expended by IMA in the acquisition and development of the Navidad Claims.

IMA appealed the decision of the trial court, alleging that the trial judge erred both in concluding that the BLEG A data was subject to the confidentiality agreement and in concluding that it was subject to common law confidentiality obligations. It further argued that, if the BLEG A data was confidential information, the appropriate remedy was damages. Minera cross-appealed, claiming that if the trial judge erred in ordering a constructive trust of the Navidad Claims, the appropriate remedy would be a constructive trust of the shares of the IMA subsidiary that owned the Navidad Claims.

3. DECISION

The Court of Appeal dismissed the appeal. The Court was satisfied that the trial judge had correctly decided that IMA had not received the BLEG A data as a gift from Newmont that was intended to curry IMA's favour and interest in Newmont's mining activities, as claimed by IMA. The Court concluded that the provision of the BLEG A data was incidental to the sale of the Calcatreau Property, that the data was provided to IMA in its capacity as a prospective purchaser, and that the data was intended only to augment IMA's due diligence.[96]

IMA alleged that the remedy of a constructive trust and an injunction was inappropriate on two grounds. First, it asserted that private international law prevents an order respecting a foreign immovable property, such as mineral claims. Minera countered that, based upon the Court's *in personam* jurisdiction to order proprietary remedies in foreign countries, which has existed for more than 250 years and was adopted by the Supreme Court of Canada in *Duke v. Andler*,[97] the trial judge's order of a constructive trust of the Navidad Claims was an available and appropriate remedy. Further, Minera noted that recent cases, including *Pro Swing*, served to expand the mechanisms available to Canadian courts in regard to private international law to reflect the globalization of commerce. The Court adopted Minera's arguments in this regard as a complete response to IMA's first ground.[98]

The second ground cited by IMA was that the contractual "flavour" and the *de minimus* nature of the breach of confidence lead to damages being the only appropriate remedy pursuant to *Cadbury Schweppes v. FBI Foods Ltd.*[99] Minera countered that the "flavour" of this case was not contractual, but a breach of confidence meriting consideration of the range of equitable remedies provided for in *Lac Minerals Ltd. v. International Corona Resources Ltd.*[100] and *Cadbury*. The Court agreed with Minera's interpretation of *Cadbury*, concluding that the proper remedy for a breach of confidence must be selected from the full range of remedies based upon what is most appropriate on the facts with the intent of placing "the

---

96 *Supra* note 94 at para. 79.
97 [1932] S.C.R. 734.
98 *Supra* note 94 at para. 92.
99 [1999] 1 S.C.R. 142 [*Cadbury*].
100 [1989] 2 S.C.R. 574 [*Lac Minerals*].

confider in as good [a] position as it would have been in but for the breach."[101] In this case, the Court was satisfied that a constructive trust and mandatory injunction were the appropriate remedies. As was found by the Supreme Court of Canada to be the case in *Lac Minerals*, the uniqueness of the mining claims staked using the confidential information precluded damages as an appropriate remedy.[102]

4. COMMENTARY

The Court's analysis and decision highlight the importance of ensuring that confidential information obtained from another party, whether subject to a confidentiality agreement or not, is appropriately handled. The Court's commentary on the uniqueness of mining claims would also apply to many oil and gas developments and emphasizes that, in the case of a breach of confidentiality, the courts will look to the broad range of equitable remedies to select a remedy that is appropriate in the circumstances.

V. CONTRACTS

A. *DOUBLE N EARTHMOVERS LTD. V. EDMONTON (CITY OF)*[103]

1. BACKGROUND

The Supreme Court of Canada in *Ontario v. Ron Engineering & Construction (Eastern) Ltd.*[104] developed the "Contract A/Contract B" analysis of the tendering process. A call for tenders is seen as an offer by an owner, and the submission of a bid signifies acceptance of that offer, giving rise to a contract known as "Contract A." When an owner issues a call for tenders, there is an implied understanding that the owner will only accept compliant bids, that is, bids that substantially comply with the material specifications set out in the tender. The submission of a compliant bid also becomes the offer for the purposes of "Contract B." When a bid is accepted, the terms of the tender documents become the terms and conditions of "Contract B." This case before the Supreme Court of Canada focused on the obligation of an owner in the tendering process to investigate potentially non-compliant bids and on the question of whether acceptance of a non-compliant bid constituted a breach of obligations owing by the owner to the unsuccessful bidder.

2. FACTS

The City of Edmonton issued a call for tenders on a 30-month contract to supply equipment and operators. The Tender Form set out a requirement that all equipment had to comply with certain specifications, including a requirement that the equipment be manufactured in 1980 or later. Six bids were submitted. Only two of these bids were compliant on their face, those of Sureway Construction of Alberta Ltd. (Sureway) and the plaintiff, Double N Earthmovers Ltd. (Double N). In its bid, Sureway stated that its two

---

101 *Supra* note 94 at para. 99, citing *Cadbury*, *supra* note 99 at para. 61.
102 *Minera Aquiline*, *ibid.* at paras. 107, 110.
103 2007 SCC 3, [2007] 1 S.C.R. 116.
104 [1981] 1 S.C.R. 111.

pieces of equipment were: (1) a unit manufactured in 1980; and (2) a 1977 or 1980 rental unit.

Prior to the award of the contract, Double N's principal notified the City of his suspicions that Sureway did not own any equipment aged 1980 or newer. The City did not investigate Double N's allegations and awarded the contract to Sureway.

Prior to the start of work, Sureway attempted to register equipment manufactured in 1979 and 1977. City officials insisted that Sureway acquire newer equipment. Sureway did not do so, but the City did not prevent Sureway from proceeding with the contract. Double N sued for a breach of Contract A. The trial judge held that there was no duty on the part of the City to investigate Sureway's tender and that the City was not in breach of Contract A by allowing Sureway to use equipment older than 1980.[105] The appeal was dismissed by the Alberta Court of Appeal.[106]

3. DECISION

In a 5-4 decision, the majority of the Supreme Court found that the appeal should be dismissed.

As a starting point, the Court accepted that it is an implied term of Contract A that an owner would only accept a compliant bid. In addition, the Court recognized an implied obligation that the owner treat all bidders fairly and equally.[107] Although Sureway stated in its tender, with respect to the second item of equipment, that it would provide *either* a 1977 *or* a 1980 rental unit, the City's acceptance of Sureway's bid was to be considered in light of the initial specifications, including the specification that the equipment be 1980 or newer. The majority concluded that the purchase order could be construed as accepting only the 1980 unit offered in Sureway's bid.[108] A majority of the Court concluded that the bid was compliant, because Sureway committed to providing certain equipment, despite the fact that it did not own such equipment. Therefore, the Court held, the City did not breach a duty to Double N to reject a non-compliant bid.[109]

The majority further found that the City did not have a duty to investigate whether Sureway's bid in fact met the specifications, even where the City had been alerted to concerns on the part of one of the other bidders.[110] This was so even though the first item of equipment in the tender submitted by Sureway listed a serial number that, had the City checked its own database, would have revealed that the unit had in fact been manufactured in 1979. However, there was neither an express nor an implied duty in Contract A to investigate a bidder's compliance with the specifications set out in the tender. "[A]llegations raised by rival bidders do not compel owners to investigate the bids made by others"[111] —

---

105 *Double N Earthmovers Ltd. v. Edmonton (City of)*, 1998 ABQB 31, 213 A.R. 81 at para. 56.
106 *Double N Earthmovers Ltd. v. Edmonton (City of)*, 2005 ABCA 104, 363 A.R. 201.
107 *Supra* note 103 at para. 32.
108 *Ibid.* at para. 43.
109 *Ibid.* at para. 74.
110 *Ibid.* at paras. 46-54.
111 *Ibid.* at para. 53.

such a requirement, the majority found, would encourage unwarranted and unfair attacks by rival bidders.[112]

As for the City continuing with Sureway as its contractor even after it discovered that the equipment did not comply, the majority noted that this was conduct that occurred after the award of Contract B. At this time, Contract A had come to an end, and any obligations on the part of the owner to unsuccessful bidders had been fully discharged. If the contract between Sureway and the City was breached, the City had the option of cancellation according to the terms of the agreement, but it was not obliged to do so.[113]

Justice Charron, writing for McLachlin C.J.C. and Bastarache and Binnie JJ., in dissent, would have found that the City had breached its contractual obligations.[114] The City breached its obligation to Double N under Contract A to ensure that Sureway's bid conformed with the tender specifications. Justice Charron wrote:

> The City's casual approach to Sureway's bid, particularly in light of the warning it received about the bid's likely non-compliance, was unfair to other bidders who provided accurate information in accordance with the tender specifications. The obligation to accept only a compliant bid would be meaningless if it did not include the duty to take reasonable steps to ensure that the bid is compliant. In my view, checking the equipment particulars — particulars which the City itself called for — against its own records was one such reasonable step the City was obliged to take in evaluating the bids for compliance.[115]

In addition to the obligation to provide serial numbers, the City also reserved for itself a right of inspection of the equipment. The reasonable steps of checking the serial numbers and inspecting the equipment would, the dissenting court found, have enabled the City to discover Sureway's deceit.[116]

Justice Charron noted that the contention that the City was entitled to accept a tender that was compliant on its face was undermined by the fact that there was a clear ambiguity in the tender. The ambiguity arose where Sureway offered the 1977 *or* 1980 rental unit for its second piece of equipment:

> The City asked only for apples, and Sureway responded by saying that it would provide the City with oranges *or* with apples. At best, the bid was ambiguous. Since the ambiguity related to an essential term of the contract, this ambiguity cannot be said to be a mere irregularity.[117]

The dissenting court also found that the City breached its duty to treat all bidders equally and fairly when it permitted Sureway to use pre-1980 machinery.[118] The City could not avoid this obligation by arguing that Contract A was at an end. Although the parties to Contract B can negotiate and amend the terms of the contract after it has been entered into, to address

---

112 *Ibid.*
113 *Ibid.* at paras. 71-72.
114 *Ibid.* at para. 84.
115 *Ibid.* at para. 116.
116 *Ibid.* at para. 114.
117 *Ibid.* at para. 120 [emphasis in original].
118 *Ibid.* at para. 84.

circumstances that may arise during the course of its performance, in these circumstances, where the City failed to take reasonable steps to ensure the bid's compliance, its waiver of the essential age requirement effectively turned a non-compliant bid into a compliant one and could not be condoned.

4. COMMENTARY

This split decision from the Supreme Court of Canada signifies a strong divide in the Court as to the obligations of an owner in the tendering process. The majority ultimately concluded that owners calling for tenders are entitled to take bidders at their word. If a bid is compliant on its face, even where rival bidders question its authenticity, an owner is entitled to accept that bid as being compliant. In this, the owner must treat all bidders equally.

In essence, Double N argued that an owner owes a bidder a duty of good faith, which persists beyond the formation of Contract B. The Court rejected this proposition, and held that once an owner accepts a bid which appears on its face to be compliant, the owner's duty to treat the unsuccessful bidders fairly is extinguished. Based upon the majority decision, once an owner accepts a compliant bid, the owner is then at liberty to negotiate with the successful bidder on any terms.

Arguably, as the dissent observed, by failing to compel the successful bidder to comply with the terms of the tender, once Contract B was awarded, the City was permitted to undermine the integrity of the tendering process. In essence, the Court's conclusion that an owner's obligations under Contract A are extinguished once Contract B is formed too narrowly interprets the owner's duties. Taken to its extreme, the Court's decision could be seen to stand for the proposition that as long as Sureway submitted a bid agreeing to use a compliant bulldozer, it was thereafter open to the City to negotiate with Sureway to undertake the job using a pick and shovel, and Double N would have no right, at that point, to expect to be treated fairly. While one might accept that it is open to an owner to look no further than the face of the tender to determine compliance, an owner's ability to thereafter ignore the terms it originally agreed to be bound by seriously undermines the tender process and jeopardizes the faith that bidders would ordinarily place in the process.

B. *NO. 2002 TAURUS VENTURES LTD. V. INTRAWEST CORPORATION*[119]

1. BACKGROUND

In this case, the Court considered a standard "entire agreement" clause excluding representations outside of the contract from becoming terms of the agreement and determined whether such a clause could exclude liability for an action in negligent misrepresentation.

---

[119] 2007 BCCA 228, 281 D.L.R. (4th) 420 [*Taurus*].

2. FACTS

The appellants (Intrawest Corporation) entered into a contract with the respondents, No. 2002 Taurus Ventures Ltd. (Taurus), whereby Taurus purchased a building lot on the Whistler Mountain development known as Kadenwood. Intrawest Corporation (Intrawest) marketed Kadenwood as a "premier ski-in/ski-out" residential development, with access to the lots by skiers on ski runs and ski trails.[120] Taurus claimed that Intrawest represented that it would build and pay for both the ski runs and ski trails within a reasonable period of time following the purchase of the lot.

The contract for purchase and sale however, did not deal with the timing of completion of the ski runs or who would build and pay for the ski runs. Further, the contract included an entire agreement clause, which read as follows:

> Miscellaneous — This Contract is the entire agreement between the parties and there are no other terms, conditions, representations, warranties or collateral agreements, express or implied, whether made by the Vendor, any agent, employee or representative of the Vendor or any other person. All of the terms, conditions, representations, and warranties contained in this Contract will survive closing and the transfer of the Property to the Purchaser.[121]

The trial judge held that Intrawest was liable for negligent misrepresentation and found that the entire agreement clause did not exclude liability for negligent misrepresentation.[122] The trial judge relied upon Iacobucci J.'s reasons for judgment in *Queen v. Cognos Inc.*[123] to support this conclusion.

3. DECISION

The Court of Appeal allowed the appeal, finding that Taurus' claim for negligent misrepresentation was barred by the entire agreement clause. While the Court accepted the possibility that there may be concurrent actions in both contract and tort,[124] the Court cited *Antorisa Investments Ltd. v. 172965 Canada Ltd.*[125] as support for the proposition that it depends on *how* parties have dealt with matters in a contract, with respect to whether they intend to exclude the right to sue in tort.[126] The Court noted the inclusion of an entire agreement clause in *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*,[127] which provided the basis on which the majority in that case concluded that a tort action could be excluded.[128]

---

120 *Ibid.* at para. 2.
121 *Ibid.* at para. 22.
122 *Intrawest Corp. v. No. 2002 Taurus Ventures Ltd.*, 2006 BCSC 293, 54 B.C.L.R. (4th) 173 at paras. 83, 85.
123 *Ibid.* at para. 74, citing *Queen v. Cognos*, [1993] 1 S.C.R. 87.
124 *Supra* note 119 at para. 46.
125 *Ibid.* at para. 48, citing *Antorisa Investments Ltd. v. 172965 Canada Ltd.* (2006), 82 O.R. (3d) 437 (Sup. Ct. J.).
126 *Taurus*, *ibid.* at para. 48.
127 [1993] 1 S.C.R. 12.
128 *Supra* note 119 at para. 46.

In the present case, although the entire agreement clause did not specifically refer to negligence, the Court found that the clause did exclude liability in tort for negligent misrepresentation.[129] The parties to the agreement were both sophisticated, commercial entities, and the contract was not a "standard adhesion contract."[130] The contract included a detailed description of the particular lot that was purchased, the Kadenwood development, and the responsibilities and obligations of the various parties involved in the development. The Court wrote:

> In these circumstances, where the contract was clearly intended to govern the relationship between the parties, it would not accord with commercial reality to give no effect to the entire agreement clause in determining whether Taurus can claim a tort remedy.[131]

The Court allowed the appeal on this issue, finding that an action in negligent misrepresentation was excluded, but also returned the matter to trial, based on a cross-appeal by Taurus, to determine whether Intrawest breached a collateral contract with Taurus.[132]

4. COMMENTARY

This case reinforces the importance of a properly-worded entire agreement clause. Too often, parties casually insert an entire agreement clause in an agreement, and little attention is paid to it in the context of the rest of the transaction. While, as in this case, imperfect language may be read sufficiently broadly to conclude that the entire agreement clause excludes liability for negligence, parties are well-advised to carefully word their entire agreement clause, and to consider the circumstances of the case and whether there have been representations in advance of contract formation that continue to bind the parties, notwithstanding the provisions of the written contract.

C. *SABLE OFFSHORE ENERGY INC. V. AMERON INTERNATIONAL CORPORATION*[133]

1. BACKGROUND

A claim for damages that is not connected to a physical injury or property loss is a claim for pure economic loss. Historically, damages for pure economic loss were not recoverable. However, in a series of decisions by the Supreme Court of Canada, there has been a gradual relaxation of this rule. In *Sable*, the Nova Scotia Court of Appeal was called upon to consider whether a claim for pure economic loss caused by non-dangerous goods could succeed.

2. FACTS

Sable Offshore Energy Inc. (Sable) was the operator and agent of the Sable Offshore Energy Project, a project that involved four offshore platforms, three onshore gas plants, and

---

129 *Ibid.* at para. 54.
130 *Ibid.* at para. 59.
131 *Ibid.*
132 *Ibid.* at paras. 88-91.
133 2007 NSCA 70, 255 N.S.R. (2d) 164 [*Sable*].

pipelines for the transmission of natural gas. Sable commenced an action against Ameron International Corporation (Ameron) alleging that Ameron, a manufacturer and supplier of paint and coatings, had supplied a paint system that resulted in the corrosion of steel, which impaired the structural integrity of the facilities. The Statement of Claim sought, *inter alia*, damages for direct and indirect costs incurred in the replacement of the paint systems, and loss of profits incurred in carrying out the replacement. Ameron applied to the Court to strike portions of the Statement of Claim on the basis that there can be no liability for pure economic loss involving non-dangerous defects. The lower court dismissed Ameron's application, finding that a claim for pure economic loss for non-dangerous goods was not obviously unsustainable.[134] Ameron appealed.

3. DECISION

The Court of Appeal reviewed the various cases and academic commentary relating to claims for economic loss. It upheld the decision of the lower court. "[T]he test on a motion to strike … is not whether the recent trend in the law seems to disallow the cause of action, but whether the action is absolutely unsustainable or certain to fail."[135] On the basis of recent developments in the law in this area, the Court of Appeal held that that could not be said of the Sable claim for damages for pure economic loss.[136]

4. COMMENTARY

In *Winnipeg Condominium Corporation No. 36 v. Bird Construction*,[137] La Forest J. recognized that contractors should be liable to pay in damages the costs of repairing dangerous defects caused by their negligence. He also left open the possibility of contractors being held to owe a duty to subsequent purchasers for the cost of repairing non-dangerous defects in buildings. Given that the defect was found to be dangerous in that case, the Court did not go on to consider whether damages for non-dangerous defects would be recoverable. The Supreme Court of Canada had previously stated, in *Canadian National Railway v. Norsk Pacific Steamship*,[138] that "new categories of cases will from time to time arise. It will not be certain whether economic loss can be recovered in these categories until the courts have pronounced on them."[139]

This case illustrates that the question of whether damages for pure economic loss are recoverable for non-dangerous defects remains, for now, unanswered.

---

134 *Sable Offshore Energy v. Ameron International Corp.*, 2006 NSSC 332, 249 N.S.R. (2d) 122.
135 *Supra* note 133 at para. 30.
136 *Ibid.*
137 [1995] 1 S.C.R. 85.
138 [1992] 1 S.C.R. 1021.
139 *Ibid.* at para. 253.

D. *SASKPOWER INTERNATIONAL INC. V. UMA/B&V LTD.*[140]

1. BACKGROUND

This case dealt with whether the wording of a limitation of liability clause served to limit the liability of a company, UMA/B&V Ltd. (UMA), engaged to provide engineering services in connection with the construction of a co-generation power plant on the site of a potash mine.

2. FACTS

SaskPower International Inc. (SaskPower) and Atco Power Canada (Atco) entered into a contract as "the Owners" with UMA as "the Engineer," pursuant to which UMA would provide professional engineering services and would be paid CDN$10 million. The Owners were to maintain professional liability insurance against errors and omissions by the Engineer, in the sum of $10 million.

The contract limited the Engineer's liability:

(a) in cases where and to the extent the insurance applied, to the amount of the insurance deductible; and

(b) in all other cases, to the amount paid to the Engineer by the Owners.[141]

SaskPower and Atco were dissatisfied with the performance of the Engineers and sued for damages in breach of contract and negligence. The damages sought were in excess of $18 million. An application was brought for a preliminary determination of a point of law on an agreed statement of facts to determine whether the Engineers' liability was limited by the provisions of the contract.[142]

Chief Justice Laing of the Court of Queen's Bench determined that the Owners could recover from the Engineer up to the limits of the insurance coverage under the policy, plus the $500,000 deductible.[143] Any other interpretation, he found, would be commercially unreasonable. He also found that to the extent the liability for damages exceeded the insurance coverage, the Engineer was liable for the excess, but not beyond the limit imposed by paragraph (b) of the limitation clause.

UMA appealed. It argued that under paragraph (a) of the limitation clause, the Engineer's liability was limited to the amount of the deductible of $500,000, and further, because the insurance did apply, paragraph (b) was not applicable. SaskPower and Atco argued that such an interpretation was commercially unreasonable because it rendered the insurance virtually valueless.

---

140 2007 SKCA 40, 293 Sask. R. 66.
141 *Ibid.* at para. 7.
142 *Saskpower International v. UMA/B&V Ltd.*, 2007 SKQB 40, [2007] S.J. No. 52 (QL).
143 *Ibid.* at para. 26.

3. DECISION

The Court of Appeal reviewed the relevant principles of contractual interpretation and emphasized that the goal of the process must be to ascertain the true intention of the parties.[144] The Court held that it was entitled to have regard to the surrounding circumstances or commercial context of the agreement, although this did not allow the Court to avoid giving effect to a term that was plainly worded or free from ambiguity. Finally, the Court had to avoid an interpretation that led to an absurdity, repugnancy, or inconsistency.[145]

Article 13.1(c) of the agreement provided that the Owners were to maintain professional liability insurance with a limit of CDN$10 million and a deductible not to exceed $500,000.[146] The Court found that to find in accordance with UMA's interpretation of the limitation of liability clause would be absurd — the result would be that this limitation would mean that neither party could access the insurance coverage if the Engineer's liability was limited to the amount of the deductible. This could not be what the parties intended.[147]

In terms of the limitation in paragraph (b), the Court again agreed with Laing C.J.Q.B. and found in favour of the Owners. The intention of paragraph (b), the Court found, was as follows: "[w]here loss occasioned by the substandard performance by the Engineer lies within the coverage but exceeds its limit, the Engineer is liable for the loss but not beyond the *combined amount* of the insurance and the amount of the Engineer's earnings."[148] Thus, the Engineer would be liable for the amount that the claim exceeded coverage, in this case a further $8 million.

The Court emphasized that exculpatory clauses must be worded clearly and will be strictly construed against the party seeking to invoke them.[149] The Court noted the phrase "where and *to the extent that*"[150] and noted that the article spoke on the whole to the Engineer's "*aggregate limit* of liability."[151]

4. COMMENTARY

This case again reminds us of the importance of properly wording exculpatory or limitation clauses. Given the important principal that exculpatory language will be strictly construed against the party relying upon such a provision, and the fact that ambiguity will be weighed against that party, care must be taken in preparing limitation language.

---

144 *Supra* note 140 at para. 23.
145 *Ibid.* at paras. 26-27.
146 *Ibid.* at para. 33.
147 *Ibid.* at para. 35.
148 *Ibid.* at para. 39 [emphasis added].
149 *Ibid.* at para. 42.
150 *Ibid.* at para. 40 [emphasis in original].
151 *Ibid.* [emphasis in original].

VI. EMPLOYMENT

A. *WEYERHAEUSER COMPANY LIMITED V. ONTARIO (HUMAN RIGHTS COMMISSION)*[152]

1. BACKGROUND

This decision is the earlier of two decisions of Canadian courts to deal with the question of whether an admitted recreational drug user was perceived by an employer as being disabled by a drug addiction. In this case, the Ontario Superior Court of Justice considered whether the Ontario Human Rights Tribunal was correct in finding, on an interim application,[153] that it could hear the complaint of Mr. Chornyj. The Tribunal had concluded that Chornyj had a tenable claim of discrimination on the ground of perceived disability.

2. FACTS

Chornyj was offered a second-class stationary engineer position with Weyerhaeuser at its plant in Kenora, Ontario. The offer of employment was conditional on him passing a drug test. Chornyj tested positive for marijuana and accordingly failed the drug test. Weyerhaeuser alleged that, when asked whether he used marijuana, Chornyj initially denied ever using it, but later admitted that he had used marijuana. Weyerhaeuser claimed that the offer of employment was withdrawn because of his dishonesty and not his drug use.

3. DECISION

This decision came prior to the Alberta Court of Appeal's decision in *Alberta (Human Rights and Citizenship Commission) v. Kellogg Brown & Root (Canada)*,[154] but the Ontario Court referenced the Alberta Court of Queen's Bench decision.[155] The Ontario Court concluded that the Tribunal had "erred in finding that Chornyj had a tenable claim of discrimination on the ground of perceived disability."[156] There was no evidence to support a conclusion that Weyerhaeuser actually perceived Chornyj as being disabled.

The Court found that the decisions of *Kellogg* and *Entrop v. Imperial Oil Ltd.*[157] did not stand for the proposition that the mere existence of a drug testing policy is prima facie discriminatory on the ground of perceived disability. The particular policy must be examined in each case.[158] In the present case, Weyerhaeuser's policy was less severe than those in *Kellogg* and *Entrop*, insofar as an employee testing positive was not subject to immediate dismissal under Weyerhaeuser's policy. In the event of a positive test, an employee could continue to work if he or she satisfied a number of conditions, including providing a negative

---

152 (2007), 279 D.L.R. (4th) 480 (Ont. Sup. Ct. J.).

153 *Weyerhaeuser v. Ontario (Human Rights Commission)* (2006), 54 C.C.E.L. (3d) 1 (Ont. Sup. Ct. J.).

154 2007 ABCA 426, 425 A.R. 35.

155 *Alberta (Human Rights and Citizenship Commission) v. Kellogg Brown & Root (Canada)*, 2006 ABQB 302, 399 A.R. 85 [*Kellogg*].

156 *Supra* note 152 at para. 27.

157 (2000), 50 O.R. (3d) 18 (C.A.) [*Entrop*].

158 *Supra* note 152 at para. 29.

drug test and signing an agreement agreeing that termination could result from showing up to work impaired or refusing to submit to an alcohol or drug test. These conditions did not indicate to the Court that Weyerhaeuser perceived any person with a positive drug test to be disabled by drug dependency.[159]

The Court granted an order of prohibition preventing the Tribunal from hearing Chornyj's complaint.

4. COMMENTARY

The Ontario Court in this case declined to follow the reasoning of the Alberta Court of Queen's Bench in *Kellogg*, which concluded that the dismissal of a recreational drug user was evidence that the employer *perceived* that the employee was disabled by drug addiction. The Ontario Court appears to have been satisfied that the lesser consequences under the Weyerhaeuser policy, requiring the employee to provide a negative drug test and sign a form agreeing to be terminated in the event of another infraction, was evidence that Weyerhaeuser did not perceive that the employee testing positive for drug metabolites was disabled.

B. *ALBERTA (HUMAN RIGHTS AND CITIZENSHIP COMMISSION) V. KELLOGG BROWN & ROOT (CANADA) COMPANY*[160]

1. BACKGROUND

Employers in the heavy industries, such as the oil and gas industry, are often faced with the challenges of managing dangerous workplace environments. One precaution that has been taken by many employers to prevent workplace accidents is to make offers of employment conditional upon the successful passing of a drug test.

In the present case, the Alberta Court of Appeal considered a case wherein an employer refused to continue to employ a candidate that tested positive in a pre-employment drug test.

2. FACTS

Kellogg Brown & Root (Canada) Company (KBR) is a construction company that was operating in the Fort McMurray area of Alberta and, at the relevant time, was assisting Syncrude Canada Ltd. (Syncrude) in its plant expansion. KBR's hiring policy required that all persons seeking non-unionized positions pass a pre-employment medical and drug screen. An employment candidate, Mr. Chiasson, was offered a job as a receiving inspector in Fort McMurray. He commenced work with KBR on 8 July 2002. The results of the drug test were received on 17 July 2002, and Chiasson was advised that he had failed. He admitted to using marijuana five days before the test and to being a recreational drug user.

Chiasson filed a complaint with the Alberta Human Rights and Citizenship Commission in October 2002, alleging discrimination in employment practices on the grounds of physical

---

159 *Ibid.* at para. 32.

160 *Supra* note 154.

and mental disability. The Human Rights Panel found that Chiasson was not discriminated against based on KBR's perception that he suffered from drug addiction. The Commission concluded that while the drug testing was prima facie discriminatory with respect to addicted persons, Chiasson had not demonstrated an actual or perceived disability and therefore KBR had not failed in its duty to accommodate a disabled employee.

The Chambers Judge concluded that the effect of the KBR drug testing policy was to treat recreational cannabis users as if they were addicted to cannabis.[161] As a result, she concluded, KBR must have perceived Chiasson to be a cannabis addict and thus disabled.[162] She also found that the discrimination was not justifiable as a bona fide occupational requirement.[163]

KBR appealed the decision of the Chambers Judge to set aside the decision of the Human Rights Panel.

3. DECISION

The Court of Appeal noted that the Syncrude project involved "[s]ome of the largest industrial equipment on the planet"[164] and that "[c]onsequences of accidents could impact workers, the plant and the environment."[165] The Court accepted that the jurisprudence had extended the scope of those grounds upon which discrimination is prohibited to include instances where the employer wrongly *perceives* that the employee has a disability, but found that this was not such a case.[166] The Court of Appeal disagreed with the Chambers Judge's conclusion that the effect of KBR's policy was to treat all prospective employees who test positive for drugs as if they were drug dependent and that the policy assumes that they are likely to report to work impaired.[167]

The Court referred to evidence that the effects of cannabis could sometimes linger for several days after use, which raised "concerns regarding the user's ability to function in a safety challenged environment."[168] KBR did not perceive Chiasson to be an addict — "[r]ather, it perceive[d] that persons who use drugs at all are a safety risk in an already dangerous workplace."[169] The Court stated that "[t]he policy is directed at actual effects suffered by recreational cannabis users, not perceived effects suffered by cannabis addicts."[170] The Court found that the issue of whether the drug policy discriminated against persons who were addicted was not placed before the panel and therefore was not a live issue.

---

161 *Supra* note 155 at para. 66.
162 *Ibid.* at para. 88.
163 *Ibid.* at para. 144.
164 *Supra* note 154 at para. 3.
165 *Ibid.*
166 *Ibid.* at para. 34.
167 *Ibid.* at para. 36.
168 *Ibid.* at para. 33.
169 *Ibid.* at para. 34.
170 *Ibid.* at para. 33.

4. COMMENTARY

We believe that the Court of Appeal got it right — KBR did not dismiss Chiasson because it perceived that he was a drug addict. KBR and many other employers hold a bona fide belief that they must do what is necessary to ensure that employees who operate complex and dangerous equipment do not create a hazard to themselves, their fellow employees, or the public. Many employers are not prepared to trade the risk of an accident against the risk that an employee will consider a drug test to be discriminatory. KBR perceived that there was a risk that an employee who exhibited the presence of drug metabolites in his system (even when he had been made aware that he would be tested) might attend at work and create a safety risk. This perception did not mean that KBR believed that the employee was an addict.

This decision has important implications for the maintenance of safety in dangerous workplaces. The effect of the Court of Appeal's decision is that in dangerous workplace environments, in which many oil and gas companies operate, it will not be discrimination on the part of the company to dismiss employees who fail a drug test, at least where the employee does not establish that he or she is addicted to the drug. The issue of whether a policy such as that put in practice by KBR would discriminate against persons who are actually addicted to alcohol or drugs was left for another day.

Leave was sought to appeal this matter to the Supreme Court of Canada, and that application was dismissed.

C. *DROUILLARD V. COGECO CABLE INC.*[171]

1. BACKGROUND

In this case, an employer told its contractor that the contractor was not to use one of the employer's former employees. The employer was found liable to the former employee for inducing the contractor to breach its contract of employment with the employee.

2. FACTS

The plaintiff, Mr. Drouillard, received an offer to work on a project of Mastec Canada (Mastec), a cable industry contractor. Mastec had been contracted to work for Cogeco Cable Inc. (Cogeco) in Windsor, Ontario, providing Internet upgrades in the area. Drouillard had worked for Cogeco until 1999, when he resigned to take employment in the U.S. Drouillard returned to Ontario in 2001, at which time he received an offer from Mastec.

Cogeco advised Mastec that it did not want Drouillard working on its projects, and as a result, Mastec dismissed Drouillard. Drouillard thereafter had difficulty finding employment in Windsor.

---

[171] 2007 ONCA 322, 86 O.R. (3d) 431.

Drouillard sued Cogeco, alleging unlawful interference with economic relations, or inducing breach of contract. Justice Gates of the Ontario Superior Court of Justice ordered Cogeco to pay CDN$200,000 in damages.[172] He found that Drouillard was a "competent and able technician"[173] and that there was no reasonable basis to refuse to permit him to work on the job site. He "rejected Cogeco's evidence … that it did not want Drouillard working on its equipment because of his attitude and because his presence on Cogeco's site would be bad for morale."[174]

Justice Gates set out the three elements in the test for unlawful interference with economic relations: (1) intent to injure the plaintiff; (2) interference with the plaintiff's employment by illegal or unlawful means; and (3) the plaintiff suffering economic loss as a result.[175]

The evidence at trial was that Cogeco had an internal policy that if it wanted to prevent a contractor from using a certain individual on a Cogeco project, it could instruct the contractor if there was reasonable cause to do so. The Court of Appeal found that the trial judge erred in concluding that the breach by Cogeco of an internal unwritten policy could amount to an unlawful act. Justice Rouleau, writing the unanimous decision, stated: "Although the limits of this tort have yet to be set, it would be inappropriate, in my view, to extend the application of this tort to breaches of a corporation's internal policies in circumstances such as those found in this case."[176]

3. DECISION

The Court of Appeal went on to assess whether the findings of the trial judge supported the conclusion that Cogeco induced Mastec to breach its employment contract with Drouillard. The tort of inducing breach of contract required proof of four elements: "(1) Drouillard had a valid and enforceable contract with Mastec; (2) Cogeco was aware of the existence of this contract; (3) Cogeco intended to and did procure the breach of the contract; and (4) [a]s a result of the breach, Drouillard suffered damages."[177] The Court found that the elements of this tort were met,[178] and found Cogeco liable for the tort of inducing breach of contract, although the total damage award was reduced almost in half to just over CDN$107,500. There was no justification defence available to Cogeco.

"Although there [was] no direct evidence that Cogeco wanted Mastec to terminate Drouillard's employment without reasonable notice," the Court found that the intention to breach could be found in the trial judge's finding "that Cogeco was not concerned about the terms of Drouillard's termination and that Cogeco acted intending to cause a breach of Drouillard's employment contract."[179]

---

172 *Drouillard v. Cogeco Cable* (2005), 42 C.C.E.L. (3d) 222 (Ont. Sup. Ct. J.).
173 *Supra* note 171 at para. 9.
174 *Ibid.*
175 *Supra* note 172 at para. 101, citing Laskin J.A. in *Reach M.D. v. Pharmaceutical Manufacturers Association of Canada* (2003), 65 O.R. (3d) 30 (C.A.) at para. 44.
176 *Supra* note 171 at para. 24.
177 *Ibid.* at para. 26.
178 *Ibid.* at para. 41.
179 *Ibid.* at para. 33.

4. COMMENTARY

There are many circumstances in which a general contractor will want to retain some control over the employees hired by its subcontractors. This case is a cautionary tale for contractors who advise their subcontractors that they will not permit a particular employee to work on its site without concern about how that employee will be terminated and whether he or she will receive appropriate compensation.

It should be noted that in this case, Drouillard had already been hired and was terminated by Mastec when Cogeco imposed its restrictions. Presumably, if Drouillard had not accepted an offer of employment, the tort of inducing breach of contract would not have been available to him. In such a case, the employee would have to rely on the tort of unlawful interference with economic relations. An unwritten policy of the company that it would not interfere with its subcontractors' choice of employees in the absence of reasonable grounds was not sufficient, the Court found, to amount to an "unlawful act" upon which to base the tort.

D. *WILDE V. ARCHEAN ENERGY LTD.*[180]

1. BACKGROUND

Two oil company executives sued their employer, alleging that they were constructively dismissed. The judgment of the Alberta Court of Appeal is divided into two components, one dealing with the dismissal issue, and one dealing with valuation of the employees' share options. The decision of Hunt J.A. dealt with the proper valuation of damages, while the decision of Slatter J.A. dealt with the issue of whether the respondents were constructively dismissed from their employment. The written reasons of Slatter J.A. will be discussed here.

2. FACTS

The two respondents, Mr. Wilde and Mr. Schott, were the chief operating officer and chief financial officer, respectively, of the appellant, Archean Energy Ltd. (Archean), a privately owned oil and gas exploration and production company. Over the years of their employment, Archean granted stock options to both Wilde and Schott. The Stock Option Agreement contained a provision allowing the holders of the options to receive cash in lieu of shares upon the exercise of the option.

In the summer of 2001, gas prices dropped and Archean experienced disappointing exploration and production results. Wilde was concerned that the value of his stock options was likely to decrease in the near future. He decided to exercise his stock options, and the option to take cash in lieu of shares, and told Schott of his intention. Schott initially was "'shocked and devastated' by this news, and … 'anticipated total disaster.'"[181] Nevertheless, Schott later decided to exercise his options as well. When the president of the company, Mr. Parks, who was also personally named as a co-defendant in the action, was told of the two

---

[180] 2007 ABCA 385, 422 A.R. 41, rev'g 2005 ABQB 636, 55 Alta. L.R. (4th) 80.

[181] *Ibid.* at para. 7 [citations omitted].

employees' intentions, he attempted unsuccessfully to dissuade Wilde and Schott from exercising their stock options.

It then became necessary to perform a valuation of the company. However, Wilde and Schott, as key employees of the company, were not only to be the beneficiaries of the valuation, but also possessed the information required to make the valuation. Parks advised Wilde and Schott that they were in a position of conflict of interest. Parks also called into question the integrity, accuracy, and completeness of the financial statements and existing reports that had been prepared by or under the direction of the two employees. Parks undertook an independent valuation of the options.

Wilde and Schott questioned Parks' good faith in pursuing this separate valuation. Wilde and Schott wrote to Parks stating that they believed that, as a result of the company's independent valuation and the remarks of Parks questioning their integrity, they had been constructively dismissed. The trial judge agreed and found that the executives had been constructively dismissed.

3. DECISION

The Court of Appeal held that Martin J. had erred in finding that Parks' conduct grounded a constructive dismissal.[182] While the Court accepted that there was no doubt that the respondents had the contractual right to exercise their options, and that an employee is not limited to exercising his or her option rights when it is convenient for the company, the Court held that this was an occasion where the exercise of options rendered impossible the continued employment of the employees.[183]

In this case, the Court felt that the executives themselves destroyed the trust and confidence that was paramount to their ongoing employment when they exercised their stock options.[184] The Court held that the exercise of the options at that particular time was "so incompatible with their continued employment with the company that the eventual termination of their employment was inevitable."[185] Even though there were disparaging comments made by the employer in correspondence following the announcement that the employees would exercise their options, the Court concluded that some of the comments of the employer were justified — such as pointing out that the employees were in a conflict of interest and calling their loyalty to the company in question — and that the employees had also likewise made negative comments towards the employer. There were mutual attacks on integrity, and the responsibility for the undermining of the employment relationship fell on both sides.

Accordingly, the Court found that the trial judge had erred in finding that the employees had been constructively dismissed. The appeal was allowed.

---

182 *Ibid.* at para. 108.
183 *Ibid.* at para. 130.
184 *Ibid.* at para. 117.
185 *Ibid.* at para. 111.

4. COMMENTARY

Customarily, constructive dismissal will be found in situations where an employer unilaterally makes changes to fundamental terms of employment. For example, a constructive dismissal may be found where an employer attempts to change compensation, changes an employee's duties or status, or demotes or relocates the employee. The Court in this case also noted a constructive dismissal may occur where conduct on the part of an employer undermines the trust and confidence necessary in an employment relationship to the point that the employment contract may be seen to have been repudiated.

In the present case, the executives alleged that they were constructively dismissed when the company pursued an independent valuation of their stock options. The trial judge accepted that there had been a constructive dismissal when the employer called into question the executives' integrity. The Court of Appeal held that the trial judge erred in reaching this conclusion.

The executives had announced their intention to exercise their stock options in August, and announced that they considered themselves constructively dismissed in November. The Court held that "the employment relationship had been damaged by the exercise by the respondents of their options on August 10th."[186] The Court also stated that "it is likely that the exercise of the options at this time was so incompatible with their continued employment with the company that the eventual termination of their employment was inevitable."[187]

The Court did not comment on the nature of the employment relationship between August and November or on the ultimate termination of the employment. One is left to conclude that the Court viewed the departure of the executives in November as a resignation. This conclusion appears to be based upon the Court's decision that the employer was justified in questioning the executives' loyalty, which in turn rests upon the Court's remarks that the exercise of the options was incompatible with their continued employment.

In this regard, the Court's *obiter* comments are baffling. Having found that the executives possessed a valid contractual right to exercise their options and were not limited to exercising those rights at a time when it is convenient for the company, the Court provided no explanation for its conclusion that the exercise of the options destroyed the fabric of the employment relationship. It is not clear from the Court's reasons why the exercise of the option right should be seen to require that the employment relationship end.

In this case, and in the case of the employment of many executives, the granting of stock options is a key element of the executive's compensation. If, as it appears, the Court is saying that options can only be exercised if the employment relationship comes to an end, this would radically reduce the value of such options.

One is also left to ponder the Court's comments that "by exercising their options at the time and in the manner they did, and then proceeding as if nothing had changed, the

---

186 *Ibid.* at para. 108.
187 *Ibid.* at para. 111.

respondents acted in their own self-interest. In this circumstance Parks was justified in forming the opinion that the loyalty of the respondents had been compromised."[188] Presumably, the employer granted the stock options as a valuable component of the executives' compensation and in an effort to maintain their loyalty and motivation. It is not clear why a move to capitalize on the value of the benefit that had been freely given by the employer should be seen to compromise the executives' loyalty. Granted, the executives likely wanted to maximize the value of the options before their value dropped further, but the alternative would be for them to be compelled to refrain from exercising the options until such time as it was not in their interest to do so. What is the value in options encumbered by this restriction?

All employees owe duties of loyalty and fidelity to their employer during the currency of the employment. Key employees, such as these executives, also owe fiduciary duties to conduct themselves in the best interest of the employer. The Court's comments that the executives' loyalty was compromised by the exercise of the options suggest that, by exercising their options in a fashion that favoured their interests over those of the company, the executives breached their duty of loyalty and their fiduciary obligations. It is not clear whether the Court was suggesting that this conduct would have grounded a dismissal for cause. However, the Court went on to suggest that this conduct by the employees justified the later comments by the company president casting aspersions on the integrity of the executives.

Curiously, the Court stated that "[h]aving been the ones who started this chain of events, the respondents cannot argue that they were constructively dismissed."[189] While the Court did not apparently consider the question of whether a constructive dismissal will be seen to have occurred where the employer calls into question the honesty of a key employee, the Court seems to have concluded that a constructive dismissal will not be found where the employee's conduct *first* damages the employment relationship.

Leave to appeal this decision to the Supreme Court of Canada has been sought and denied.

This case is a cautionary tale to both employers and employees. Employees can take from this case that the grant of stock options may be much less valuable than might otherwise appear, given that this Court held that, in some circumstances, the employment relationship must end when the options are exercised. Likewise, employers must be mindful that this case stands for the proposition that by granting stock options, they may be setting in motion the ultimate departure of valued employees.

---

188 *Ibid.* at para. 125.
189 *Ibid.* at para. 131.

VII. ENVIRONMENTAL LAW

A. *HOME EXCHANGE (ALBERTA) LTD. V. GOODYEAR CANADA INC.*[190]

1. BACKGROUND

Real estate transactions have traditionally been premised on the Latin maxim "*caveat emptor*."[191] This case explores the limits of the maxim as it relates to historical environmental issues on industrial lands.

2. FACTS

In 1988, real estate developer Cottonwood Developments (Cottonwood) purchased a parcel of light-industrial real estate in Edmonton from Goodyear Canada Inc. (Goodyear). Cottonwood leased the property to commercial tenants until 1996, when it sold the property to one of its tenants. As a condition of sale, the tenant required that an environmental assessment be conducted. The assessment revealed the existence of an underground storage tank on the property. Before the tenant would close the sale, it required that the tank be removed and the property remediated. This was carried out by Cottonwood at a cost of over CDN$50,000. Cottonwood's successor on title, to whom this cause of action was assigned, Home Exchange (Alberta) Ltd. (together with Cottonwood, the Plaintiffs), sought recovery from Goodyear to cover the cost of removing the tank and remediation of the surrounding soil on the basis that Goodyear was aware of the tank, which the Plaintiffs alleged was a potentially hazardous latent defect, and had a positive duty to disclose it.

3. DECISION

While Langston J. found, based upon historical correspondence relating to the property produced during discovery, that Goodyear knew or ought to have known of the existence of the underground storage tank, he held that the fact that Goodyear had this knowledge in 1988, at a time when knowledge of and attention to environmental matters was much less prevalent, did not equate to knowledge at that time of a hazard constituting a latent defect.[192] It was noted that, at the time of the sale to the Plaintiffs in 1988, there were no regulatory guidelines for the clean-up of petroleum hydrocarbons,[193] and few environmental concerns were being raised during real estate transactions.[194] The property required remediation in connection with the sale by Cottonwood in 1996 resulting from the fact that the purchaser negotiated a different deal than Cottonwood did in 1988. Justice Langston concluded that

---

190 2007 ABQB 371, 418 A.R. 1.

191 *The Canadian Oxford Dictionary*, *s.v.* "*caveat emptor*": "the principle that the buyer alone is responsible if dissatisfied."

192 *Supra* note 190 at para. 115.

193 *Ibid.* at para. 112.

194 *Ibid.* at para. 113.

> the defect now alleged did not impair the Plaintiff's continued use of the Property; the Plaintiff got exactly what it bargained for, industrial land. It is not the fault of Goodyear that at the time the 1996 sale was to occur, the rules of real estate practice had changed.[195]

Justice Langston went on to discuss whether, if Goodyear had knowledge of a hazard, its conduct was such that it would fit within an exception to the rule of *caveat emptor*. In surveying the relevant case law, he concluded that, where there are no misrepresentations regarding a latent defect, the purchaser must show either a physical act of concealment on the part of the vendor or that the vendor intended by silence to conceal the defect.[196] Mere silence regarding a defect does not constitute an exception to *caveat emptor* "if the purpose of the silence is not concealment."[197] The Court noted that

> a sophisticated real estate developer who purchases industrial commercial property "as is", after having the right of inspection, at a time when environmental issues are not considered as part of standard real estate practice, cannot successfully assert liability on the part of the vendor when the developer subsequently discovers an environmental issue which the vendor took no steps to conceal and did not have actual knowledge of at the time of sale.[198]

4. COMMENTARY

The decision in this case underlines that, in tort-based claims, the relevant standard of care is to be determined as of the date at which the alleged negligent act occurred and not in hindsight and that the maxim of *caveat emptor* is still alive and well in Alberta law.

B. *MININGWATCH CANADA V. CANADA (MINISTER OF FISHERIES AND OCEANS)*[199]

In this case, Martineau J. of the Federal Court allowed an application of MiningWatch Canada challenging the legality of decisions or actions taken by the Department of Fisheries and Oceans and Natural Resources Canada in conducting the environmental assessment of a proposed mine development pursuant to the *Canadian Environmental Assessment Act*.[200] Justice Martineau held that the determination of the need for a comprehensive study should be based on the project as put forward by the proponent, not as scoped by the responsible authority. It has been suggested that this decision is in conflict with the decision in *Prairie Acid Rain Coalition v. Canada (Minister of Fisheries and Oceans)*,[201] in which the Court found that federal authorities were entitled to use their discretion to narrow the scope of an environmental assessment under the *CEAA* to only those components under federal jurisdiction. An appeal of this case has been filed in the Federal Court of Appeal. For further

---

195 *Ibid.* at para. 117.
196 *Ibid.* at para. 120.
197 *Ibid.*
198 *Ibid.* at para. 139.
199 2007 FC 955, [2008] 3 F.C. 84.
200 S.C. 1992, c. 37 [*CEAA*].
201 2004 FC 1265, 257 F.T.R. 212; aff'd 2006 FCA 31, [2006] 3 F.C. 610.

information on this case, please refer to "Recent Regulatory and Legislative Developments of Interest to Oil and Gas Lawyers 2007-2008."[202]

C. *PEMBINA INSTITUTE FOR APPROPRIATE DEVELOPMENT V. CANADA (A.G.)*[203]

On 5 March 2008, Tremblay-Lamer J. handed down her decision in a judicial review application brought by various non-profit groups calling into question the appropriateness of an environmental impact assessment of the Kearl Oil Sands Project in northern Alberta. The judicial review application was allowed in part, with the matter remitted back to the same panel to provide a rationale for its conclusion that the proposed mitigation measures would reduce the potentially adverse effects of the project's greenhouse gas emissions to a level of insignificance. For further discussion of this case, please refer to "Recent Regulatory and Legislative Developments of Interest to Oil and Gas Lawyers 2007-2008."[204]

VIII. FREEHOLD LEASES

A. *KENSINGTON ENERGY LTD. V. B & G ENERGY LTD.*[205]

1. BACKGROUND

This decision of the Alberta Court of Appeal on the appeal of the 2005 decision of LoVecchio J.[206] provides further analysis on the proper interpretation of the shut-in well clauses of freehold leases.

2. FACTS

A predecessor to Kensington Energy Ltd. (Kensington) obtained several identical leases (the Leases) covering a section of land. During the initial term of the Leases, a single well was drilled and produced for several years. In January 2001, this well was shut-in and shut-in payments were made in respect of the Leases at all relevant times. Kensington obtained the Leases and, in September 2003, resumed production of the well from a different formation. Prior to the acquisition of the Leases by Kensington, B & G Energy Ltd. (B&G) had top-leased the lands covered by the Leases, filed a caveat protecting its leases, and brought proceedings challenging the caveats filed to protect the Leases on the grounds that the Leases had expired. The relevant provisions of the Leases appear below:

The *habendum* of the Leases provides as follows:

---

202 *Supra* note 62 at 537-40.
203 2008 FC 302, 323 F.T.R. 297.
204 *Supra* note 62 at 540-41.
205 2008 ABCA 151, 432 A.R. 141 [*Kensington Appeal*].
206 *Kensington Energy Ltd. v. B & G Energy Ltd.*, 2005 ABQB 734, [2005] A.J. No. 1672 (QL).

TO HAVE AND ENJOY the same for the term of Five (5) years (hereinafter called the "said term") from the date hereof and so long thereafter as the leased substances or any of them are produced from the said lands ... , subject to the sooner termination of the said term as hereinafter provided.[207]

The third proviso of the Lease provides as follows:

AND FURTHER ALWAYS PROVIDED that

[I.] if at the end of the said term the leased substances are not being produced from the said lands ... and the Lessee is then engaged in drilling or working operations thereon, or

[II.] if at any time after the expiration of the said term production of the leased substances has ceased and the Lessee shall have commenced further drilling or working operations within ninety (90) days after the cessation of said production,

then this Lease shall remain in force so long as

[Permutation 1] any drilling or working operations are prosecuted with no cessation of more than ninety (90) consecutive days, and,

[Permutation 2] if such drilling or working operations result in the production of the leased substances or any of them, so long thereafter as the leased substances or any of them are produced from the said lands ...;

provided further that notwithstanding anything hereinbefore contained or implied to the contrary,

[Amelioration A] if drilling or working operations are interrupted or suspended as the result of any cause whatsoever beyond the Lessee's reasonable control or

[Amelioration B] if any well on the said lands or on any spacing unit of which the said lands or any portion thereof form a part, is shut in, suspended or otherwise not produced for any cause whatsoever which is in accordance with good oil field practice, the time of such interruption or suspension or non-production shall not be counted against the Lessee.[208]

Clause 3 of the Leases ("Shut-in Wells") provides as follows:

Subject to the provisions hereinbefore set forth, if all wells on the said lands are shut-in,suspended or otherwise not produced during any year ending on an anniversary date, the Lessee shall pay to the Lessor at the expiration of each such year, a sum equal to the delay rental hereinbefore set forth and each such well shall be deemed to be a producing well hereunder, provided that this clause shall not impose an obligation upon the Lessee to make the payment of a sum equal to the delay rental unless all wells on the said lands are shut-in, suspended or otherwise not produced for a period of ninety (90) consecutive days in any such year.[209]

---

207 *Kensington Appeal*, *supra* note 205 at para. 45 [emphasis omitted].
208 *Ibid.* [emphasis omitted].
209 *Ibid.* [emphasis omitted].

At the trial level, LoVecchio J. held that the Leases had expired, finding that the well was shut-in because it was a dry hole and that this did not constitute shutting in pursuant to good oil field practices, which he determined was required to shut in the well in accordance with the third proviso. He further determined that cl. 3 did not save the Leases because cl. 3 must be read subject to the third proviso, and as a result, the payment of shut-in payments was not sufficient to save the Leases if they were not saved in accordance with the terms of the third proviso.[210]

Kensington appealed the trial decision on the grounds that the trial judge had erred in concluding that cl. 3 could only continue the Leases if the well is shut-in in accordance with good oil field practices as set out in the third proviso. In the alternative, Kensington submitted that the trial judge erred in excluding expert evidence regarding whether the well was shut-in in accordance with good oil field practice. The Court allowed the appeal in a split decision.

3. DECISION

Justice Hunt, writing for herself and Slatter J.A., disagreed with the conclusions of the trial court and criticized the reasoning of the trial judge as "not always easy to follow and at times [it] misstates parts of the Lease or the law."[211] After analyzing the provisions of the Leases, Hunt J.A. concluded that there were several compelling reasons to conclude that, contrary to the interpretation given to cl. 3 at the trial level, the "subject to" language in cl. 3 should not be read as limiting the application of cl. 3 to circumstances of good oil field practices as set out at the end of the third proviso.[212] First, the "good oil field practices" sub-proviso to the third proviso dealt with suspending time to excuse lack of production, while cl. 3 deemed production to have occurred if the contemplated payments are made.[213] Second, the *habendum* clause provided that the Leases would remain in force as long as any of the leased substances were produced, and cl. 3 deemed a well to be a producing well if the shut-in payments were made.[214] Third, the deemed production language in cl. 3 was not expressly limited by a "good oil field practices" proviso and was much broader than the shut-in clauses considered in numerous other cases.[215] Finally, Hunt J.A. pointed out that the "subject to" language was general, and as it did not expressly reference the third proviso, should be read as a reference to any of the foregoing provisions of the Leases, which could relate to the functions of cl. 3, including the *habendum* clause.[216]

---

210 *Ibid.* at paras. 78-89.

211 *Supra* note 205 at para. 17.

212 *Ibid.* at para. 11.

213 *Ibid.* at para. 26.

214 *Ibid.* at para. 27.

215 *Ibid.* at para. 28: Justice Hunt references *Freyberg v. Fletcher Challenge Oil and Gas*, 2005 ABCA 46, 363 A.R. 35 and *Kissinger Petroleums Ltd. v. Nelson Estate* (1984), 54 A.R. 100 (C.A.), leave to appeal to S.C.C. refused, 19067 (14 November 1984), as cases where shut-in clauses that were more limited in nature than cl. 3 were considered.

216 *Kensington Appeal*, *ibid.* at para. 29.

Justice Hunt concluded that as long as there is production or deemed production under the Leases, the Leases will continue in force. She further stated:

> The words found at the beginning of Clause 3 "subject to the provisions hereinbefore set forth" potentially engage two concepts:
>
> (a) no delay rentals arguably need to be paid to keep the lease in force if it would stay in force under one of the provisos, for example, under the exception for wells shut-in in accordance with a good oil field practice, or the interruption of drilling for causes beyond the [lessee's] control, and
>
> (b) the payment of delay rentals cannot revive a lease that has been terminated at any prior point because of a failure of production or deemed production, for example where a lease terminated because a well was shut in other than in accordance with good oil field practice and no delay rental was paid.[217]

In this case, because the shut-in payments had been paid at all relevant times, the well was deemed to be a producing well. As the Leases had not terminated for any other reason, Hunt J.A. concluded that the Leases continued in force and allowed the appeal.

In dissenting reasons, Romaine J. agreed with the conclusion of the trial judge that "the mere payment of shut-in well payments pursuant to Clause 3 of the Lease does not keep it in force."[218] Justice Romaine viewed cl. 3 as "an adjunct and complementary to the *habendum* clause generally, and not an additional or distinct way to prevent the termination of the Lease by the payment of shut-in well payments."[219] In her view, cl. 3 applied to obligate the lessee to make a payment only in circumstances where the lease continues in force pursuant to the provisions of the *habendum* and its provisos. Justice Romaine noted that her interpretation of cl. 3 was one imposing a financial obligation and conflicted with the decision of the trial court, as endorsed by the Alberta Court of Appeal, in *Durish v. White Resource Management Ltd.*[220] In that case, the courts held that the shut-in clause, which was almost identical to cl. 3, did not create an obligation to make the shut-in payment, but rather created an option to continue the lease that could be exercised by the lessee by making the shut-in payment in a timely manner.

Although she agreed with the trial judge's conclusion that cl. 3 did not save the Leases, Romaine J. indicated that she would nevertheless have allowed the appeal and ordered a new trial on the basis that the trial judge erred in refusing to admit expert evidence on the issue of whether the well was shut-in in accordance with good oil field practice. Justice Romaine noted that the trial judge concluded that the well was shut-in because it was a dry hole based upon his review of the very same documents that he had discounted as evidence when refusing to permit such expert evidence.[221]

---

217 *Ibid.* at para. 37.
218 *Ibid.* at para. 40.
219 *Ibid.*
220 (1988), 63 Alta. L.R. (2d) 265 (C.A.), aff'g (1987), 82 A.R. 66 (Q.B.) [*Durish*].
221 *Supra* note 205 at para. 90.

4. COMMENTARY

This decision of the majority of the Court confirms the law in Alberta: where the shut-in clause of a lease includes language deeming production if shut-in payments are made, the lease can be maintained in force by virtue of such deemed production. This appears to be consistent with the comments, in *obiter*, of the trial court and the Alberta Court of Appeal in *Durish* that a well drilled under a lease nearly identical to that in this case "[could] be shut-in either under the third proviso or under the shut-in well clause."[222] It is important to note, however, that each well must be interpreted on its own terms and each case on its own facts. A different form of well or a different fact scenario may well have resulted in a different outcome.

Also notable is the indication, in *obiter* comments made by both Hunt J.A. and Romaine J., that, contrary to the conclusion of the courts in *Durish*, cl. 3 may create an obligation to make shut-in payments in certain circumstances. Both suggest that this issue should be left for another day, suggesting that this issue may be ripe for reconsideration.[223]

B. *AMETHYST PETROLEUMS LTD. V. PRIMROSE DRILLING VENTURES LTD.*[224]

1. BACKGROUND

This case is the appeal of the 2006 decision of Hawco J.,[225] in which he determined that a well drilled in response to an invalid offset notice was not a title-preserving well for the purposes of cl. 1010 of the 1990 Canadian Association of Petroleum Landmen (CAPL) *Operating Procedure*.[226]

2. FACTS

Amethyst Petroleums Ltd. (Amethyst) and Primrose Drilling Ventures Ltd. (Primrose) were lessees pursuant to a lease with Bearspaw Petroleum Ltd. (Bearspaw). In September 1997, Bearspaw issued a notice alleging that Amethyst was in default under the lease as a result of gas being drained from the detrital formation by production on neighbouring lands. Counsel to Primrose responded to Bearspaw, indicating that the default notice was invalid for several reasons, including that an existing well on leased lands (the 14-8 well) satisfied any offset obligations. In response, Bearspaw withdrew its offset notice.

Primrose believed that Bearspaw would serve another notice and investigated whether it should drill a second well on leased lands. On the urging of its geologist, Primrose decided to proceed with the drilling of another well (the 2-8 well).

---

222 *Ibid.* at para. 66, citing *Durish*, *supra* note 220 at 267.

223 *Kensington Appeal*, *ibid.* at paras. 17, 75.

224 2007 ABCA 355, [2007] A.J. No. 1242 (QL).

225 *Amethyst Petroleum Ltd. v. Primrose Drilling Ventures Ltd.*, 2006 ABQB 595, [2006] A.J. No. 980 (QL).

226 *1990 CAPL Operating Procedure* (Calgary: Canadian Association of Petroleum Landmen, 1990) [*Operating Procedure*].

In April 1998, Bearspaw served a second default notice which repeated the drainage claims in the first notice. The second notice also contained an additional paragraph pursuant to which Bearspaw proposed that if Amethyst chose not to drill an offset well, Amethyst could retain rights to the 14-8 well and its producing zones, but would forfeit the balance of the leased lands to Bearspaw. It concluded that, if Amethyst did not accept this offer within 30 days, Bearspaw would seek to terminate the lease and take over the 14-8 well.

Two days following the date of the second default notice, Primrose notified the other lessees of its intent to drill the 2-8 well as a title-preserving well in response to the second notice. While negotiations and discussions among the lessees were ongoing, Primrose proceeded to drill the 2-8 well and completed it to two formations, the detrital, and the glauconite. Amethyst and HillOil (1993) Ltd. (Hill) did not elect to participate, and Primrose advised them that they had forfeited their interests in the leased lands pursuant to the title-preserving well provisions of cl. 1010 of the CAPL 1990 *Operating Procedure*[227] and began withholding all production revenues from them. Amethyst and Hill brought an action for an accounting of production revenues, damages, and declarations of their respective title interests.

At trial, Hawco J. determined that the 2-8 well was not a title-preserving well. He noted that there were valid concerns regarding the validity of the offset notice, and concluded that the 2-8 well was drilled because Primrose wanted to drill it and not because failure to drill it would result in termination of the lease. He also noted that, even if the second offset notice was valid, termination of the lease could also have been prevented by surrendering non-producing zones in accordance with the offer set out in the notice and did not require drilling the 2-8 well.[228]

Primrose appealed the trial decision.

3. DECISION

The Court of Appeal first determined that the trial judge's determination that the 2-8 well was not a title-preserving well was a finding of fact and that the applicable standard of review was thus palpable and overriding error.[229] The Court's determination on whether the trial court had erred in this finding of fact was succinctly stated as follows:

> The trial judge determined that nothing had changed between Bearspaw's first and second default notices that would affect Primrose's original position that a title preserving well was not called for, except that Primrose's geologist had become very optimistic about the potential success of another well. In effect, the trial judge found that the well was drilled for reasons other than the default notice. There was evidence to support these findings. Although Primrose argues the trial judge made a palpable error because the geologist was enthusiastic well before the first notice was issued, this supports the trial judge's conclusion that nothing had changed. More importantly, her enthusiasm was based on what she expected to be produced by the 2-8 well from both the detrital and glauconite formations. To be a true off-set well production, the 2-8 well would

---

227 *Ibid.*
228 *Supra* note 225 at paras. 63-64.
229 *Supra* note 224 at para. 20.

> have had to be restricted to the detrital formation alone. Finally, the trial judge held that another option was available to the parties, short of outright forfeiture, as formations could have been surrendered rather than giving up the entire lease. All of these determinations were based on evidence and cannot be upset given the applicable standard of review.[230]

The appeal on this ground was dismissed.

4. COMMENTARY

This decision of the Court of Appeal affirms that, in determining whether a well is a title-preserving well, the intention of the party drilling the well and the availability of options other than drilling an offset to preserve the lease are relevant.

IX. UNIT AGREEMENTS

A. *SIGNALTA RESOURCES LIMITED V. DOMINION EXPLORATION CANADA LTD.*[231]

1. BACKGROUND

The issue in this case was whether a particular formation was a unitized formation pursuant to a unit agreement. In analyzing this issue, the Court commented on the proper interpretation of some of the "standard" clauses commonly found in unit agreements.

Dominion Exploration Canada Ltd. (Dominion) and Signalta Resources Limited (Signalta) became engaged in an ownership dispute over production from a gas well in the Viking area of Alberta. The well was drilled by Dominion into the Glauconite formation at Section 8, Township 49, Range 13, west of the Fourth Meridian (Section 8). Portions of Section 8 are unitized, forming Tract 29 of the West Viking Gas Unit No. 1 (the Unit), and Signalta is the Unit operator. The crux of the dispute centred around the issue of whether the Glauconite formation was included in Tract 29. Signalta asserted that the Glauconite formation of Section 8 had been part of the Unit since its inception, while Dominion denied that it had ever formed part of the Unit.

2. FACTS

In early 1974, when discussion around the formation of the Unit commenced, Siebens Oil & Gas Ltd. (Siebens) held freehold mineral title to Section 8 and Hudson's Bay Oil & Gas Co. Ltd. (HBOG) held an option to take a petroleum and natural gas lease of Section 8. In the initial meetings regarding formation of the Unit, Voyager Petroleums Ltd. (Voyager) was appointed as the interim unit operator and HBOG participated as a working interest owner. Prior to the formation of the Unit, HBOG entered into a multi-section farmout agreement with Dyco Petroleum Corp. (Dyco) pursuant to which Dyco was entitled to earn interests in certain lands in respect of which HBOG held options, including Section 8. In December 1974, HBOG advised Voyager by letter that it had farmed out its interest in the proposed

---

230 *Ibid.* at para. 23.

231 2007 ABQB 636, [2007] A.J. No. 1203 (QL).

Unit to Dyco. At this time, the Unit Agreement was being finalized and circulated for execution, with an effective date of 1 February 1975, and Exhibit "A" to the Unit Agreement indicated that HBOG was the working interest owner of Tract 29 and that Tract 29 was comprised of the Viking and Glauconite formations of Section 8.

At the January 1975 meeting of the operating committee, all tracts other than Tract 29 were approved for inclusion in the Unit. Tract 29 was not included at that time as Dyco could not yet establish title, but it was agreed that Tract 29 would be included in the Unit if Dyco could establish title prior to 1 May 1975. In April 1975, HBOG issued a sublease of Section 8 in respect of leased substances to the base of the Viking formation, being "contract depth" pursuant to the farmout agreement between HBOG and Dyco. At the 1 May 1975 meeting of the Unit operating committee, the inclusion of Tract 29 in the Unit was approved. Thereafter, Revision 1 to Exhibit "A" to the Unit Agreement was issued, indicating the Dyco was the working interest owner of Tract 29, but continuing to indicate that Tract 29 was comprised of the Viking and Glauconite formations of Section 8. While a draft letter from Dyco to HBOG, which was disclosed during pre-trial discoveries, indicated that Dyco was aware of the inconsistency between the interest that it held pursuant to the sublease and the interest reflected in Revision 1 to Exhibit "A," there was no evidence that the letter was finalized and sent to HBOG or that Dyco ever raised the discrepancy in respect of inclusion of the Glauconite formation in Tract 29 to Voyager as Unit operator.

In 1992, Poco Petroleums Ltd. (Poco), the operator of the Unit at that time, issued Revision No. 13 to the Unit Agreement. Among the changes reflected in this revision, which were not outlined or explained in Poco's cover letter, was the addition of a notation indicating that the Glauconite formation was an excepted zone in Tract 29.

In 2000, Signalta became operator of the Unit. Later that same year, Dominion, a successor in interest to HBOG and Siebens, drilled a well on Section 8 (the 13-8 well), which produced from the Glauconite formation. Signalta notified Dominion of its belief that the Glauconite formation was a unitized formation and that the 13-8 well was producing from this unitized formation, and that therefore production from the 13-8 well properly belonged to the Unit. Dominion maintained that, as Dyco had no interest in the Glauconite formation, it had no ability to contribute this formation to the Unit, and as such, the Glauconite formation did not and never had formed part of Tract 29. Therefore, it believed that production from the 13-8 well did not belong to the Unit.

3. DECISION

The trial involved significant viva voce evidence from executives and employees of both Signalta and Dominion, as well as reports and testimony from a number of experts. This testimony offered an insight into a number of issues, including the history of unitization, oil and gas leases and agreements, and the creation of the Unit, as well as the events that took place in the Unit between its inception and the time at which the dispute arose.

Upon weighing the evidence, Park J. found that the Glauconite formation underlying Section 8 was "not committed to the Unit by HBOG or Dyco."[232] In his view, the initial inclusion of the Glauconite formation in Revision 1 to Exhibit "A" of the Unit Agreement was due to an error on the part of the Unit's title and operating committees, which had assumed that HBOG was conveying all of its working interest to Dyco. Justice Park reasoned that "[t]heir error was based upon their collective failure to determine, accurately or at all, whether Dyco held title to the interest they believed Dyco contributed to the Unit."[233] Although there was some suggestion by Signalta that Dyco may, in fact, have earned an interest in the Glauconite formation pursuant to the farmout agreement, Park J. found that this position was not supportable, since pursuant to the terms of the farmout agreement between HBOG and Dyco, Dyco could only earn formations below "contract depth," being the Viking formation, by drilling a well into a formation below contract depth.[234] As Dyco earned its interest based upon the unitization of Section 8 and did not drill a well on Section 8, it could not have earned an interest in the Glauconite formation, which is located below the Viking formation.[235]

Signalta also argued that HBOG and Siebens both executed the Unit Agreement and therefore accepted that the Unit Agreement, including Exhibit "A" which included the Glauconite formation, was correct. It also pointed out that cl. 1302 of the Unit Agreement stated that "if a Party owns a Working Interest and a Royalty interest, its execution of this Agreement shall constitute execution in both capacities."[236] Based upon this clause, Signalta argued that HBOG had executed the Unit Agreement both in its capacity as an owner of a working interest in the Glauconite formation in Tract 29 and as a royalty owner in the Viking formation. Justice Park did not accept this argument, pointing out that there was no evidence that HBOG had executed the unit operating agreement[237] (to which all working interest owners were signatories) and that, after notifying Voyager that it was assigning its working interest to Dyco, HBOG did not attend any operating committee meetings, sign any authorization for expenditures, or receive any revenues as a working interest owner.[238] On this basis, he found that HBOG did not execute the Unit Agreement in the capacity of a working interest owner of a portion of Tract 29.

Finally, Signalta relied upon cl. 1103 of the Unit Agreement in support of its position that the Glauconite formation underlying Tract 29 was unitized. Clause 1103 provided:

> If the title of a Working Interest Owner to a Tract fails, the Tract shall be excluded from … the Unit … unless:
>
> (a) any other Party is held or declared to own the title in which event that Party shall be bound by this Agreement and the Unit Operating Agreement in respect of the Tract.[239]

---

232 *Ibid.* at para. 234.
233 *Ibid.* at para. 235.
234 *Ibid.* at para. 50.
235 *Ibid.* at para. 241.
236 *Ibid.* at para. 223.
237 *Ibid.* at para. 45.
238 *Ibid.* at para. 104.
239 *Ibid.* at paras. 134, 277.

Signalta argued that if Dyco's title failed, it would revert to HBOG, and because HBOG was a party to the Unit Agreement, the Glauconite formation would remain in the Unit pursuant to cl. 1103. Justice Park rejected this argument on the basis that Dyco's "title to the Glauconite formation could not fail as the title or interest to the Glauconite formation never passed to Dyco as a Working Interest owner."[240]

While Park J. accepted Signalta's evidence regarding the calculation of the tract factor for Tract 29 and concluded that the tract factor had been determined based upon inclusion of both the Glauconite and the Viking formations of Section 8, he viewed this as a separate issue which might give rise to claims for unjust enrichment as between the other working interest owners and their successors, along with the royalty interest owners and their successors, as against HBOG and its successors. In his view, the inclusion of the Glauconite formation in the Tract 29 tract factor did nothing to change the fact that neither HBOG nor Dyco had contributed the Glauconite formation of Section 8 to the Unit.[241]

Justice Park dismissed Signalta's claim against Dominion, concluding that the 13-8 well drilled by Dominion into the Glauconite formation was not producing from a unitized zone.

4. COMMENTARY

This case clarifies some of the limitations of the types of "curative" clauses, such as cls. 1103 and 1302, that are typically included in unit agreements. It also highlights the importance of thorough title review, including review of documentation in respect of "last minute" conveyances.

X. INJUNCTIONS

A. *SIGNALTA RESOURCES LIMITED V. LAND PETROLEUM INTERNATIONAL INC.*[242]

1. BACKGROUND

This case involved an attempt by Signalta to force Land Petroleum International Inc. (Land) to relinquish its position as operator of various gas wells in Alberta.

2. FACTS

Signalta applied to the Alberta Court of Queen's Bench for an injunction against Land prohibiting Land from preventing Signalta from exercising its rights as the newly appointed operator of certain gas wells, and requiring Land to fulfill its obligations on transfer of ownership.

PrimeWest Energy (PrimeWest) assigned its interest as joint operator of certain Ferry Bank Gas Wells to Signalta, pursuant to the 1993 CAPL's assignment procedure. Signalta

---

240 *Ibid.* at para. 241.
241 *Ibid.* at paras. 272, 276.
242 2007 ABQB 290, [2007] A.J. No. 496 (QL).

asserted that all of the joint operators holding the majority interests in each of the gas wells had voted affirmatively to change operatorship from Land to Signalta.

Land refused to relinquish operatorship, arguing that Signalta had no entitlement to the PrimeWest joint operator interests because PrimeWest was in default of operating and other costs, that Signalta had "no privity of contract with Land under the [applicable] CAPL operating procedures or other applicable procedures or governing agreements, and that Signalta [had] not been novated into the applicable Governing Agreements."[243] Land physically locked Signalta out from the facilities.

Land did not file an objection to the assignment by PrimeWest to Signalta as it could have done under the CAPL operating procedure. Instead, Land issued a notice of default to PrimeWest claiming outstanding operating and other costs and expenses of more than CDN$375,000. Land maintained that it had an Operator's Lien, and that the lien precluded PrimeWest from assigning its interest to Signalta.[244]

3. DECISION

Land argued that Signalta was seeking a mandatory injunction and would be required to show that it had a strong prima facie case against Land. Signalta argued, on the other hand, that it was seeking only an interim prohibitory injunction, which would prevent Land from interfering with Signalta's exercise of rights as the new operator of the gas wells.

Justice Mason accepted that the nature of the injunction sought was mandatory and that demonstration of a strong prima facie case was required.[245] Land had argued that under the operating procedures it had an Operator's Lien and this lien precluded transfer of the interests to Signalta.[246] Justice Mason accepted, on the evidence presented, that Signalta had established a strong prima facie case that it had been properly elected as operator according to the CAPL operating procedures, and found that even if an Operator's Lien existed, it did not preclude PrimeWest from assigning its interest in accordance with the applicable CAPL operating procedure.[247] Justice Mason also noted that approval by the other operators of PrimeWest's assignment to Signalta may have been given because Land had failed to provide proper accounting, which failure may have amounted to a breach of Land's fiduciary duties as operator.[248]

The Court then considered whether Signalta would suffer irreparable harm in the absence of an injunction. The Court accepted that Signalta had presented sufficient evidence to show a prima facie breach of fiduciary duty by Land by virtue of Land's failure to properly account. The Court also noted that Land had lost the confidence of all the other joint operators. While the Court did not discuss the nature of the harm that would be suffered by

243 *Ibid.* at para. 13.
244 *Ibid.* at paras. 20-21.
245 *Ibid.* at para. 26.
246 *Ibid.* at paras. 20-21.
247 *Ibid.* at paras. 27-32.
248 *Ibid.* at para. 33.

Signalta, the Court did accept that the harm extended beyond the relationship of Signalta and Land and involved all of the joint operators. It appears that the Court accepted that all of the joint operators would suffer irreparable harm in the absence of proper accounting.[249]

On the final branch of the injunction test — the balance of convenience — the Court noted that Land no longer had the confidence of the joint operators. The Court held that Land's ability to look to Signalta's undertaking as to damages weighed in favour of granting the injunction.[250]

4. COMMENTARY

This decision reinforces the effectiveness and utility of the provisions of the CAPL operating procedures with respect to replacement of operators. The case stands for the proposition that irreparable harm will flow to the other joint operators where the conduct of the operator justifies the replacement of that operator. Unfortunately, the decision is short on details as to the nature of the irreparable harm and on how the balance of convenience will favour granting of the injunction. It is likely that this case will have only limited precedential value in cases arising on different facts.

XI. RIGHTS OF FIRST REFUSAL

A. *APEX CORPORATION V. CECO DEVELOPMENTS LTD.*[251]

1. BACKGROUND

This decision is the appeal of the 2005 decision of Brooker J.[252] While the case and the decision deal with a number of issues, including calculation of damages, breach of a buy/sell or shotgun clause, misrepresentation and mistake, and allegations of misconduct, this summary addresses only the portion of the decision dealing with the allegation of breach of a right of first refusal (ROFR).

2. FACTS

The pertinent facts may be briefly summarized as follows: Apex Land Corporation (Apex Land) and Ceco Developments Ltd. (Ceco) were parties to a joint venture to develop a multi-family residential project. Their joint venture agreement (the JVA) contained a ROFR clause. The relationship between Apex Land and Ceco deteriorated. Apex Land and its parent company planned to undertake an internal corporate reorganization, the end result of which would include the ownership of Apex Land's assets by a new affiliated corporation. Apex Land requested that Ceco waive its ROFR in respect of the reorganization transactions and Ceco refused. The reorganization nonetheless proceeded and the assets of Apex Land were

---

249 *Ibid.* at paras. 33-34.
250 *Ibid.* at para. 35.
251 2008 ABCA 125, 429 A.R. 110.
252 *Apex Corp. v. Ceco Developments Ltd.*, 2005 ABQB 656, 387 A.R. 211.

transferred to The Apex Corporation (Apex), a corporation with the same officers, directors, and employees as Apex Land. Thereafter, Apex Land was dissolved.

Several months later, Ceco undertook various searches and determined that Apex Land's assets had been transferred to Apex. Ceco sued Apex and several of its affiliates, alleging that the transfer of the joint venture assets by Apex Land to Apex without first offering the interest to Ceco was a breach of Ceco's ROFR under the JVA.

At trial, Apex argued that the transfer of the joint venture assets from Apex Land to Apex did not breach the ROFR on several grounds. Apex argued that the transfer of the assets pursuant to the reorganization was not a true disposition as Apex Land and Apex had the same directors, officers, and employees, and were essentially the same entity and not a third party. Justice Brooker dismissed this argument out of hand as inconsistent with company law. Apex also argued that the non-arm's length transfer of the assets was not a "sale" and therefore did not trigger the ROFR, essentially taking the position that, although the ROFR clause in the JVA did not contain an exception for non-arm's length transfers, one should be implied. Finally, Apex argued that, as the joint venture assets comprised only a portion of the assets being transferred from Apex Land to Apex, a "package sale" exception should be applied even though, again, the JVA ROFR clause contained no such exception. In respect of these latter arguments, Brooker J. declined to imply exceptions into the ROFR clause, noting that it is preferable to allow parties to negotiate exceptions that they believe are appropriate for inclusion in their contracts. Justice Brooker held that the ROFR provisions of the JVA had been breached and that Ceco was entitled to damages as a result thereof.

3. DECISION

Justice Côté, writing for the Court of Appeal, agreed with the decision and expressly adopted much of the reasoning of the trial court on the issue of whether the ROFR had been breached. The Court of Appeal reiterated the trial court's conclusion that there was no reason to read affiliate or package sale exceptions into the ROFR clause. The Court noted that, in order for a term to be implied into a contract, it must either be necessary to give business efficacy to the transaction or be so obvious as to go without saying. In this case, the Court of Appeal concluded that to imply the terms suggested by Apex would introduce uncertainty into the contract.[253]

The Court also rejected Apex's argument that the non-arm's length transfer of the assets pursuant to the reorganization was not a true sale to a third party, commenting that

> Apex's argument that no sale occurred because the final owner of the joint venture interest had the same name and parent as Apex, ignores the invention and use of companies (corporations) as separate persons over the past few centuries.[254]

Finally, the Court rejected as irrelevant Apex's argument that Ceco got a bargain in exercising its ROFR because the sale of assets in the reorganization was for less than fair

---

253 *Supra* note 251 at paras. 31-32.
254 *Ibid.* at para. 37.

market value. Justice Côté concluded his discussion of the ROFR by observing that the breach of the ROFR was very plain.[255]

4. COMMENTARY

In its decision, the Court of Appeal reinforces the message conveyed by the trial court that no implied exceptions are to be read into ROFR clauses. This is consistent with the traditional approach of the courts in strictly interpreting restrictions on disposition, and emphasizes the importance, when drafting ROFR clauses, of carefully considering what exceptions the parties wish to apply.

B. *CANADIAN NATURAL RESOURCES LIMITED V. ENCANA OIL & GAS PARTNERSHIP*[256]

1. BACKGROUND

The interplay between ROFR clauses and farmout agreements has been an issue for some time in the oil and gas industry. In this case, the Alberta Court of Queen's Bench addressed the questions of when a ROFR is triggered if lands subject to a ROFR are included in a farmout agreement and what rights the holder of the ROFR has in respect of the farmout.

2. FACTS

Canadian Natural Resources Ltd. (CNRL) entered into a pooling agreement with AEC Oil and Gas, a predecessor to EnCana Oil & Gas Partnership (EnCana). The pooling agreement incorporated by reference CAPL's 1990 *Operating Procedure*,[257] including a ROFR pursuant to Alternate B of clause 2401. EnCana later entered into a farmout agreement with Marauder Resources West Coast (Marauder) pursuant to which it farmed out 15 parcels of land, two of which were subject to the CNRL ROFR.

In the second year of the farmout, Marauder selected three test well locations, which entitled it to earn a working interest in pooled lands. EnCana served CNRL with a notice of disposition (the Notice of Disposition) setting out the test well locations, the dates by which the test wells were required to be spudded and completed, and the amount of liquidated damages to be paid if the test wells were not drilled and completed pursuant to the terms of the farmout agreement. Following email correspondence between CNRL and EnCana regarding the terms of the farmout agreement and the test well locations, CNRL elected to exercise its ROFR.

A week after exercising its ROFR, CNRL sent a letter to EnCana claiming an extension to the spud date on the basis that, in its sole opinion, governmental restrictions made the test well sites inaccessible. Another week later, in response to a draft farmout agreement provided to it by EnCana, CNRL sent correspondence indicating that the farmout agreement

---

255 *Ibid.* at para. 42.
256 2007 ABQB 460, 33 B.L.R. (4th) 163.
257 *Supra* note 226.

between CNRL and EnCana should define "test well" in the same manner as that term was defined in the Marauder farmout agreement, a change which would permit CNRL to select test well sites from the farmout lands rather than being obliged to drill on the test well sites identified in the Notice of Disposition. EnCana declined to make this change and CNRL did not drill the test wells. As a result, EnCana served written notice of default, claiming CDN$300,000 in liquidated damages for each of the test wells that had not been drilled as provided for in each of the Marauder farmout agreement and the Notice of Disposition.[258] CNRL commenced a court application claiming that it was entitled to select is own locations for the three test wells and that it was not bound by the timelines set out in the Notice of Disposition, but rather was entitled to more time to drill the three test wells.

3. DECISION

CNRL argued that it was entitled to a Notice of Disposition when EnCana signed the farmout agreement with Marauder and that, upon exercising the ROFR after receipt of the Notice of Disposition, it became entitled to the same rights as Marauder had under the farmout agreement. EnCana countered that the ROFR was triggered only when Marauder had selected earning lands to which the ROFR applied and that the ROFR, once triggered, entitled CNRL to elect to earn those lands by drilling test wells in the locations selected by Marauder. It did not entitle CNRL to select other test well sites or other earning lands as if CNRL were the original farmee.

The Court agreed with EnCana's analysis. Pursuant to the ROFR provisions of the CAPL 1990 *Operating Procedure*, a ROFR arises when either party seeks to dispose of any of its interest in the subject lands.[259] As a result, CNRL's ROFR was not triggered until Marauder selected test well locations which would entitle it to earn lands that were subject to the CNRL ROFR. Once exercised, the ROFR did not entitle CNRL to step into the place of Marauder under the farmout agreement as asserted by CNRL. The Court pointed out that the farmout agreement was a broad agreement,[260] covering 15 parcels of land, only two of which were pooled lands subject to CNRL's ROFR. The Court held that CNRL's ROFR was limited to dispositions by EnCana of working interests in the pooled land,[261] and that the exercise of the ROFR entitled CNRL to acquire the interest in pooled lands identified in the Notice of Disposition on the same terms as had been offered to Marauder. The Court held that, once CNRL exercised its ROFR, it was bound by the terms of the Notice of Disposition, including in respect of the working interests to be earned. It noted that "[w]hat Encana is disposing of and what Marauder is entitled to earn relates directly to the well sites chosen. CNRL is not entitled under the ROFR to choose its own locations for the three test well sites."[262]

---

258 *Supra* note 256 at para. 13.
259 *Ibid.* at para. 29.
260 *Ibid.* at para. 39.
261 *Ibid.*
262 *Ibid.* at para. 45.

The Court also held that CNRL was not entitled to additional time to drill the test wells.[263] While CNRL's letter to EnCana indicated that it was unable to drill the test wells because, in CNRL's sole opinion, governmental restrictions made the well sites inaccessible, the Court noted that there was no evidence that government restrictions or ground conditions — the two permitted grounds to delay the drilling of the test wells under the farmout agreement — affected CNRL.[264] While it acknowledged that the timelines for CNRL to drill the test wells were tight, the Court indicated that the timing was clearly set out in the Notice of Disposition. It was open to CNRL, if it felt that it would be unable to meet those timelines, to seek to acquire the interest for cash consideration pursuant to the provisions of the ROFR clause, which provided for the substitution of the cash value of non-cash consideration where such consideration cannot be matched in kind. The Court concluded that

> [EnCana] had every reason to expect that CNRL, having exercised the ROFR, would abide by the terms of it. It is akin in my view to the exercise of a ROFR on the sale of a home when a prospective third party purchaser comes forward with an Offer to Purchase with a set closing date, a set price and set conditions. The party exercising the ROFR must decide whether or not they can meet those terms and conditions. If so, they exercise their ROFR or negotiate adjustments prior to exercising the ROFR. Once the ROFR is exercised, they are bound by the same terms and conditions as the third party purchaser and cannot be heard later to complain that they are unreasonable.
>
> While it may seem harsh, these parties are sophisticated business entities and the entire industry depends on the ability to enter into and rely on contracts. In this case, once the ROFR was exercised, it became a binding contract. That was the expectation of the parties entering into it. It is not, as Encana says, the right to enter into negotiations. If CNRL was unable to comply with the Notice of Disposition under the same arrangement Marauder was, then they had options available to them which they chose not to exercise. As such, I find that CNRL is not entitled to more time to drill its three test well locations.[265]

Finding that CNRL was not entitled to more time to drill the test wells, the Court also held that EnCana was entitled to CDN$300,000 in liquidated damages for each well not drilled as specified in both the Marauder farmout agreement and in the Notice of Disposition.

4. COMMENTARY

In our view, the Court's conclusions in this case are correct. The exercise of a ROFR creates binding obligations on both the issuer of a disposition notice and the party exercising the ROFR. It does not, as argued by EnCana and paraphrased by the Court, create the right to enter into negotiations. This decision also offers welcome answers to questions surrounding the interplay between ROFR clauses and farmout of interests subject thereto.

---

263 *Ibid.* at para. 53.
264 *Ibid.* at para. 50.
265 *Ibid.* at paras. 52-53.

XII. SURFACE RIGHTS

A. *NEXEN INC. V. FORT ENERGY CORP.*[266]

1. BACKGROUND

Nexen Inc. (Nexen) applied to the Court for a declaration that Fort Energy Corp. and 981405 Alberta Ltd. (together Fort) were required to transfer, assign, or deliver surface rights, rights of way, permits, licences, and other rights relating to the site of a proposed operation to Nexen as operator under an independent operations notice.

2. FACTS

Nexen and Fort were joint venture partners under a joint operating agreement (the JOA) with respect to the development of a coal bed methane gas field in the Fort Assiniboine area of Alberta. On some of the lands under the JOA, Fort was the operator, while Nexen was the operator of other of these lands.

Nexen, Fort, and CNRL were also parties to a farmout agreement (the Farmout Agreement) on lands, which included a parcel described as 13-2. Both the JOA and the Farmout Agreement were governed by the CAPL 1990 *Operating Procedure*.[267]

The Crown lease on 13-2 was set to expire unless drilling was commenced. For this reason, Nexen served a notice of independent operations on CNRL and Fort pursuant to the Farmout Agreement. The target location was 13-2, but the surface operations were to be located on 4-1, land held by Nexen and Fort under the JOA. Under art. 1004 of the CAPL *Operating Procedure*, Nexen, as the party proposing the independent operation, was to be the operator. For it to undertake operations under the Farmout Agreement on 4-1, Nexen required surface rights, which Fort held pursuant to the JOA. Under art. 308 of the *Operating Procedure*, an operator holds surface rights for the joint account of all parties. By virtue of the fact that Fort held the surface rights pursuant to an agreement in which both Fort and Nexen were parties, Nexen sought assignment and delivery of the surface rights that would enable it to undertake operations on 4-1 targeting the zone on 13-2.

3. DECISION

Justice Kent found that Fort held surface rights on 4-1, pursuant to the Farmout Agreement, for the joint account of itself, Nexen, and CNRL. She held that the term "joint account" referenced only the Farmout Agreement.[268] The fact that both Nexen and Fort were also parties to the separate JOA did not mean that Nexen was entitled to an assignment of the surface rights on 4-1 to enable it to conduct operations targeting 13-2. Nexen's application for assignment of the surface rights on 4-1 was dismissed.

---

266 2007 ABQB 385, [2007] A.J. No. 1202 (QL).
267 *Supra* note 226.
268 *Ibid.* at para. 17.

Justice Kent accepted that, pursuant to art. 305 of the CAPL *Operating Procedure*, Fort was required to provide *copies* of surface rights agreements on 4-1 to the joint interest holders under the JOA, including Nexen.[269]

4. COMMENTARY

Nexen's application was made pursuant to an Originating Notice and not as the result of the filing of a Statement of Claim. Fort argued that the action ought to have been brought pursuant to a Statement of Claim, and the Court accepted that there was nothing in the *Judicature Act*,[270] that dealt with the relief sought by Nexen. Nexen applied to amend its Originating Notice to reference r. 410 of the *Alberta Rules of Court*.[271] The Court accepted that r. 410(e) permitted the Court to grant relief, provided that three elements were satisfied, namely: (1) there are no disputed facts; (2) the dispute arises in respect of a written instrument; and (3) the relief sought was in the nature of a declaration as to the rights of the parties.[272] In this case, the Court found that no facts were in dispute, as Fort had chosen not to file any evidence. Second, the Court accepted that the written instrument at issue was the CAPL *Operating Procedure*. Finally, the Court found that the application was in the nature of a declaration as to rights arising from the agreements and the *Operating Procedure*.[273]

The decision stands for the proposition that simply because companies may be parties to multiple agreements that are themselves governed by the CAPL *Operating Procedure*, the rights arising from one agreement do not necessarily carry over to the other agreements.

XIII. TAXATION

A. *PENN WEST PETROLEUM LTD. V. CANADA*[274]

1. BACKGROUND

This case considered the application of a specific anti-avoidance rule in the *Income Tax Act*[275] in circumstances where a partner extracted resource properties from a partnership and was allocated the proceeds of disposition realized by the partnership. The partner that received the property had joined the partnership for the sole purpose of extracting a particular set of Canadian resource properties, which were the subject of a ROFR dispute.

By way of background, under the *ITA*, a purchaser of a Canadian resource property will generally add the purchase price to a tax pool known as cumulative Canadian oil and gas property expense (COGPE), which is deductible on a 10 percent declining balance basis. The vendor of a Canadian resource property generates negative COGPE to the extent of the sale proceeds and will first reduce its cumulative COGPE pool by the sale proceeds, and to the

---

269 *Ibid.* at para. 19.
270 R.S.A. 2000, c. J-2.
271 Alta. Reg. 390/1968, r. 410.
272 *Ibid.*, r. 410(e).
273 *Supra* note 266 at paras. 8-9.
274 2007 TCC 190, [2007] 4 C.T.C. 2063.
275 R.S.C. 1985 (5th Supp.), c. 1 [*ITA*].

extent of any remainder, will reduce other resource tax pools with any remaining balance being included in income. Where a partnership disposes of a Canadian resource property, the *ITA* provides that the negative COGPE recognized by the partnership is allocated to each partner directly in proportion to the partner's "share" of the proceeds of disposition of the resource property. In the oil and gas industry, it is common for partnership agreements to provide that where a property is extracted by one of the partners, a 100 percent share of the proceeds is allocated to the partner that receives the property.

2. FACTS

While the facts of the case are complex, they can be summarized as set out below.

On 17 February 1994, Petro-Canada sold its interest in certain Canadian resource properties (the TroCana Properties) as well as the shares of TroCana Resources (a corporation that also held an interest in the TroCana Properties) to 594159 Alberta Ltd., a corporation controlled by a person who was dealing at arm's length with Petro-Canada, for approximately CDN$170 million. On 21 February 1994, 594159 Alberta Ltd. and TroCana Resources formed the TroCana Partnership (the Partnership) and contributed the TroCana Assets to the Partnership on a tax-deferred basis.

On 22 April 1994, Penn West Petroleum Ltd. (Penn West) acquired the shares of 594159 Alberta Ltd. and the shares of TroCana Resources for approximately $170 million. On 1 July 1994, Penn West transferred its own oil and gas properties to the Partnership and renamed it as the Penn West Petroleum Partnership.

The sale of the TroCana Assets by Petro-Canada in February 1994 triggered a ROFR in favour of Phillips Petroleum Resources Ltd. (Phillips), Suncor, and B.C. Star Partners in respect of a portion of the TroCana Assets known as the "Blueberry Assets." In August 1994, Petro-Canada sent a ROFR notice in respect of the transfer, but the ROFR holders objected to the price. To avoid a lawsuit in respect of the ROFR, Penn West entered into a letter agreement with Phillips (on behalf of itself and the other ROFR holders) on 29 December 1994, pursuant to which a subsidiary of Penn West (which was the successor to the partnership interest of 594159 Alberta Ltd. and which was subsequently amalgamated with Penn West) agreed to sell an interest in the Partnership to Phillips for CDN$14.1 million (the Letter Agreement).

On 30 January 1995, Phillips acquired a 5.27 percent interest in the Partnership. On 17 February 1995, Phillips gave notice to Penn West (as managing partner of the Partnership) that it was electing to have its interest in the Partnership redeemed, and on 24 February 1995, the Blueberry Assets were transferred to Phillips in satisfaction of Phillips' interest in the Partnership. In accordance with s. 3.17 of the partnership agreement, Phillips was allocated all of the proceeds of the disposition of the Blueberry Assets (in the form of an allocation of negative COGPE).

The Minister of National Revenue contended that this result was contrary to s. 103(1) of the *ITA* and reassessed Penn West on the basis that it should have received 92.82 percent of

the negative COGPE, in accordance with Penn West's interest in the Partnership on the date that Phillips withdrew as a partner.

3. DECISION

The issue before Bowman C.J. of the Tax Court of Canada was whether the allocation of the entire proceeds of the disposition of the Blueberry Assets to Phillips contravened s. 103(1) of the *ITA*, considering that Phillips had only a 5.27 percent interest in the Partnership. Section 103(1) of the *ITA* provides:

> *Where the members of a partnership have agreed to share*, in a specified proportion, *any income or loss of the partnership* from any source or from sources in a particular place, as the case may be, or any other amount in respect of any activity of the partnership that is relevant to the computation of the income or taxable income of any of the members thereof, *and the principal reason for the agreement may reasonably be considered to be the reduction or postponement of the tax that might otherwise have been or become payable under this Act, the share of each member of the partnership in the income or loss*, as the case may be, or in that other amount, *is the amount that is reasonable having regard to all the circumstances including the proportions in which the members have agreed to share profits and losses of the partnership from other sources or from sources in other places*.[276]

Chief Justice Bowman had his doubts about whether s. 3.17 could operate to divide up the negative COGPE. He wrote:

> Section 3.17 of the partnership agreement seeks to provide that the deemed disposition that the *Income Tax Act* dictates falls on the partnership can be shifted contractually to one of the partners even though as a civil matter nothing has changed. I have serious reservations as to whether this can be achieved as a matter of law. Obviously partners can contractually divide up a real pie any way they like but I have a conceptual difficulty in seeing how a pie that exists only because the *Income Tax Act* deems that it exists and belongs to the partnership can, by agreement, be given to one of the partners along with the tax consequences that flow from that notional ownership.[277]

Even if s. 3.17 of the partnership agreement could do what it purported to do, Bowman C.J. found that the allocation to Phillips was not reasonable in the circumstances.[278] However, he accepted that in certain circumstances, allocations of income in accordance with s. 3.17 of the partnership agreement might not be unreasonable.[279] He gave as an example a situation where a partner transfers resource properties to a partnership, makes an election pursuant to s. 97(2) of the *ITA* such that the properties are transferred on a tax-deferred basis, and then the same partner takes the assets out of the partnership. In such a case, Bowman C.J. concluded that it would be reasonable for that partner to bear the tax consequences of extracting the properties.[280] However, that situation was not what the Tax Court was dealing

---

276 *Ibid.*, s. 103(1) [emphasis added].
277 *Supra* note 274 at para. 33.
278 *Ibid.* at para. 38.
279 *Ibid.* at para. 39.
280 *Ibid.*

with in this case. Chief Justice Bowman set out several factors that should be considered in determining the reasonableness of the distribution in the present circumstances:

- Phillips never put any assets into the Partnership;
- Phillips joined the Partnership simply to extract the Blueberry Assets;
- It was not merely a matter of Phillips' joining the Partnership and taking advantage of a pre-existing s. 3.17 — the partnership agreement had to be amended to meet Phillips' objectives; and
- Phillips' involvement in the Partnership was, pursuant to an indemnity agreement, risk free.[281]

Chief Justice Bowan went on to consider whether the principal reason for the allocation under the partnership agreement could reasonably be considered to be for the reduction or postponement of the tax that might otherwise have been payable under the *ITA*. In this regard, he concluded that "the arrangement from Phillips' point of view was not tax motivated" and that Phillips "wanted to get the [Blueberry] assets at the lowest possible [cost]" and was willing to accept the tax consequences.[282] However, he concluded that the principal reason for the arrangement was the reduction of Penn West's tax that would otherwise have been payable under the *ITA*. It was Bowman C.J.'s view that there was no reason for the arrangement other than to make the price that Phillips was willing to pay for the Blueberry Assets more economical for Penn West. Otherwise, Penn West would have sold the Blueberry Assets directly to Phillips.[283]

4. COMMENTARY

While the result in this case appears to have been driven by its particular facts, the decision does create some uncertainty as to the circumstances in which it is appropriate for arm's length parties to rely on a clause in a partnership agreement to allocate the proceeds of disposition to the partner that extracts a property from a partnership. Clauses of this nature are common in the oil and gas industry to provide that the economic consequences of removing a property from a partnership follow the property. The comments in the decision that appear to confine the scope of such a clause to properties contributed by the same partner on a tax-deferred basis are troubling. An appeal to the Federal Court of Appeal has been filed in this case.

---

281 *Ibid.*
282 *Ibid.* at para. 43.
283 *Ibid.* at para. 48.

B. *RAINFORTH V. CANADA*[284]

1. BACKGROUND

An amount claimed as a tax deduction under the provisions of the *ITA*[285] as a Canadian exploration expense must be expended in a bona fide effort to explore for petroleum or natural gas.

2. FACTS

The appellant, Mr. Rainforth, through his tax accountant, entered into investments related to the purchase of seismic data transactions each year for seven years, along with a number of other investors. The investments were intended to create a Canadian exploration expense (CEE) under s. 66.1(3) of the *ITA*. Rainforth directed his annual investment to a corporation known as NR Management Ltd. (NRM).

NRM had entered into a joint venture agreement with 667523 Alberta Ltd. Pursuant to this agreement, NRM was to acquire an undivided interest in seismic data for an area known as Tedji Lake in the Northwest Territories, and was to conduct exploration activities for oil and gas prospects generated from the interpretation of this data.

For each taxation year under appeal, Rainforth claimed a tax deduction of CDN$50,000 for the CEE. The definition of CEE is found in s. 66.1(6). The Court highlighted the relevant portions of the section:

> "Canadian exploration expense" of a taxpayer means any expense incurred after May 6, 1974 that is
>
> (a) *any expense* including a geological, geophysical or geochemical expense *incurred by the taxpayer* (other than an expense incurred in drilling or completing an oil or gas well or in building a temporary access road to, or preparing a site in respect of, any such well) *for the purpose of determining the existence, location, extent or quality of an accumulation of petroleum or natural gas* (other than a mineral resource) in Canada.[286]

The Crown argued before the Court that Rainforth did not acquire any interests in seismic data or, alternatively, the expenses were not incurred for exploration purposes.

3. DECISION

Rainforth's tax accountant testified that NRM showed him, from time to time, technical reports related to the seismic data, but that he paid little attention to these reports. Neither Rainforth nor his tax accountant presented any evidence as to the value of the seismic data. Moreover, Rainforth did not lead any evidence from the joint venture representatives as to the value of the seismic data. The Crown, on the other hand, led evidence, supported by

---

284 2007 TCC 132, [2007] 3 C.T.C. 2229 [*Rainforth*].
285 *Supra* note 275.
286 *Supra* note 284 at para. 39 [emphasis in original].

arm's length transactions, that suggested that the seismic data was worth far less than the value placed on it by the joint venture company.

The Court examined Rainforth's assertion that he had incurred expenses of CDN$50,000 in each of the several years in issue for the purpose of oil and gas exploration. It noted that the purpose test for determining whether an expense is a CEE requires that such an expense be incurred for the purpose of determining the existence, location, extent, or quality of an accumulation of petroleum or natural gas. The Court noted that the test could be satisfied by showing that the data was actually used for a qualifying purpose, or by showing that there was a credible plan for use of the data for such purpose.[287] The Court found that Rainforth's tax accountant had no direct knowledge of any use made of the seismic data.[288] As to Rainforth's knowledge of use of the seismic data, the Court wrote that

> Mr. Rainforth knew very little about these transactions, except for the favourable tax consequences that would be available. Although it would not be unusual for investors to rely extensively on advisers, it would be unusual for an investor to make the same type of investment for eight consecutive years without having any objective evidence of the investment's performance.[289]

The Court went on to conclude that Rainforth and his tax accountant were indifferent as to whether the joint ventures actually conducted any exploration activities. The Court found that Rainforth had failed to establish that the vague objectives of the joint venture agreement ever resulted in a credible plan to use the data for exploration activities.

4. COMMENTARY

This case reinforces the proposition that in order to qualify for favourable tax treatment as a CEE, investors must be able to demonstrate that the investment is for the purpose of determining the existence, location, extent, or quality of petroleum or natural gas and that seismic data so acquired was actually used for a qualifying purpose. Alternatively, the investor may be able to show that there is a credible plan for use of the data. This case also highlights the need for investors in projects related to exploration for oil and gas to have a reasonable understanding of the project. Investors cannot stand by year after year, continuing to take the CEE deduction, and be indifferent as to whether exploratory activities are planned or going ahead.

C. *ALBERTA (MINISTER OF MUNICIPAL AFFAIRS) V. ALBERTA OIL SANDS PIPELINE LTD.*[290]

1. BACKGROUND

This case, a judicial review of a decision of the Alberta Municipal Government Board (MGB), deals with the question of when a pipeline is subject to taxation.

---

287 *Ibid.* at para. 41, citing *Petro-Canada v. Canada*, 2004 FCA 158, [2004] 3 C.T.C. 156.
288 *Rainforth*, *ibid.* at para. 42.
289 *Ibid.* at para. 48.
290 2007 ABQB 652, 436 A.R. 89 [*AOSPL*].

2. FACTS

Alberta Oil Sands Pipeline Ltd. (AOSPL) constructed two pipeline loops, 18.1 and 55.3 kilometres in length, along an existing pipeline between Fort McMurray and Edmonton, Alberta. When tax assessments were issued on the loops, AOSPL filed a complaint with the MGB, arguing that the loops were neither completely constructed nor capable of being used to transport petroleum products as of the date specified in legislation. AOSPL argued that certain commissioning tests had not yet been completed that would permit commercial operation of the pipeline loops without risk to public safety and the environment.

Under s. 284(1)(k)(iii)(A) of the *Municipal Government Act*,[291] "pipelines" are defined as linear property, and include

> any continuous string of pipe, including loops, by-passes, cleanouts, distribution meters, distribution regulators, remote telemetry units, valves, fittings and improvements used for the protection of pipelines intended for or used in gathering, distributing or transporting gas, oil, coal, salt, brine, wood or any combination, product or by-product of any of them, whether the string of pipe is used or not.

The *MGA* also specifies that linear property that is under construction is not to be the subject of a tax assessment unless it is capable of being used to transmit gas, oil, or electricity prior to 31 October of the year in question:

> No assessment is to be prepared
>
> (a) for linear property that is under construction but not completed on or before October 31, unless it is capable of being used for the transmission of gas, oil or electricity.[292]

The Court considered the standard of review applicable to decisions of the MGB, using the pragmatic and functional approach mandated by *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*.[293] The Court concluded that a standard of reasonableness *simpliciter* was appropriate to a review of findings of the MGB of mixed fact and law.

3. DECISION

The MGB agreed with AOSPL and held that the loops were under construction and not yet complete on 31 October 2003.

The Court considered the decision of the Alberta Court of Appeal in *Alliance Pipeline Ltd. v. Alberta (Minister of Municipal Affairs)*[294] and concluded that the MGB had correctly ruled as to the stage that construction of a pipeline is complete:

---

291 R.S.A. 2000, c. M-26 [*MGA*].
292 *Ibid.*, s. 291(2).
293 [1998] 1 S.C.R. 982.
294 2006 ABCA 9, 376 A.R. 44 [*Alliance*].

> [T]he MGB, in my view, was correct in the present case in stating that construction cannot be considered to be complete before the commissioning process has reached the point where the *public and the environment are no longer compromised* and the pipeline is capable of being used for the commercial transmission of oil.
>
> …
>
> The MGB's conclusion that "construction" cannot be viewed as complete at least until completion of those activities that make a pipeline *capable of safe, commercial use*, accords with the purpose of s. 291(2).[295]

The Court cited *Alliance* as support for the MGB's conclusion that a pipeline is not complete until "basic safety and systems testing to ensure that the public and environment are not at risk when the pipeline moves to full line capacity."[296] The Court accepted that, in the present case, the AOSPL loops could not be used for commercial transmission by 31 October 2003, and were not subject to assessment.[297]

4. COMMENTARY

In *Alliance*, the Alberta Court of Appeal had applied the pragmatic and functional approach to assess whether the MGB had properly determined the question of proper interpretation of s. 291(2)(a) of the *MGA*. There, the Court held that the proper standard of review is one of correctness when determining if a pipeline is capable of being used for the transmission of petroleum products. The Court held that the lower court had erred in applying the patent unreasonableness standard.

In the *AOSPL* case, the Court accepted the argument that the MGB's analysis of whether a pipeline is capable of safe transmission of petroleum products should be reviewed on a standard of reasonableness *simpliciter*. This was the same standard applied by the Court of Queen's Bench in *Alberta (Minister of Municipal Affairs) v. Alberta (Municipal Government Board)*.[298] The *AOSPL* case stands for the proposition that, irrespective of which standard is applied, a pipeline must be safe for the public and the environment before it will be seen to be complete and subject to tax assessment.

XIV. SECURITIES

A. *KERR V. DANIER LEATHER INC.*[299]

1. BACKGROUND

The trial decision[300] in this action indicated that an issuer could attract civil liability under the provisions of the Ontario *Securities Act*[301] as a consequence of failure to disclose matters

---

295 *Supra* note 290 at paras. 50, 66 [emphasis added].
296 *Ibid.* at para. 77, citing *Alliance*, *supra* note 294 at para. 68.
297 *AOSPL*, *ibid.* at para. 81.
298 2007 ABCA 217, 417 A.R. 112.
299 2007 SCC 44, 286 D.L.R. (4th) 601.
300 *Kerr v. Danier Leather*, (2004), 46 B.L.R. (3d) 167 (Ont. Sup. Ct. J.).
301 R.S.O. 1990, c. S.5.

that are material, but which are not expressly required to be disclosed pursuant to the disclosure provisions of the *Securities Act*. Understandably, this result produced considerable uncertainty and concern regarding the true scope of information which issuers were required to disclose to avoid liability pursuant to the civil liability provisions of the *Securities Act*.

2. FACTS

Danier Leather Inc. (Danier) made an initial public offering (IPO) in the spring of 1998. Danier included, in its final prospectus filed on 6 May 1998, its actual results for the first three quarters and forecasted results for the fourth quarter of its 1998 fiscal year. It was these forecasted results that became the centre of this action.

Unfortunately for Danier, the spring of 1998 was unseasonably warm across most of Canada, negatively impacting Danier's sales. In analyzing its financial results for the first half of the fourth quarter, Danier executives determined that, as of 16 May 1998, Danier's revenues for the quarter were off 24 percent. Despite this, Danier executives testified that they continued to believe that it would meet or exceed the prospectus forecast. The IPO closed on 20 May 1998 and, shortly thereafter, Danier's executives became concerned that it would fall short of the sales and revenue forecast set out in the prospectus. On 4 June 1998, Danier issued a press release and filed a material change report revising downward its forecast for the 1998 fiscal year. Immediately upon release of this information, Danier's share price dropped substantially.

On 13 November 1998, the plaintiff filed an action for prospectus misrepresentation under s. 130(1) of the *Securities Act*, alleging that the results of the 16 May 1998 analysis should have been released before the IPO closed. The action was certified as a class proceeding on 3 December 2002.

At the trial level, Lederman J. determined that Danier had complied with its obligations under s. 56(1) of the *Securities Act* to provide full, true, and plain disclosure as of the date the prospectus was filed[302] and that the cause of Danier's poor financial results was poor weather, which was not a material change requiring an amendment to the prospectus pursuant to s. 57(1) of the *Securities Act*.[303] He nonetheless concluded that s. 130(1) of the *Securities Act* imposed an independent and continuing obligation on Danier to disclose material facts arising between the date of the prospectus and the closing of the IPO and that failure to do so resulted in the forecast being a misrepresentation in the prospectus at the time of purchase, attracting liability under s. 130(1).[304] Justice Lederman further found that, while Danier's officers continued to believe that the forecast included in the prospectus was achievable, this belief was "objectively unreasonable"[305] as at the date the IPO closed. Justice Lederman awarded damages in the amount of CDN$2.35 per share, plus costs, and a cost premium of $1 million.

---

302 *Supra* note 300 at para. 222.
303 *Ibid.* at para. 223.
304 *Ibid.* at para. 278.
305 *Ibid.* at para. 285.

The Ontario Court of Appeal overturned the trial judgment in a unanimous decision[306] on three grounds. First, the Court concluded that Lederman J. had misinterpreted s. 130(1) of the *Securities Act*, and held that this section did not pose liability for failure to disclose material facts which do not constitute a material change.[307] Second, the Court disagreed with Lederman J.'s finding that the forecast contained an implied representation of reasonableness.[308] Finally, the Court held that the forecast was objectively reasonable as of the closing date and that, based on the "Business Judgment Rule,"[309] Lederman J. should not have substituted his own view for that of Danier's executives.[310] In addition to overturning the trial decision, the Court of Appeal awarded costs to the defendants on a partial indemnity basis.

3. DECISION

The Supreme Court of Canada, in a unanimous decision, dismissed the appeal. The Court upheld the Court of Appeal's decision that the trial judge erred in interpreting s. 130(1) in a manner that required continuous disclosure of material facts not constituting material changes that arise after a prospectus is filed.[311] The Court noted that s. 57(1) of the *Securities Act* requires post-filing disclosure of material changes, being any change in business, operations, or capital that would reasonably be expected to impact the market price of the issuer's securities.[312] Section 57(1) does not require continuous disclosure by issuers of material facts, a term which is more broadly defined within the *Securities Act* and includes any fact that significantly affects or would reasonably be expected to affect the market price of an issuer's securities. Justice Binnie, writing for the Supreme Court of Canada, stated that

> [i]mposition of civil liability under s. 130(1) for an omission to do what the legislature as a matter of policy has declined to require in s. 57(1) would simply be to substitute the court's view of policy for that adopted by legislature. The distinction between "material change" and "material fact" is deliberate.[313]

The Supreme Court of Canada disagreed with the conclusion of the Court of Appeal that the forecast included in Danier's prospectus did not contain an implied representation of reasonableness. The Supreme Court was of the view that, based on the language of the prospectus itself, the forecast carried an implied representation of reasonableness, as held by the trial judge, but the Supreme Court clarified that the representation spoke to reasonableness as at the date of filing and not to any future date.[314] The Supreme Court found that the trial judge, having determined that the Danier forecast was reasonable as of the date of filing, erred in going on to evaluate whether the forecast remained reasonable as of the date of closing of the IPO and in awarding damages on that basis.[315]

---

306 *Kerr v. Danier Leather* (2005), 77 O.R. (3d) 321 (C.A.).
307 *Ibid.* at paras. 137-38.
308 *Ibid.* at para. 139.
309 See discussion of the "Business Judgment Rule" in *Maple Leaf Foods v. Schneider Corp.* (1998), 42 O.R. (3d) 177 (C.A.) at 192.
310 *Supra* note 306 at para. 140.
311 *Supra* note 299 at para. 37.
312 *Ibid.* at paras. 38, 45.
313 *Ibid.* at para. 38.
314 *Ibid.* at para. 49.
315 *Ibid.* at para. 51.

In their appeal, the respondents argued that the Business Judgment Rule applied to disclosure requirements under ss. 56 to 58 of the *Securities Act*. The Supreme Court disagreed, noting that "[t]he Business Judgment Rule is a concept well-developed in the context of *business* decisions but should not be used to qualify or undermine the duty of disclosure."[316]

Finally, the Supreme Court declined the named appellant's argument that the Court of Appeal erred in awarding costs against him. Although the discussion centred on specific provisions of Ontario's *Class Proceedings Act, 1992*,[317] the Court concurred with the Court of Appeal that this case was, in essence, a commercial dispute between sophisticated parties involving private commercial interests, and not a case where public interest concerns such as power imbalance or access to justice warranted departure from the usual cost consequences.[318]

4. COMMENTARY

The decision of the Supreme Court of Canada in this case confirmed that the civil liability provisions of the *Securities Act* do not impose liability for failure to disclose matters which are not required to be disclosed pursuant to the disclosure provisions of the *Securities Act*. The Court also clarified that the Business Judgment Rule does not modify legal disclosure requirements under the *Securities Act*.

It is also notable that, in upholding the Court of Appeal's award of costs to Danier, the Court commented that "there is no magic in the form of a class action proceeding"[319] such that the normal considerations regarding the award of costs should not apply to class actions where not excluded by the applicable class proceedings legislation.

316 *Ibid.* at para. 54 [emphasis in original].
317 S.O. 1992, c. 6.
318 *Supra* note 299 at para. 65.
319 *Ibid.* at para. 66.