RECENT JUDICIAL DEVELOPMENTS OF INTEREST TO ENERGY LAWYERS

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This article provides an overview of recent judicial developments of interest to energy lawyers. The authors summarize and provide commentary on recent Canadian case law in the areas of Aboriginal law, leases, joint operating agreements, surface rights, environmental law, contract law, taxation, privilege, employment law, conflict of laws, and limitations law.

Cet article donne un aperçu des derniers développements judiciaires intéressant les avocats travaillant dans le secteur énergétique. L'auteur résume et commente la récente jurisprudence canadienne dans le domaine du droit des autochtones, des baux, des ententes concertées d'exploitation, des droits de superficie, du droit de l'environnement, du droit du contrat, de la taxation, du privilège, du droit du travail, du conflit de lois et des prescriptions.

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I. ABORIGINAL LAW

A. *DA'NAXDA'XW/AWAETLALA FIRST NATION V. BRITISH COLUMBIA (MINISTER OF ENVIRONMENT)*

1. BACKGROUND

The decision of *Da'naxda'xw/Awaetlala First Nation v. British Columbia (Minister of Environment)*[1] from the British Columbia Supreme Court is principally concerned with the Crown's duties to consult with and accommodate First Nations. The subtext of this case is the competition between the rights of First Nations to pursue economic development and the protection of the environment.

2. FACTS

This case concerned a proposal to construct a hydroelectric facility (the Project) in an area designated to be a conservancy, a type of protected area, that formed a part of the lands claimed by the Da'naxda'xw First Nation (DFN). In order for the Project to proceed, the conservancy boundary required modification. The conservancy boundary had previously been the subject of a regional negotiation between the British Columbia government and the DFN and had been agreed to in principle in 2006. Shortly thereafter, the DFN made a request that the proposed conservancy boundary be modified so as to exclude the Project.[2]

In January 2008, the Minister of the Environment (the Minister) sought to consult with the First Nations regarding the boundary modification. On 29 April 2008, the government introduced a bill,[3] which did not include the boundary amendment requested by the DFN. In January 2010, the DFN submitted a formal amendment request to Cabinet under the then current *Provincial Park Boundary Adjustment Policy*,[4] which was not applicable to conservancies, but which the DFN had been informed would act as a guideline.

In March 2010, the government published the new *Provincial Protected Area Boundary Adjustment Policy*.[5] It was substantially similar to the previous policy, but included new criteria. One of the new criteria on which a proposed boundary amendment could be rejected was if significant adverse effects on environmental or social values could not be compensated for, mitigated, or avoided altogether.[6] Subsequently, on 27 April 2010, the Minister refused to recommend the boundary amendment, a decision the Court found to be based primarily on the potential negative environmental impacts of the Project.[7]

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1 2011 BCSC 620, [2011] 3 CNLR 188 [*Da'naxda'xw*].
2 *Ibid* at paras 13-14, 20-21.
3 Bill 38, *Protected Areas of British Columbia (Conservancies and Parks) Amendment Act, 2008*, 4th Sess, 38th Parl, British Columbia, 2008 (assented to 29 May 2008), SBC 2008, c 26.
4 British Columbia, Ministry of the Environment, *Provincial Park Boundary Adjustment Policy, Process and Guidelines* (Victoria: Ministry of the Environment, 2004).
5 British Columbia, Ministry of the Environment, *Provincial Protected Area Boundary Adjustment Policy, Process and Guidelines* (Victoria: Ministry of the Environment, 2010), online: Ministry of the Environment <http://www.env.gov.bc.ca/bcparks/planning/docs/boundary_adj_guide.pdf>.
6 *Ibid* at 5.
7 *Da'naxda'xw*, *supra* note 1 at para 123.

The DFN argued that the Minister had failed to consult them before making this decision. The Minister argued he had no duty to consult because he was simply preserving the status quo.

3. DECISION

The Court held that the government did in fact have a duty to consult regarding the boundary amendment and rejected the argument that an act of the government conserving the status quo does not require consultation. Justice Fisher noted that "[t]he primary issue is whether the Crown's contemplated conduct might adversely affect the Da'naxda'xw's claim to aboriginal title"[8] and found that the Minister's decision caused the DFN to lose a significant and unique opportunity. In response to the government's argument that the duty to consult is not intended to grant First Nations rights to lands where they have not proven their claims, the Court held that in this case, the DFN was seeking to leave the decision open as to how the land would be used and further stated that this would not give the DFN an advantage in negotiation or a disincentive to negotiate further.[9]

The Court went on to find that the government's duty to consult had not been satisfied and declared that the Minister had an obligation to consult with the DFN with respect to its decision on the boundary amendment application.[10]

4. COMMENTARY

Where lands are the subject of an Aboriginal title claim, a decision by a government to conserve such lands is not a decision that will automatically relieve the government of its duty to consult. On its face, a decision to protect lands by placing them in a conservancy would appear to be a decision that is not adverse to an Aboriginal rights claim. However, the Court in this instance deemed that the government's refusal to exclude the Project lands from the conservancy constituted an adverse effect sufficient to require the government to consult with the affected First Nation. This decision is a reminder that First Nations are active economic actors and the status quo may include a situation where the First Nations can continue to engage in economic activity. In this context, preventing a First Nation from developing lands to which they have an Aboriginal rights claim may have an adverse effect on the status quo and warrants consultation between the government and the affected First Nation.

B. *KEEWATIN V. ONTARIO (MINISTER OF NATURAL RESOURCES)*

1. BACKGROUND

Pending an appeal, this decision[11] is significant with respect to the ability of the provinces to regulate resource development within treaty lands. The primary matter to be determined in this case was whether the Province of Ontario had jurisdiction to regulate resource

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8 *Ibid* at para 133.
9 *Ibid* at para 41.
10 *Ibid* at para 198.
11 *Keewatin v Ontario (Minister of Natural Resources)*, 2011 ONSC 4801, [2012] 1 CNLR 13 [*Keewatin*].

development on lands subject to the rights of the Ojibway provided for under *Treaty 3*,[12] or whether such resource development remained subject only to the power and authority of the federal government.

2. FACTS

This action was commenced after the Province of Ontario issued forestry licences to Abitibi-Consolidated Inc. for clear cut forestry over lands that were the subject of *Treaty 3* (the Keewatin Lands). *Treaty 3* provided certain harvesting rights for the Ojibway within the *Treaty 3* lands, and the Ojibway alleged that the activity contemplated by the licences interfered with their trap lines and thus their harvesting rights granted under the treaty.[13]

Treaty 3 does provide that the "Government of the Dominion of Canada" can take up portions of the *Treaty 3* lands for purposes authorized by the government; however, the Ojibway contended that this right was reserved to the Government of Canada and not to the Province of Ontario.[14] Ontario claimed that the annexation of the Keewatin Lands to Ontario in 1912 resulted in the lands becoming subject to legislation passed by the Government of Canada in 1891, which authorized the Government of Ontario to take up certain treaty lands.[15] The Ojibway argued that the 1891 legislation was not applicable to the Keewatin Lands, and that the 1912 annexation by Ontario was not accompanied by any legislation from the Government of Canada that authorized the Government of Ontario to take up the Keewatin Lands.[16]

3. DECISION

The Ontario Superior Court of Justice found that there were two questions to be answered: (1) does Ontario have the authority "within that part of the lands subject to Treaty 3 that was added to Ontario in 1912, to exercise the right to *'take up' tracts of lands for forestry, within the meaning of Treaty 3, so as to limit the rights of the [Ojibway] to hunt or fish as provided for in Treaty 3*";[17] and (2) if not, does Ontario have the "authority pursuant to the division of powers between Parliament and the legislatures under the *Constitution Act, 1867* to justifiably infringe the rights of the [Plaintiff] to hunt and fish as provided for in Treaty 3."[18]

In addressing the first question, the Court found that Ontario did not have the right to take up Keewatin Lands in a manner that would interfere with the Ojibway's harvesting rights.[19] The Court engaged in a detailed analysis of the historical record to determine that the parties who had entered into the treaty had intended it to be a treaty specifically between the Ojibway and the Government of Canada. Furthermore, the Court found that the 1891 legislation had been promulgated in respect of lands other than the Keewatin Lands and there

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12 *Treaty 3 Between Her Majesty the Queen and the Salteaux Tribe of the Ojibbeway Indians at the Northwest Angle on the Lake of the Woods*, 3 October 1873 [*Treaty 3*].
13 *Keewatin*, *supra* note 11 at paras 1-3.
14 *Ibid* at paras 13-14.
15 *Ibid* at para 9.
16 *Ibid* at paras 13-14.
17 *Ibid* at para 2 [emphasis in original].
18 *Ibid*.
19 *Ibid* at para 1452.

was "no plain and clear proof that Canada intended to alter Treaty 3 Harvesting Rights"[20] in implementing the 1912 annexation of the Keewatin Lands to Ontario.

Having found that the answer to the first question was no, the Court then found that the doctrine of interjurisdictional immunity applied and that jurisdiction over harvesting rights was at the core of the federal government's jurisdiction over Indians provided for in section 91(24) of the *Constitution Act, 1867*.[21] As such, Ontario could not interfere with the harvesting rights without authorization from the Government of Canada.

4. COMMENTARY

In the future, parties wishing to proceed with the development of lands that are subject to treaties with First Nations should assess whether a licence from the province is sufficient, or if further approval from the Government of Canada will also be required. However, in this case, the Court's detailed examination of the circumstances, history, and specific wording of *Treaty 3* suggests that any future claim brought by a First Nation on this ground will also have to have a similarly favourable fact situation in order to be successful.

C. *WAHGOSHIG FIRST NATION V. ONTARIO*

1. BACKGROUND

In the case of *Wahgoshig First Nation v. Ontario*,[22] the Ontario Superior Court of Justice granted injunctive relief to the Wahgoshig First Nation (WFN) on terms and conditions upon finding that its rights to consultation and accommodation had been ignored by a mining company.

2. FACTS

Solid Gold Resources Corp. (Solid Gold) is a mining exploration company with claims that lie within the WFN's traditional territory on which the WFN exercises Aboriginal and treaty rights though its traditional practices. Solid Gold staked its claims between November 2007 through at least 2010.[23] In July 2009, the Crown advised Solid Gold to contact the WFN and consult regarding its intended mineral exploration. The Crown offered to facilitate the process; however, Solid Gold failed to take any steps to consult with the WFN.[24]

Solid Gold started exploratory drilling in March 2011, which the WFN discovered shortly thereafter. The WFN attempted to contact Solid Gold to consult, but received no response. In November 2011, the Crown again advised Solid Gold that consultation must occur, but Solid Gold proceeded without doing so. Solid Gold had raised money through flow-through shares, the monies from which were required to be expended by the end of 2011, and the

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20 *Ibid* at para 1457.
21 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5; *Keewatin*, *supra* note 11 at paras 1552-54.
22 2011 ONSC 7708, 108 OR (3d) 647.
23 *Ibid* at paras 9-10.
24 *Ibid* at para 57.

Court found that it, therefore, elected to continue with its drilling program, rather than suspend it to undertake any consultation with the WFN.[25]

The WFN sought an injunction to prevent Solid Gold from conducting further exploration on their traditional lands without consultation. The WFN argued that Solid Gold "willfully continued its operations despite knowledge that it was obligated to consult [with] and accommodate"[26] the WFN. Solid Gold argued that it had no such duty, and to the extent that any such duty existed, it resided with the Crown. In addition, Solid Gold argued that a "free entry" system reigned in Ontario, allowing it to prospect and stake any Crown lands without any consultation or permit.[27]

3. DECISION

Justice Brown enjoined Solid Gold from carrying on any further exploratory activity on the lands at issue for 120 days and directed that the parties enter into a "*bona fide*, meaningful consultation and accommodation regarding any future activity"[28] on the lands. In the event that the process was not productive, the WFN was entitled to seek an extension of the injunction. The requirement for an undertaking as to damages was dispensed with, and any costs of facilitating the process with a third party were to be shared equally between Solid Gold and the Crown.[29]

The Court was satisfied that there were sufficiently serious issues that merited a hearing at trial, and that there was a significant possibility of harm to the WFN's Aboriginal and treaty rights. Justice Brown noted that: (1) if the duties to consult and accommodate have not been met, it may not be possible to identify the impact of a project on the culture, rights, and values of a First Nation with any precision, or how that impact may be avoided or mitigated, so as to demonstrate absolute certainty of irreparable harm; (2) if the First Nation's ability to exercise its Aboriginal and treaty rights in preferred places is negatively affected, that constitutes irreparable harm; and (3) the lost opportunity to be consulted and accommodated in a meaningful way in relation to the impact of a project on Aboriginal and treaty rights also constitutes irreparable harm.[30]

Finally, the Court held that the balance of convenience favoured granting the injunction, as it is in the public interest to ensure that the Constitution and the rights afforded under it, including Aboriginal rights, are honoured and respected.[31]

4. COMMENTARY

This decision again demonstrates that resource companies must ensure that they, with the assistance of the Crown, have undertaken an appropriate and meaningful consultation and accommodation process with First Nations in relation to any projects that may potentially

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25 *Ibid*.
26 *Ibid* at para 21.
27 *Ibid* at paras 22-23.
28 *Ibid* at para 78.
29 *Ibid* at paras 78-79.
30 *Ibid* at paras 49-53.
31 *Ibid* at paras 72-73.

affect Aboriginal rights. Although the ultimate legal responsibility to ensure that consultation and accommodation has occurred belongs to the Crown, resource companies who fail to undertake these steps may be enjoined from continuing with their projects until such consultation and accommodation have taken place in a meaningful way.

II. LEASES

A. *ENCANA CORP. V. ARC RESOURCES LTD.*

1. BACKGROUND

The ownership of coalbed methane (CBM) on freehold lands has been uncertain in Alberta due to ongoing disputes between coal owners and natural gas owners. In some instances where the ownership of coal and gas under the same parcel of land has been split between two different owners, each owner has claimed ownership of the CBM. In this decision,[32] the Alberta Court of Queen's Bench affirmed the efficacy of the legislative fix passed by the Alberta Legislature. That provision stipulates that CBM is natural gas and that the right to exploit CBM can be leased by natural gas owners.

2. FACTS

In 2010, the Alberta Legislature amended the *Mines and Minerals Act*[33] to declare that CBM is and always has been natural gas. The Court applied this amendment in granting summary judgment to the natural gas lessees, who had sought declaratory relief as to the ownership of CBM in certain lands where there were other owners of the coal lease rights and there was no specific mention of CBM on the face of the various leases.

3. DECISION

The Court held that section 10.1 of the *MMA* settled the ownership of CBM. The Court rejected the need to determine what CBM was from a scientific or etymological perspective, and noted that, even if it accepted that CBM was coal, it was irrelevant because the legislature had declared it to be natural gas.[34]

The Court held that, in accordance with section 10.1(2) of the *MMA*, only those parties whose lease specifically contemplated that CBM was not included in the lease would be protected from the operation of section 10.1(1).[35] Of the leases dealt with in this decision, none specifically addressed CBM, and as such, the lessees of the natural gas were found to be the lessees of the CBM.[36] As a result, the application for summary judgment was granted.

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32 *Encana Corp v ARC Resources Ltd*, 2011 ABQB 431, 523 AR 108 [*Encana*].
33 RSA 2000, c M-17 [*MMA*].
34 *Encana*, *supra* note 32 at para 60.
35 *Ibid*.
36 *Ibid*.

4. COMMENTARY

With this decision, the Alberta Court of Queen's Bench has hopefully foreclosed any further significant litigation with respect to disputes over the ownership of CBM under lands where natural gas and coal are owned by two different parties, and the Court has provided certainty to the lessees of such rights in Alberta.

B. *OMERS ENERGY V. ALBERTA (ENERGY RESOURCES CONSERVATION BOARD)*

1. BACKGROUND

In this case,[37] OMERS Energy Inc. (OMERS) appealed a decision of the Energy Resources Conservation Board (ERCB) suspending two gas well licences because the underlying lease had expired.[38] Leave to appeal was granted on the sole issue of whether the ERCB erred in its interpretation of the phrase "capable of producing the leased substances."

2. FACTS

OMERS, as lessee, entered into a Canadian Association of Petroleum Landmen (CAPL) 91 form of lease with a primary term of five years (the Lease). OMERS drilled a well before the expiry of the primary term, but it experienced water difficulties and despite attempts at reworking, the well never produced for more than a few minutes at a time. Believing that the Lease had expired, the owner of the minerals re-leased the lands and Montane Resources Ltd. (Montane) eventually became the lessee under the new lease.[39]

OMERS took the position that the Lease had not terminated and relied upon the suspended wells clause. OMERS made the argument that the lands were "capable of producing the leased substances." After receiving notice from Montane that it was applying to have OMERS' caveat in respect of the Lease discharged, OMERS sought and obtained new licences for additional activity on the lands. Upon learning that the licences had been issued, Montane applied to the ERCB for a review on the grounds that "Omers did not have a valid and subsisting lease."[40]

At the hearing, OMERS took the position that the phrase "capable of producing" was satisfied if a well is capable of achieving any production flow, no matter how miniscule. Montane argued that this interpretation would render the provisions of the Lease requiring

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37 *OMERS Energy v Alberta (Energy Resources Conservation Board)*, 2011 ABCA 251, 513 AR 292 [*OMERS Energy*]. This decision is covered in more detail in the article "Assessment and Analysis of the Decision of the Alberta Court of Appeal in *OMERS Energy v Alberta (Energy Resources Conservation Board)*" authored by Alicia Quesnel and Aaron Rogers in this edition of the *Alberta Law Review*, (2012) 50:2 Alta L Rev 337.

38 See ERCB, *OMERS Energy Inc, Section 39 Review of Well Licences No 0336235 and No 0392996, Warwick Field* (12 May 2009), ERCB Decision 2009-037, online: ERCB <http://www.ercb.ca/decisions/2009/2009-037.pdf>.

39 *OMERS Energy*, *supra* note 37 at paras 4-8.

40 *Ibid* at para 12.

the lessee to conduct operations to obtain, maintain, or increase production meaningless.[41] The ERCB held that the Lease had terminated.[42]

3. DECISION

The Alberta Court of Appeal upheld the ERCB's approach in trying to give effect to the plain meaning of the Lease while considering the commercial realities of the parties involved. The Court also agreed with the ERCB's determination that two factors needed to be satisfied in determining if a well was "capable of producing the leased substances." The first factor was whether the well could produce from a technical perspective, meaning that the well had to be able to produce in its current configuration when the tap was "turned on." The second factor to be assessed was whether the production obtained from the well would be in meaningful quantities.[43]

The Court agreed with the ERCB's finding that the well was not technically capable of production because it needed an operation to address water loading.[44] The Court then went on to review the ERCB's finding that "meaningful production" was to be determined by assessing whether there was a reasonable expectation of profit if the well was produced. In reviewing this point, the Court rejected some American authorities which had found that "capable of production" could be interpreted to mean "capable of production in paying quantities," but in doing so agreed with the rationale behind the American decisions insofar as they were based upon an analysis of the parties' intent on entering into a lease, that being the profitable development of hydrocarbon production.[45] Consequently, the Court again agreed with the ERCB and found that meaningful production would be production in quantities "sufficient to provide a reasonable expectation of profits."[46] The appeal was therefore dismissed.

4. COMMENTARY

This decision represents a significant development in the case law relating to freehold leases in Alberta, and given the widespread use of the CAPL 91 lease, this case will certainly be relied upon in the future. Furthermore, given that the Court rejected the American interpretation of "capable of production" as being "capable of production in paying quantities," but endorsed the logic of those decisions and provided its own interpretation as being "production with a reasonable expectation of profits," courts will surely be called on in the future to determine the difference, if any, between these two standards.

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41 *Ibid* at paras 13-14.
42 *Ibid* at para 22.
43 *Ibid* at para 80.
44 *Ibid*.
45 *Ibid* at para 95.
46 *Ibid* at para 97.

III. JOINT OPERATING AGREEMENTS

A. *RE TRIDENT EXPLORATION CORP.*

1. BACKGROUND

In *Re Trident Exploration Corp.*,[47] an operator failed to advise its partners under a pooling agreement to respond to an offset notice issued by Alberta Energy. The issue was whether this inaction constituted gross negligence, such that liability under the *1990 CAPL Operating Procedure*[48] could be established.

2. FACTS

Blaze Energy Ltd. (Blaze) held the mines and minerals lease in the north half of 29-38-20-W4M in trust for Mutiny Oil & Gas Ltd. and a number of other corporations (collectively referred to as Mutiny). Trident was the lessee for a portion of the south half, with Bearspaw Petroleum Ltd. (Bearspaw) and F.M. Kaplan Technical Services Ltd. (Kaplan) holding the lease for the other portion. Pursuant to a non-cross conveyed pooling agreement, Trident was appointed the operator. The *1990 CAPL Operating Procedure* was incorporated into the pooling agreement.[49]

On 7 June 2005, Alberta Energy issued offset notices to Blaze, Trident, and Bearspaw, which stated that each lease was subject to an offset obligation as a result of gas production from adjoining lands. The notice provided each recipient with six months in which to respond, failing which the subject lease would be amended to cancel the rights to the base of the production zone as described in the notice.[50] On 13 June 2005, Blaze forwarded the notice to Mutiny, which then notified its partners. Drilling had already commenced on a well on the pooled lands, and it was expected that the well would be on production within the timeline provided for a response. Having a well on production from the offset zone was one of five potential responses to the offset notice that would have extended the lease rights that were subject to cancellation.[51]

When it became clear that the well would not be on production within that six-month time period, which was to end on 7 December 2005, Trident sent a letter to each of Mutiny, Bearspaw, and Kaplan to advise of the delay and recommending, as operator, that the offset obligation be satisfied by paying the offset compensation to the Crown pending production from the well. Trident advised that it would make the payment to the Crown and would invoice the partners for their pooled interest share, and requested a prompt response from each recipient.[52]

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47 2012 ABQB 242, [2012] AJ no 639 (QL) [*Re Trident*].
48 See CAPL, *1990 CAPL Operating Procedure* (Calgary: CAPL, 1990).
49 *Re Trident*, *supra* note 47 at paras 2-3.
50 *Ibid* at paras 4-5.
51 *Ibid* at paras 4-6.
52 *Ibid* at para 6.

By the time Trident sent its letter, Mutiny had already advised Trident by phone that it agreed with Trident's proposal, and so it did not respond to Trident's letter. Bearspaw advised Trident that it would send its own response to the Crown. Trident did not advise Mutiny of Bearspaw's response, did not pay the compensatory royalty, and did not take any further steps to respond to the offset notice in relation to the Blaze lease.[53]

Mutiny learned that the lease had lapsed after the time to appeal the termination of lease rights had already passed. The Crown reposted the lands for sale, and although Mutiny bid on the lands, Bearspaw was the successful bidder and Mutiny lost its rights to the lands.[54] After Trident, along with ten other related companies, sought protection under the *Companies' Creditors Arrangement Act*,[55] Mutiny brought an application to determine whether Trident had any liability to Mutiny under the terms of the pooling agreement.

3. DECISION

Justice Kent held that Trident was in breach of its obligations as an operator under article 401 of the *1990 CAPL Operating Procedure* and was grossly negligent. Her ladyship found that the letter sent by Trident to the other parties had been reasonably interpreted by Mutiny to mean that Trident would take care of responding to the offset notice for all of the parties. After receiving Bearspaw's response, Trident's failure to advise the parties that each would be responsible for their own response to the notice was clearly negligent, particularly given Trident's obligation to do all things necessary to maintain the title documents in good standing and in full force and effect pursuant to article 309 of the *1990 CAPL Operating Procedure*.[56]

The question then was whether Trident's negligence amounted to gross negligence. The Court noted that the meaning of gross negligence is "'very great negligence', 'conscious wrongdoing', [or] 'a very marked departure' from the standard of care,"[57] and that:

> "[T]he character and the duration of the neglect to fulfill [the] duty, including the comparative ease or difficulty of discharging it [are] important, if not vital, factors in determining whether the fault (if any) … is so much more than merely ordinary neglect that it should be held to be a very great, or gross negligence," and "conscious indifference."[58]

The Court held that Trident's conduct was not a simply momentary lapse. All that Trident was required to do was to advise the other parties as to their individual obligations to respond to the offset notice which, given Bearspaw's position, would have been easily done. Trident's failure to do so constituted gross negligence, and accordingly, Trident was held liable to Mutiny.[59]

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53 *Ibid* at para 7.
54 *Ibid* at para 9.
55 RSC 1985, c C-36, as amended.
56 *Re Trident*, *supra* note 47 at para 24.
57 *Ibid* at para 23, citing *Adeco Exploration Company Ltd v Hunt Oil Company of Canada*, 2008 ABCA 214, 437 AR 33 at para 55.
58 *Ibid*.
59 *Re Trident*, *ibid* at para 24.

4. COMMENTARY

Operators in the oil patch, though taking their obligations seriously, are often cavalier about being found liable if the standard to which they are held is gross negligence, which is the prevailing standard and is included in the CAPL Operating Procedures. Anecdotally, many operators are of the view that to be liable for gross negligence, one's actions must verge on criminal. This decision reinforces that operators may be found liable for gross negligence for conduct more similar to simple negligence, particularly where failing to meet their obligations does not constitute a "momentary lapse," or where the mistake could easily be rectified. It would appear that as more cases of gross negligence are brought, the courts are finding ways to find that a party has been grossly negligent, bringing this standard much closer to that of simple negligence and potentially obviating the difference between the two standards. Operators in particular should take note of this easing of the gross negligence standard.

IV. SURFACE RIGHTS

A. *MUELLER V. MONTANA ALBERTA TIE LINE*

1. BACKGROUND

This case[60] deals with the extent to which the Surface Rights Board (SRB) has discretion to allow or deny applications for Right of Entry Orders onto privately held lands once the Alberta Utilities Commission (AUC) has issued a licence to construct and operate a power line.

2. FACTS

Montana Alberta Tie Ltd. (MATL) required access to privately held lands in order to build its international power line (IPL) from its substation northeast of Lethbridge, Alberta to the Canada/US border. MATL had applied for and received a permit from the National Energy Board (NEB), pursuant to federal legislation, and had also received a licence from the Energy Utilities Board (now the AUC) to construct and operate the IPL. Both the federal and provincial processes were subject to judicial review applications, and subsequent appeals, by several of the same applicants in this matter.

MATL applied to the SRB for Right of Entry Orders. After receiving the notice and application, most of the affected landowners filed objections, to which MATL responded in writing. Although many of the landowners requested an oral hearing to call further evidence, the SRB did not hold any and issued Right of Entry Orders after reviewing the written submissions in favour of MATL. The landowners sought judicial review of the Right of Entry Orders on the grounds that: (1) the Orders failed to meet the correctness standard; and (2) the SRB breached its duty of procedural fairness by, *inter alia*, failing to provide a fair hearing.[61]

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60 *Mueller v Montana Alberta Tie Line*, 2011 ABQB 738, 528 AR 116 [*Mueller*].

61 *Ibid* at paras 4-6.

3. DECISION

Justice D.K. Miller reviewed the role of the SRB in the larger regulatory context that applied to the IPL that MATL was seeking to construct. His lordship noted that once the IPL had been approved in principle by the NEB and the AUC, the SRB's function pursuant to section 15(6) of the *Surface Rights Act*[62] was simply to ensure that any Right of Entry Order granted was consistent with the licence granted by the AUC.[63] It was impermissible to allow the applicant landowners to make a collateral attack on the permitting process during proceedings with respect to the Right of Entry Orders. The SRB was simply "'ancillary and in aid of' activities authorized under the AUC"[64] and was "to arbitrate concerns and balance the rights of landowners and industry as a followup to decisions granted by the AUC."[65]

The Court then reviewed the specific issues raised in the judicial review application, specifically, whether the SRB had satisfied the requirements of procedural fairness, and whether the SRB's decisions on the conditions to be attached to the Right of Entry Order satisfied the appropriate standard of review. The Court reviewed the SRB's handling of the Right of Entry Orders in the context of each of the factors set out in *Baker v. Canada (Minister of Citizenship and Immigration)*[66] and found as follows:

(1) The nature of the decision being made, given the regulatory context of Right of Entry Orders, is less like judicial decision-making and so does not necessitate a standard that requires a high level of participatory rights, as: (a) the role of the SRB in issuing Right of Entry Orders is separate from that of ordering compensation; (b) where the AUC had already issued a permit, the SRB had no alternative but to issue Right of Entry Orders; (c) given the regulatory context, the SRB was not required to hold an oral hearing prior to issuing Right of Entry Orders; and (d) the SRB is entitled to set its own procedure.[67] Accordingly, the SRB's failure to hold an oral hearing, to grant adjournment requests made by the applicant landowners, or to address every one of the applicant landowners' concerns did not "translate into a characterization of its process as being procedurally unfair."[68]

(2) The statutory scheme allows for applicants to seek judicial review, to request a rehearing of a matter, and to have a full hearing in relation to compensation, all of which are factors that point to a more relaxed requirement for procedures that would protect the applicant landowners' interests in relation to the duty of fairness.[69]

(3) Although the decision is undoubtedly important to the individuals affected, it is simply "'ancillary and in aid of' activities authorized under the AUC."[70] Allowing

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62 RSA 2000, c S-24.
63 *Mueller*, *supra* note 60 at para 20.
64 *Ibid* at para 25.
65 *Ibid* at para 24.
66 [1999] 2 SCR 817.
67 *Mueller*, *supra* note 60 at paras 34-38.
68 *Ibid* at para 38.
69 *Ibid* at paras 39-40.
70 *Ibid* at para 42.

the applicants to challenge the SRB's decision as being equivalent to an expropriation would be tantamount to a collateral attack on the AUC's decision to issue the licence to MATL for the IPL. The SRB's role at this point is merely to facilitate the AUC's decision.[71]

(4) It was not a legitimate expectation of the applicant landowners that they should be granted an oral hearing by the SRB. The SRB has the latitude to set its own procedure, and there was no established SRB practice of allowing oral hearings in similar situations.[72]

(5) There was no evidence that in choosing not to provide an oral hearing to the applicant landowners, the SRB deviated from its past practice and, therefore, that the SRB is not entitled to deference.[73]

In summary, the Court held that the SRB met the requirements of procedural fairness.

The Court concluded that the appropriate standard of review to be applied in assessing whether the conditions to be attached to the Right of Entry Orders is that of reasonableness, as it was not easily separable from the factual situation and involved the interpretation of the role the SRB plays in the larger regulatory context.[74] The conditions the applicant landowners sought to have reviewed had already been determined by the AUC and, therefore, were improperly brought before the SRB. Accordingly, the SRB's decisions with respect to the conditions contained in the Right of Entry Orders were reasonable.[75]

4. COMMENTARY

This decision once again demonstrates the place of the SRB in issuing Right of Entry Orders to corporations who have already sought and received all necessary permits and licencing from federal and provincial regulatory authorities. The courts will not permit collateral attacks by landowners on matters already determined by other regulatory bodies.

In addition, the SRB will not be required by the courts to provide a high level of procedural protection to landowners when determining the conditions applicable to Right of Entry Orders that it is issuing, given the SRB's limited scope in dealing with such orders. Requests such as oral hearings and deadline extensions may be properly denied by the SRB in these types of cases.

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71 *Ibid*.
72 *Ibid* at paras 45-46.
73 *Ibid* at para 49.
74 *Ibid* at paras 66-67.
75 *Ibid* at para 76.

V. ENVIRONMENTAL LAW

A. *SMITH V. INCO LIMITED*

1. BACKGROUND

In *Smith v. Inco Limited*,[76] the Ontario Court of Appeal overturned the decision of the trial judge, who had awarded $36 million for damage resulting from emissions from a nickel refinery. The case was the first trial of an environmental class action in a common law province.

2. FACTS

Inco Limited (Inco) operated a nickel refinery in Port Colborne, Ontario from 1918 to 1984. During that time, waste product was emitted into the air from a 500-foot smoke stack. Beginning in 2000, 16 years after the refinery had closed, concerns about the level of nickel in the soil began to surface and caused widespread public concern and controversy. Neighbouring property owners contended that the public concern had resulted in their property values not increasing at the same rate as comparable properties.[77] The trial judge agreed and awarded $36 million in damages after holding Inco liable in both private nuisance and under the rule in *Rylands v. Fletcher*.[78]

3. DECISION

The Ontario Court of Appeal unanimously allowed Inco's appeal and set aside the trial judgment. It determined that the claimants had failed to establish Inco's liability under either private nuisance or the rule in *Rylands v. Fletcher*, and in any event, the claimants had suffered no loss.[79] To succeed in their nuisance claim, the claimants were required to show either that nickel at any level posed a risk, or that the nickel levels present were above the levels at which there was a risk to human health and wellbeing. The evidence presented did not establish either point. Moreover, the Court found that a chemical change in the content of soil, without more, does not amount to physical damage to property.[80]

With respect to the rule in *Rylands v. Fletcher*, the Court found that Inco's operation of the refinery was not a "non-natural" use of its property. Inco operated the refinery in an industrial part of the city and did not create any risks beyond what would be expected of an industrial operation. Additionally, although compliance with environmental and zoning regulations is not a defence, the Court clarified that it is an important consideration to be taken into account in actions of this type.[81]

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76 2011 ONCA 628, 107 OR (3d) 321, leave to appeal to SCC refused, 34561 (26 April 2012) [*Smith*].
77 *Ibid* at para 1.
78 (1866) LR 1 Ex 265, aff'd (1868), LR 3 HL 330.
79 *Smith*, *supra* note 76 at para 114.
80 *Ibid* at para 67.
81 *Ibid* at paras 100-103.

4. COMMENTARY

The Ontario Court of Appeal has provided some further clarity on the causes of action in nuisance and strict liability. This will provide significant guidance to the future litigation of environmental and other property-related claims.

VI. CONTRACT LAW

A. *NEXXTEP RESOURCES LTD. V. TALISMAN ENERGY*

1. BACKGROUND

In this case,[82] the Alberta Court of Queen's Bench was asked to resolve a dispute with respect to the ownership of a well and zone as it related to a purchase and sale agreement (the PSA) between the parties. The dispute arose after the sale had been completed, when the parties determined that a well retained by the vendor was producing from a formation which had been included in the sale under the PSA.

2. FACTS

Talisman Energy Canada (Talisman) and Nexxtep Resources Ltd. (Nexxtep) entered into a PSA in March 2004. Pursuant to the PSA, Nexxtep acquired certain assets from Talisman including petroleum and natural gas rights. Talisman retained certain petroleum and natural gas rights that were below the same surface location but, in respect of geological formations, above those being sold to Nexxtep. At the time of the sale, there was a vertical well (the Vertical Well) producing from a formation that the parties believed was a formation retained by Talisman.

Some time following completion of the sale, Nexxtep became aware that the Vertical Well was producing from one of the formations which had purportedly been conveyed to Nexxtep from Talisman. Nexxtep then commenced an action against Talisman for trespass and conversion.[83]

3. DECISION

The issue before the Court was "whether the PSA should be interpreted as conveying the pool from which the [Vertical Well] produced as of March 31, 2004."[84] In interpreting the PSA, Justice Poelman noted that the parties' words as used in the contract would be given primacy. However, as the goal was to determine the parties' intention, the Court would also consider the factual matrix, or surrounding circumstances, in making its determination. If the parties' intent could not be determined and ambiguity remained, the Court could then consider parol evidence.[85]

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82 *Nexxtep Resources Ltd v Talisman Energy*, 2012 ABQB 62, 62 Alta LR (5th) 219.
83 *Ibid* at paras 1-3.
84 *Ibid* at para 4.
85 *Ibid* at paras 5-7.

The Court found that at the time the PSA was entered into, the parties did not intend for Talisman to sell, and Nexxtep to acquire, the pool from which the Vertical Well was producing. Accordingly, the Court held that the pool produced by the Vertical Well was excluded.[86] The Court further found that if its contractual interpretation was not correct, there was sufficient justification to order the same result though rectification.[87]

This decision has been appealed to the Alberta Court of Appeal by Nexxtep.

4. COMMENTARY

This case does not raise any novel points of law, but it confirms that the courts will look beyond the words of the contract to the factual matrix in order to determine the intention of the parties. This is a reminder to contracting parties of the importance of properly recording their intentions when entering into purchase and sale transactions. Further, when entering into agreements for the purchase and sale of specific formations where producing wells are involved, the parties may wish to go beyond the typical practice of describing the assets being purchased solely by reference to the specific formation.

VII. TAXATION

A. *DAISHOWA-MARUBENI INTERNATIONAL LTD. V. CANADA*

1. BACKGROUND

This case[88] is of key importance to industries (including the oil and gas industry) where the assumption of reclamation liabilities is part of the purchase and sale of properties.

2. FACTS

Daishowa-Marubeni International Ltd. (Daishowa) sold its timber mill division in High Level, Alberta (High Level Division) to Tolko Industries Ltd. (Tolko) in 1999 and its timber mill division located near Red Earth, Alberta (Brewster Division) to Seehta Forest Products (Seehta) in 2000. Each of the asset sales included the timber resources properties. Pursuant to the *Timber Management Regulation*,[89] a forest tenure could not be sold without an assignment of the silviculture liability associated with the forest tenure. Accordingly, each of the purchase agreements provided for the purchaser to assume Daishowa's silviculture liabilities, which spanned a period of 14 years.[90]

The purchase price paid by Tolko to Daishowa was derived from its bid of $180 million less the silviculture liability, which was estimated to be $11 million. Following closing, that figure was calculated by accountants for Daishowa to be $11,269,225 plus interest.

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86 *Ibid* at para 59.
87 *Ibid* at para 68.
88 *Daishowa-Marubeni International Ltd v Canada*, 2011 FCA 267, 422 NR 108, leave to appeal to SCC granted, 34534 (3 August 2012) [*Daishowa*].
89 Alta Reg 60/1973.
90 *Daishowa*, *supra* note 88 at paras 13, 20.

Consequently, Daishowa paid to Tolko the additional $269,225 plus interest pursuant to the terms of the sale agreement.[91] The silviculture liability for the Brewster Division was estimated to be $3 million.[92]

Daishowa did not include the amounts for the assumed silviculture liabilities in its proceeds of disposition for either sale. The Minister of Revenue reassessed Daishowa to include those amounts in its proceeds of disposition for the timber resource properties. Daishowa appealed to the Tax Court.

The decision of the Tax Court was discussed in the article "Recent Judicial Developments for Energy Lawyers" in the 2011 Energy Law Edition of the *Alberta Law Review*.[93] In summary, the Tax Court allowed the appeal, but only to the extent of a reduction in the amount to be included as proceeds of disposition. Daishowa appealed to the Federal Court of Appeal and the Minister of Revenue cross-appealed.

3. DECISION

The Court considered several issues, the most important of which was the treatment of the silviculture liabilities as additional proceeds of disposition. Daishowa admitted that if it had not assigned the silviculture liabilities to Tolko or Seehta, it would have received additional consideration. A majority of the Court found that the $11 million figure that was used by the parties was an agreed upon value of the silviculture liabilities, and accordingly, that the entire amount was to be included in the proceeds of disposition by Daishowa for income tax purposes.[94]

The majority also held that the Tax Court erred in finding that this amount was to be discounted to reflect present-day values. Rather, present value is not an issue, as the parties agreed to a specific value to be used to adjust the final value paid by Tolko to Daishowa.[95] The majority also upheld the Tax Court's conclusion that Tolko's assumption of the silviculture liability was to be treated as a capital expenditure and, therefore, could not be deducted from Daishowa's income.[96]

With respect to the Brewster Division, the Federal Court of Appeal found that the Tax Court had provided insufficient reasons for its decision and that it was, therefore, unable to make a determination on the appeal. The Court returned the matter to the Tax Court for reconsideration of the issues in light of the reasons given in relation to the appeal of the High Level Division disposition.[97]

The Federal Court of Appeal noted that for tax purposes, the question to be determined "is not the subjective value of property to the parties, or what returns or costs will ultimately

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91 *Ibid* at paras 11-15
92 *Ibid* at para 20.
93 Colin Feasby, Simon Baines & Daina Kvisle, "Recent Judicial Developments of Interest to Energy Lawyers" (2011) 49:2 Alta L Rev 427.
94 *Daishowa*, *supra* note 88 at paras 58-59, 84.
95 *Ibid* at paras 75-76.
96 *Ibid* at para 100.
97 *Ibid* at paras 116-18, 124.

flow from that property, but whether the parties agreed to accept a certain amount as consideration for that property."[98] Accordingly, parties will be held to the value they assign in a purchase and sale contract as consideration for various aspects of the transaction.

The dissenting opinion from Justice Manville disagreed fundamentally with the reasoning of the Tax Court decision and the majority opinion of the Federal Court of Appeal. Justice Manville's decision focused on the fact that the silviculture liability could not have been retained by Daishowa as a part of the sale — by selling the assets they were required to sell the silviculture liability. As such, he did not agree with separating the value ascribed to the assets and the value ascribed to the silviculture liability in calculating the proceeds of sale.[99]

Justice Manville analogized the situation to that of the sale of a building where there were certain repairs needed to bring that building into compliance with building regulations. He pointed out that if the building was sold before the repair work was done, the building would sell for less than if the building was sold after the work was done. He went on to say that if the building was sold prior to the work being completed, the Canada Revenue Agency would not in that case add to the vendor's proceeds of the sale the value of the repair work liability which the purchaser had assumed. Justice Manville stated that despite the differences between the case on appeal and the building analogy, there was "no fundamental difference" between the two.[100]

This matter has been appealed to the Supreme Court of Canada, which has granted leave to appeal.[101]

4. COMMENTARY

Unless overturned on appeal to the Supreme Court, this case will have a significant impact on the sale of any business or asset where the purchaser assumes various obligations and a value is assigned to the assumption of those obligations. Although the specific outcome in this case was a result of the terms of the sale agreements and the admission by Daishowa that it would have received additional consideration had the silviculture liabilities not been assumed by Tolko, this will have implications for purchase and sale transactions where significant liabilities are being transferred along with the assets. This is of particular concern to the oil and gas industry where producing wells and abandoned wells with reclamation liabilities are often sold as a package. Depending on the decision of the Supreme Court, oil and gas companies may have to review their past transactions to ensure that the proceeds of sale were correctly reported and potentially vary their approach to new transactions.

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98 *Ibid* at para 66.
99 *Ibid* at para 128.
100 *Ibid* at para 140.
101 See *supra* note 88.

VIII. PRIVILEGE

A. *BARRICK GOLD CORP. V. GOLDCORP*

1. BACKGROUND

In *Barrick Gold Corp. v. Goldcorp*,[102] the Ontario Superior Court was asked to rule on whether privilege had properly been asserted by the defendants in respect of certain documents that involved communications not only between the solicitors and their clients, but also outside advisors to the clients. The outside advisors were financial advisors retained by the defendants for the purpose of negotiating a transaction, which was then the subject of the action commenced by the plaintiff, Barrick Gold Corporation.

2. FACTS

In order to address this dispute, the Court elected to review the documents that the defendants claimed to be privileged. Following that review, the Court found that the documents that had been withheld from the plaintiff were documents in which the defendants' lawyers had provided advice or notes and that those documents which did not contain legal advice had been produced.[103] The Court also found that the defendants' outside advisors had also received advice from the defendants' counsel and had contributed to the deliberations between the lawyers and their clients, and so were advisors whose "input was necessary and appropriate"[104] in the context of counsel being able to provide the advice sought. Furthermore, the Court also noted that, when specific advice was being sought, some of the advisors who had been a part of the deal team were left off of the communications with the lawyers if their specific advice was not being sought.[105]

3. DECISION

Justice Campbell found that the defendants had properly classified the privileged documents as privileged. His lordship relied upon *General Accident Assurance Co. v. Chrusz*[106] to find that privilege is not lost if a party and its lawyers consult with a third party, where such a third party's input is required in order for the lawyer to provide legal advice to the client.[107]

In this case, each of the non-legal advisors were appropriately regarded as part of the "deal team" for the purposes of requesting, obtaining, and receiving legal advice, and their input was necessary to the consideration, structuring, planning, and implementation of complex transactions in a relatively short time frame. The interrelationship in these types of transactions between third party advisors, clients, and lawyers is often a practical reality, and

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102 2011 ONSC 1325, [2011] OJ no 3530 (QL) [*Barrick*].
103 *Ibid* at paras 12-13, 18.
104 *Ibid* at para 4.
105 *Ibid* at para 9.
106 (1999), 45 OR (3d) 321 (CA).
107 *Barrick*, *supra* note 102 at para 19.

the input of third party advisors is required for the overall legal considerations of the transaction.[108]

However, the Court expressly stated that it did not expect to recognize privilege over communications between a "deal team" in every transaction, going on to say that there must be a framework in place to maintain the privileged nature of the communications. Each situation will be assessed on a case-by-case basis.[109]

4. COMMENTARY

This case makes it clear that privilege is not necessarily waived if communications between the lawyer and their client include third party advisors. It appears that the Court satisfied itself that privilege had been maintained in this case because of the limited number of third party advisors involved and the necessity of communicating with them in order for the lawyers to provide legal advice. However, in the context of corporate transactions, lawyers and their clients must take steps to assess which of the third party advisors should be included in privileged communications and refrain from including any third party advisors in those communications if their input is not specifically required for the underlying purpose. The consequence for including a third party advisor whose input is not required in order for the lawyer to provide advice could be the loss of privilege over those communications in subsequent litigation.

IX. EMPLOYMENT LAW

A. *GLOBEX FOREIGN EXCHANGE CORP. V. KELCHER*

1. BACKGROUND

This case[110] deals with the enforceability of restrictive covenants in employment relationships. The Alberta Court of Appeal decided two important issues: (1) whether the continued employment of an employee constitutes sufficient consideration for agreeing to a new restrictive covenant; and (2) whether a non-competition covenant can survive in a case where the employee has been wrongfully dismissed.

2. FACTS

Globex Foreign Exchange Corporation (Globex) employed the three defendants: Kelcher, MacLean, and Oliverio. Each employee had signed a non-competition and non-solicitation agreement containing restrictive covenants. Kelcher and Oliverio agreed to the restrictions during their employment, while MacLean signed the agreement as a condition to beginning his employment. All three eventually left their employment when Globex asked them to accept more onerous non-competition and non-solicitation restrictive covenants. The employees joined a competitor shortly after leaving Globex.

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108 *Ibid.*
109 *Ibid.*
110 *Globex Foreign Exchange Corp v Kelcher*, 2011 ABCA 240, 513 AR 101 [*Globex*].

After they left Globex, the defendants prepared lists of clients that they would not contact in an attempt to honour the non-solicitation covenants. After these covenants expired, two of the defendants used these lists as a source of clients and actively solicited their previous contacts. Globex sued, alleging damages from loss of clients.[111]

3. DECISION

At first instance, Justice Hawco found that MacLean had been wrongfully terminated and, therefore, the restrictive covenants were not enforceable against him. The agreements signed by Kelcher and Oliverio were both signed during the course of employment and, having received nothing new in return for signing their respective agreements were, therefore, unenforceable due to lack of consideration. Moreover, Justice Hawco found that there was no consideration between Globex and the defendants in the form of a "promise made or implied or otherwise not to fire [Kelcher and Oliverio] for any period of time if they signed their agreements."[112] In the alternative, Justice Hawco held that even if there was consideration, the covenants were unenforceable because they were too broadly worded, with the exception of the non-solicitation covenant to which Kelcher had agreed.[113]

On appeal, Justice Hunt (with Justice Martin concurring and Justice Slatter dissenting in part) held that none of the defendants were bound by the restrictive covenants. All three non-competition covenants were overly broad.[114] Kelcher's non-solicitation covenant was unreasonable, as it was impossible for Kelcher to predict when he was breaching it. It prohibited contact with all clients with whom Kelcher had ever had "dealings," which was found to be unreasonable. Moreover, the non-solicitation covenant was overbroad and unreasonable due to the prohibition against soliciting any client of Globex for any reason whatsoever; it was not restricted to soliciting clients in relation solely to Globex's business.[115]

There was no evidence that the defendants had taken confidential information from Globex at termination, and at best, it was questionable whether the lists of clients made from memory, post-employment, would constitute confidential information. In this case, the defendants compiled the lists so that they could comply with their non-solicitation covenants, and to the extent that two of the defendants used those lists later for a different purposes, they used the lists only after they had good reason to believe that they were no longer bound by the restrictive covenants. In any event, the majority of the Court held that it would be improper to impose a common law obligation more onerous, in terms of the length of time during which the defendants could not solicit clients, than what Globex considered reasonable and as had been agreed to in the contracts themselves.[116]

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111 The facts of this case are set out in the trial decision: *Globex Foreign Exchange Corp v Kelcher*, 2009 ABQB 471, 473 AR 219.

112 *Ibid* at para 45.

113 *Ibid* at paras 63,71.

114 *Globex*, *supra* note 110 at para 92.

115 *Ibid* at para 21.

116 *Ibid* at para 39.

With respect to MacLean, the majority of the Court held that once Globex repudiated his contract by wrongfully dismissing him and he accepted that repudiation by taking another job, he was no longer bound by the restrictive covenants.[117]

Finally, the majority of the Court held that Kelcher's and Oliverio's restrictive covenants were not enforceable because they received no consideration for agreeing to them beyond that to which they were already entitled. There was no evidence of any promise made or implied by Globex, other than that their employment would continue as a result of their agreement. The Court held that "continued employment alone does not provide consideration for a new covenant extracted from an employee during the term of employment because the employer is already required to continue the employment until there are grounds for dismissal or reasonable notice of termination is given."[118]

Justice Slatter wrote a strong and lengthy dissent that combined a careful analysis of the issues with a consideration of the practicalities of the modern workplace. With respect to the issue of consideration for the restrictive covenants, Justice Slatter concluded that forbearance to exercise the employer's legal right to terminate an employee is sufficient consideration. That this was the case here was clear on the evidence, as Kelcher testified that Globex required all employees to sign the agreement in order to continue their employment, that he thought he would lose his job if he did not sign the new agreement, and that he had been advised that he had to sign the agreement immediately or leave the office. In addition, MacLean was actually terminated because he refused to sign the new agreement. For Justice Slatter, all of this evidence pointed to the same conclusion — that consideration was being given in the form of a forbearance from Globex's right to terminate these employees.[119]

Justice Slatter also noted that:

(1) In most cases, Alberta law recognizes "an implied 'tacit agreement' to forbear from exercising the right to terminate the contract as being sufficient consideration to support any changes in an ongoing employment relationship";[120]

(2) It is not unreasonable to imply such a tacit agreement as a term of the employment agreement when there are so many other key terms of an employment agreement that are routinely implied;[121]

(3) The primary purpose of the law of consideration is to "draw a line between gratuitous … promises and legally enforceable obligations," and is not intended to provide an escape for parties who later have second thoughts about what they have agreed to, particularly where the underlying relationship had been premised on those covenants for years;[122]

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117 *Ibid* at para 72.
118 *Ibid* at para 87.
119 *Ibid* at para 139.
120 *Ibid* at para 128.
121 *Ibid* at para 129.
122 *Ibid* at para 134.

(4) A breach of the employment contract by way of termination of the employee should result in remedies, and not a forfeiture of rights under the contract;[123] and

(5) If Globex was in fact in breach of its own covenants, that did not give MacLean the right to breach his covenants, appropriate Globex's proprietary information, or ignore his contractual obligations.[124]

Justice Slatter also held that the covenants as worded were reasonable, as Globex had a legitimate interest in protecting its client base, there was no need for a geographic limitation to the covenants (the business being telephone-based), and the clients which could not be contacted had been identified with sufficient particularity.[125]

Leave to appeal to the Supreme Court of Canada was not sought.

4. COMMENTARY

Employers should consider the principles outlined in this case as they enter into restrictive covenants with their employees. The law in Alberta is that:

(1) Consideration must be given to support a restrictive covenant;

(2) The promise of continued employment is insufficient unless the employer advises that it will exercise its right to terminate unless the agreement is signed;

(3) Wrongful dismissal will relieve the employee from his restrictive covenants; and

(4) Only restrictions that are reasonably required to protect the business will be enforceable:

  (a) They must protect a proprietary interest that is entitled to protection;

  (b) Non-competition clauses will be accepted only if a non-solicitation clause would be insufficient;

  (c) The scope of the prohibition must be no broader than necessary; and

  (d) The restraint on trade must be in the public interest.

Those employers who have simply presented restrictive covenants to their employees periodically for signature on the understanding that continued employment is sufficient consideration should revisit those agreements in light of this decision.

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123 *Ibid* at para 150.
124 *Ibid*.
125 *Ibid* at para 166.

B. *GASTOPS LTD. V. FORSYTH*

1. BACKGROUND

Employers are well aware that they must provide significant notice or compensation to senior employees in the event that such employees are terminated without cause. However, as this case[126] demonstrates, key employees may also have to provide a lengthy notice period prior to their resignation, particularly when they resign en masse, or they may face an award of damages to their former employer.

2. FACTS

GasTOPS Ltd. (GasTOPS) was an industry leader in providing engineering consulting services and related computer software programs, along with maintenance of marine and aviation gas turbine engines. Each of the individual defendants were senior employees of GasTOPS and all resigned around the same time, each giving two weeks' notice. Forsyth and Brouse then incorporated a competing business, MxI Technologies Ltd. (MxI), and Cass and Vandenberg immediately commenced employment with MxI. Shortly thereafter, a number of GasTOPS employees resigned and were subsequently hired by MxI. The employees departed at a time when GasTOPS was pursuing very lucrative contracts with potential customers.[127]

GasTOPS commenced an action alleging that each of Forsyth, Brouse, Cass, and Vandenberg had breached their fiduciary duties owed to it by misappropriating confidential information, trade secrets, and corporate opportunities, and that they had failed to give reasonable notice of their intention to resign. MxI was also named as a defendant.

3. DECISION

At first instance, Justice Granger found that the four individual defendants were effectively the designers of the core programs of GasTOPS' technology products and had full knowledge of the business opportunities GasTOPS was pursuing and what was required by its potential customers. They had GasTOPS' business plan and its strategic plan to acquire some very significant contracts from large customers. Each of the four defendants was "crucial to the direction and guidance of the company."[128]

The trial judge also found that the individual defendants had given wholly inadequate notice, that they each knew this, and that "they intended [to] destroy GasTOPS' technology business. They were fully aware that [their] departures would leave [GasTOPS] unable to fulfill its existing contracts, or continue to pursue the business opportunities it had been cultivating."[129] After their departure, they pursued almost every one of GasTOPS' existing and potential customers using GasTOPS' confidential business information, resulting in

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126 *GasTOPS Ltd v Forsyth*, 2012 ONCA 134, 288 OAC 201 [*GasTOPS*].
127 *Ibid* at paras 13-16.
128 *GasTOPS Ltd v Forsyth*, [2009] OJ no 3969 (QL) at para 273 (Sup Ct J).
129 *GasTOPS*, *supra* note 126 at para 15.

success for MxI and causing immediate and significant damage to GasTOPS.[130] The individual defendants were found liable for breach of contract for leaving their positions with GasTOPS without giving reasonable notice. His lordship ordered MxI to disgorge its profits made from using this information over a ten-year period — an amount in excess of $12 million — and awarded damages against each of the four individual defendants in the same amount on a joint and several basis. The Court also ordered full indemnity costs in favour of GasTOPS.[131]

The primary issue on appeal was the quantification of damages, with the appellants arguing that ten years exceeds the time limit set by case law for assessing damages, whether for breach of confidence, breach of fiduciary duty, or failure to give notice. The Ontario Court of Appeal held that since each cause of action was not assessed separately, comparison to case law dealing with only one breach was not appropriate.[132] The Court noted that the industry was small and highly specialized and that the defendants used confidential technical information in the new business. The Court declined to interfere with the ten-year accounting period ordered by the trial judge, finding that it was an integral component of the equitable remedies for breach of confidence and breach of fiduciary duty. The Court also noted that the trial judge had assessed the relevant facts in coming to a determination, and that he had not made any palpable or overriding errors in that regard. Finally, the Court noted that the remedy was balanced and proportional in all of the circumstances of the case, as the effects of the breaches would not dissipate for ten years.[133]

Although the trial judge found that the defendants should have provided GasTOPS with ten to twelve months' notice of their intended resignation, the Court of Appeal specifically noted that it should not be taken to agree with that period or the factors that the trial judge had considered in coming to that determination.[134]

4. COMMENTARY

Although this case is very fact-specific, it confirms the importance of the obligations that key employees owe to their employer, particularly in relation to the use of confidential information, and emphasizes the possibility that in the right circumstances, employers may be awarded damages for an employee's failure to provide appropriate notice. The quantum of damages in this case was significant because of the nature of the breach, the intent of the departing employees, and the impact the departures had on a small and highly technical business. However, the underlying principles with respect to the determination of an appropriate notice period should be noted:

(1) The roles held by the departing employees;

(2) The length of time it will take for the former employer to get back on its feet;

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130 *Ibid* at para 19.
131 *Ibid* at para 22.
132 *Ibid* at para 52.
133 *Ibid* at paras 45-46, 50.
134 *Ibid* at para 62.

(3) The length of time it will take for replacements to be hired and trained;

(4) The ability of the former employer to compete with the new company in the marketplace; and

(5) Whether there has been sufficient time during the notice period to lessen the effect of any breach of the departing employees' fiduciary duties to the employer.

X. CONFLICT OF LAWS

A. *CLUB RESORTS LTD. V. VAN BREDA*

1. BACKGROUND

Club Resorts Ltd. v. Van Breda[135] was the first of a trilogy of cases released on 18 April 2012 by the Supreme Court of Canada, each of which dealt with the application of conflict of laws principles in tort claims.[136] The Court elaborated on the "real and substantial connection" test as the appropriate common law conflicts rule for the assumption of jurisdiction and further clarified the application of the doctrine of *forum non conveniens*.

2. FACTS

This appeal dealt with two separate cases. In the first, Mrs. Van Breda and her husband stayed at a resort in Cuba managed by Club Resorts Ltd. (Club Resorts), a company incorporated in the Cayman Islands. The arrangements for the trip were made through an Ottawa-based travel agent. On the first day of her vacation, she tried to perform exercises on a metal structure on the beach, but the structure collapsed, causing her to suffer traumatic and catastrophic injuries. She became paraplegic as a result.[137] After the accident, Van Breda and her husband moved to Calgary where her family lived. She now lives in British Columbia, and never returned to Ontario.[138]

In the second case, Mr. Charron and his wife booked a vacation, through an Ontario-based travel agent, to stay at a resort also managed by Club Resorts. Charron drowned at the resort while scuba diving.[139]

Van Breda and the Charron family brought separate proceedings against Club Resorts, along with other defendants, in Ontario. Club Resorts sought to block the two lawsuits, claiming that the Ontario courts lacked jurisdiction and, in any event, that Cuban courts would be a more appropriate forum. In both actions, the motions judges held that Ontario could assume jurisdiction, and that it was a more appropriate forum for the lawsuits.[140] The

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135 2012 SCC 17, 343 DLR (4th) 577 [*Club Resorts*].

136 The other two cases are *Éditions Écosociété v Banro Corp*, 2012 SCC 18, 343 DLR (4th) 647 and *Breeden v Black*, 2012 SCC 19, 343 DLR (4th) 629. Each of these two cases dealt with the application of conflict of laws principles to defamation claims.

137 *Club Resorts*, *supra* note 135 at para 4.

138 *Ibid*.

139 *Ibid* at para 7.

140 *Ibid* at paras 9-11

two cases were heard together on appeal, and the Ontario Court of Appeal dismissed both appeals.[141]

3. DECISION

Canadian courts have struggled with various analytical frameworks for determining when the "real and substantial connection" requirement is met since it was first articulated by the Supreme Court of Canada in *Moran v. Pyle National (Canada) Ltd.*[142] The Court took this opportunity to affirm the real and substantial connection test as the appropriate common law rule for the assumption of jurisdiction, and to provide further guidance on how it is to be applied. Justice LeBel, for the Court, stated that to achieve justice and fairness in dealing with conflict of laws issues, "a system of principles and rules that ensures security and predictability in the law governing the assumption of jurisdiction by a court"[143] must be put in place, based primarily upon "objective factors that connect the legal situation or the subject matter of the litigation with the forum."[144]

The Court simplified the test for determining jurisdiction to three questions: (1) does the court have presumptive jurisdiction; (2) can that presumptive jurisdiction be rebutted; and (3) in a case where the court has presumptive jurisdiction that has not been rebutted, should the court decline to exercise its jurisdiction in favour of a clearly more appropriate forum?[145]

Justice LeBel listed specific presumptive factors for when the assumption of jurisdiction is appropriate: (1) when the defendant is domiciled or resident in the province; (2) when the defendant carries on business in the province; (3) when the tort was committed in the province; or (4) when a contract connected with the dispute was made in the province.[146] When any one of these factors is established, a rebuttable presumption of jurisdiction will arise. The Court was careful to note that these presumptive factors related to tort claims and issues associated with such claims and were not to be considered to be "an inventory of connecting factors covering the conditions for the assumption of jurisdiction over all claims known to the law."[147]

Moreover, even in relation to tort claims, the Court noted that this list of factors is not exhaustive and that lower courts retain discretion to recognize additional factors. However, any new presumptive factors would have to fit within the same framework as those factors listed above, in that: (1) any new presumptive factor should create similar connections to the forum to those created by the presumptive factors already listed; and (2) the court should use the values of order, fairness, and comity to assess the strength of the relationship to the forum being sought.[148]

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141 *Ibid* at para 11.
142 [1975] 1 SCR 393.
143 *Club Resorts*, *supra* note 135 at para 73.
144 *Ibid* at para 82.
145 *Ibid* at paras 80-81.
146 *Ibid* at para 90.
147 *Ibid* at para 85.
148 *Ibid* at paras 91-92.

A party challenging a court's assumption of jurisdiction may rebut the presumption by establishing facts to show that the applicable presumptive connecting factor "does not point to any real relationship between the subject matter of the litigation and the forum or points only to a weak relationship between them."[149] In such a circumstance, the real and substantial connection test will not have been satisfied, and the court cannot assume jurisdiction over the lawsuit.

However, if a presumptive connecting factor is established (whether listed or new), and it is not rebutted by the party challenging jurisdiction, the real and substantial connection test will have been met and the court will have jurisdiction. It is only at this point in the analysis that the court may determine whether to decline to exercise that jurisdiction should *forum non conveniens* be raised by a party.[150] This doctrine gives a residual power to the court to decline jurisdiction if doing so would ensure efficient resolution of the dispute and fairness to the parties in the overall context of the dispute. Before a court may decline jurisdiction, the defendant must show that there is "another forum that has an appropriate connection under the conflicts rules and that should be allowed to dispose of the action."[151] The alternate jurisdiction must be "clearly more appropriate"[152] before a court will exercise its discretion to deny the plaintiff the benefits of the jurisdiction it has selected. Some of the factors that may assist in guiding the court's analysis may include:

> [T]he locations of parties and witnesses, the cost of transferring the case to another jurisdiction or of declining the stay, the impact of a transfer on the conduct of the litigation or on related or parallel proceedings, the possibility of conflicting judgments, problems related to the recognition and enforcement of judgments, and the relative strengths of the connections of the two parties.[153]

With respect to the two appeals before it, the Court dismissed both. After the recognized presumptive connecting factors were assessed, the Ontario courts had jurisdiction. The Court also declined to exercise its discretion under the doctrine of *forum non conveniens* in both cases, on the basis that considerations of fairness weighed in favour of the plaintiffs.[154]

4. COMMENTARY

This decision, which clarifies the real and substantial connection test for assuming jurisdiction, is of particular importance for companies engaged in interprovincial and international business, as it outlines the circumstances under which companies may be exposed to litigation in Canadian jurisdictions.

The impact of this clarification remains to be seen. In attempting to create a more predictable analysis for determining whether there is a real and substantial connection between an action and the forum, the Supreme Court has clearly limited the discretion of a

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149 *Ibid* at para 95.
150 *Ibid* at para 98.
151 *Ibid* at para 103.
152 *Ibid* at para 108.
153 *Ibid* at para 110.
154 *Ibid* at paras 118, 124.

judge to assume jurisdiction, which may result in a higher burden being placed on the party seeking jurisdiction to meet the test.

To understand the full implications of this decision, it should be read in conjunction with the two companion decisions released simultaneously by the Supreme Court.

XI. LIMITATIONS LAW

A. *HAMILTON (CITY OF) V. METCALFE & MANSFIELD CAPITAL CORP.*

1. BACKGROUND

Litigants looking to suspend a limitation period should pay close attention to this decision. In this case,[155] the Ontario Court of Appeal held that the damage required to crystallize an actionable misrepresentation claim is suffered at the moment the plaintiff enters into the transaction, not when the plaintiff suffers actual financial losses as a result of the misrepresentation.

2. FACTS

On 24 July 2007, the City of Hamilton (the City) purchased $10 million in non-bank sponsored asset-backed commercial paper (ABCP), allegedly on the basis of misrepresentations made by the defendants. Shortly thereafter, on 13 August 2007, the non-bank sponsored ABCP market collapsed. In an effort to address the collapse, various banks and investors, including the City, entered into an agreement known as the "Montreal Accord" on 23 August 2007. The Montreal Accord included a 60-day standstill agreement, pursuant to which the signatories agreed to refrain from taking any action that would precipitate a default by the issuers of the ABCP.[156]

When the City's ABCP matured on 26 September 2007 (during the standstill period), Metcalfe, the issuer, failed to make repayment. The standstill was subsequently extended and expired on 10 January 2008. The City did not commence its action until 25 September 2009, which was one day prior to the second anniversary of the ABCP coming due. The City framed its action in misrepresentation, claiming that the defendants had misrepresented certain material facts in relation to the assets underlying the notes that made it highly unlikely or impossible that the defendants would be able to pay the City the amount owed under the ABCP. The City alleged that it would not have purchased the ABCP had it known the truth about those material facts and claimed that as a result of misrepresentations, it had suffered damages.[157]

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155 *Hamilton (City of) v Metcalfe & Mansfield Capital Corp*, 2012 ONCA 156, 347 DLR (4th) 657.
156 *Ibid* at paras 4-7.
157 *Ibid* at para 12.

3. DECISION

The defendants brought a motion for summary judgment on the basis that the City had filed its claim outside of the applicable two-year limitation period. The Superior Court of Justice granted summary judgment in favour of the defendants and dismissed the City's claim. Justice Frank held that because the City had framed its action in misrepresentation and not default of payment when due, the two-year limitation period commenced to run when the City discovered that it had not received what it had believed it had purchased, which discovery was made some time before it signed the Montreal Accord.[158]

The Ontario Court of Appeal upheld this decision. The Court did not accept the City's submission that it could not have discovered its action against the defendants until it learned of the extent of its loss, which was not realized until 26 September 2007 when the ABCP became due but was not paid. The Court agreed with Justice Frank that upon entering the Montreal Accord on 23 August 2007, the City already knew that it had suffered at least some loss and that a cause of action in tort had arisen. Accordingly, the limitation period had commenced to run. Damage was suffered at the moment that the City entered into the transaction, because it was at that point that it was in a worse position than before the transaction, thereby completing the cause of action.[159]

The Court noted that the City's position failed to appreciate the distinction between "damage" and "damages." "Damage" is the loss needed to make out a cause of action; in this case, the condition of being worse off as a result of the defendants' misrepresentation. On the other hand, "damages" is the monetary measure of the extent of a plaintiff's loss, which need not be ascertained in order for a cause of action to accrue.[160] Although the City may not have been able to calculate its damages until such time as the defendants failed to pay the ABCP, the City incurred damage sufficient to complete its cause of action when it entered into the transaction. That damage was discovered by the time it signed the Montreal Accord, which triggered the running of the limitation period.

The City also argued that the standstill provision in the Montreal Accord constituted an agreement to temporarily suspend or "toll" the limitation period. However, the Court disagreed. It found that there was no evidence that the defendants had offered consideration in return for the City's promise to forbear from suing during the standstill period, as would be required by the common law in a debtor-creditor scenario, and in any event, that these principles would not readily be extended to claims in tort.[161] The Court also held that the standstill provision did not comply with the Ontario *Limitations Act, 2002*,[162] which provides that: (1) the parties may enter into an agreement to suspend the limitation period while an independent third party attempts to resolve the claims, or (2) the parties may enter into a specific agreement to suspend the limitation period.

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158 *Ibid* at para 16.
159 *Ibid* at paras 64-69.
160 *Ibid* at para 54.
161 *Ibid* at paras 79-82.
162 SO 2002, c 24, Schedule B, ss 11(1), 22(3).

4. COMMENTARY

Although this decision is based upon Ontario's *Limitation Act, 2002*, it highlights a number of important points to be considered when calculating the applicable limitation period or contemplating the execution of a tolling agreement to suspend a limitation period in any Canadian jurisdiction that applies the principle of discoverability with respect to limitation periods.

Whether or not the full extent of the damages suffered by the plaintiff is known or can be calculated, the applicable limitation period will begin as soon as the plaintiff has suffered the loss necessary to make out a cause of action. In addition, each cause of action will dictate when the applicable limitation period commences to run, and as such, the applicable limitation period for all possible causes of action must be assessed and considered.