

RECENT JUDICIAL DECISIONS OF INTEREST TO ENERGY LAWYERS

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The second year of the COVID-19 pandemic continued to impact the Canadian economy, commercial activity, and the legal system in general. Courts, tribunals, legislatures, law firms, corporations, and workers all learned to adapt to remote working, remote hearings, and new ways of living. Within the crisis came opportunities to modernize systems and think about new ways of accessing justice.

This article summarizes a number of recent judicial decisions of interest to energy lawyers. The authors review key case law from several broad areas, including: Indigenous and First Nations law; contractual interpretation; environmental law; tax law; corporate and securities law; bankruptcy and insolvency; and constitutional law. In each area of law, the authors will provide insight on the significance and potential implications of these decisions on the Canadian energy industry.

The authors also canvas more specific topics, such as: economic interests and the Crown's duty to consult; the Canada Revenue Agency's priority ranking in the restructuring process; the ability of receivers to disclaim an agreement in the bankruptcy process and unilaterally impose go-forward terms on a secured party; the priority of builders' liens in the face of abandonment and reclamation obligations; the evolution of the "reverse vesting order"; and provincial control over resources.

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I. INDIGENOUS AND FIRST NATIONS

Indigenous law issues continue to arise on multiple fronts in Canada — in proceedings at the federal courts, at the provincial courts, and in front of regulatory tribunals. This past year saw some interesting decisions arising from the special consideration given to Indigenous economic interests and developments affecting Indigenous land. Additionally, the Supreme Court of Canada opened the door to allow pre-judgment funding for impecunious First Nations who wish to pursue their rights through lengthy and costly litigation.

A. *YAHEY V. BRITISH COLUMBIA*¹

1. BACKGROUND

Yahey marked the first time a court has found treaty infringement based on the cumulative effects of development within a First Nation's territory. In answering the question of

¹ 2021 BCSC 1287 [*Yahey*].

infringement, the British Columbia Supreme Court was required to consider whether the impacts caused by the cumulative effects of multiple projects could ground a treaty rights infringement action.

2. FACTS

Treaty 8 was made between the Crown and Indigenous signatories in 1899, and the ancestors of the plaintiff First Nation, Blueberry River First Nations (Blueberry), adhered to Treaty 8 in 1900. Although the Province of British Columbia was not a signatory to Treaty 8, it holds the same duties and benefits of the treaty along with Canada.²

Blueberry argued that, over the course of time, the cumulative impacts from multiple provincially authorized industrial developments in the territory, including forestry, agriculture, and oil and gas developments, breached Treaty 8 and infringed their rights.³ Blueberry argued these cumulative effects had impacts on moose populations,⁴ polluted their land and water,⁵ affected food sources, and limited its peoples' ability to move freely in Blueberry's traditional territory, among other things.⁶

Both parties agreed *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*⁷ identified the relevant test for alleged treaty right infringements but were at odds as to its interpretation and application.⁸ Blueberry's position was that the test merely requires establishing there is *no meaningful* right remaining, not whether no meaningful rights remain *at all*.⁹ The effect of British Columbia's position, on the other hand, was that establishing treaty infringement requires demonstrating that *no* rights remain at all.¹⁰ British Columbia also forwarded an argument to the effect that exercising its duty to consult could be relied on to avoid a finding of infringement.¹¹

3. DECISION

The Court rejected British Columbia's position on both fronts, stating that:

It cannot be that the consultation duty outlined in *Mikisew* precludes a First Nation from bringing an infringement claim in appropriate circumstances, or that it has to wait until it has no ability to exercise rights to do so.

...

² *Ibid* at paras 19–20.

³ *Ibid* at para 3.

⁴ *Ibid* at para 357.

⁵ *Ibid* at para 358.

⁶ *Ibid* at para 359.

⁷ 2005 SCC 69 [*Mikisew*].

⁸ *Yahey*, *supra* note 1 at paras 446–47.

⁹ *Ibid* at para 491.

¹⁰ *Ibid* at paras 494–98, 503.

¹¹ *Ibid* at paras 497–98.

[British Columbia's] reliance on the duty to consult, and its insistence that an action for infringement requires proof of *no* meaningful right to hunt, fish or trap, does not address circumstances where impacts are at a "tipping point" beyond which the right to meaningfully exercise treaty rights is lost."¹²

Rather, a more nuanced and contextual approach is required.¹³

Speaking specifically to the cumulative effects of development on treaty rights infringements, the Court pointed to the Supreme Court of Canada's decision in *Mikisew* as well as the Alberta Court of Appeal's decision in *Fort McKay First Nation v. Prosper Petroleum Ltd.*¹⁴ for the notion that cumulative effects of previous developments must be considered in the determination.¹⁵ If such cumulative effects build to a "tipping point after which the exercise of treaty rights either becomes less meaningful or impossible," treaty right infringement may be found.¹⁶ Further, when considering the alleged infringement, the governmental scheme can be considered as a whole, as well as the history of development on the lands, historical use, and impacts caused by allocation of the resources.¹⁷

The Court canvassed several prior decisions dealing with treaty rights infringements in determining the requisite degree of cumulative effects necessary to establish infringement, holding that, in its view, all these cases were "trying to get at the idea of rights being diminished in a meaningful or significant way. [The Court found] it appropriate to consider whether there has been an infringement of Blueberry's treaty rights by considering if there has been a significant or meaningful diminishment of the rights."¹⁸

Ultimately, the Court accepted data evidencing that, as of 2016, 84 percent of Blueberry's traditional territory was within 500 metres of an industrial disturbance and, as of 2018, 91 percent of its traditional territory was disturbed when a 500-metre buffer was applied. This data was noted as important contextual information in the determination.¹⁹ The Court thus declared, among other things, that the extent of British Columbia's causing and permitting the above cumulative impacts of industrial development on Blueberry's treaty rights resulted in insufficient and inappropriate lands in its traditional territory to allow for the meaningful exercise of its treaty rights. Since British Columbia did not advance a justification defence, British Columbia thus infringed Blueberry's treaty rights "in permitting the cumulative impacts of industrial development to meaningfully diminish" Blueberry's ability to exercise such rights in its traditional territory.²⁰

Shortly after this decision, British Columbia indicated it would not appeal, but rather intends to work and consult with Blueberry moving forward.²¹

¹² *Ibid* at paras 501–502 [citations omitted, emphasis in original].

¹³ *Ibid* at para 515.

¹⁴ 2019 ABCA 14.

¹⁵ *Yahey*, *supra* note 1 at paras 516, 520.

¹⁶ *Ibid* at para 517.

¹⁷ *Ibid* at para 521.

¹⁸ *Ibid* at para 529.

¹⁹ *Ibid* at paras 905–906.

²⁰ *Ibid* at para 1884.

²¹ Government of British Columbia, "Attorney General's Statement on *Yahey v. British Columbia*" (28 July 2021), online: <news.gov.bc.ca/releases/2021AG0117-001488>.

4. COMMENTARY

Blueberry's success in preventing future industrial development authorizations in its territory in the *Yahey* decision is particularly important for businesses operating in the natural resource development sphere on treaty lands. Not only has it lowered the threshold to establish treaty rights infringements, the *Yahey* decision is a firm statement that such businesses must not only consider the isolated impacts of their individual projects on treaty rights, but also the cumulative effects their individual projects may have when added to the aggregate of other historical developments in the same area up to that point in time. A necessary consideration also flowing from this judicial development is the importance of the duty to consult and accommodate. That said, British Columbia did not provide a justification of infringement, and Blueberry had received several million dollars through resource management agreements with British Columbia from 2006–2013,²² so it is likely we will see developments in defences to justify treaty rights infringements moving forward.

B. *ERMINESKIN CREE NATION V. THE MINISTER OF ENVIRONMENT AND CLIMATE CHANGE, THE ATTORNEY GENERAL OF CANADA AND COALSPUR MINES (OPERATIONS) LTD.*²³

1. BACKGROUND

The *Ermieskin* decision was a Federal Court case concerning the Crown's duty to consult in the context of a designation order affecting a project proponent's natural resource development project, where said proponent was also party to an impact benefits agreement (an IBA) with an interested Indigenous group.

Specifically, the Federal Court was required to consider whether an IBA containing a provision "compensating" the Indigenous group signatory for negatively impacted economic interests was capable of triggering the Crown's duty to consult.

2. FACTS

The Minister of Environment and Climate Change (the Minister) issued a designation order (the Designation Order) under section 9(1) of the federal *Impact Assessment Act*,²⁴ which designated certain phases of a coal mine expansion project and underground test mine (the Coal Mine Project), proposed by Coalspur Mines (Operations) Ltd. (Coalspur).²⁵

Previously, Ermieskin Cree Nation (Ermieskin) entered into two IBAs respecting the Coal Mine Project with Coalspur, under which Coalspur was to provide valuable economic, community, and social benefits to Ermieskin. Both IBAs were intended to compensate

²² *Yahey*, *supra* note 1 at para 1213.

²³ 2021 FC 758 [*Ermieskin*].

²⁴ SC 2019, c 28, s 1 [IAA].

²⁵ *Ermieskin*, *supra* note 23 at paras 1–2.

Ermineskin for potential impacts, caused by natural resource development, on the ability of Ermineskin members to exercise Indigenous rights in their traditional territory.²⁶

The Designation Order had the immediate effect of prohibiting Coalspur from doing anything in connection with carrying out the phases of the Coal Mine Project subject to the Designation Order.²⁷ Further, the Minister did not consult with, nor give notice to, Ermineskin before making the Designation Order.²⁸

Ermineskin applied for judicial review seeking to quash the Designation Order, arguing it would adversely impact Indigenous and treaty rights, including economic opportunities created through its contractual relationship with Coalspur under the IBAs. Specifically, Ermineskin argued the Designation Order would “delay, lessen, or eliminate Ermineskin’s economic interest” in the Coal Mine Project phases.²⁹ The Minister’s position was that “such loss of economic, social and community benefits is not an adverse impact related to an Aboriginal or Treaty right, and does not relate to Aboriginal title to the land that may be developed, or to the ownership of the coal resource.”³⁰

3. DECISION

The Federal Court granted Ermineskin’s application and disagreed with the Minister’s position that economic loss is not an adverse impact related to Indigenous or treaty rights. The Federal Court held that a generous and purposive approach must be given to the constitutional doctrine of the honour of Crown and its corresponding duty to consult.³¹

One of the most significant holdings coming out of the *Ermineskin* decision is that, in the Federal Court’s view, the IBAs and, more specifically, the “valuable economic rights and benefits” contained therein, were closely related to and derivative from Indigenous rights.³² Specifically, the Federal Court noted a “key issue” in arriving at this result was whether the Minister had a duty to consult with Ermineskin, which is subject to the three-prong test identified in *Haida Nation v. British Columbia (Minister of Forests)*.³³ The Minister argued the Designation Order did not trigger the third prong of the duty to consult test articulated in *Haida Nation*, which asks whether there is a “possibility that the Crown conduct may affect the Aboriginal claim or right.”³⁴

The Federal Court disagreed with the Minister, stating “jurisprudence says the duty to consult may be engaged when broader economic interests may be adversely impacted.”³⁵ The Federal Court concluded the IBAs were examples of such economic interests “closely related

²⁶ *Ibid* at para 5.

²⁷ *Ibid* at paras 16–18, 76.

²⁸ *Ibid* at para 10.

²⁹ *Ibid* at para 6.

³⁰ *Ibid*.

³¹ *Ibid* at paras 7–8.

³² *Ibid* at para 9.

³³ *Ibid* at para 94, citing *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 [*Haida Nation*].

³⁴ *Ermineskin*, *ibid* at paras 100–103.

³⁵ *Ibid* at para 105.

to and thus derivative from Aboriginal and Treaty rights,”³⁶ as they were “designed ‘to compensate’ Ermineskin for the loss of its Aboriginal and Treaty rights.”³⁷ Not only was there a possibility of these interests being impacted in the present instance, but the Federal Court held the negative impact already occurred.³⁸ The Federal Court ultimately concluded the Minister breached its duty to consult with Ermineskin, as it was not provided notice of, nor had the benefit of, any consultation before the Designation Order was issued. The matter was remanded for reconsideration.³⁹ The Federal Court of Appeal dismissed the appeal.⁴⁰

4. COMMENTARY

The *Ermineskin* decision dispels any lingering notion that Indigenous rights must be in conflict with a project proponent’s interests to trigger the duty. The Crown’s duty to consult extends beyond merely those Indigenous stakeholders opposed to resource development, but also to those who stand to benefit from such projects. *Ermineskin* also affirms that negatively impacted economic interests of First Nations stakeholders in natural resource development projects can trigger the Crown’s duty to consult. More importantly, *Ermineskin* has expanded the basis for establishing a negative impact on economic interests to contractual IBAs with project proponents.

What this means practically is that industry proponents subject to regulatory permits, licences, approvals, orders, and so on will be wise to consider how any existing or prospective IBAs entered into relating to their resource development projects may factor into the ultimate validity of such regulatory instruments. This is especially true where said IBAs contain “economic interest” compensation clauses and where Indigenous group signatories have not been given notice or consulted in relation to the same.

C. *ANDERSON V. ALBERTA*⁴¹

1. BACKGROUND

In the *Anderson* decision, the Supreme Court of Canada clarified the “impecuniosity requirement” of the advance costs test when dealing with First Nation governments. The impecuniosity requirement, generally speaking, requires a First Nation community to “genuinely” demonstrate that it is unable to pay for the proposed litigation — this clarification by the Supreme Court may have widespread impacts on access to justice for First Nation communities.

³⁶ *Ibid* at para 107.

³⁷ *Ibid* at para 105.

³⁸ *Ibid* at para 106.

³⁹ *Ibid* at paras 132–33.

⁴⁰ *The Minister of Environment and Climate Change and, the Attorney General of Canada v Ermineskin Cree Nation and, Coalspur Mines (Operations) Ltd; The Minister of Environment and Climate Change, The Attorney General of Canada, Louis Bull Tribe, Keepers of the Water Society, The West Athabasca Watershed Bioregional Society, and Stoney Nakoda Nations (Bears paw First Nation, Chiniki First Nation and Wesley First Nation)*, 2022 FCA 123.

⁴¹ 2022 SCC 6 [*Anderson*].

2. FACTS

Beaver Lake Cree Nation (Beaver Lake) is a First Nation band located near Lac La Biche, Alberta. Beaver Lake brought forward a claim against the Government of Canada (Canada) and the Government of Alberta (Alberta) pursuant to section 35 of the *Constitution Act, 1982*⁴² alleging that Canada and Alberta had improperly allowed Beaver Lake's traditional lands to be taken up for industrial and resource development and thereby compromised Beaver Lake band members' ability to pursue their traditional way of life. During the litigation, Beaver Lake brought an application for advanced costs.⁴³

In order to be awarded advanced costs, an applicant must demonstrate impecuniosity, present a prima facie meritorious case, and raise issues of public importance. The parties agreed that the latter two requirements were met in this case; however, they disagreed on whether Beaver Lake should be considered impecunious. Although Beaver Lake had access to more than \$3 million in unrestricted funds and ongoing revenue that could be used to pay for its legal fees, Beaver Lake argued that these funds had to be used to address other pressing needs within the community, and therefore, it should still be considered impecunious.⁴⁴

The initial case management judge determined that Beaver Lake had met the test for impecuniosity. She noted that although Beaver Lake had access to funds, the First Nation band experienced "substantial deficits in housing and infrastructure and ... high levels of unemployment and social assistance."⁴⁵ She found that there were pressing needs that required Beaver Lake's existing funding and the First Nation band should therefore be considered impecunious. The Alberta Court of Appeal reversed the case management judge's decision, noting the fact that Beaver Lake had more than \$3 million in unrestricted funds alone meant that it did not meet the legal test. The Court of Appeal found that only spending on "basic necessities" could cause an applicant to be deemed impecunious despite having access to funds. The Court of Appeal found there was no evidence suggesting that Beaver Lake would have been forced to choose between spending on basic necessities and pursuing the litigation.⁴⁶

3. DECISION

In deciding this appeal, the Supreme Court of Canada established the following rule: in assessing whether a First Nation government has sufficient resources to pay for litigation after meeting its pressing needs, a court must be able to (1) identify the applicant's pressing needs; (2) determine what resources are required to meet those needs; (3) assess the applicant's financial resources; and (4) identify the costs of funding the litigation.⁴⁷ The applicant bears the onus to prove that it cannot afford to pay its legal fees due to other pressing needs.⁴⁸

⁴² Being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

⁴³ *Anderson*, *supra* note 41 at para 2.

⁴⁴ *Ibid* at para 6.

⁴⁵ *Ibid* at paras 13, 55.

⁴⁶ *Ibid* at para 14.

⁴⁷ *Ibid* at para 41.

⁴⁸ *Ibid* at para 42.

The Supreme Court found that pressing needs should not be confined to only the bare necessities of life, such as adequate housing, a safe water supply, or basic health and education services — instead, the requirement should be interpreted from the perspective of a First Nation government. Courts should consider the context in which a First Nation government sets priorities and makes financial decisions, recognizing that a First Nation government is best situated to assess the needs of their community. Spending to improve standards of living, to provide enhanced health and education services, or to promote cultural survival could all potentially qualify. The Supreme Court noted that even allocating funds to construct a skating rink, for instance, could potentially be considered a pressing need if the First Nation community adduces evidence of how an urgent youth crisis in the community has led it to promote physical health and outdoor activities.⁴⁹

An applicant must adduce evidence of the cost of meeting its pressing needs and it must also adduce evidence showing that existing resources are indeed being spent on addressing the pressing needs. An applicant must demonstrate that it made sufficient efforts to obtain alternative funding. Additionally, they must also submit a detailed litigation plan so that the court is able to assess the costs the applicant will incur in pursuing litigation.⁵⁰

Applying this to the case at hand, the Supreme Court determined that the case management judge had erred in her impecuniosity analysis. The Supreme Court noted that the case management judge did not make findings regarding the estimated costs of Beaver Lake’s pressing needs or the extent to which those costs were not covered by Beaver Lake’s existing financial resources. There was also no evidence as to how those resources were being applied to meet those pressing needs. The Supreme Court further noted that Beaver Lake had access to several other potential revenue streams that it had not sufficiently proven it could not access to meet its pressing needs.⁵¹ As a result, the Supreme Court found that the appeal should be allowed and the matter should be remitted back to the Alberta Court of King’s Bench for consideration in light of the clarification offered in this decision.⁵²

4. COMMENTARY

Anderson clarifies the test for impecuniosity when dealing with First Nation applicants and arguably lowers the threshold that an applicant must meet. By determining that, in the context of First Nation governments, “pressing needs” can be interpreted to mean more than the “basic necessities of life,” it is reasonable to expect that there will be an increase in the number of applications for advance costs and that these applications will have a greater likelihood of success. Parties dealing with potentially impecunious First Nation communities will have to factor the possibility of advance costs being awarded into their litigation cost analyses.

It remains to be seen whether this interpretation of “pressing needs” will have applicability outside of the context of First Nation applicants.

⁴⁹ *Ibid* at paras 43–44.

⁵⁰ *Ibid* at paras 45–46, 50–51.

⁵¹ *Ibid* at paras 54, 57, 64–66.

⁵² *Ibid* at para 70.

D. *ENBRIDGE GAS INC.*⁵³

1. BACKGROUND

The Ontario Energy Board (OEB) considered whether carbon pricing charges can be charged to Indigenous customers purchasing natural gas.

2. FACTS

The federal *Greenhouse Gas Pollution Pricing Act*⁵⁴ created a fuel charge payable by Enbridge Gas Inc. (Enbridge) on the amount of natural gas delivered to its customers, as well as carbon pricing obligations related to Enbridge's own use of natural gas. The OEB responded by ordering that Enbridge customers be billed charges based on the volume of their gas consumption, as well as charges to recover the carbon pricing costs associated with Enbridge's use of natural gas. These two charges are referred to collectively as the Federal Carbon Pricing Program Charges (FCPP Charges).⁵⁵ The Chiefs of Ontario and Anwaatin Inc. (collectively, Indigenous Applicants) challenged the application of the FCPP Charges to Indigenous customers, raising arguments based on the *Indian Act*⁵⁶ and section 35 of the *Constitution Act, 1982*.⁵⁷

3. DECISION

The OEB did not accept the Indigenous Applicants' arguments and found that Indigenous customers should not be exempt from the FCPP Charges. First, the OEB found that the FCPP Charges are not taxes but regulatory charges and are therefore not covered by section 87 of the *Indian Act*, which provides that "the interest of an Indian or a band in reserve lands or surrendered lands" and "the personal property of an Indian or a band situated on a reserve" are exempt from taxation.⁵⁸

Second, the OEB also found that there was no existing treaty or Indigenous right that was infringed by collection of the FCPP Charges. Receiving natural gas service from a regulated utility is not an ancestral practice or tradition, and neither is receiving such a service at a particular price.⁵⁹

Lastly, the OEB found that additional arguments raised by the Indigenous Applicants related to section 89 of the *Indian Act*, the honour of the Crown, the *United Nations Declaration of the Rights of Indigenous Peoples*, and the OEB's mandate to fix just and reasonable rates do not support the exemption of Indigenous customers.⁶⁰

⁵³ *Enbridge Gas Inc: 2020 Federal Carbon Pricing Program Application – Applicability of Charges to Indigenous Customers* (23 September 2021), EB-2019-0247, online: Ontario Energy Board <www.rds.oeb.ca/CMWebDrawer/Record/726311/File/document> [*Enbridge*].

⁵⁴ SC 2018, c 12, s 186.

⁵⁵ *Enbridge*, *supra* note 53 at paras 1–2.

⁵⁶ RSC 1985, c I-5.

⁵⁷ *Constitution Act, 1982*, *supra* note 42.

⁵⁸ *Enbridge*, *supra* note 53 at paras 35, 53–60; *Indian Act*, *supra* note 56, s 87.

⁵⁹ *Enbridge*, *ibid* at paras 73–80.

⁶⁰ *Ibid* at paras 60–62, 89–93, 101, 106–109; *United Nations Declaration of the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, Supp No 53, UN Doc A/Res/61/295 (2007).

4. COMMENTARY

This decision highlights the important distinction between a “tax” and a “regulatory charge.” The *Indian Act* will not serve to insulate First Nations people from being subject to valid regulatory charges. This clarification from the OEB will reduce costs for gas suppliers subject to this regulatory scheme, as well as for any other companies that may become subject to comparable regulatory schemes in the future.

II. BANKRUPTCY, INSOLVENCY, AND RECEIVERSHIP

After a rush of insolvency filings early in the pandemic, corporate insolvency filings slowed in 2021.⁶¹ Nevertheless, many important cases worked their way up through appellate courts, including some highly anticipated decisions dealing with tax and priority issues, set-off, and the increasingly popular restructuring vehicle known as the reverse vesting order. We are still seeing the ripple effects of the 2019 Supreme Court of Canada decision in *Orphan Well Association v. Grant Thornton Ltd.*,⁶² as courts continue to deal with abandonment and reclamation obligations left behind by insolvent companies.

A. *YUKON (GOVERNMENT OF) V. YUKON ZINC CORPORATION*⁶³

1. BACKGROUND

The Government of Yukon assessed a mining company with a \$35 million security deposit to cover future abandonment costs. When the mine was subsequently put into receivership, the court-appointed receiver had to determine priorities between a secured lender and the government’s claim. The Yukon Court of Appeal considered the priority issues surrounding environmental claims, and the ability of the receiver to issue a “partial disclaimer” of a master equipment lease.

2. FACTS

The Wolverine Mine, a zinc-silver-lead mine owned by Yukon Zinc Corporation (YZC), came into operation in 2012, but only operated for three years until closing and filing for creditor protection under the *Companies’ Creditors Arrangement Act*.⁶⁴ In 2017, a significant flood occurred at the inactive mine, causing the government to increase a security deposit for reclamation costs from \$10.5 million to \$35 million. In 2018, Welichem Research General Partnership (Welichem) loaned the company \$8.5 million, the proceeds of which were used (in part) to buy out a lease of mining and construction equipment. The equipment was then leased back to YZC under a master lease agreement. The Yukon government subsequently obtained an order for a court-appointed receiver.⁶⁵

⁶¹ Innovation, Science and Economic Development Canada, *2021 Insolvency Statistics in Canada*, Catalogue No lu73-5E-PDF (Ottawa: Innovation, Science and Economic Development Canada, 2022), online: <[ised-isde.canada.ca/site/office-superintendent-bankruptcy/sites/default/files/attachments/2022/Annual-insolvency-statistics-2021-EN.pdf](https://www.ised-isde.canada.ca/site/office-superintendent-bankruptcy/sites/default/files/attachments/2022/Annual-insolvency-statistics-2021-EN.pdf)>.

⁶² 2019 SCC 5 [*Redwater*].

⁶³ 2021 YKCA 2 [*Yukon Zinc*].

⁶⁴ RSC 1985, c C-36 [CCAA].

⁶⁵ *Yukon Zinc*, *supra* note 63 at paras 11–16.

The receiver reviewed the mine's assets and determined that only 79 pieces of equipment were necessary for the care and maintenance of the mine. The receiver subsequently issued a notice of disclaimer with respect to the master lease agreement, carving out the 79 pieces of equipment they deemed essential. The receiver's disclaimer notice stated that the receiver retained the right to use the specified equipment at a specified monthly rental rate.⁶⁶

The chambers judge ruled that the disclaimer provisions in the *Bankruptcy and Insolvency Act*⁶⁷ and in the receivership order had a binary choice: to either disclaim or affirm the contract in question. In essence, the receiver was attempting a "partial disclaimer," which was framed as a permissible carve-out of its general disclaimer powers. The Supreme Court of Yukon determined that the receiver was entitled to keep the essential pieces of equipment through its general powers under section 243 of the *BIA* to "take any other action that the court considers advisable" and to preserve and protect the assets.⁶⁸ Welichem appealed this decision.⁶⁹

The chambers judge also held that the Yukon government's claim for unpaid security deposits did not meet the standard of a "provable claim" under insolvency statutes. Finally, the chambers judge concluded that the Yukon government's claim did not meet the definition of a "secured claim" under section 14.06(7) of the *BIA* and that the mineral claims in question could be considered "real property" for the purpose of that analysis. The Yukon Government appealed these rulings.⁷⁰

3. DECISION

The Yukon Court of Appeal confirmed that the Yukon government's claim was not a "claim provable" under the insolvency statutes, as the abandonment costs had not yet been incurred and there was no collection mechanism to enforce payment.⁷¹ Similarly, section 14.06(7) of the *BIA* was not applicable to create a secured claim over the assets. It was incorrect to apply a "sufficiently certain" analysis to this provision — on its plain reading, the section only applied to costs which had already been incurred on the date of bankruptcy.⁷² The Yukon Court of Appeal did overturn the chambers judge's decision with respect to whether the security interest created by 14.06(7) applied to mineral leases. In the view of the appellate Court, the relevant mineral leases are only "interest[s] in land" and not "real property," a distinction which is relevant due to the specific wording of this provision.⁷³

With respect to the partial disclaimer issue, the Yukon Court of Appeal affirmed there was no partial disclaimer in this case — it was a full disclaimer, coupled with an appropriation by the receiver of certain essential leased items for its use.⁷⁴ The Yukon Court of Appeal found that this "appropriation" by the receiver was inappropriate, and beyond the scope of

⁶⁶ *Ibid* at paras 20–22.

⁶⁷ RSC 1985, c B-3 [*BIA*].

⁶⁸ *Yukon Zinc*, *supra* note 63 at para 35, citing *BIA*, *ibid*, s 243(1)(c).

⁶⁹ *Yukon Zinc*, *ibid* at paras 33–37.

⁷⁰ *Ibid* at paras 28–32.

⁷¹ *Ibid* at paras 66–68.

⁷² *Ibid* at paras 77–85.

⁷³ *Ibid* at para 98.

⁷⁴ *Ibid* at para 140.

its powers. The general powers given to a receiver do not generally extend to appropriation of third-party property. Although the Court of Appeal had sympathy for the receiver's position, it noted that "receivership 'is not a license to ignore rules, and insolvency professionals are bound by and must comply with valid provincial laws' during receivership."⁷⁵

4. COMMENTARY

The Yukon government sought leave to appeal this decision to the Supreme Court of Canada, which was denied on 4 November 2021.⁷⁶ As a result, the Yukon government is an unsecured creditor with respect to its claim for the unpaid security deposit and has lost its priority battle with the secured lender. This is a rather surprising result, given the Supreme Court's elevation of abandonment and reclamation obligations in the 2019 *Redwater* decision, but is primarily based on the wording of the Yukon *Mining Act* and the definition of a "provable claim" under the *BIA*.

With respect to the disclaimer issue, this decision is an important statement on the extent of a receiver's powers, especially when dealing with third-party rights.

B. *CANADA V. CANADA NORTH GROUP INC.*⁷⁷

1. BACKGROUND

In this highly anticipated and closely decided ruling, the Supreme Court of Canada confirmed that in the context of a *CCAA* restructuring, the Canada Revenue Agency's (CRA) claims for statutory deemed trusts arising from unremitted source deductions cannot trump court-ordered security interests.

2. FACTS

Canada North Group Inc. (Canada North) had a business of supplying remote work camp facilities, largely to the oil and gas industry in Alberta. In 2017, it filed for creditor protection under the *CCAA*. As is regularly done in insolvency proceedings, the Alberta Court of Queen's Bench granted certain "super-priority" charges over the assets of Canada North, in priority to existing secured interests. These "super-priority" charges, or "priming charges," included a charge in favour of Business Development Bank of Canada, who provided debtor-in-possession (DIP) interim financing to Canada North during the restructuring, and a charge to secure the fees of the monitor and legal counsel. At the time of the *CCAA* filing, Canada North owed the CRA over \$1 million for unremitted source deductions.⁷⁸

⁷⁵ *Ibid* at para 143.

⁷⁶ *Yukon (Government of) v Yukon Zinc*, 2021 YKCA 2, leave to appeal to SCC refused, 39659 (4 November 2022).

⁷⁷ 2021 SCC 30 [*Canada North*].

⁷⁸ *Ibid* at paras 5–6.

The *Income Tax Act*⁷⁹ (and other fiscal statutes) contains a provision by which unremitted source deductions are subject to a “deemed trust.” The CRA argued that their deemed trust rights took them outside the regular priority scheme for creditors and, in fact, they were not a creditor at all, but held a property interest outside the insolvency estate. Therefore, their deemed trust claims trumped the rights of all other creditors, and of any priming charges.

The chambers judge dismissed the CRA’s application and confirmed the priority of the priming charges. On appeal, the Alberta Court of Appeal upheld the chambers judge’s decision, but with a strong dissenting opinion from Justice Wakeling, which relied on a plain reading of the relevant statutes, which state that the CRA is the “beneficial owner” of amounts subject to a deemed trust.⁸⁰

The CRA appealed to the Supreme Court of Canada and several interveners were granted status to make submissions at the hearing. The respondents and interveners argued that without a confirmed priority for “priming charges” it would be difficult to successfully restructure insolvent corporations.

3. DECISION

By a slim majority, and with four separate reasons, a 5–4 majority of the Supreme Court of Canada dismissed the CRA’s appeal. In the first set of reasons, Justice Côté noted the broad, remedial purpose of the *CCAA* and held that the deemed trust claims are neither a property interest nor a security interest but had to be understood on their own terms. The deemed trust claims could be subordinated to priming charges under the general powers of the court in section 11 of the *CCAA*. The power to subordinate a deemed trust claim to priming charges must be exercised sparingly, and only in appropriate circumstances, for example, if a professional or lender will not act without a priming charge, or when the *CCAA* proceedings are not simply a liquidation process.⁸¹

In the second set of reasons, Justice Karakatsanis concurred with Justice Côté in the dismissal of the CRA appeal and expanded on the circumstances in which it would be appropriate for a court to grant priming charges ahead of the CRA’s deemed trust claim.⁸²

Two dissenting opinions noted the clear wording of the relevant statutes, which give absolute priority to deemed trusts over all security interests, notwithstanding the *CCAA*.⁸³

4. COMMENTARY

This case was closely followed by the insolvency community, as the fear was that if the CRA could assert a deemed trust claim ahead of all other priming charges (including professional fees and interim lending), it could create a chilling effect on restructurings in Canada. Unremitted source deductions are sometimes seen as a “piggy bank” for insolvent

⁷⁹ RSC 1985, c 1 (5th Supp), s 227(4.1) [*ITA*].

⁸⁰ *Canada North*, *supra* note 77 at paras 9–11, 13–15.

⁸¹ *Ibid* at paras 17–74.

⁸² *Ibid* at paras 96–182.

⁸³ *Ibid* at paras 183–265.

corporations who collect but do not remit from their payroll in order to temporarily solve some of their cash flow issues. Directors and officers can be personally liable for failure to make such remissions. The CRA has aggressively asserted its rights under the relevant statutes, and there had been mixed case law as to whether such rights are in the nature of a “property right” or a “security interest.”

Although the CRA may have (narrowly) lost this battle, this ruling only applied to restructurings under the *CCAA* and not other types of restructurings, such as proposals under the *BIA*. It remains to be seen how the CRA will continue to assert its claims and how courts will respond when granting priming charges in the face of a CRA deemed trust. Counsel are cautioned to make sure the CRA is properly notified and served with any application seeking priming charges, even if it is not clear at the time whether there are any unremitted source deductions.

C. *MANITOK ENERGY INC. (RE)*⁸⁴

1. BACKGROUND

The 2019 *Redwater* decision continues to be reviewed and interpreted in order to determine the priorities between creditors and stakeholders in an insolvency scenario. This case specifically dealt with the priority battle between builders’ liens and the Alberta Energy Regulator’s (AER) claims for abandonment and reclamation obligations.

2. FACTS

Manitok Energy Inc.’s (Manitok) receiver (the Receiver), who had been appointed prior to the release of the *Redwater* decision, applied to the Alberta Court of Queen’s Bench for directions in an uncertain post-sale situation — it had sold some of the assets under a sale approval and vesting order (SAVO) and held the sale proceeds (subject to a holdback for the lienholders). However, the Receiver could not distribute those proceeds as it did not know who had priority rights to the funds — the AER, or the builders’ lien claimants.

The respondent, Prentice Creek Contracting Ltd., provided equipment and services to Manitok related to the reclamation and cleanup of certain oil and gas well sites. The respondent, Riverside Fuels Ltd., provided fuel and lubricants to Manitok. Both filed builders’ liens for their unpaid work prior to Manitok’s bankruptcy on 20 February 2018.

Manitok had some assets that had remaining value, but it also had many assets with no remaining net value. After identifying some of the valuable assets, the Receiver arranged for their sale. Despite the various sales made by the Receiver, Manitok’s end-of-life obligations still exceeded the proceeds of its estate. The Receiver intended to “disclaim” those assets so that any reclamation obligations would fall on the Orphan Well Association.

The chambers judge distinguished the facts of *Manitok* from those in *Redwater* on the basis that the AER had not taken any steps to issue an abandonment order until *after* the

⁸⁴ 2022 ABCA 117 [*Manitok ABCA*].

assets had been sold.⁸⁵ Therefore, the Receiver was not required to use sale proceeds to fulfil the end-of-life obligations because they were no longer part of the Manitok estate, and the new licensee assumed the obligations. The Alberta Court of Queen's Bench ruled in favour of the builders' lien claimants and held they were entitled to be paid out of the proceeds of the sale in priority to other claims. The AER appealed the decision.

3. DECISION

The Alberta Court of Appeal disagreed with the lower court's decision. It found that unless the sale proceeds of the valuable assets are available to satisfy the abandonment and reclamation obligations, they can never be satisfied.⁸⁶ It noted that the "whole point of *Redwater*, however, is that the proceeds of the sale of the valuable assets must be applied towards reclamation of the worthless orphaned assets."⁸⁷

The Alberta Court of Appeal confirmed that assets in the estate do not cease to be available to discharge end-of-life obligations because they are sold by the Receiver and converted to cash.⁸⁸ The sale proceeds were part of the Manitok estate, even though they were held in an interest-bearing trust account.⁸⁹ Under the SAVO, the proceeds were to specifically stand in place of the physical assets that had been sold, without affecting in any way the priorities and claims of various claimants.

The Alberta Court of Appeal held that there is no distinction to be made between various kinds of assets in the bankrupt estate; all assets of an oil and gas company are to be treated as a "package."⁹⁰ It then clarified that end-of-life obligations are inherent in oil and gas properties from the minute extraction of the resources commences.⁹¹ The Alberta Court of Appeal explained that the public duty on the Receiver to use the assets of the estate to discharge the obligations are imposed by statute on all licensees and exist independently of any enforcement action taken by the AER.⁹²

As such, the appeal was allowed, and the Alberta Court of Queen's Bench decision was set aside. The Alberta Court of Appeal ruled that although the quantum of the two builders' lien claims was relevant to setting the quantum of the holdback, the end-of-life obligations must be satisfied by the Receiver from Manitok's estate in preference to the builders' lien claims.⁹³

4. COMMENTARY

The Alberta Court of Appeal's decision in *Manitok* clears up some of the uncertainty arising from the *Redwater* decision and reaffirms the priority of abandonment and

⁸⁵ *Manitok Energy Inc (Re)*, 2021 ABQB 227.

⁸⁶ *Manitok ABCA*, *supra* note 84 at para 29.

⁸⁷ *Ibid* at para 30.

⁸⁸ *Ibid* at para 32.

⁸⁹ *Ibid* at paras 42, 44.

⁹⁰ *Ibid* at paras 28–29; *Redwater*, *supra* note 62 at para 18.

⁹¹ *Manitok ABCA*, *ibid* at para 38; *Redwater*, *ibid* at para 29.

⁹² *Manitok ABCA*, *ibid* at paras 38–41.

⁹³ *Ibid* at paras 45–47.

reclamation obligations of a licensee. A builders' lien is a powerful tool used by many companies in the oilfield services sector. However, the priority of a valid registered lien may still be defeated by claims from the AER for abandonment and reclamation. Oilfield suppliers and service companies should carefully consider the extent of their lien rights, especially when working on lands which are subject to abandonment and reclamation obligations.

D. *HARTE GOLD CORP. (RE)*⁹⁴

1. BACKGROUND

Over the last two years, reverse vesting orders (RVOs) have become increasingly popular in insolvency proceedings. This decision is the new leading case on RVOs and sets out the legal test for when it is appropriate for a court to grant approval of such a process.

2. FACTS

Harte Gold Corp. (Harte Gold) operated the Sugar Loaf gold mine near Sault Ste. Marie, Ontario, with assets valued at over \$163 million and liabilities exceeding \$166 million. Since 2019, it had worked with its lenders and restructuring advisors to find new capital through a potential sale. In late 2021, its priority secured lender had lost patience and proposed a restructuring to take over the assets by way of credit bid, using a share subscription agreement mechanism.⁹⁵

Harte Gold filed for CCAA protection in late 2021 and obtained a court order for an expedited sales and solicitation process (SISP). The priority secured creditor submitted its stalking horse bid and was ultimately deemed the successful bidder.⁹⁶ In a traditional insolvency sale, the SISP is formalized with an agreement for purchase and sale of assets, and effected by way of a vesting order, transferring the purchased assets into the hands of the purchaser free and clear. Following completion of the asset sale, any excluded assets and liabilities are left in the debtor company, which either falls into bankruptcy, or files a plan of arrangement for voting by its creditors.

In an RVO scenario, there is no asset sale effected by a vesting order, and no plan of arrangement to be voted on by creditors. Instead, assets are transferred between corporations within a corporate group such that the “good” assets are put into the hands of new shareholders, and the “unwanted” assets and liabilities are left behind or transferred into newly formed entities (ResidualCos). There are some distinct advantages to avoiding asset sales in certain circumstances — for example, if the asset in question is not able to be easily transferred to a new purchaser without government approval, because of permits, intangibles, licences, and so on.

⁹⁴ 2022 ONSC 653 [*Harte Gold*].

⁹⁵ *Ibid* at paras 3–10.

⁹⁶ *Ibid* at paras 10–11.

3. DECISION

The authority for granting a RVO in CCAA proceedings can be found under the general powers of the court described in section 11 of the CCAA. Justice Penny of the Ontario Superior Court of Justice noted that the use of RVOs should involve close scrutiny by the courts and should not become the norm for restructurings. The court needs to apply the relevant statutory test for sale approval, while considering: why it is necessary in each case; whether it produces an economic result which is just as favourable as another viable alternative; if any stakeholder is worse off than they would be under another alternative structure; and whether the consideration being paid fairly reflects the value of the assets preserved under the RVO structure.⁹⁷

In *Harte Gold*, the RVO was approved, as it allowed for a going-concern transfer of ownership while preserving the many permits and licences required to operate a gold mining operation. The Ontario Superior Court of Justice used the Ontario *Business Corporations Act*⁹⁸ to justify the cancellation and issuance of new shares and granted broad releases to the company's directors and officers.⁹⁹

4. COMMENTARY

It is easy to see why RVOs have become increasingly popular in recent years. By completing the transfer of assets through a corporate and share transaction within a corporate group, it allows for easy transfer of intangible assets, and avoids the cost and uncertainty of presenting a plan of arrangement to vote by the creditors. This case marks an attempt by the courts to put some standards and restraints around the use of RVOs. We have seen RVOs used in cannabis, mining, and other cases involving licences, leases and permits, and tax pools. We expect the use of these structures to continue in the years ahead.

E. *MONTRÉAL (CITY) V. DELOITTE RESTRUCTURING INC.*¹⁰⁰

1. BACKGROUND

SM Group was a consulting engineering firm who was part of a scandal involving construction contracts with the City of Montreal (Montreal). Montreal alleged that SM Group had committed collusion and fraud, giving rise to a damages claim. When SM Group later went insolvent, Montreal refused to pay for services rendered, claiming a right of set-off.

2. FACTS

The Province of Quebec had conducted a lengthy investigation into schemes involving collusion and corruption in the awarding and management of public contracts. Following that investigation, it entered into a settlement agreement with SM Group (on behalf of the

⁹⁷ *Ibid* at paras 36–38.

⁹⁸ RSO 1990, c B.16.

⁹⁹ *Harte Gold*, *supra* note 94 at paras 61–62.

¹⁰⁰ 2021 SCC 53 [*Deloitte*].

municipality) as part of a “voluntary reimbursement program” for recovery to the government of amounts improperly paid. Montreal also launched its own civil lawsuit against SM Group, alleging collusion in relation to a call for tenders for a water meter project. Before the case went to trial and the monies could be repaid, SM Group became insolvent and filed for creditor protection under the *CCAA*. While under *CCAA* protection, it continued to do work for Montreal, which created post-filing accounts payable, which Montreal refused to pay. Instead, Montreal sought to set-off debts owed to them prior to the *CCAA* order against post-filing payables.¹⁰¹

The monitor sought a declaration from the courts that Montreal could not assert set-off and must pay for services rendered post-filing. The Superior Court of Quebec granted the monitor’s request, and the ruling was upheld at the Quebec Court of Appeal. Montreal appealed to the Supreme Court of Canada.

3. DECISION

Generally speaking, it is not allowable to set-off pre-filing debt against post-filing debt. Insolvency legislation creates a “freeze” of creditors’ status and rights on the date of an insolvency filing. A stay of proceedings is put into place which prohibits any creditors from taking further collection action in order to ensure a level playing field, where all creditors are treated in accordance with priorities as set out in legislation and court orders. As a result, set-off rights are strictly construed, and are generally only allowed when both obligations occur before the date of insolvency.¹⁰²

However, the court retains a broad discretion pursuant to section 11 of the *CCAA*, and that discretion can be exercised to lift a stay of proceedings in appropriate circumstances.¹⁰³ In exceptional circumstances, it may be possible for a stay to be lifted to allow for pre-filing debt to be set-off against post-filing debt. The supervising judge must consider:

1. the appropriateness of the order being sought, assessed against the remedial purposes of the *CCAA*;
2. whether the applicant proceeded with due diligence; and
3. the good faith of the applicant.¹⁰⁴

One consideration the court may look to is whether the pre-filing debt is one which involves fraud and is therefore outside the general stay provisions pursuant to section 19(2)(d) of the *CCAA*.

The Supreme Court of Canada upheld the Quebec Court of Appeal’s decision that set-off was not permitted in this case. Participation in the voluntary reimbursement program was not an admission of fraud, and the claim was not one which fit within the definition of section

¹⁰¹ *Ibid* at paras 6–7.

¹⁰² *CCAA*, *supra* note 64, s 21.

¹⁰³ *Ibid*, s 11.

¹⁰⁴ *Deloitte*, *supra* note 100 at para 85.

19(2)(d) of the CCAA.¹⁰⁵ There were no “exceptional circumstances” in this case needed to break the general prohibition against pre-post set-off.¹⁰⁶

4. COMMENTARY

Set-off is a powerful remedy which can be used to provide recovery to unsecured creditors who would otherwise have to wait for a pro rata distribution with other unsecured creditors. A good example in the energy context is joint operating agreements, where joint venture partners can continually balance and set-off obligations. This Supreme Court of Canada decision confirmed that the scope of section 11 of the CCAA is wide enough to allow for the possibility of pre-post set-off, in the appropriate circumstances.

III. CIVIL PROCEDURE AND REMEDIES

Civil procedure rules are the weapons by which courtroom battles can be won or lost. This past year saw a Federal Court decision on interim orders to temporarily block a corporate merger and a Supreme Court of Canada decision on a sealing order arising from a notorious estates case. Additionally, the Alberta Court of Appeal provided guidance on the principle of res judicata in the context of private arbitrations and subsequent administrative proceedings.

A. *COMMISSIONER OF COMPETITION V. SECURE ENERGY SERVICES INC., AND TERVITA CORPORATION*¹⁰⁷

1. BACKGROUND

The Federal Court of Appeal confirmed that the Competition Tribunal has the jurisdiction to issue “interim interim” orders, which is intervening relief obtained prior to the granting of an “interim order” that temporarily blocks contested mergers and proposed transactions in urgent circumstances.

2. FACTS

On 12 March 2021, Secure Energy Services Inc. and Tervita Corporation (the Respondents) submitted to the Commissioner of Competition (the Commissioner) a pre-merger notification (the Proposed Transaction) pursuant to section 114(1) of the *Competition Act*.¹⁰⁸ The Commissioner issued a Supplementary Information Request, which was answered by the Respondents on 31 May 2021 and included a production of approximately 396,000 documents. In accordance with section 123 of the *Competition Act*, the Proposed Transaction could close 30 days later.¹⁰⁹ On 28 June 2021, the Respondents provided 72 hours’ notice of their intention to close the Proposed Transaction.¹¹⁰

¹⁰⁵ *Ibid* at para 21; *Voluntary Reimbursement Program*, CQLR c R-2.2.0.0.3, r 1; CCAA, *supra* note 64, s 19(2)(d).

¹⁰⁶ *Deloitte, ibid* at paras 88–95.

¹⁰⁷ 2022 FCA 25 [*Secure Energy*].

¹⁰⁸ RSC 1985, c C-34, s 114(1).

¹⁰⁹ *Ibid*, s 123.

¹¹⁰ *Secure Energy, supra* note 107 at paras 3–4.

On 29 June 2021, the Commissioner responded by filing two applications with the Competition Tribunal (the Tribunal) under the *Competition Act*. The applications sought various forms of relief, including: (1) an injunction under section 92 of the *Competition Act* to prevent the Proposed Transaction from closing based on its competitive impact;¹¹¹ (2) an interim order under section 104 of the *Competition Act* to prevent the Proposed Transaction from closing until a verdict was reached on the section 92 application;¹¹² and (3) an “interim interim” order to also prevent the Proposed Transaction from closing until the section 104 application could be heard. The Commissioner requested an emergency case management conference to discuss the application for an “interim interim” order, which was heard by the Tribunal on 30 June 2021.¹¹³

The Tribunal found it lacked jurisdiction to grant the temporary relief requested by the Commissioner and dismissed the Commissioner’s applications. Shortly after the Tribunal’s decision, the Respondents closed the Proposed Transaction.¹¹⁴ The Commissioner appealed.

3. DECISION

As the Proposed Transaction had already closed, the substantive issue before the Federal Court of Appeal was whether the Tribunal had the jurisdiction to grant “interim interim” relief to delay a proposed merger until an application for interim relief under section 104 of the *Competition Act* had been heard and decided.¹¹⁵ Section 104(1) contemplates the issuing of “any interim order” that the Tribunal considers appropriate, and this broad scope is limited only by reference to ‘principles ordinarily considered by superior courts when granting interlocutory or injunctive relief.’¹¹⁶ The Federal Court of Appeal found that the wording of section 104(1) did not preclude the type of interim interim relief sought by the Commissioner.¹¹⁷

The Federal Court of Appeal went on to assert that there was nothing in the context of section 104 that suggested the broad power of the Tribunal to issue “any interim order that it [considered] appropriate’ should be read more narrowly than a plain textual reading suggests.”¹¹⁸ The intent of the merger review scheme provided for in the *Competition Act*, including in section 104, is to ensure that proposed mergers can be reviewed and, if necessary, challenged *before* they close.¹¹⁹ The Tribunal maintains the role of deciding whether relief is fair and appropriate in the circumstances of each case and may refuse to grant relief where it is inappropriate.¹²⁰

Having considered the text, context, and purpose of section 104, the Federal Court of Appeal concluded that the Tribunal has jurisdiction, in the proper circumstances, to grant both interlocutory relief (as that term is typically used in superior courts) pending a decision

¹¹¹ *Competition Act*, *supra* note 108, s 92.

¹¹² *Ibid*, s 104.

¹¹³ *Secure Energy*, *supra* note 107 at para 5.

¹¹⁴ *Ibid* at para 6.

¹¹⁵ *Ibid* at para 46.

¹¹⁶ *Ibid* at para 56, citing *Competition Act*, *supra* note 108, s 104(1).

¹¹⁷ *Secure Energy*, *ibid*.

¹¹⁸ *Ibid* at para 63.

¹¹⁹ *Ibid* at para 64.

¹²⁰ *Ibid* at para 66.

on application under section 92, and interim relief (again, as that term is typically used in superior courts) pending a decision on whether to grant interlocutory relief.¹²¹

4. COMMENTARY

Although the relief granted in this circumstance was moot because the Proposed Transaction had already closed, the Federal Court of Appeal's decision clarified the Tribunal's ability to prevent transactions from closing when the Competition Bureau is conducting merger reviews. Notably, the Competition Bureau issued a press release following the decision welcoming the ruling and stating it would "continue to use all of the tools at its disposal in keeping with its mandate to protect competition and the public interest."¹²² Parties should keep this decision in mind when considering their strategy in dealing with the Competition Bureau and determining the timing of closing a reviewable transaction under the *Competition Act*.

B. *SHERMAN ESTATE V. DONOVAN*¹²³

1. BACKGROUND

Wealthy philanthropists Bernard and Honey Sherman were found dead in their home in December 2017. The resulting criminal investigation and legal proceedings attracted intense media scrutiny. The trustees of their estates sought sealing orders over the court files related to the probate of their estates. This case was the first time the Supreme Court of Canada has had an opportunity to refine the test for the granting of sealing orders, and to consider the extent to which privacy concerns interact with the principles of free speech and open court.

2. FACTS

Justice Dunphy of the Ontario Superior Court of Justice granted the sealing order, sealing the court files for two years, with a possibility of renewal. A journalist and the newspaper investigating the murders appealed, arguing that the sealing orders violated the constitutional rights of freedom of expression and freedom of the press, as well as the open court principle.¹²⁴ Since 2002, the legal test for sealing orders has been set out in the Supreme Court of Canada decision in *Sierra Club of Canada v. Canada (Minister of Finance)*:

1. the "order is necessary to prevent a serious risk to an important interest, including a commercial interest ... because reasonably alternative measures will not prevent the risk"; and

¹²¹ *Ibid* at para 67.

¹²² Competition Bureau Canada, News Release, "Federal Court of Appeal Confirms that the Competition Tribunal has the Power to Temporarily Block Mergers" (14 February 2022), online: <canada.ca/en/competition-bureau/news/2022/02/federal-court-of-appeal-confirms-that-the-competition-tribunal-has-the-power-to-temporarily-block-mergers.html>.

¹²³ 2021 SCC 25 [*Sherman Estate*].

¹²⁴ *Ibid* at para 12.

2. the positive effects of the order outweigh the negative effects, including the public interest in open court proceedings.¹²⁵

3. ONTARIO COURT OF APPEAL DECISION

The journalist and newspaper appealed the sealing order to the Ontario Court of Appeal, who overturned Justice Dunphy's decision. The Ontario Court of Appeal noted that the privacy interest in question was simply a personal concern and "there was no evidence [in this case] that could warrant a finding that disclosure of the content of the estate files posed a real risk to anyone's physical safety."¹²⁶

4. SUPREME COURT OF CANADA DECISION

The trustees appealed to the Supreme Court of Canada, who denied the appeal. The central issue considered was whether the privacy of the affected individuals and their physical safety amounted to important public interests that were of such a serious risk that the file should be sealed. The Supreme Court stated that the *Sierra Club* test should be reformulated as follows, so that three core prerequisites are required:

- (1) [C]ourt openness poses a serious risk to an important public interest;
- (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,
- (3) as a matter of proportionality, the benefits of the order outweigh its negative effects.¹²⁷

In the *Sherman* case, the trustees wanted to seal information like names and addresses, the identity of estate administrators, the extent of assets dealt with within the estates, and the identities of beneficiaries. The Supreme Court confirmed that this type of information did not involve the core biographical data which would have justified a sealing order and a less onerous order (like a publication ban) would have been sufficient to mitigate any risk.¹²⁸

5. COMMENTARY

Since the *Sierra Club* decision in 2002, sealing orders have been regularly granted by the Alberta courts, often to protect commercial interests. For example, sealing orders are routinely granted where assets are being sold in a court-supervised sales process under insolvency statutes. Sellers and purchasers are able to obtain the benefit of a court vesting order while having their confidential pricing structures, customer lists, and other commercially sensitive information sealed by court order. These orders are designed to protect the public interest in ensuring the integrity of a court-supervised sale process. Private economic harm is not generally considered an important enough public interest to justify a sealing order. The *Sherman Estate* case, which reformulates the *Sierra Club* test, is an

¹²⁵ *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41 at para 53 [*Sierra Club*].

¹²⁶ *Donovan v Sherman Estate*, 2019 ONCA 376 at para 13; *Sherman Estate*, *supra* note 123 at para 19.

¹²⁷ *Sherman Estate*, *ibid* at para 38.

¹²⁸ *Ibid* at para 89.

indicator that the courts are increasingly giving greater scrutiny to sealing order requests, and the Alberta Court of King’s Bench is now requiring that specific electronic notices to media accompany each sealing order request.

**C. *TRANSALTA CORPORATION*
*V. ALBERTA (UTILITIES COMMISSION)***¹²⁹

1. BACKGROUND

In this appeal, revolving around the decommissioning costs of a power plant, the Alberta Court of Appeal reviewed the principle of *res judicata* and found that it cannot be used to overturn interlocutory decisions, nor used to bind administrative bodies to the decisions of private arbitrations. The Alberta Court of Appeal also dealt with standard of review and possibly signalled a widening of the scope of review for correctness.

2. FACTS

This appeal relates to TransAlta Corporation’s (TransAlta) application to the Alberta Utilities Commission (AUC) for payment from the Balancing Pool of costs to decommission two generating units, namely Sundance A Generating Units 1 and 2 (the Sundance A Units), specifically whether costs related to decommissioning the associated Highvale Mine (the Mine) can be included (Decommissioning Application).

Pursuant to section 5 of the *Power Purchase Arrangements Regulation*,¹³⁰ the owner of a “generating unit” can recover the costs of decommissioning a power plant. Generating unit is defined in the *Electric Utilities Act*,¹³¹ which was the *PPA Regulation*’s enabling statute, as including “associated facilities” such as “fuel and fuel handling equipment” that are “necessary for the safe, reliable and economic operation of the generating unit, which may be used in common with other generating units.”¹³² TransAlta asserted that the Mine is an associated facility and therefore the decommissioning costs should also include a portion of the costs to decommission the Mine proportionate to the amount of Mine product that was used as fuel for the Sundance A Units.

Prior to TransAlta’s Decommissioning Application for the Sundance A Units, TransAlta and the Balancing Pool had participated in a private arbitration pursuant to the *Arbitration Act*¹³³ dealing with the Balancing Pool’s obligation to pay the decommissioning costs of other generating units at the Sundance Power Plant (the Arbitration). In the Arbitration, it was decided that the Mine was an associated facility of the Sundance B and C generating units. In its Decommissioning Application for the Sundance A Units, TransAlta filed an application seeking an order that the issue of whether the decommissioning costs of the Mine should be included in the decommissioning costs of the Sundance A Units was *res judicata*, meaning

¹²⁹ 2022 ABCA 37 [*TransAlta*].

¹³⁰ Alta Reg 167/2003, as repealed by *Electric Utilities Act*, SA 2003, c E-5.1 [*PPA Regulation*].

¹³¹ SA 2003, c E-5.1.

¹³² *Ibid*, s 1(1)(u).

¹³³ RSA 2000, c A-43.

that the AUC would be bound by the findings from the Arbitration. This application was refused by the AUC.

3. DECISION

The Alberta Court of Appeal affirmed the AUC's decision to refuse the application. First, the Court noted that the AUC's refusal of TransAlta's application was an interlocutory ruling in an unfinished proceeding. By refusing the application, the AUC had not decided to completely dismiss the findings of fact from the Arbitration, but had instead indicated that it would decide the issue of decommissioning costs at the end of the process.¹³⁴ Because the AUC may still ultimately agree with the findings from the Arbitration, the Court found that it was premature to find that the AUC had erred by not adhering to said findings. "[T]he Court would be doing so on a premise of inevitable future 'error' which the law does not assume."¹³⁵

Second, it was noted that the AUC was not bound by the legal conclusions arising from the Arbitration as the Arbitration and the application were decided in different contexts under different enactments.¹³⁶ The Court balked at the idea that a regulatory tribunal could be bound by the findings from a private arbitration, specifically stating that:

[I]t is inconceivable that the Legislature would intend that a socially important legislative responsibility with polycentric characteristics and with the public interest at its heart (as given to an expert tribunal) could be sidelined by private arbitral dealings between interested parties, even if those dealings are allowed under the same overall legislative scheme.¹³⁷

4. COMMENTARY

In *TransAlta*, the Alberta Court of Appeal emphasizes that parties must typically exhaust their remedies within the tribunal system before the courts will intervene. The courts are wary to step on the toes of administrative bodies especially in a situation where an issue has not yet been decided finally. The Court also firmly stated that arbitral awards cannot form the basis for *res judicata* claims in subsequent administrative proceedings.

Of note, the Alberta Court of Appeal decided that the applicable standard of review in this situation was that of correctness. This was based on *Canada (Minister of Citizenship and Immigration) v. Vavilov*¹³⁸ and *Northern Regional Health Authority v. Horrocks*,¹³⁹ which established that correctness is the appropriate standard of review when dealing with jurisdictional lines between two administrative bodies. However, the Arbitration was not conducted by an administrative body making a statutorily authorized decision. As noted in Justice O'Ferrall's concurring reasons, "[t]he *Arbitration Act* is simply a private law statute intended to provide parties with a process for settling their disputes if they so choose."¹⁴⁰ It

¹³⁴ *TransAlta*, *supra* note 129 at paras 33–36.

¹³⁵ *Ibid* at para 42.

¹³⁶ *Ibid* at paras 45–46.

¹³⁷ *Ibid* at para 48.

¹³⁸ 2019 SCC 65 [*Vavilov*].

¹³⁹ 2021 SCC 42.

¹⁴⁰ *TransAlta*, *supra* note 129 at para 133.

is possible that this decision signals an expansion of the standard of review principles post-*Vavilov*.

IV. CLASS ACTIONS

Class actions can arise from multiple sources, including environmental claims and consumer protection legislation. The courts in British Columbia and Alberta recently dealt with two such cases, one alleging price manipulation of retail gasoline as an “unconscionable transaction” under British Columbia’s consumer protection legislation, and the other alleging pure economic loss arising from the loss of use of waterways affected by a pipeline spill.

A. *PANTUSA V. PARKLAND FUEL CORPORATION*¹⁴¹

1. BACKGROUND

In this case regarding the retail price of gasoline, the British Columbia Supreme Court clarified the limits to the doctrine of unconscionability under the *Business Practices and Consumer Protection Act*.¹⁴²

2. FACTS

The plaintiff sought an order certifying his action as a class proceeding on behalf of all those who purchased retail gasoline in British Columbia for personal, family, or household purposes, from 1 January 2015 to 2 March 2022. The plaintiff alleged that the defendants breached section 9 of the *BPCPA*, which prohibits suppliers from committing or engaging in an “unconscionable act or practice in respect of a consumer transaction.”¹⁴³ It was alleged that this provision was breached because the defendants had been abusing their position of control over the wholesale gasoline market by overcharging their wholesale customers, who then sold to consumers, resulting in “inordinately high” retail gasoline prices.¹⁴⁴

The defendants, a consortium of refiners and wholesale marketers of gasoline, sought to have the plaintiff’s claim dismissed on summary judgment.¹⁴⁵

3. DECISION

The British Columbia Supreme Court granted summary judgment, finding that there were no genuine issues for trial.¹⁴⁶ In doing so, the British Columbia Supreme Court outlined the limits to the doctrine of unconscionability under the *BPCPA*. It was found that a consumer transaction is not unconscionable simply because the sellers operate in an oligopoly that allows them to charge higher prices than in a perfectly competitive market.¹⁴⁷ It was also

¹⁴¹ 2022 BCSC 322 [*Pantusa*].

¹⁴² SBC 2004, c 2 [*BPCPA*].

¹⁴³ *Pantusa*, *supra* note 141 at para 2; *BPCPA*, *ibid*, s 9.

¹⁴⁴ *Pantusa*, *ibid* at paras 1, 7.

¹⁴⁵ *Ibid* at para 4.

¹⁴⁶ *Ibid* at paras 134–35.

¹⁴⁷ *Ibid* at paras 114–15, 131.

found that benchmark pricing is not an inherently unconscionable practice.¹⁴⁸ Lastly, the British Columbia Supreme Court stated that the court will not regulate prices under the *BPCPA* as such issues are matters of public policy and are best left to the government to consider.¹⁴⁹

4. COMMENTARY

This decision provides important benchmarks for the doctrine of unconscionability under the *BPCPA*. It demonstrates the high standard needed to prove unconscionability and shows the general unwillingness of the courts to step into a regulatory role and interfere with the pricing decisions made by sophisticated companies, such as the refiners and wholesale gasoline marketers involved in this case.

As noted in *Pantusa*, abuses of market power are typically regulated under the *Competition Act*, and not under provincial consumer protection legislation.¹⁵⁰

B. *RIEGER V. PLAINS MIDSTREAM CANADA ULC*¹⁵¹

1. BACKGROUND

The *Plains Midstream* decision provides insight for tort-based environmental class actions and reaffirms the Supreme Court of Canada's recent decision in *1688782 Ontario Inc. v. Maple Leaf Foods Inc.*¹⁵² concerning pure economic loss claims.

2. FACTS

In *Plains Midstream*, Suzanne and Darin Rieger (the Riegers) sought to have a class action certified arising from a ruptured pipeline owned and operated by Plains Midstream Canada ULC (Plains). Plains accepted responsibility for the spill and, prior to the commencement of the class proceedings, had proactively settled with approximately 517 landowners, residents, and business owners who were directly impacted by the spill. Those settlements totaled approximately \$40,000,000.¹⁵³ Interestingly, the Riegers, who commenced the class action, sustained no physical damage to their lands nor to themselves personally. Accordingly, the Riegers' claim was for pure economic loss only, which included: (1) damages for loss of use of Gleniffer Lake and Red Deer River; and (2) diminution of their property value.¹⁵⁴

On application for certification, the chambers judge rejected Plains' argument that there was no cause of action for pure economic loss and certified the class proceeding. The judge found that, while the plaintiffs would face challenges making out their claim, it was not

¹⁴⁸ *Ibid* at paras 116–19.

¹⁴⁹ *Ibid* at para 132.

¹⁵⁰ *Ibid* at para 127.

¹⁵¹ 2022 ABCA 28 [*Plains Midstream*].

¹⁵² 2020 SCC 35 [*Maple Leaf*].

¹⁵³ *Plains Midstream*, *supra* note 151 at paras 4–5.

¹⁵⁴ *Ibid* at paras 2–5.

hopeless because the area of law concerning pure economic loss was unsettled.¹⁵⁵ Notably, the chambers judge's decision was released prior to *Maple Leaf*.

Plains appealed this decision to the Alberta Court of Appeal on the basis that the chambers judge erred in law by finding that the claim of the Riegers for relational economic loss might succeed, which led him to grant certification when it should have been refused. In the alternative, Plains argued that the chambers judge erred in: (1) certifying the class with no relational or objective connection to the causes of action plead; and (2) failing to apply the proper legal test concerning certification of common issues pursuant to section 5 of the *Class Proceedings Act*.¹⁵⁶

3. DECISION

The Alberta Court of Appeal overturned the certification order on two grounds. First, the Alberta Court of Appeal held that, in light of *Maple Leaf*, the Riegers' claim for relational economic loss could not succeed. The Supreme Court of Canada in *Maple Leaf* clarified that "there is no general right, in tort, protecting against the negligent or intentional infliction of pure economic loss."¹⁵⁷ The Supreme Court went on to state that what matters in determining liability is "whether the parties were at the time of the loss in a sufficiently proximate relationship."¹⁵⁸ The Alberta Court of Appeal found that the Riegers' physical proximity to the pipeline and Gleniffer Lake was not enough to establish a sufficiently proximate relationship and therefore they were unable to show that a novel duty of care existed between the parties.¹⁵⁹ As a result, the Alberta Court of Appeal stated that Riegers had no cause of action against Plains, as required by section 5 of the *CPA*, and the proceeding could not be certified as a class proceeding.¹⁶⁰

Second, the Alberta Court of Appeal found that the class definition proposed by the Riegers was too large and arbitrary to be certified.¹⁶¹ The geographical area, approximately 1,400 kilometres, was too large and would likely be overinclusive. Additionally, the Alberta Court of Appeal noted that those proposed class members who were directly impacted by the spill had already signed releases after agreeing to settle with Plains. In the circumstances, a class action was not the preferable method of litigation as there was a risk that "the class will become fragmented and that individual issues will dominate the proceeding."¹⁶²

4. COMMENTARY

While *Maple Leaf* was decided in the context of product liability, it is clear that its impact will extend far beyond its subject matter, as we have seen in *Plains Midstream*. Going forward, those seeking damages for environmental torts will need to establish a sufficiently proximate relationship in order to certify class actions, or otherwise. In the class proceeding

¹⁵⁵ *Ibid* at para 6.

¹⁵⁶ *Ibid* at para 12; *Class Proceedings Act*, SA 2003, c C-16.5, s 5 [*CPA*].

¹⁵⁷ *Maple Leaf*, *supra* note 152 at para 19.

¹⁵⁸ *Ibid* at para 22.

¹⁵⁹ *Plains Midstream*, *supra* note 151 at para 50.

¹⁶⁰ *Ibid* at para 64.

¹⁶¹ *Ibid* at para 77.

¹⁶² *Ibid* at para 80.

context, the Alberta Court of Appeal's application of *Maple Leaf* in *Rieger* reinforces the court's gatekeeper function in class proceedings and highlights importance for hopeless claims to be screened out at an early stage. Moreover, it begs the question of whether the court's "low bar" for certifying class proceedings should remain as it presently stands.

V. CONTRACTS

Contracts are the core of an energy lawyer's work, and even boilerplate clauses can attract judicial scrutiny in the right circumstances. The Supreme Court of Canada released an important decision with respect to releases/limitation of liability clauses; the British Columbia Court of Appeal examined the meaning of the phrase "best efforts"; and the Ontario Superior Court of Justice considered whether the pandemic could constitute a material adverse effect in the context of a failed mega-merger.

A. *CORNER BROOK (CITY) V. BAILEY*¹⁶³

1. BACKGROUND

The Supreme Court of Canada reviewed the current state of the law governing the interpretation of releases and the extent of limitations on liability. Specifically, the Supreme Court had an opportunity to consider whether previous jurisprudence continues to establish a strict rule that releases are always limited to those things specifically contemplated by the words in the release or whether a more flexible, purposive approach is more appropriate.

2. FACTS

While operating her husband's vehicle, a third-party civilian (Bailey) struck a City of Corner Brook (Corner Brook) employee who was performing road work (the Incident). The employee sued Bailey for injuries he had sustained in the incident by way of a statement of claim.¹⁶⁴

In a separate action, Bailey and her husband sued Corner Brook for injuries and damage sustained in relation to the Incident. Bailey and her husband later settled with Corner Brook, released Corner Brook from liability relating to the Incident, and discontinued their action (the Release).¹⁶⁵ Among other things, the Release purported to release Corner Brook for "*all demands and claims of any kind or nature whatsoever arising out of or relating to the [Incident] which occurred on or about March 3, 2009, and without limiting the generality of the foregoing from all claims raised or which could have been raised in the [Bailey Action]*."¹⁶⁶

Years after entering the Release, Bailey brought a third-party claim against Corner Brook for contribution or indemnity in the action brought by the Corner Brook employee. Corner Brook responded by bringing a summary trial application on the basis that the release barred

¹⁶³ 2021 SCC 29 [*Corner Brook*].

¹⁶⁴ *Ibid* at paras 2, 5–6.

¹⁶⁵ *Ibid* at paras 5–7.

¹⁶⁶ *Ibid* at para 7 [emphasis in original].

the third-party claim. Bailey maintained that the Release did not bar the third-party claim, because the third-party claim was not specifically contemplated by the parties when they signed the release.¹⁶⁷

The application judge concluded the release barred Bailey's third-party claim against Corner Brook and stayed the claim.¹⁶⁸ The Court of Appeal of Newfoundland and Labrador unanimously allowed the appeal and reinstated the third-party notice.¹⁶⁹ Corner Brook appealed to the Supreme Court of Canada.

3. DECISION

The Supreme Court allowed the appeal, holding the Release did bar Bailey's third-party claim through use of the words "any and all claims" in relation to the Incident, and the order of the application judge was reinstated.¹⁷⁰

The Supreme Court held that courts should no longer refer to the rule set out in *London and South Western Railway Co. v. Blackmore*¹⁷¹ that the general words in a release are limited always to those things which were specifically in the contemplation of the parties at the time of the release. Rather, the *Blackmore* rule has been entirely subsumed by the principles set out in the Supreme Court's decision in *Sattva Capital Corp. v. Creston Moly Corp.*¹⁷² and courts are to read a contract broadly as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of the formation of the contract.¹⁷³

In coming to its conclusion, the Supreme Court rejected the notion that explicit language is *always* required to prove that a release surrenders rights and claims that the releasing party was unaware of.¹⁷⁴ It is a sensible approach for parties to consider wording that makes it clear whether the release will cover unknown claims and whether the claims must be related to a particular area or subject matter. Further, the Supreme Court suggested that releases that are narrowed to a particular time frame or subject matter are less likely to give rise to tension between the words of the release and what the surrounding circumstances indicate the parties objectively intended.¹⁷⁵ Courts should consider releases in the context of the dispute itself, with the dispute serving as a limiting factor to the breadth of wording found in the release.¹⁷⁶

However, a release can be found to cover unknown claims without particularizing with precision the *exact claims* that fall within its scope.¹⁷⁷ In the present case, even though the parties had not explicitly turned their minds to the possibility of a third-party claim, it was

¹⁶⁷ *Ibid* at paras 8–9.

¹⁶⁸ *Temple v Bailey*, 2018 NLSC 177.

¹⁶⁹ *Bailey v Temple*, 2020 NLCA 3; *Corner Brook*, *supra* note 163 at paras 10–13.

¹⁷⁰ *Corner Brook*, *ibid* at para 59.

¹⁷¹ (1870), LR 4 HL 610 [*Blackmore*].

¹⁷² 2014 SCC 53 [*Sattva*].

¹⁷³ *Corner Brook*, *supra* note 163 at paras 20–34.

¹⁷⁴ *Ibid* at para 48.

¹⁷⁵ *Ibid* at para 41.

¹⁷⁶ *Ibid* at para 36.

¹⁷⁷ *Ibid* at para 27.

their mutual intent to cover *all types of claims relating to the accident*. As such, the release covered the third-party claim.¹⁷⁸

4. COMMENTARY

The *Corner Brook* decision serves as a reminder of the omnipresence of *Sattva*'s requirement that surrounding circumstances should always be considered in interpreting contracts and such contracts are always read purposively, with words given their ordinary and grammatical meaning. *Corner Brook* also dismisses any uncertainty over the continued application of the *Blackmore* rule, holding in no uncertain terms that the rule has been entirely subsumed by *Sattva*.

Practically, *Corner Brook* provides a few key insights relevant for those involved in drafting and interpreting enforceable releases. Most notably, the reasoning of the Supreme Court in *Corner Brook* means it is unnecessary to provide an exhaustive list of all possible claims in releases. Language such as “any and all claims” can be taken on its face to encompass all possible claims. In fact, providing a list of claims and forgetting to use language such as “including but not limited to” may inadvertently restrict the applicability and coverage of the release only to those mentioned.

B. SUTTER HILL MANAGEMENT CORPORATION V. MPIRE CAPITAL CORPORATION¹⁷⁹

1. BACKGROUND

In *Sutter*, the British Columbia Court of Appeal interprets the meaning of contractual terms regarding using “commercially reasonable best efforts” to obtain regulatory approval “as soon as possible.”

2. FACTS

On 14 January 2016, the parties entered into an agreement regarding the purchase and sale of a care home in British Columbia that required the respondent to obtain regulatory approvals from the Fraser Health Authority (FHA). On 31 July 2017, the parties entered into an amended and restated purchase agreement that included a term that stated “[t]he Purchaser shall use commercially reasonable best efforts to satisfy the condition precedent set out in this Section 2.5 as soon as possible,” the condition precedent being obtaining regulatory approval from the FHA.¹⁸⁰

On 8 November 2017, the FHA sent three agreements to the respondent for review and comment that were to be executed as part of the final approval process. From 8 November to 20 November 2017, the respondent’s counsel did nothing with these agreements. On 20 November 2017, the respondent’s Ontario solicitor advised the respondents that he lacked

¹⁷⁸ *Ibid* at para 54.

¹⁷⁹ 2022 BCCA 13 [*Sutter*].

¹⁸⁰ *Ibid* at paras 2, 15 [emphasis in original].

expertise to advise about the agreements, stating that they should find British Columbia legal counsel to review them. By 27 November 2017, the agreements had yet to be returned to the FHA. The appellants gave notice of default, stating that the aforementioned clause in the amended and restated purchase agreement had been breached. The respondents nonetheless indicated their desire to complete the transaction, but by 14 December 2017, the agreements still had yet to be returned to the FHA.¹⁸¹

3. DECISION

The question before the British Columbia Court of Appeal was whether the respondents had used “commercially reasonable best efforts” to obtain approval from FHA “as soon as possible.” The British Columbia Court of Appeal applied the *Sattva* rules of contractual interpretation that state that a contract must be interpreted with a “‘practical, common-sense approach’ to the interpretation on contracts, ‘not dominated by technical rules of construction.’”¹⁸² The overriding concern is to determine “the intent of the parties and the scope of their understanding.”¹⁸³ The chambers judge decided to interpret the terms “commercially reasonable best efforts” and “as soon as possible” separate from each other; the British Columbia Court of Appeal found this to be a mistake of law. The clause must be considered in its totality, using a contextual approach to determine what the parties intended.¹⁸⁴

The British Columbia Court of Appeal disagreed with the chambers judge that the word “best” does not add anything to the phrase “commercially reasonable best efforts.” “Commercially reasonable efforts” typically means making choices based on sound judgment. However, given the surrounding circumstances and the desire to obtain regulatory approval “as soon as possible,” the addition of the word “best” must indicate a desired standard that falls somewhere between “commercially reasonable efforts” and “best efforts,” a standard that implies no stone is to be left unturned.¹⁸⁵ The British Columbia Court of Appeal concluded that by inserting this clause, the parties intended that “the purchaser would do everything it reasonably could to obtain the necessary approvals as soon as possible, excepting only such steps as would be commercially unreasonable.”¹⁸⁶

Based on this interpretation, the British Columbia Court of Appeal went on to find that the respondents had not met this standard and were therefore in breach of the contract. They had not done everything they reasonably could do to obtain the necessary approvals as soon as possible.¹⁸⁷ The British Columbia Court of Appeal also rejected the respondent’s position that much of the delay was caused by their legal counsel and that such delay could not be attributed to them. As an agent of the respondent, it is trite law that the delay caused by the respondent’s solicitor must be attributed to the respondent.¹⁸⁸

¹⁸¹ *Ibid* at paras 18–21.

¹⁸² *Ibid* at para 30.

¹⁸³ *Sattva*, *supra* note 172 at para 47; *Sutter*, *ibid* [citations omitted].

¹⁸⁴ *Sutter*, *ibid* at para 32.

¹⁸⁵ *Ibid* at paras 39–40.

¹⁸⁶ *Ibid* at para 41.

¹⁸⁷ *Ibid* at para 107.

¹⁸⁸ *Ibid* at para 97.

The respondent's application for leave to appeal to the Supreme Court of Canada was dismissed.¹⁸⁹

4. COMMENTARY

Sutter serves as important reminder about being cautious and precise in choosing language to include in a contract. Parties should be careful about deviating from standard contractual terms and using language that has not been widely interpreted by the courts, such as “commercially reasonable best efforts ... as soon as possible.” Better yet, parties are well-advised to use precise terms that specify a specific time period, as opposed to comparatively vague terms such as “best efforts” and “commercially reasonable efforts.”

If parties choose to use such terminology, they should be aware that “best efforts” represents a high standard that requires parties to “leave no stone unturned,” whereas “commercially reasonable efforts” represents a lower standard that allows parties to exercise their business judgment. “Commercially reasonable best efforts ... as soon as possible” represents a middle ground that requires parties to fulfil their duties as soon as possible, excepting any steps that would be commercially unreasonable.

Additionally, *Sutter* shows the importance of retaining local counsel when engaged in multi-jurisdictional transactions. Any delays caused by a party's counsel getting up to speed or by searching for local counsel will ultimately be attributed to that party.

C. *CINEPLEX V. CINEWORLD*¹⁹⁰

1. BACKGROUND

The *Cineplex* decision out of the Ontario Superior Court of Justice considers the interpretation of material adverse effect (MAE) and “ordinary course” operating covenant clauses in Canada, particularly in the context of a worldwide pandemic.

2. FACTS

Cineplex, Canada's largest movie theatre operator, and Cineworld, a U.K.-based movie theatre operator, entered into an arrangement agreement (the Arrangement Agreement), which was to proceed by statutory plan of arrangement, in December 2019 where Cineworld would acquire all the shares of Cineplex for CAD \$34/share. The transaction was valued at approximately CAD \$2.8 billion. The deal would close no later than 30 June 2020.¹⁹¹

As the COVID-19 pandemic intensified in March 2020, all theatres in Canada were required to close.¹⁹² On 12 June 2020, Cineworld purported to give Cineplex notice that it

¹⁸⁹ *Sutter Hill Management Corporation v. Mpire Capital Corporation*, 2022 BCCA 13, leave to appeal to SCC refused, 40112 (1 September 2022).

¹⁹⁰ 2021 ONSC 8016 [*Cineplex*].

¹⁹¹ *Ibid* at para 1.

¹⁹² *Ibid* at para 30.

was terminating the Arrangement Agreement.¹⁹³ Cineplex proceeded to sue for breach of contract.¹⁹⁴ Cineworld did not negotiate a “break fee” in the Arrangement Agreement to allow it to walk away from the transaction.¹⁹⁵

Two provisions were particularly important in this decision: the “operating covenant” clause, requiring Cineplex to operate its business in the “Ordinary Course and in accordance with Laws” between signing the Arrangement Agreement and closing (the Operating Covenant);¹⁹⁶ and the MAE clause, which provided that Cineworld could refuse to close if a MAE occurred, except if it was caused by, among other things, “outbreaks of illness or other acts of God.”¹⁹⁷

3. DECISION

The Ontario Superior Court of Justice rejected Cineworld’s argument that Cineplex had failed to abide by the Operating Covenant’s requirement to operate in the “ordinary course” by closing theatres. It had no choice but to shut its theatres when required to do so by the government under various public health orders.¹⁹⁸ Additionally, the Ontario Superior Court of Justice found that none of Cineplex’s actions during the pandemic were so drastic so as to alter its business to the extent it was outside of the “ordinary course.”¹⁹⁹

The Ontario Superior Court of Justice was also persuaded that by carving out “outbreaks of illness” from the definition of MAE, the parties allocated the risk of a pandemic to Cineworld.²⁰⁰ A clause requiring a company to operate in the “ordinary course of business” has to be read in the context of risks transferred to the buyer.²⁰¹ Cineworld assumed this risk and could not transfer it back to Cineplex as if COVID-19 did not exist.

The Ontario Superior Court of Justice ultimately awarded damages to Cineplex based on the “loss of synergies”²⁰² that Cineplex would have gained by merging with Cineworld: approximately CAD \$1.24 billion. The Ontario Superior Court of Justice stated that “[a]lthough the ultimate benefit of the synergies would have accrued to Cineworld as the shareholder of Cineplex ... it [did] not change the fact that these synergies would have been realized by the corporate entity, Cineplex.”²⁰³

Cineworld has since appealed this decision and the appeal is set to be heard by the Ontario Court of Appeal.

¹⁹³ *Ibid* at para 39.

¹⁹⁴ *Ibid* at para 4.

¹⁹⁵ *Ibid* at para 185.

¹⁹⁶ *Ibid* at paras 41–43.

¹⁹⁷ *Ibid* at para 45.

¹⁹⁸ *Ibid* at paras 122–23.

¹⁹⁹ *Ibid* at paras 124–25.

²⁰⁰ *Ibid* at para 126.

²⁰¹ *Ibid* at para 107.

²⁰² *Ibid* at paras 153, 159.

²⁰³ *Ibid* at paras 176.

4. COMMENTARY

The *Cineplex* case serves as a reminder of the importance of negotiating seemingly boilerplate clauses such as MAEs or “ordinary course of business” clauses in transactional contracts, including in the natural resource development industries. Specifically in today’s uncertain and unpredictable state, ensuring that contracting parties are carving out exceptions to allow an avenue to escape a mired transaction will mitigate against suffering the same fate as Cineworld.

More importantly, though, is the Court’s discussion of the interaction between “ordinary course” covenants and MAE exclusions and how these provisions must be read in the context of how risk is transferred to the purchaser. Drafters of similar agreements should be cognizant of these findings and draft agreements with these concepts front of mind.

It is also prudent to note that the Court’s interpretation of MAE clauses was consistent with the interpretation adopted in *Fairstone Financial Holdings Inc. v. Duo Bank of Canada*,²⁰⁴ in which the Ontario Superior Court of Justice held a MAE is “the occurrence of unknown events that substantially threaten the overall earnings potential of the target in a durationally-significant manner.”²⁰⁵

Cineworld has since appealed the Ontario Superior Court of Justice’s decision, so further developments on the principles above may be forthcoming.

VI. CORPORATE

In most cases, boardroom battles are held behind closed doors, but this past year saw two cases where the battles spilled into the courtrooms, including the highly publicized battle for control of Rogers Communications. Additionally, the courts looked at the thorny issue of whether directors can be held accountable for fraudulent or improper transfers under the “corporate attribution” doctrine.

A. *BAYLIN TECHNOLOGIES INC. v. GELEMAN*²⁰⁶

1. BACKGROUND

The Toronto Stock Exchange (TSX) Company Manual requires issuers to establish a majority voting policy where said issuer does not have a majority shareholder, for purposes of electing and removing directors from issuers’ board. The Ontario Court of Appeal was asked to determine the interpretation and application of such a voting policy.

²⁰⁴ 2020 ONSC 7397 [*Fairstone*].

²⁰⁵ *Cineplex*, *supra* note 190 at para 105; *Fairstone*, *ibid* at para 64.

²⁰⁶ 2021 ONCA 45 [*Baylin*].

2. FACTS

Pursuant to an asset purchase agreement (APA), the appellant Baylin Technologies Inc. (Baylin) acquired various assets from the respondent Spacebridge Inc. (Spacebridge). The individual respondent, David Gelerman (Gelerman), founded Spacebridge. Under the APA, Baylin agreed to nominate Gelerman for election to its board of directors for the 2018 and 2019 annual general meeting of the shareholders.

Baylin was listed on the TSX. The TSX's majority voting policy at section 461.3 of the TSX Manual states that every issuer listed on the TSX that does not have a majority shareholder must establish a majority voting policy requiring that directors be elected by 50 percent +1 of votes cast, or else resign, absent exceptional circumstances.²⁰⁷ As a result of a separate Baylin acquisition in 2018, Baylin ceased to have a majority shareholder and was therefore required to adopt the majority voting policy, which was adopted in March 2019 (Majority Voting Policy).²⁰⁸

Baylin's Majority Voting Policy provided that if a director received more withheld votes than "for" votes at any shareholders meeting where shareholders vote on the uncontested election of directors, the director must immediately submit their resignation to the Board. However, there were also three carveouts in Baylin's Majority Voting Policy which provided for limited exceptional circumstances for not accepting a director's resignation.²⁰⁹ Baylin's Majority Voting Policy also did not expressly include an "exceptional circumstance" for non-compliance with commercial agreements regarding the composition of the Board (Commercial Agreements Exception), which is an express example of an exceptional circumstance for not accepting a director's resignation provided by the TSX for these policies.²¹⁰

Difficulties arose between Gelerman and the Chairman of the Board of Baylin. In March 2019, Baylin wrote to Gelerman advising that he would be nominated for election, but its largest shareholder did not intend to vote in his favour.²¹¹ At the annual general meeting, Gelerman only received 29 percent of eligible votes for his re-election and 71 percent were withheld.²¹² Gelerman never submitted his resignation as required by Baylin's Majority Voting Policy, so the Baylin board never considered whether it would accept his resignation.²¹³

The application judge held, in part, that Baylin's Majority Voting Policy did not comply with the TSX majority voting policy in three ways:

- 1) The TSX Requirement refers to the majority of votes cast at the meeting whereas the [Baylin Majority Voting Policy] is not based on votes cast but rather on "withheld votes";

²⁰⁷ Toronto Stock Exchange, "TSX Company Manual" (12 November 2020) s 461.3, online (pdf): <decisia.lexum.com/tsx/m/en/454460/1/document.do> [TSX, "Company Manual"].

²⁰⁸ *Baylin*, *supra* note 206 at para 15.

²⁰⁹ *Ibid* at paras 16–17.

²¹⁰ *Ibid* at para 18.

²¹¹ *Ibid* at paras 19–21.

²¹² *Ibid* at para 22.

²¹³ *Ibid*.

2) the TSX Requirement does not limit what might constitute “Exceptional Circumstances” which the board must find to not accept the resignation and allow the director to continue whereas the [Baylin Majority Voting Policy] restricts the Board’s determination of Exceptional Circumstances to consideration of three circumstances only; and

3) in restricting the Exceptional Circumstances to the three enumerated circumstances, the [Baylin Majority Voting Policy] excludes the TSX’s specific example of exceptional circumstances concerning “commercial agreements regarding the composition of the Board.”²¹⁴

Baylin appealed to the Ontario Court of Appeal.

3. DECISION

The Ontario Court of Appeal allowed Baylin’s appeal. In concluding that the application judge erred in finding Baylin’s Majority Voting Policy did not comply with TSX’s requirements, the Ontario Court of Appeal stated the TSX policy is clear that withheld votes count against a director, pointing to the express stated purpose of these majority voting policies being to provide “a meaningful way for security holders to hold directors accountable and remove underperforming or unqualified directors.”²¹⁵ Considering votes withheld as votes against a director accomplishes this purpose.²¹⁶

The Ontario Court of Appeal held the lower court’s findings regarding the legality of limiting “Exceptional Circumstances” was also flawed. There is nothing in the TSX policy precluding a corporation from stipulating, in advance, what it will or will not consider as exceptional circumstances. In fact, the TSX specifically intended such circumstances to be dealt with on a case-by-case basis.²¹⁷ The specific examples provided by the TSX were to assist members in applying the TSX majority voting policy.²¹⁸

Finally, the Ontario Court of Appeal stated that the lower court’s finding that Baylin’s Majority Voting Policy did not meet TSX requirements, for failing to provide the Commercial Agreements Exception, suffered from the same flaw outlined above.²¹⁹

Gelman’s subsequent application for leave to appeal to the Supreme Court of Canada was dismissed.²²⁰

²¹⁴ *Ibid* at para 26; *Baylin v Gelerman*, 2020 ONSC 404 at para 39.

²¹⁵ *Baylin*, *ibid* at paras 12, 38.

²¹⁶ *Ibid* at paras 36–38.

²¹⁷ *Ibid* at paras 40, 43.

²¹⁸ *Ibid* at para 41.

²¹⁹ *Ibid* at para 45.

²²⁰ *Baylin Technologies Inc v Gelerman*, 2021 ONCA 45, leave to appeal to SCC refused, 39624 (29 July 2021).

4. COMMENTARY

The *Baylin* decision provides a few key takeaways relevant in interpreting and applying the TSX's requirement for issuers subject to the TSX Company Manual's section 461.3 to establish a majority voting policy.²²¹

Firstly, withheld votes at such elections count as votes "against" the election of a director. They are not to be discarded. This enables shareholders to hold directors accountable when they are underperforming or unqualified for the role, in furtherance of the TSX's stated purpose of these policies.

Secondly, although issuers must adhere to TSX's requirements, they are afforded a certain degree of latitude in establishing their own majority voting policy. Those examples of "exceptional circumstances" provided by the TSX are only meant to be used as a guide and are not prescribed requirements. Issuers have the freedom to tailor these exceptional circumstances to their own circumstances as long as the policy meets the TSX's stated purpose: to provide a meaningful way for security holders to hold directors accountable and remove underperforming or unqualified directors.²²² Further to this point, issuers are not precluded from expressly stipulating, in advance, what they will consider as exceptional circumstances.

B. *ERNST & YOUNG INC. v. AQUINO*²²³

1. BACKGROUND

For the first time, the Ontario Court of Appeal considered the common law doctrine of corporate attribution as it applies to transfers under value under section 96 of the *BIA*.²²⁴ Previously, Canadian courts have considered the corporate attribution test in the context of civil and criminal matters to impose liability on a corporation where the corporation benefited from a directing mind's fraudulent conduct. This decision reframed the test for corporate attribution in the bankruptcy and insolvency realm to better protect creditors' interests.

2. FACTS

Bondfield Construction Company Limited (Bondfield) and its affiliate Forma-Con Construction (Forma-Con) were part of the Bondfield Group, a full-service group of construction companies that carried on business in the Greater Toronto Area and Southern Ontario starting in the mid-1980s.²²⁵ Prior to its insolvency, the Bondfield Group was run by the Aquino family.²²⁶ Both companies began to experience financial strain in 2018 and were

²²¹ TSX, "Company Manual," *supra* note 207, s 461.3.

²²² Ontario Securities Commission, "Amendments to Part IV of the TSX Company Manual – Request for Comments" (2011) 34:36 OSCB 9500 at 9502.

²²³ 2022 ONCA 202 [*Aquino*].

²²⁴ *BIA*, *supra* note 67, s 96.

²²⁵ *Aquino*, *supra* note 223 at para 6.

²²⁶ *Ibid* at para 7.

subsequently placed into bankruptcy protection under the *CCAA*, with a monitor being appointed for Bondfield and a trustee appointed for Forma-Con.²²⁷

After investigation, the monitor and trustee discovered that Bondfield and Forma-Con had illegally paid tens of millions of dollars to John Aquino, the son of Bondfield Group's founder, and others through a false invoicing scheme.²²⁸ The monitor and trustee brought applications before the Ontario Superior Court of Justice's Commercial List for various forms of declaratory relief — the monitor sought relief under a combination of section 36.1 of the *CCAA* and section 96 of the *BIA*, and the trustee sought relief under the latter only.²²⁹ Each asserted that the false invoicing schemes were implemented by means of “transfers at undervalue” by which John Aquino “intended to defraud, defeat or delay a creditor” under section 96 of the *BIA*.²³⁰ The application judge granted the declarations sought by the monitor and the trustee, which required the Bondfield parties to repay \$21,807,693 and the Forma-Con parties to repay \$11,366,890 on a joint and several liability basis (other than those whose specific liability was limited).²³¹

The appellants, John Aquino and others, appealed the application judge's decision to the Ontario Court of Appeal. The principal question on appeal was whether the appellants could be held liable under section 96 of the *BIA* to repay the money they had received through the fraudulent invoicing scheme by virtue of the corporate attribution doctrine. This involved an assessment of John Aquino's intentions (as directing mind of Bondfield and Forma-Con).

3. DECISION

In its unanimous decision, the Ontario Court of Appeal recognized that the corporate attribution doctrine had traditionally been applied in the fields of criminal and civil liability and had not yet been considered in the bankruptcy and insolvency context under section 96 of the *BIA*, which made this “a case of first impression.”²³² The Ontario Court of Appeal held that the corporate attribution doctrine is grounded in public policy and that the underlying question in its application, regardless of legal subject matter, is: “[W]ho should bear responsibility for the [impugned] actions of the corporation's directing mind?”²³³

The Ontario Court of Appeal also recognized that the traditional application and principles of the corporate attribution test — to criminal and civil matters — were different in the bankruptcy and insolvency context. Accordingly, the Ontario Court of Appeal reframed the test for corporate attribution in the bankruptcy context as: “[W]ho should bear responsibility for the fraudulent acts of a company's directing mind that are done within the scope of his or her authority — the fraudsters or the creditors?”²³⁴ The Ontario Court of Appeal concluded that permitting fraudsters to get a benefit at the expense of creditors would be perverse. In order to avoid this outcome, the Ontario Court of Appeal attached the fraudulent intentions

²²⁷ *Ibid* at para 8.

²²⁸ *Ibid* at para 9.

²²⁹ *Ibid* at paras 2, 9.

²³⁰ *Ibid* at paras 2, 26; *BIA*, *supra* note 67, s 96.

²³¹ *Aquino*, *ibid* at paras 10–12, 13–16; *Ernst & Young Inc v Aquino*, 2021 ONSC 527 at paras 275–82.

²³² *Aquino*, *ibid* at para 70.

²³³ *Ibid* at para 72, citing *Deloitte & Touche v Livent Inc (Receiver of)*, 2017 SCC 63 at para 102.

²³⁴ *Aquino*, *ibid* at para 78.

of John Aquino to Bondfield and Forma-Con in order to achieve the social purpose of providing proper redress to creditors, which is the core aim of section 96 of the *BIA*. The appeals were dismissed with costs.

4. COMMENTARY

As a result of *Aquino*, the fraudulent intent of the directing mind of a debtor corporation can now be attributed to that corporation for the purpose of obtaining remedies pursuant to the “transfers at undervalue” scheme under the *BIA*. It is anticipated this decision will be influential in other areas of the law, including fraudulent preferences under section 95 of the *BIA*, and other provisions requiring an element of intent.

C. *ROGERS V. ROGERS COMMUNICATIONS INC.*²³⁵

1. BACKGROUND

The boardroom battle at Rogers Communications Inc. found its way into court when Edward Rogers, Board Chair, applied for a court order affirming the validity of a consent resolution to remove and replace five board members.

2. FACTS

Rogers Communications Inc. (RCI) is a large public telecommunications and media company operating throughout Canada and incorporated under the British Columbia *Business Corporations Act*.²³⁶ RCI had a dual class structure, with Class A voting shares and Class B non-voting shares.

In 2007, Ted Rogers established the Rogers Control Trust (the RCT) for the benefit of the Rogers family as the means by which control of the RCI would be exercised. Since Ted Rogers’ passing, his son, Edward Rogers, has acted as the Control Trust Chair of the RCT; Melinda Rogers-Hixon (Edward Rogers’ sister) is the Control Trust Vice-Chair.²³⁷

The RCT is the controlling shareholder of RCI and, either directly or through private Rogers family companies controlled by the RCT, the RCT beneficially owns 97.5 percent of the issued and outstanding Class A Voting Shares and approximately 10 percent of the outstanding Class B Non-Voting shares of RCI.²³⁸ The remainder of the Class A and Class B shares are widely held. Effectively, the RCT owns or controls approximately 29 percent of RCI, and Edward, as the Control Trust Chair, is able to direct the voting of the RCT’s Class A voting shares at his discretion.²³⁹

RCI had entered into a massive deal to purchase Shaw Communications Inc., and Edward wanted to replace RCI’s Chief Executive Officer and President in advance of that deal.

²³⁵ 2021 BCSC 2184 [*Rogers*].

²³⁶ SBC 2002, c 57 [*BCA*].

²³⁷ *Rogers*, *supra* note 235 at para 27.

²³⁸ *Ibid* at para 30.

²³⁹ *Ibid* at paras 31–32.

Divisions and disagreements between board members ensued, leading up to a consent resolution whereby Edward proposed to remove and replace five directors on the board (the Consent Resolution).

As Control Trust Chair of the RCT, Edward took a number of steps to replace the independent directors by means of the Consent Resolution.²⁴⁰ The matter came before Justice Fitzpatrick of the British Columbia Supreme Court, where the singular legal issue to be decided was whether the Consent Resolution was valid and effective in accordance with the *BCA*.²⁴¹

3. DECISION

In determining the validity and effectiveness of the Consent Resolution, the Court considered both the provisions of the articles of RCI (the Articles) and the *BCA*. The provisions were read in their grammatical and ordinary sense, harmoniously with the scheme and object of the *BCA* and the intention of the legislature. The ordinary meaning of the words was a “dominant” consideration.²⁴²

When RCI was incorporated, it did so in accordance with the British Columbia *Company Act*.²⁴³ Under section 130(3) of the *Company Act*, directors could be removed and replaced despite anything in the company memorandum or articles.²⁴⁴ In March 2004, the *Company Act* was repealed and replaced by the *BCA*.²⁴⁵ Notably, the provisions of the *BCA* concerning the removal and replacement of directors are unique in contrast to other corporate legislation in Canada, both federally and in other provinces.²⁴⁶

The main issue was whether the Articles require a meeting of shareholders to remove and replace directors, rather than the abbreviated process of a Consent Resolution.²⁴⁷

Edward argued that both the Articles and the *BCA* provide that directors of RCI may be removed by way of an ordinary resolution passed by the Class A shareholders, as they are the only shareholders that carry the right to vote at general meetings.²⁴⁸

Both the *BCA* and the Articles define “special majority” as a two-thirds majority, and an ordinary resolution may be passed by the registered Class A shareholders holding at least a “special majority” of the votes entitled to be cast on the resolution and submitted to the other registered Class A shareholders entitled to vote.²⁴⁹ Accordingly, Edward submitted that an ordinary resolution here is a “consent resolution,” defined as a written resolution consented to in writing by registered Class A shareholders holding at least a “special majority” of the

²⁴⁰ *Ibid* at para 63.

²⁴¹ *Ibid* at para 79.

²⁴² *Ibid* at para 84.

²⁴³ RSBC 1996, c 62, as repealed by *Business Corporations Act*, SBC 2002, c 57, s 445.

²⁴⁴ *Rogers*, *supra* note 235 at para 127; *ibid*, s 130(3).

²⁴⁵ *BCA*, *supra* note 236.

²⁴⁶ *Rogers*, *supra* note 235 at para 129.

²⁴⁷ *Ibid* at para 132.

²⁴⁸ *Ibid* at para 146.

²⁴⁹ *Ibid* at para 150.

votes entitled to be cast on the resolution and submitted to the other shareholders entitled to vote.

The Court stated “[t]here is no rational reason why ... a ‘meeting’ could not include either an actual meeting or a ‘deemed’ meeting.”²⁵⁰ The Act provides for a “legal fiction” in that the effect that the Consent Resolution has is as if an actual meeting had taken place to both remove and replace directors, as contemplated by Article 3.4.²⁵¹ Furthermore, it was sufficient to “submit” the Consent Resolution to shareholders by mailing it, and it was not necessary for the mail to have come directly from RCI.

The Court concluded that the process by which Edward Rogers obtained the Consent Resolution was available to him under the Articles and the *BCA*, and in accordance with the Articles and the *BCA*, it was deemed to be valid and enforceable.²⁵²

4. COMMENTARY

The Court adopted a largely black-letter analysis in approaching the wording of both the Articles and the *BCA*, confirming this approach even if that analysis appears to contradict current corporate governance trends and concepts of shareholder democracy. The holder or holders of voting control will be able to unilaterally determine the makeup of the board, and independent directors and senior officers effectively serve at the discretion of the controlling shareholder.

The decision also reaffirms that British Columbia (and the *BCA*) remains the most controlling-shareholder friendly jurisdiction for dual-class and similar ownership structures in Canada.

VII. ENVIRONMENTAL

Environmental law cases pose a challenge to the courts — they must balance polarizing views on natural resource exploration with the statutory frameworks that govern energy industry operations. In this section, we discuss two cases — one in which the British Columbia Court of Appeal was asked to opine on whether climate change should be considered a relevant factor when granting a mine permit; and a consideration of the effect an injunction order has on the reputation of the courts.

²⁵⁰ *Ibid* at para 179.

²⁵¹ *Ibid.*

²⁵² *Ibid* at para 237.

**A. *HIGHLANDS DISTRICT COMMUNITY ASSOCIATION
V. BRITISH COLUMBIA (ATTORNEY GENERAL)***²⁵³

1. BACKGROUND

Concerns respecting climate change impacts are considered in the context of an application for mine permits under the British Columbia *Mines Act*.²⁵⁴

2. FACTS

The *Highlands* decision was an appeal from the dismissal of an application for judicial review of a mines inspector's decision to issue a permit to operate a rock quarry. The only issue on appeal was whether the decision was unreasonable because the mines inspector failed to consider the climate change impacts of the proposed quarry.²⁵⁵

The facts underpinning the *Highlands* decision concern the same parties and rock quarry project in the decision of *O.K. Industries Ltd. v. District of Highlands*.²⁵⁶ O.K. Industries Ltd. (OK Industries) purchased 66 acres of vacant lands with the intention of creating a rock quarry (the Project). The lands were located in the District of Highlands on Vancouver Island (the District). The lands were not zoned for industrial or commercial uses, and the company was unsuccessful in its rezoning application. However, despite significant opposition by the appellant, Highlands District Community Association (HDCA), the District, and the Capital Regional District, OK Industries successfully applied for a mine permit to operate a rock quarry pursuant to British Columbia's *Mines Act*.²⁵⁷

A senior mines inspector found there were no health, safety, economic, or environmental grounds significant enough to deny the permit, which was granted subject to numerous and extensive conditions relating to environmental protection. In his response to HDCA's concern respecting the Project's impact on global climate change, the mines inspector stated, in part: "[w]hile this is an important issue and Canada has passed a non-binding motion to declare a national climate emergency in Canada, climate change is not relevant under the *Mines Act*."²⁵⁸

HDCA's appeal to the British Columbia Supreme Court was rejected, which led to it further appealing to the British Columbia Court of Appeal. The British Columbia Court of Appeal addressed questions concerning climate change impacts. The HDCA's position was that the mines inspector's failure to investigate and consider climate change impacts constituted a failure to discharge his duty to conduct a thorough assessment of the environmental impact of the Project, whereas OK Industries argued the mines inspector properly considered environmental impacts of the Project within the scope of the legislative scheme.

²⁵³ 2021 BCCA 232 [*Highlands*].

²⁵⁴ RSBC 1996, c 293.

²⁵⁵ *Highlands*, *supra* note 253 at para 1.

²⁵⁶ 2022 BCCA 12 [*OKI*].

²⁵⁷ *Mines Act*, *supra* note 254.

²⁵⁸ *Highlands*, *supra* note 253 at para 9.

3. DECISION

The British Columbia Court of Appeal dismissed the HDCA's appeal, concluding broadly that the submission sought a legislative response to a problem of global magnitude, but provided no basis for the present Court to be required to intervene.²⁵⁹ In coming to this conclusion, the Court first noted that the environmental protection and reclamation considerations under the *Mines Act* are narrower than those to be considered under the more expansive environmental assessment required under British Columbia's *Environmental Assessment Act*,²⁶⁰ which includes consideration of greenhouse gas emissions.²⁶¹ The Project was not of the size or scope to bring its permitting process under the ambit of the *EAA* regime.

Additionally, the Court was satisfied that the mines inspector, though not obligated to do so, nevertheless endeavoured to consider climate change impacts in the initial application process.²⁶² The Court further held that, despite his overly broad language regarding the relevance of climate change, the mines inspector's interpretation of factors he was required to consider in an application for permit under section 10 of the *Mines Act* was reasonable.²⁶³ He exercised his broad discretion in compliance with language, rationale, and purview of the applicable statutory scheme.²⁶⁴

After a review of the relevant legislative scheme and the reasoning provided by the mines inspector, the Court concluded that climate change is not a key element in the text or purpose of the statutory scheme under the *Mines Act*, nor is it a required factor of consideration in the context of the permitting process for rock quarry projects of the same size and scope as the Project.²⁶⁵

HDCA subsequently sought leave to appeal this decision to the Supreme Court of Canada, but leave was refused late in 2021.²⁶⁶

4. COMMENTARY

As a threshold consideration, it is important to note that the Project's size in the *Highlands* decision was not large enough to bring it under the more expansive ambit of the *EAA* and its regulations, which would have required consideration of greenhouse gas emissions. As such, the applicability of this decision to future projects may only be marginally assistive to mining projects with annual production capacity under 250,000 tonnes.²⁶⁷

²⁵⁹ *Ibid* at paras 61–62.

²⁶⁰ SBC 2018, c 51 [EAA].

²⁶¹ *Highlands*, *supra* note 253 at paras 16, 44, 46.

²⁶² *Ibid* at para 38.

²⁶³ *Ibid* at para 40.

²⁶⁴ *Ibid*.

²⁶⁵ *Ibid* at paras 46–47.

²⁶⁶ *Highlands District Community Association v British Columbia (Attorney General)*, 2021 BCCA 232, leave to appeal to SCC refused, 39775 (10 November 2021).

²⁶⁷ *Highlands*, *supra* note 253 at para 16; see also the *Reviewable Projects Regulation*, BC Reg 243/2019, Part 3, Table 6 – Mine Projects.

However, the *Highlands* decision is an interesting development in the natural resource development industry as it highlights the increasing relevancy of climate change concerns for these types of commercial projects. This case serves as a reminder of the importance of taking proactive steps to address climate change, such as taking steps to mitigate emissions, adapting investment strategies to mitigate climate change impacts, publicly disclosing climate related risks, and, of course, ensuring full compliance with all relevant regulatory obligations.

As technology advances and we become more sophisticated in tracking individual businesses' carbon footprints, the prevalence of tort claims against corporations in resource development industries may see an uptick. That said, the pendulum can also swing in the other direction, as technology advances in this area provide an equal opportunity for organizations to respond to and mitigate climate change impacts in its operations.

**B. *TEAL CEDAR PRODUCTS LTD.*
*V. RAINFOREST FLYING SQUAD*²⁶⁸**

1. BACKGROUND

In *Teal Cedar*, a case concerning logging protests in British Columbia, the British Columbia Court of Appeal clarified what can be considered by the courts when deciding whether to grant an injunction. The British Columbia Court of Appeal specifically addressed the availability of remedies, other than injunctive relief, and the effect that granting an injunction has on the reputation of the courts.

2. FACTS

Teal Cedar Products Ltd. (Teal Cedar) is a logging company on Vancouver Island. The Rainforest Flying Squad is a group of protestors that engaged in dangerous criminal behaviour to prevent Teal Cedar from conducting its logging operations, including digging trenches in roads, chaining themselves into "sleeping dragon" devices, constructing barricades on roads, placing objects on helicopter land pads, suspending themselves over roadways, occupying "tree sits," and more.²⁶⁹ On 1 April 2021, Justice Verhoeven of the British Columbia Supreme Court granted an injunction enjoining the blockades, stating that Teal Cedar would suffer irreparable harm if the injunction was not granted. On 14 September 2021, Teal Cedar appeared before the British Columbia Supreme Court again to seek a one-year extension of the injunction.²⁷⁰

Justice Thompson declined to grant the extension. In doing so, he referenced the well-known *RJR-MacDonald Inc. v. Canada (Attorney General)*²⁷¹ test for the granting of injunctions which establishes that, in order to grant an injunction: (1) there needs to be a serious issue to be tried; (2) the applicant must be facing irreparable harm if the injunction is not granted; and (3) the balance of convenience must favour granting the injunction. The

²⁶⁸ 2022 BCCA 26 [*Teal Cedar*].

²⁶⁹ *Ibid* at para 5.

²⁷⁰ *Ibid* at para 17.

²⁷¹ [1994] 1 SCR 311.

judge concluded that the first two requirements were met but the third requirement was not. He found that the balance of convenience favoured refusing the injunction. Of note, the judge stated that the availability of recourse via the *Criminal Code*,²⁷² provincial laws, and the strong public interest in maintaining the court's reputation all weighed in favour of not granting an injunction.²⁷³

3. DECISION

The British Columbia Court of Appeal allowed the appeal and extended the injunction until 26 September 2022. Specifically, the British Columbia Court of Appeal found that the judge had erred in considering both of these factors in deciding not to grant an injunction. Regarding the availability of charges under the *Criminal Code*, the British Columbia Court of Appeal found that this was not a relevant consideration in determining whether to grant an injunction.²⁷⁴ A private applicant has no power to force the police and prosecutors to pursue criminal law proceedings.²⁷⁵ Therefore, the possibility that charges might be laid is of no relevance in this situation. However, the British Columbia Court of Appeal noted that the availability of other means such as provincial statutory offences could potentially be relevant in certain situations. If the alternative enforcement methods were actually being used in a way that caused protestors to stand down, then that would be relevant to whether an applicant could establish irreparable harm.²⁷⁶ The availability of other options is of particular importance when the government is seeking an injunction because, unlike a private applicant, the government has the ability to access and enforce alternative remedies.²⁷⁷ The British Columbia Court of Appeal further found that the judge had erred in finding that the criminal law *would* be used in this case to prevent ongoing harm to Teal Cedar — there was nothing in the record that supported the judge's inference that the police and British Columbia Prosecution Service would employ the criminal law to stop the unlawful conduct.²⁷⁸

The British Columbia Court of Appeal also ruled that the judge erred by considering potential harm to the court's reputation in his analysis. It is wrong to say that the court's reputation is being harmed by its obligation to uphold the rule of law. The enjoinder of unlawful conduct by the courts is a necessary and fundamental aspect of civil society and the rule of law.²⁷⁹ The court's reputational interest lies in its legitimacy and effectiveness, which requires the court to be independent and impartial. The popularity of its decisions with the public is not relevant.²⁸⁰ Furthermore, the British Columbia Court of Appeal rejected the judge's finding that police misconduct had a negative impact on the reputation of the court. The RCMP answers to the executive branch of government, not the courts; the two bodies are constitutionally independent of each other. In the context of Teal Cedar's application to

²⁷² RSC 1985, c C-46.

²⁷³ *Teal Cedar*, *supra* note 268 at para 26.

²⁷⁴ *Ibid* at para 30.

²⁷⁵ *Ibid* at para 34.

²⁷⁶ *Ibid* at para 40.

²⁷⁷ *Ibid*.

²⁷⁸ *Ibid* at para 47.

²⁷⁹ *Ibid* at para 62.

²⁸⁰ *Ibid* at para 60.

extend the injunction, police conduct should not have been a central focus.²⁸¹ Leave to appeal this decision to the Supreme Court of Canada was denied in September 2022.²⁸²

4. COMMENTARY

Teal Cedar is important because it clarifies that neither the availability of other recourse nor the potential for public scrutiny should act as barriers to a party seeking an injunction. This ensures that parties will continue to have access to this important and timely remedy and it serves as a strong statement from the court that it will continue to issue injunctions in order to uphold the rule of law and protect private rights from unlawful interference.

VIII. GOVERNMENT RELATIONS

The past year witnessed two topical decisions — one related to the constitutionality of Alberta’s *Preserving Canada’s Economic Prosperity Act*,²⁸³ and the other a finding that the *Impact Assessment Act*²⁸⁴ and *Physical Activities Regulations*²⁸⁵ are in violation of Canada’s constitutional division of powers. Additionally, an interesting decision was rendered by the Ontario Superior Court of Justice, which considered whether the Government of Ontario had destroyed evidence relating to a developer’s application to construct an offshore windfarm.

A. ATTORNEY GENERAL OF ALBERTA V. ATTORNEY GENERAL OF BRITISH COLUMBIA²⁸⁶

1. BACKGROUND

Alberta (Attorney General) concerns an unsuccessful challenge by the Province of British Columbia of Alberta’s *PCEP Act*.

2. FACTS

Alberta introduced the *PCEP Act* which authorized the Minister of Energy to establish a licensing regime for the export of natural gas, crude oil, and refined fuels. In the legislative debates prior to the passing of the *PCEP Act*, members of the Alberta Legislature made statements suggesting that the *PCEP Act* was political retaliation that would allow Alberta to restrict the flow of natural resources to British Columbia in response to the opposition to the Trans Mountain pipeline expansion.²⁸⁷

British Columbia commenced an action in the Federal Court pursuant to section 19 of the *Federal Courts Act*²⁸⁸ seeking a declaration that the *PCEP Act* was unconstitutional. Alberta brought a motion asking the Federal Court to strike British Columbia’s action because it

²⁸¹ *Ibid* at paras 64–66.

²⁸² *Ibid*, leave to appeal to SCC refused, 40115 (29 September 2022).

²⁸³ SA 2021, c P-21.51 [*PCEP Act*].

²⁸⁴ *IAA*, *supra* note 24, s 1.

²⁸⁵ SOR/2019-285.

²⁸⁶ 2021 FCA 84 [*Alberta (Attorney General)*].

²⁸⁷ *Ibid* at para 3.

²⁸⁸ RSC 1985, c F-7, s 19 [*FC Act*].

disclosed no reasonable cause of action. The Federal Court dismissed Alberta's motion to strike and granted British Columbia's motion for an injunction.²⁸⁹

3. DECISION

Writing for the majority of the Federal Court of Appeal, Justice LeBlanc stated that the appeal should be allowed. Although he found that the Federal Court has jurisdiction pursuant to section 19 of the *FC Act* to hear matters of this nature, he found that British Columbia had not met the legal test for granting declaratory relief. This was largely due to the fact that, at the time the appeal was heard, no licensing scheme had actually been enacted and, therefore, there was no dispute requiring declaratory relief.²⁹⁰

Section 19 of the *FC Act* states that “[i]f the legislature of a province has passed an Act agreeing that the Federal Court ... has jurisdiction in cases of *controversies* between Canada and that province, or between that province and any other [province(s)] that have passed a like Act, the Federal Court has jurisdiction to determine the controversies.”²⁹¹ Justice LeBlanc concluded that this provision is broad enough to encompass interprovincial controversies that raise questions related to the constitutional validity of provincial legislation. In reaching this conclusion, he noted the following three points.

First, the language used in section 19 contemplates controversies between provinces without specifying the kinds of legal interests that can be asserted. Justice LeBlanc found that the fact that a particular subject matter may give rise to private claims is not fatal to a finding of Federal Court jurisdiction, so long as the requirements of section 19 are otherwise met.²⁹²

Second, Justice LeBlanc states that legislation granting jurisdiction to the Federal Court should be interpreted generously and liberally. In interpreting the *FC Act*, he noted that the fact that it creates a regime for notifying the Attorney General of Canada and their provincial counterparts that an issue of constitutional validity is before the Federal Court is compelling evidence that Parliament has given the Federal Court the power to rule on the constitutional validity of provincial legislation.²⁹³

Third, Justice LeBlanc found that the limited case law dealing with section 19 does not set out the complete scope of the provision and therefore does not act as an obstacle to a broad interpretation of the kinds of “controversies” that may be considered pursuant to section 19.²⁹⁴

However, Justice LeBlanc nonetheless declined to grant declaratory relief on the basis that British Columbia had not met the *Ewert v. Canada*²⁹⁵ test which requires that (i) the court have jurisdiction over the subject matter; (ii) the dispute be real and not theoretical; (iii) the

²⁸⁹ *Alberta (Attorney General)*, *supra* note 286 at para 10.

²⁹⁰ *Ibid* at paras 112–13.

²⁹¹ *FC Act*, *supra* note 288, s 19 [emphasis added]; *Alberta (Attorney General)*, *ibid* at para 13 [emphasis in original].

²⁹² *Alberta (Attorney General)*, *ibid* at paras 132, 156.

²⁹³ *Ibid* at paras 133, 160.

²⁹⁴ *Ibid* at para 134.

²⁹⁵ 2018 SCC 30.

party raising the issue have a genuine interest in its resolution; and (iv) the responding party have an interest in opposing the declaration sought.²⁹⁶ The primary barrier to granting declaratory relief arose at the second part of the test which requires the dispute be real; because Alberta had not established a regulatory framework for enforcing the *PCEP Act*, any dispute arising from the *PCEP Act* was entirely theoretical.²⁹⁷

4. COMMENTARY

Although the Federal Court of Appeal did not rule on the constitutional validity of the *PCEP Act*, this case added clarity to constitutional issues surrounding control of provincial resources and the scope of the federal courts. The Court has clarified that federal courts have jurisdiction to decide on the validity of provincial legislation if it can be considered to be a controversy between two or more provinces. It also clarified that legislation such as the impugned *PCEP Act* cannot form the basis of a dispute unless there is a system in place that allows action to be taken — without a regulatory scheme allowing for enforcement, legislation such as the *PCEP Act* does not cause any dispute for the courts to rule on.

B. *TRILLIUM POWER WIND CORP. V. ONTARIO*²⁹⁸

1. BACKGROUND

The Government of Ontario took certain actions which indirectly resulted in the failure of a wind farm developer's application to construct an offshore windfarm. The developer sued the government, alleging various causes of action.

2. FACTS

During the Dalton McGuinty administration in Ontario, that government initiated a policy of subsidizing wind projects in the province pursuant to the *Green Energy Act, 2009*.²⁹⁹ This policy included a “feed in tariff” (FIT) program, which guaranteed developers a high price for electricity.³⁰⁰ Some years later, it was clear that the policy had caused economic turmoil and it was cancelled. In the meantime, Trillium Power Wind Corporation (Trillium) was in the midst of obtaining authorization to operate a wind farm in Lake Ontario. The proposal was premised on ultimately bringing the project into the FIT program, which would have made the project economically feasible. The provincial government then announced a moratorium on consideration of any offshore wind farm projects which effectively terminated Trillium's approval application. The date of the announcement coincided with the closing date for Trillium's financing of its proposed project. As a result of the change of policy, Trillium's financial institution withdrew funding.³⁰¹

²⁹⁶ *Ibid* at para 81; *Alberta (Attorney General)*, *supra* note 286 at para 174.

²⁹⁷ *Alberta (Attorney General)*, *ibid* at paras 181, 186–87.

²⁹⁸ 2021 ONSC 6731 [*Trillium*].

²⁹⁹ SO 2009, c 12, Sch A, as repealed by the *Green Energy Repeal Act, 2018*, SO 2018, c 16, s 10.

³⁰⁰ *Trillium*, *supra* note 298 at para 7.

³⁰¹ *Ibid* at paras 6–13.

Trillium filed a statement of claim alleging various claims for damages against the government. The Ontario Court of Appeal struck most of Trillium's claims but left open the possibility that Trillium could proceed on the basis of allegations that the government's actions were targeted to stop Trillium's offshore wind project before Trillium's financing was in place in order to deprive Trillium of the resources to contest the government's decision to cancel the wind projects.³⁰² As a result, Trillium moved forward with this claim in the Ontario Superior Court of Justice.

In light of information about the McGuinty government's practice of destroying all electronic communications of departed personnel, Trillium also amended their claim to add the tort of spoliation stating that "but for the destruction, or spoliation, of relevant documentation, it would have been in a position to succeed in the claim that the [Ontario] Court of Appeal left open."³⁰³

3. DECISION

Regarding the financing claim, the Ontario Superior Court of Justice started by noting that for the government to stop the project before Trillium's financing was in place, the government would have had to know when that financing was to take place. The only way the government could have known when the financing deal was to close was through "courtesy notices" that Trillium allegedly sent.³⁰⁴ A representative of Trillium explained that a lobbyist retained by Trillium sent voicemail messages to two government officials alerting them of the closing. However, the representative had no direct knowledge of whether the messages were sent or what they contained, and the lobbyist was not called by Trillium to testify, nor did she submit an affidavit.³⁰⁵ Furthermore, the government included affidavits of the two alleged recipients of the messages which stated that neither of them had received any voicemails.³⁰⁶ The Ontario Superior Court of Justice found that the dearth of evidence proffered by Trillium precluded it from being able to advance this claim.

It was also noted that Trillium would have to prove that had the financing closed it would have changed the litigation outcome. However, as the Court pointed out, Trillium had no trouble bringing forward this litigation without the funding and no amount of money would have allowed it to present better arguments than it already did.³⁰⁷ The Ontario Superior Court of Justice further found that it was highly unlikely that Trillium's proposed project would have been economically feasible — without the now-cancelled FIT subsidy, Trillium could only possibly prove that the government's actions denied it a money-losing business venture.³⁰⁸

Regarding the spoliation claim, the Ontario Superior Court of Justice remarked that spoliation as a self-standing cause of action is a novel claim — in the past, it has been recognized as an evidentiary rule. The evidentiary rule is that where there has been

³⁰² *Ibid* at para 17.

³⁰³ *Ibid* at para 26.

³⁰⁴ *Ibid* at paras 33–34.

³⁰⁵ *Ibid* at paras 35–36.

³⁰⁶ *Ibid* at para 38.

³⁰⁷ *Ibid* at para 46.

³⁰⁸ *Ibid* at paras 47–48.

destruction of evidence by a party who reasonably anticipated litigation in which that evidence would play a part, then a rebuttable presumption arises that the evidence would have been unfavourable to the party who destroyed it.³⁰⁹ The Ontario Superior Court of Justice did not address whether spoliation could stand on its own as a newly recognized tort because it found that regardless of whether it was approached as a tort or an evidentiary rule, the basic elements of spoliation were not satisfied by Trillium. Any presumption against the government due to its intentional destruction of records was rebutted by the evidence that demonstrates that the normal record-keeping practice at the time was to purge email accounts for departing employees. There was no evidence that any of the records were deleted in an attempt to influence litigation.³¹⁰ As a result, the Ontario Superior Court of Justice found that neither Trillium's financing claim nor its spoliation claim had any hope of success.

4. COMMENTARY

Trillium is an interesting case that looks into controversial energy and communication policies from Ontario's former McGuinty government. However, even in the face of these controversial and, as the Ontario Superior Court of Justice put it, "anti-democratic," practices, Trillium's claims against the government were still ultimately unsuccessful.³¹¹

Trillium also leaves open the possibility that the tort of spoliation will be recognized in Canada. If recognized, this will give parties facing unscrupulous action from opposing parties one more available tool to access recourse.

C. REFERENCE RE IMPACT ASSESSMENT ACT³¹²

1. BACKGROUND

In this case, the Alberta Court of Appeal found the *Impact Assessment Act*³¹³ and *Physical Activities Regulations*³¹⁴ (collectively, the *IAA*) to be unconstitutional, finding that Parliament had overstepped its jurisdiction and intruded on areas of exclusive provincial jurisdiction.

2. FACTS

The *IAA* sets out a comprehensive impact assessment process geared toward assessing the effects of certain physical activities carried out in Canada, including any environmental, economic, social, cultural, or heritage effects caused by the activity. Those physical activities include those deemed to be "designated projects." Although ostensibly crafted to address various impacts from an assortment of physical activities, the *IAA* was viewed by many as the federal government creating a veto for projects with high greenhouse gas emissions. In fact, in the legislative debates surrounding the *IAA*, the federal government acknowledged that the criteria for deeming designated projects should include "an environmental threshold,

³⁰⁹ *Ibid* at paras 50–51, citing *Leon v Toronto Transit Commission*, 2014 ONSC 1600 at para 9.

³¹⁰ *Trillium*, *ibid* at paras 52–53.

³¹¹ *Ibid*.

³¹² 2022 ABCA 165 [*Reference re IAA*].

³¹³ *IAA*, *supra* note 24.

³¹⁴ *Physical Activities Regulation*, *supra* note 285.

including greenhouse gas emissions³¹⁵ and that projects should fit within the government's "climate change action plan."³¹⁶ Many of the activities deemed to be designated projects involve intraprovincial activities which fall under exclusive provincial jurisdiction. For example, construction of in situ oil sands extraction facilities, intraprovincial highways, or hydroelectric generating facilities are all intraprovincial activities that are covered by the *IAA* regime. Under the *IAA*, once the federal government determines that a designated project causes effects on areas of federal jurisdiction that are contrary to the "public interest," then the project proponent is prohibited from proceeding with that project.

Alberta challenged the validity of this legislation as it pertains to intraprovincial activities deemed to be designated projects, arguing that the *IAA* intrudes impermissibly into provincial jurisdiction by regulating intraprovincial activities that do not fall within Parliament's jurisdiction.³¹⁷ Canada, on the other hand, defended the validity of the *IAA*, arguing that it only regulates matters that fall squarely within federal jurisdiction because it focuses merely on the "adverse effects within federal jurisdiction."³¹⁸

3. DECISION

The majority held the *IAA* to be unconstitutional as it undermines Canada's constitutional division of powers. They noted that under the *Constitution Act, 1867*,³¹⁹ the environment is not listed as a head of power assigned to either the federal or provincial governments. In order to introduce legislation regulating the environment, the legislation must be "linked to the appropriate head of power" falling within the specific government's jurisdiction.³²⁰ The majority relied on the principle of subsidiarity — which is that "law-making and implementation are often best achieved at a level of government that is not only effective, but also closest to the citizens affected and thus most responsive to their needs, to local distinctiveness, and to population diversity"³²¹ — to hold that provincial jurisdiction should be favoured.

In reviewing the validity of the legislation, the Alberta Court of Appeal used the well-established two-stage analytical approach. The first stage involves characterizing the "pith and substance" of the legislation. The second stage involves classifying the legislation under the federal and provincial heads of power as set out in the *Constitution Act, 1867*.³²²

After reviewing intrinsic evidence, such as the title, preamble, and statutory purposes of the *IAA*, and extrinsic evidence, such as the legislative debates surrounding the introduction of the *IAA*, the majority found that the "pith and substance" of the *IAA* is properly characterized as "the establishment of a federal impact assessment and regulatory regime that

³¹⁵ *Reference re IAA*, *supra* note 312 at para 204.

³¹⁶ *Ibid.*

³¹⁷ *Ibid* at para 34.

³¹⁸ *Ibid* at para 39.

³¹⁹ *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5.

³²⁰ *Reference re IAA*, *supra* note 312 at para 48.

³²¹ *Ibid* at para 149, citing *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40 at para 3.

³²² *Constitution Act, 1867*, *supra* note 319.

subjects all activities designated by the federal executive to an assessment of all their effects and federal oversight and approval.”³²³

Canada argued that Parliament had jurisdiction over the subject matter by virtue of several different heads of power. The majority found that the subject matter of the legislation does not properly fall under any of the proposed federal heads of power. Instead, the Court found that the application of the *IAA* to intraprovincial designated projects falls squarely within several heads of provincial jurisdiction, stating that “Parliament’s claimed power to regulate all environmental and other effects of intra-provincial designated projects improperly intrudes into industrial activity, resource development, local works and undertakings and other matters within provincial jurisdiction.”³²⁴

4. COMMENTARY

The potential impacts of this decision are far-ranging. Under the *IAA*, the federal government is essentially given a veto over various intraprovincial resource development projects. The *IAA* being deemed unconstitutional, and therefore invalid, will return significant autonomy to provinces and territories over the development of natural resources and will remove red tape for proponents of such projects. However, the true impact of this decision remains uncertain as the Attorney General of Canada has filed a notice of appeal with the Supreme Court of Canada.

IX. LIMITATION PERIODS

Undoubtedly, as lawyers, one of our most common concerns is an impending (or potentially missed) limitation period. Below, we canvas two cases which provide further context for lawyers with respect to the requirement of “discoverability” when assessing limitation periods.

A. *GRANT THORNTON LLP v. NEW BRUNSWICK*³²⁵

1. BACKGROUND

In *Grant Thornton*, the Supreme Court of Canada sets a new standard for when claims become discoverable for the purpose of tolling a limitation period.

2. FACTS

The Province of New Brunswick filed a statement of claim against Grant Thornton LLP (Grant Thornton) seeking damages for negligence. Grant Thornton argued that the claim should be dismissed as it was outside of the two-year statutory limitation period.³²⁶

³²³ *Reference re IAA*, *supra* note 312 at paras 31, 372.

³²⁴ *Ibid* at para 421.

³²⁵ 2021 SCC 31 [*Grant Thornton*].

³²⁶ *Ibid* at para 1.

The negligence claim arose out a loan deal whereby on 24 April 2009 New Brunswick agreed to guarantee loans from the Bank of Nova Scotia (the Bank) to Atcon Group of Companies (Atcon) on the condition that an external review be conducted by Grant Thornton. On 19 May 2009, Grant Thornton reported to New Brunswick that Atcon's financial statements presented fairly in all material respects, in accordance with Canadian generally accepted accounting principles (GAAP).³²⁷ As a result, New Brunswick guaranteed Atcon's loans on 30 June 2009. By October 2009, Atcon had run into financial difficulty and the Bank called on New Brunswick to pay out the loan guarantee in March 2010. In June 2010, New Brunswick retained RSM Richter Inc. (Richter) to perform a second audit on Atcon's financial statements. Richter released a report on 4 February 2011, showing that Atcon's financial statements did not actually conform with GAAP and that there were many material errors in the statements. New Brunswick commenced its claim against Grant Thornton on 23 June 2014.³²⁸

3. DECISION

In interpreting New Brunswick's *Limitation of Actions Act*,³²⁹ the Supreme Court found that sections 5(1)(a) and (2) codify the common law discoverability rule and therefore "a claim is discovered when the plaintiff has knowledge, actual or constructive, of the material facts upon which a plausible inference of liability on the defendant's part can be drawn."³³⁰ A plaintiff has constructive knowledge "when the evidence shows that the plaintiff ought to have discovered the material facts by exercising reasonable diligence."³³¹ A "plausible inference of liability" denotes a degree of knowledge that is more than a mere suspicion or speculation, but less than certainty of liability or "perfect knowledge."³³²

For example, the Supreme Court noted that a plaintiff does not need to know the exact extent or type of harm it has suffered, or the precise cause of its injury, in order for a limitation period to run. For a claim in negligence, a plaintiff does not need knowledge that the defendant owed it a duty of care or that the defendant's act or omission breached the applicable standard of care.³³³

Applying these findings to the facts, the Supreme Court determined that New Brunswick discovered its claim on 4 February 2011. By that date, New Brunswick knew that it had suffered a loss and knew or ought reasonably to have known that the loss was caused or contributed to by an act or omission of Grant Thornton.³³⁴ This is the date Richter released its report. Although Richter did not comment directly on Grant Thornton's audit results, Richter's conclusions stood in stark contrast with the conclusions drawn by Grant Thornton.³³⁵ As a result, New Brunswick's claim was outside of the limitation period.

³²⁷ *Ibid* at para 8.

³²⁸ *Ibid* at paras 5–16.

³²⁹ SNB 2009, c L-8.5.

³³⁰ *Grant Thornton, supra* note 325 at paras 3, 42.

³³¹ *Ibid* at para 44.

³³² *Ibid* at para 46.

³³³ *Ibid* at paras 46, 48.

³³⁴ *Ibid* at para 51.

³³⁵ *Ibid* at para 57.

4. COMMENTARY

Grant Thornton outlines a new standard for discoverability of claims. While decided in the context of New Brunswick’s *Limitation of Actions Act*, the standard will likely be applicable in Ontario, Alberta, and Saskatchewan as well, since, as stated in the case, all three of those provinces have also codified the common law rule regarding discoverability.³³⁶

Grant Thornton also sets a lower standard for the level of knowledge of a claim required in order to start the clock on any limitation period. It is not required that a plaintiff have knowledge of all of the constituent elements of a claim in order to have “discovered” it. Parties who become aware of the possible existence of a claim should consult with legal counsel as soon as possible in order to ensure that they do not fall outside the limitation period under this new standard.

B. *THERMAL EXCHANGE SERVICE INC. v. METROPOLITAN TORONTO CONDOMINIUM CORPORATION NO. 1289*³³⁷

1. BACKGROUND

The Ontario Court of Appeal considered when a creditor may rely on assurances made by a debtor to rebut the statutory presumption that the limitation period begins when non-payment first occurred.

2. FACTS

From 2002 to 2015, the respondent, Thermal Exchange Service Inc. (Thermal Exchange), serviced the HVAC units in the appellant’s, Metropolitan Condo Corp.’s (the Condo Corp.), building at 168 Simcoe St. in Toronto.³³⁸ Thermal Exchange received work orders from the Condo Corp.’s property manager, Helen Da Ponte, and would invoice the Condo Corp. after performing the work that was requested. Each of Thermal Exchange’s invoices stated that payment was due within 30 days from the date of the invoice, however, the Condo Corp. typically made payment much later than this — often 300 days later. Thermal Exchange continued to provide services on request and tendered fresh invoices for the same.³³⁹

“From 2008 forward, Thermal Exchange stopped sending individual invoices to the Condo Corp. for each work order, and began sending a single, semi-annual ‘batch invoice’.... The trial judge made no findings as to who initiated the change in billing practice, but ... found that the indebtedness of the Condo Corp. was in the nature of a running account.”³⁴⁰

Conflicting evidence arose at trial as to what arrangements, if any, had been made between Thermal Exchange and Da Ponte regarding payment. The evidence of Mr. Pintaric, representative of Thermal Exchange, “was that he had several conversations with Ms. Da

³³⁶ *Ibid* at para 35.

³³⁷ 2022 ONCA 186 [*Thermal Exchange*].

³³⁸ *Ibid* at para 2.

³³⁹ *Ibid* at para 6.

³⁴⁰ *Ibid* at para 8.

Ponte about the non-payment of invoices, and she would invariably tell him that she was terribly busy and unable to attend to the matter immediately, but was ‘working on’ the invoices.³⁴¹ The trial judge found that her assurances led Thermal Exchange to believe that the problem could and would be remedied without the need for court intervention.³⁴² The trial judge accepted Pintaric’s evidence that by October 2015 he thought a demand letter from his lawyer might stir Da Ponte to process the invoices.

Thermal Exchange’s understanding was that it was contracting with the Condo Corp. rather than the individual unit owners and, at trial, the Condo Corp. conceded the contractual relationship, accepting that but for the limitations defence it would be liable to pay the invoices.³⁴³ At all relevant times, however, Da Ponte operated on a different and mistaken understanding of the nature of the Condo Corp.’s contractual obligation to Thermal Exchange.³⁴⁴ Thermal Exchange first became aware of this in November 2016, when Da Ponte advised Pintaric via email that the Condo Corp. was not responsible for paying the invoices and was only obligated to pay if and when it was able to collect payment from the unit owners on whose behalf the work was done.³⁴⁵

On 17 August 2017, Thermal Exchange filed its statement of claim, seeking damages for services supplied, breach of agreement, and unjust enrichment in the amount of \$122,105.34. By the time of trial, the amount outstanding had been reduced to \$86,055.49.³⁴⁶ “The central issue at trial was discoverability: specifically, when Thermal Exchange first determined that a proceeding would be an appropriate means to remedy its claim, per [section] 5(1)(a)(iv) of the *Limitations Act*.”³⁴⁷

3. DECISION

The Ontario Court of Appeal found that:

[T]he Condo Corp. created a barrier to Thermal Exchange receiving payment (it would not pay unless it first received payment from the unit owners, and was not taking any steps to getting the unit owners to pay), prevented Thermal Exchange from understanding the nature of the problem, and led Thermal Exchange to believe that it would take care of the problem.³⁴⁸

The Ontario Court of Appeal held that it was not until the 4 November 2016 email from Da Ponte that Thermal Exchange became aware of the nature of the problem and “became conscious that a proceeding would be an appropriate means to seek to remedy that problem.”³⁴⁹

³⁴¹ *Ibid* at para 11.

³⁴² *Ibid*.

³⁴³ *Ibid* at para 3.

³⁴⁴ *Ibid* at para 10.

³⁴⁵ *Ibid*.

³⁴⁶ *Ibid* at para 13.

³⁴⁷ *Ibid* at para 14.

³⁴⁸ *Ibid* at para 23.

³⁴⁹ *Ibid* at para 26.

The trial judge's finding that the Condo Corp. had a running account with Thermal Exchange was supported by the evidence of Pintaric and the practice of batch invoicing.³⁵⁰ Additionally, while the trial judge did not address the Condo Corp.'s defence of laches, the Ontario Court of Appeal held that the argument could not have succeeded given the trial judge's findings that it was reasonable for a person in the position of Thermal Exchange to rely on the assurances of the property manager and hold off commencing an action. Having made that finding, a laches defence was not available.³⁵¹ The Ontario Court of Appeal concluded that Thermal Exchange's action was not barred by Ontario's two-year limitation period.

4. COMMENTARY

In Ontario (and most of Canada), the general rule is that most civil actions must be commenced within two years from the date that the claim was "discovered," which is presumed to be the date that the injury, loss, or damage occurred. As highlighted in this decision, one way a claimant can rebut this presumption is found under section 5(1)(a)(iv) of the *Limitations Act*, which provides that a claim is not "discovered" until a reasonable person in the claimant's position first knew that a proceeding would be the appropriate means to remedy the claim. Here, the property manager's assurances that she was "working on" payment of the invoices was enough for Thermal Exchange to reasonably believe that a proceeding was not the appropriate means to seek a remedy. There was nothing to suggest they could not or would not pay.

X. SECURITIES

Securities regulators enforce legislation designed to protect investors in the capital markets. The various provincial *Securities Acts* create fines and penalties for those who misrepresent public company information, and also create statutory causes of action upon which class actions can be based. The Ontario Court of Appeal considered whether a press release reporting on a spill from a tailings pond constituted public correction, and the Alberta Court of Appeal considered whether a wrongdoer can escape fines and penalties by filing for bankruptcy.

A. *BALDWIN V. IMPERIAL METALS CORPORATION*³⁵²

1. BACKGROUND

In *Baldwin*, the Ontario Court of Appeal considered the role and scope of "public correction" in a shareholders proposed class action for misrepresentation in the secondary securities market under Ontario's *Securities Act*.³⁵³

³⁵⁰ *Ibid* at para 28.

³⁵¹ *Ibid* at para 31.

³⁵² 2021 ONCA 838 [*Baldwin*].

³⁵³ RSO 1990, c S.5 [Ontario *Securities Act*].

2. FACTS

The respondent, Imperial Metals Corporation (Imperial), is a reporting issuer in Ontario whose shares trade on the Toronto Stock Exchange.

On [4 August 2014], Imperial issued a press release, reporting that the tailings storage facility (the “TSF”) at its Mount Polley gold and copper mine in British Columbia had been breached, releasing an “undetermined amount of water and tailings.” The press release stated that the cause of the breach was unknown. Following this disclosure, Imperial’s share price declined by 40% and the company lost about \$500 million in market capitalization.³⁵⁴

Baldwin, a shareholder acting as class representative, sought leave to commence an action pursuant to section 138.3 of the *Securities Act*, which creates a cause of action for misrepresentation in the secondary securities market.³⁵⁵ Section 138.3(1) provides the remedy to anyone who “acquires or disposes of the issuer’s security during the period between the time when the document [containing the misrepresentation] was released and the time when the misrepresentation contained in the document was publicly corrected.”³⁵⁶

Section 138.8(1) contains a screening mechanism: no action may be commenced under section 138.3 without leave of the court and the court shall only grant leave where it is satisfied that (a) the action is being brought in good faith; and (b) there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff.³⁵⁷

The chambers judge denied leave to commence the action. He ruled that in order to obtain leave under the *Securities Act*, the plaintiff must allege “not only a misrepresentation but also *some discrete and identifiable public correction*. That correction ... must be reasonably capable of revealing to the market the existence of an untrue statement of material fact or an omission to state a material fact.”³⁵⁸

In this case, the press release on 4 August 2014 could not be a public correction as it said nothing more than: (i) the TSF had been breached; (ii) the cause of the breach was unknown; and (iii) the company was working with authorities to assess the damage.³⁵⁹ There was nothing to indicate that the breach was caused by deficient design, defective construction, or problems in operations.³⁶⁰

3. DECISION

The primary issue on appeal was whether the chambers judge took an impermissibly narrow approach to determining whether the alleged misrepresentations were publicly corrected.³⁶¹

³⁵⁴ *Baldwin*, *supra* note 352 at paras 8–9.

³⁵⁵ Ontario *Securities Act*, *supra* note 353, s 138.3.

³⁵⁶ *Ibid*, s 138.8(1); *Baldwin*, *supra* note 352 at para 18.

³⁵⁷ *Baldwin*, *ibid* at para 14.

³⁵⁸ *Ibid* at para 23 [emphasis in original].

³⁵⁹ *Ibid* at para 27.

³⁶⁰ *Ibid*.

³⁶¹ *Ibid* at para 40.

The Ontario Court of Appeal was of the view that the chambers judge set the bar too high by requiring that the public correction be express and directly linked to a specific misrepresentation.³⁶² The “public correction need not be a ‘mirror-image’ of the alleged misrepresentation or a ‘direct admission that a previous statement is untrue.’”³⁶³ There need only be some linkage or connection, and the public correction need not be issued by the company itself — it can emanate from third parties.³⁶⁴

At the leave stage, the overarching question concerning a public correction is whether it was reasonably capable of being understood in the secondary market as correcting what was misleading in the impugned statement. The analysis of a public correction in this regard requires going beyond the text of the alleged correction and examining: (i) the surrounding context in which the alleged correction was made; and (ii) how the alleged public correction would have been understood in the secondary market.

The Ontario Court of Appeal concluded that, taking into account all the evidence, the press release could be understood by the market as corrective and there was a reasonable possibility that the action would be resolved in favour of the plaintiff at trial.³⁶⁵ The appeal was therefore allowed, and the plaintiff was granted leave to commence the action.

4. COMMENTARY

This decision lowers the threshold required to obtain leave under the *Securities Act*, potentially widening the scope of liability for disclosures made in the secondary market.

The Ontario Court of Appeal, in keeping with its earlier ruling in *Drywall Acoustic Lathing and Insulation, Local 675 Pension Fund v. Barrick Gold Corporation*,³⁶⁶ confirmed that while public correction is an important part of the statutory scheme, its role, at least at the leave stage, is a modest one.³⁶⁷ It remains an open question whether public correction is a necessary element of the statutory cause of action, or simply a time post to identify and delimit the members of the class.

B. ALBERTA SECURITIES COMMISSION V. HENNIG³⁶⁸

1. BACKGROUND

In 2008, the Alberta Securities Commission (ASC) levied an administrative penalty against Mr. Hennig based on breaches of the Alberta *Securities Act*.³⁶⁹ Rather than paying the fines and penalties, Hennig went bankrupt, but the ASC continued attempts to collect the

³⁶² *Ibid* at para 48.

³⁶³ *Ibid* at para 54, citing *Swisscanto v Blackberry*, 2015 ONSC 6434 at para 62.

³⁶⁴ *Baldwin*, *ibid* at paras 54–55.

³⁶⁵ *Ibid*.

³⁶⁶ 2021 ONCA 104.

³⁶⁷ *Baldwin*, *supra* note 352 at para 51.

³⁶⁸ 2021 ABCA 411 [*Hennig*].

³⁶⁹ RSA 2000, c S-4 [*Alberta Securities Act*].

debt, relying on an exemption in the *BIA* for a “fine, penalty or restitution order” or debts arising from “false pretences or fraudulent misrepresentation.”³⁷⁰

2. FACTS

Hennig was the chief financial officer of various publicly traded corporations and faced charges from the ASC for improper financial disclosure, misrepresentation, undisclosed financial benefits, market manipulation, and failing to report insider trading. After a 38-day hearing, the ASC levied an administrative penalty of \$400,000 and a costs award of \$175,000.³⁷¹ The penalty and costs award was filed with the Alberta Court of Queen’s Bench, and had the same force and effect as a judgment. Hennig unsuccessfully appealed, and then filed an assignment into bankruptcy. He was discharged from bankruptcy in 2015, but the ASC continued to pursue collection, and applied to renew their judgment and obtain a declaration that their debt survived the bankruptcy discharge on certain statutory exemptions in section 178 of the *BIA*.³⁷² Firstly, the ASC argued that the debt was in the nature of a “fine, penalty, restitution order or other order similar in nature to a fine, penalty or restitution order, imposed by a court in respect of an offence, or any debt arising out of a recognizance or bail.”³⁷³ Alternatively, the ASC argued that the debt arose from “obtaining property or services by false pretences or fraudulent misrepresentation, other than a debt or liability that arises from an equity claim.”³⁷⁴

The chambers judge hearing the matter at first instance agreed with the ASC’s submissions and made a declaration that the debt survived bankruptcy discharge. Hennig appealed to the Alberta Court of Appeal.³⁷⁵

3. DECISION

The Alberta Court of Appeal began by noting that the *BIA* has two main purposes — to provide for the general distribution of a bankrupt’s assets between creditors and to facilitate a bankrupt’s financial rehabilitation. The *BIA* is intended to provide the honest and unfortunate debtor with a fresh start. As such, most debts are discharged through the bankruptcy process, with only certain debts designated by the legislature as “survivable” — for example, spousal and child support, student loan debt (for the first seven years after graduation), debts arising from fraud, and so on.³⁷⁶

The Alberta Court of Appeal took a purposive analysis and noted that the ASC had not specifically alleged that Hennig had committed fraud, nor had they chosen to prosecute him under the more serious quasi-criminal sections of the *Securities Act*.³⁷⁷ Although he may have committed, broadly speaking, acts which could be considered reprehensible, dishonest, or immoral, his actions did not fit within the narrow definitions of the provisions of section 178.

³⁷⁰ *Hennig*, *supra* note 368 at para 1; *BIA*, *supra* note 67, ss 178(1)(a), 178(1)(e).

³⁷¹ *Workum and Henning, Re*, 2008 ABASC 719.

³⁷² *BIA*, *supra* note 67, s 178.

³⁷³ *Ibid*, s 178(1)(a); *Hennig*, *supra* note 368 at para 41.

³⁷⁴ *BIA*, *ibid*, s 178(1)(e); *Hennig*, *ibid* at paras 3–13, 56.

³⁷⁵ *Ibid* at paras 12–13.

³⁷⁶ *Ibid* at paras 16–26.

³⁷⁷ *Alberta Securities Act*, *supra* note 369.

Not all monetary charges imposed by a regulator in the public interest will fall within the exceptions in section 178.³⁷⁸ The proper analysis is not to look at the underlying conduct and consider if it is “just as bad” as the conduct underlying criminal fine and penalties. The *BIA* provisions reflect the underlying divisions of authority between the criminal and civil legal systems. An administrative penalty and costs order does not meet the standard of a penalty or fine, because it is not imposed as punishment for offences against the state in criminal or quasi-criminal proceedings.³⁷⁹

With respect to the exemption for debts arising from “false pretences or fraudulent misrepresentation,” the Alberta Court of Appeal noted that no specific allegations of fraud were made at the original ASC hearing, even though his conduct with respect to the financial statements was found to be “deceptive and despicable.”³⁸⁰ Furthermore, Hennig’s misrepresentations with respect to the financial statements were not made to the ASC, but to investors and the capital markets generally. For section 178(1)(e) to apply, the misrepresentation must be made directly to the creditor complaining of the conduct.³⁸¹

As a result, the Alberta Court of Appeal granted the appeal, and held that Hennig’s ASC debts were eliminated through his 2015 bankruptcy discharge.

4. COMMENTARY

Hennig confirms that administrative penalties imposed under the *Securities Act* (or similar regulatory authority) can be discharged through bankruptcy, even though it may involve behaviour which could be described as “deceptive and dishonourable” or involving “deception, concealment and manipulation.”³⁸² Based on this ruling, an administrative penalty can be eliminated through bankruptcy unless it arises in criminal or quasi-criminal proceedings, or unless it meets the strict test for fraudulent pretenses or fraudulent misrepresentation. Securities regulators who wish to make sure their penalties have “teeth” should be sure to specifically allege fraud and prosecute under quasi-criminal proceedings where appropriate. The result of this decision may be that securities regulators take a more aggressive approach in their charges and prosecutions.

XI. TAX

Taxes are inevitable, as is judicial scrutiny of the vehicles created to minimize those taxes. The Supreme Court of Canada weighed in on the applicability of avoidance rules to a capital gain arising from an entity created to take advantage of a Luxembourg tax treaty, and whether a parent company’s injection of capital into a foreign subsidiary prevented the application of a tax exemption.

³⁷⁸ *BIA*, *supra* note 67, s 178.

³⁷⁹ *Hennig*, *supra* note 368 at paras 41–55.

³⁸⁰ *Ibid* at paras 56–78.

³⁸¹ *Ibid* at para 79; *BIA*, *supra* note 67, s 178(1)(e).

³⁸² *Hennig*, *ibid* at para 115.

A. CANADA V. ALTA ENERGY LUXEMBOURG S.A.R.L.³⁸³

1. BACKGROUND

This decision marked the first time the Supreme Court of Canada has ruled on the application of the general anti-avoidance rule (the GAAR) to tax treaties. In a 6-3 majority ruling, the Supreme Court found that the Minister of National Revenue (Minister) did not prove abusive tax avoidance.

2. FACTS

In 2012, a restructuring of Alta Energy Partners Canada Ltd. (Alta Canada) took place. “As part of the restructuring, Alta Luxembourg was incorporated under the laws of Luxembourg to hold interests in Luxembourg and foreign companies.”³⁸⁴ The shares of Alta Luxembourg were issued to a new Canadian partnership formed in Alberta, Alta Energy Canada Partnership.

In 2013, Alta Luxembourg sold its shares of Alta Canada to Chevron Canada Ltd. for approximately \$680 million, creating a capital gain exceeding \$380 million. Alta Luxembourg claimed an exemption from Canadian income tax on the basis that the gain was not included in its “taxable income earned in Canada” under section 115(1)(b) of the *Income Tax Act*³⁸⁵ because the shares were “treaty-protected property” under articles 13(4) and (5) of the *Convention between the Government of Canada and the Government of the Grand Duchy of Luxembourg for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital*.³⁸⁶

The sole issue before the Federal Court of Appeal was whether the GAAR applied to void the exemption because there had been an abuse of the *ITA* or the *Treaty*.³⁸⁷ Writing for a unanimous court, Justice Webb found that the object, spirit, and purpose of the relevant provisions of the *Treaty* were reflected in the words chosen by Canada and Luxembourg.³⁸⁸ Since the provisions had operated as they were intended to, there was no abuse. The Minister appealed to the Supreme Court of Canada.

3. DECISION

The Supreme Court of Canada recognized that if the Minister can establish abusive tax avoidance under the GAAR, section 245 of the *ITA* will apply to deny the tax benefit even where the tax arrangements are consistent with a literal interpretation of the relevant provisions.³⁸⁹

³⁸³ 2021 SCC 49 [*Alta Energy*].

³⁸⁴ *Ibid* at para 12.

³⁸⁵ *ITA*, *supra* note 79.

³⁸⁶ *Alta Energy*, *supra* note 383 at paras 13–15; 10 September 1999, Can TS 2000 No 22, arts 13(4)–13(5) [*Treaty*].

³⁸⁷ *Alta Energy*, *ibid* at para 23.

³⁸⁸ *Ibid* at para 24.

³⁸⁹ *Ibid* at para 30.

Applying the GAAR involves a three-part process meant to determine: (i) whether there is a tax benefit arising from a transaction; (ii) whether the transaction is an avoidance transaction; and (iii) whether the avoidance transaction is abusive.³⁹⁰ Since *Alta Luxembourg* did not dispute that there was a benefit and an avoidance transaction, the only element in dispute before the Supreme Court was the abusive nature of the transaction.³⁹¹

To determine whether a transaction is abusive, the Supreme Court applied the two-step inquiry set out in *Canada Trustco Mortgage Co. v. Canada*.³⁹² Under the first step, the provisions relied on for the tax benefit are interpreted to determine their object, spirit, and purpose. The second step is to undertake a factual analysis to determine whether the avoidance transaction at issue is consistent with or frustrates the object, spirit, and purpose of the provisions.³⁹³

“Abusive tax avoidance occurs ‘when a taxpayer relies on specific provisions of the [ITA] in order to achieve an outcome that those provisions seek to prevent’ or when a transaction ‘defeats the underlying rationale of the provisions that are relied upon.’”³⁹⁴

The objective of tax treaties, broadly stated, is to govern the interactions between national tax laws in order to facilitate cross-border trade and investment. One of the most important operational goals is the elimination of double taxation, where the same source of income is taxed by two or more states without any relief. If left unchecked, double taxation risks creating barriers to international trade and investment, which are vital in a globalized economy.

...

Another important consideration is the dual nature — contractual and statutory — of tax treaties. Consideration of the contractual element is crucial to the application of the GAAR because it focuses the analysis on whether the particular tax planning strategy is consistent with the compromises reached by the contracting states.³⁹⁵

The business property exemption is a carve-out from source-based capital gains tax and applies where a capital gain is realized on the sale of shares whose value is derived principally from immovable property in which a business was carried on.³⁹⁶ As noted by the Supreme Court, only a very small number of the world’s tax treaties include the carve-out, thereby signaling that its inclusion in the *Treaty* was intentional on Canada’s part.³⁹⁷

³⁹⁰ *Ibid* at para 31.

³⁹¹ *Ibid* at para 28.

³⁹² 2005 SCC 54 [*Canada Trustco*].

³⁹³ *Alta Energy*, *supra* note 383 at para 31, citing *Canada Trustco*, *ibid* at para 45.

³⁹⁴ *Alta Energy*, *ibid* at para 32.

³⁹⁵ *Ibid* at paras 35–36.

³⁹⁶ *Ibid* at para 76.

³⁹⁷ *Ibid* at para 78.

The Supreme Court also considered whether the use of conduit corporations in this context perverts the bargain struck between Canada and Luxembourg. The Supreme Court concluded that it does not, as the GAAR was enacted to catch unforeseen tax strategies, and the use of conduit corporations was not an unforeseen tax strategy at the time of the *Treaty*.³⁹⁸

Alta Luxembourg was created as part of a restructuring of activities to take advantage of the carve-out provided for in article 13(4) of the *Treaty*.³⁹⁹ “It concede[d] that this tax benefit was derived from a transaction not arranged primarily for a *bona fide* purpose other than to obtain this benefit.”⁴⁰⁰ However, this avoidance transaction was not abusive.⁴⁰¹ “[F]rom the moment that Alta Luxembourg realized a gain on the disposition of its shares of Alta Canada, the laws of Luxembourg applied and Canada’s interest in the gain ceased. As a result, Alta Luxembourg’s resident status [fell] squarely within the object, spirit, and purpose of [articles] 1 and 4(1) of the *Treaty*.”⁴⁰² The CRA’s appeal was dismissed, and the capital gains were not taxable in Canada.

4. COMMENTARY

Some corporate reorganizations are tax-driven, or designed to take advantage of certain provisions, treaties, or rules which will result in favourable tax treatment. The Supreme Court of Canada has made it clear that tax avoidance is not tax evasion and should not be conflated with abuse. There must be more than simple tax avoidance in order to meet the “abusive” requirements under the GAAR and tax treaties. It should be noted that the Canadian government has pledged to renegotiate many of its tax treaties and modernize the GAAR regime, so these types of structures may become less common in the future.

B. *CANADA V. LOBLAW FINANCIAL HOLDINGS INC.*⁴⁰³

1. BACKGROUND

The Supreme Court of Canada confirmed that income earned by a Barbados bank subsidiary of Loblaw Financial Holdings Inc. (Loblaw Financial) was not foreign accrual property income and therefore not taxable in Canada.

2. FACTS

In 1992, Loblaw Financial, a member of the Loblaw Group of Companies (the Loblaw Group) incorporated a subsidiary in Barbados, which was later renamed Glenhuron Bank Limited (Glenhuron), regulated under the laws of Barbados.

³⁹⁸ *Ibid* at paras 79–80.

³⁹⁹ *Treaty*, *supra* note 386, art 13(4).

⁴⁰⁰ *Alta Energy*, *supra* note 383 at para 91.

⁴⁰¹ *Ibid*.

⁴⁰² *Ibid* at para 92.

⁴⁰³ 2021 SCC 51 [*Loblaw*].

Between 1992 and 2000, the Loblaw Group made several capital investments in Glenhuron, and Glenhuron was able to grow its asset base to \$700 million by the end of 2010. Loblaw Financial did not include income earned by Glenhuron in its Canadian tax returns as foreign accrual property income (FAPI) because it claimed that Glenhuron's activities were covered by the financial institution exception (the Exception) in the FAPI rules.⁴⁰⁴ The CRA reassessed the taxpayer for the years 2001–2005, 2008, and 2010, and the taxpayer appealed.

For the Exception to apply, four requirements must be met: (i) the controlled foreign affiliate (CFA) must be a foreign bank, or another financial institution listed in the exception provision; (ii) its activities must be regulated under foreign law; (iii) the CFA must employ more than five full-time employees in the active conduct of its business; and (iv) its business must be conducted principally with persons with whom it deals at arm's length.⁴⁰⁵

Before the Supreme Court, the sole issue was whether Glenhuron conducted business principally with persons with whom it was dealing at arm's length during the taxation years in issue.⁴⁰⁶

3. DECISION

The Supreme Court noted that where the words of a statute are “precise and unequivocal,” their ordinary meaning will play a dominant role; and in the taxation context, a “unified textual, contextual and purposive” approach continues to apply.⁴⁰⁷ The Supreme Court should also consider the *Duke of Westminster* principle (that taxpayers are entitled to arrange their affairs to minimize the amount of tax payable) in order to assess the broader purpose of the scheme.⁴⁰⁸

In this case, the dispute surrounds the meaning of “business conducted principally with” within the arm's length requirement, and specifically whether a parent corporation's injection of capital or corporate oversight amounts to conducting business with a foreign affiliate.⁴⁰⁹ The Supreme Court held that while raising capital is a necessary part of any business and enables business to be conducted, one would not generally speak of capitalization itself as the conduct of the business.⁴¹⁰ The grammatical and ordinary meaning of the words “business conducted,” read in the context and in light of the purpose of the FAPI regime, clearly shows that Parliament did not intend capital injections to be considered.⁴¹¹

With respect to corporate oversight by a parent, the Supreme Court noted that while a corporation's business may be conducted using money provided by shareholders or in accordance with policies adopted by the board of directors on behalf of the shareholders, this

⁴⁰⁴ *Ibid* at para 11.

⁴⁰⁵ *Ibid*.

⁴⁰⁶ *Ibid* at para 27.

⁴⁰⁷ *Ibid* at para 41.

⁴⁰⁸ *Ibid*; *Inland Revenue Commissioners v Duke of Westminster* (1935), [1936] AC 1 (HL (Eng)).

⁴⁰⁹ *Loblaw*, *ibid* at paras 40, 43.

⁴¹⁰ *Ibid* at para 46.

⁴¹¹ *Ibid* at para 61.

does not change the fact that the corporation is a separate legal entity and remains the one conducting its own business.⁴¹²

Once corporate oversight and the capital investments received by Glenhuron were excluded, only its investment activities remained to be considered for the application of the arm's length requirement. Since the vast majority of these activities were conducted with arm's length persons, the Supreme Court concluded that the arm's length requirement was met and Loblaw Financial was entitled to rely on the Exception.⁴¹³

4. COMMENTARY

Many tax cases involve statutory interpretation of the complex provisions of the *ITA*. While this case involved a technical exception for foreign subsidiary banks, it confirms that courts will enforce clear language where appropriate. It also clarifies the meaning of "conduct business" by distinguishing income-earning activities from other activities (for example, capitalization, oversight, and coordination within a corporate group).

⁴¹² *Ibid* at para 64.

⁴¹³ *Ibid* at para 67.